IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1413 OF 2019

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 preferred this application for setting aside the order dated 26.9.2019 passed by the learned Special Judge passed below Exhibit-60 in Criminal Misc. Application No.997/2018. Said application was filed under Sections 357, 275 read with 290(F) of the Companies Act, 2013 for issuing notice to the Official Liquidator to appear and represent the company 'Gili India Limited'. The said application was rejected.

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. Pursuant to the FIR, a charge sheet was filed by the CBI before the learned Special CBI Judge on 15.5.2018. The learned judge took cognizance against the Applicant and the other accused on 22.5.2018. It was registered as Special CBI Case No.38/2018 and is pending before the Special Judge for CBI, Sessions Court, Greater Bombay. In pursuance to the registration of the FIR by the CBI, The Enforcement

Directorate (for short, 'ED') registered Enforcement Case Information Report [ECIR] No. MBZO-I/04/2018. The ED filed a 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 on 3/7/2018 against the Applicant and the other accused and the case is pending before that court at the stage of appearance.

ii. 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 Fugitive Economic Offenders Act, 2018 (hereinafter referred to as the 'FEO Act').

iii. According to the Applicant, the list of properties submitted with the application under Section 4 read with Section 12 of the FEO Act would reveal that the properties sought to be confiscated were owned by Gili India Limited. This Court vide order dated 10.9.2018 passed in Company Petition No.762/2014 titled as 'Anchal Collection Limited Vs. Gili India Limited' has admitted the winding-up petition against Gili India Ltd and had ordered for the appointment of Official Liquidator as a Provisional Liquidator. Therefore, according to the Applicant, the Official Liquidator was required to be served with the notice to appear and represent the company Gili India Ltd. This application was rejected by the impugned order.

SUBMISSIONS ON BEHALF OF THE APPLICANT:

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

i. Section 10 of the FEO Act provides for issuing notice. This step is important before hearing the application under Section 4 as per the procedure laid down under Section 11 of the FEO Act. He submitted that under Section 279 of the Companies Act, 2013 when a winding-up order is passed or a Provisional Liquidator is appointed, no suit or legal proceedings can commence; and if pending, cannot be proceeded with.

ii. He submitted that the provisions of Section 279 of the Companies Act apply to the present proceedings as well. He relied on the judgment of the High Court of Gujarat in the case of **Harish C. Raskapoor and others Vs. Jaferbhai Mohmedbhai Chhatpar, Divya Vasundhara Financiers P. Ltd.**[1] wherein it is held that the term 'suit or other proceeding' would cover all types of proceedings against the company including even criminal proceedings. He submitted that the present proceedings are also in the nature of criminal proceedings and, therefore, they cannot be proceeded with.

iii. He further submitted that as per section 290 of the Companies Act, only the Liquidator can represent the said company. He submitted that since the properties of the said company Gili India Limited are sought to be confiscated, therefore, notice to the Provisional Liquidator of the said company is absolutely essential and without

1 [1989] 65 CompCas 163(Gujarat High Court)

such notice and without his presence the proceedings cannot be proceeded with.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2:

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

i. As per Section 12 of the FEO Act, there are two stages as provided under sub-sections (1) & (2). In the first stage, provided under sub-section (1), a declaration will have to be made about the individual being a fugitive economic offender; and the second stage provided under sub-section (2) is for confiscation of the properties. Learned Judge has rightly held that the matter of confiscation of properties would arise for consideration only once the declaration as sought under Section 4 of the FEO Act is allowed.

ii. Shri Venegavkar submitted that the Applicant does not have any locus to make an application for issuing notice to the Provisional Liquidator of Gili India Limited. Section 10 of the FEO Act specifically provides for the persons to whom the notice can be issued and it is for the Court to issue notice to the individuals. Apart from the notice to the person who is sought to be declared as a fugitive economic offender, the notice is also required to be issued to any other person who has any interest in the property. Shri Venegavkar submitted that neither of these sub-sections gives locus to the present applicant to make an application for issuance of notice to the liquidator of Gili India Limited.

REJOINDER ON BEHALF OF THE APPLICANT :

6. In rejoinder to the submissions of Shri Venegavkar, Shri Aggarwal further submitted that even as per the case of the Deputy Director who has filed the application under Section 4 of the FEO Act, the Applicant has interest in the property of the said company i.e. Gili India Limited and, therefore, it cannot be said that the Applicant is a stranger and has no locus to file such an application. In fact, Rule 3 sub-rule (1)(viii) of the Declaration of Fugitive Economic Offenders (Forms and Manner of Filing Application) Rules, 2018 (for short, 'FEO Rules') mentions a list a

persons who may have an interest in any of the properties listed under clauses (v) & (vi). Even Section 4(2)(e) of the FEO Act provides for a list of persons who may have an interest in any of the properties listed under clauses (c) & (d). He, therefore, submitted that the Applicant was well within his rights and had locus to file the said application for directions to issue notice to the Provisional Liquidator of the said company.

REASONS :

7. I have considered these submissions. The relevant provisions are as follows :

. Sections 4, 10 and 12 of the FEO Act :

> **"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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"10. Notice. (1) Where an application under section 4 has been duly filed, the Special Court shall issue a notice to an individual who is alleged to be a fugitive economic offender.

(2) The notice referred to in sub-section (1), shall also be issued to any other person who has any interest in the property mentioned in the application under sub-section (2) of section 4.

(3) A notice under sub-section (1) shall—

(a) require the individual to appear at a specified place and time not less than six weeks from the date of issue of such notice; and

(b) state that failure to appear on the specified place and time shall result in a declaration of the individual as a fugitive economic offender and confiscation of property under this Act.

(4) A notice under sub-section (1) shall be forwarded to such authority, as the Central Government may notify, for effecting service in a contracting State.

(5) The authority referred to in sub-section (4) shall make efforts to serve the notice within a period of two weeks in such manner as may be prescribed.

(6) A notice under sub-section (1) may also be served to the individual alleged to be a fugitive economic offender by electronic means to—

(a) his electronic mail address submitted in connection with an application for allotment of Permanent Account Number under section 139A of the Income-tax Act, 1961 (43 of 1961);

(b) his electronic mail address submitted in connection with an application for enrolment under section 3 of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or

(c) any other electronic account as may be prescribed, belonging to the individual which is accessed by him over the internet, subject to the satisfaction of the Special Court that such account has been recently accessed by the individual and constitutes a reasonable method for communication of the notice to the individual."

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"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.

(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.

(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."

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. Rule 3 of the FEO Rules :

"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."

8. The learned Judge has referred to the 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."

. The learned Judge further observed that the matter as to confiscation of the properties would arise for consideration only in case the declaration as sought by ED is allowed. Therefore, the application filed for issuing notice to the Official Liquidator to appear and represent the company Gili India Ltd. cannot be considered at this stage as the matter as to confiscation was not to be considered first as per the order dated 31.1.2019 and it can be taken up at an appropriate stage subject to result of the declaration sought under Section 4 read with Section 12 of the FEO Act.

Therefore, the learned Judge has not committed any error in deciding to consider the issue about the declaration first.

9. As submitted by Shri Venegavkar, Section 12 of the FEO Act also provides two stages under sub-section (1) and sub-section (2). Therefore, the Court rightly decided to complete the stage one under Section 12(1) of the FEO Act. Only after that stage is crossed, the question about necessity to issue notice to the other persons would arise. The impugned order is, therefore, based on sound reasoning and I do not see any reason to interfere with the said impugned order. Consequently, the Application is rejected. The interim relief stands vacated.

(SARANG V. KOTWAL, J.)

PRADIPKUMAR PRAKASHRAO DESHMANE

Digitally signed by PRADIPKUMAR PRAKASHRAO DESHMANE Date: 2023.09.21 13:42:00 +0530