

28.06.2023.
Court No.13
Item No. 1
ap

W.P.A. No. 2343 of 2023

**Kannan Tiruvangadam
Versus
Union of India & Ors.**

Mr. Jishnu Chowdhury,
Ms. Ujjaini Chatterjee,
Mr. Saptarshi Mandal.

...For the petitioner.

Mr. Billwadal Bhattacharyya, DSGI,
Ms. Reshmi Bothra.

...For the UOI.

Mr. Arijit Chakraborti,
Mr. Deepak Sharma.

...For the ED.

1. The writ petitioner is the liquidator appointed by the National Company Law Tribunal (NCLT) in C.P.(IB) No.1290/KB/ 2018 in respect of a Company called, “Jas Infrastructure & Power Limited” (hereinafter referred to as ‘Corporate Debtor’) under the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC).
2. Prior thereto on 12th June, 2018 a provisional attachment order assets of the Corporate Debtor being Order No. 2 of 2018 by the Enforcement Directorate (ED) under the provisions of the Prevention of Money Laundering Act of 2002 (PMLA).
3. By an order dated 4th December, 2018 the Adjudicating Authority under the PMLA confirmed the order of provisional attachment, under Section 8 of Act of 2005.

4. On 28th February, 2019 the Enforcement Directorate (in short 'ED') applied before a Special Court at New Delhi for confiscation of the assets so attached.

5. The ED had launched itself inter alia in aid of the criminal proceedings against the Corporate Debtor and its Directors and/or promoters, for being an accused under the "Coal Scam". The Special Court was constituted under the orders of the Hon'ble Supreme Court of India that shall be referred to later hereunder.

6. In the meantime, the CIRP had failed and the NCLT at Calcutta had on the 17th of July, 2020 ordered liquidation of the Corporate Debtor under the provisions of the Insolvency and Bankruptcy Code, 2016.

7. It is pertinent to note that at no point of time was the ED ever notified either by the Corporate Debtor or its Directors of the aforesaid proceedings before the NCLT, Kolkata. The Authorities under the PMLA Act, 2002, therefore, did not have occasion to participate in such proceedings.

8. The Liquidator came to be notified of the attachment of the ED sometime on December 21, 2022 by email, for the first time by the instance of the directors and/or persons in control and management of the Corporate Debtor.

9. Having realized that the attachment process and orders would stand in the way of sale of the assets of

the Corporate Debtor now in liquidation, the instant writ petition came to be filed by the Liquidator, on January 31, 2023.

10. An affidavit-in-opposition has been used by the ED. The ED has vehemently opposed to the sale of the assets by the liquidator.

11. Mr. Jishnu Chowdhury, Counsel for the petitioner has placed in detail the provisions of Section 32A of the Insolvency & Bankruptcy Code, 2016. The said Section was brought into force by amendment to the parent act effected sometime around in December, 2019.

12. It is argued by Mr. Chowdhury that by reason of Sub-Section (2) of Section 32A, the offences against the Directors under the provisions of the PML Act, 2002 may continue but the assets attached by the ED under the provisions of PML Act would stand freed to be sold by the liquidator.

13. Reliance is placed by Mr. Chowdhury on a decision of the Hon'ble Supreme Court of India in the case of ***Manish Kumar – Vs. – Union of India & Anr.*** reported in ***(2021) 5 Supreme Court Cases 1***. In the said decision the Hon'ble Supreme Court of India had occasion to deal with the constitutional validity of Section 32A and the same came to be upheld.

14. The Hon'ble Supreme Court found that the object of Section 32A was laudable to the extent that it sought to free assets and immovable properties from

the clutches of the State Authorities in attachment proceeding, particularly under the Prevention of Money Laundering Act, 2002, so that the same can be ploughed back into the main stream of economy of the country. The Directors and other liable persons for the affairs of the Corporate Debtor would, however, continue to be charged under the offences in question.

15. Extensive reliance is also placed on a decision of Single Bench of the Delhi High Court in the case of ***Nitin Jain Liquidator PSL Limited Vs. - Enforcement Directorate*** reported in **2021 SCC OnLine Delhi 5281**. In the said decision the Hon'ble Delhi High Court had in detail set out the observations of the Supreme Court of India in the case of Manish Kumar's decision (supra). The High Court had in the facts and circumstances of the said case permitted the liquidator under the IBC to sell the assets of the Corporate Debtor therein that were attached by the ED under the provisions of the PMLA, 2002.

16. Mr. Chowdhury had also placed reliance of other decision in the case of ***Rajiv Chakraborty Resolution Professional of EIEL - Vs. - Directorate of Enforcement*** reported in **2022 SCC OnLine Delhi 3703**.

17. In reply Mr. Arijit Chakraborti, Counsel appearing for the Enforcement Directorate, would argue before this Court that the "Coal Scam" cases stand on a different footing from that of any other

cases and particularly, the subject matter of **Nitin Jain Liquidator PSL Limited** decision (supra) and **Rajiv Chakraborty's** decision (supra).

18. Mr. Chakraborti would place a decision of the Hon'ble Supreme Court of India in the case of **Manohar Lal Sharma – Vs. – Union of India** reported in **(2015) 13 Supreme Court Cases 35** particularly paragraph 10 thereof. A further clarification of the decision in **Manohar Lal Sharma's** decision (supra) as made in the case of **Girish Kumar Suneja – Vs. – Central Bureau of Investigation** reported in **(2017) 14 Supreme Court Cases 809** has also been placed.

19. The territorial jurisdiction of this Court to entertain the writ petition has also been questioned by the ED.

20. For the purpose of a fair assessment of the rival arguments and particularly the maintainability issue (not necessarily confined to territorial jurisdiction) as raised by the ED, it would be useful to set out paragraphs 6, 7, 8, 9 and 10 of the decision of the Hon'ble Supreme Court in the case of **Manohar Lal Sharma's** decision (supra).

6. In pursuance of our order dated 18-7-2014 [*Manohar Lal Sharma v. Union of India*, WP (Cri) No. 120 of 2012, order dated 18-7-2014 (SC), wherein it was directed: "We direct the Secretary General of this Court to write to the Registrar General of the High Court of Delhi to take order from the Hon'ble the Chief Justice, Delhi High Court nominating an officer of Delhi Higher Judicial Service to be posted as Special Judge to deal and exclusively try the offences pertaining to coal block allocation matters under the Penal Code, 1860, Prevention of Corruption Act, 1988, Prevention of Money-Laundering Act, 2002 and other allied offences. The Registrar General, High Court of Delhi

shall communicate the decision of the Hon'ble the Chief Justice on or before 25-7-2014. List this group of matters on 25-7-2014 at 2 p.m.]" , the Registrar General, Delhi High Court has intimated to the Secretary General of this Court that the Hon'ble the Chief Justice of Delhi High Court has been pleased to nominate Mr Bharat Prashar, an officer of Delhi Higher Judicial Service for being posted as Special Judge to deal and exclusively try the offences pertaining to coal block allocation matters under the Penal Code, 1860, Prevention of Corruption Act, 1988, Prevention of Money-Laundering Act, 2002 and other allied offences.

7. We, accordingly, direct the competent authorities to issue requisite notifications appointing Mr Bharat Prashar, an officer of Delhi Higher Judicial Service as Special Judge for the above purpose. The notifications shall be issued within two weeks from the date of communication of copy of this order.

8. We also order that Mr R.S. Cheema, Senior Advocate shall be appointed as Special Public Prosecutor by the Government of India to conduct the prosecution of the offences pertaining to coal block allocation matters on behalf of CBI and Enforcement Directorate. On such appointment, Mr R.S. Cheema may choose two other advocates, who, in his opinion, will be of assistance in the matter. While doing so, Mr R.S. Cheema may keep in view the magnitude and complexities of the case.

9. The Special Public Prosecutor shall have access to the entire evidence/material including case diaries collected in the course of investigation. We direct CBI to render all necessary assistance to the Special Public Prosecutor.

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 aforementioned. 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.

21. It would, therefore, follow from the above decision that the Hon'ble Supreme Court of India in exercise of power under Article 142 of the Constitution of India and in public interest, has directed that all the prosecutions relating to matters arising out of or connected with the "Coal Scam", particularly under the provisions of the Indian Penal Code, 1860, the Prevention of Corruption Act, 1988 and the Prevention of Money Laundering Act, 2002 and the allied offences to be tried at one particular place/Court.

22. The Hon'ble Supreme Court had approved the appointment of one Mr. Bharat Prashar, an Officer of

Delhi Higher Judicial Service as a Special Judge/Court to hear all cases under aforesaid three statutes mentioned hereinabove relating to the coal scam. The Hon'ble Supreme Court also appointed a Senior Advocate as Special Public Prosecutor, in this regard.

23. A fortiori and/or as an obvious corollary it would, therefore, imply that all matters relating to "Coal Scam" particularly the prosecutions and proceedings arising out of the PMLA against the Corporate Debtor would fall within the exclusive jurisdiction of the Special Court. The subject matter of the writ petition i.e. sale by the Liquidator of the assets of the Corporate Debtor which are already attached by the ED would have come within the sole purview of the Authority of the Special Court as appointed by the Supreme Court.

24. The legality of the decision in the case of **Manohar Lal Sharma's** decision (supra) came to be questioned and/or resultantly considered by the Hon'ble Supreme Court of India in case of **Girish Kumar Suneja's** decision (supra).

25. In the said decision, another three Judge Bench of the Hon'ble Supreme Court of India, reiterated and upheld the constitution of the Special Court and transfer of all cases and prosecutions relating and arising out of the "Coal Scam" to the said Special Court. The observations of the Hon'ble Supreme Court

of India at paragraphs 49, 50, 51, 79 and 80 must be noted and are hence set out hereinbelow:

49. It must not be forgotten that the cases arising out of the Coal Block Allocations are not ordinary cases but fall under a special or distinct category which requires special attention given the magnitude of the illegalities allegedly committed including some with criminal intent. It is in this view of the matter that this Court had no option but to hand over the investigations to CBI and to monitor the investigations so that they reach their logical conclusion, without any interference from any quarter. The magnitude of the illegalities is such that it appears that even the integrity of the Director of CBI was prima facie compromised, and this Court had to intervene and direct investigations into the conduct of the Director of CBI. That being so, it can hardly be said with any degree of seriousness that the procedure adopted by this Court, in the facts and circumstances of the case, violate any right to the life and liberty of any of the appellants or any other persons allegedly involved in the criminality associated with the allocation of coal blocks.

Article 32 and Article 142 of the Constitution

50. It was submitted that para 10 of the order contravenes the fundamental right of the appellants to access justice and an accused person cannot be deprived of this fundamental right even by a judicial order. Reliance was placed on *Naresh Shridhar Mirajkar v. State of Maharashtra* [*Naresh Shridhar Mirajkar v. State of Maharashtra*, (1966) 3 SCR 744 : AIR 1967 SC 1] . It was further submitted that in the garb of doing complete justice, this Court could not deprive the appellants of their right to access justice.

51. It is no doubt true that the words “complete justice” appearing in Article 142 of the Constitution enable this Court to exercise extremely wide powers but there is also no doubt that the power is ancillary and can be made use of only when it is not in conflict with the substantive provisions of any law. This has been the view expressed by several larger Benches of this Court including in *Mirajkar* [*Naresh Shridhar Mirajkar v. State of Maharashtra*, (1966) 3 SCR 744 : AIR 1967 SC 1] and *Antulay* [*A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372] and was also settled in *Supreme Court Bar Assn. v. Union of India* [*Supreme Court Bar Assn. v. Union of India*, (1998) 4 SCC 409] . It is not necessary for us to further elucidate this position or to elaborate on it.

79. The aforesaid order came up for consideration before this Court in *Shahid Balwa v. Union of India* [*Shahid Balwa v. Union of India*, (2014) 2 SCC 687 : (2014) 4 SCC (Cri) 385] . While dealing with the submissions made in relation to the aforesaid order (submissions that are similar to those made before us) this Court held that considering the width and ambit of the investigation which could even spread overseas and also considering the larger public interest, the aforesaid order was passed reserving the right of the accused to move this Court if there is a grievance against the order passed by the Special Judge during the trial and that this would ensure that progress in the trial is not hampered. Such an order was permissible under the provisions of Article 136 read with Article 142 of the Constitution. It was also made clear that the parties cannot invoke the jurisdiction under Article 226 or 227 of the Constitution or under Section 482 CrPC

so as to ensure compliance with the orders passed by this Court otherwise the very purpose and object of the order would be defeated. This Court held in paras 22 and 23 of the Report as follows: (SCC p. 699)

“22. We may, at the very outset, point out that CBI as well as the Enforcement Directorate are yet to complete the investigation of the cases relating to 2G Scam and the case which is being tried by the Special Judge is only one amongst them, wherein the charge-sheet has been filed and the trial is in progress. This Court, taking into consideration the width and ambit of the investigation which even spreads overseas and the larger public interest involved, passed the orders impugned, reserving the right of all, including the accused persons, to move this Court if their prayer would amount to staying or impeding the progress of the trial. In case they have any grievance against the orders passed by the Special Judge during trial, they are free to approach this Court so that the progress of the trial would not be hampered by indulging in cumbersome and time-consuming proceedings in the other forums, thereby stultifying the peremptory direction given by this Court for day-to-day trial.

23. Article 136 read with Article 142 of the Constitution of India enables this Court to pass such orders, which are necessary for doing complete justice in any cause or matter pending before it and, any order so made, shall be enforceable throughout the territory of India. The parties, in such a case, cannot invoke the jurisdiction under Article 226 or 227 of the Constitution of India or under Section 482 CrPC so as to interfere with those orders passed by this Court, in exercise of its constitutional powers conferred under Article 136 read with Article 142 of the Constitution of India. Or, else, the parties will move courts inferior to this Court under Article 226 or Article 227 of the Constitution of India or Section 482 CrPC, so as to defeat the very purpose and object of the various orders passed by this Court in exercise of its powers conferred under Article 136 read with Article 142 of the Constitution of India.”

80. It was further held in *Shahid Balwa case* [*Shahid Balwa v. Union of India*, (2014) 2 SCC 687 : (2014) 4 SCC (Cri) 385] that the order passed only facilitates the progress of the trial by ordering that it must proceed on a day-to-day basis. It was noted that the backlog of cases is often an incentive to the litigants to take unfair advantage of the delays and therefore, it was necessary to pass the order dated 11-4-2011 [*Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 117 : (2012) 2 SCC (Cri) 61] . It was stated as follows in para 31 of the Report: (*Shahid Balwa case* [*Shahid Balwa v. Union of India*, (2014) 2 SCC 687 : (2014) 4 SCC (Cri) 385] , SCC pp. 701-02)

“31. We also, therefore, find no basis in the contention of the petitioners that the orders dated 11-4-2011 [*Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 117 : (2012) 2 SCC (Cri) 61] and 9-11-2012 [*Shahid Balwa v. Union of India*, (2014) 2 SCC 687, 692 (footnote 2)] have the effect of monitoring the trial proceedings. No court, other than the court seized of the trial, has the power to monitor the proceedings pending before it. The order dated 11-4-2011 [*Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 117 : (2012) 2 SCC (Cri) 61] only facilitates the progress of the trial by ordering that the trial must proceed on a day-to-day basis. Large backlog of cases in the courts is often an incentive

to the litigants to misuse the courts' system by indulging in unnecessary and fraudulent litigation, thereby delaying the entire trial process. Criminal justice system's procedure guarantees and elaborateness sometimes give, create openings for abusive, dilatory tactics and confer unfair advantage on better heeled litigants to cause delay to their advantage. Longer the trial, witnesses will be unavailable, memories will fade and evidence will be stale. Taking into consideration all those aspects, this Court felt that it is in the larger public interest that the trial of 2G Scam be not hampered. Further, when larger public interest is involved, it is the bounden duty of all, including the accused persons, who are presumed to be innocent, until proven guilty, to cooperate with the progress of the trial. Early disposal of the trial is also to their advantage, so that their innocence could be proved, rather than remain enmeshed in criminal trial for years and unable to get on with their lives and business."

26. Having regard to the aforesaid observations, this Court is of the view that any prayer for interference with the attachment and pending prayers of the ED for confiscation of assets of the Corporate Debtor, must be made only before the Special Court constituted by the Hon'ble Supreme Court of India as above or before the Hon'ble Supreme Court of India itself.

27. Any leave by this Court to permit the liquidator to ignore the attachment orders would also render infructuous the prayers for confiscation already made before a Special Court by the ED of the assets of the Corporate Debtor. The very object and purpose of constitution of the Special Court by the Hon'ble Supreme Court may be defeated and/or rendered nugatory.

28. There is yet another aspect of the matter that is rather striking to this Court. The locus standi of the liquidator to file the writ petition, probably cannot be questioned since he is an authority constituted under the Statute and may have been conferred with powers

under the IBC consequent upon being appointed by the NCLT.

29. The enthusiasm of the liquidator to move this Court under Article 226 of the Constitution of India, to seek a Mandamus to free the assets of the Corporate Debtor from attachment of the ED and to permit him to sell the same for the benefit of the economy in general and the secured creditors in particular, is misplaced and his bona fides are rather suspect.

30. It is interesting to note that not a single secured creditor is a party to the writ petition. Not a single creditor, bank or financial institution has come forward before this Court either to support the liquidator or to initiate any similar proceedings of their own. While the arguments of the liquidator, that the writ petition has been filed to give effect to the object and purpose of the Insolvency & Bankruptcy Code, 2016, are laudable, this Court is unable to countenance his bona fides. The liquidator suo motu need not have espoused the cause of the creditors. The Creditors have not lodged any claims. No such claims have been referred to or placed by the liquidator before this Court.

31. As already discussed hereinabove, the Enforcement Directorate or any Authority under the PMLA were never notified of the proceedings against the Corporate Debtor before the NCLT at any point of time, until the order of the liquidator was passed.

32. The Court's mind is not free from doubt that the promoters and/or Directors of the Corporate Debtor may have been instrumental in causing the liquidator to file this writ petition for collateral purposes. An attempt to frustrate orders of the Hon'ble Supreme Court of India and nullify the authority of the Special Court referred to hereinabove, cannot be ruled out.

33. In the case of Girish Kumar Suneja (supra) and particularly paragraphs set out hereinabove, the power of the Hon'ble Supreme Court of India in public interest, and in very special cases, to restrict the powers of the High Courts under Section 482 of the Code of Criminal Procedure and Articles 226 and 227 of the Constitution of India has been discussed.

34. The upshot of the decision of the Manohar Lal Sharma's decision (supra) and the clarification in the case of Girish Kumar Suneja (supra) would abundantly indicate to this Court that there were special reasons for transferring all matters arising out of the coal scam and particularly, the proceedings and prosecution under the PMLA to the Special Court.

35. There are a large number of arguments on other issues and the cases cited by the parties which this Court does not deem it necessary to consider in view of the observations made in hereinabove.

36. The instant writ petition fails and is hereby dismissed.

37. In the facts and circumstances of the case, however, this Court stops short of imposing any costs.

38. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)