* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 26th APRIL, 2023

IN THE MATTER OF:

\+ **LPA 381/2023**

RBL BANK LTD ..... Appellant

Through: Mr. Kunal Tandon and Ms. Richa Sandilya, Advocates.

versus

THE DIRECTORATE OF ENFORCEMENT & ORS .... Respondents

Through: Mr. Zoheb Hossain, Advocate for ED with Mr. Vivek Gurnani, Mr. Kavish Garach and Mr. Hasnain Khawaja, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

CM APPL. 20666/2023 (Exemption)

Allowed, subject to all just exceptions.

LPA 381/2023 & CM APPL. 20665/2023

1. The Appellant seeks to challenge the Order dated 22.03.2023, passed by the learned Single Judge in W.P.(C) 10048/2019, dismissing the writ petition.

2. A Provisional Attachment Order (PAO) No.12/2019 dated 02.09.2019 in ECIR No. ECIR/05/DLZO-II/2018 was passed by the Deputy Director, Directorate of Enforcement, New Delhi attaching the immoveable property

bearing No. D-PH-01, 12th Floor, Central Park-I, Sector-42, Main Sector Road, Near DLF Golf Course, Gurgaon, Haryana (*hereinafter referred to as 'subject property'*) under Section 5(1) of the Prevention of Money Laundering Act, 2002 (*hereinafter referred to as 'PMLA Act'*).

3. Pursuant to the Provisional Attachment Order dated 02.09.2019, Original Complaint No.1201/2019 was filed by the Directorate of Enforcement on 26.09.2019. The Appellant/Bank approached this Court by filing W.P.(C) 10048/2019 challenging the Provisional Attachment Order dated 02.09.2019 seeking the following relief:-

> *"(a) Issue an appropriate writ, order or direction, more particularly a writ of Certiorari thereby setting aside/quashing the Impugned Order dated 02.09.2019 passed by Deputy Director, Enforcement of Directorate, DLZO-II, New Delhi in Provisional Attachment Order No.12/2019;"*

4. This Court vide Order dated 13.01.2020 in W.P.(C) 10048/2019 stayed the proceedings of the adjudicating authority qua the Appellant herein observing as under:-

> *"...In the meantime, there shall be a stay on further proceedings before the Adjudicating Authority qua the petitioner and the properties claimed to have been mortgaged to the petitioner."*

5. The Adjudicating Authority confirmed the PAO by an order dated 21.02.2020. Since the proceedings *qua* the Appellant herein was stayed by this Court, the Adjudicating Authority observed that directions in respect of the properties will be passed after the disposal of the Writ Petition.

6. In the writ petition preferred before the learned Single Judge, the Appellant/Bank had moved an application bearing No.12337/2021 for

directions seeking permission to confirm the sale of the subject property which was mortgaged to the Appellant/Bank and the registration of the necessary documents relating thereto. The learned Single Judge allowed the said application *vide* Order dated 04.06.2021 permitting the Appellant/Bank to proceed and finalise the sale of the subject property with the proposed purchaser through a private treaty and also directed that the sale proceeds received by the Appellant/Bank would subject to further Orders. It was also made clear that in case, the Appellant/Bank is unsuccessful in the writ petition; the Court may consider passing appropriate Orders for restitution.

7. The writ petition came up for final hearing before the learned Single Judge on 22.03.2023. The learned Single Judge after hearing the parties held that the sale proceeds would continue to remain with the Appellant/Bank and the Appellant/Bank is free to approach the Adjudicating Authority under Section 8(2) first proviso of the PMLA Act to establish before the Adjudicating Authority that the subject property is not involved in any money laundering activities. The learned Single Judge *vide* the Order impugned herein in the present LPA passed the following directions:-

> *"14. It is observed that the challenge is to a PAO dated 2nd September, 2019 and the purpose of ensuring that the subject property is duly sold and the amounts are realized, has been achieved. Further, the Petitioner has a remedy under Section 8(2) first proviso of the PMLA Act, 2002 to approach the Adjudicating Authority (PMLA) and to establish that the subject property is not involved in money laundering. In view thereof, the following directions are passed:*
>
> *(i) The matter shall now proceed before the Adjudicating Authority under the provisions of PMLA Act, 2002.*

> *(ii) The Petitioner would be free to file an application before the Adjudicating Authority under Section 8 of the PMLA Act, 2002 and raise contentions that the subject property is not subject matter of any money laundering activities and was purchased much before the allegations were raised.*
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> *(iii) The said application, if filed, shall be considered and adjudicated in accordance with law.*
>
> *(iv) The Respondent No.1- The Directorate of Enforcement shall take the necessary steps post the passing of the PAO qua the Petitioner.*
>
> *(v) The time spent, in the writ petition i.e. from 17th September, 2019 till today shall stand excluded for the purposes of calculating the limitation of 180 days under Sections 5 & 8 of the PMLA Act, 2002."*

8. The Appellant/bank, thereafter, approached this Court by filing the instant LPA challenging the Impugned Order dated 22.03.2023 passed by the learned Single Judge in W.P.(C) 10048/2019.

9. Learned Counsel appearing for the Appellant/bank submits that the subject property was mortgaged to the bank even prior to the transactions entered into by the owners of the subject property and, therefore, the property could not have been termed as proceeds of crime. It is submitted on behalf of the Appellant/bank that the Provisional Attachment Order (PAO) No.12/2019 dated 02.09.2019 in ECIR NO.ECIR/O5/DLZO-II/2018 has been passed by the Deputy Director, Directorate of Enforcement in a

mechanical manner without appreciating that facts of the case in the correct perspective. He submits that the Appellant/bank being a secured creditor, to whom the subject property has been mortgaged in the year 2007, would have a priority over the rights of the Enforcement Directorate under the PMLA Act.

10. Learned Counsel appearing for the Appellant/Bank further submits that the Order passed by the learned Single Judge relegating the Appellant/Bank to the Adjudicating Authority would not serve any purpose or provide any efficacious remedy to the Appellant/Bank as the Adjudicating Authority, while confirming the PAO Order No.12/2019 dated 02.09.2019, has already held that the subject property is involved in money laundering activities and the same is proceeds of crime. He submits that the learned Single Judge ought to have decided the issue at the first instance as to whether the subject property could have been attached as proceeds of crime by the Enforcement Directorate or not.

11. *Per contra*, Mr. Zoheb Hossain, learned Counsel appearing for the Enforcement Directorate (ED), submits that the present case arises out of offences of criminal breach of trust and forgery committed by the accused persons between 2007 and 2018 and this period overlaps with the period of creation of mortgage. He, therefore, submits that it is for the Appellant to prove that he has taken due diligence and has taken reasonable precautions to ensure that the property which was mortgaged to them was not a tainted asset. He submits that in accordance with Section 8(2) of the PMLA Act, the Adjudicating Authority has been bestowed with the jurisdiction to hear any aggrieved person who claims that his property has been wrongfully attached. He submits that Section 8(8) of the PMLA Act gives power to the Special

Court to consider the claim and pass Orders directing the Central Government to restore the property in case the property has been wrongfully attached.

12. Heard learned Counsel appearing for the Parties and perused the material on record.

13. The facts of the case reveal that the subject property was mortgaged to the Appellant /Bank in the year 2007. The subject property was attached by passing a Provisional Attachment Order (PAO) No. 12/2019 dated 02.09.2019 in ECIR No. ECIR/0S/DLZO-I1/2018 on the ground that the authority has reason to believe, on the basis of material in possession, that the subject property is proceeds of crime. The said PAO Order dated 02.09.2019 was confirmed by the Adjudicating Authority by its Order dated 21.02.2020 passed under the PMLA Act in respect of the properties as stated in the PAO Order dated 02.09.2019 except for the subject property, as the attachment of the subject property was stayed by the learned Single Judge *vide* Order dated 13.01.2020.

14. The Appellant approached this Court praying for a relief that the Appellant/bank ought to be permitted to sell the subject property. The subject property has been sold by the Appellant/Bank and the proceeds of the sale are lying with the Appellant/Bank. The learned Single Judge vide the Impugned Order has directed the Appellant/Bank to approach the Adjudicating Authority under Section 8(2) first proviso of the PMLA Act, 2002. Sections 8(2) and 8(8) of the PMLA Act, 2002 read as under:

> *"8(2) The Adjudicating Authority shall, after-*
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> *(a) considering the reply, if any, to the notice issued under sub-section (1);*

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him, by an order, record a, finding whether all or any of the properties referred to in the notice issued under subsection (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

***8(8)** Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also such Central Government to restore direct the confiscated property or part thereof of a claimant with a legitimate interest in the properly, who may have suffered quantifiable loss as a result of the offence of money laundering:*

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering:]

[Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.]

15. The predicate offence in the present case are acts of criminal breach of trust and forgery by the accused persons with respect to the credit facilities provided by the Appellant/Bank between the years 2007-2018. The issue as to whether the commission of the offence between 2007-2018 overlaps or is prior to the creation of mortgage can be adjudicated by the authorities under the PMLA Act and this Court, at this juncture, is not inclined to go into that question. This Court, therefore, does not find any reason to interfere with the order of the learned Single Judge who has also not commented on this question and has left the matter to the authorities under the PMLA Act to consider the issue.

16. It is well settled that when a statute prescribes a particular mode or a mechanism for adjudication of disputes arising out of that statute, then writ Courts must loathe in interfering the mode prescribed in that stature. The Apex Court in Whirlpool Corpn. V. Registrar of Trade Marks, **(1998) 8 SCC 1** has held as under:

> "*14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".*
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> ***15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court***

> ***would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."***

(emphasis supplied)

17. Following the judgment of Whirlpool Corpn (supra), the Apex Court in Harbanslal Sahnia v. Indian Oil Corpn. Ltd., **(2003) 2 SCC 107** has observed as under:

> *" 7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies.*

> *Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."*

18. The abovementioned two judgments have further been quoted and followed by the Apex Court in the case of M/s. South Indian Bank Ltd. & Ors. vs. Naveen Mathew Philip & Anr. Etc. passed in **SLP (Civil) Nos. 22021-22022 of 2022** dated 17.04.2023, In the said Judgment, the Apex Court has observed as under:

> ***"18. While doing so, we are conscious of the fact that the powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal."*** (emphasis supplied)

19. The scheme of the PMLA Act provides for mechanism beginning with a Provisional Attachment Order (PAO) attaching the property which is then confirmed by the Adjudicating Authority under Section 8(2) of the Act. When a property stands confiscated, a trial is conducted by the Special Court and in accordance with Section 8(8) of the Act, the Special Court may direct Central Government to restore such confiscated property. Therefore, this Court is of the view that the Appellant/Bank has an alternate efficacious remedy within the scope of the Act. In any event, the learned Single Judge, while exercising jurisdiction under Article 226 of the Constitution of India,

has directed the subject property to be sold so as to mitigate any loss that has been caused to the Appellant/Bank if it is ultimately found that the property was not liable to be attached as proceeds of crime. This Court, therefore, does not find any infirmity in the judgment of the learned Single Judge in relegating the Appellant/Bank to the Adjudicating Authority to ventilate its grievances under Section 8(2) of the PMLA Act and the same does not require interference and is accordingly upheld.

20. Resultantly, the LPA is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

APRIL 26, 2023
S. Zakir