(2023) 10 ATPMLA CK 0001

In the Appellate Tribunal Under Prevention Of Money Laundering Act

Case No : MP-PMLA-6033, 6079, 6107, 6109/SRT/2019, FPA-PMLA-3038, 3059, 3073/SRT/2019

Jayesh Desai APPELLANT

Vs

Deputy Director, Directorate Of Enforcement RESPONDENT

Date of Decision : 31-10-2023

Acts Referred:
Prevention Of Money Laundering Act, 2002 — Section 2(1)(u), 26

Citation : (2023) 10 ATPMLA CK 0001

Hon'ble Judges : Munishwar Nath Bhandari, Chairman;Rajesh Malhotra, Member

Bench : Division Bench

Advocate : Udit Jain, Hardik Modh, Aditya Singla, Sahil Sharma

Final Decision : Dismissed

Judgement

The appeal has been filed under Section 26 of Prevention of Money Laundering Act, 2002 against the order dated 29.03.2019 passed by the Adjudicating Authority confirming the provisional attachment order.

The learned counsel for the appellant Jayesh Desai submitted that the flat attached by the respondent was purchased much prior to the alleged crime and even sold to third party (i.e., appellants namely Rajesh Bhanwarlal Jain and M/s Meridian Jewellery Pvt. Ltd., (in connected appeals) in the year 2012.

The name of the appellant Jayesh Desai did not figure in the initial complaints rather it was shown in the last complaint. The allegation against the accused was regarding preparation of 17 fake Bills of Entries and submitted before the ICICI Bank for fraudulent foreign remittance atHongkong and UAE. Based on it FIR was registered on 11.04.2014. In the said FIR, the appellant Jayesh Desai was not named for commission of crime. However, after further investigation, an ECIR was recorded on 17.04.2014. The allegation against the appellant was finally for embezzlement of the amount to which it was actively connected. The Fake Bill of Entries for foreign remittance was given, however allegation is yet to be proved by the prosecution and in any case when the purchase of flat by the appellant Jayesh Desai is much prior to commission of alleged offence, it could not have been subjected to attachment. It is more so when the property was sold by appellant Jayesh Desai on 18th June, 2012 to other appellants.

The prayer is accordingly to set-aside the provisional attachment order so also the order passed by the Adjudicating Authority.

The appeal has been contested by the learned counsel for the respondent. It is submitted that the flat in question was attached for the value equivalent to proceeds of crime. It was for the reason that the proceeds of crime were not available or traceable in the hands of the appellant at the time of attachment. Thus, even if the flat in question was purchased much prior to the commission of offence, it was rightly subjected to attachment pursuant to the definition of "Proceeds of Crime" given under Section 2 (1) (u) of the Prevention of Money Laundering Act, 2002. The only argument raised by the learned counsel for the appellant would not survive in the light of definition of proceeds of crime and the judgement of Delhi High Court in the case of Prakash Industries &Anr. v/s Directorate of Enforcement Reported, in 2019 SCC Online Del. 7854 and Deputy Director, Directorate of Enforcement,Delhi vs. Axis Bank reported in 2019 SCC Online Del. 7854. The prayer is accordingly made to dismiss the appeal.

We have considered the rival submission of the learned counsel for the parties and perused the record carefully. The only argument raised by the learned counsel for the appellant Jayesh Desai to question the order of provisional attachment and also the order of the Adjudicating Authority is in reference to the date of alleged commission of offence and the date of purchase of the flat. It is submitted that flat in question was purchased much prior to the alleged commission of offence, thus could not have been subjected to attachment. It is more so, when it was sold to third parties by the sale deed in the month of June, 2012 itself. That is much prior to even registration of FIR.

It is with the further statement that name of the appellantJayesh Desai figured in the last complaint only, otherwise he was not initially named in the FIR and also the ECIR.

The only argument raised by the appellant has been considered by us and for the aforesaid, reference of the definition of "Proceeds of Crime" would be relevant and is quoted hereunder: -

"Section 2 (1) (u)"

"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];

The perusal of the definition refers not only the proceeds of crime derived or obtained, directly or indirectly as a result of criminal activity, but the value of such property. The definition has three parts. The first part of the definition refers to a property which is obtained or derived out of criminal activity. The second part is regarding value of such property and lastly if the property is taken and held outside the country then equivalent value of the property within the country. In the instant case,appellant gave Fake Bill of Entries for remittance in UAE. The proceeds was not available or traceable in the hands of the appellant at the time of attachment. Thus, the flat in question was attached for value equivalent to the proceeds of crime. It is permissible under law and has been elaborately clarified by Delhi High Court in the case Prakash Industries and Axis Bank (Supra)

The relevant paras no. 103 to 111 of the judgement in the case of Axis Bank (Supra) are quoted hereunder: -

"103. The special legislation against money-laundering (PMLA) seeks to enforce the sanction of confiscation (initiated by attachment) against ill-gotten assets expecting to ensnare them in a net wider than under most of the existing laws germane to the issue of economic well-being, security and integrity of India as a sovereign State. The expansive definition of the targeted property, described as "proceeds of crime", as given in section 2(1) (u) is as under: -

"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;

104. The above definition may be deconstructed into three parts: -

(i) property derived or obtained (directly or indirectly) as a result of criminal activity relating to scheduled offence; or

(ii) the value of any such property as above; or

(iii) if the property of the nature first above mentioned has been "taken or held" abroad, any other property "equivalent in value" whether held in India or abroad.

105. It is vivid that the legislature has made provision for "provisional attachment" bearing in mind the possibility of circumstances of urgency that might necessitate such power to be resorted to. A person engaged in criminal activity intending to convert the proceeds of crime into assets that can be projected as legitimate (or untainted) would generally be in a hurry to render the same unavailable. The entire contours of the crime may not be known when it comes to light and the enforcement authority embarks upon a probe. The crime of such nature is generally executed in stealth and secrecy, multiple transactions (seemingly legitimate) creating a web lifting the veil whereof is not an easy task. The truth of the matter is expected to be uncovered by a detailed probe which

may take long time to undertake and conclude. The total wrongful gain from the criminal activity cannot be computed till the investigation is completed. The authority for "provisional" attachment of suspect assets is to ensure that the same remain within the reach of the law.

106. Among the three kinds of attachable properties mentioned above, the first may be referred to, for sake of convenience, as "tainted property" in as much as there would assumably be evidence to prima facie show that the source of (or consideration for) its acquisition is the product of specified crime, the essence of "money-laundering" being its projection as "untainted property" (Section 3). This would include such property as may have been obtained or acquired by using the tainted property as the consideration (directly or indirectly). To illustrate, bribe or illegal gratification received by a public servant in form of money (cash) being undue advantage and dishonestly gained, is tainted property acquired "directly" by a scheduled offence and consideration is also "proceeds of crime", it having been obtained using such bribe as consideration is also "proceeds of crime", it having been obtained "indirectly" from a prohibited criminal activity within the meaning of first limb of the definition.

107. In contract, the second and third kinds of properties mentioned above would ordinarily be "untainted property" that may have been acquired by the suspect legitimately without any connection with criminal activity or its result. The same, however, are intended to fall in the net because their owner is involved in the proscribed criminality and the tainted assets held by him are not traceable, or cannot be reached, or those found are not sufficient to fully account for the pecuniary advantage thereby gained. This is why for such untainted properties (held in India or abroad) to be taken away, the rider put by law insists on equivalence in value. From this perspective, it is essential that, before the order of attachment is confirmed, there must be some assessment (even if tentative one) as to the value of wrongful gain made by the specified criminal activity unless it be not possible to do so by such stage, given the peculiar features or complexities of the case. The confiscation to be eventually ordered, however, must be restricted to the value of illicit gains from the crime. For the sake of convenience, the properties covered by the second and third categories may be referred to as "the alternative attachable property" or "deemed tainted property".

108. Generally, there would be no difficulty in proceeding with the attachment or confiscation of a tainted property respecting which there is material available to show that the same was derived or obtained as a result of criminal activity of specified nature, so long as such property is fund held by the person who had indulged in such criminal activity, it amounting to money-laundering, as indeed those who may have aided or abetted such acts. Dispute, however, is likely to arise in relation to attachment or confiscation upon questions being raised at the instance of the person suspected of money-laundering (or his abettor) as to sufficiency of the material or reasons to believe for such action as indeed of the

fairness or propriety of the procedure followed. Dispute may also arise in such context if the property has been transferred to another person, after it had been acquired by the transaction relatable to money-laundering and before its attachment under PMLA. The third party may have a claim to agitate that it had been acquired by the transaction relatable to money-laundering and before its attachment under PMLA. The third party may have a claim to agitate that it had been acquired by it bonafide and for lawful and adequate consideration.

109. The inclusive definition of "proceeds of crime" respecting property of the second above-mentioned nature - i.e. "the value of any such property" - gives rise (as it has done so in these five appeals) to potential multi-layered conflicts between the person suspected of money-laundering (the accused), a third party (with whom such accused may have entered into some transaction vis-a-vis the property in question) and the enforcement authority (the State). Since the second of the above species of "proceeds of crime" uses the expression "such property, the qualifying word being "such", it is vivid that the "property" referred to here is equivalent to the one indicated by the first kind. The only difference is that it is not the same property as of the first kind, it having been picked up from among other properties of the accused, the intent of the legislature being that it must be of the same "value as the former. The third kind does use the qualifying words "equivalent in value. Though these words are not used in the second category, it is clear that the said kind also has to be understood in the same sense.

110. Thus, it must be observed that, in the opinion of this court, if the enforcement authority under PMLA has not been able to trace the "tainted property" which was acquired or obtained by criminal activity relating to the scheduled offence for money-laundering, it can legitimately proceed to attach some other property of the accused, by tapping the second (or third) above-mentioned kind provided that it is of value near or equivalent to the proceeds of crime. But, for this to be a fair exercise, the empowered enforcement officer must assess (even if tentatively), and re-evaluate, as the investigation into the case progresses, the quantum of "proceeds of crime" derived or obtained from the criminal activity so that proceeds or other assets of equivalent value of the offender of money-laundering (or his abettor) are subjected to attachment to such extent, the eventual order of confiscation being always restricted to take over by the Government of illicit gains of crime, the burden of proving facts to the contrary being on the person who so contends.

111. If such other property as above (the alternative attachable property or deemed tainted property) is owned by, or held in the name of, the accused, objections to attachment (or confiscation) would generally concern the material on which reasons to believe about money-laundering and acquisition of proceeds of crime are founded or the value of the property which has been attached. Again, the possibility of conflict involving interest of a third party comes in for which the bonafides of the acts through which such third party may have

acquired interest in the targeted property, as indeed of the lawfulness and adequacy of consideration for such acquisition, would need scrutiny.”

In the light of judgment in the case Supra, we do not find any force in the argument of the appellant. Even if the flat in question was purchased much prior to the commission of crime, it can be attached if the proceeds of crime are not available or traceable in the hand of the appellant at the time of attachment of the property.

So far as sale of the flat in favour of other appellants vide the sale deed dated 18.06.2012 is concern, it is considered to be without consideration for the reason that cheques tendered by the purchaser (other appellants) towards the consideration of the property were notencashed and thereby the consideration for sale was never passed on to the appellant Jayesh Desai, which is otherwise a pre-condition for sale of property as per the Indian Contract Act. It was considered to be a sham transaction. The pleas taken by the appellant Jayesh Desai that consideration was taken in cash, but there was nothing to prove the aforesaid. The appellant could not show from where the cash was brought by the purchaser (other appellants), so as to pay it to the appellant Jayesh Desai. In the light of the aforesaid, the sale of the flat in question was taken to be asham transaction. It is also that if flat has been sold by the appellant then why he is pursuing the case against the attachment. The Adjudicating Authority did not find any material to accept the contention of the appellants and accordingly it confirmed the order of provisional attachment. In the light of the facts and the only legal ground raised by the appellant Jayesh Desai to challenge the order of provisional attachment so also the order of Adjudicating Authority cannot be accepted. In the result, appeal filed by appellant Jayesh Desai fails and it is dismissed accordingly.

In the light of the reasoning given with respect to appeal of Jayesh Desai, the two connected appeals filed by other appellants/ purchasers of property could have been dismissed on merit, but dismissed for non-prosecution in absence of representation on their behalf.

