IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.320 OF 2020

Mehul Choksi .....Applicant
Versus
1. State of Maharashtra,
2. Enforcement Directorate, Mumbai .... Respondents

Mr. Vijay Aggarwal, Advocate a/w. Rahul Agarwal, Yash Agrawal, Abhiraj Rai, Jasmin Purani, Rohit Kaul, Yashwardhan Tiwari for the Applicant.

Mr. A.R. Patil, APP for the Respondent No.1-State.

Mr. H.S. Venegavkar, Special P.P. a/w. Aayush Kedia for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

RESERVED ON : 11th SEPTEMBER, 2023
PRONOUNCED ON: 21st SEPTEMBER, 2023

ORDER:

1. Heard Shri Vijay Aggarwal, learned counsel for the Applicant, Shri A.R. Patil, learned APP for the Respondent No.1-State and Shri H.S. Venegavkar, learned Special P.P. for the Respondent No.2.

2. The Applicant has challenged the order dated 23.1.2020 passed by the learned Special Judge, Greater Bombay rejecting the application filed at Exhibit-67 in Criminal Misc. Application No.997/2018. By the said application, the Applicant prayed that the application filed at Exhibit-66 be decided forthwith before proceeding further. Said application vide Exhibit-66 was for directions to the prosecution to comply with the provisions of the Indian Evidence Act, 1872 and allow the Applicant to place his objection on record concerning the affidavit and the exhibits; and in the alternative for passing the order that the affidavit and the exhibits will not be considered while deciding the application under Section 4 of the Fugitive Economic Offenders Act, 2018 (hereinafter referred to as the "FEO Act").

3. The brief background of the case is as follows:

i. An FIR No.RC.02(E)/2018 was registered with BS & FC (CBI) Mumbai on 15.2.2018 under Section 120-B read with 420 of IPC and under section 13(2) read with 13(1)

(d) of the Prevention of Corruption Act 1988 against the Applicant and others. The investigation was carried out and the charge-sheet was filed by the CBI before the learned Special CBI Judge on 15.5.2018. It was registered as Special CBI case No.38/2018 and is pending before the Special Judge for CBI, Sessions Court, Greater Bombay. Pursuant to the registration of the FIR by the CBI, the Enforcement Directorate (ED) registered an Enforcement Case Information Report [ECIR] No. MBZO-I/04/2018 registered pursuant to an FIR bearing No.RC.RCBSM2018E0002 dated 15.2.2018 registered by CBI, BS & FC, Mumbai.

ii. The ED filed complaint under Section 45 of the Prevention of Money Laundering Act, 2002 (for short, 'PML Act') before the Special PMLA Court. That court took cognizance against the Applicant and the other accused. That case is pending.

iii. On 10.7.2018, the ED filed an application under section 4 read with Section 12 of the Fugitive Economic Offenders Ordinance, 2018 praying that the Applicant be declared as a fugitive economic offender and his properties be confiscated under the provisions of the FEO Act. The ED sought to rely upon various documents which were annexed to the said Application.

iv. It is the contention of the Applicant that the ED had to follow the provisions of the Indian Evidence Act. Without following such provisions, those documents were inadmissible in evidence.

v. The learned Special Judge passed an order below Exhibit-67, as mentioned earlier, that said objection raised under Exhibit-66 in those proceedings in Criminal Misc. Application No.997/2018 would be decided at the final hearing stage while deciding the Application under Section 4 of the FEO Act. The Applicant is aggrieved by that order and hence this Application is filed.

SUBMISSIONS ON BEHALF OF THE APPLICANT:

4. Learned counsel Shri Aggarwal appearing for the Applicant made the following submissions:

i. Section 16 of the FEO Act puts the burden on the Director or the person authorized by the Director who has filed the application under Section 4 of the FEO Act for establishing that an individual is a fugitive economic offender or that the property is the proceeds of crime. According to that Section the standard of proof was 'pre-ponderance of probabilities'.

ii. Shri Aggarwal submitted that the standard of proof of preponderance of probabilities can only be considered if the documents relied by the Director or the authorized person were admissible in evidence. The Director had to prove these documents as per the provisions of the Indian Evidence Act and in particular to comply with the provisions relating to proof of documentary evidence.

Once that stage is crossed, then it is for the Court to test their evidentiary value on the standard of preponderance of probabilities.

iii. Shri Aggarwal submitted that the Deputy Director who has filed the application under Section 4 of the FEO Act has not crossed the first hurdle and the documents are not proved in accordance with the Indian Evidence Act and, therefore, the Court cannot refer to these documents.

iv. Shri Aggarwal submitted that therefore at this stage before deciding the Application under Section 4 of the FEO Act it was necessary for the learned Special Judge to have decided the issue about the admissibility of those documents which was raised under Exhibit-66 in those proceedings.

v. Shri Aggarwal invited my attention to the application filed under Section 4 of the FEO Act and the annexures to the Application which are mentioned in the index. He submitted that the documents mentioned in the index are copies of various documents and the original documents are not annexed to the said Application. Therefore, these documents were inadmissible and the learned Judge ought to have decided this issue before proceeding further.

vi. He submitted that the proper procedure established under law is required to be followed otherwise it affects the valuable right of the Applicant guaranteed under Article 21 of the Constitution of India.

vii. He submitted that in the application preferred by the Applicant at Exhibit-66, two important judgments were referred i.e. (i) **R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another** as reported in **2003(8) SCC 752** and (ii) **Peacock Industries Ltd., Mr. Daud Vs. Budhrani Finance Ltd. and State of Maharashtra IV (2006) BC 302** as reported in **2006(5) MhLJ 162.**

Based on these judgments, he submitted that the objection regarding admissibility has to be taken when the documents are tendered. When the document is admitted in evidence and marked as an Exhibit, the objection that it should not have been admitted in evidence cannot be raised at a subsequent stage. He submitted that the Court should permit the Respondent to raise the objection and such objection has to be decided at that stage itself. He submitted that the learned Special Judge did not refer to the ratio of these judgments and without assigning any reasons for not following that ratio; decided Exhibit-67 and, therefore, the impugned order be set aside and the matter be remanded back.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2:

5. In response to these submissions, Shri Venegavkar made the following submissions:

i. The proceedings under the FEO Act are summary in nature. The object of the Act is to provide for measures to deter the fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of the Indian Courts. He submitted that the special procedure under the FEO Act is provided which has to be followed. The Deputy Director has complied with the said procedure and, therefore, there is no substance in the argument of Shri Aggarwal.

ii. Shri Venegavkar relied on the definition of the 'fugitive economic offender' as provided under Section 2(1)(f) of the FEO Act. He submitted that Section 12(1) provides for declaring an individual as an fugitive economic offender and after this stage of such declaration, sub-section (2) of Section 12 of the FEO Act provides for confiscation of the properties. Therefore, at the first stage what is required to be seen is the availability or non-availability of the offender. He submitted that in that context, the application in paragraph-9 elaborately makes reference to the statement of reasons to believe that the accused is a fugitive economic offender. Further, in paragraph-10 the statement of information available on the whereabouts of the accused person believed to be a fugitive economic offender is provided and in paragraph-11 the efforts taken to bring the fugitive economic offender back to India are mentioned. This is in consonance with the Declaration Of Fugitive Economic Offenders (Forms And Manner Of Filing Application) Rules, 2018 (hereinafter referred to as 'FEO Rules') and in particular Rule 3 of the FEO Rules. The index mentions copies of NBW dated 5.7.2018 and 5.3.2018 issued against the Applicant. The copies of the same are annexed to the application. Thus, all the requirements of Rule 3 are complied with. Therefore, there is no impediment in the proceedings for the Court to decide the application under Section 4 read with Section 12 of the FEO Act.

iii. Shri Venegavkar submitted that a Division Bench of this Court (Coram: B.P. Dharmadhikari & Smt. S.S. Jadhav, JJ.) vide an order on 4.12.2019 in I.A. No.1/2019 and other companion matters had observed that the Applicant has not given any reasons for his non-appearance in terms of Section 11(1) of the FEO Act. If any such reasons exists the Special Court can look into it. Shri Venegavkar submitted that the Applicant has not pointed out this order to this Court.

REJOINDER ON BEHALF OF THE APPLICANT :

6. In rejoinder to the submissions of Shri Venegavkar , Shri Aggarwal further submitted that Section 16(1) regarding the burden of proof is in two parts i.e. 16(1)(a) and 16(1)(b) and the procedure provided under the FEO Act is applicable to both these clauses. Therefore, it cannot be said that the admissibility can be tested only at the second stage.

7. Shri Aggarwal submitted that the order of the Division Bench was on a totally different issue and the question of admissibility raised in Exhibit-66 in Criminal Misc. Application No.997/2018 was not before the Division Bench.

REASONS:

8. I have considered these submissions. Section 2(1)(f) of the FEO Act reads thus :

> **"2. Definitions.** (1) In this Act, unless the context otherwise requires,--

> xxxx
>
> xxxx
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> (f) "fugitive economic offender" means any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who
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> (i) has left India so as to avoid criminal prosecution; or
>
> (ii) being abroad, refuses to return to India to face criminal prosecution;”

9. As rightly submitted by Shri Venegavkar, Section 12 of the FEO Act is divided under different sub-sections. Sub-section (1) of Section 12 of the FEO Act is a distinct sub-section which provides for declaration of an individual as a fugitive economic offender for reasons to be recorded in writing. For this purpose the main consideration would be whether he is an individual against whom a warrant for arrest in relation to a scheduled offence has been issued by any Court in India and who has left India so as to avoid the criminal prosecution and being abroad refuses to return to India to face the criminal prosecution. For the purpose of declaration under Section 12(1), these considerations are important and for that purpose the copies of warrants annexed to the application under Section 4 are important.

10. The next stage of confiscation of the properties comes subsequently. Therefore, the learned Judge has rightly observed that this matter can be decided in two stages. This is reflected in paragraph-6 of the impugned order. In these proceedings, the predecessor of the Special Judge who has passed the impugned order; had passed an order dated 31.1.2019, which reads thus :

> "As pointed above, there are complex issues as regards the right or interest in respect of the properties involved and it will take its own time for hearing. Considering the same, it would be expedient to split the hearing and decision of the application Exhibit-1 in two parts. The court will take the hearing of the application (Exhibit-1) first for the issue as regard declaration of N.A. No.1 as a fugitive economic offender and will pass order. Based on outcome of first order, if necessary, court will take hearing as per law on the issue that the properties involved can be subjected to confiscation to Central Government."

. This particular order is not challenged and the course adopted by the said order cannot be faulted with.

11. Section 12 of the FEO Act provides for such stages. Said Section reads thus :

"**12. Declaration of fugitive economic offender.** (1) After hearing the application under section 4, if the Special Court is satisfied that an individual is a fugitive economic offender, it may, by an order, declare the individual as a fugitive economic offender for reasons to be recorded in writing.

(2) On a declaration under sub-section *(1)*, the Special Court may order that any of the following properties stand confiscated to the Central Government—

(a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and

(b) any other property or *benami* property in India or abroad, owned by the fugitive economic offender.

(3) The confiscation order of the Special Court shall, to the extent possible, identify the properties in India or abroad that constitute proceeds of crime which are to be confiscated and in case such properties cannot be identified, quantify the value of the proceeds of crime.

(4) The confiscation order of the Special Court shall separately list any other property owned by the fugitive economic offender in India which is to be confiscated.

(5) Where the Special Court has made an order for confiscation of any property under sub-section *(2)*, and such property is in a contracting State, the Special Court may issue a letter of request to a Court or authority in the contracting State for execution of such order.

(6) Every letter of request to be transmitted to a contracting State under sub-section *(5)* shall be transmitted in such form and manner as the Central Government may, by notification, specify in this behalf.

(7) The Special Court may, while making the confiscation order, exempt from confiscation any property which is a proceed of crime in which any other person, other than the fugitive economic offender, has an interest if it is satisfied that such interest was acquired *bona fide* and without knowledge of the fact that the property was proceeds of crime.

> (8) All the rights and title in the confiscated property shall, from the date of the confiscation order, vest in the Central Government, free from all encumbrances.
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> (9) Where on the conclusion of the proceedings, the Special Court finds that the individual is not a fugitive economic offender, the Special Court shall order release of property or record attached or seized under this Act to the person entitled to receive it.
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> (10) Where an order releasing the property has been made by the Special Court under sub-section *(9)*, the Director or any other officer authorised by him in this behalf may withhold the release of any such property or record for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under this Act."

12. Considering the above discussion, in my opinion, the learned Special Judge has not committed any error in passing the impugned order observing that the application at Exhibit-66 was to be put up for orders with the main application for declaration of the Applicant as a Fugitive Economic Offender.

13. The submission of Shri Venegavkar that the special procedure is provided under the FEO Act and the FEO Rules is also important. Said Act and Rule 3 provides as to how the application is to be filed. Section 4 of the FEO Act and Rule 3 of the FEO Rules read thus :

“4. Application for declaration of fugitive economic offender and procedure therefor. (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 reasons for such belief to be recorded in writing), on the basis of material in his possession, that any individual is a fugitive economic offender, he may file an application in such form and manner as may be prescribed in the Special Court that such individual may be declared as a fugitive economic offender.

(2) The application referred to in sub-section *(1)* shall contain—

(a) reasons for the belief that an individual is a fugitive economic offender;

(b) any information available as to the whereabouts of the fugitive economic offender;

(c) a list of properties or the value of such properties believed to be the proceeds of crime, including any such property outside India for which confiscation is sought;

(d) a list of properties or *benami* properties owned by the individual in India or abroad for which confiscation is sought; and

(e) a list of persons who may have an interest in any of the properties listed under clauses *(c)* and *(d)*.

(3) The Authorities appointed for the purposes of the Prevention of Money-laundering Act, 2002 (15 of 2003) shall be the Authorities for the purposes of this Act.”

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“3. Form and manner of application for declaring an individual as a fugitive economic offender.—(1) The Director or the authorised officer, as the case may be, shall prepare an index containing the following materials, namely:-

(i) a copy of a warrant of arrest in relation to prosecution of a Scheduled Offence against the individual believed to be a fugitive economic offender issued by any Court in India;

(ii) a statement of reasons to believe that an individual is a fugitive economic offender;

(iii) a statement on any information available as to the whereabouts of the individual believed to be a fugitive economic offender;

(iv) any proof of effort undertaken to bring the individual believed to be a fugitive economic offender back to India;

(v) a list of properties or value of such properties believed to be the proceeds of crime, including any such property outside India for which confiscation is sought;

(vi) a list of properties or benami property owned by the individual believed to be a fugitive economic offender in India or abroad for which confiscation is sought;

(vii) a copy of a confiscation order issued by the Adjudicating Authority under the Prohibition of Benami Property Transactions Act, 1988, if any;

(viii) a list of persons who may have an interest in any of the properties listed under clauses (v) and(vi).

(2) The index and material prepared under sub-rule (1) shall be signed on each page and forwarded to the Special Court in a sealed envelope, indicating a reference number and date of despatch.

(3) The Director or the authorised officer, as the case may be, shall maintain registers and other records such as acknowledgement slip register and dak register and shall ensure that necessary entries are made in the register immediately as soon as a copy of the application along with the materials are forwarded to the Special Court."

14. As pointed out earlier, the Application under Section 4 contains the reasons for belief that an individual is a fugitive economic offender and it also contains the list of properties. Rule 3 mentions different materials from sub-clauses (i) to (viii). The Deputy Director has complied with the requirements of Rule 3 by providing material mentioned under the said Rule.

15. The judgments referred to by Shri Aggarwal, mentioned hereinabove, speak about the stage at which the objection can be raised. In the present case that occasion would arise only at the stage of hearing of the application. The procedure provided under the Act is about filing of the application under Section 4 and then hearing the said application by following the procedure under Section 11 and then passing necessary order of declaration.

16. Section 11 of the FEO Act is as follows :

> **"11. Procedure for hearing application.** (1) Where any individual to whom notice has been issued under sub-section *(1)* of section 10 appears in person at the place and time specified in the notice, the Special Court may terminate the proceedings under this Act.

> (2) Where any individual to whom notice has been issued under sub-section *(1)* of section 10 fails to appear at the place and time specified in the notice, but enters appearance through counsel, the Special Court may in its discretion give a period of one week to file a reply to the application under section 4.
>
> (3) Where any individual to whom notice has been issued under sub-section *(1)* of section 10 fails to enter appearance either in person or through counsel, and the Special Court is satisfied—
>
> (a) that service of notice has been effected on such party; or
>
> (b) that notice could not be served in spite of best efforts because such individual has evaded service of notice, it may, after recording reasons in writing, proceed to hear the application.
>
> (4) The Special Court may also give any person to whom notice has been issued under sub-section *(2)* of section 10 a period of one week to file a reply to the application under section 4."

. Sub-section (3) of Section 11 mentions that once the steps under sub-sections (1), (2) and (3) are completed then the Court can proceed to hear the application. There is no process in between which could be undertaken by the Court at the instance of any party. Therefore, once the application is duly filed under Section 4, the next procedure is provided under Section 11. The learned Special Judge has followed the same procedure under

Section 11 and has decided to proceed to hear the said application. His approach is in consonance with the provisions of the FEO Act.

17. Shri Aggarwal referred to Section 16 of the FEO Act, which is regarding the process of deciding the said application and the nature of the burden of proof. Section 16 of the FEO Act reads thus:

> **"16. Rules of evidence.--** (1) The burden of proof for establishing—
>
> (a) that an individual is a fugitive economic offender; or
>
> (b) that a property is the proceeds of crime or any other property in which the individual alleged to be a fugitive economic offender has an interest,
>
> shall be on the Director or the person authorised by the Director to file the application under section 4.
>
> (2) Notwithstanding anything contained in any other law for the time being in force, where any person referred to in sub-section *(2)* of section 10 claims that any interest in any property was acquired *bona fide* and without knowledge of the fact that, such property constitutes proceeds of crime, the burden of proving such fact shall lie upon him.
>
> (3) The standard of proof applicable to the determination of facts by the Special Court under this Act shall be preponderance of probabilities."

18. As mentioned earlier, the learned Judge has already referred to two stages which were to be considered while deciding the said application under Section 4 of the FEO Act and, therefore, he had passed an order for putting up Exhibit-66 for order with the main application for declaration (Exhibit-1). Therefore, I do not find any infirmity in the impugned order rejecting Exhibit-67 for deciding Exhibit-66 forthwith. The approach of the learned Judge was correct. It was in accordance with the provisions of the FEO Act and I do not see any reason to interfere with the impugned order. Consequently, I do not find any merit in the present application and it is accordingly rejected. Interim relief stands vacated.

(SARANG V. KOTWAL, J.)

PRADIPKUMAR PRAKASHRAO DESHMANE

Digitally signed by PRADIPKUMAR PRAKASHRAO DESHMANE Date: 2023.09.21 13:41:43 +0530