(2017) 06 ATPMLA CK 0001

In the Appellate Tribunal Under Prevention Of Money Laundering Act

Case No : FPA-PMLA-1123/DLI/2015

Kotak Mahindra Bank Ltd. APPELLANT

Vs

Financial Intelligent Unit, Delhi RESPONDENT

Date of Decision : 28-06-2017

Acts Referred:

Prevention Of Money Laundering (Maintenance Of Records) Rules, 2005 — Rule 2(g), 2(h), 3, 3(d), 5, 5(2), 7, 7(3), 8, 8(3), 9

Prevention Of Money Laundering Act, 2002 — Section 2(e), 3, 12, 12A, 13, 13(2)(a), 13(2)(d)

Citation : (2017) 06 ATPMLA CK 0001

Hon'ble Judges : Manmohan Singh, J;Kaushal Srivastava, Member;Anand Kishore, Member

Bench : Full Bench

Advocate : Jagriti Ahuja, Satish Aggarwal, Amish Aggarwal, Neelu

Final Decision : Disposed Of

Judgement

FPA-PMLA-1123/DLI/2015

1. That the present appeal has been filed by Kotak Mahindra Bank challenging the impugned order dated 04.09.2015 passed by the Director, Financial

Intelligence Unit (FIU) India, whereby penalty of Rs.3 Lacs has been imposed in respect of an allegation on the Bank not complying with the

mechanism in detecting and reporting of attempted suspicious transactions (three in number).

2. Admittedly, the sting operation was conducted by the journalists of Cobra Post and purely relying on certain video tape recordings of the

conversation between the bank officials and the journalists of Cobra Post.

3. On merit, it was argued by the appellant that the conversation between the officials of the Appellant and the journalists of Cobra Post demonstrate

that there was no Bank-Customer relationship with the journalists and the entire conversation was in the nature of making inquiries and seeking

clarification from the bank officials with respect to opening of account and other aspects.

4. It was also argued before us that even the transcripts/ video recordings relied upon by the department were edited and were not complete. The said

conversation cannot be said to be an â??attempted suspicious transactionâ? within the meaning of the Prevention of Money Laundering Act and as

defined in Rule 2(g) of the Money Laundering (Maintenance of Records) Rules, 2005 or a â??transactionâ?? itself [Rule 2(h)].

5. It was submitted that the video tapes relied upon by the Department were not accompanied by Certificate required by law under Section 65B of the

Act. Thus, the said video tapes could not have been the basis of any investigation or any proceedings without there being any legal proof thereof.

Honâ?ble Supreme Court in the matter of Ram Singh & Ors. vs. Col. Ram Singh, AIR 1986 SC 3 P,ara 32 - has observed the conditions precedent

for admissibility of tape recorded statement which are given a complete go-by by the department.

6. The Appellant relies upon various provisions of Money Laundering Act and related rules, especially Rule 2(g) and 2(h) of the Money Laundering

(Maintenance of Records) Rules, 2005, which defines â??suspicious transactionâ? and which also includes such â??attempted transactionâ? and

transaction respectively. It is submitted that the present conversation between the journalists and the officials of the bank, under no circumstances, can

be said to be a transaction or a suspicious transaction within the meaning of Rule 2(g) and Rule 2(h) and the conversation between the journalists and

the officials of the bank cannot be covered under the attempted transaction as there was no â??attemptâ??.

Hon'ble Supreme court in catena of judgement has explained elaborately as to what would constitute an attempt.

7. The reliance in this regard is placed on behalf of appellant that in the matter of State of Maharashtra vs. Mohd. Yakub & Ors., (1980) 3 SCC 57,

wherein the Honâ?ble Supreme Court under the Customs Act has defined as to what would constitute an attempt. Therefore, in the present scenario,

there is no â??suspicious transactionâ?? or â??attempted transactionâ??.

8. It is submitted that the impugned order and proceedings wherefrom the same is passed, are illegal, unilateral and arbitrary.

9. It is stated on behalf of the appellant that without prejudice and without admitting any allegation against the Bank, warning letter dated 18.09.2014

issued to the bank was sufficient penalty imposed on the Bank for the related contravention and there was no occasion for the Department to levy

Rs.3 Lacs of penalty u/s 13(2) (d) of the Act since the letter dated 18.09.2014 was issued condoning the act if any done.

10. Apart of arguing the matter on merit and without prejudice to contest the matter, it is urged on behalf of the appellant that even otherwise, once

Department has decided to close the matter under section 13(2)(a) of Prevention of Money Laundering Act, 2002 in view of warning vide closure

letter dated 18.09.2014 in respect of some other transaction as well as dispute in hand, the imposition of penalty vide the impugned order was

unsustainable. The argument of the respondent now cannot be accepted that despite of addressing various letters where the errors in any way

condoned the same admission was merely of typographical error. The impugned order was passed as an afterthought as the department is converting

the similar disputes with other bank wherein the department has closed the case by passing the order u/s 13 (2) (a) of the Act but the Department in

the present case has also passed the order u/s 13(2) (d) whereby maximum penalty was imposed.

11. In order to know as to whether, it was typing mistake or not, it is necessary to refer the contents of few letters with following details:-

i) On 10.07.2013, some information is sought by the Department. The case number referred is F25- 1/2013-FIU-IND. This is responded by the

erstwhile ING Vysya Bank on 05.08.2013. The contents of both letters are given as under:-

â??F. No. 25-I/2013/FIU-IND/Pt-I

Government of India

Ministry of Finance

Department of Revenue

Financial Intelligence Unit-

India (FIU-IND)6,u Floor, Hotel

Sam rat, Kautilya Marg

Chankyapuri, New Delhi - 1 10

021,

Date: 10.07.2013

To,

Padmaja B

Principal Officer

Head Compliance A ML Sanctions Fraud

Monitoring* INC Vysya Bank Limited, No.22, MG

Road,

Bangalore,

Karnataka-560001

Sub: Sting operation by Cobrapost -Alleged Money Laundering in banks -Reg.

Dear Sir/Madam,

We are in receipt of your preliminary report. You are asked to submit further information as per Questionnaire enclosed (Annexure-A).

2. In order to facilitate Computer Assisted Audit (CAA.) Techniques for possible enquiries under section 13 of the PM.LA, we would, like to obtain

some information about your accounting and computer systems in the form for ""Survey of Computer Systems "" (Annexure-B).

3. You are also requested to give details of roles & responsibilities assigned to all ihc officials identified in the Cobrapost sting operation.

4. This issues with the approval of the Director, FIU-IND,

Encl: as above

(A.Y. Gokhale)

Deputy Director

Email: anandg@fiuindia.gov.in Tel.No. 011-26883012

Financial Economic Crime 05/08/2013

Ref. No. Comp/64Z/2013

Mr. A.Y. Gokhale

The Deputy Director Finance

Intelligent Unit-India 6th Floor,

Hotel Samrat, Kautilya Marg,

Chanakyapuri,

New Delhi-110021

Dear Sir,

Reg: Sting operation by Cobrapost â?" Alleged Money Laundering in Banks

We acknowledge receipt of your letter no. F.No, 25-1/2013/FIU-IND/Pt-t dated 10.07.2013 on the captioned subject.

As called for therein, please find the following annexures along with this letter:

- Information as per the given Questionnaire (under Annexure A), and

Information on our accounting and computer systems to facilitate Computer Assisted Audit Techniques (under Annexure B).

- Roles and responsibilities assigned to the officials identified in the Cobra post sting operation are available in Annexure A under point number 11.

Kindly let us know if you need any further information or if you have any clarifications in the regard.

Yours truly,

(Padmaja B)

Head-Compliance & MI.RO

Encl: As above

ING Vysya Bank Limited

Regd. & Corporate Office : 'ING Vysya House' # 22, M. G. Road, Bangalore - 560 001, India'. T : +91 80 25005000

www. ingvysya bank.com.

12) Admitted by, the show cause notice is issued on 27.01.2014 and a response thereto is given on 26.02.2014. In the meantime another letter dated

03.02.2014 with the same file number from Ms. Renu Amitabh, Additional Director was received to which, reply dated 21.02.2014 was given. The

same are reproduced below:-

F.No. 25-1/2013/FIU-IND

Government of India

6th Floor, Hotel Samrat

Kautilya Marg,

Chanakyapuri

NewDelhi-110 021

Dated: 27th January, 2014

Subject: Notice under Section 13 of Prevention of Money Laundering Act, 2002 for noncompliance with the provisions of Section 12

ING Vysya Bank Ltd (hereinafter referred to as 'bank') is a banking company as defined under Section 2(e) of the Prevention of Money Laundering

Act, 2002 (hereinafter referred to as the 'Act').

2. Section 12 of the Act and the Prevention of Money. Laundering (Maintenance of Records) Rules, 2005 (hereinafter referred to as the 'Rules'),

framed under the Act imposes obligations on banking companies to inter alia verify the identity of the clients, maintain records of specified transactions

and report to Director, Financial Intelligence Unit - India (hereinafter referred to as 'Director, FIU-IND') information relating to such transactions.

These reports include reports on cash transactions, suspicious transactions and counterfeit currency transactions.

3. Rule 3 of the Rules specifies the transactions, the records of which are to be maintained; Rules 5, 7 & 8 of the Rules prescribe the procedure,

manner and time of maintaining and furnishing such information; and Rule 9 of the Rules prescribes the procedure and manner of verification of

records of identity of clients.

4. Section 13 of the Act confers on the Director, FIU-IND powers to enquire into cases of failure to comply with the provisions of Section 12 of the

Act and the Rules there under and to levy a fine for each such failure.

5. Vide letter dated July I0lh, 2013, the bank was asked whether any STR was reported for attempted transactions reported by the Cobra Post. The

bank in its reply dated August 5, 2013 confirmed that no STR was filed for attempted transactions.

6. As per the definition of STR in Rule 2(g) of PML (Maintenance of Records) Rules, STR means a transaction referred to in clause (h) including an

attempted transaction. Therefore the three branches visited by Cobrapost i.e. Chandigarh, Banjara Hills and Rash Behari Avenue Branch should have

filed STR for attempted suspicious transactions but no STR was filed by the bank in respect of these attempted transactions. This is in contravention

of provisions of sec 12(b) of Prevention of Money Laundering Act, 2002 read with Rules 2(g), 3(d), 7(3),and 8(3) of PML (Maintenance of Records)

Rules.

Ref: COMP/2I5/S013-20H

Date. 26.02.2014

The. Director,

Financial Intelligence Um't - India, Department of

Revenue, Ministry of Finance'; Government- bfIndia,

6th Floor, Hotel Sarnrat, Kautilya'.Marg>

Chatiakyapuri; New Delhi- 110 021.

Dear Sir, '

Sub: Notice under Section 13 of the Prevention of Money Laundering Act 2002 (PML Act)

Ref: Your letter F.No. 25-1/2013/FIU-IND dated 27th January 2014

****

We acknowledge the receipt of your letter under reference received by the Bank on 7th February, 2014 and we submit our reply as under:

At the outset, we wish to reassure you that our Bank fully understands the requirements under the PML Act and has put in place processes and

guidelines to ensure its compliance. These apart, periodic trainings are provided to the concerned Bank staff to create awareness and meet the

objectives of the PML Act. Messages from our Managing Director & CEO are sent to all the staff of our Bank, from time to time reiterating lack of

tolerance for anyone resorting to unethical practices or compromising on the statutory, regulatory requirements and ethical standards. Accordingly, our

staff have significant experience to comply with all the requirements under the PML Act including those that relate to identification of suspicious

transaction, record maintenance, reporting etc.

We note that the basis of the averments in the letter under reply is the video recording transmitted, published and / or posted in public domain by

Cobrapost; which appears to be an on-line magazine;

Our-Bank has, conducted n thorough investigation into, the matter to ascertain the facts and the veracity of the video recordings 'by Cobrapost; the

entire video containing recordings of discussion that the Cobrapost representative had with our Bankâ??s staff has been thoroughly scrutinized by our

Bank ;and also has been subjected to forensic examination by an independent agency, according to which it is established that the video was pre-

edited. The contents of the video recording has been edited and; extracted by Cobrapost with malafide intentions; to create perceptions in the minds of

the viewers and public at large

INS vysya Bank Limited

Regd., & Corporate Office : lING Vysya House',

22, M.G. Road, , Bangalore â?" 560 001, India.

T +91 80 25005000

www.ingvsyabank.com

13) On 25.03.2014, Department issued another communication for personal hearing and subsequently, on 18.09.2014, the Department in the same file

number referring to the same three STRs, closed the case by issuing a warning letter advising the Bank to be more vigilance in future failing which,

actions can be initiated. The said letter is reproduced below:-

RENU AMITABH

Additional Director FIU-IND

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

FINANCIAL INTELLIGENCE UNIT â?" INDIA â?

6th Floor, Hotel Samrat, Chanakyapuri,

New Delhi-1 10021

Tel. No. : +91-11-24672805, Fax No. : +91-11-26874459

E-mail : renuamitabh@fiuindia.gov.in

F. No. 25-1/2013/FIU-IND Dated 18th Sep,

The Designated Director

ING Vysya Bcink 6th Floor,

ING Vysya House No.22,

IvJG Road Bangalore - 560001

Dear Sir

Sting Operation by Cobra Post

Please refer to your letter dated February 21, 2014 on the above mentioned subject vide which you had submitted your reply to the enquiries made by

us-under section 12A of the Prevention of Money laundering Act, 2002

It is observed that you have filed 3STRs covering 79 transactions for the year 2012-13 subsequent to our queries on the subject under reference. This

implies that the system prevalent in your bank failed to capture the said transactions at the material time. As you may be aware, this implies that the

bank failed to put in place a mechanism to examine, detect and report suspicious transactions thereby violating the provisions of Sec 12 (1)(b) of

PMLA, 2002 read with rules 3(D), 7(3), 5(2) and 8(3) of the PML Rules. You are hereby advised to be more vigilant and exercise caution in future by

making necessary modifications and strengthening the PML related procedures in your bank to prevent the recurrence of such events in the event of

recurrence of these lapses, we will be constrained to initiate compliance proceedings against the bak or the persons responsible in accordance with

Section 3 of PMLA.

This issues with the approval of Director, FIU.

Yours sincerely,

(Renu Amitabh)

14) In case all the letters are read together, it is difficult to accept the arguments of the respondent that the Department can state that the

communication dated 18.09.2014 was in respect of some other case or other transaction or other file. As a matter of fact, it was combined

/consolidated/ common communication dated 18.09.2014 while issuing the warning letter advising the bank to be more vigilant in future failing which

action can be taken. It was combined warning. It is incorrect how to allow that there is any typo error nor the Department has explained as to what

kind of typo error occurred as the impugned order admittedly have been passed in the same file number pursuant to the same show cause notice,

which in the submission of Appellant, was closed on 18.09.2014.

15. It is evident from the record that before initiating proceedings, respondent

vide its communication dated 18.09.2014 after considering the responses

of the Appellant, closed the matter advising the Appellant to be more conscious and vigilance. As it appears from the said letter, the case number

referred is F25-1/2013- FIU-IND and the letter is in relation to three STRs (Suspicious Transaction Reports).

16. It is apparent that after closing the matter on 18.09.2014 by advising the Bank to be vigilant, the impugned order dated 04.09.2015 was passed

without any further show cause notice and in respect of the Cobra sting past matter which were closed by virtue of the warning letter dated

18.09.2014. The present proceedings initiated after closing the matter on 18.09.2014 are afterthought.

17. We are of the considered view that once the proceedings were closed by a warning letter, it could not have been re-opened unilaterally without

any notice/ show cause without following the principles of natural justice. In fact, the party cannot suffer for re-opening of the closed proceedings as

once final decision of closure was taken by the Department by issuance of warning letter dated 18.09.2014 it cannot be re-opened to the detriment of

the Appellant. It is surprising to us that in the impugned order, this issue has not been discussed at all, rather warning letter dated 18.04.2014 is now

sought to be differently interpreted when the document contains the simple language.

18. Since, the appellant is ready to accept the advice of the Department not to do any conversation of the type which has happened in the matter and

that if any such instances covered under section 12 of the Act are there, the same shall be reported to the respondent. The bank shall be more vigilant

in future, we are passing the present order in the same line of warning given by department and not to any action on the advice is accepted by the

appellant.

19. We are of the view, in view of above said reason and circumstance, it is not necessary to go into the present matter on merit once the closure

letter is already issued by the department by giving warning to the appellant.

20. The appeal is accordingly disposed of by setting aside the impugned order in the present case. The amount of penalty deposited by the appellant, if

any in pursuance of the order/interim order shall be released within four weeks.

21. In the circumstances there is no order as to cost.

