
(2015) 08 MAD CK 0092

In the Madras High Court

Case No : Writ Petition Nos. 7854, 10643, 14448, 15317 of 2015 and M.P. Nos. 1, 2, 3 of 2015

R.K.M. Powergen Private Limited

APPELLANT

Vs

The Joint Director, Directorate of Enforcement, Government of India and Others

RESPONDENT

Date of Decision : 26-08-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 3

Prevention of Money-Laundering Act, 2002 — Section 2(1)(y), 2(na), 49, 49(1), 5

Citation : (2015) 6 CTC 801 : (2015) WritLR 851

Hon'ble Judges : M.M. Sundresh, J.

Bench : Single Bench

Advocate : B. Kumar, Senior Counsel for S. Ramachandran, for the Appellant; G. Rajagopalan, Additional Solicitor General assisted by Dhandapani, for the Respondent

Final Decision : Allowed

Judgement

M.M. Sundresh, J.—As the issues involved in all these writ petitions are one and the same, being communications sent by the respondents to various Banks, it would be appropriate to dispose them by a common order. Facts in Brief:

1.1. The petitioner company was incorporated on 15.12.2004. The petitioner signed a Memorandum of Understanding with the Government of Chhattisgarh for setting up 1440 MW, coal based Mega Power Plant. The petitioner is said to have spent an amount of Rs. 9,672.77 crores out of the total project costs of Rs. 10,377.33 crores of the total amount, a sum of Rs. 2,171.36 crores is the contribution by the shareholders and the remaining amount of Rs. 7,856.90 crores to be funded by the lenders in the consortium led by the Power Finance Corporation Limited. The consortium also included several banks. After approval of the power project agreement by the Chhattisgarh State Electricity Regulatory Commission on 22.12.2007, Coal Block was allotted on 23.01.2008. The petitioner signed the Implementation Agreement with the Government of

Chhattisgarh on 28.07.2008 followed by Power Purchase Agreement for 700 MW with PTC India Limited on 08.05.2009.

1.2. On 07.08.2014, a First Information Report was registered against the petitioner by the Central Bureau of Investigation. By an order dated 24.09.2014, the Apex Court cancelled the Coal Block allotments of the petitioner along with many others.

1.3. On 06.01.2015, the Power Finance Corporation sent a letter to the petitioner regarding approval of cost overrun, modification of terms and conditions of sanction and underwriting of cost overrun debt. On 19.01.2015, Punjab National Bank wrote a letter to the petitioner in respect of approval of Bank Guarantee of Rs. 422.00 crores. On 31.01.2015, Bank of Baroda wrote a letter for the renewal of credit facility.

1.4. The respondent issued summons to the petitioner on 19.02.2015 under Section 50 (2) and (3) of Prevention of Money-Laundering Act, 2002, requiring the petitioner to appear before the Assistant Director on 25.02.2015.

1.5. On 20.02.2015, letters have been sent by the respondents to the bankers of the petitioner. The following passage would be apposite.

"Further considering the sensitive nature of the case you are also advised not to transfer or liquidate or withdraw or otherwise deal with that the amount/stock/security held in the above referred account(s) as on date, except with the prior permission of the authorities of this Directorate."

This letter is challenged in W.P. No. 7854 of 2015.

1.6. On receipt of the same, banks stopped the petitioner from transacting with them. On 24.02.2015 and 27.02.2015, the petitioner wrote letters to the respondents that they would co-operate with the investigation and there is no necessity to freeze the bank accounts. It was also informed that the accounts are "trust" and "retention" accounts and they can be operated and used only for the purpose of approval by the lenders viz., Banks, which was followed by another letter dated 11.03.2015.

1.7. On 23.03.2015, the respondents wrote a letter to one of the petitioner's bank viz., Punjab National Bank that there is no objection for release of sanctioned/fresh funds for project including the bank guarantee and working capital facilities and for pledging of shares among the consortium. However, the earlier request of not to release the fund available with the Fixed Deposit has been reiterated.

1.8. In the representation made on 07.05.2015, the petitioner has stated that the amount will have to be released for proper running of the units including the requisite payment to the staff, conclusion of the ongoing work and production. During the pendency of the writ petitions, the petitioner has also filed an affidavit of undertaking with respect to the plant and machinery as well as immovable

property that they would not be sold or otherwise parted away till the completion of the proceedings. Such an affidavit has been filed in W.P. No. 14448 of 2015. In W.P. No. 7854 of 2015, the following passage of the order has been impugned.

"Further, considering the sensitive nature of the case you are advised not to transfer or liquidate or withdraw or otherwise deal with that the amount/stock/security held in the above referred account(s) as on date, except with the prior permission of the authorities of this Directorate."

1.9. In W.P. Nos. 10643, 14448 and 15317 of 2015, the following are the relevant passages of the impugned orders, which are the subject matter of the writ petitions.

"It is to clarify that this Directorate has no objection for release of sanctioned/fresh funds for the project including the bank guarantees & working capital facilities and for pledging of shares among the consortium of lenders without its sale/transfer to a third party. It is also requested not to disturb the Fixed Deposits held with your bank or the consortium of lenders/pledged to the Customs authorities, without the prior concurrence of this Directorate."

1.10. On the earlier occasion, this Court framed the following issues.

(i) Whether in terms of Section 49(1) of the Prevention of Money-Laundering Act, 2002, the respondent herein, namely, The Assistant Director, Directorate of Enforcement, Government of India, Chennai Zonal Office, is vested with power to issue the impugned proceedings?

(ii) Whether the order, dated 24.09.2014 made in W.P.(Crl) No. 120/12, with W.P. (C) No. 463, 515/12 and 280/13, reported in Manohar Lal Sharma Vs. The Principle Secretary--> and Coal Block Allocation case are still pending and being monitored by the Hon"ble S.C.?

(iii) Whether any similar orders have been passed in any other Enforcement Directorate by the Assistant Director and aggrieved over the same, any challenge is made (or) case is pending before other High Courts?

1.11. Thereafter, on 31.07.2015, further orders have been passed, which is reproduced hereunder:

"This Court also heard the submissions of the learned Additional Solicitor General of India, appearing for the Directorate and he would submit that orders are explicit and incapable of interpretation as projected by the petitioner. This Court, upon hearing the rival submissions and in the light of the facts pleaded by both the parties, directs the Assistant Director, Office of the Joint Director, Enforcement Directorate, Chennai Zonal Office, Chennai-600006, to pass appropriate orders on the letter of the Power Finance Corporation Limited, dated 22.05.2015, and further directs the Enforcement Directorate to pass orders on the petitioner's representation, dated 11.03.2015 on or before 14.08.2015, and communicate the decision taken to the petitioner."

1.12. However, none knows about the orders passed in this regard. Therefore, this Court takes it as if no orders have been passed and in any case, there is no order in favour of the petitioner. In pursuant to the order passed by this Court, the petitioner has also filed S.L.P. No. 18293-18296 of 2015, in which, the following order is passed.

"Heard learned counsel for the petitioner.

The special leave petition is dismissed.

However, the petitioner may raise whatever contentions are available in law before the High Court."

2. Submissions of the Petitioner: Mr. B. Kumar, learned Senior Counsel appearing for the petitioner submitted that the order impugned is one without jurisdiction as the respondents do not have the power or authority to freeze the bank accounts. The procedure contemplated under the Prevention of Money-Laundering Act has not been followed and therefore, it would be violation of Articles 3 and 19(1)(g) of the Constitution of India. A satisfaction has to be recorded by a person in the cadre of Deputy Director and therefore, the respondents concerned cannot do the same. There is no necessity to freeze the accounts especially when there are civil consequences. Nobody would be benefited by the orders impugned. There is no indication about the necessity to do so for the purpose of investigation. Such an investigation cannot go on for ever affecting the rights of the party. The proceedings do not have any relevancy to the case registered by the Central Bureau of Investigation. The petitioner has admittedly not started the mining operation. Even assuming that power is available to the respondents under Section 5 of the Prevention of Money-Laundering Act, 2002, the same cannot be used without any basis, especially when an affidavit has been filed. The impugned orders are contrary to the scheme of the Act. The object of the Act is to prevent the property from being alienated. Even in case of an attachment, a person interested would continue to enjoy the immovable property. There is no proceeds of the crime involved. The respondents have not looked into the relevant materials especially the various letters addressed by the petitioner. Accordingly, it is submitted that the proceedings will have to be quashed.

3. Submissions of the Respondents:-

The learned Additional Solicitor General of India assisted by Mr. M. Dhandapani, the learned counsel for the respondents submitted that the respondents concerned are the competent authority to investigate. Such a power is available to the respondents under the Prevention of Money-Laundering Act. On a conjoint reading of Sections 2(1)(y) , 49 and 54 of the Prevention of Money-Laundering Act, 2002 (hereinafter referred to as the "Act") it could be seen that the respondents are the authority appointed under Section 49 of the Act. In view of power conferred under Section 54 of the Act to assist for an enquiry, the orders impugned cannot be assailed on lack of jurisdiction. As the issues pertaining to

coal allotment are pending consideration before the Apex Court, the same cannot be raised though incidentally in these proceedings. There is no necessity to deal with Section 5 of the Act as such a power has not been exercised by an appropriate authority. In support of his contention, the learned Additional Solicitor General of India has relied upon the judgment of a Division Bench of Calcutta High Court in *Rose Valley Real Estate and Constructions Ltd. and Others Vs. Union of India and Others*--> .

4. Reply by The Petitioner:-

The learned Senior Counsel appearing for the petitioner, by way of reply, submitted that the Apex Court has passed the order observing that it is open to the petitioner to raise all the issues before the Court. Therefore, there is no bar for this Court to decide the issues raised. There is no connection between the case pending before the Apex Court and the issues involved in the present writ petitions. In so far as the reliance made upon the decision of the Calcutta High Court is concerned, the learned Senior Counsel has submitted that even in the said case, the Deputy Director concerned passed an order and therefore, the ratio laid down therein does not have any application to the case on hand.

5. Discussion:-

5.1 On Maintainability:

Coming to the maintainability and propriety to deal with the case on merits, this Court is of the considered view that there is no apparent connection between the issues before the Apex Court qua allotment of Coal Block and the one involved before this Court. The petitioner has not even started the mining and the same has been cancelled already. Neither the respondents are parties before the Apex Court nor the issues similar. Thus, the objection raised by the respondents is rejected.

5.2. On Merits:

The legal issue raised has, in fact, been considered by the Calcutta High Court in *Rose Valley Real Estate and Constructions Ltd. and Others Vs. Union of India and Others*--> . By a detailed order, the Division Bench has agreed with the exercise of power during the course of investigation. As there is no dispute on the power of the respondents to investigate, the ratio laid down therein would apply to the case on hand. In other words, the exercise of power by the respondents is well within their jurisdiction while discharging duties as an Investigation Officer. Therefore, the distinction sought to be made by the learned Senior Counsel appearing for the petitioner cannot be accepted. The Division Bench has taken into consideration Sections 2(na) and 54 of the Act. The following paragraphs would be apposite.

"A balance has to be struck between the right to property of an individual and the measures which may be required to be inferred by necessary implication in an investigating agency for effective enforcement of the proceedings under the

Act. Impugned letter dated 19.09.2014 must be read as a temporary measure during investigation undertaken for preservation of evidence in contemplation of initiation of proceedings under the Act and for its enforcement. Such letter is not an end itself. While on the other hand, failure to resort to such measure may render the substantive powers under the Act otiose, to permit the same to continue indefinitely would amount to supplanting them.

In conclusion it is held as follows:-

(a) Impugned letter dated 19.09.2014 issued by respondent No. 3 requesting respondent banks (reporting entities under the Act) to prohibit/freeze withdrawal of monies from the account of the appellant's group of Companies is to be read as an indispensable temporary measure for preservation of evidence pending investigation and has been issued in aid of proceedings for attachment and seizure contemplated under section 5 or 7 of the Act and not to supplant them. Such incidental and consequential power being in aid to proceedings contemplated under the Act is held to be vested in the investigating agency in view of the inclusive definition of "investigation" under section 2(na) of PML Act, 2002.

(b) Respondents banks being "reporting entities" under the Act are duty bound to assist the investigating agency in terms of section 54 of PML Act and therefore issuance of notice upon the respondents banks cannot be said to be illegal.

(c) Failure to refer to other "scheduled offences" apart from the one under the SEBI Act in the impugned letter would not ipso facto invalidate the same in view the materials emanating from the records of investigation as also the saving provision engrafted in section 68 of the PML Act, 2002.

(d) Impugned letter dated 19.09.2014 having been held to be a temporary measure in aid of proceedings under the Act cannot be an end it itself. Hence, embargo contained in the said letter cannot continue indefinitely but is required to be restricted to a time frame within which the respondents may initiate appropriate proceedings under the Act in respect of the accounts/assets referred therein.

Accordingly, the impugned letter dated 19.09.2014 is modified and the embargo contained therein is directed to operate for a period of three months from date within which the respondent authorities are at liberty to initiate appropriate proceedings as contemplated under the Act, if not already done, in respect of the assets/accounts referred to therein. If the respondent authorities fail to initiate proceedings under the Act in respect of the accounts/assets referred to in the impugned letter within the aforesaid time frame, the respondent banks would be at liberty to permit the appellants to operate the said accounts/assets in accordance with law.

The appeal is partly allowed.

Findings or observations made herein are for the purpose of disposal of the

appeal and shall not have any binding effect on the parties at the subsequent stage of the proceeding or in any other collateral proceeding."

5.3. Now, the issue for consideration is as to whether the continuance of such an exercise of power is justified or not? As clearly held by the Division Bench referred to supra, the exercise of power is only meant for the purpose of investigation. Thus, such an exercise is meant to be undertaken sparingly to the minimum extent for a temporary period. Such a power can neither be a substitute nor akin to the power available under Section 5 of the Act, which is substantive in nature. The Court must be conscious of fact that the power is used even before the activation of Section 5 of the Act. Thus, such a power is neither unlimited nor unbridled. It is only a prelude to a proposed action and not a substitute. An incidental or ancillary action brought forth under the umbrage of investigation has to keep in mind the civil consequences that would arise. The process of investigation shall ensure that a party shall not be prejudiced. The investigation is only an enquiry into an offence. Thus, an investigation Officer may or may not conclude that an offence has been committed. While doing so, he has to avoid an element of arbitrariness especially when it partakes the character of an administrative action having civil consequences. As such an investigation is only a process of finding the truth, the power has to be exercised inconsonance with the same. If the officer concerned is of the view that the exercise of power would adversely affect a party, then, for its continuance, he has to apply his mind and consider the relevant materials.

5.4. In the case on hand, the plea of the petitioner is that by the impugned orders its entire activity has come to a grinding halt. The Officers and the employees could not be paid the salary and the project could not be started. In other words, the petitioner has pleaded before the respondents that it is being strangled by freezing of the funds. Apart from the undertaking given, it also made reliance upon the letter of the Power Finance Corporation dated 22.05.2015. A specific statement has been made that the trust and retention accounts duly monitored by the lenders at the time of release. A further statement has been made that fixed deposits have been created only to augment interest. The need for releasing the amounts has also been reiterated from time to time. Unfortunately, these factors have not been taken into consideration by the respondents. The respondents have treated the power exercisable for investigation with the one available under Section 5 of the Act by an officer other than him. There is no explanation as to why the investigation has prolonged. There is no sufficient material to hold that the continuity of the orders impugned would be necessary for investigation. Admittedly, the power under Section 5 of the Act has not been invoked so far. Strangling the petitioner would benefit none. When the exercise of power is for a specified purpose, it cannot be used otherwise. The decision of the Division Bench cited supra also would go against the respondents. It has also been held therein that such a power cannot be a substitute to the one available under Section 5 of the Act. The non consideration of the plea of the petitioner would lead to arbitrariness and thus, there is

violation of Article 14 of the Constitution of India. Incidentally it would attract a violation of Article 19(1)(g) of the Constitution of India. It is not the case of the respondents that the plea of the petitioner, particularly, with reference to the continued usage is not correct. Therefore, this Court is of the considered view that though the power is available to the respondents to pass the orders impugned, its continued exercise in the given case cannot be sustained in the eye of law. More over even under Section 5 of the Act, the provisional attachment can be in force only for a period of 180 days and not beyond.

5.5. On the question of applicability of Section 68 of the Act, it deals with invalidation of the notice on certain grounds. In the light of the discussion above, there is no difficulty in upholding the power of the respondents. However, the issue being one of the continued existence of orders meant to be used sparingly for a temporary period, the rigour of Section 68 of the Act would not apply to the case on hand. We should also bear in mind the fact that these orders have been passed unilaterally without even affording an opportunity to the petitioner neither indicating the reasons nor the application of mind. Therefore, the respondents ought to have done a complete review by taking into consideration of the entire materials.

6. Conclusion:

Accordingly, the orders impugned are hereby set aside. The writ petitions are allowed. In view of the same, this Court is of the considered view that there is no necessity to consider the consequential prayers. However, this order will not stand in the way of the appropriate authority taking further action in accordance with law based upon relevant material. In other words, the discussion and observations made are to be understood in the context of the issues raised in these writ petitions alone. No costs.

Writ Petition Nos. 7854, 10643, 14448 & 15317 of 2015 and respective M.Ps.

After the disposal of the Writ Petitions, Mr. Dhandapani, the learned counsel for the respondents submitted that a further period of two weeks may be granted.

7. The request made is opposed by the learned counsel for the petitioner. Considering the submissions made, this Court is inclined to grant a further period of one week from today to keep the order passed in abeyance considering the peculiar facts and circumstances of the case. It is made clear that no more extension will be granted.