

(2022) 08 CAL CK 0049
In the Calcutta High Court
Case No : Writ Petition No. 17454 Of 2022

M/S. Rashmi Metaliks Limited & Anr.

APPELLANT

Vs

Enforcement Directorate & Ors.

RESPONDENT

Date of Decision : 10-08-2022

Acts Referred:

Prevention Of Money-Laundering Act, 2002 — Section 2(1)(u), 3, 17, 17(1), 17(1A), 17(1)(a), 17(1)(b), 17(1)(c), 17(1)(d), 17(1)(e), 17(1)(f)
Income Tax (IT) Act, 1961 — Section 132(1), 132(3)

Citation : (2022) 08 CAL CK 0049

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Sidharth Luthra, Sandipan Ganguly, Shyamal Ghosh, Smriti Sinha, Sutapa Sanyal, Ayan Bhattacharya, Subhangni Jain, Siddhartha Datta, Sakabda Roy, Rohit Mukherji, Trisha Mukherjee, Surabhi Binani, Vipul Kundalia, Anurag Roy, Uneaza Ali

Final Decision : Disposed Of

Judgement

Moushumi Bhattacharya, J

1. The petitioners pray for stay of two orders of freezing of the accounts of the petitioner no. 1 dated 13th July, 2022. The orders of freezing, both issued on the same day i.e. 13th July, 2022, were made under Section 17(1-A) of The Prevention of Money-Laundering Act, 2002 (PMLA). Six accounts in the name of the petitioner no. 1 with SBI and one account with ICICI Bank were seized by the Enforcement Directorate (ED) with a further direction that the funds lying in the said accounts shall not be transferred or otherwise dealt with except with the prior permission of the ED.

2. Learned counsel appearing for the petitioners places the factual genesis of the matter from 2012 to the date on which the freezing orders were issued and decisions of Single and Division Benches of this Court as well as by the Supreme Court with reference to an ECIR case filed against the petitioner no. 1 in 2012.

Counsel submits that orders were passed by which leave to file charge-sheets against the petitioner no. 1 was refused and proceedings against the petitioner no. 1 were stayed by the Supreme Court. Counsel also places relevant provisions of The PMLA with reference to action initiated under Sections 17 and 17(1-A) of The PMLA.

3. Learned counsel appearing for the ED submits that the impugned orders were passed upon incriminating material being found in three premises of the petitioner no. 1 in a search made in the said three premises. Counsel submits that all the statutory formalities for conducting the search and seizure were complied with and further submits that the ED is entitled to investigate in the affairs of the petitioner no. 1 as there is no order of stay of such investigation. It is further submitted that The PMLA contains procedural safeguards including a period of 30 days within which the authority is under an obligation to file an application requesting for retention of the property seized as well as an outer limit of 180 days for provisionally attaching any property.

4. The adjudication of the present dispute involves and hence must be made in two parts. The first part is concerned with the factual aspect of the matter and the second is on the powers of the ED under Sections 17 and 17(1-A) of The PMLA.

5. In relation to the first part, it is relevant to note that both the impugned orders of freezing dated 13th July, 2022 mention the "File Number ECIR/KLZO/06/2012". This would mean that the impugned orders were passed with reference to an ECIR case filed against the petitioner no. 1 in 2012. Therefore, it becomes necessary to consider the facts from 2012 to 13th July, 2022. The relevant facts have been stated in detail in a Transfer Petition of 2015 made by the Union of India, Ministry of Railways in the Supreme Court against several entities including the petitioner no. 1. The Transfer Petition was filed for a comprehensive hearing of numerous proceedings pending before the High Courts with reference to a dual-pricing mechanism for iron-ore prescribing freight rates for transportation of iron-ore supplies for domestic consumption as part of the inflation management strategy of the government. The measure was implemented vide a Rates Circular containing a set of instructions which were subsequently fine-tuned resulting in the prevalent Rates Circular 36 of 2009. In brief, the guidelines specified the list of documents which a consignor/consignee was required to furnish to the Railways for establishing its status as an authorised domestic manufacturing unit.

6. The Circular and the prevailing guidelines resulted in the Railways issuing show-cause notices along with claims of penal charges on the ground of evasion of freight by availing of lower rate of freight for transporting iron-ore for domestic consumption and for utilization for purpose other than the domestic use. These show-cause notices were challenged by the parties mentioned in the Transfer Petition in different High Courts including in this Court. The ensuing proceedings resulted in a review petition filed by the first petitioner against an

order of the Division Bench dated 24.12.2014 by which the Division Bench rejected the challenge to the 2009 Circular on the ground that the Railway Board has the jurisdiction to issue the said Circular. The Union of India also filed a civil suit being CS No. 311/2014 before this Court. Both these proceedings find specific mention in the order passed by the Supreme Court on 14th December, 2015 staying all further proceedings in all of such cases until further orders. The cases mentioned in the order of the Supreme Court include both the review petition being RVW 44/2015 as well as CS No. 311/2014 being the suit filed by the Union of India against the petitioner no. 1. This Court has not been made aware of any further orders passed in the Transfer Petition after 14th December, 2015. The stay of the proceedings stated above is admittedly subsisting as on date.

7. The above facts therefore begs the question as to the basis on which the ED proceeded to initiate action under Sections 17 and 17(1-A) of The PMLA for freezing the bank accounts of the petitioner no. 1. The ECIR case of 2012 shows that the impugned orders can be traced to the 2009 Rates Circular and the show-cause notices issued to the petitioner no. 1. Significantly, the Summons produced by the parties also mentioned the same ECIR case number of 2012. The Summons are of February-September, 2014. Hence, the Summons were issued prior to the stay order of the Supreme Court which was passed in 2015. It is also not the case of the ED that the ED initiated action against the petitioner no. 1 or proceeded to take steps pursuant to any new case filed or show-cause notices issued after 2012. The contention of the ED that the impugned freezing orders were passed on incriminating material being found in the premises of the petitioner no. 1 also does not reveal that the searches were made pursuant to a new ECIR case filed against the petitioner no. 1 after 2012.

8. It can therefore reasonably be presumed that the ED took steps for search and seizure and freezing of the petitioners bank accounts after 7 years from the date on which all pending proceedings were stayed by the Supreme Court. It may also not be out of place to come to a finding that the Rates Circular of 2009 is at the top of the pyramid of proceedings travelling down through the sprouting of challenges to the Circular with the orders passed by the Courts forming the base of the triangle.

9. This Court is therefore inclined to hold that the ED could not have initiated any action against the petitioners during the subsistence of the order of stay of the pending proceedings against the petitioner no. 1 by the Supreme Court dated 14th December, 2015.

10. The second part deals with the position under The Prevention of Money-Laundering Act, 2002, in relation to search and seizure under Section 17 of the Act.

11. The pre-requisite for an authorised officer of a certain rank being entitled to search and seize is that such officer has information in his possession and a

reason to believe, expressed in writing that a person:-

- i) committed any act of money-laundering, or
- ii) is in possession of any proceeds of crime involved in money laundering, or
- iii) is in possession of records relating to money-laundering, or
- iv) is in possession of any property related to crime.

Section 17(1)(a)-(f) delineates the measures which the authorised officer can take for entering, searching and seizing any record or property subject to the satisfaction of the four pre-requisites stated above. The pre-requisites not only indicate that the authorised officer must have reason to believe (reduced to writing) on the information in his possession but also that the person in relation to the premises is guilty of an offence defined in Section 3 of The PMLA - "money-laundering".

12. Section 3 entails a separate set of requirements and evidence including that the person who is found guilty of the offence of money-laundering has knowingly indulged or assisted in the commission of an activity connected with "proceeds of crime" and has concealed, possessed, acquired or used the same. The term "proceeds of crime" has been defined in Section 2(1)(u) as any property derived directly or indirectly by any person as a result of criminal activity related to a scheduled offence as well as any property which is used in the commission of an offence under The PMLA or any of the scheduled offences. Besides, commission of an offence would only qualify as money-laundering if the offence generates proceeds of crime and tainted property (*Vijay Madanlal Choudhary vs. Union of India*; 2022 SCC OnLine SC 929).

13. Therefore, the search and seizure under Section 17(1) must also satisfy the defining characteristic of "money-laundering" and "proceeds of crime" as well as their respective procedural requirements as separately stipulated in The PMLA. In other words, the power to enter and search any place or to seize any record or property must be predicated by the satisfaction of all the requirements under Section 17(1) which should find a particularized statement in the written "reason to believe" component by the authorised officer under Section 17(1). It is only on the fulfillment of the conditions stipulated under Section 17(1) together with the satisfaction of the conditions of Sections 2(1)(u) and 3 that the power to search and seize is crystallized.

14. Section 17(1-A) is an alternative to Section 17(1) for facilitating the measures which are required to be taken in the event search and seizure is not practicable. Section 17(1-A) starts with the opening of an alternative avenue to an authorised officer under Section 17(1) to make an order of freezing a property where it is not practicable to seize the property. The word (used four times) in Section 17(1-A), is the word "such". The word "such" precedes "record/property" and "order" wherever used in Section 17(1-A). The qualification of property and records by use of "such" fixes the sequence of steps which may be initiated by

the authorised officer under Section 17(1) followed by Section 17(1-A). This means that the officer must

- a) Satisfy the pre-requisites of Section 17(1) stated in paragraph 13 above
- b) Upon satisfaction of the conditions, enter the place and search and seize the property and
- c) Come to a conclusion that seizing the property under Section 17(1) is not practicable
- d) Record the reasons why it is not practicable to search and seize under Section 17(1)
- e) Satisfy the reason/basis of the apprehension that the property may be transferred or otherwise dealt with unless such freezing order is passed.

Each of the above five conditions is required to be satisfied before graduating from 17(1) to the next stage of action under 17(1-A).

15. Before reaching the power conferred under Section 17(1-A), the authorised officer must also come to an informed finding that the exact location of proceeds of crime or the documents relating to money-laundering cannot be ascertained and hence the requirement to enter and search the premises on a reason to believe (based on material in his possession) that the proceeds of crime/documents may be located in the place of search. Second, the finding must also include the apprehension of resistance on the part of the person whose place is proposed to be entered into and searched. This would be evident from Section 17(1)(b) which includes forcible entry into the premises and breaking open of the receptacle for exercising the power conferred by Section 17(1-A).

16. These factors were taken into consideration by a Division Bench of the Allahabad High Court in *Motilal vs. Preventive Intelligence Officer, Central Excise and Customs, Agra*; (1971) 80 ITR 418 where Section 132(3) of the Income Tax (IT) Act, 1961 was under consideration. Section 132(3) of the IT Act is similar in import and purpose to Section 17(1-A) of The PMLA. The conclusions of the Allahabad High Court were relied upon in *Commissioner of Income Tax, Haryana, Himachal Pradesh and Delhi vs. Tarsem Kumar*; (1986) 3 SCC 489. A Division Bench of the Delhi High Court in *Shri L.R. Gupta vs. Union of India*; 1992 (22) DRJ 1 also opined that facts and circumstances must exist on the basis of which the belief under Section 132(1) of the Income Tax Act can be formed and would include the information with the Department that a person is not likely to produce the documents voluntarily.

17. The impugned orders of freezing in the present case do not discharge the onus of stating with reasons as to the necessity of passing such orders or the basis for freezing accounts under Section 17(1-A) of The PMLA. The Assistant Director, ED, simply notes :

".... for the purpose of investigation under PMLA, hereby make an order to freeze

the below mentioned property..... as it is not practicable to seize the balance lying in the below mentioned accounts..."

What follows is even more cryptic;

"I further order that the funds lying in the above accounts shall not be transferred or otherwise dealt with except with the prior permissions of the office of the Deputy Director, ED..... which shall result in the frustration of the proceeds of crime or hamper the investigation under the (PMLA)."

18. The singular absence of statements of reasons or the basis of an apprehension, factual or otherwise, for freezing the properties of the petitioners is apparent from the impugned orders. The requirement of satisfaction of the conditions stated in Section 17(1) before proceeding to Section 17(1-A) do not contemplate parroting the words used in the sections but a precise statement, in writing, reflecting the factors which form the basis of the conclusion arrived at. A person reading the order must be able to find the connecting link between the reason given and the action taken. The view of the Court is bolstered by the specific conditions under Section 17(1) as well as in Section 3 (Offence of money-laundering) which demand that properly graded reasons must be stated in an order justifying initiation of measures under Sections 17(1) and 17(1-A).

19. The impugned orders fall short at all levels of the statutory requirements. The defence that the freezing orders were passed only upon incriminating material being found in the three premises of the first petitioner cannot redeem the situation since the impugned orders do not contain any "reason to believe" which is a mandate for search and seizure under Section 17(1) and for freezing orders under Section 17(1-A).

20. The discouragement of the Supreme Court with regard to passing orders of stay of criminal investigation in Siddharth Mukesh Bhandari vs. The State of Gujarat passed on 2nd August, 2022, relying upon Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra; (2021) SCC OnLine SC 315 was in light of the Gujarat High Court granting the very same interim relief which was earlier set aside by the Supreme Court. In the recent judgment of a 3-Judge Bench of Supreme Court in Vijay Madanlal Choudhary vs. Union of India the expression "proceeds of crime", is described as the core of the offence of money-laundering and has been defined as a portion or whole of the property derived by any person as a result of criminal activity relating to a stated scheduled offence. The Supreme Court drew a distinction between possession of unaccounted property acquired by legal means which may otherwise be actionable for tax violation but may not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence in the Schedule to The PMLA. The Supreme Court also cautioned that the authorities under The PMLA cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime unless the same is registered with the jurisdictional police or pending enquiry in a competent forum.

More important, Vijay Madanlal Choudhary carved out a further area of exception for a person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or quashing of the criminal case against the person. An analogy can be drawn to the present facts where the stay of proceedings ordered by the Supreme Court on 14th December, 2015 is continuing till date.

21. The above reasons persuade this Court to hold that the impugned orders cannot be sustained either in law or in fact. There shall accordingly be an order of stay of the impugned freezing orders dated 13th July, 2022. The respondents are directed not to act in terms of the said orders or take steps in furtherance thereto. WPA 17454 of 2022 is disposed of in terms of the above.

22. The prayer for stay made on behalf of the Enforcement Directorate is considered and refused given the findings and observations made in the Judgment.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties after fulfillment of requisite formalities.