

(2012) 07 MAD CK 0005

In the Madras High Court

Case No : Criminal O.P. No. 2240 of 2011

M. Saraswathy and R. Devadass

APPELLANT

Vs

The Registrar Adjudicating Authority and The Deputy Director,
Directorate of Enforcement

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 20, 20(1), 20(2), 226
Criminal Procedure Code, 1973 (CrPC) — Section 157, 173, 482
Penal Code, 1860 (IPC) — Section 294(b), 406, 419, 420, 447
Prevention of Money-Laundering Act, 2002 — Section 17, 18, 2(y), 3, 3(2)(i)

Citation : (2013) 1 LW(Cri) 54

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : K.S. Viswanathan for Mr. S. Sivakumar, for the Appellant; M. Dhandapani, Central Government Standing Counsel for Enforcement Directorate, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—Invoking the inherent jurisdiction of this Court u/s 482 Cr.P.C, the petitioners have preferred this petition seeking the

relief of quashing the criminal proceedings in Original Complaint (O.C.) No. 73 of 2010 in Provisional Attachment Order No. 07/2010 in the case

file No. ECIR/53/CZ/PMLA/2010, on the file of the first respondent. The petitioners are the director and managing director of M/s. D.R. Logistics

Pvt., Ltd., a company incorporated under the Indian Companies Act, 1956.

2. It is manifested from the records that the following cases viz., crime Nos. 277 of 2010, dated 26.05.2010; 349 of 2010, dated 18.07.2010;

350 of 2010, dated 18.07.2010 and 391 of 2010, dated 27.08.2010, have been registered on the file of E3-Minjur Police Station, Chennai

against the petitioners alleging that they have committed the offences under Sections 406, 419, 420, 447, 294(b), 465, 468, 471 and 506(ii)

I.P.C.

3. The above said first information reports have been forwarded to the concerned Magistrate u/s 157 Cr.P.C., by the Station House Officer

attached to E3-Minjur Police Station, Chennai to the effect that the petitioners viz., Mrs. M. Saraswathi and Mr. R. Devadoss have contravened

the provisions of Section 419, 420 and 471 I.P.C., for having committed the offence of impersonation, cheating and fabrication/forgery of

documents pertaining to the lands of the complainant in the above mentioned criminal cases.

4. It is also manifested that the offences committed by the petitioners are the scheduled offences as defined u/s 2(y) of the Prevention of Money-

Laundering Act, 2002 (herein after it may be referred to as "P.M.L.A.,").

5. The petitioners were making arrangements to transfer 51 numbers of immovable properties specified in the Annexure-I of the Provisional

Attachment Order in favour of third parties, which were purchased by the second petitioner Mr. R. Devadoss from the crime proceeds and got

registered them in the name of the first petitioner Mrs. M. Saraswathi during the period from January 2006 to August 2009, those properties were

therefore provisionally attached in terms of Section 5(1) of P.M.L.A., 2002 vide Provisional Attachment Order No. 7 of 2010, dated 01.11.2010

by the second respondent.

6. The provisional attachment of 51 numbers of immovable properties under the Order of Provisional Attachment are liable to be confirmed u/s

8(3) of P.M.L.A., by the first respondent. Therefore, the second respondent vide the Deputy Director, Directorate of Enforcement (Prevention of

Money-Laundering Act), Government of India, Shastri Bhavan, Chennai has filed a complaint in O.C. No. 73 of 2010 u/s 5(5) of P.M.L.A., 2002

before the Chairperson and Member of the Adjudicating Authority (under Prevention of Money Launder Act, 2002), New Delhi.

7. Under this circumstance, the petitioners have come forward with this petition seeking the relief of quashing the above said complaint.

8. Heard Mr. K.S. Viswanathan, learned counsel appearing for Mr. S. Sivakumar, learned counsel, who is on record for the petitioners and Mr.

M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate.

9. Mr. K.S. Viswanathan, learned counsel, while advancing his arguments, has submitted that the petitioners being the Director and the Managing

Director of the Company under the name and style of M/s. D.R. Logistics Private Limited, had been doing real estate business for the past several

years. Out of the profit earned from the business, they had purchased certain lands at Vallur and at Edaiyanchavadi Village, Ponneri Taluk,

Thiruvallur District in the name of their family members.

10. He has submitted further that on account of downfall in their real estate business, their company had defaulted in repayment of the loan amount,

which was availed from the Bank of India and in view of this fact, the Bank of India exercising its power u/s 13(2) of the Securitization and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, had issued notice to the petitioners threatening to take over the

possession and management of the Company.

11. Only under this circumstance, the petitioners had decided to dispose certain personal properties belonging to the first petitioner Mrs. M.

Saraswathi, Director of M/s. D.R. Logistics Pvt., Ltd., and to settle the bank dues.

12. He has also added that a prospective purchaser was found and necessary sale deeds were prepared for the sale of certain properties at Vallur

and Edaiyanchavady Village. When the sale deeds were presented before the Sub-Registrar Office at Thiruvotriur, for registration, the Sub-

registrar had refused to register the sale deeds stating that the properties, which were the subject matter of the sale, had been attached by the

Enforcement Directorate exercising powers under P.M.L.A., 2002,

13. In this regard, Mr. K.S. Viswanathan, learned counsel, has submitted that no notice of such attachment was received by the petitioners or their

family members. He has also" added that after getting information from the second respondent, through the Right to Information Act, 2002, the

petitioners were put to understand that the Enforcement Directorate had initiated investigation against the petitioners under P.M.L.A., 2002 and

that the Sub-Registrar of Thiruvotriur was requested not to entertain the registration of the properties 51 in numbers purchased by the petitioners

and their family members.

14. It is significant to note here that the petitioners have filed this petition to quash the criminal proceedings in the Original Complaint (O.C.) No.

73 of 2010 in Provisional Attachment Order No. 07 of 2010 in the case file No. ECIR (Enforcement Case Information

Report)/53/CZ/PMLA/2010 on the file of the first respondent.

15. On verification of records, this Court is able to find that the petitioners have already filed two writ petitions in W.P. Nos. 24444 and 24445 of

2010, before this Court, seeking the relief of quashing the Attachment Order in respect of the properties belonging to the petitioners listed in the

Annexure to the Attachment Order in file No. ECIR (Enforcement Case Information Report)/53/CZ/PMLA/2010.

16. After hearing both sides, the learned single Judge of this Court had proceeded to dismiss these writ petitions on 18.11.2010 on the ground of

devoid of any merits.

17. As per the case of the second respondent, based on the four cases in Crime Nos. 277, 349, 350 and 391 of 2010, which have been

registered on the file of E3-Minjur Police Station for the offences under Sections 406, 419, 420, 447, 294(b), 465, 468, 471 and 506(H) I.P.C.,

the offences under Sections 419, 420 and 471 I.P.C., are the scheduled offences and hence prima facie case is made out to presume that the

petitioners shall be guilty of offence of Money-Laundering as contemplated u/s 3 of P.M.L.A., 2002.

18. Chapter-II of P.M.L.A., encompasses Sections 3 and 4. Section 3 defines the offence of Money-Laundering. It reads as under:

3. Offence of money-laundering.-Whosoever 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 and projecting it as untainted property shall be guilty of offence of

Money-Laundering.

Section 4 is the penal provision to punish the offender. It reads as under:

4. Punishment for money-laundering.-Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term

which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees:

Provided that where the proceeds of crime involved in money-laundering relates

to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.

19. Mr. K.S. Viswanathan, learned counsel has mainly based his arguments on the following three grounds:

i. The petitioners were not even served with notices prior to the making of Provisional Attachment Order in respect of 51 numbers of immovable properties specified in the Annexure.

ii. P.M.L.A., 2002 is having only prospective effect and not having retrospective effect and therefore P.M.L.A., 2002 cannot be made applicable to the offences relating to the year 1999-2000.

iii. No such order of attachment shall be made unless, in relation to the scheduled offences, a report has been forwarded to a Magistrate u/s 173

Cr.P.C., as the report u/s 173 Cr.P.C., to a Magistrate is one of prerequisite conditions for effecting the provisional attachment in respect of the

immovable property as contemplated under the first proviso to Section 5(1) of P.M.L.A., 2002.

Ground No. I:

20. Mr. K.S. Viswanathan, learned counsel, has canvassed that when the sale deeds were presented before the Sub-Registrar of Thiruvotriur by

the petitioners for transferring the properties in favour of the prospective buyer, he had refused to register the sale deeds stating that the properties,

which were the subject matter of the sale, had been attached by the Enforcement Directorate under P.M.L.A., 2002. He has also maintained that

no notice of such attachment was received either by the petitioners or by their family members prior to the passing of provisional attachment order

and that the act of the second respondent was in total negation of the principles of natural justice.

21. In so far as this portion of argument is concerned, at the very first out set, this Court, in view of the proviso to Section 5(1) of P.M.L.A., 2002,

finds that it is not able to be countenanced. The reason why is P.M.L.A., 2002 does not contain any such provision, which mandates or directs the

competent officer attached to the Directorate of Enforcement to issue a notice prior to the effecting of provisional attachment.

22. To bring more clarity on this ground, it may be better to extract the proviso to Section 5 of P.M.L.A., 2002. It reads 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 him 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;

(b) such person has been charged of having committed a scheduled offence; and

(c) 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 fifty days) from the date of the order,

in the manner provided in the Second Schedule to the income tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by

him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that schedule.

23. From the provisions of Section 5(1) of P.M.L.A., 2002 five conditions are prerequisite for attaching the proceeds of crime provisionally

without issuing notice prior to the attachment. They are:

i. The Director, or any other officer, who provisionally attaches any property, shall have reasons to believe on the basis of materials in his

possession;

ii. The person, against whom proceedings under P.M.L.A., 2002 has been initiated, must be in possession of any proceeds of crime;

iii. Such person must be charged of having committed any scheduled offence;

iv. Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner; and

v. If the provisional attachment is not ordered immediately such concealment or transfer of such proceeds of crime may result in frustrating the

proceedings relating to confiscation of such proceeds of crime.

24. Clause (c) to Sub-Section 1 to Section 5 of P.M.L.A., is very clear that, if the proceeds of crime are likely to be concealed, transferred or

dealt with in any manner, which may end in frustrating any proceedings relating to confiscation of such proceedings of crime, the Director, or any

other officer not below the rank of Deputy Director authorised by him, may order in writing, provisionally attach such property for a period not

exceeding one hundred and fifty days from the date of Order.

25. The second proviso to Section 5(1) also contemplates that if the Director or any other officer not below the rank of Deputy Director, has

reason to believe (the reasons for such belief to be recorded in writing) that if such property involved in money-laundering is not immediately

attached, the non-attachment of the property is likely to frustrate any proceedings under this Chapter, he may attach any property of any person

under this Section.

26. If it appear that there is immediate necessity, urgency, or imminence that unless and until the property involved in P.M.L.A., is not attached at

once, it will frustrate any proceedings under this Act, a notice prior to the provisional attachment does not require.

27. Keeping in view of the above observations, this Court finds that the question of issuance of notice, prior to the provisional attachment order,

does not arise at this stage.

Ground No. II:

28. Mr. K.S. Viswanathan, learned counsel appearing for Mr. S. Sivakumar, learned counsel, who is on record for the petitioners, has adverted to

that the Prevention of Money-Laundering Act was enacted in the Parliament only in the year 2002 and subsequently it was notified and came into

effect from July, 2005. The Act, therefore, cannot have retrospective application in respect of the offences that are alleged to have been committed

in the year 1999-2000.

29. He has also submitted that even assuming that the allegations levelled against the petitioners, in the first information report, were correct, still the

provisions of P.M.L.A., would not be made applicable for the simple reason that the alleged offences were said to have been taken place well

before the enactment of the Act.

30. Mr. K.S. Viswanathan, learned counsel, has also argued that P.M.L.A., is not an expost facto law. An expost facto or retroactive law is a law

that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law.

31. He has also maintained that in reference to criminal law, it may criminalise actions that were legal when committed or it may aggravate a crime

by bringing it into a more severe category than it was in at the time it was committed or it may change or increase the punishment prescribed for a

crime, such as by adding new penalties or extending terms or it may alter the rules of evidence in order to make conviction for a crime more likely

than it would have been at the time of the action for which an accused is prosecuted.

32. He has also added that unless P.M.L.A., clearly specifies that the legislation is retrospective or retro active in operation, it cannot cover cases

that occurred long before the Act came into force.

33. Mr. K.S. Viswanathan, learned counsel, has also added that prior to the enactment of P.M.L.A., 2002, the offences were governed by the

Indian Penal Code and only for the purpose of preventing money-laundering a scheme was carved out by the law makers and therefore P.M.L.A.,

2002 came to be enacted under the Act 15 of 2003, which can operate only prospectively and not retrospectively.

34. Mr. K.S. Viswanathan, learned counsel, while advancing his arguments, has drawn the attention of this Court to Article 20(1) of the

Constitution of India, which prescribes as follows:

No person shall be convicted of any offence except for a violation of a law in force at the time of the commission of the act charged as an offence,

nor be subjected to any penalty greater than that might have been inflicted under the law in force at the time of the commission of the offence.

35. With regard to Article 20(1) of the Constitution of India, firstly, he has canvassed that a person, who has been charged with an offence, shall

be convicted and punished only in accordance with the penal law, which is in force at the time of commission of such offence.

36. Secondly, he has submitted that such person shall not be subjected to any punishment or penalty greater than that might have been inflicted

under the law in force at the time of the commission of the offence.

37. Another point has also been projected by Mr. K.S. Viswanathan, learned counsel, that unlike the FERA or such other legislation, where

prosecution under the Act does not depend on I.P.C., offences, solely depends on offences having been committed under the provisions of the

Indian Penal Code and in order to conclude that the proceeds of the crime might have been utilised for acquisition of certain properties to satisfy

the concept of money-laundering. Therefore, unless prima facie it is shown that certain I.P.C., offences have been committed by the accused, no

action under P.M.L.A., could be taken.

38. Placing reliance upon the following decisions viz.,

i. Ritesh Agarwal and Another Vs. Securities and Exchange Board of India and Others, ; and

ii. Ganesh Gogoi Vs. State of Assam,

Mr. K.S. Viswanathan, learned counsel has argued that the aforesaid two decisions had clearly laid down the proposition that a criminal law could

not be retrospective in operation as the same would violate the Article 20(1) of the Constitution of India.

39. In the first case viz. Ritesh Agarwal and Another Vs. Securities and Exchange Board of India and Others, , the Division Bench of the Hon''ble

Supreme Court of India headed by His Lordship Hon''ble Mr. Justice S.B. Sinha has held that:

Where the commission of offence in question was complete prior to enforcement of the 1995 Regulations, the appellants could not have been

proceeded against for violation of the said Regulations.. Thus, since the said Regulations were not attracted, imposition of ban on appellants from

having access to capital market for a period of 10 years, was impermissible and violative of Article 19(1)(g) of the Constitution.

40. This Court has gone through the above quoted decision and after giving it's consideration, is of view that the above quoted decision is not

made applicable to the instant case on hand as the facts and circumstances narrated therein are entirely different.

41. In the second case viz., Ganesh Gogoi Vs. State of Assam, the Division Bench of the Apex Court has observed in paragraph No. 21 as

follows:

21. It appears that in the instant case the charge which was framed by the Court against the appellant was u/s 3(5) of the said Act. But such a

charge could not have been framed against him by the Court in as much as on

the alleged date of occurrence, i.e. in September 1991, Section 3(5)

of the Act was not brought on the statute. The framing of the charge was thus inherently defective. However the appellant has been convicted only

u/s 3(2)(i).....

42. On coming to the given case on hand, as observed herein before, since the proceeds of crime viz., the properties 51 in numbers, which were

said to have been purchased by the second petitioner and registered in the name of the first petitioner, were about to be transferred in the name of

some third parties, the authorised officer, who is the second respondent herein, had instructed the Sub-Registrar of Thiruvotriur not to entertain

those sale deeds for registration.

43. As contemplated u/s 5(1)(c), since there was dire urgency and if the properties were not immediately attached, the non-attachment of the

properties was likely to frustrate the proceedings under this Act, the second respondent was constrained to attach the properties provisionally.

Hence, P.M.L.A., 2002 cannot be equated with TADA and therefore, this Court is of considered view that the decision viz. Ganesh Gogoi Vs.

State of Assam, is not made applicable to the present case.

44. The learned counsel appearing for the petitioners has also placed reliance upon the following two decisions:

i. Union of India (UOI) Vs. Hassan Ali Khan and Another, and

ii. Unreported Judgment of Bombay High Court in First Appeal Nos. 527 of 2010 and 528 of 2010 in Radha Mohan Lakhotia vs. The Deputy

Director, PMLA, Directorate of Enforcement, Ministry of Finance, Department of Revenue, Mumbai with Radha Mohan Lakhotia (HUF), through

its Karta, Radha Mohan Lakhotia vs. The Deputy Director, PMLA, Directorate of Enforcement, Ministry of Finance, Department of Revenue,

Mumbai.

This Court has gone through the above quoted decisions and after giving it's due consideration, is of view that the above quoted decisions are also

not made applicable to the instant case on hand.

45. Mr. M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate, has vehemently opposed the arguments

advanced by Mr. K.S. Viswanathan.

46. Mr. M. Dhandapani has argued that in accordance with the second proviso to Section 5(1) P.M.L.A., the provisions of P.M.L.A., are made

applicable even to the properties, which were acquired by the proceeds of crime prior to the enactment of P.M.L.A., and that the confiscation

proceedings under Chapter-III could very well be initiated and that there might not be any doubt in regard to the retrospective penalisation of

P.M.L.A., 2002.

47. The proviso one and two to Section 5(1) P.M.L.A., 2002 have been substituted by Act 21 of 2009 by Section 3(b), with effect from

01.06.2009.

48. The second proviso to Section 5(1) of P.M.L.A., 2002 reads as under:

Provided further that, notwithstanding anything contained in clause (b), 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.

49. In support of his contention, Mr. M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate, has quoted a

decision in B. Rama Raju Vs. Union of India (UOI), Ministry of Finance, Department of Revenue and Others, wherein a similar issue was arisen as

to:

Whether provisions of the second proviso to Section 5(1) [incorporated by the second amendment Act with effect from 06.03.2009] are

applicable to property acquired prior to enforcement of this provision and if so, whether the provision is invalid for retrospective penalisation?

This issue was considered by the Division Bench of the Andhra Pradesh High Court and answered as under:

The provisions of the second proviso to Section 5 are applicable to property acquired prior to the coming into force of this provision (vide second

amendment Act with effect from 06.03.2009); and even so is not invalid for retrospective penalisation.

50. The Division Bench of Andhra Pradesh High Court, in paragraph Nos. 46 and

47, has also held as follows:

46. On analysis of the provisions of Sections 5, 8, 17 and 18, it is clear that provisions of the Second Amendment Act have carefully ironed out

the creases and the latent rucks in the texture of the provisions of the Act relating to attachment, adjudication and confiscation in Chapter-III.

Attachment or confiscation of proceeds of crime in the possession of a person who is not accused or charged of an offence; u/s 3 is thus not an

incorporation for the first time by the provisions of the Second amendment Act, 2009. The contention on behalf of the petitioners that the second

proviso to Section 5(1) of the Act, applies only to property acquired/possessed prior to (sic. subsequent to) enforcement of this provision or if

interpreted as being retrospective, the provision itself must be invalidated for arbitrary retrospective operation is therefore without substance or

force.

47. The above contention does not merit acceptance even otherwise. Article 20 of the Constitution of enacts an injunction only in respect of ex

post facto laws resulting in conviction for offences or imposition of penalties greater than which might have been inflicted under the law enforceable

at the time of commission of the offence. No provision of the Constitution has been brought to our notice which prohibits a legislative measure

which targets for attachment and confiscation proceeds of crime. On the text and authority of our Constitution while it may perhaps gainfully be

contended that conviction for the offence of money-laundering cannot be recorded if the said offence is committed prior to the enforcement of

Section 3 of the Act, such a contention cannot be advanced to target proceedings for attachment and confiscation, as these fall outside the pale of

the prohibitions of the Constitution, in particular Article 20(1).

51. The Division Bench of Andhra Pradesh High Court, while penning down the Judgment, has also made reference to the observations in the

majority opinions of the Constitution Bench in M/s. Khemka & Co., (Agencies) Pvt., Ltd., vs. State of Maharashtra and held in paragraph Nos.

49, 50 and 51 as follows:

49. The majority opinion in Khemka & Co., is only a reiteration and application of the well-accepted "void for vagueness" principle which applies

to invalidate irredeemably ambiguous statutory provisions. The observations in

the majority opinions are not to be considered as encompassing

legislative sanctions which does not affect personal liberties within the constitutional prohibition of ex post-facto laws enjoined by Art. 20(2) of the

Constitution. The Khemka majority opinion, in our carefully considered view, only means that no regulation of conduct; imposition of person's

civil, economic rights or of personal liberty or regulation of freedoms, natural or guaranteed by constitutionally entrenched rights, may be brought

about by overly vague and unspecific: legislative prescriptions; and nothing more.

50. In Amratlal Prajivandas's case the validity of SAFEMA was challenged and upheld by the Constitution Bench. Section 3(c) of the legislation

defined "illegally acquired property" as any property acquired whether before or after the commencement of SAFEMA, wholly or partly out of or

by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law which the

Parliament has the power to make. The challenge to the definition of illegally acquired wealth on grounds of overbreadth and as an excessive and

disproportionate legislative response to the perceived evil, was repelled. Jeevan Reddy. I put it pithily when he observed: Bitter medicine is not bad

medicine.

51. The huge quanta of illegally acquired wealth; acquired from crime and economic and corporate malfeasance corrodes the vitals of rule of law;

the fragile patina of integrity of some of our public officials and State actors; and consequently threatens the sovereignty and integrity of the Nation.

The Parliament has the authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired

prior to the enactment of the Act as well. It has also the authority to recognise the degrees of harm an identified pejorative conduct has on the

fabric of our society and to determine the appropriate remedy for the pathology.

52. In the light of the above quoted decision and based on the provisions to Clause (c) of Sub-Section (1) to Section 5 and the second proviso to

Sub-Section (1) to Section 5 of P.M.L.A., 2002, this Court finds that the provisions of the second proviso to Section 5(1) are unambiguously

applicable to the property acquired even prior to the coming into force of P.M.L.A., 2002.

53. As rightly observed by the Division Bench of Andhra Pradesh in the above

cited decision, the act itself is not invalid for retrospective penalisation.

Ground No. III:

54. As observed herein before, in Ground No. II, the first proviso to Section 5(1) has been substituted by Act 21 of 2009 by Section 3(B), for the proviso with effect from 01.06.2009.

55. The first proviso to Section 5(1) of P.M.L.A., 2002 reads as follows:

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

u/s 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 the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be.

56. The first proviso to Section 5(1) of P.M.L.A., 2002 encompasses two portions. The first portion envisages that:

Unless a report has been forwarded to a Magistrate u/s 173 Cr.P.C., in relation to the commission of a scheduled offence, no such Order of attachment shall be made.

The second portion envisages that:

Unless a complaint has been filed before a Magistrate or Court, for taking cognizance of the scheduled offence by a person authorised to investigate the offence, mentioned in the schedule, no such Order of attachment shall be made.

57. In this connection, Mr. K.S. Viswanathan, learned counsel, has adverted to that none of these conditions have been complied with by the second respondent in the instant case on hand.

58. He has also argued that the four complaints registered in F.I.R. Nos. 277 of 2010, 391 of 2010, 349 of 2010 and 350 of 2010, on the file of

E3 Minjur Police Station, Chennai, under Sections 406, 419, 420, 447, 294(b), 465, 468, 471 and 506(i) I.P.C., were admittedly still under

investigation and no final report was filed against the petitioners and in such an event, the provisions of Section 5(1) of P.M.L.A., 2002 were not

attracted to the instant case.

59. He would submit further that if P.M.L.A., was to be applied to the cases

where even a final report had not been filed, it would lead to disastrous consequences and would become liable for misuse as any person could be charged with an offence under P.M.L.A., if an F.I.R., is filed against him and certainly this was not the object of the Act.

60. He has also maintained that on the merits of the first information reports filed against the petitioners, a mere perusal of the same would reveal that they had been filed belatedly in the year 2010, after a period of eleven years in respect of certain transactions that were alleged to have been taken place in the year 1999-2000.

61. Indeed, Section 173 of the Code of Criminal Procedure, 1973 deals with the report of police officer on completion of investigation. In this connection, Mr. M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate, has submitted that in view of the second proviso to Section 5(1), the provisional attachment could be made even without forwarding a report u/s 173 Cr.P.C,

62. He has also submitted that based on the language coined in second proviso to Section 5(1) P.M.L.A., 2002 insofar as forwarding a report to the Magistrate is concerned, when the attachment of a property involved in P.M.L.A., was to be effected immediately based on the materials and adequate reasons, the question of forwarding the report to the Magistrate with regard to the provisional attachment would not arise.

63. He has also added that the proceedings, which are sought to be quashed in this criminal original petition, was only relating to the provisional attachment and as such the final stage was not yet arisen and consequently the requirement of forwarding the report to the Magistrate under the first proviso did not arise at this juncture.

64. Mr. M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate has also quoted an unreported decision of this Court dated 18.11.2010 and made in W.P. Nos. 24444 and 24445 of 2010, which were filed by the petitioner herein. In this Order, the question relating to the forwarding of a report u/s 173 Cr.P.C., to the Magistrate, has been elaborately discussed. The learned single Judge of this Court, in paragraph No. 11, has observed as follows:

11.....Apart from this, as rightly contended by the learned counsel for the respondent Department, as far as first proviso is concerned, it deals with

the report to be forwarded to the Magistrate u/s 173 of the: Code of Criminal Procedure, 1973 is concerned, it is a final report to be submitted

after the investigation and as such this cannot be now insisted and as far as these things are concerned, in my opinion, it relates to the final

attachment and not the provisional attachment.

65. It is obvious to note here that the petitioners herein have not challenged the Order of this Court made by the learned single Judge, dated

18.11.2010 and made in W.P. Nos. 24444 and 24445 of 2010 and they have allowed the same to become final.

66. It is pertinent to note here that on perusal of the records it is apparent that all the four cases in Crime Nos. 277, 349, 350 and 391 of 2010

have been forwarded to the Magistrate for taking cognizance of the scheduled offences viz., the offences punishable under Sections 419, 420 and

471 I.P.C.

67. It is also manifested that a. prima facie case relating to an offence u/s 3 of P.M.L.A., 2002 is made out, which requires further investigation on

the petitioners in accordance with the provisions of the said Act as well as with the rules framed therein. It is also crystallised that the second

respondent has registered Enforcement Case Information Reports (ECIR) Nos. 53 of 2010, 54 of 2010, 55 of 2010 and 56 of 2010 (Annexures

VII to X).

68. Keeping in view of the above facts, this Court is also of opinion that since the properties 51 in numbers, described in Annexure-I, have been

provisionally attached so as to prevent the petitioners from transferring them in favour of the third parties, the question of sending a final report u/s

173 Cr.P.C., does not arise at this stage.

69. Apart from this, Mr. M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate has pointed out that the

petitioners were estopped from filing the petition to quash the proceedings in O.C. No. 73 of 2010 in Provisional Attachment Order No. 07 of

2010, dated 11.10.2010, incase file No. ECIR/53/CZ/PMLA/2010 on the file of the first respondent, in view of the Order of dismissal dated

18.11.2010 and made in W.P. Nos. 24444 and 24445 of 2010.

70. The above two writ petitions were filed by the petitioners seeking the relief of quashing the attachment Order dated 11.10.2010 in the

Proceedings in File No. ECIR/53/CZ/PMLA/2010. These two writ petitions were heard together by the learned single Judge of this Court and

decided finally as against the petitioners with an observation that this Court did not find any merits in these writ petitions and hence these two writ

petitions were dismissed.

71. Having been failed in their attempt in the above said W.P. Nos. 24444 and 24445 of 2010, which were filed under Article 226 of the

Constitution of India to quash the above said proceedings, now the petitioners by way of second innings have approached this Court after invoking

the inherent jurisdiction of this Court u/s 482 Cr.P.C.

72. Article 226 of the Constitution of India deals with the extra-ordinary jurisdiction of this Court. Whereas, Section 482 Cr.P.C., deals with the

inherent jurisdiction of this Court. The exercise of power, u/s 482 Cr.P.C., or under Article 226 of the Constitution of India, is discretionary to be

exercised in the facts of each case.

73. Strictly speaking the High Court under Article 226 is required to enforce rule of law and not pass an order or direction which is contrary to

what has been enjoined by law. The High Court while exercising a power of judicial review is concerned with illegality, irrationality and procedural

impropriety of an order passed by the State or a statutory authority, as decided by the Apex Court in *Dwarka Prasad Agarwal (D)* by LRs. and

Another Vs. B.D. Agarwal and Others, .

74. On the other hand, the inherent power u/s 482 Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure ends of

justice. Such power cannot be exercised to do something which is expressly barred under the Code. If any consideration of the facts by way of

review is not permissible under the Code and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and

record a conflicting decision. If there had been change in the circumstances of the case, it would be in order for the High Court to exercise its

inherent power in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of

the Court.

75. Therefore, as rightly argued by Mr. M. Dhandapani, learned Central Government Standing Counsel for Enforcement Directorate, the

petitioners are estopped from filing the criminal original petition, in view of the Order passed by this Court dated 18.1.1.2010 and made in W.P.

Nos. 24444 and 24445 of 2010. As observed herein before, this Court cannot exercise its inherent power to reconsider the Order passed by the

learned single Judge of this Court in W.P. Nos. 24444 and 24445 of 2010 or to record a conflicting decision.

76. It is also relevant to note here that the Order dated 18.11.2010 and made in W.P. Nos. 24444 and 24445 of 2010 operate as a constructive

res judicata to this petition u/s 482 Cr.P.C.

77. The Order in the above writ petitions has been based on the averments of the writ petitions as well as on the material facts and issues along

with supporting facts and issues. Since this Court has basically adjudicated the material issues in the above writ petitions and decided finally after

hearing the petitioners as well as the respondents herein and since no appeal has been preferred by the petitioners and allowed the Order to

become final, the Order of this Court dated 18.11.2010 and made in W.P. Nos. 24444 and 24445 of 2010 certainly operate as constructive res

judicata.

78. In this connection, this Court: would like to place reliance upon a decision in S. Murugesan Vs. V. Vijay Sai, Lavanya Velumani, Prasanna

Venkatakrishnan and Dugar Finance and Investments Limited, In this case, this Court has observed that:

Principle of estoppel would apply where issue of fact has been judicially decided between parties and same issue comes directly in question

subsequent proceedings between parties, then it would be illogical to allow parties to reopen same issue again.

79. Having regard to the findings given above, this Court considers that this criminal original petition is liable to be dismissed on the ground of

devoid of any merits. In the result, this criminal original petition is dismissed. Consequently, connected miscellaneous petitions are closed.