

(2017) 10 KAR CK 0004
In the Karnataka High Court
Case No : 11544 of 2017 (GM-RES)

DEVAS MULTIMEDIA PRIVATE LIMITED

APPELLANT

Vs

THE JOINT DIRECTOR & Ors

RESPONDENT

Date of Decision : 04-10-2017

Acts Referred:

Constitution of India, Article 226, Article 227, Article 20(1) - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court -

Citation : (2017) 10 KAR CK 0004

Hon'ble Judges : B.S.Patil

Bench : SINGLE BENCH

Advocate : UDAYA HOLLA, NANDISH A.PATEL, OMAR AHMED, SUSHAL TIWARI, K.M.NATARAJ, P.KARUNAKAR

Final Decision : Dismissed

Judgement

1. In the present writ petition filed under Articles 226 and 227 of the Constitution of India, petitioner - Devas Multimedia Private Limited, a company registered under the provisions of the Companies Act, 1956, is calling in question provisional attachment order dated 27.02.2017 issued by the Joint Director, Enforcement Directorate, Bengaluru Zone Office, Bengaluru, under Section 5(1) of the Prevention of Money-Laundering Act, 2002 (for short, "the PML Act") and the show-cause notice dated 20.02.2017 issued by the Adjudicating Authority (PMLA), New Delhi under Section 8 of the PML Act.

2. By the provisional attachment order, respondent No.1 has provisionally attached petitioner's mutual fund deposits and bank accounts for a period of 180 days. The show-cause notice is issued by the Adjudicating Authority pursuant to an application filed on 20.02.2017 by the Deputy Director, Enforcement Directorate under Section 18(10) read with Section 17(4) of the PML Act. The showcause notice calls upon the petitioner to show-cause why the properties or records seized or frozen under Section 17 of PML Act should not be retained as

property involved in money laundering and required for the purpose of confiscation.

3. Petitioner contends that allegations made against it are totally false, frivolous and malafide and that it had not violated any provisions of PML Act.

4. It is the case of petitioner that there was an agreement between itself (Devas Multimedia Limited) and Antrix Corporation Limited, a Government of India Company (a wholly owned subsidiary of the Department of Space) on 28.01.2005 for Lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft. It is the further case of the petitioner that it applied to the Foreign Investment Promotion Board (for short, "FIPB") for approval in respect of the then contemplated investments to be made in the petitioner by Telecom Ventures LLC and Columbia Capital LLC or their subsidiaries. The FIPB granted its approval to the petitioner's application on 02.02.2006.

5. Antrix terminated the agreement with the petitioner by letter dated 25.02.2011. Petitioner disputed the action alleging lack of bonafides and absence of valid grounds for termination. Petitioner alleges that as it did not accept the termination and was intending to invoke arbitration, in order to harass the petitioner, Department of Space, Government of India instructed the Department of Revenue and Department of Corporate Affairs to investigate matters pertaining to petitioner, particularly issues with reference to Foreign Exchange and Management Act (for short, the "FEMA") and PML Act.

6. On 29.06.2011, petitioner claims to have invoked arbitration under the ICC Rules challenging termination of the agreement by Antrix and seeking specific performance and in the alternative compensation/damages in a sum of USD 1.4 billion. Petitioner alleges that because of initiation of arbitration proceedings by petitioner, in order to harass the petitioner and its Directors both present and past, series of coercive actions have been initiated against petitioner including the impugned actions.

7. Petitioner alleges that because of the direction issued by the Department of Space, Ministry of Corporate Affairs commenced investigation under the Companies Act through the Registrar of Companies. Petitioner further alleges that Antrix having failed in its attempt to get stay of the arbitration proceedings adopted methods to subject the petitioner to several baseless legal proceedings and investigations with a malafide intention. Reference in this regard is made to letter dated 02.02.2012 by Secretary, Ministry of Corporate Affairs to the Department of Space; letter dated 15.03.2013 by Secretary to Department of Space to Ministry of Corporate Affairs; letter dated 17.01.2014 by Department of Space to Ministry of Corporate Affairs to contend that State machinery was being abused and misused for fishing and roving enquiry in order to create a false defence and to force the petitioner not to pursue legitimate remedies.

8. Petitioner urges that an Award was passed in September, 2015 in favour of petitioner directing Antrix to pay a sum of USD 562.5 million along with interest;

the proceedings initiated by Income Tax Department under Section 263 of Income Tax Act were also stayed.

9. Petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act before Delhi High Court seeking to secure the amount awarded by the Arbitral Tribunal in favour of petitioner. It is urged that respondents after about 4 - years of roving and fishing investigation purported to lodge a complaint on 31.05.2016 making baseless allegations of violation of FEMA; thereafter, impugned show-cause notice dated 06.07.2016 was issued based on the complaint dated 31.05.2016, which was apparently at the instance and instructions issued by Department of Space, Government of India, on 01.06.2011 to the Department of Revenue, calling upon it to investigate the petitioner under relevant provisions of FEMA. Hence, it is urged that the show-cause notice issued has been actuated by malafide intention.

10. Learned Senior Counsel appearing for petitioner ? Sri Udaya Holla has addressed his arguments for petitioner. Sri K.M.Nataraj, learned Additional Solicitor General has appeared for the respondents.

11. At the outset, learned ASG has raised question regarding maintainability of the petition filed against the provisional attachment order and the show-cause-notice issued. He has relied on number of judgments of the Apex Court and the High Courts to contend that writ petition is not maintainable against the show-cause notice and the provisional attachment order.

12. Learned Senior Counsel Sri Udaya Holla appearing for petitioner has urged the following contention asserting that present writ petition is maintainable though it is filed against the provisional order of attachment and the showcause notice issued. (i) that action of respondent - authorities is malafide and hence, petition under Articles 226 and 227 is maintainable;

(ii) that the proceedings initiated and investigation sought to be conducted by the respondent - authorities under PML Act is without jurisdiction;

(iii) that the respondents were applying the provisions of PML Act with retrospective effect contrary to law;

(iv) as there is non-existence of proceeds of crime, provisions of PML Act does not apply;

(v) that the provisional attachment order is bad in law because there were no reasons to believe that petitioner was in possession of proceeds of crime and that they were likely to be concealed or transferred, etc.

13. Elaborating all the above contentions, Sri Holla urged that after the petitioner - company invoked ICC Arbitration, the Government of India has started to harass the petitioner - company and its Directors, present and past, with a malafide intention, which is evident from the instructions contained in the letter dated 01.06.2007 issued by Department of Space to Department of Revenue.

14. In the wake of this contention, it is necessary to refer to Annexure-J - letter written by Doctor K.Radhakrishnan, Secretary, Department of Space, addressed to Sri D.K.Mitthal, Secretary, Department of Corporate Affairs, North Block, New Delhi. Contents of the said letter reveal that Antrix Corporation Limited had entered into an agreement with petitioner for lease of transponders in the S-Band on two satellites. The said subject matter was reviewed in the Department in the light of increased demand for S-Band Transponders for National that is to say strategic and societal needs. That, Government had decided that transponder capacity in the S-Band would not be made available for commercial purpose, hence agreement between Antrix and petitioner was annulled. As there were certain question raised regarding the manner in which the agreement was entered into and the agreement itself, a high power review committee had been set up by the Government to enquire into the said aspect; the committee submitted its recommendation; after examining the recommendation, the competent authority had decided that certain matters be investigated by Department of Corporate Affairs and also Department of Revenue. The matters to be investigated as enumerated in the letter dated 01.06.2011 - Annexure-J are as under: "(e)The reasons given by M/s Devas for issuing shares at such high premia and the promises which were offered to the share holders in this process;

(f) The efforts made by the Company in investing in development of hand-held hybrid technology equipment which were part of their contract;

(g) The profits made by the promoters/share holders merely by diluting their original share holdings; and;

(h) Any other issue which is incidental to the main context of the investigation with reference to the relevant provisions of Foreign Exchange Management Act, 1999, Prevention of Money Laundering Act, 2002, Companies Act, 1956; and other Legislation that may come to light during the course of investigation."

15. It is clear from Annexure-J - letter that decision to undertake investigation through the Department of Corporate Affairs and Department of Revenue was not at the instance of Department of Space, but was on account of the recommendation made by the High Powered Review Committee. By the mere fact that any other issue which was incidental to the main context of the investigation with reference to FEMA, PML Act, Company Act and other legislation that might come to light during the course of investigation had to be also enquired into, it cannot be said the authorities were acting with a malafide intention. Such a conclusion of malafide action cannot be arrived at by this Court based on Annexure-J - letter, so as to restrain the authorities from proceeding in accordance with the provisions of law. Indeed, as the matter is seized by the Adjudicating Authority all questions can be urged before it.

16. Similarly, mere fact that the High Court of Delhi has stayed proceedings initiated by the Registrar of Companies does not automatically lend support to the contention of the petitioner that action initiated under the provisions of PML

Act are the result of malafide intention on the part of the respondent - authorities. Reliance placed on Annexure- S - letter in this connection, written by Antrix Division of Department of Space to the Secretary, Ministry of Corporate Affairs, New Delhi, cannot be of much help to the petitioner for invoking the writ jurisdiction, because that was in connection with interim order granted by the Delhi High court staying the investigation initiated under Section 235 of Companies Act and requesting for moving the Court for vacation of the interim stay. If vacation of the interim order facilitated investigation by Ministry of Corporate Affairs and helped Antrix in the on-going arbitration proceedings as pointed out in the said letter Annexure-S, the same cannot per se be regarded as a malafide action on the part of respondents herein in initiating proceedings under the PML Act which is the result of recommendation made by the High Powered Committee as already referred to above.

17. Hence, reliance placed by the learned Senior Counsel for the petitioner on the judgments in the case of BAHADUR SINGH LAKU BHAI GOIL Vs. JAGDISH BHAI M.KAMALIA & OTHERS - 2004 (2) SCC 65; RAVI YESHWANTH BHOIR VS. DISTRICT COLLECTOR, RAIGAD & OTHERS - 2012 (4) SCC 407; AND TONDON BROTHERS Vs. STATE OF W.B. & OTHERS - 2001 (5) SCC 664 would be of no help as they have no application to the facts of the present case.

18. The next contention urged by learned Senior Counsel for petitioner is that respondents have acted without jurisdiction in initiating proceedings under Chapter-II & III of PML Act regarding attachment and confiscation. In this connection, it is urged that basic requirement for initiating action is commission of offence resulting in "proceeds of crime" as defined under Section 2(u) of PML Act. It is urged that "proceeds of crime" means any property derived or obtained directly or indirectly by any person as a result of criminal activity relating to scheduled offence (emphasis supplied). It is urged that the entire action is based on the alleged offence of cheating and criminal conspiracy for which CBI had filed charge sheet and there was no scrutiny of the relevant materials by independent investigation under the PML Act, therefore, respondent No.1 had virtually abdicated its statutory duty to investigate the matter in a fair and transparent manner, hence, the action was illegal.

19. It is in this connection only petitioner has urged the other ground pertaining to retrospective application of PML Act by the respondents contrary to law. Sri Holla contends that jurisdictional facts required to invoke the provisions of PML Act are absent because offences alleged against the petitioner were in relation to transactions of the year 2005. It is urged that principal allegation made being that some public official of the Government of India and Antrix Corporation Limited had cheated the GOI by abusing their official position in order to cause favour to the petitioner - Company and that there was criminal conspiracy, in that the accused public servants had given rights to petitioner - company for delivery of video, multimedia and information services to mobile receivers in vehicles and mobile phones via S-Band through GSAT - 6 and GSAT - 6A

satellites and terrestrial systems in India, the said acts did not constitute scheduled offence as on the date the aforesaid offences of cheating and conspiracy under Section 420, 120B of IPC and Section 13 of the Prevention of Corruption Act, 1988 were allegedly committed in the year 2005; they were not part of the schedule appended to the PML Act; those offences were included in the schedule to PML Act with effect from 01.06.2009 pursuant to PML (Amendment) Act (Act No.21/2009); hence, any retrospective application of penal law was unconstitutional being violative of Article 20(1) of Constitution of India. Petitioner has placed reliance on the following decisions in support of their contention: 1. RAO SHIV BAHADUR SINGH & ANOTHER Vs. STATE OF VINDHYA PRADESH - AIR 1953 SCR 394;

2. SONI DEVRAJ BHAI BABUBHAI Vs. STATE OF GUJARAT & OTHERS - 1991 (4) SCC 298;

3. VARINDER SINGH Vs. STATE OF PUNJAB & ANOTHER - 2014 (3) SCC 151;

4. SUKHDEV SINGH Vs. STATE OF HARYANA - 2013 (2) SCC 212;

Judgments of various other High Courts have also been relied upon.

20. In reply to this important contention, learned ASG, having taken me through the relevant provisions of PML Act, its scheme, particularly by referring to Section 2(u), 3, 5(1)(a), 8, 23, 26 and 45 contends that action initiated was in accordance with law and within the purview of the authority and jurisdiction of the respondent - authorities.

21. Section 2(u) defines the term "proceeds of crime" meaning 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.

22. The expression "scheduled offence" is defined under Section 2(y) which means - (i) the offences specified under Part A of the Schedule; or (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or (iii) the offences specified under Part C of the Schedule. Section 5 relates to attachment of property involved in money laundering. Section 5(1)(a) reads as under: "5. Attachment of property involved in moneylaundering -

(1) Where the Director or any other officer not below the rank of Deputy Director authorized by the Director for the purpose 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"

23. A conjoint reading of the above provisions would show that the emphasis of Section 5 is to attach property involved in money laundering regardless of

whether it was in possession of person charged of having committed a scheduled offence or any other person, provided it was shown to be proceeds of crime and that 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 the PML Act.

24. It has to be noticed that PML Act has been enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering. Section 3 of the Act provides that whoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

25. It is not in dispute that Section 420 IPC has been included as a scheduled offence only in 2009, so also Section 120B IPC and Section 13 of the Prevention of Corruption Act. The question whether petitioner was involved in money laundering as provided under Section 3 of the PML Act has to be decided by the competent authority. What is the date of laundering in the facts of the present case and what process or activity by which illicit money was being projected as untainted in the facts and circumstances of the case has to be examined by the authorities. This again is an important fact which the authority has to examine. It becomes a mixed question of law and fact.

26. The Act seeks to prevent money laundering which in plain term means - preventing legitimization of money earned through illegal and criminal activities. Such actions of money laundering would wreck the economy of the nation as also the security and well being of its citizens. Commercial frauds associated with money laundering of higher magnitude would certainly affect economic fabric of the nation. Therefore, as per Section 5 of PML Act, the authority concerned is entitled to pass a provisional attachment order if he had reason to believe that any person is in possession of any proceeds of crime. Whether any person is in possession of proceeds of crime is a question of fact. At the stage when an order of provisional attachment is passed, the authority must have reason to believe that property in possession of person constitutes proceeds of crime involved in money laundering. This conclusion is reached before the process of hearing had begun without any participatory process of hearing. The parties may be ultimately able to produce materials to disprove the assumption regarding involvement of property in money laundering. The process of provisional attachment being preemptive in nature is an urgency clause. The purpose of a provisional attachment order is to prevent a scenario where any proceedings under the PML Act might get frustrated if the property was not attached immediately. It would be always open to the affected person to place such materials as would convince the authorities that the property attached was not involved in money laundering or that it was not part of the proceeds of crime. Hence, at this stage, the contention urged by petitioner alleging that authorities

have acted against the settled principles of law by retrospectively operating penal laws thereby violating Article 20(1) of the Constitution of India, cannot be accepted, at this stage. The said contention proceeds on the assumption that the act of money laundering had occurred in the year 2005 or prior to 2009. What shall happen if any person continues to derive the property or value of such property, no matter when the offence was inserted in the schedule? Whether proceedings can be initiated against such person at all are larger questions that can be examined based on relevant facts as and when they emerge during the course of adjudication.

27. Learned Additional Solicitor General has submitted that there could be interconnected transaction as conceived by Section 23 of PML Act which might be extension of the same transaction that had taken place prior to the amendment that could also be dealt with as they would become part of money laundering activity. It is not necessary to go into this aspect at this stage.

28. In the instant case, as the adjudication process has not yet started and the matter is at the stage of show-cause notice and provisional attachment, it is not proper for this Court to express any opinion on this aspect of the matter. It is also evident from the show-cause notice that allegations of money-laundering are made in respect of transactions spanning over a period of time, even beyond the period when the amendment was brought about. This is evident from paragraphs 9.40 and 9.46 of the showcause notice.

29. It is well established by catena of decisions of the Apex Court that High Court will not entertain a petition under Article 226 of the Constitution, if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken, itself contains a mechanism for redressal of the grievance. This principle is well enunciated in the case of NIVEDITA SHARMA VS. CELLULAR OPERATORS OF INDIA & OTHERS - 2011 (14) SCC 337. In fact, the Apex Court in the case of SPECIAL DIRECTOR & ANOTHER VS. MOHD. GHULAM GHHOUSE & ANOTHER - 2004 (3) SCC 440, has deprecated the practice of High Courts entertaining writ petitions questioning the legality of the show-cause notices, thereby stalling enquiries retarding investigative process initiated to find actual facts with the participation and in the presence of the parties unless the petitioner established absolute want of jurisdiction of authority to even investigate into facts. It is observed in this context that writ petitions should not be entertained and the petitioner should invariably be directed to respond to the show-cause notice.

30. It is necessary to notice that at the stage of provisional attachment under Section 5(1) of PML Act, a person interested in the enjoyment of the suspect immovable property is not deprived of its enjoyment. Taking over possession of the attached property would arise upon confirmation of the provisional attachment. On an analysis of several provisions of the Act in particular Section 5, Section 8 and Section 26, it becomes clear that the legislative intent underlying the sequential provisions for provisional attachment, confirmation of

such attachment and eventual confiscation or for retention of a seized property and also providing remedy of appeal to the appellate authority, is to balance public interest with the individual interest of the person against whom allegations are made and action is initiated. A mechanism is provided under the Act for redressal of the grievance at different stages that is to say before the Adjudicating Authority at the first instance and latter before the Appellate Tribunal. It is only when a person is aggrieved by the order of the Appellate Tribunal that he may file an appeal to the High Court as per Section 42 of PML Act. When such is the mechanism provided for the effective redressal of the grievance within the four corners of the provisions of the PML Act, petitioner is not justified in rushing to this Court at the stage of show-cause notice and the provisional order of attachment. Therefore, it is not appropriate for this Court to enter into various contentions urged by petitioner.

31. In the case of ASST. COLLECTOR OF CENTRAL EXCISE, WEST BENGAL VS. DUNLOP INDIA LTD., & OTHERS - 1985 (19) ELT 22 (SC), the Apex Court after referring to earlier decision on the point has held that where the statute itself provides the petitioner with an efficacious alternative remedy by way of appeal to the prescribed authority and a second appeal, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring the complete statutory machinery.

32. For all the reasons stated above, I am of the view that this is not a case where extraordinary jurisdiction of High Court under its writ jurisdiction has to be exercised ignoring the efficacious machinery provided under the Act. Hence, without expressing any opinion on the merits of the matter and making it clear that whatever prima facie opinion is expressed shall be confined only for the purpose of deciding the maintainability of the writ petition, by reserving liberty to the petitioner to urge all necessary grounds before the competent authority, this writ petition is dismissed. It is made clear that that period taken in prosecuting this writ petition before this Court shall be excluded for the purpose of time limit prescribed under the Act, both for seeking redressal by the petitioner and also with regard to duration of the provisional attachment order. Parties shall bear their respective costs.