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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16.11.2023
Pronounced on: 31.01.2024

+ W.P.(C) 10993/2023 & CM APPL. 42616/2023

MR MAHENDER KUMAR KHANDELWAL Petitioner
Through: Mr.D.P. Singh, Mr.Archit
Singh & Ms.Shreya Dutt, Advs.
versus

DIRECTORATE OF ENFORCEMENT & ANR.

..... Respondents
Through: Mr.Zoheb Hossain, Mr.Vivek
Gurnani, Mr.Kavish Garach &
Mr.Vivek Gaurav, Advs. for
ED

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This petition has been filed by the petitioner praying for the following reliefs:

- “i. *Issue a writ of mandamus or any other appropriate writ/direction/ order declaring that the order dated 10.02.2021 passed by the Ld. Adjudicating Authority allowing Original Application bearing O.A. No. 404/2020 filed u/s 17(4) of PMLA, 2002 has ceased to have effect from date 11/02/2022 due to non-filing of prosecution complainant within 365 days as contemplated u/s 8(3)(a) of PMLA.*
- ii. *Issue a writ of mandamus or any other appropriate writ/direction/ order to the Respondent/ED to release/ return all the*



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documents, records, digital devices, and gold & diamond jewelry as mentioned in the Panchanama / seizure memo dated 19/08/2020 and 20/08/2020.”

Factual matrix

2. It is the case of the petitioner that, vide order dated 26.07.2017, passed by the learned National Company Law Tribunal, Principal Bench, New Delhi (in short, ‘NCLT’) in CA No.(IB)-202(PB)/2017, the petitioner was appointed as the Interim Resolution Professional (in short, ‘IRP’) for the Corporate Insolvency Resolution Process of M/s Bhushan Power and Steel Ltd. (hereinafter referred to as ‘BPSL’).
3. On 01.09.2017, the Committee of Creditors (in short, ‘CoC’) for BPSL confirmed the appointment of the petitioner as the Resolution Professional (in short, ‘RP’) for BPSL.
4. On 16.10.2018, the CoC also approved the resolution plan for BPSL, which was submitted by M/s JSW Steel Limited. The said plan was approved by the learned NCLT vide order dated 05.09.2019.
5. The petitioner claims that in the course of his functioning as the IRP and as the RP of BPSL, the petitioner unearthed fraud committed by the ex-promoters and directors of BPSL, for which he even filed a criminal complaint dated 07.02.2020 with the SHO, Thelkoloi Police Station, District- Sambalpur, Odisha, under Sections 419,420,465,467,468,469,471 read with Section 120-B of the Indian Penal Code, 1860 (in short, ‘IPC’). The petitioner also filed an application under Section 66 of the Insolvency and Bankruptcy Code, 2015 (in short, ‘IBC’) for the fraudulent and wrongful trading, before the learned NCLT.



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6. It is alleged that the Central Bureau of Investigation, New Delhi (in short, 'CBI') registered an FIR/RC No.RCBDI/2019/E/0002 dated 05.04.2019 against BPSL, its Directors, and the other Key Managerial Persons, on allegations of offences committed under Sections 120-B read with Sections 420, 468, 471 & 477A of the IPC, and Section 13(2) r/w 13(1) (d) of the Prevention of Corruption Act, 1988. The petitioner was neither named as an accused in the FIR nor was investigated by the CBI. He was neither summoned nor asked to join the investigation by the CBI in the said FIR.

7. Based on the said FIR, the respondent registered an Enforcement Case Information Report (in short, 'ECIR') bearing no.ECIR/DLZ0-1/02/2019 dated 25.04.2019 under the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the 'Act').

8. The petitioner claims that he has duly co-operated with the investigations conducted by the respondent and his statement has also been recorded under Section 50 of the Act, on 13.09.2019, 30.09.2019 and 04.10.2019. He claims to have furnished information and documents from the records of BPSL which were in his custody while performing his duty as an RP of BPSL.

9. The petitioner states that a Provisional Attachment Order, bearing PAO no.11/2019 dated 10.10.2019 was passed attaching the properties of the BPSL and its promoters and other Key Managerial Personnel. Thereafter, the respondent filed an Original Complaint no. 1221/2019 under Section 5(5) of the Act before the Adjudicating Authority on 08.11.2019, seeking confirmation of the attached properties. The proceedings in the Original Complaint no. 1221/2019



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were stayed by the Supreme Court vide its order dated 18.12.2019 in Special Leave to Appeal (C) Nos.29327-29328 of 2019, titled as ***Committee of Creditors v. Directorate of Enforcement & Ors.*** The respondent also filed a Prosecution Complaint bearing CC no.01/2020 dated 17.01.2020 before the learned Special Judge, Rouse Avenue District Court, New Delhi under Sections 44 and 45 of the Act against BPSL and 24 other accused persons; the petitioner was cited as a witness in the said Prosecution Complaint.

10. The petitioner claims that on 19th and 20th August, 2020, the respondent carried search and seizure on the premises of the petitioner on the basis of the abovementioned ECIR and seized various documents, records, digital devices, and gold and diamond jewellery having an aggregate value of Rs.85,98,677/- from the petitioner.

11. On 17.09.2020, the respondent filed an Original Application bearing no. 404/2020 under Section 17 (4) of the Act before the Adjudicating Authority seeking confirmation of the retention of the items, documents, records, and jewellery seized by the respondent during the search and seizure.

12. The Adjudicating Authority, by its order dated 10.02.2021 passed under Section 8(3) of the Act, confirmed the retention of the items, documents, records, and jewellery seized by the respondent during the search and seizure.

13. The petitioner claims that as no complaint against the petitioner was thereafter filed for a period of more than 365 days, the petitioner, *vide* an application dated 11.04.2023, sought the return of the seized documents and properties. As the respondent did not return the said



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properties nor gave any reply to the request of the petitioner, the petitioner has filed the present petition claiming the aforementioned reliefs.

Submissions of the learned counsel for the Petitioner

14. The learned counsel for the petitioner submits that though more than three years have passed since the seizure of petitioner's property, and though no prosecution with respect to the petitioner or the said property has been initiated by the respondent, yet the seized items continue to be retained by the respondent. The petitioner, in fact, continues to be a witness for the respondent. He submits that in terms of Section 8(3)(a) of the Act, retention of the property so seized can be continued only for a period not exceeding 365 days or during the pendency of the proceedings relating to any offence under the Act before a Court. As no complaint in relation to the goods seized from the petitioner is pending, and the period of 365 days from the passing of the order by the Adjudicating Authority has expired, the property and the documents seized from the petitioner are liable to be returned to the petitioner.

15. He submits that the reliance of the respondent on the complaint in CC no.01/2020 for further retention of the property and the documents seized from the petitioner, is ill-founded. He submits that for further retention of the property seized, the criminal proceedings mentioned in Section 8(3)(a) of the Act has to involve the property so seized or the person from which it was seized as an accused. He submits that the term 'pendency of proceedings' cannot be given an



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expansive meaning so as to deprive the petitioner of his constitutional and legal rights. He submits that to invoke the provision of ‘pendency of proceedings’ under Section 8(3)(a) of the Act, the complaint must be against the petitioner or, at least seek the confiscation of the retained properties. In support, he places reliance on the judgement of Punjab & Haryana High Court in ***Seema Garg & Ors. v. The Deputy Director, Directorate of Enforcement***, 2020 SCC OnLine P&H 738.

16. The learned counsel for the petitioner further submits that the reliance of the respondents on the Explanation to Section 8(3) of the Act also cannot be accepted inasmuch as there was no order passed by a Court staying the investigation. In fact, the respondent attached the properties of the petitioner post the order dated 28.08.2020 passed by this Court in Writ Petition (Crl.) no.1342/2020, titled as ***Mahender Kumar Khandelwal v. Union of India & Ors.***, whereby the respondent was restrained from taking any coercive action against the petitioner. The respondents did not even apply for seeking the vacation of the said order before carrying out the search and seizure. He submits that the reliance of the respondents on the said order to seek extension of seizure is, therefore, *mala fide*.

Submissions of the learned counsel for the respondents

17. On the other hand, the learned counsel for the respondents submits that in the present case, based on the information obtained from open source regarding initiation of investigation against BPSL by the Director General of GST Intelligence, Bhubaneswar (hereinafter referred to as ‘DGGI’) involving fraudulent and



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clandestine removal of finished goods by the previous as well as the current management of BPSL, the respondents collected incriminating evidence in the shape of statements recorded by DGGI. It was found that BPSL had engaged in clandestine clearance of the finished goods from its Odisha Plant to its plants at Kolkata and Chandigarh. A total of 58 of such consignments had been cleared in a clandestine manner. The total value of these consignments was Rs.705.39 Crore, out of which, three such consignments, valuing Rs.40.42 crores, were cleared after 26.07.2017. It was further gathered that the data has been deleted from the servers of BPSL, Odisha. It was further noted that one Sh.H.C.Verma, before the start of the resolution process on 26.07.2017, and the petitioner thereafter, were the two main persons responsible for the clandestine removal of the goods leading to the siphoning of funds from BPSL. Based on the above facts, searches were conducted under Section 17(1) of the Act, which resulted in the recovery of various incriminating documents/digital devices/phones/jewellery. Basis which, the petitioner was called for investigation. An Original Application, being OA no.404/2020, was filed before the Adjudicating Authority, on 17.09.2020, seeking retention of the seized items for purposes of investigation. The Adjudicating Authority was pleased to confirm the same vide order dated 10.02.2021. Further investigations were also carried out, which showed that the petitioner and one Sh.Rajiv Goel, by way of criminal activity related to the scheduled offences, had siphoned of an amount of Rs.1,73,63,488/- from BPSL. Accordingly, an amount equivalent to the above was attached provisionally by the Adjudicating Authority vide Provisional



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Order of Attachment dated 05.10.2021. The same has been challenged by the petitioners before this Court in form of W.P.(C) 11256/2022, titled as ***Mahender Kumar Khandelwal v. Directorate of Enforcement***, which is pending adjudication before this Court.

18. The learned counsel for the respondents submits that as the complaint, that is CC no. 01/2020, is pending before a Special Court, in terms of Section 8(3)(a) of the Act, the seizure shall continue during the pendency of the said proceedings. He submits that by an order dated 17.01.2020 passed by the learned Special Judge, the cognizance on the complaint, that is Ct.Case no.38/2020, has been taken by the learned Special Judge, while granting leave to the respondent to file further supplementary complaints in due course. He submits that the cognizance having already been taken on the complaint, it shall amount to proceedings pending in relation to an offence under the Act for the purpose of Section 8(3)(a) of the Act. He submits that cognizance is taken of the offence and not the offender. He submits that it is immaterial as to whether the said prosecution complaint arrays the petitioner herein as an accused or not. In support, he places reliance on the following judgments:

- a) ***Vijay Madanlal Choudhary & Ors. v. Union of India & Ors.***, 2022 SCC OnLine SC 929;
- b) ***S.K.Sinha v. Videocon International Ltd. & Ors.***, (2008) 2 SCC 492;
- c) ***Sunil Bharti Mittal v. Central Bureau of Investigation*** (2015) 4 SCC 609;



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d) Nahar Singh v. State of Uttar Pradesh & Anr.(2022) 5 SCC 295;

e) Pradeep S. Wodeyar v. State of Karnataka, 2021 SCC OnLine SC 1140; and,

f) Yogender Chandolia v. Vishesh Ravi & Ors. 2021 SCC OnLine Del 5540.

19. He submits that apart from the above Criminal Complaint, there are other proceedings that are also pending, which shall also fall within the scope and ambit of Section 8(3)(a) of the Act. They are as follows:

(a) W.P. (Crl.) 1342/2020 filed by the petitioner seeking quashing of summons dated 19.08.2020 and 22.08.2020 issued under the Act;

(b) W.P.(C) 11256/2022 filed against the Provisional Attachment Order No. 10/2021 passed against the petitioner;

(c) W.P. (Crl.) 233/2021 filed by the petitioner seeking setting aside of the search and seizure action and direction seeking supply of the relied upon documents; and

(d) W.P. (Crl.) 96/2022 filed by one R.P. Goyal wherein this Court, by its order dated 10.02.2022, stayed the trial of the CC No. 01/2020.

20. He submits that in light of the clear language of Section 8(3)(a), all kind of proceedings, including the above, shall lead to an extension of seizure. Placing reliance on the judgment of the Supreme Court in ***Babita Lila v. Union of India***, (2016) 9 SCC 647, he submits that no presumption of *casus omissus* exists and the Court should not read



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anything in the statute, that is Section 8(3)(a) of the Act, so as to limit its scope and ambit.

21. He further submits that in any case, and without prejudice to the above, by the order dated 28.08.2020 passed by this Court in W.P.(Crl.) no.1342/2020, ***Mahender Kumar Khandelwal v. Union of India & Ors.***, filed by the petitioner herein, the respondent has been restrained from taking any coercive action against the petitioner. He submits that the said *interim* order continues till date. He submits that the power of arrest is an inherent part of the procedure of investigation and therefore, the above order restraining the respondents from taking any coercive action against the petitioner would fall within the ambit of the Explanation to Section 8(3) of the Act, thereby extending the period of 365 days for investigation as provided under Section 8(3) (a) of the Act. In support, he places reliance on the judgment of the Supreme Court in ***P.Chidambaram v. Directorate of Enforcement*** (2019) 9 SCC 24, and of this Court in ***Sujeet Bhati v. The State***, Neutral Citation No.2023/DHC/000597.

22. He submits that faced with a no coercive order passed by this Court, the respondent has not filed a prosecution complaint against the petitioner yet. Placing reliance on ***Ram Mittal v. Ishwar Singh Punia***, (1988) 4 SCC 284; ***Bharat Damodar Kale v. State of A.P.***, (2003) 8 SCC 559; and the order dated 07.08.2023 passed in SLP (Crl.) 8939/2023, titled ***V. Senthil Balaji v. Enforcement Directorate***, he submits that it is well-settled that no person can be prejudiced by action of the Court *actus curiae neminem gravabit*.



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23. He further submits that, in any case, Section 8(3)(a) does not provide for any consequence on the lapse of the period of 365 days inasmuch as it does not state that the order of seizure would thereafter lapse or that the documents and property seized must be returned to the person from whom it is seized. He submits that in absence of such a provision, the present petition is liable to be dismissed.

Analysis and finding

24. I have considered the submissions made by the learned counsels for the parties.

25. The issue in the present case is the meaning to be prescribed to the words '*the proceedings relating to any offence under this Act before a Court*' in Section 8(3)(a) of the Act. While the learned counsel for the petitioner submits that these words have to be read in a narrow manner so as to mean only the complaint which arrays the person from whom the documents or the property has been seized as an accused or mentions such documents or property as relied upon in such complaint, the learned counsel for the respondents submits that there is no reason to give a restricted meaning to these words and any proceedings relating to any offence under this Act shall be sufficient to extend the period by which the property seized or frozen can be retained.

26. For appreciating the above submissions, a few provisions of the Act may be important to be considered.

27. Section 3 of the Act defines the offence of money laundering. Section 5 of the Act provides for attachments of the property involved



in money laundering. Sub-Section 1 of Section 5 of the Act is relevant and is reproduced hereinunder:-

“5. Attachment of property involved in money-laundering. -(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 reason for such belief to be recorded in writing), on the basis of material in his possession, that-

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for



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such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act:

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a of order of vacation of such further period not exceeding thirty days from the date stay order shall be counted.”

28. A reading of the above provision would show that the provisional attachment of the property can be ordered where there is a reason to believe that any person is in possession of any proceeds of crime and such proceeds of crime is likely to be concealed, transferred or dealt with in any manner which may result in frustrating ‘*any proceedings relating to confiscation of such proceeds of crime*’. The first proviso of Section 5(1) of the Act states that no such order of attachment shall be made unless *inter alia*, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the CrPC, or a complaint has been filed by a person authorized to investigate the offence mentioned in the schedule before a Magistrate or a Court for taking cognizance of the scheduled offence. Therefore, for ordering a provisional attachment of the property, proceedings in the form of a report under Section 173 of the CrPC or a complaint for taking cognizance of a scheduled offence is a pre-requisite. The second proviso to Section 5(1) of the Act states that the



above pre-requisite can be not insisted upon if the authority has reason to believe that if such property is not attached immediately under the Act, the non attachment of the property is likely to frustrate any ‘*proceedings under this Act*’.

29. On the provisional attachment of the property, in terms of Section 5(5) of the Act, a complaint stating the facts of such attachment has to be filed before the Adjudicating Authority under the Act.

30. Section 17 of the Act empowers the competent officer to carry out a search and to *inter alia* seize any record or property found as a result of such search. Where the seizure of such record or property is not practicable, an order of freezing such property can be passed. In terms of sub-Section 4 of Section 17, where the property is seized or frozen, an application is to be filed before the Adjudicating Authority requesting for retention of such record or property seized under sub-Section 1 of Section 17 or for continuation of the order freezing such property under sub-Section 1-A of Section 17 of the Act. Section 17 of the Act is reproduced hereinunder:-

“17. Search and seizure.—(1) *Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—*
(i) *has committed any act which constitutes money-laundering, or*
(ii) *is in possession of any proceeds of crime involved in money-laundering, or*
(iii) *is in possession of any records relating to money-laundering, or*



(iv) is in possession of any property related to crime, then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or property, if required or make or cause to be made extracts or copies therefrom;

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

(1A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.

(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure [or upon issuance of a freezing order, forward a copy of the reasons so recorded along with material in his



possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence: Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

(4) The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority."

31. Similarly power of search of a person is vested in the competent authority under Section 18 of the Act.

32. Sections 20 and 21 of the Act provide for the retention of property and/or records seized or frozen under Section 17 or Section 18 of the Act. They read as under:-

"20.Retention of property.—(1) Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication



under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be.

(2) The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the order along with the material in his possession, referred to in sub-section (1), to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) On the expiry of the period specified in sub-section (1), the property shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.

(4) The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in sub-section (1), shall satisfy himself that the property is prima facie involved in money-laundering and the property is required for the purposes of adjudication under section 8.

(5) After passing the order of confiscation under sub-section (5) or sub-section (7) of section 8, Special Court, shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it.

(6) Where an order releasing the property has been made by the Special Court under sub-section (6) of section 8 or by the Adjudicating Authority under section 58B or



sub-section (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such property 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.

21. Retention of records.—(1) *Where any records have been seized, under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the Investigating Officer or any other officer authorised by the Director in this behalf has reason to believe that any of such records are required to be retained for any inquiry under this Act, such records may if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such records were seized or frozen, as the case may be.*

(2) *The person, from whom records seized or frozen, shall be entitled to obtain copies of records.*

(3) *On the expiry of the period specified under sub-section (1), the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period.*

(4) *The Adjudicating Authority, before authorising the retention or continuation of freezing of such records beyond the period specified in sub-section (1), shall satisfy himself that the records are required for the purposes of adjudication under section 8.*

(5) *After passing of an order of confiscation or release under sub-section (5) or sub-section (6) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized.*



(6) Where an order releasing the records has been made by the Court Adjudicating Authority under sub-section (5) of section 21, the Director or any other officer authorised by him in this behalf may withhold the release of any such record for a period of ninety days from the date of receipt of such order, if he is of the opinion that such record is relevant for the appeal proceedings under this Act.”

33. Section 8 of the Act empowers the Adjudicating Authority to *inter alia* pass an order confiscating the properties on a complaint received under sub-Section 5 of Section 5 or application under Section 17(4) or 18(10) of the Act. Section 8 of the Act reads as under:-

“8. Adjudication.—(1) *On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:*

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person: Provided further that where such property is held jointly



by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after— (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 sub-section (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.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

(a) continue during investigation for a period not exceeding ninety days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and]

(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court



(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed: Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.]

(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 direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a 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.”

34. From the reading of the above Section, it would be apparent that in terms of sub-Section 1 of Section 8 of the Act, the Adjudicating Authority may pass an order declaring that the property attached under Section 5(1) or seized or frozen under Sections 17 or 18 of the Act is involved in money laundering and confirm the attachment of such property or the retention of the property or record so seized or frozen. Such an order becomes final after an order of confiscation is passed under sub-Section 5 or sub-Section 7 of Section 8 or Section 58B or sub-Section 2A of Section 60 by the Special Court. Sub-Section 5 of Section 8, in turn, provides that where the Special Court finds that the offence of money laundering has been committed, it shall order the property involved in money laundering or which has been used for the commission of the offence of money laundering, to stand confiscated to the Central Government. Sub-Section 7 of Section 8 states that the Special Court, if it is of the opinion that the trial under the Act cannot



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be conducted by reason of death of the accused or the accused being declared proclaimed offender or for other reasons, may pass an appropriate order regarding confiscation or release of the property in respect of which an order has been passed sub-Section 3 of Section 8 of the Act. Similar, provisions under Section 58B and Section 60(2A) of the Act have been made with respect to a trial under the corresponding law of any other country.

35. From the combined reading of the above provisions of the Act, it is evident that the powers of attachment, seizure and freezing of the properties and records becomes final on the order passed by the Special Court in relation thereto. The words '*proceedings relating to any offence under this Act*' appearing in Section 8(3)(a) of the Act, therefore, has to be read in light of the above provisions to mean only a proceeding that is pending before a Special Court in relation to the property or records that are so attached or seized or frozen or with the respect to the person from whom such property was seized or recovered. The provisions of the Act have to be reasonably read and in a harmonious manner with other provisions. It is also to be remembered that the power of attachment, seizure, and freezing of the properties and records, is a draconian provision that has to be strictly construed. Reference in this regard is placed on ***Radha Krishnan Industries v. State of Himachal Pradesh & Ors.***, (2021) 6 SCC 771.

36. In the present case, the order dated 10.02.2021 passed by the Adjudicating Authority allows further retention of the documents and properties seized from the petitioner, by observing as under:-



“On perusal to facts of the case as brought out in the complaint, subsequent proceedings before the adjudicating Authority, and the discussions in the preceding paras, I find that the provisions of Section 17, 8(1), 20, 21 have been complied with.

1. What is required to be seen at this juncture is the interest of the investigation, where prima facie allegations exist regarding commission of the offence of money laundering. The background stated in the OA sufficiently indicates that the scheduled offences are committed and the proceeds of crime are involved. The investigation of money laundering is going on. Undoubtedly the Investigation about the proceeds of crime and money laundering is required to be continued. There is justification for permitting the retention of the document and digital devices. The interest of investigation is required to be borne in mind at this stage. Hence the Original Application for permitting retention of the documents and digital devices deserves to be allowed and is hereby allowed. The material in OA is sufficient to arrive at the satisfaction by this Authority that the documents and digital devices are required for the purpose of Adjudication under Section 8 of PMLA.

2. The proceedings at present are in the form of OA, wherein the documents and digital devices seized are prayed by the Enforcement Directorate to be retained for the purpose of continuing Investigation/and Adjudication. As of now there is nothing in this Application which affects any substantial right of the Defendants, like attachment and/ or confiscation of the properties of the Defendants. The Application is simply for retention of the documents, digital devices, so that the investigation for PMLA offence and Adjudication can be carried on without any obstruction.

3. In view of the aforesaid background, in the interest of justice the Application of the



Applicant, Enforcement Directorate is allowed and they are permitted to retain records/digital devices seized/recovered vide panchnama(s) dated 19.08.2020 from the residence and office premises of the respondents as mentioned at page no 4-8 of this order, in terms of section 17(4) of the PMLA.

4. Hence the Application as filed by the Enforcement Directorate is allowed.”

xxxxx

7. Having taken into consideration the facts and circumstances of the case and request of the defendants first to give a suitable date for pronouncement and second to defer to any date after 08.02.2021, in view of the statutory limitation involved the pronouncement of order cannot be kept pending. Moreover this order which is merely for granting permission to retain the seized articles for the purpose of investigation in the backdrop of serious economic offences and no prejudice is caused to the Respondents at this stage, the order which is subject to the directions of the Hon'ble High Court in the writ petition, is pronounced today in the open court as per schedule for pronouncement vide cause list dated 09.02.2021.”

(Emphasis supplied)

37. From the above, it would be apparent that the retention of the documents and properties has been allowed for the purposes of investigation/adjudication. The same would, therefore, extend for a period of 365 days in terms of Section 8(3)(a) of the Act unless a proceeding relating to the offence under the Act has been filed prior thereto. As noted hereinabove, the proceeding relating to any offence under this Act has to mean proceeding filed before the Special Court in relation to the property or the record so attached, seized or frozen.



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38. It is not disputed by the respondents that the Complaint, being CC no.01/2020, which is pending before the Court of the learned Special Judge, Rouse Avenue Court, does not name the petitioner herein as an accused. In fact, it names the petitioner as one of the witness. It also does not make a mention of the documents or the property seized from the petitioner. The Cognizance on the said complaint was taken by the learned Special Judge vide order dated 17.01.2020, that is, prior to the seizure of the documents and the property from the petitioner, though while granting leave to the respondents to file further supplementary complaints in due course and on further investigation.

39. Though, there can be no doubt on the proposition of law that cognizance is taken of an offence and not of an offender, however, under Section 8(3)(a) of the Act, ‘the proceedings’ must be in relation to the property or the record which is seized under Section 17 of the Act. The interpretation to Section 8(3)(a) of the Act as propounded by the learned counsel for the respondent would, in fact, make the said provision confiscatory and violative of Article 14 of the Constitution of India inasmuch as it would allow the seizure to continue endlessly even though the same does not culminate into any “proceedings relating to any offence under the Act before a court” within the period of 365 days as prescribed by that very provision.

40. In **Seema Garg** (supra), the High Court of Punjab & Haryana under similar circumstances, has held as under:

“25. The conceded facts emerging from record are that two Appellants had purchased their property in 1991 and one Appellant in



2011. The alleged offence of fraudulent availment of VAT refund was committed in February-March' 2013 and PMLA came into force w.e.f. 1.7.2005. As per FIR of scheduled offence, ECIR and different orders passed by Respondents, M/s. Jaldhara Exports, a proprietorship concerned of Raman Garg fraudulently obtained VAT refund from VAT authorities without actual export of goods. The properties in question are lying mortgaged with bank, since 2009. As per impugned order, the Respondent is empowered to attach any property, thus property even though purchased in 1991 could be attached. Concededly, the Appellants are neither arrayed as accused in scheduled offence nor criminal complaint filed before Special Court under PMLA. The Respondent has already filed criminal complaint under PMLA against Raman Garg and others before Special Court, however admittedly investigation is still pending. The respondent has not filed any criminal complaint under Section 3 of PMLA against Appellants and a period of even 365 days from the date of confirmation order passed by Ld. Adjudicating Authority has already expired.

xxxxxxx

27. Q.(i). As per clause (a) of Sub-Section (3) of Section 8 of the PMLA, the provisional attachment shall continue during investigation for a period not exceeding 90 days. The aforesaid period of 90 days has been increased to 365 days w.e.f 01.08.2019 vide amendment Act 7 of 2019. The concept of 90 days period during investigation was Introduced w.e.f. 19.04.2018. In the case in hand, the Adjudicating Authority vide order dated 28.05.2018 (Annexure A-3) confirmed provisional attachment wherein it was ordered that attachment shall continue during investigation for a period not exceeding 90 days.

28. The Respondent has pleaded that amendment prescribing 90 days period during



investigation came into force w.e.f. 19.04.2018 and complaint under Section 44 & 45 of PMLA was filed on 22.12.2017 before Special Court, thus Appellants are not entitled to benefit of amendment made w.e.f 19.04.2018. In the adjudication order, it was ordered that attachment shall continue during investigation for a period not exceeding 90 days. It was Appellants who challenged said order before Tribunal, thus Respondent cannot take any plea contrary to order of Adjudicating Authority, thus contention of Respondent that Appellant is not entitled to amended provision is misconceived and accordingly rejected.

29.The Respondent in its reply before Tribunal as well during the course of arguments before this Court conceded that investigation is still pending and although complaint stands filed against only Raman Kumar and Others but not present Appellants. As investigation even against Raman Kumar and Others is still pending, Adjudicating Authority ordered to continue attachment for 90 days during the pendency of Investigation. The Appellants were neither arrayed as accused in police case (FIR relating to scheduled offence) nor in the complaint filed before Special Court, thus the Appellants are entitled to benefit of time period cap prescribed by Section 8(3)(a) of PMLA. The 90 days period prescribed Under Section 8(3)(a) has been enlarged to 365 days w.e.f. 01.08.2019. In the present case even 365 days period has expired but Investigation is still pending, thus Appellants are entitled to benefit of 90/365 days cap and provisional attachment order stands ceased to exist by operation of law.”

(Emphasis supplied)

41. In the present case as well, the order dated 10.02.2021 passed by the Adjudicating Authority itself records that the retention of documents, digital devices, and the property seized from the petitioner



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herein, is 'to be retained for the purpose of continuing investigation/ adjudicating'. The investigation has not culminated into any complaint nor has it culminated into a supplementary complaint to the original complaint filed against BPSL and others.

42. Explanation (ii) to Section 44 of the Act states that the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted "to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence" for which complaint has already been filed, whether named in the original complaint or not. From the said provision also, it is apparent that the investigation may lead to filing of a subsequent complaint to bring on record further evidence in form of seized documents and records, either against the accused named in the original complaint or subsequent thereto. However, till such Supplementary Complaint is filed, it has to be presumed that the investigation is still pending, and in such a scenario, the outer limit of 365 days to retain the property/documents seized, shall continue to operate.

43. In view of the above, it is held that the period of 365 from the passing of the order dated 10.02.2021 by the Adjudicating Authority having been passed, the documents/digital device/property seized from the petitioner in the search and seizure conducted on 19th and 20th August, 2020 from the premises of the petitioner are liable to be returned.

44. The other proceedings that are pending and on which the learned counsel for the respondent has placed reliance, that is, W.P.



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(Crl.) 1342/2020, W.P. (C) 11256/2022, W.P. (Crl.) 233/2021, and/or W.P. (Crl.) 96/2022, also do not fall within the ambit and scope of the expression “pendency of the proceedings relating to any offence under this Act before a Court” in Section 8(3)(a) of the Act.

45. As far as the petition filed by the petitioner challenging the Summons dated 19.08.2020 and 22.08.2020 issued under the Act, that is, W.P.(Crl) 1342/2020, titled as ***Mahender Kumar Khandelwal v. Union of India & Ors.***, the same cannot come to the aid of the respondent to extend the period for retention of the seized documents and the property. As noted hereinabove, the expression “pendency of the proceedings relating to any offence under this Act before a Court” relates to a complaint pending before the Special Court. To hold that a writ petition filed by the petitioner to challenge the summons issued by him, and on which challenge there is no order passed by the Court staying the investigation, would also extend the period by which the property seized can be retained by the respondent, would be contrary to the bare reading of the Section 8(3) of the Act. It would be like penalising the petitioner availing of the legal remedies against a perceived illegal act of the respondent.

46. The same logic applies to the writ petition filed by the petitioner seeking setting aside of the search and seizure action and for a direction for supply of the relied upon documents, being W.P.(CRL) 233/2021, titled as ***Mahender Kumar Khandelwal v. Union of India & Ors.*** It is not shown that on the said petition if any order has been passed by the Court staying the investigation against the petitioner. The said writ petition again cannot fall within the ambit and scope of



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the expression “pendency of the proceedings relating to any offence under this Act before a Court”.

47. As far as the W.P.(C) 11256/2022, titled as ***Mahendar Kumar Khandelwal v. Directorate of Enforcement***, is concerned, the petitioner, by the said writ petition, claims that due to passage of 180 days from the passing of the order of Provisional Attachment of the properties under Section 5 of the Act, the attachment has lapsed. In the said petition, an *interim* order dated 28.07.2022 has been passed, which read as under:

“3. Till the next date of listing, the respondent shall stand restrained from taking further steps as contemplated under Section 8 of Prevention of Money Laundering Act, 2002. The petitioner shall also stand restrained from disposing of or creating any third party rights or encumbering the property which forms subject matter of the provisional order of attachment.”

48. I am informed that the above order continues till date.

49. However, the fact remains that the above Writ Petition does not relate to the seizure of the documents and property. In case the above Writ Petition relates to any document or property seized pursuant to the action taken on 19-20.08.2020 and by the order dated 10.02.2021 passed by the Adjudicating Authority, the order presently passed shall be subject to the *interim* order as referred hereinabove. However, it is clarified that for the purposes of extending the seizure under the order dated 10.02.2021 passed by the Adjudicating Authority, the pendency of the above writ petition can come to no avail to the respondent inasmuch as the said writ petition is not a “proceedings pending in



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relation to the offence under the Act” but in challenge to an order passed under the Act. The reasons given hereinabove also to this Writ Petition.

50. The reliance of the learned counsel for the respondent on the Explanation attached to Section 8(3) of the Act, also cannot be accepted. Though arrest of a suspect/accused may be an important part of the investigation, however, the order dated 28.08.2020 passed by this court in W.P. (Crl.) 1342/2020, merely restrains the respondents from taking any coercive action against the petitioner. Explanation to Section 8(3) of the Act becomes applicable only where the ‘investigation is stayed by any Court’. The order dated 28.08.2020 passed in W.P.(Crl.) 1342/2020 cannot be said to be an order staying the investigation. The Explanation to Section 8(3) of the Act is, therefore, not attracted to the facts of the present case and cannot extend the period of retention of the seized documents and property of the petitioner. In case the respondents wished to conduct custodial investigation/arrest of the petitioner, it was open to the respondent to move an appropriate application in this regard in the said Writ Petition. The respondents, admittedly, did not do so.

51. The contention of the learned counsel for the respondents that as Section 8(3)(a) of the Act does not provide for a consequence of lapsing of 365 days, there can be no direction for the return of the property so seized, also cannot be accepted. The continuation of such seizure beyond 365 days, in absence of the pendency of any proceedings relating to any offence under this Act before a court or under the corresponding law of any other country before the



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competent court of criminal jurisdiction outside India, shall be confiscatory in nature, without authority of law and, therefore, violative of Article 300A of the Constitution of India. In this regard, reference may be made to ***M.C.Mehta v. Union of India and Ors.***, 2020 SCC OnLine SC 648, wherein it has been held as under:

“107. Article 300A of the Constitution provides that nobody can be deprived of the property and right of residence otherwise in the manner prescribed by law. When the statute prescribes a mode, the property's deprivation cannot be done in other modes since this Court did not authorize the Committee to take action in the matter. An action could have been taken in no other manner except in accordance with the procedure prescribed by law as laid down in the decisions referred to at the Bar thus:

(a) *State of Rajasthan v. Basant Nahata*, (2005) 12 SCC 77, wherein this Court observed:

“59.In absence of any substantive provisions contained in a parliamentary or legislative act, he cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right of property as envisaged under Article 300-A of the Constitution.”

(b) *K.T. Plantation Pvt. Ltd. v. State of Karnataka*, (2011) 9 SCC 1 in which it was opined:

“168. Article 300-A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a



competent legislature. The expression “property” in Article 300-A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law.

169. This Court in State of W.B. v. Vishnunarayan and Associates (P) Ltd., while examining the provisions of the West Bengal Great Eastern Hotel (Acquisition of Undertaking) Act, 1980, held in the context of Article 300-A that the State or executive officers cannot interfere with the right of others unless they can point out the specific provisions of law which authorises their rights.”

(emphasis supplied)

(c) *In T. Vijayalakshmi v. Town Planning Member, (2006) 8 SCC 502, the Court observed:*

“13. Town Planning legislations are regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of a legislation. In terms of the provisions of the Karnataka Town and Country Planning Act, a comprehensive development plan was prepared. It indisputably is still in force. Whether the amendments to the said comprehensive development plan as proposed by the Authority would ultimately be accepted by the State or not is uncertain. It is yet to apply its mind. Amendments to a development plan must conform to the provisions of the Act. As noticed hereinbefore, the State has called for objection from the citizens. Ecological balance no doubt is required to be maintained and the courts while interpreting a statute should bestow



serious consideration in this behalf, but ecological aspects, it is trite, are ordinarily a part of the town planning legislation. If in the legislation itself or in the statute governing the field, ecological aspects have not been taken into consideration keeping in view the future need, the State and the Authority must take the blame therefor. We must assume that these aspects of the matter were taken into consideration by the Authority and the State. But the rights of the parties cannot be intermeddled with so long as an appropriate amendment in the legislation is not brought into force.

* * *

15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away.”

(emphasis supplied)

(d) In the matter of State of U.P. v. Manohar, (2005) 2 SCC 126, this Court observed:

“7. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the Forty-fourth Amendment to the Constitution, Article 300-A has been placed in the Constitution, which reads as follows:

“300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law.”



8. This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities. ...”

(e) *In Delhi Airtech Services (P) Ltd. v. State of U.P.*, (2011) 9 SCC 354, this Court held:

“83. The expression “law” which figures both in Article 21 and Article 300-A must be given the same meaning. In both the cases the law would mean a validly enacted law. In order to be valid law it must be just, fair and reasonable having regard to the requirement of Articles 14 and 21 as explained in *Maneka Gandhi*. This is especially so, as “law” in both the Articles 21 and 300-A is meant to prevent deprivation of rights. Insofar as Article 21 is concerned, it is a fundamental right whereas in Article 300-A it is a constitutional right which has been given a status of a basic human right.”

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(k) *In Shrirampur Municipal Council v. Satyabhamabai Bhimaji Dawkher*, (2013) 5 SCC 627 it was held:

“43. This is the reason why time-limit of ten years has been prescribed in Section 31(5) and also under Sections 126 and 127 of the 1966 Act for the acquisition of land, with a stipulation that if the land is not acquired within six months of the service of notice under Section 127 or steps are not commenced for acquisition, reservation of the land will be deemed to have lapsed. Shri Naphade's interpretation of the scheme of Sections 126 and 127, if accepted, will lead to absurd results and the landowners will be deprived of their right to use the property for an indefinite period without being paid compensation. That would tantamount to depriving the citizens of



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their property without the sanction of law and would result in violation of Article 300-A of the Constitution.”

(emphasis supplied)

52. Therefore, the natural consequence of the investigation for a period beyond three hundred and sixty five days not resulting in any proceedings relating to any offence under the Act, in terms of Section 8(3) of the Act, is that such seizure lapses and the property so seized must be returned to the person from whom it was so seized.

Directions:

53. In view of the above, the respondents are directed to return the documents, digital devices, property, and other material seized from the petitioner pursuant to the search and seizure operation conducted on 19th and 20th August, 2020, forthwith to the petitioner, subject to any order to the contrary passed by any competent Court.

54. The petition is allowed in the above terms. The pending application is also disposed of.

55. There shall be no order as to costs.

NAVIN CHAWLA, J

JANUARY 31, 2024
RN/VP/RP/SS

[Click here to check corrigendum, if any](#)