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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.03.2022

DELIVERED ON : 08.06.2022

CORAM:

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

and

THE HONOURABLE MR. JUSTICE A.A. NAKKIRAN

W.P. No.24700 of 2021 and W.M.P. No.25993 of 2021

R.K.M. Powergen Private Ltd.
represented by its Director
T.M. Singaravel
45/14, Dr. Giriappa Road
T. Nagar
Chennai 600 017

..Petitioner

vs.

1 The Assistant Director/Officer on Special Duty
Directorate of Enforcement
Government of India
Chennai Zonal Office
Shastri Bhavan, III Block III & IV Floor
26, Haddows Road
Chennai 600 006

2 The Joint Director/Officer on Special Duty
Directorate of Enforcement
Government of India
Chennai Zonal Office
Shastri Bhavan, III Block III & IV Floor
26 Haddows Road
Chennai 600 006

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of mandamus forbearing the respondents from investigating under the Prevention of Money Laundering Act in Ref.No.ECIR/01/CEZO-11/PMLA/2015 against the petitioner company, as there is no proceeds of crime arising out of coal block allotted in the State of Chhattisgarh on 23.01.2008 which was cancelled on 29.07.2014, from which no coal was excavated, as it would be without jurisdiction.



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For petitioner : Mr. B. Kumar, Sr. Counsel
for Mr. S. Ramachandran

For respondents: Mr. R. Sankaranarayanan
Additional Solicitor General
assisted by Mr. N. Ramesh
Special Public Prosecutor
for Enforcement Directorate

ORDER

P.N. PRAKASH, J.

This is a petition under Article 226 of the Constitution of India seeking a mandamus forbearing the respondents from investigating Ref.No.ECIR/CEZO-1/PMLA/2015 under the Prevention of Money-Laundering Act, 2002 (for brevity "the PML Act") on the premise that the investigation is without jurisdiction.

2 The undisputed facts are as under:

- i. Five women entrepreneurs incorporated a company which went by the name of "R.K. Powergen Pvt. Ltd., Chennai" (for brevity "RK Company") and established a bio-mass power generation plant in Hiriya, Karnataka sometime in 1991. The plant is stated to be functional as on date. On 15.12.2004, RK Company and Mudajaya Corporation, a Malaysian company (for brevity "Mudajaya"), joined hands and incorporated R.K.M. Powergen Pvt. Ltd., the petitioner herein (for brevity "RKM Company") under the Companies Act, 1956, having its registered Office in Chennai, with the object of setting up coal-based power plants in India.
- ii. On 13.07.2005, RK Company and Mudajaya entered into a joint venture agreement, in and by which, Mudajaya agreed to invest in the shares of RKM company at a premium.
- iii. While so, on 13.11.2006, the Ministry of Coal invited applications for allotment of 38 coal blocks stating that a preferential allotment will be given to power plants based on coal as feed as well to cement and steel sectors. The said advertisement stated that no land would be allotted as such, but only an area would be designated for excavation of coal. The coal so excavated was to be used for captive consumption for the power generation plant that was to be set up by the allottee (s).



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- iv. In response to the said advertisement, RKM Company submitted an application, dated 13.11.2006, for allotment of a coal block in the State of Chhattisgarh.
- v. On 08.02.2007, a shareholders' agreement was signed by RK Company, and Mudajaya, under which, it was agreed that there would be an allotment of 26% of equity shares of RKM Company either to Mudajaya or to its nominee at a premium. The premium was calculated under the Foreign Exchange Management (Transfer or issue of Security by a person resident outside India) Regulations, 2000, a threshold requirement for receipt of foreign investment into India.
- vi. In 2007, RKM Company began establishing a power generation plant with coal as feed in Uchhpinda Village of Chhattisgarh. Coal for this power project was to be purchased via coal linkage from Coal India Limited and other subsidiaries of the Central Government.
- vii. On 23.01.2008, the Ministry of Coal issued an order allotting Fatehpur East Coal Block in Chhattisgarh, jointly to RKM Company and four other companies, viz., (1) Green Infrastructure Pvt. Ltd., (2) Visa Power Ltd., (3) JLD Yavatmal Energy Ltd. and (4) Vandana Vidyut Ltd. As per the requirements of the Central Government, these five entities were required to join together and float one common entity for the purpose of harnessing coal from Fatehpur East in Chhattisgarh and use the coal so harnessed for their power plants.
- viii. Accordingly, RKM Company and the other four entities joined together and floated an entity called "Fatehpur East Coal Pvt. Ltd." and furnished a bank guarantee for Rs.100 crores in favour of the Central Government in this regard.
- ix. The jubilation of Fatehpur East Coal Pvt. Ltd. in getting the coal block allotment was short-lived because when they went and inspected the place that was allotted to them, they were shocked to find that it was a category I of a reserve forest area in Chhattisgarh, where, no non-forest activity, much less mining activity could be undertaken. Ergo, they were haggling with the Central Government to re-classify the allotted area and there was an exchange of communication between the two in this regard.
- x. While so, a public interest litigation was filed by one Manohar Lal Sharma in the Supreme Court alleging that the coal block allocations made by the Central



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Government were riddled with corruption. A three-Judge Bench, vide order dated 24.09.2014¹, held that coal block allocations made through the screening committee route as well as the government dispensation route were illegal. Vide further proceedings dated 24.09.2014, all coal block allocations, barring two allocations made to Sasan Power Limited (UMPP) and two allocations made to a Central Government public sector undertaking not having any joint venture, were cancelled.

- xi. Accordingly, the CBI started registering FIRs qua each coal block allotment in order to find out if there was any irregularity in the allotment process. One such FIR registered by the CBI is FIR No.RC 219 2014E 0018 dated 07.08.2014 for the offences under Section 420 read with Section 120-B IPC and Section 13(1)(d) of the Prevention of Corruption Act, against unknown public servants in respect of coal block allotment made to Fatehpur East Coal Pvt. Ltd.
- xii. Since the case registered by the CBI disclosed a scheduled offence under the PML Act, the Enforcement Directorate registered a case in ECIR/CEZO-1/PMLA/2015 on 07.01.2015 and took up investigation of the same under the PML Act.
- xiii. Be it stated, the ECIR registered by the Enforcement Directorate is almost a reproduction of the averments in the CBI's FIR. For the ease of reference, the averments in the ECIR are reproduced hereunder:

"Investigations by CBI revealed that the applicant M/s. RKM Powergen Private Limited had misrepresented the networth and project capacity of their company so as to meet the criteria of pre-qualification specified for the allocation of coal blocks. M/s. RKM Powergen Private Limited, a joint venture company incorporated for setting up an independent power plant in the State of Chhattisgarh was promoted by M/s. R.K. Powergen Private Limited, Chennai and M/s. Mudajaya Corporation Berhad, Malaysia, respectively with share capital of 74% and 26% of the joint venture. M/s. RKM Powergen Private Limited had claimed their networth as Rs.2,752 crores in their application for coal block allocation by including the networth of the collaborator's group companies which were not having any equity participation in M/s. RKM Powergen Private Limited either as on the

1 Manohar Lal Sharma v. Principal Secretary & others - (2014) 9 SCC 516



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date of application or as on the date of allocation. Accordingly, it has been alleged that M/s. RKM Powergen Private Limited had obtained the allocation of Fatehpur East Coal Block by resorting to misrepresentation of facts and thereby had committed the offence of criminal conspiracy, cheating and criminal misconduct chargeable under Section 120-B r/w Section 420 of IPC. It was also observed that the final allocation of Fatehpur East Coal Block was made to M/s. RKM Powergen Private Limited through letter dated 23.01.2008 issued by the Ministry of Coal and until that date, the shares of M/s. RKM Powergen Private Ltd. were not issued to M/s. Mudajaya Corporation Berhad, Malaysia.

Further, with regard to the financial consideration consequent on the allocation of the coal block, it has been found that 74% shares of M/s. RKM Powergen Private Ltd. was allotted to M/s. RK Powergen Private Limited, the Indian promoter at par value and whereas 26% of shares was allotted to M/s. Mudajaya Corporation Berhad, Malaysia at a premium of Rs.240/- per share. Accordingly, the Malaysian promoter had paid Rs.1,174.92 crores for acquiring the said 26% of the equity and on the other hand, the Indian promoter had only paid Rs.133.75 crore that too for acquiring 74% equity of M/s. RKM Powergen Private Ltd. thereby resulting in substantial financial benefit to Indian promoter viz., M/s. R.K. Powergen Private Ltd.

In view of the above, prima facie, there appears to be an offence of Money Laundering defined u/s 3 of the Prevention of Money Laundering Act, 2002."

Simultaneously, the CBI and the Enforcement Directorate began their investigations by summoning the officers of RKM Company for interrogation from time to time.

- xiv. The Enforcement Directorate passed an order dated 20.02.2015 freezing all the bank accounts of RKM Company paralyzing their business operations.
- xv. Ergo, RKM Company filed writ petitions in W.P. Nos.7854, 10643, 14448 and 15317 of 2015, before this Court challenging the action of the Enforcement Directorate,



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which were allowed vide a common order dated 26.08.2015².

- xvi. As alluded to above, RKM Company completed the construction of the power plants in Ucchpinda Village in Chhattisgarh and the first unit of 360 MW power plant was commissioned on 27.11.2015 and coal for this power plant was being purchased from Coal India and other subsidiaries of the Central Government.
- xvii. The second power plant unit was commissioned on 12.02.2016 and a power purchase agreement was signed by RKM Company and Uttar Pradesh Power Corporation Ltd. for the supply of 350 MW of power to Uttar Pradesh for 25 years.
- xviii. Thus, RKM Company's power projects in Chhattisgarh proceeded unhindered and at present, they have 4 power generation units there and are supplying power to several States, including Tamil Nadu.
- xix. The CBI investigation did not throw up any material which ultimately led to the filing of a closure report in RC 219 2014E 0018 on 27.09.2017 before the jurisdictional Special Court in New Delhi, stating that the investigation conducted by them did not disclose commission of any offence. However, the Special Court, by order dated 27.09.2017, directed the CBI to conduct further investigation to find out if any public servant was involved in the matter.
- xx. It is admitted by both sides that the CBI has been taking time from the Special Court to complete further investigation. However, the fact remains that, as on date, no material has surfaced from the CBI investigation to show that RKM Company had misrepresented facts for getting allocation of the Fatehpur East coal block. In other words, neither any irregularity was found in the coal block allotment process nor was any proceeds of crime generated via the allocation as the allotted land to RKM Company was found to be a reserve forest area ruling out any possibility of commercial exploitation.
- xxi. It is not the case of the CBI or the Enforcement Directorate that RKM Company had obtained the allotment order through illegal means and after so obtaining, they excavated coal and hence, generated proceeds of crime, as defined under the PML Act.

2 RKM Powergen Pvt. Ltd. vs. The Joint Director, Enforcement Directorate - (2015 WLR 851)



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xxiii.

While that being so, the Enforcement Directorate did not proceed further with their investigation till November 2019, obviously because, they were aware that in the absence of any proceeds of crime being generated from any criminal activity, they had no role to play. However, suddenly from November 2019 onwards, the Enforcement Directorate started summoning the officers of RKM Company and also the officials of financial institutions who lent money to RKM Company, from time to time. Unable to withstand the continued harassment of the Enforcement Directorate, RKM Company has filed the present writ petition for the reliefs stated, supra.

3 We have heard Mr. B. Kumar, learned Senior Counsel for Mr.S.Ramachandran, learned counsel on record for the petitioner/RKM Company and Mr. R. Sankaranarayanan, learned Additional Solicitor General for the Enforcement Directorate.

4 Mr.R.Sankaranarayanan, learned Additional Solicitor General, representing the Enforcement Directorate, raised a preliminary objection that this Court has no jurisdiction to entertain this writ petition and the remedy, if any, is before the Supreme Court.

5 On merits, Mr. Sankaranarayanan, learned Additional Solicitor General, stoutly defended the action of the Enforcement Directorate by contending that during investigation by the Enforcement Directorate, they stumbled upon "round tripping" transactions between the Indian and the overseas entities. He also submitted a flow chart in support of the stand of the Enforcement Directorate. To be more precise, we extract the relevant portion from the written submissions of the Enforcement Directorate:

"7. RKMPPPL applied to the Power Finance Corporation (PFC), New Delhi on 07.01.2005 seeking financial assistance and PFC by sanctioning the loan on 02.08.2007 made the first disbursement on 26.06.2009. RKMPPPL have availed financial assistance from the consortium of lenders led by PFC to the extent of Rs.1941.13 crores and Rs.7651.76 crores respectively for the Phase I and Phase II of their project. RKMPPPL derived public funds to tune of Rs.9,592.89 crores through financial assistance and by awarding EP contract ostensibly as a trade-off to the investment in it made by the MJC to MIPP have transmitted funds aggregating to Rs.3826.98 crores for the supply of overvalued plant and equipment to its power plant."



6 The learned Additional Solicitor General further submitted that the prayer in the writ petition was not maintainable, and that in any event, this Court should not interfere at a stage when investigation was still ongoing.

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7 In response, Mr. B. Kumar, learned Senior Counsel appearing for RKM Company submitted that the allegation of "round tripping" is a smokescreen that has been created by the Enforcement Directorate to keep the investigation going, knowing full well that the coal block allotment was only on paper and there was no generation of any proceeds of crime via any criminal activity. In this connection, Mr. B. Kumar invited the attention of this Court to the averments in paragraph 12 of the counter affidavit filed by the Enforcement Directorate:

"12. Be that as it may, the aspects on money laundering/round tripping of funds as revealed in the investigation of this Directorate have been shared with CBI, EO-I in terms of Section 66(2) of PMLA as early as on 18.07.2019, with a request to incorporate it in their investigation to enable this Directorate to take up the said aspect for extension of PMLA investigation into the imputation of "round-tripping" also and necessary intimation with regard to outcome on the aspects shared by this Directorate is awaited....."

8 Mr. B. Kumar submitted that from the aforesaid passage, it was clear that the Enforcement Directorate was aware that they did not have the power to proceed further with the investigation relating to the allegation of "round tripping", which is why, the Enforcement Directorate themselves, requested the CBI to expand the scope of their investigation and till date, the CBI has not thought it fit to do so, because, the CBI was convinced that there was no "round tripping" at all.

9 We have considered the rival submissions.

10 The sheet anchor of the Enforcement Directorate's case is that the writ petition under Article 226 of the Constitution is not maintainable. As the issue of maintainability was required to be tested at the threshold, we heard the learned counsel on either side and vide an order dated 15.02.2021, we concluded that the writ petition under Article 226 was maintainable. Our conclusions were as under:

"14. Mr.B.Kumar contended that, challenging the directions issued by the Enforcement Directorate to the various banks, for freezing the accounts of the petitioner Company, the petitioner Company filed four



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writ petitions viz., W.P.Nos.7854, 10643, 14448 and 15317 of 2015 in this Court and when these writ petitions came up before a learned Single Judge, the Enforcement Directorate filed a counter and took a stand that the cases should be heard by the Supreme Court and not by this Court, in view of the order dated 25.07.2014 (supra) passed by the Supreme Court; therefore, the learned Single Judge of this Court passed the following order on 17.06.2015:

"3. In the light of the stand taken by the respondent/Enforcement Directorate in the counter affidavit, this Court is not inclined to pass any orders, based on the said request of the learned Senior Counsel appearing for the petitioner. However, the petitioner is at liberty to submit such a kind of representation to the respondent Directorate, if it is so advised. 4. Post the matter on 25.06.2015, at the end of Motion List. 5. Registry is directed to furnish a copy of this order to the learned counsel for the parties, on payment of necessary charges."

15. Aggrieved by the above order, the petitioner Company approached the Supreme Court in SLP (C) Nos.18293 to 18296 of 2015 (R.K.M. Powergen Private Limited Vs. The Assistant Director, Directorate of Enforcement, Chennai etc.). A 3 Judge Bench of the Supreme Court has dismissed the said petitions, observing as under: "Heard learned counsel for the petitioner. The special leave petition is dismissed. However, the petitioner may raise whatever contentions are available in law before the High Court." (emphasis supplied)

16. Pursuant to the above, a learned Single Judge of this Court, heard the writ petitions viz., W.P.Nos.7854, 10643, 14448 and 15317 of 2015 and passed final orders on 26.08.2015, allowing the writ petitions and directed defreezing of the bank accounts of the petitioner Company. Even in the said order, the learned Single Judge has discussed on the maintainability of the writ petition in the High Court and held as under in paragraph 6.1 :

"6.1 On Maintainability : Coming to the maintainability and propriety to deal with the case on merits, this Court is of the



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considered view that there is no apparent connection between the issues before the Apex Court qua allotment of Coal Block and the one involved before this Court. The petitioner has not even started the mining and the same has been cancelled already. Neither the respondents are parties before the Apex Court nor the issues similar. Thus, the objection raised by the respondents is rejected."

17. Therefore, Mr.B.Kumar contended that in the litigation between the same parties, with regard to the same ECIR, when a writ petition has been entertained pursuant to the directions of the Supreme Court vide order dated 20.07.2015 in SLP (C) Nos.18293 to 18296 of 2015, there could be no bar for this Court, to entertain the present writ petition.

"18. We are in agreement with the aforesaid submission of Mr.B.Kumar, since the issue as to the very maintainability of the writ petition in the High Court went up to the Supreme Court and when the Supreme Court, has, by order dated 20.07.2015, permitted the petitioner Company to raise all contentions before the High Court, we cannot wash our hands off and say that the petitioner Company should have to go to the Supreme Court.

With the above finding of ours, on the question of maintainability, we adjourn this case to 07.03.2022."

11 Thereafter, we adjourned this case, from time to time, to enable the Enforcement Directorate to test the correctness of the aforesaid order. After giving sufficient opportunities, we had proceeded to hear the matter finally.

12 Though we have held that the writ petition is maintainable, the question is whether this finding must necessarily result in a writ being issued in terms of the prayer sought by the petitioner/RKM Company. There is a subtle, yet, vital difference between the maintainability of a petition and the refusal to exercise jurisdiction on the facts of a given case. In the former case, the Court lacks the inherent jurisdiction to entertain a cause before it. In the latter case, the Court chooses to decline exercising its jurisdiction as a measure of self-imposed restraint.



13 The jurisdiction of this Court under Article 226 of the Constitution is a basic feature of the Constitution of India and cannot be taken away even by a constitutional amendment (See *L. Chandra Kumar v Union of India*³). In that view of the matter, it cannot be contended, with any degree of seriousness, that a High Court does not possess the inherent jurisdiction to issue a writ in an appropriate case. It is also well settled that the High Court can issue a writ of mandamus to stop an investigation where it is found that the investigating officer was misusing his powers of investigation. We are fortified in holding so in the light of the decision of the Supreme Court in *S.N. Sharma v Bipen Kumar Tiwari*⁴, wherein it was observed as under:

"It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers."

14 Nevertheless, the existence of jurisdiction is one aspect, and the manner of its exercise is quite another. The power of a High Court to issue high prerogative writs like a mandamus, certiorari, etc., flows from its plenary power under Article 226 of the Constitution of India and is discretionary in nature. Therefore, it does not imply that because the High Court is vested with jurisdiction to issue an appropriate writ, it must necessarily follow that a writ must issue in all cases. The remedy is discretionary in nature and must be exercised in consonance with sound judicial principles. We have proceeded to pen these prefatory observations in the light of the submissions made at the bar that a writ petition under Article 226 was not maintainable in view of the order of the Supreme Court in *Manohar Lal Sharma v Union of India*⁵.

15 We have carefully perused the order dated 25.07.2014 passed by the Supreme Court. What is discernable is that the CBI is conducting a Court-monitored investigation into the coal block allocations, by issuing various directions from time to time. The Court had taken note of the fact that a Special Judge

3 (1997) 3 SCC 261

4 (1970) 1 SCC 653

5 (2015) 13 SCC 35



had been notified by the Chief Justice of the Delhi High Court to try the coal block allocation cases. The Court had also appointed a Special Public Prosecutor to conduct the prosecutions of the cases filed by the CBI and had proceeded to issue the following direction:

"10. All cases pending before different courts in Delhi pertaining to coal block allocation matters shall stand transferred to the Court of the Special Judge as aforesaid. We also make it clear that any prayer for stay or impeding the progress in the investigation/trial can be made only before this Court and no other court shall entertain the same."

16 We also notice that the CBI and the Enforcement Directorate have been periodically filing detailed status reports of the various prosecutions conducted by them (See the series of orders collectively reported as "Manohar Lal Sharma v Union of India (2017) 11 SCC 731"). Having carefully considered the various orders/directions passed by the Supreme Court, we are of the considered opinion that judicial propriety and institutional comity require us to refrain from exercising our jurisdiction under Article 226 by venturing to interdict the investigation of alleged offences under the PML Act, 2002 qua the coal block scam cases investigated by the CBI and monitored by the Supreme Court.

17 However, the complaint of Mr. B. Kumar, learned Senior Counsel is that the CBI having filed a closure report before the Special Court qua the allegations regarding the coal block allocation against RKM company, the Enforcement Directorate is now purporting to exercise powers to investigate the so-called offences under the FEMA and Customs Act, 1962 which have no connection with the allegations in the coal block scam cases.

18 To examine the aforesaid contention, it is first necessary to set out the relevant legal provisions. The offence of money-laundering is defined in Section 3 of the PML Act, 2002 as under:

"Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."

Explanation.—For the removal of doubts, it is hereby clarified that,—



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(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:- (a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; or (f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever."

19 The expression "proceeds of crime" is defined in Section 2(u) of the PML Act, 2002 as under:

"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 3 [or where such property is taken or held outside the country, then the property equivalent in value held within the country] 4 [or abroad]; Explanation.-For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence."

20 On a combined reading of Sections 3 and 2(u) of the PML Act, 2002, the following are the ingredients of the offence of money-laundering:

- i. There should have been a criminal activity relating to a scheduled offence under the PML Act;
- ii. The scheduled offence should have resulted in the generation of proceeds of crime; and
- iii. The proceeds of crime so generated should have been projected or claimed as untainted money.

21 The first limb is the case registered by the CBI registered in FIR NoRC 219 2014E 0018 on 07.08.2014 for the offences under Section 420 IPC and Section 13(1)(d) of the



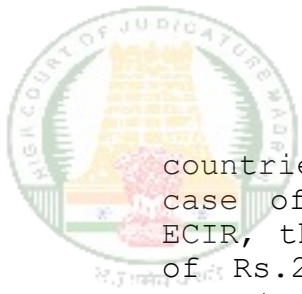
Prevention of Corruption Act, which are, admittedly, scheduled offences under the PML Act.

22 The Enforcement Directorate then went about searching for proceeds of crime by summoning and interrogating the officers of RKM Company during 2015. It is not the case of the Enforcement Directorate that the officers of RKM Company did not cooperate with them. For over 7 years, the officers of RKM Company, including women, were summoned, from time to time, by the Enforcement Directorate as could be seen from the summons issued to Dr. Andaal Arumugam, Lakshmi Serisha and T.Ramachandran time and again. It is pertinent to point out that even the former officials of RKM Company were not spared. A perusal of the annexure to the summons issued to Paranjothi, former General Manager of RKM Company shows that she has been called upon to produce not only documents relating to her, but also documents relating to her family members as well. For the sake of appreciation, we extract the annexure verbatim:

1. Copy of documents evidencing identity with latest photograph (passport size)
2. Profile of the individual with details of business/ventures in India and overseas along with financial statements including Balance Sheet, Profit and Loss Account and annual reports of such entities/business and self for the past 10 years.
3. Copies of IT returns and bank accounts of self and family members along with statement of accounts for the past 10 years.
4. Documents evidencing your responsibility in M/s. RKM Powergen Pvt. Ltd., Chennai, along with copy of statutory returns, if any filed in this regard.
5. Activities connected to the EP contract between M/s. RKM Powergen Pvt. Ltd. and M/s.MIPP International Ltd., along with documentary evidences, if any.

23 What we have extracted above is only a sample and we find that others have also been asked to furnish such personal details. As alluded to above, the Enforcement Directorate froze all the bank accounts of RKM Company and brought their business to a standstill. Therefore, RKM Company had to rush to this Court and get relief, by which time, for over 9 months, they were unable to do any business transaction.

24 Coming to the allegation of "round tripping" which was strenuously pursued by the learned Additional Solicitor General, it is necessary to briefly notice the import of this expression. "Round tripping" can be defined as a practice by which funds are transferred from one country to another and transferred back to the origin country for purposes like black money laundering or to get the benefit of tax concession/evasion/avoidance from



countries like Mauritius, which enjoy low taxes, etc. It is the case of the Enforcement Directorate, as discernable from the ECIR, that a 10 rupee share of RKM Company was sold at a premium of Rs.240. In this way, it is contended that the Malaysian promoter had paid only Rs.1174.92 crore for acquiring 26% equity, whereas, the Indian promoter paid Rs.133.75 crore for acquiring 74% of the equity in RKM Company which resulted in substantial financial benefit to the RKM Company.

25 In this connection, our attention was invited to the letters dated 04.07.2008 and 28.09.2012 issued by the Reserve Bank of India to RKM Company acknowledging the statutory declarations made by them under the Foreign Exchange Management (Transfer or issue of security by a Person Resident Outside India), Regulations 2000. These communications clearly demonstrate that the sale of shares with a face value of Rs.10/- each at a premium of Rs.240/- per share was reported to the Reserve Bank of India by submitting the statutory declarations. This belies the contention of the Enforcement Directorate that RKM Company engaged in a clandestine deal with Mudajaya. On the contrary, these facts were fully reported to the Reserve Bank as statutorily required under Rule 9 of the 2000 Regulations.

26 Faced with this difficulty, the Enforcement Directorate has come up with a completely different case in its counter affidavit before this Court. In paragraph 10 of its counter affidavit, it is contended as under:

"10. I humbly submit that in view of the foregoing, the entire investments from MJC and EIHL in RKMPPPL are suspected to have been made by 'round tripping' of funds and as it represents the public money which was routed to MIPP in the guise of supply of overvalued P&M, the same is liable to be reckoned as "proceeds of crime" as defined under Section 2(1) (u) of PMLA."

27 It is necessary to point out that the case of the Enforcement Directorate in the ECIR is grounded on the twin allegation that RKM Company had obtained the allocation of Fatehpur East Coal Block by resorting to misrepresentation of facts. However, it is an undisputed fact that there was no mining from the said coal block with the result that RKM Company did not derive any benefit from the same. The Enforcement Directorate admits to this factual position as is evident from paragraph 18 of its counter affidavit wherein it is stated thus:

"Admittedly, the evidences available on record implied that no mining activity was carried out by M/s Fatehpur East Coal Private Limited, the joint venture created by the joint allottees of the subject Coal



Block and no mine land was even purchased, but the entity had incurred expenditure on mine development activities."

It is, therefore, clear that even according to the Enforcement Directorate, no mining was carried out and on the other hand, RKM Company had expended funds from its coffers on mine development activities. Once it is held that RKM Company had not derived any benefit from the allocation of the coal block, it follows that the corpus delicti of the offence viz., the proceeds of crime, does not exist.

28 The allegation of round-tripping, even assuming there is one, as alleged by the Enforcement Directorate, is a criminal activity, falling within the domain of Foreign Exchange Management Act (FEMA), there is no arrest provision under the provisions of FEMA, whereas, threat of arrest looms large in an investigation under the PML Act with bail conditions being very stringent.

29 As regards the contention of the Enforcement Directorate that Customs Duty was not paid properly for the imports that were made by RKM Company, be it noted, this falls within the domain of the Customs authorities under the Customs Act. Moreover, these imports of plant and machinery were made by RKM Company for commissioning their power plant in Ucchpinda Village in Chhattisgarh during 2011 and after the said imports, the power plant itself has been commissioned, as stated above. In any event, as on date there is no predicate offence under the Customs Act, 1962. The Enforcement Directorate cannot exercise its powers of investigation under the PML Act, 2002 to discover the existence of a predicate offence which is tantamount to putting the cart before the horse.

30 We are aware of the legal position that the Enforcement Directorate was created under the Foreign Exchange Regulation Act, 1973, which was subsequently replaced by the Foreign Exchange Management Act, 1999 (for brevity "the FEMA"). Chapter VI of the FEMA is titled "Directorate of Enforcement". When the PML Act came into force, the officers of the Enforcement Directorate were empowered to conduct investigations under the PML Act too. Thus, an officer of the Directorate of Enforcement could wear two hats, one, while investigating a case under the FEMA and the other, while investigating a case under the PML Act. However, wearing the hat of an officer under the PML Act, an officer of the Enforcement Directorate cannot conduct investigation under the FEMA, because, the PML Act has arrest powers, whereas the FEMA does not. Thus, under the guise of investigation under the FEMA, the Enforcement Directorate cannot keep the sword of arrest under the PML Act hanging over the head of a person.



31 The aforesaid is the *raison d'être* for Section 66(2) of the PML Act which states that, while investigating a case under the PML Act, if any information or material comes to the possession of the Investigating Officer, he shall share the information or material in his possession with the agency concerned for necessary action. This clearly means that he cannot arrogate to himself the power of the agency concerned under another statute and conduct investigation under that statute.

32 The learned Additional Solicitor General submitted that in the light of the recent amendments to Sections 3 and 44 of the PML Act vide Act 23 of 2019, notwithstanding the filing of the closure report of the CBI, the present investigation under the PML Act can proceed. To buttress this contention, he placed reliance on a Division Bench judgment of this Court in *Yazhini Realtors Pvt. Ltd. v. The Assistant Director*⁶, in which, one of us (PNPJ) was a member. The relevant portion of the said judgment reads thus:

"8. The complete answer to the aforesaid arguments of the learned counsel for the petitioners is available in the recent amendments to Sections 3 and 44 of the PML Act, vide Act No.23 of 2019. The amendment clearly states that a prosecution under the PML Act can proceed notwithstanding the result of the prosecution under the predicate offence. That apart, the amendment also clarifies that, the date of commission of the predicate offence is not relevant and that, if a person projects the proceeds of crime as untainted, it is a continuing offence. Hence, the aforesaid arguments fail."

33 There is a fallacy in the aforesaid submission, in that, in *Yazhini Realtors* (supra), on facts, there were proceeds of crime and those proceeds were projected as untainted property, whereas, in this case, the scenario is entirely different. In any event, as we have pointed out earlier in paragraph 16, we are not interdicting the investigation under the PML Act, 2002 insofar as they relate to the predicate offences in the FIR registered by the CBI for the coal block cases.

34 Therefore, on the facts and circumstances of the case, we find that the Enforcement Directorate cannot exercise its powers of investigation to discover the existence of a predicate offence under the FEMA or the Customs Act. In plainer terms, the jurisdictional condition for exercising the powers of investigation cannot be made the subject matter of investigation. The Enforcement Directorate's powers of

6 CrI.O.P.No.15979 of 2017 decided on 01.02.2021



investigation are statutory in nature. It must follow that the power of investigation must, therefore, be exercised strictly on the terms in which it is granted. We notice the sapient observations of the Chief Justice Y.V. Chandrachud in *State of West Bengal v Swapan Kumar Guha*⁷ which run thus:

"There is no such thing like unfettered discretion in the realm of powers defined by statutes and indeed, unlimited discretion in that sphere can become a ruthless destroyer of personal freedom. The power to investigate into cognizable offences must, therefore, be exercised strictly on the condition on which it is granted by the Code. I may, in this behalf, usefully draw attention to the warning uttered by Mathew, J. in his majority judgment in *Prabhu DayalDeorah v. D.M., Kamrup* [(1974) 1 SCC 103 : 1974 SCC (Cri) 18 : AIR 1974 SC 183 : (1974) 2 SCR 12, 22-23 : 1974 Cri LJ 286] to the following effect : (SCC p. 114, para 21)

"We say, and we think it is necessary to repeat, that the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of procedure. And observance of procedure has been the bastion against wanton assaults on personal liberty over the years. Under our Constitution, the only guarantee of personal liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law."

35 The following observations of the Supreme Court in *Secretary, Minor Irrigation & Rural Engg. Services, U.P. v Sahngoo Ram Arya*⁸ are also apt:

"6. It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the police or CBI to find out whether he has committed

7 (1982) 1 SCC 561

8 (2002) 5 SCC 521



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any offence or is living as a law-abiding citizen. Therefore, it is clear that a decision to direct an inquiry by CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations. In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case established to direct an inquiry has proceeded on the basis of "ifs" and "buts" and thought it appropriate that the inquiry should be made by CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause [(1999) 6 SCC 667 : 1999 SCC (Cri) 1196]."

(emphasis supplied)

As held by the Supreme Court in the aforesaid judgment, everyone has a fundamental right to a peaceful life guaranteed under Article 21 of the Constitution of India, for, ours is not a police State.

36 From 2015 till today, the Enforcement Directorate has been unable to pin RKM Company to the ground by collecting evidence showing that they had committed an offence under the PML Act. Instead, the Enforcement Directorate has been freezing the bank accounts of RKM Company, summoning their officers, both present and former, including women, in order to find out if any offence has been committed by them under enactments other than the PML Act. A Constitutional Court cannot afford to shut its eyes when a citizen is being harassed in the name of investigation.

37 We may demonstrate the fallacy in the stand of the Enforcement Directorate with the following hypothetical example. Let us assume for a moment that during investigation under the PML Act, the officers of the Enforcement Directorate search the house of an accused. During the search, they discover a dead body buried in the house and suspect the commission of an offence under Section 302 IPC. Can they be permitted to record the statement of the accused qua discovery of the body in the house? Such a statement, if it is confessional in nature, would become admissible and relevant in the murder trial as it has been given to a non-police officer. Hence, their duty is to inform the police about the discovery of the dead body and leave it at that. Applying the same analogy to the instant case, if the Enforcement Directorate are unable to find materials worth the salt to show that RKM Company had committed a criminal



activity, generated proceeds of crime via the said criminal activity and had projected the same as untainted money, their role stops there. It does not lie with them to investigate to find out about other violations under the FEMA and Customs Act allegedly committed by RKM Company. They can very well hand over these aspects to the appropriate investigating agency and leave it at that.

38 However, it needs to be stated that the materials collected by the Enforcement Directorate, so far, cannot be thrown overboard, because, even if it were to be held that evidence was illegally obtained, they are per se not inadmissible provided they are relevant. The investigation agency may transfer the materials collected by them, under Section 66(2) of the PML Act, to the agency concerned for investigation.

39 In view of the above discussion, we hold that in the absence of there being any predicate offence under the Customs Act, 1962, for the present, and the fact that the alleged offence under the FEMA, 1999, is not a predicate offence under the PML Act, 2002, it follows that there cannot be any offence of money-laundering under Section 3 of the PML Act, 2002 qua these offences. Consequently, a writ of mandamus is issued restraining the Enforcement Directorate from exercising its powers under the PML Act, 2002, qua the investigation of alleged money-laundering in respect of these offences alone. We make it abundantly clear that we have not interdicted the investigation pertaining to the allegations of money-laundering qua the predicate offences forming the subject matter of FIR No.RC 219 2014E 0018 which is being investigated by the CBI. These investigations will proceed in terms of the directions/orders of the Supreme Court in Manohar Lal Sharma v Union of India⁹, unhindered, and uninfluenced by any of the observation(s)/direction(s) made in this order.

The writ petition is disposed on the aforesaid terms, with no order as to costs. Connected W.M.P. is closed.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

cad



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+1cc to Mr.S.Ramachandran, Advocate, S.R.No.33323

W.P. No.24700 of 2021

PL (CO)
UMA (23/06/2022)