



In the High Court of Punjab and Haryana, at Chandigarh

Civil Writ Petition No. 24420 of 2024 (O&M)

Reserved On: 23.09.2024
Pronounced On: 04.10.2024

MGF Developments Limited
... Petitioner(s)
Versus
Directorate of Enforcement and Another
... Respondent(s)

CORAM: Hon’ble Mr. Justice Sheel Nagu, Chief Justice.
Hon'ble Mr. Justice Anil Kshetarpal.
Present: Mr. Anand Chibber, Senior Advocate
Mr. Puneet Bali, Senior Advocate (Through Video Conferencing), Mr. Atul Nanda, Senior Advocate with Ms. Rameeza Hakeem, Mr. Amandeep Singh Talwar, Mr. Sachin Jain and Mr. Gursimran Moddar, Advocates for the petitioner(s).

Mr. Zoheb Hossain, Special Counsel (Through Video Conferencing) and Mr. Lokesh Narang, Senior Panel Counsel, for the respondents.

Anil Kshetarpal, J.

1. Introduction

1.1 In this case, the question is “whether it is appropriate to entertain the present writ petition against the Provisional Attachment Order (PAO) issued by the Directorate of Enforcement on 28.08.2024 before the statutory period of 30 days elapsed when the Adjudicating Authority is required to examine the same under Section 5 (5) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as “the 2002 Act”)?”

2. Submissions put forth the Learned Counsel Representing the Parties

2.1 The learned counsel representing the parties have been heard at the stage of admission of the writ petition. On the one hand, the petitioner’s

counsel submits that there is fundamental flaw in the attachment order as the petitioner has no concern with the proceeds of crime on account of demerger of the companies. Moreover, the Enforcement Directorate (ED) has wrongly held the property to be the proceeds of crime and attachment of the property of equivalent value. Further the methodology for calculating the proceeds of crime allegedly generated from ante dating six collaboration agreements is fundamentally flawed. Reliance is placed upon the judgments passed in *Radha Krishan Industries v. State of Himachal Pradesh and Others (2021) 6 SCC 771* and *Godrej Sara Lee Limited v. Excise and Taxation Officer-cum-Assessing Authority and Others 2023 SCC OnLine SC 95*.

2.2 Per contra, the ED's counsel contest the entertainability of this writ petition.

3. Analysis of the Submissions

3.1 The availability of the statutory alternative remedy under Section 5(5) of the 2002 Act is admitted by the petitioner's counsels. The petitioner has a remedy of filing its objections which shall be required to be decided by the Adjudicating Authority within a period of 180 days from the date the provisional attachment order was passed. Moreover, Section 8 of the 2002 Act enables the objector to file its objections and produce evidence on which he relies and the other relevant information.

3.2 The jurisdiction of the Constitutional Courts to entertain the petition at any stage is plenary. However, there are self imposed limitations which should be followed by the Court. Ordinarily, exhaustion of statutory alternative remedies is the rule and not exception. In State of *Himachal Pradesh and Others v. Gujarat Ambuja Cements Limited and Another*

(2005)6 SCC 499, the Supreme Court carved out the following three exceptions while examining the enforceability of prerogative writ:-

- I) If the order is without jurisdiction or when the proceedings are taken before the forum under the provision of law which is ultra vires.
- II) If the order passed is made in violation of the principles of natural justice.
- III) If the order is abuse of the process of law.

3.3 Reliance placed by the learned counsel on *Radha Krishan Industries's case (supra)* is misplaced because it was found that the only remedy that was available was in the form of invocation of the writ jurisdiction as the order passed by the Joint Commissioner as a delegate of the Commissioner was not subject to an appeal. Similarly, in *Godrej Sara Lee Limited's case (supra)*, the jurisdiction of the Deputy Excise and Taxation Commissioner (ST)-cum-Revisonal Authority was questioned by the assessee. In that context, the Supreme Court held that the High Court was not correct in relegating to the alternative remedy of appeal under Section 33 of the Haryana Value Added Tax Act, 2003.

3.4 The learned senior counsels representing the petitioner have not contended that the order passed is without jurisdiction, or passed in violation of the principles of natural justice or is an abuse to the process of law. At this stage, only the PAO has been passed which is subject to confirmation within a period of 180 days by the Adjudicating Authority. As per Section 5(5) of the 2002 Act, the ED is required to file a complaint before the Adjudicating

Authority. When the writ petition was filed, the statutory period of 30 days had not come to an end.

3.5 The Supreme Court, in *Vijay Madanlal Choudhary & Others v. Union of India & Others (2002) SCC Online SC 929*, while examining the constitutional validity of various provisions of the 2002 Act, has also examined the validity of Section 5. It has been found that the adequate safeguards have been provided in the 2002 Act in order to give an opportunity to the aggrieved person to file his response/objections before the Adjudicating Authority. The 2002 Act has also ensured that the PAO will be passed either by the Director or any other officer not below the rank of Deputy Director authorized by the Director for the purpose of this Section while giving reasons to believe on the basis of material in his possession. Para Nos. 57, 61 and 70 read as under:-

“57. Be that as it may, as aforesaid, sub-section (1) delineates sufficient safeguards to be adhered to by the authorised officer before issuing provisional attachment order in respect of proceeds of crime. It is only upon recording satisfaction regarding the twin requirements referred to in sub-section (1), the authorised officer can proceed to issue order of provisional attachment of such proceeds of crime. Before issuing a formal order, the authorised officer has to form his opinion and delineate the reasons for such belief to be recorded in writing, which indeed is not on the basis of assumption, but on the basis of material in his possession. The order of provisional attachment is, thus, the outcome of such satisfaction already

recorded by the authorised officer. Notably, the provisional order of attachment operates for a fixed duration not exceeding one hundred and eighty days from the date of the order. This is yet another safeguard provisioned in the 2002 Act itself.

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61. The third proviso in Section 5(1) of the 2002 Act is another safeguard introduced vide Act 13 of 2018 about the manner in which period of one hundred and eighty days need to be reckoned thereby providing for fixed tenure of the provisional attachment order. Before the expiry of the statutory period relating to the provisional attachment order, the Director or any other officer not below the rank of Deputy Director immediately after attachment under subsection (1) is obliged to forward a copy of the provisional attachment order to the three-member Adjudicating Authority (appointed under Section 6(1) of the 2002 Act, headed by, amongst other, person qualified for appointment as District Judge), in a sealed envelope under Section 5(2), which is required to be retained by the Adjudicating Authority for the period as prescribed under the rules framed in that regard. This ensures the fairness in the action as also accountability of the Authority passing provisional attachment order. Further, in terms of Section 5(3), the provisional attachment order ceases to operate on the date of an order passed by the Adjudicating Authority under Section

8(3) or the expiry of the period specified in sub-section (1), whichever is earlier. In addition, under Section 5(5) the authorised officer is obliged to file a complaint before the Adjudicating Authority within a period of thirty days from such provisional attachment. Going by the scheme of the 2002 Act and Section 5 thereof in particular, it is amply clear that sufficient safeguards have been provided for as preconditions for invoking the powers of emergency attachment in the form of provisional attachment.

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70. The procedural safeguards provided in respect of provisional attachment are effective measures to protect the interest of the person concerned who is being proceeded with under the 2002 Act, in the following manner as rightly indicated by the Union of India:

- i) For invoking the second proviso, the Director or any officer not below the rank of Deputy Director will have to first apply his mind to the materials on record before recording in writing his reasons to believe is certainly a sufficient safeguard to the invocation of the powers under the second proviso to Section 5(1) of the 2002 Act.*
- ii) There has to be a satisfaction that if the property involved in money-laundering or ‘proceeds of crime’ are not attached “immediately”, such non-attachment might*

frustrate the confiscation proceedings under the 2002 Act.

iii) The order passed under Section 5(1) of the 2002 Act is only provisional in nature. The life of this provisional attachment order passed under Section 5(1) of the 2002 Act is only for 180 days, subject to confirmation by an independent Adjudicating Authority.

iv) Under Section 5(2) officer passing provisional attachment order has to immediately forward a copy of this order to the Adjudicating Authority in a sealed envelope. v. Under Section 5(5) of the 2002 Act, the officer making such order must file a complaint before the Adjudicating Authority within 30 days of the order of provisional attachment being made.

vi) Section 5(3) of the 2002 Act provides that the provisional attachment order shall cease to have effect on the expiry of the period specified in Section 5(1) i.e. 180 days or on the date when the Adjudicating Authority makes an order under Section 8(2), whichever is earlier.

vii) Under Section 8(1), once the officer making the provisional attachment order files a complaint and if the Adjudicating Authority “has a reason to believe that any person has committed an offence under Section 3 or is in possession of the proceeds of crime”, the Adjudicating

Authority may serve a show cause notice of not less than 30 days on such person calling upon him to indicate the sources of his income, earning or assets or by means of which he has acquired the property attached under Section 5(1) of the 2002 Act.

viii) The above SCN would require the noticee to produce evidence on which he relies and other relevant information and particulars to show cause why all or any of the property “should not be declared to be the properties involved in moneylaundering and confiscated by the Central Government”.

ix) Section 8(2) requires the Adjudicating Authority to consider the reply to the SCN issued under Section 8(1) of the 2002 Act. The Section further provides to hear the aggrieved person as well as the officer issuing the order of provisional attachment and also take into account “all relevant materials placed on record before the Adjudicating Authority”. After following the above procedure, the Adjudicating Authority will record its finding whether all the properties referred to in the SCN are involved in money-laundering or not.

x) While passing order under Section 8(2) read with Section 8(3) there are two possibilities which might happen:

a) the Adjudicating Authority may confirm the

order of provisional attachment, in which case again, the confirmation will continue only up to i. the period of investigation not exceeding 365 days, or ii. till the pendency of any proceedings relating to any offence under the 2002 Act or under the corresponding law of any other country before the competent Court of criminal jurisdiction outside India.

b) Adjudicating Authority may disagree and not confirm the provisional attachment, in which case attachment over the property ceases.

xi) Under Section 8(4) of the 2002 Act, upon confirmation of the order of provisional attachment, the Director or other officer authorized by him shall take the possession of property attached.

xii) Under Section 8(5) of the 2002 Act, on the conclusion of a trial for an offence under the 2002 Act if the Special Court finds that the offence of money-laundering has been committed it will order that the property involved in money-laundering or the property which has been involved in the commission of the offence of money-laundering shall stand confiscated to the Central Government.

xiii) However, under Section 8(6) if the Special Court

on the conclusion of the trial finds that no offence of moneylaundering has taken place or the property is not involved in money-laundering it will release the property which has been attached to the person entitled to receive it.

xiv) Under Section 8(7), if the trial before the Special Court cannot be conducted because of the death of the accused or because the accused is declared proclaimed offender; then the Special Court on an application of the Director or a person claiming to be entitled to possession of a property in respect of which an order under Section 8(3) is passed either to confiscate the property or release the property to the claimant, after considering the material before it.

xv) Under Section 8(8), when a property is confiscated, Special Court may direct the central government to restore the property to a person with the legitimate interest in the property, who may have suffered a quantifiable loss as a result of money laundering. Provided that the person must not have been involved in money-laundering and must have acted in a good faith and has suffered a considerable loss despite taking all reasonable precautions.

xvi) The order passed by the Adjudicating Authority is also subject to appeal before the Appellate Tribunal

which is constituted under Section 25 of the 2002 Act. Thus, the Adjudicating Authority is not the final authority under the 2002 Act as far as the attachment of proceeds of crime or property involved in money-laundering is concerned.

xvii) Any person aggrieved of an order confirming the provisional attachment order can file an appeal before the Appellate Tribunal under Section 26(1) of the 2002 Act. The Appellate Tribunal on receipt of an appeal after giving the parties an opportunity of being heard will pass an order as it thinks fit either confirming or modifying or setting aside the provisional attachment order appealed against.

xviii) Further, the order passed by the Appellate Tribunal is further appealable before the High Court under Section 42 of the 2002 Act on any question of fact or question of law arising out of the order passed by the Appellate Tribunal.

It is, thus, clear that the provision in the form of Section 5 provides for a balancing arrangement to secure the interest of the person as well as to ensure that the proceeds of crime remain available for being dealt with in the manner provided by the 2002 Act. This provision, in our opinion, has reasonable nexus with the objects sought to be achieved by the 2002 Act in

preventing and regulating money-laundering effectively. The constitutional validity including interpretation of Section 5 has already been answered against the petitioners by different High Courts. We do not wish to dilate on those decisions for the view already expressed hitherto.”

3.6 Once the sufficient provisions have been made in the 2002 Act to ensure availability of the adequate remedies, it would not be appropriate for this Court to entertain the petition even before the statutory 30 days’ period from the date when PAO has been passed. It is only in the rare and exceptional cases, the Constitutional Court would entertain the petition before the expiry of the period of 30 days.

4. **Decision**

4.1 Keeping in view the aforesaid discussion, this Court disposes of the writ petition relegating the petitioner to avail its alternative remedy. Needless to observe that this Court has not made any observation on the merits of the case and the Adjudicating Authority will make efforts to expedite the matter.

4.2 The miscellaneous application(s) pending, if any, shall also stand disposed of.

(Anil Kshetarpal)
Judge

(Sheel Nagu)
Chief Justice

October 4th, 2024
“DK”

Whether speaking/reasoned :Yes/No

Whether reportable : Yes/No