
(2024) 12 KL CK 0070
In the High Court Of Kerala
Case No : Writ Petition (Crl.) No.1354 Of 2023

Davy Varghese

APPELLANT

Vs

Deputy Director Directorate Of Enforcement

RESPONDENT

Date of Decision : 16-12-2024

Acts Referred:

Citation : (2024) 12 KL CK 0070

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : A.S.Dileep, Suseela Dileep, P.Binod, K.Y.Sudheendran, Sudeep Aravind Panicker, A.R.L. Sundaresan, Jaishankar V.Nair

Final Decision : Partly Allowed

Judgement

Bechu Kurian Thomas, J

1. A septuagenarian, who claims to be suffering from a terminal illness, along with his wife, has approached this Court seeking to quash the order of provisional attachment issued under the Prevention of Money-Laundering Act, 2002 (for short 'PML Act'). According to the petitioners, by the attachment, they have been wholly crippled to even manage the day-to-day living as all their immovable properties, bank accounts and all their vehicles have been attached.

2. Petitioners allege that their family has business interests in hosiery, textiles and chit funds apart from real estate. They contend that loans were availed by them from financial institutions for their business activities and were regularly repaying them as well. According to the petitioners, in the year 2015, they approached the Karuvannur Service Co-operative Bank No.112 (for short 'the Bank') for an overdraft facility for their business ventures. After satisfaction of the security offered, which included their residential property, a total loan of Rs.3.49 Crores was granted in the name of the first petitioner and his four business associates. Petitioners allege that the security offered by them was far more valuable than the amounts availed as overdraft facility and the present

market value of the mortgaged property is more than Rs.8.5 Crores.

3. In the meantime, petitioners learnt from the media that some irregularities were detected at the bank relating to the disbursement of loans to other persons and an investigation was being conducted. While so, petitioners received summons from the first respondent requiring their presence and production of documents relating to the loans availed by them, which were duly complied with. Petitioners allege that during the enquiry they were made to sign certain statements dictated by the officials of the first respondent and later they were served with a provisional order of attachment dated 13.10.2023 bearing No.05/2023. The order attached five of their immovable properties - four belonging to the second petitioner and one that of the first petitioner apart from the motorcar of the second petitioner and the bank accounts held by them. Petitioners allege that the provisional attachment order is manifestly illegal, without jurisdiction or authority and have hence approached this Court under Article 226 of the Constitution of India.

4. A statement has been filed by the respondents contending that the writ petition is not maintainable as the remedy lies elsewhere under the PML Act. It was pleaded that the committee members including the Secretary and other persons of the bank had conspired from 2014 onwards to swindle more than Rs.100 Crores thereby making pecuniary gains. It was alleged that several loans were sanctioned to the same person against the limit of the bank that too on the basis of the same security, using fake addresses, after altering the bank's software and at times without the knowledge of the owner of the property. Pursuant to an F.I.R registered as Crime No.650/2021 on 14.7.2021, under sections 406, 420, 409 and 465 read with section 34 of the IPC against six persons, the Enforcement Directorate initiated enquiry proceedings since a scheduled offence under section 420 of IPC was involved. The first respondent further alleges that during the investigation, several searches were conducted and it was realised that loans were availed by persons violating the provisions of the byelaws of the bank and the public was cheated of crores of money which were embezzled by the accused.

5. The statement also pointed out that, petitioners had availed a total loan of Rs.3.49 Crores as of 31.03.2018 in the name of seven persons and the total outstanding loan had risen to Rs.7.06 Crores. According to the respondents, during the course of investigation, it was found that petitioners had conspired with the employees of the bank to obtain illegal loans and embezzled the funds and therefore, properties purchased using the proceeds of crime were attached under section 5(1) of the PML Act. It was also specifically averred that certain other properties of the petitioners were also attached for the reason that they were mortgaged for obtaining fraudulent loans and also because a large portion of the proceeds of crime generated by the petitioners were not available for attachment as they were already frustrated by the petitioners. The respondents allege that the total proceeds of crime provisionally attached is only Rs.2.13

Crores.

6. Adv. P. Binod appearing on behalf of the petitioners vehemently contended that petitioners had no role at all in the alleged fraud or cheating committed at the bank. It was submitted that petitioners had availed the loan after mortgaging their own properties worth several times the value of the loan and therefore there cannot be any illegality. The learned counsel also contended that the alleged violation of the byelaws cannot be a reason to attach their properties under the PML Act. Apart from the above, the learned counsel contended that even if the entire allegations are assumed to be admitted for the sake of arguments, still, what can be attached under the PML Act are only tainted properties and not those which have no connection with the crime or are not proceeds of crime. Learned counsel submitted that, out of the five properties attached, three of them were purchased in the years 1999, 1997 and 2005, while the period during which the offences were allegedly committed at the bank is stated to be between 2014 to 2018 and therefore under no circumstances can those three properties of the petitioners be attached even provisionally. The learned counsel also argued that when the provisional attachment is null and void, the alternative remedy cannot be a restraint for this Court to interfere.

7. Sri. A.R.L Sunderesan, the Additional Solicitor General of India, instructed by Sri. Jayashankar V. Nair, learned counsel for the respondents on the other hand contended that the writ petition itself is not maintainable as the petitioners have alternative remedies provided under the statute and since they have already invoked the said remedy, this Court is precluded from considering the said contentions. According to the learned Senior counsel, after filing the appeal, petitioners cannot continue this case and the hierarchical system created under the PML Act provides for an appeal to the High Court and therefore the issue can come up before this Court at the appellate stage, and hence it is not proper to consider this petition under Article 226 of the Constitution of India. The learned ASG also submitted that after the petitioners approached the Adjudicating Authority, the issue was considered and an order adverse to them was issued, which is already challenged in an appeal before the Tribunal as well. 8. Relying upon the decisions in *Santiago Martin v. Union of India* [2023 (5) KLT 388] and paragraph 298 of *Vijay Madanlal Choudhary and Others v. Union of India and Others* [2022 SCC OnLine SC 929], it was contended that the respondents were entitled to proceed against the property equivalent to the corresponding value of the proceeds of crime and hence the action of the authority cannot be said to be illegal. The learned counsel also argued that once the Adjudicating Authority passed an order, the impugned order of provisional attachment did not survive any more as it had merged and therefore interfering with the order under section 5(1) of the PML Act, after an order under section 8 was issued, is legally impermissible.

9. On considering the rival contentions, the following two issues arise:- (1) Whether this writ petition is maintainable? and (ii) Whether the order of

provisional attachment of immovable properties of the petitioner, dated 13-10-2023, is wholly without jurisdiction? These issues are considered below.
Issue No. (i) Whether this writ petition is maintainable?

10. A three-tier remedy is provided under the PML Act itself, to alleviate the grievances of those aggrieved. Normally, when such a scheme is available, it is not proper to exercise the extraordinary jurisdiction under Article 226 of the Constitution ignoring the statutory machinery. However, if the Constitutional Court feels that there are good and sufficient reasons to bypass the alternative remedy provided by statute, the jurisdiction under Article 226 can be exercised. Exceptional circumstances also warrant such an exercise of power.

11. Under Article 226 of the Constitution, the High Court has a discretion to or not to entertain a Writ Petition, depending on the facts of each case. Amongst the self-imposed restrictions, though, availability of an effective and efficacious alternative remedy is one, the same by itself, would not operate as a bar in at least four contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the impugned order is without jurisdiction or the vires of an Act is challenged, as held in the often quoted decision of *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Others* [(1998) 8 SCC 1] and the Constitution Bench decision in *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and Another* [AIR 1961 SC 1506]. Further when a question of law is involved, the alternative remedy under a statute shall not be a restraint to entertain a writ petition.

12. In this context, it is apposite to refer to the decision in *Godrej Sara Lee Ltd v. Excise & Taxation Officer - Cum - Assessing Authority and Others* [2023 SCC OnLine SC 95], wherein it was held that the power under Article 226 is plenary in nature and the limitation on the exercise of such power must be found in the Constitution itself. It was further held that when the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should ideally be decided by the High Court instead of dismissing the writ petition on the ground of an alternative remedy being available.

13. Apart from the above, in the decision in *Prodair Air Products India Pvt. Ltd. v. State of Kerala* [2023 (3) KLT 234], a Division Bench of this Court had very lucidly explained the distinction between the maintainability and entertainability of writ petitions, as follows:

"The writ jurisdiction being a discretionary jurisdiction, it is for the constitutional courts to decide whether or not they should exercise their discretion to entertain a Writ Petition. In that context, it would be apposite to point out that there is a subtle distinction that exists between instances when a Court dismisses a Writ Petition as 'not maintainable' and when it exercises its discretion against 'entertaining' it. The former is a case where the Court finds that the

circumstances are such that it is rendered incapable of even receiving the lis for adjudication whereas the latter is a case where the Court finds that, while it is competent to adjudicate the lis, the adjudication is better left to other forums that are more suited for the same (*M/s Godrej Sara Lee v. Excise & Taxation Officer-cum-Assessing Authority* (AIR 2023 SC 781)).

An argument as regards existence of an alternate remedy is one that is aimed at persuading a court against 'entertaining' a Writ Petition that is otherwise 'maintainable' before it. While accepting such an argument, the Court essentially finds that notwithstanding the petitioner having made out a sound legal point it would be against public interest for it to entertain and adjudicate the matter."

14. In the instant case, the writ petition was filed on 26-12-2023 and despite petitioners' insistence on having the matter heard, this Court could not take up the case for hearing. In the meantime, petitioners participated in the proceedings before the Adjudicating Authority, who confirmed the provisional attachment by an order under section 8 of PML Act on 12-03-2024. In view of the legal question involved, this writ petition was retained and at the same time petitioners were given liberty to challenge the order of confirmation. It is informed that the adverse order of the Adjudicating Authority has been challenged before the Appellate Tribunal. Despite the aforesaid proceedings, this Court's jurisdiction under Article 226 of the Constitution cannot be taken away, if the initial order itself was without jurisdiction.

15. The scheme of section 5(3) of the PML Act indicates that a person aggrieved by a provisional order of attachment cannot challenge such an order before any authority. In *Santiago Martin v. Union of India* (supra) at paragraph 38 it was observed that there is no appeal against a provisional attachment order. The statute contemplates a complaint to be filed by the Officer who issued the attachment order to prefer a complaint to the Adjudicating Authority under section 5(2) of the PML Act. If the provisional attachment is found to be illegal, the Adjudicating Authority's order will be effective only from such a date and not the date of the provisional order. Even if the attachment is wholly illegal, still, at least for the period during which the provisional attachment remained in force, the property would have the taint of a proceeds of crime. The stigma on the property will not be effaced at least for the said period. Thus, if an order of attachment of a property is without jurisdiction or a non est, the remedy under the statute may not be a completely efficacious and alternative mechanism. Hence, if the order of provisional attachment under section 5 of PML Act is without jurisdiction, a writ petition is maintainable and can even be entertained.

Issue No. (ii) Whether the order of provisional attachment of immovable properties of the petitioner, dated 13-10-2023, is wholly without jurisdiction?

16. The immovable properties that belong to the petitioners and attached as per Ext.P1, are tabulated below:

Item No.

Owner

Extent

Sy. No.

Village

Date of acquisition

1

Petitioner 2

8.51 Ares

301/11

Ollur

26-09-1997

2

Petitioner 1

2.43 Are

301/11

Ollur

18-06-1999

3

Petitioner 2

1.74 Are

559/2,

556/11,

556/2

Chembukavu

18-04-1987

4

Petitioner 2

2400

sq.ft

1927/2015

Velampalayam Tirupur, Tamil

Nadu

22-04-2015

5

Petitioner 2

3.18 Are

18/61

Ollur

03-07-2015

17. The first three properties in the above table were concededly purchased by the petitioners in the years 1997, 1999 and 1987, i.e. even before the PML Act was enacted. As seen from Ext.P1, the period during which the predicate offence is alleged to have been committed by the officers of the bank is between 2014 to 2020. Hence, the properties purchased by the petitioners in 1997, 1999 and 1987 cannot be treated as properties purchased using the proceeds of crime.

18. Section 5 of the PML Act deals with the provisional attachment of property. The said provision reads as below:

"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."

19. The term 'proceeds of crime' is defined in S.2(1)(u) of the PML Act as follows:

"proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

Explanation: For the removal of doubts, it is hereby clarified that proceeds of

crime include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relating to the scheduled offence.”

20. Section 5 of PML Act authorizes the attachment of proceeds of crime. The above-extracted definition indicates that there can be three types of proceeds of crime, which are:

- (i) property derived or obtained as a result of a criminal activity,
- (ii) value of any such property and,
- (iii) if the property is taken or held outside India, then a property equivalent in value held within India.

21. The definition of the term 'proceeds of crime' explicitly states that when the proceeds of a crime is a property, such property must have been obtained or derived as a result of any criminal activity relating to a scheduled offence. No doubt, even if the property was obtained indirectly, it can still be regarded as proceeds of crime. Assuming that a property derived out of a criminal activity mentioned is not available, still, attachment can be effected to the extent of the equivalent value of such property. The term 'value' in S.2(1)(u) can only mean the monetary worth of the property that was derived from the criminal activity. This is evident from the words 'value of any such property'. The only method, when a property, which is unconnected with the proceeds of crime, can be attached, is when the property derived out of the criminal activity was taken out of India or is held outside the country. Under no other circumstance does the statute mandate attaching a property unconnected with the proceeds of crime.

22. The statute never intends to attach or confiscate all properties of a person connected with the crime. Moreover, the consequences of a crime cannot have a retroactive implication. Arbitrariness will loom large if the implication of a crime is extended to anything done before the crime itself was committed. The principle of ex post facto law, enshrined in Article 20 of the Constitution of India, protects against punishment or penalty for anything which was not an offence at the time it was committed. Though the said principle may not have application stricto sensu in relation to proceeds of crime, still the philosophy behind the concept cannot be brushed aside.

23. Further, the Supreme Court had, in *Pavana Dibbur v. Directorate of Enforcement* [2023 SCC OnLine SC 1586], specifically considered the question of attaching property acquired prior to the commission of the crime and held, in the negative. In the afore noted decision, paragraphs 15 and 19 are relevant wherein it was observed, after referring to paragraph 253 of *Vijay Madanlal Choudhary's* case, as follows:

“15. The condition precedent for the existence of proceeds of crime is the existence of a scheduled offence. On this aspect, it is necessary to refer to the decision of this Court in the case of *Vijay Madanlal Choudhary's* case as follows:

"253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money - laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now

19.Another allegation is that both the first and second properties have been acquired out of the proceeds of crime. The first property, ex facie cannot be said to have any connection with the proceeds of crime as the acts constituting the scheduled offence took place after its acquisition..... This is not a case where any material is placed on record to show that the sale consideration was paid from a particular bank account of the appellant. Therefore, it is not possible to record a finding at this stage that the second property was not acquired by using the proceeds of crime." (emphasis supplied).

24. The contention of the learned ASG that the observation in paragraph 298 of Vijay Madanlal Choudhary's case (supra) though impressive at first blush, is not legally credible on a deeper consideration. The observation in paragraph 298 ought to be read in the light of paragraph 253 apart from paragraphs 106 and 170 (of SCC Online). The latter two paragraphs are extracted as below:

"106. The proceeds of crime being the core of the ingredients constituting the offence of money laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime.

170. Be it noted that the attachment must be only in respect of property which appears to be proceeds of crime and not all the properties belonging to the concerned person who would eventually face the action of confiscation of proceeds of crime, including prosecution for offence of money laundering. As mentioned earlier, the relevant date for initiating action under the 2002 Act - be it of attachment and confiscation or prosecution, is linked to the inclusion of the

offence as scheduled offence and of carrying on the process or activity in connection with the proceeds of crime after such date. The pivot moves around the date of carrying on the process and activity connected with the proceeds of crime; and not the date on which the property has been derived or obtained by the person concerned as a result of any criminal activity relating to or relatable to the scheduled offence.” (emphasis supplied)

25. Apart from the above, the decision in Vijay Madanlal Choudhary’s case (supra) dealt with, as is observed in the initial part of the said judgment itself, only about the challenge to the relevant provisions of the PML Act, and did not deal with facts and issues. However, in Pavana Dibbur’s case (supra), the Supreme Court specifically dealt with the question regarding the attachment of properties acquired prior to the commission of the predicate offence. Thus, on a combined reading of the decisions in Vijay Madanlal Choudhary’s case, (supra) and Pavana Dibbur’s case (supra), it is evident that the immovable property acquired by the petitioners prior to the commission of the predicate offence cannot be attached under section 5 of the PML Act, unless the proceeds of crime were taken out of the country.

26. The above view is fortified by the decision of the High Court of Andhra Pradesh in Kumar Pappu Singh v. Union of India, Ministry of Finance and Others [2021 SCC OnLine AP 983], which held that the properties purchased before the commission of offence cannot fall within the definition of ‘proceeds of crime’ and cannot be attached or confiscated under the Act. The High Court of Patna in HDFC Bank Limited Chotisaraiganj v Government of India [2021 SCC OnLine Pat 4222], held that the property derived from a legitimate source cannot be attached on the ground that the property derived from the scheduled offence is not available for attachment. Similarly, the High Court of Punjab & Haryana in Seema Garg v Deputy Director, Directorate of Enforcement [2020 SCC OnLine P&H 738] had held that the property acquired prior to the commission of offence cannot be attached unless the property acquired from the scheduled offence was taken or is held out of the country. This Court had also, in Satish Motilal Bidri v. Union of India [2024 (4) KLT 198] held that provisions in the PML Act cannot be used to proceed against properties that are unconnected with any of the criminal activity in question.

27. A perusal of Ext.P1 reveals that the authority who issued the said order had no case that any proceeds of the crime involving the petitioners had been taken out of the country. In such circumstances, the attachment of properties purchased by the petitioners prior to 2014, under the provisions of section 5(1) of PML Act is ex-facie null and void and wholly without jurisdiction.

28. As mentioned earlier, three of the petitioners’ properties which were provisionally attached as per Ext.P1 were purchased on 26.09.1997, 18.06.1999 and 18.04.1987, which were even before the PML Act came into existence. Since this Court is of the view that the provisional attachment of properties purchased prior to 2014 cannot be proceeded against under section 5 of PML Act, the said

order of attachment to that extent is wholly without jurisdiction. Petitioners need not be relegated to pursue the alternative remedy for those three properties. Therefore the provisional order of attachment relating to the immovable properties purchased by the petitioners prior to 2014 is liable to be set aside.

In the result, the provisional attachment of three of the immovable properties stated in Ext.P1 order which were acquired on 26.09.1997, 18.06.1999 and 18.04.1987 is hereby quashed. As far as the remaining properties are concerned, the petitioners are relegated to pursue the statutory remedies available under law.

This writ petition is allowed in part.