
(2022) 12 ATPMLA CK 0001

In the Appellate Tribunal Under Prevention Of Money Laundering Act

Case No : MP-PMLA-10414, 10415, 10416, 10417/DLI/2022, FPA-PMLA-5226, 5227/DLI/2022

Abbeys Realcon LLP

APPELLANT

Vs

Directorate Of Enforcement PMLA, New Delhi

RESPONDENT

Date of Decision : 19-12-2022

Acts Referred:

Prevention of Money-laundering (Maintenance of Records) Rules, 2005 — Rule 6(2)
Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of the Adjudicating Authorities) Rules, 2007 — Rule 3
Prevention Of Money Laundering Act, 2002 — Section 5, 6, 6(2), 6(3), 6(5)(a), 6(5)(b), 6(6), 6(7), 6(15), 11(1), 11(3)
Indian Penal Code, 1860 — Section 120, 420
Prevention of Corruption Act, 1988 — Section 7, 12, 13(1)(d), 13(2)
Prevention Of Money Laundering Act, 2002 — Section 3, 4, 5, 5(5), 50

Citation : (2022) 12 ATPMLA CK 0001

Hon'ble Judges : Munishwar Nath Bhandari, J; Balesh Kumar, Member; Rajesh Malhotra, Member

Bench : Full Bench

Advocate : Vijay Aggarwal, Hardik Sharma, Abhiraj Ray

Final Decision : Dismissed

Judgement

FPA-PMLA-5226/DLI/2017 & FPA-PMLA-5227/DLI/2017

Two separate appeals have been preferred by the appellant to challenge the order dated 10.11.2022 passed by the Adjudicating Authority deciding two separate applications by a common order.

We have heard both the appeals and are passing this common order.

The appeal no.5227/2022 challenges the order dated 10.11.2022 where prayer of the appellant was not accepted for stay of the proceeding till such time the coram of Adjudicating Authority, as stipulated under Rule 6 (2) of the Prevention of Money Laundering Act, 2002 (in Short "the Act") is constituted.

The learned counsel for the appellant submitted that though the prayer of the appellant was to stay the proceedings arising out of the O.C. till such time the coram of Adjudicating Authority, as stipulated under Section 6(2) of the Act of 2002 is constituted. The Adjudicating Authority considered aforesaid application to be a challenge to the coram and decided it ignoring the prayer made therein.

Learned counsel for the appellant submitted that the Adjudicating Authority consists of three Members however, ignoring the aforesaid, the issue has been decided after holding that one Member Bench is also competent to hear the case. The prayer is to set aside the impugned order with a direction to the Adjudicating Authority not to proceed in the matter till it is constituted as per Section 6 (2) of the Act. In absence of it, the Bench suffers from "coram non-judice".

Elaborate arguments have been made and would be referred while discussing the issue raised by the appellant.

The stay of the proceedings till constitution of the Adjudicating Authority as per Section 6 (2) was prayed. It is after taking interpretation of the provision, that a Single Member would not constitute coram for hearing the case. In all circumstances three Members Bench would constitute the coram. To appreciate the argument, we may quote Section 6 of the Act of 2002;

"6. Adjudicating Authorities, composition, powers, etc.—

(1) The Central Government shall, by notification, appoint [an Adjudicating Authority] to exercise jurisdiction, powers and authority conferred by or under this Act.

(2) An Adjudicating Authority shall consist of a Chairperson and two other Members:

Provided that one Member each shall be a person having experience in the field of law, administration, finance or accountancy.

(3) A person shall, however, not be qualified for appointment as Member of an Adjudicating Authority,—

(a) in the field of law, unless he—

(i) is qualified for appointment as District Judge; or

(ii) has been a member of the Indian Legal Service and has held a post in Grade I of that service;

(b) in the field of finance, accountancy or administration unless he possesses such qualifications, as may be prescribed.

(4) The Central Government shall appoint a Member to be the Chairperson of the Adjudicating Authority.

(5) Subject to the provisions of this Act,—

(a) the jurisdiction of the Adjudicating Authority may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority may deem fit;

(c) the Benches of the Adjudicating Authority shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify;

(d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Adjudicating Authority may exercise jurisdiction.

(6) Notwithstanding anything contained in sub-section (5), the Chairperson may transfer a Member from one Bench to another Bench.

(7) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(8) The Chairperson and every Member shall hold office as such for a term of five years from the date on which he enters upon his office:

Provided that no Chairperson or other Member shall hold office as such after he has attained the age of 2[sixty-five] years.

(9) The salary and allowances payable to and the other terms and conditions of service of the Member shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Member shall be varied to his disadvantage after appointment.

(10) If, for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member, then, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Adjudicating Authority from the stage at which the vacancy is filled.

(11) The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(12) The Chairperson or any other Member shall not be removed from his office except by an order made by the Central Government after giving necessary opportunity of hearing.

(13) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(14) When the Chairperson of the Adjudicating Authority is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson of the Adjudicating Authority until the date on which the Chairperson of the Adjudicating Authority resumes his duties.

(15) The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to regulate its own procedure."

The perusal of the provision quoted no doubt provides for Adjudicating Authority consists of Chairman and two other Members, but Section 6(5)(b) authorises Chairperson to constitute Bench consists of one or two Members. Section 6(5)(a) provides for jurisdiction of Authority to be exercised by the Benches. The aforesaid provision permits constitution of Bench with one or two Members and there is no mandate for constitution of Bench with three Members. The appellant seems to be have been driven by Section 6(2) which talks about the constitution of the Adjudicating Authority and not for the Bench which has been referred under sub-Section 5(a) & (b) and sub-Section 7 of Section 6. As per sub-Section 7 hearing of case by two Members Bench would be when matter is such which ought to be heard by the Bench having composition of more than one Member otherwise it can be heard by one Member. In view of the above, a Bench of the Adjudicating Authority can consist of one Member. The provision aforesaid does not provide that till three Members Adjudicating Authority is constituted, Chairperson or a Member cannot hold Bench. The Adjudicating Authority was constituted as per the provision but now there is vacancy to be filled up by the Government.

In the light of the aforesaid, the prayer of the appellant to stay the proceedings till the Adjudicating Authority is constituted with three Members is not acceptable. The issue aforesaid has no more rest inertia in view of the judgment of the Madras High Court in the case of "G. Gopalakrishnan Versus Deputy Director, Directorate of Enforcement, Chennai" in Writ Petition W.P. (MD) No.11454/2018. The relevant para of the judgment is quoted here under;

"v) The contention regarding coram non-judice, that the Adjudicating Authority is manned only by a single Member also cannot be countenanced with reference to

explicit provision contained in Section 6 of PMLA and allied provisions, wherein it is provided for formation of Bench by less than three Members. Therefore, the issue of coram non-judice is answered against the writ petitioners, notwithstanding the fact that at the time of pronouncement of this order, the Adjudicating Authority is consisting of three Members.”

The judgment supra was rendered on the similar facts thus covers the issue. The learned counsel for the appellant however referred to the judgment of the Apex Court in the case of “Vijay Madanlal Choudhary Versus Union of India” reported in 2022 SSC OnLine SC 929 to impress upon the constitution of Bench with three Members.

We have gone through the judgment in the case supra and find that three Members are referred for the constitution of Adjudicatory Authority and not for formation of Bench. Thus, the judgment of the Apex Court in the case supra does not help the appellant in any manner rather the issue was even decided by the Delhi High Court in the case of “J. Sekar Versus Union of India” - WP(C) 5320/17 dated 11.01.2018, relevant paras of the judgment are quoted here under;

“Composition of the AA and AT

79. The Court next takes up the question of the composition of the AA on which extensive arguments were advanced by the learned counsel for the Petitioners. In this context, it must be noticed that under Section 6 PMLA, the AA is supposed to consist of the Chairperson and two other members - one of whom shall be a person having experience in the field of law. Section 6(3) further sets out what the qualifications for appointment as a member of an AA should be. One of those qualifications is that the person has to be qualified for appointment as a District Judge or a person in the field of law or a member of an Indian Legal Service. The other qualification is possession of a qualification in the field of finance, accountancy or administration as may be prescribed. It is, therefore, not the case that all the members of the AA should be judicial members.

80. It is seen that under Section 5 PMLA, the jurisdiction of the AA may be exercised by the Benches thereof. Under Section 6(5)(b) PMLA, a Bench may be constituted by the Chairperson of the AA with one or two members as the Chairperson may deem fit. Therefore, it is possible to have single-member benches. The word 'bench' therefore does not connote plurality. There could, even under Section 6(5)(b) PMLA, be a single member bench'. When Section 6(6) PMLA states that a Chairperson can transfer a member from one bench to another bench, it has to be understood in the above context of there also being single-member benches.

81. The Court is unable to agree with the submission that since the Adjudicating Authority (Procedure) Regulations 2013 requires every order- sheet to have the signatures of the Chairperson and members constituting the bench, it necessarily means that every matter has to be heard by a bench comprising the Chairperson and members. This would be an erroneous interpretation which is contrary to the

main provision of the PMLA itself, viz., Section 6(5)(b) PMLA. Likewise, under Rule 3 of the Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of the Adjudicating Authorities) Rules 2007, although it states that the AA should have three members, that has to be read along with Section 6(5)(b) that there can be single-member benches. A contrary interpretation would actually frustrate the working of the AA. The Court, therefore, rejects the contention of the Petitioners that there cannot be any single-member benches of the AA.”

In view of the above, we do not find any merit in the appeal no.5227/2022 and any error in the impugned order which has denied stay of the proceedings on the grounds urged by the appellant.

The other issue has been raised by the appellant in appeal no.5226/2022, where an application submitted by the appellant to allow cross examination of certain witnesses was dismissed.

The learned counsel for the appellant would submit that as per Section 6 (15) of the Act of 2002, the Adjudicating Authority should guide itself by the principle of natural justice subject to other provisions of the Act. The Authority has been given powers to regulate its own procedures. The principle of nature justice envisages an opportunity of cross examination to bring the truth on record yet appellant has been denied an opportunity of cross examination of the witnesses named in the application along with the question relevant to them. It is more so when as per Section 11(1) and 11(3) of the Act of 2002, the Adjudicating Authority has been given power for production of records, receiving the evidence on affidavits and issuing commission for examination of witness and documents.

Instead of calling the witness for cross examination, the Adjudicating Authority dismissed the application to deny cross examination of the named persons despite a provision for the aforesaid.

A reference of Rule 21 to 24 of Adjudicating Authority (Procedure Regulation) 2013 has also been given.

The counsel for the appellant has given reference of following judgments to press his arguments:-

1. State of Kerala V/s. K.T. Shaduli Grocery Dealer (1977) 2 SCC 777.
2. Needle Industries (India) Ltd. & Ors. V/s. Needle Industries Newey (India) Holding Ltd. & Ors. AIR 1981 SC 1298
3. Ayubkhan Noor Khan Pathan V/s. The State of Maharashtra & Ors. No.7728/2012
4. Shahid Balwa V/s. Directorate of Enforcement LPA No.79/2013
5. Nirmal Seeds Pvt. Ltd. V/s. Union of India & Anr. W.P. No.1643/2017
6. Subhash Chander V/s. Bhagwan Yadav 2010 (1) AD (Delhi) 96

7. Kharaiti Lal & Sons HUF V/s. Hairi Singh 2002 (61) DRJ 827 (DB)
8. Raj Bahadur V/s. State 1996 JCC 356
9. S.C. Girothia V/s. UCO Bank 1995 SUPP (3) SCC 212
10. Mandini Co-operative Bank Ltd. V/s. Nimesh B. Thakor (2010) 3 SCC 83

The judgments referred to above hold that cross examination of the witness is a part of natural justice. The prayer is accordingly to set aside the order of the Adjudicating Authority, as otherwise it has passed a non-speaking order.

The judgments cited by the counsel for the appellant laid down proposition of law on the issue, however, principle of natural justice cannot be an unruly horse and thereby, there can be an exception of it. The proceedings before the Adjudicating Authority are summary in nature. It is for confirmation of Provisional Attachment Order to secure the property obtained out of proceeds of crime. It is still the disposal of the case by the Trial Court/Special Court in reference to the offences because final order of confiscation lies with the court only and therefore, second issue has to be considered in the light of the aforesaid.

Before addressing the issue, it would be relevant to give brief facts of the case in reference to which the proceedings under the Act of 2002 were initiated. The aforesaid would be relevant to analyse the issue to be raised by the appellant. It is even to find as to whether cross examination should have been permitted by the Adjudicating Authority by accepting the prayer of the appellant.

The Enforcement Directorate provisionally attached the properties of the appellant vide Provisional Attachment Order No.15/2022 dated 02.08.2022. The PAO was issued consequent to ECIR dated 07.03.2020 filed against twelve (12) accused based upon the schedule offence registered by the CBI on 07.03.2020. The allegation in the RC lodged by the CBI is about alleged criminal conspiracy between Mr. Rana Kapoor, a Promoter Director of YES Bank and M/s. DHFL, wherein Rs.3,983 Crores investment was made by YES Bank in M/s. DHFL in lieu of kickback of Rs.600 Crores paid by M/s. DHFL to companies held by Mr. Rana Kapoor. The five (5) properties comprises of the apartment and four (4) pieces of land, valued around Rs.164,67,00,000/- were attached. These properties are the equivalent value of the part of the proceeds of crime generated in the case and have been diverted by Mr. Avinash Bhosale for his own beneficial purpose. The brief facts given in the appeal are quoted hereunder:-

a. FIR bearing 219 2020 E0004 dated 07.03.2020, u/s 120 r/w 420 of IPC & Section 7, 12 & 13(2) r/w 13(1) (d) of PC Act, 1988 was registered by CBI against the accused M/s DHFL, M/s DOIT Urban Ventures (India) Limited, Mr. Rana Kapoor, the then Promoter Director of Yes Bank Limited Ors. (The Defendants are not named as Accused in the said FIR).

b. That it is submitted that the present ECIR NO. ECIR/MBZ0-1/03/2020 dated 07.03.2020 was filed against twelve Accused Persons under Section 3 & 4 of

PMLA is based on the 'Scheduled offence' registered by Central Bureau of Investigation in RC 219 2020 E 004 dated 07.03.2020 alleging that Accused, Rana Kapoor entered into a criminal conspiracy with the then Promoters of DHFL whereby Yes Bank invested Rs.3,983 Crore in DHFL (by subscription to debentures issued by DHFL and loans to DHFL) in lieu of kickbacks of Rs.600 Crore paid by DHFL to companies held by Rana Kapoor and his family members by way of loans. (Para 7.1, Page 4 of the OC). It is pertinent to mention that the Answering Defendants were not arraigned as an Accused either in the said RC being 'Schedule Offence' or the present ECIR based on the Schedule Offence. (The Defendants are not named as Accused in the said ECIR).

c. The crux of Enforcement Directorate's case qua Answering Defendant No. 1 is that Rs.3,983 Crore invested by Yes Bank in DHFL is the result of criminal activity between Rana Kapoor and Kapil/Dheeraj Wadhawan and out of this Rs.3,983 Crore invested by Yes Bank in DHFL almost at the same time, (i) monies were sanctioned by DHFL to Radius Group entities of Rs. 2788 crores (Rs. 2317 crores actually disbursed). (Para 8.1, Page 6 of the OC)

(i) It has been further alleged that:

a. The amount received by Radius Group of Companies was used to repay Rs. 67.85 crores to one entity of the Answering Defendant No,1 i.e. Nibodh Realty LLP ("Nibodh Realty") and Rs. 25 crores paid to ABIL Diary LLP, which is allegedly the proceeds of crime (Para 11.2 and 11.3, Page 38 of the OC);

b. Rs.71.82 Crores was paid by DHFL to Answering Defendant No.1 and ABIL Group entities towards fees/consultancy services etc. out of which Rs. 40.50 crores have been transferred by DHFL immediately after receiving funds from Yes Bank and no such services were ever provided by Answering Defendants and ABIL Group entities. (Para 11.6, Page 39 of the OC)

d. That pursuant to the registration of the ECIR, the Complainant/ED provisionally attached the properties of the Defendants vide Provisional Attachment Order bearing PAO No. 15/2022 dated 02.08.2022. The relevant portion/Order/para 28 of the provisional attachment order showing the details of properties attached is shown, hereunder:

Schedule-A of properties

Sr.

No.

Description of Property

Approx. Value of Property being attached

Name of Owner

1.

Duplex Apartment No. 24

admeasuring 7118.17 Sq. Feet

RERA Carpet on 53rd and 54th Floor SESEN Building, 29, Nepean Sea Road, Mumbai- 400006

Rs. 103,60,00,000/-

M/s Abbeys Realcon LLP, (this entity is beneficially owned by Mr. Avinash Bhosale)

2.

Land parcel admeasuring 6,143.71 Sq.

Meters situated at Gat No: 65, 63,

Plinth No.147, Village: M Peth Shahapur, Taluka: Mulhi, Dist. Pune (Amby Vally)

Rs. 14,65,00,000/-

M/s Samit Realty Pvt. Ltd.

(this entity is beneficially owned by Mr. Avinash Bhosale)

3.

Land parcel admeasuring 31,500 Sq. Meters situated at Gat No: 202 to 209, Village

Aglambe , Taluke Haveli, Pune, MH

Rs. 29,24,00,000/-

Mrs. Gauri Avinash Bhosle

(Actual beneficial owner is Mr. Avinash Bhosale)

4.

Land parcel admeasuring 20,200 Sq. Meters situated at Gat No: 2A/4, Village Dongargaon, Taluke, Nagpur Gramin, Nagpur MH

Rs. 15,52,87,000/-

Mrs. Gauri Avinash Bhosle

(Actual beneficial owner is Mr. Avinash Bhosale)

5.

Land parcel admeasuring 13,600 Sq. Meters situated at Gat No: 134, Village Dongargaon, Taluka: Nagpur Gramin, Nagpur MH

To the extent of Rs.

1,45,13,000/-

(value of property Rs.

10,45,50,000/-)

Mrs. Gauri Avinash Bhosle

(Actual beneficial owner is Mr. Avinash Bhosale)

Total

164,67,00,000/-

e. ED provisionally attached the properties of the Defendants vide the Provisional Attachment Order bearing PAO No. 15/2022 on the following allegations:

I. Allegation of receiving illegal diverted funds given by Yes Bank to DHFL which were transferred to Radius Group of Companies and thereafter from Radius Group of Companies to ABIL group concerns:

a. It has been alleged at Para 11.2, Page 38 of the Complaint that the answering Defendant No.1 conspired with Sh. Sanjay Chhabria for illegal receipt of funds as under;

11.2. After receipt of the public fund of YES Bank into DHFL to the tune of Rs. 3983 Crore, Mr. Kapil Wadhawan diverted Rs. 2317 Crore to the entities of Mrs. Sanjay Chhabria in the name of development of one of his projects namely "Avenue-54" at Santacruz But Mr. Sanjay Chhabria, instead of using this fund for development of the said project, further diverted huge part of it for other purposes. He, in conspiracy with Mr. Avinash Bhosale, diverted Rs. 267 Crore and Rs. 25 Crore out of this fund to his (Avinash Bhosale's) beneficially owned entities namely M/s Nibodh Realty LLP and M/s Abil Dairy LLP respectively. Also, as per the directions of Mr. Kapil Wadhawan, Mr. Sanjay Chhabria diverted a fund of Rs. 115 Crore to M/s Mentor Capital Ltd. Apart from this, huge part of this fund was used by Mr. Sanjay Chhabria for repayment of loans and interest thereon with regard to his other group companies. This project for which this loan had been disbursed by DHFL is still incomplete and the loan has turned into NPA.

b. It has been alleged in Para 11.2, Page 38 of the Complaint that amount of Rs. 267 Crores has been received by Nibodh Realty LLP from Radius Group of Companies during the period April 2018 onwards out of which, amount of Rs. 67.85 crores is the proceeds of crime and Rs. 25 crores received by ABIL Dairy LLP is the proceeds of crime. The relevant portion is reproduced as under:

11.3 One more conspiracy was hatched between Mr. Avinash Bhosale and Mr. Sanjay Chhabria for illegally obtaining the said funds of approx. Rs. 431 Crore in one of his beneficially owned entities namely M/s Nibodh Realty LLP. It is important to mention here that out of this Rs. 431 Crore approx. a considerable amount to the tune of Rs. 267 Crore had been obtained by Mr. Avinash Bhosale

from Mr. Sanjay Chhabria during the period April 2018 onwards. This was the same period when Mr. Sanjay Chhabria had received funds from DHFL in the name of the development of the "Avenue 54" Project. The project is still incomplete and the loan accounts have turned into NPA. It is revealed that, out of the total Rs. 431.33 Crore received by Shri Avinash Bhosle of ABIL Group, Rs. 363.48 Crore (Rs. 237.50 Crore + Rs. 122.631 Crore + Rs. 3.37 Crore) was the actual cost to M/s Nibodh realty LLP on the said so called loan of Rs. 237.50 Crore given to Mr. Sanjay Chhabria. The remaining amount of Rs. 67.85 Crore (Rs. 431.33 Crore- Rs. 363.48 Crore) is the amount of POC generated from this conspiracy of Mr. Avinash Bhosale and Mr. Sanjay Chhabria. The said POC to the tune of Rs. 67.85 Crore has been received by Mr. Avinash Bhosale of ABIL group and was routed in his various group companies and utilized therein.

II. Allegation of Rs. 71.82 crores received by companies of present Answering Defendant No.1 from DHFL under the alleged garb of consultancy fees etc.

a. It has been alleged that the Answering Defendant conspired with the promoters of M/s. DHFL to divert funds to the tune of Rs. 71.82 Cr. In Para 11.6 of Page 39 of the Complaint the following has been stated:

11.6 Mr. Avinash Bhosale had also entered into a criminal conspiracy with Mr. Kapil Wadhawan of DHFL to illegally & fraudulently obtain huge funds from DHFL. Under this conspiracy, Mr. Kapil Wadhawan through DHFL had illegally diverted a huge amount of public money to the tune of Rs. 71.82 Crore to Mr. Avinash Bhosale and his beneficially owned entities. This fund was given by DHFL to Mr. Avinash Bhosale and his beneficially owned entities, in several tranches in the name of fee/consultancy charges, etc. for providing services by them related to loans given to various projects by DHFL. However, the fact is that no such service has ever been provided either by Mr. Avinash Bhosale or by his entities. Thus, the said payments were made by DHFL to them are nothing but siphoning of the funds of DHFL. It is important to mention here that funds to the tune of Rs. 40.50 Crore (out of Rs. 71.82 Crore) had been diverted from DHFL to Mr. Avinash Bhosle of Pune based ABIL Group and to his beneficially owned entities immediately after the transfer of Rs. 2700.00 Crore (out of Rs. 3983 Crore) by YES Bank to DHFL against subscription for the NCDs.

f. Directorate of Enforcement filed Original Complaint 1793/2022 dated 25.08.2022 under Section 5 (5) of PMLA before the Ld. Adjudicating Authority for confirmation of the provisional attachment done vide PAO No. 15/2022 dated 02.08.2022.

Mr. Avinash Bhosale is connected with the appellant company and alleged to be involved in money laundering. The facts given above make a reference of a case registered by the CBI and ECIR registered by the Enforcement Directorate before the provisional attachment of five (5) properties. The allegations made by the department are based on the documents and copies of which were provided to the appellant to submit reply before the Adjudicating Authority where it can deny

or admit the documents. The reply was not filed by the appellant before filing application in question.

In the light of the documentary evidence produced by the ED, we would analyse as to whether cross examination of the witness should have been permitted. The appellant had given details of the witnesses along with the question to be raised in the cross examination which are reproduced here under;

S.

NO.

NAME OF THE WITNESS

&

REASON FOR CROSS EXAMINATION

1.

Smt. Surbhi Wahi (S. No. 3 of RUD), statement recorded on 18.07.2022 under section 50 (2) & (3) of the PMLA, 2002.

The witness has not made any incriminating statement against the Appellant herein, yet her statement is relied upon by the Original Complainant. She is required to be cross-examined to prove that:

(a) The Appellant herein had no connection whatsoever with the alleged transaction with DHFL or any office bearer or any individual with regard to or even known or met at any point of time of Scheduled Offence.

(b) The Appellant herein had remotely no connection whatsoever with the alleged Money Laundering Offence.

(c) The Appellant herein had no connection whatsoever with any process related to the offence of money laundering.

The property / record seized by the Original Complainant had no connection with the alleged offence of money laundering or alleged scheduled offence.

2.

Mr. Sanjay Chhabria (S. No. 4-11 of RUD), statement recorded on 07.06.2022 to 14.06.2022 under section 50 (2) & (3) of the PMLA, 2002.

The witness has not made any incriminating statement against the Appellant herein, yet his statement is relied upon by the Original Complainant. He is required to be cross-examined to prove that:

(a) The Appellant herein i.e. Abeyes Realcon LLP did not enter into any impugned transaction with Mr. Sanjay Chhabria or in relation to the alleged Scheduled Offence. There was no question of Mr. Sanjay Chhabria ever giving any money to the Appellant herein in relation to any impugned transaction or qua the

alleged Scheduled Offence.

(b) The Appellant herein had remotely no connection whatsoever with the alleged Money Laundering Offence.

(c) The Appellant herein had no connection whatsoever with any process related to the offence of money laundering.

(d) To prove that the statement of a participus accomplice cannot be taken into consideration.

3.

Mr. Rajendra Mirashie (S. No. 12 of RUD), statement recorded on 18.07.2022 under Section 50(2) & (3) of PMLA 2002.

The witness has not made any incriminating statement against the Appellant herein, yet his statement is relied upon by the Original Complainant. He is required to be cross-examined to prove that:

(a) The Appellant herein had no connection whatsoever with the alleged transaction with DHFL or any office bearer or any individual with regards to or even known or met at any point of time of Scheduled Offence.

(b) The Appellant herein had remotely no connection whatsoever with the alleged Money Laundering Offence.

(c) The Appellant herein had no connection whatsoever with any process related to the offence of money laundering.

4.

Mr. Avinash Bhosale (S. No. 12 of RUD), statement recorded on 29.06.2022 to 10.07.2022 under Section 50(2) & (3) of PMLA 2002.

The witness has not made any incriminating statement against the Appellant herein, yet his statement is relied upon by the Original Complainant. He is required to be cross-examined to prove that:

(a) The Appellant herein had no connection whatsoever with the alleged transaction with DHFL or any office bearer or any individual with regards to or even known or met at any point of time of Scheduled Offence.

(b) The Appellant herein had remotely no connection whatsoever with the alleged Money Laundering Offence.

(c) The Appellant herein had no connection whatsoever with any process related to the offence of money laundering.

5.

Mr. Santosh Maheshwari (S. No. 20 and 21 of RUD), statement recorded on 20.06.2022 and 25.07.2022 under Section 50(2) & (3) of PMLA 2002.

The witness has not made any incriminating statement against the Appellant herein, yet his statement is relied upon by the Original Complainant. He is required to be cross-examined to prove that:

(a) The Appellant herein had no connection whatsoever with the alleged transaction with DHFL or any office bearer or any individual with regards to or even known or met at any point of time of Scheduled Offence.

(b) The Appellant herein had remotely no connection whatsoever with the alleged Money Laundering Offence.

(c) The Appellant herein had no connection whatsoever with any process related to the offence of money laundering.

6.

Mr. Srinivasan Govindan (S. No. 22 of RUD), statement recorded on 20.06.2022 under Section 50(2) & (3) of PMLA 2002

The Witness has stated as under in his statement:

Ans. To my knowledge, Mr. Sanjay Chhabria had been introduced by Mr. Avinash Bhosle to Mr. Kapil Wadhawan in June, 2017 in connection with financing for development of one of their projects namely "One Mahalaxmi".....

...

....

Yes, during the years, 2017 and 2018 Rs.51.50 Crore had been transferred from DHFL to Mr. Avinash Bhosle and his group companies viz. on 25.10 .2017- Rs.13 Crore was transferred from DHFL to Avinash Bhosle Group vide Invoice date 03.10.2017; on 18.10.2017- Rs.16 Crore was transferred from DHFL to Arindam Developers LLP vid Invoice date 03.10.2017; on 18.05.2018-Rs.15 Crore was transferred from DHFL to Mr. Avinash Bhosle vide Invoice date 06.04.2018; on 08 .06 .2018- Rs .7.5 Crore was transferred from DHFL to Mr. Avinash Bhosle Group vide Invoice date 08.05.2018. These funds had been transferred from DHFL's Axi.x Bank a/c no. 004010203312906.....

....

Q.7. With regard to the above stated two agreements, each dated 04.07.2017, please provide details of the services provided by the above said two service providers namely Avinash Bhosle Group and Arindam Developers LLP.

Ans. As per records and to the best of my knowledge, no such services have been provided by Avinash Bhosle Group or Arindam Developers LLP in respect of the project "One Mahalaxmi".

....

...

Q.8. Was it a sham agreement?

Ans. Yes Sir, It appears to be a sham agreement, as the funds were transferred by DHFL to Avinash Bhosle Group and Arindam Developers LLP, without they providing any service in project evaluation and structuring of the financial proposal (loan proposal) for project "One Mahalaxmi"

The witness needs to be cross-examined on the aspect as to how he has concluded that that Mr. Sanjay Chabbria was introduced to Mr. Kapil Wadhawan by Mr. Avinash Bhosale. Further, he has to be examined on how he had declared the consultancy fee awarded to the Avinash Bhosale was a sham transaction.

Many other aspects also deserve cross-examination.

7.

Mr. Dayaramam Kedia (S. No. 23 of RUD), statement recorded on 19.07.2022 under Section 50(2) & (3) of PMLA, 2002.

The witness has not made any incriminating statement against the Applicant herein, yet his statement is relied upon by the Original Complainant. He is required to be cross-examined to prove that:

(a) The Applicant herein had no connection whatsoever with the alleged transaction with DHFL or any officer bearer or any individual with regard to or even known or met at any point of time of the Scheduled Offence.

(b) The Applicant herein had remotely no connection whatsoever with the alleged offence of Money Laundering.

(c) The Applicant herein had no connection whatsoever with any process related to the offence of money laundering.

The perusal of the reasons given for cross examination and the questions would show that according to the appellant, most of the witnesses named above have not made any incriminating statement against it, yet the appellant prayed for cross examination of those witnesses. Few of them are even involved in alleged money laundering. The allegations are made mainly in reference to the documentary evidence collected by the Department yet ignored by the appellant.

It is further a fact that the cross examination has been sought to prove that applicant had no communication for alleged transactions with M/s. DHFL involved in schedule offence rather appellant is not remotely connected with the offence of money laundering. Those common questions have been referred for majority of the witnesses ignoring the documentary evidence to prove it.

The permission to cross examination has been asked to substitute the arguments to be raised before the Adjudicating Authority at the time of final hearing to contest the allegations. The arguments to contest the case cannot be taken for the cross examination. When according to appellant himself, the witnesses did not make any incriminating statement against him than what would be the cross

examination of those witnesses, remains unexplained. This finding is in reference of the prayer of the appellant for cross examination of Smt. Surbhi Wahi, Rajendra Mirashie, Avinash Bhosale, Santosh Maheshwari and Dayramam Kedia. So far as the question to be raised to Sanjay Chhabria is concerned, he is one of the accused in the case. The appellant wants to cross examine him to show that it did not enter into any transactions in relation to the alleged schedule offence. The ECIR and notice refers to the documentary evidence to prove the aforesaid. Thus, cross examination from the witnesses would be in reference to the documentary evidence for which an opportunity has been given to the appellant to contest the notice by filing reply and documents. The application to seek cross examination was filed even before filing reply to the notice along with the documents. It is otherwise a fact that Mr. Avinash Bhosale is connected with the appellant and an accused in the matter to be cross examined to espouse his own cause, cannot be permitted.

One Mr. Srinivasan Govindan has also been called for cross examination and the questions have been referred with answers given by the said witnesses in his statement under Section 50 of the Act. The transfer of the amount was through the invoices and the documents are referable to prove the same and till date it has not been controverted by the appellant by filing reply.

In view of the above, we find that cross examination of witnesses sought by the appellant is for the sake of it and to delay the proceedings before the Adjudicating Authority.

It is after noticing that after an order for provisional attachment, the Adjudicating Authority has to pass an order within 180 days and therefore, the Adjudicating Authority has to proceed within the time frame given under the Act and for that Section 5 of the Act is referred and quoted as under;

"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 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 further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.];

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the 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 order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under [sub-section (3)] of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.”

The Apex Court in “Vijay Madanlal Choudhary” case supra has referred aforesaid provision to hold that sufficient safeguard has been provided on Provisional Attachment Order. The attachment would lapse with expiry of period of 180 days if it is not confirmed. The attachment order continues for 180 days period, or till the Adjudicating Authority pass an order within 180 days. The effort of the appellant in this case seems to be to derail the proceedings so that the provisional attachment may lapse with efflux of time and thereafter cross

examination of the witnesses was sought for the sake of it.

It is no doubt that a chance of cross examination is part of the principle of natural justice and it should be given in an appropriate case but there are exception and it would be when no reason exists for cross examination or if the intention of the parties is to make the proceedings infructuous by calling the witnesses for cross examination for the sake of it. The case in hand is of the nature where appellant made an application for cross examination of the witnesses without even denial of documents referred by the Enforcement Directorate and only with a view to delay the proceedings before the Adjudicating Authority so that proceedings may lapse with expiry of the period of 180 days.

The principle of natural justice would apply when some real prejudice is going to be caused out of the action of one party. In the instant case, the appellant has failed to reflect as to what prejudice is going to cause to him if the cross examination of witness is not permitted. It is apart from the fact that the material on record shows that the allegations against the appellant are in reference to the documentary evidence which has not been refuted by the appellant by filing reply. The Madras High Court in the case "G. Gopalakrishnan Versus Deputy Director, Directorate of Enforcement, Chennai" supra referred to the judgment of the Apex Court in the case of "Chairman, Board of Mining Examination v. Ramjee, (1977) 2 SCC 256". Relevant paras of the said judgment are quoted as under:

"2.1. In Chairman, Board of Mining Examination v. Ramjee, (1977) 2 SCC 256, the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures."

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply not as to their scope and extent. Everything depends on the subject matter, the application for principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject- matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice depend on the facts and the circumstances of the case, the nature of the enquiry, the rules

under which the tribunal is acting, the subject-matter to be dealt with, and so forth.”

The Apex Court in the case of “Vijay Madanlal Choudhary Versus Union of India” supra did not accept challenge to the certain provisions of the Act of 2002 in reference to the provision of Cr.P.C. The Act of 2002 was taken to be special legislation, thus cannot be governed by the provisions of Cr.P.C. The elaborate discussions on the issue have been made in the judgment supra for holding the Act of 2002 to be constitutionally valid.

So far as the proceedings in question are concerned, it is of attachment of the properties out of the proceeds of crime. The proceeding in question does not culminate into confiscation rather it can be when an order for it is passed by the Special Court under the PML Act. The purpose of attachment of the property is to save it till completion of trial by Special Court/Trial Court. It is the Court alone which has been given power of confiscation.

The property does not get affected in regard to ownership. It is only subjected to attachment. For such proceedings, the legislature has given maximum period of 180 days to pass an order of confirmation of provisional attachment, otherwise it is to lapse.

Therefore, sufficient safeguard has been provided and looking to the nature of proceedings, cross examination cannot be permitted as a rule rather it can be as an exception. A case of exceptional nature is not made out herein. Thus, we do not find any reason to cause interference with the order of the Ld. Adjudicating Authority.

We cannot ignore even one more aspect of the matter arising out of the cross examination of the witnesses. It cannot be disputed that Special Court would try the matter under the Act of 2002 against the accused and the few witnesses summoned for cross examination are even the accused in the case. If those accused are summoned for cross examination, they may be required to open their defence at a premature stage, while the defence can be opened by them in the case when tried by the Special Court. The cross examination in these proceedings may have serious consequences against those who are accused.

Looking to the scope of attachment proceedings, cross examination can be permitted only as an exception and not as a rule, otherwise it may delay the proceedings, resulting in lapse of proceedings and causing serious consequences even against the accused, if they are forced to disclose their defence at a premature stage.

In the light of all these reasonings, we do not find it to be a fit case to accept the prayer of the appellant to allow cross examination of the witnesses.

In view of the discussions made above, we do not find any reason to interfere in the order passed by Adjudicating Authority and therefore the appeals are dismissed.