

(2023) 04 TEL CK 0003
In the Telangana High Court
Case No : Criminal Petition No. 431 Of 2023

Sukesh Gupta

APPELLANT

Vs

Directorate Of Enforcement Hyderabad And Another

RESPONDENT

Date of Decision : 03-04-2023

Acts Referred:

Prevention of Corruption Act, 1988 — Section 13
Prevention of MoneyLaundering Act, 2002 — Section 2(1)(u), 2(1)(v), 3, 5
Code Of Criminal Procedure, 1973 — Section 154, 362, 482
Indian Penal Code, 1860 — Section 40

Citation : (2023) 04 TEL CK 0003

Hon'ble Judges : K. Surender, J

Bench : Single Bench

Advocate : S.Niranjan Reddy, Avinash Desai, Ravi Kiran Rao,
A.R.M.Sundaresam, Gadi Praveen Kumar, V.Ramakrishna Reddy

Final Decision : Allowed

Judgement

1. The petitioner is questioning the ongoing investigation by Enforcement Directorate, Hyderabad in ECIR/05/HYZO/2014.

2. A criminal complaint was registered by the CBI under Section 13 of the Prevention of Corruption Act against this petitioner and others on 03.01.2013. Thereafter, the company of the petitioner filed arbitration application and also MMTC filed civil suits. On 25.02.2014, present ECIR/05/HYZO/2014 was registered under Section 3 of Prevention of Money-Laundering Act, 2002 on the basis of FIR that was registered by CBI.

3. The crux of the allegation is that the petitioner being Director of MBS group of companies, received gold from MMTC on buyers Credit loan basis by keeping the forex position open. On account of the rupee fluctuation, lowering the value of the rupee, the petitioner was liable to pay additional 5% margin money in accordance with the MOU. According to MMTC, the company suffered a loss to the tune of Rs.220 Crores. CBI in its charge sheet alleged that this petitioner

entered into criminal conspiracy with public servants of MMTC and received gold.

4. Having heard the arguments at the stage of admission on 20.01.2023 my findings were:

"10. Even according to the investigation done by the CBI and also the case projected by ED, the outstanding liability of the petitioner's company stood at Rs.181.39 Crores due to the forex exchange fluctuation and the rupee value crashing by 27% and on account of such fluctuation, the alleged liability arose. However, the said liability under such circumstances was accepted by this petitioner and MMTC company in accordance with the MOU.

11. The core question that arises for consideration and not discussed earlier in the Criminal Petition No.5196 of 2019 is with regard to the outstanding claim by MMTC, whether such outstanding falls within the definition of 'proceeds of crime'. In the said circumstances, when the basis for prosecution under PML Act is projecting proceeds of crime as untainted money, the following point arises for consideration.

12. POINT: On account of any agreement or condition in an MOU between parties, with respect to forex fluctuation (depending on crashing or gaining of rupee value) results in an outstanding or liability payable by one of the parties, whether such an accrual of 'outstanding' or 'liability' amounts to 'Proceeds of Crime' as defined under the Act.

13. In the scenario of the rupee value gaining in the process of forex fluctuation, the petitioner would have gained and MMTC would have been liable to whatever extent.

14. In the said circumstances, when the alleged outstanding by the Petitioner prima facie is not on account of any criminal activity but on account of accepting liability with regard to forex fluctuation, this Court deems it appropriate to stay all further proceedings in the present case ECIR/05/HYZO/2014, until the point for consideration is determined."

5. Heard Sri S.Niranjan Reddy, Sri Avinash Desai, Sri Ravi Kiran Rao, learned Senior Counsel for the petitioner and Sri A.R.M.Sundaresam, learned Senior Counsel/Additional Solicitor General of India, appearing for Sri V.Rama Krishna Reddy, learned Central Government Standing Counsel appearing for the respondent/Enforcement Directorate.

6. The undisputed facts are;

i) Gold was delivered by MMTC only against the payments made by the petitioner's company and not on credit;

ii) There was an understanding in between MMTC and MBS that the gold would be bought on buyers credit policy and MMTC also collected 5% extra margin money to cover fluctuation of rupee and then delivered gold.

iii) The outstanding of Rs.181.39 Crores as claimed by MMTC is reflected in the agreement that was entered into between MMTC and MBS Impex Private Limited on 25.11.2005 whereby the petitioner accepted an outstanding of Rs.181.39 Crores on account of devaluation of rupee by 27%.

iv) Around 5800 kgs of gold was supplied to MBS group over a period of nearly 6 years to the tune of nearly Rs.20,000 Crores.

v) The CBI completed investigation in the year 2014 and filed charge sheet, however, the ED is still continuing investigation and recently attached properties in the case.

7. Initial objection was raised by the Enforcement Directorate regarding the maintainability of the quash petition. Since Criminal Petition No.5196 of 2019 filed by petitioner for similar prayer was dismissed and there being no changed circumstances, the second Criminal Petition cannot be maintained.

8. Sri A.R.M.Sundaresan, learned Senior Counsel submitted that the quash petition itself is not maintainable as an ECIR is not an FIR, for which reason, this Court under Section 482 of Cr.P.C cannot quash the ECIR. He relied on the judgments of Hon'ble Supreme Court in the case of Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and another (1990) 2 Supreme Court Cases 437, wherein it was held that inherent jurisdiction of the High Court cannot be invoked to override the powers of review under Section 362 of Cr.P.C. Learned Senior Counsel argued that the present petition which is the second quash petition on the very same grounds cannot be maintained for the reason of prohibition under Section 362 of Cr.P.C. He also relied on the judgment of Madras High Court in the case of S.Madan Kumar v. K.Arjunan 2006 (1) MWN(Cr.)1(DCC), wherein it is held that a person cannot approach the High Court in installments seeking remedy in the very same case by withholding part of his case and filing another petition with similar relief. Reliance was also placed on the judgment of Division Bench of Madras High Court in the case of N.Dhanraj Kochar and others v. The Director, Directorate of Enforcement, New Delhi and another CrI.O.P.No.SR 46376 of 2021, wherein it was held that the ECIR is not registered under the Code of Criminal Procedure and it is not akin to FIR registered under Section 154 of Cr.P.C. Accordingly, the ECIR registered by the Enforcement Directorate cannot be the subject matter of judicial review under Section 482 of Cr.P.C.

9. The Hon'ble Supreme Court in the judgment reported in the case of Anil Khadkiwala v. State (Government of NCT of Delhi) (2019) 17 Supreme Court Cases 294 held that the second application for quashing the complaint cannot be refused only for the reason of dismissal of earlier application. It was further held that the second application filed will not fall within the bar under Section 362 Cr.P.C.

10. According to the learned counsel for the petitioner, after dismissal of the earlier Criminal Petition, properties were attached under Section 5 of Prevention

of Money-Laundering Act 2002 (For short 'the Act').

11. As seen from Section 5 of the Act, any attachment can be done on the basis of proof available with the concerned authority of the Enforcement Directorate that any person is in possession of any proceeds of crime and 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 by the Enforcement Directorate. The earlier Criminal Petition was dismissed mainly on the round that the investigation is still pending. The ECIR was registered in 2014 and Criminal Petition was filed in 2019. Since the Enforcement Directorate has attached the properties recently, it means that the Enforcement Directorate subsequent to the dismissal of the criminal petition had basis to believe that the petitioner was in possession of proceeds of crime. The said attachment would be sufficient ground to entertain the present application. Moreover in the back ground of this Court framing the point for consideration which is Whether an outstanding arising out of any agreement or condition in MOU between the parties with respect to forex fluctuation amounts to proceeds of crime.

The said aspect whether the outstanding as projected by the Enforcement Directorate falls within the definition of 'Proceeds of Crime' or not was not determined in the earlier order. Accordingly, the petition is maintainable.

12. The other ground raised by the learned Senior Counsel for ED is that an ECIR cannot be quashed since it is not an FIR registered under Section 154 of Cr.P.C.

13. The Hon'ble Supreme Court has dealt with the inherent powers of the High Court under Section 482 of Cr.P.C in respect of nature, scope and circumstances under which the power can be exercised. The Hon'ble Supreme Court in the State of Harayana v. Bhajanlal reported in (1992) SUPP 1 page 335 observed at paragraph 60 as follows:

".....But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the court on being approached by the person aggrieved for the redress of any grievance, has to consider the nature and extent of the redress of any grievance, has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution."

The three Judge bench of Hon'ble Supreme Court in the case of State of Karnataka v. M.Devendrappa (2002) 3 Supreme Court Cases 89 held that the powers under Section 482 of Cr.P.C envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction.

No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law.

It was further held as follows:

"Inherent power is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice." (Underlined by me)

14. The said principles form basis for the High Court to invoke the inherent powers under Section 482 of Cr.P.C. If this Court finds that in a given case it is just and necessary to prevent abuse of process of the Court or in any criminal proceedings orders can be passed to serve the ends of justice. As discussed in earlier paras, this petition is not filed to recall or review the order made in Criminal Petition No.5196 of 2019, but filed under changed circumstances. Applying the principle laid down in Anil Khadkiwala's case (supra), this Criminal Petition is maintainable and Section 362 of Cr.P.C has no application.

15. To prosecute under Section 3 of the Act, a person has to be actually involved in any process or activity connected with 'Proceeds of Crime'. 'Proceeds of Crime' is defined under Section 2(1)(u) of the said Act, which is extracted hereunder:

"proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property; or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad."

16. It is specifically stated that any property derived or obtained by any person as a result of criminal activity relating to a scheduled offence would amount to 'Proceeds of Crime'.

17. Criminal activity is not defined under the Act. However, any act, which is done intentionally, prohibited by law or an act which is made punishable under law can be said to have committed a crime. It involves mensrea, which means a guilty mental state and lack of which would negate a crime. Mensrea is an essential element of every offence. Exclude mensrea and person cannot be mulcted with criminal liability.

18. Penal liability is indicated in the maxim actus non facit reum nisi mens sit rea which means the act does not alone amount to guilt, but it must be accompanied

by a guilty mind. However, there can be an exemption made in a statute and unless the statute expressly or by necessary implication rules out mensrea, the element of mensrea has to be read into all penal provisions.

19. Even Indian Penal Code does not define 'Crime'. However, under Section 40 of IPC, the word 'offence' denotes a thing punishable under the Code.

20. The Act of 2002 was enacted to prevent money laundering and to provide for confiscation of the property derived there from.

21. Learned Senior Counsel Sri A.R.M.Sundaresam, appearing for the Enforcement Directorate would submit that the property obtained in any manner either directly or indirectly would fall within the definition of 'Proceeds of Crime' as defined under Section 2(1)(u) when read with 2(1)(v) of the Act. 'Property' is defined under Section 2(1)(v), which means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located. Further, according to the explanation, the term 'property' includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences. The definition under Section 2(1)(u) deals with 'Proceeds of Crime', Section 2(1)(v) deals with the 'property'. They have to be read in tandem and it indicates that any outstanding that arises even in a commercial transaction would amount to 'Proceeds of Crime'. Since an outstanding arose though on account of dollar-rupee fluctuation, the petitioner is liable to pay and non-payment of such accrual of outstanding is a wrongful gain and falls within the definition of 'Proceeds of Crime'.

22. The said argument of the learned Senior Counsel for the Enforcement Directorate is wholly unacceptable. The intent of introducing the enactment is to prevent money laundering. The said money/property should have been the result of committing a crime and should fall within the definition of 'Proceeds of Crime'.

23. Section 3 of the Act of 2002 reads as follows:

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 including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money laundering."

In the present case there is no property which is derived consequent to any criminal activity. The question of proceeds of crime being concealed or being in possession or the question of acquiring the such property, does not arise.

As argued by the learned Senior Counsel for the Enforcement Directorate, if every commercial business or loan transaction, where an outstanding would arise in the normal course of business falls within the definition of 'Proceeds of Crime', it would have disastrous consequences. It would bring into its fold, every civil dispute. It is not the intention of the legislature to get every civil dispute or

commercial transaction to be prosecuted under the Act of 2002. Specifically in the scheme of the enactment there should be such property derived or obtained directly or indirectly as a result of criminal activity relating to the scheduled offence. Unless the basic ingredient of criminal activity is satisfied, the question of invoking Section 3 of the Act does not arise.

23. The outstanding arose on account of the MOU that has been entered into in between the MMTC and MBS jewelers regarding dollar-rupee fluctuation. It is an understanding between two entities doing business. It is not in dispute that MMTC has not given any gold which was not paid for by the petitioner/MBS jewelers. There is no property that is generated on account of the dollar-rupee fluctuation. The petitioner or his firm can do nothing about the devaluation of the rupee vis-a-vis US dollar. In fact, in business terms the outstanding that had to be paid by the petitioner's firm would be termed as a loss occurred during the normal course of business transaction.

24. Further, the contention of the learned senior counsel for ED is that since the charge sheet is already filed for the predicate offence, the ED is justified in proceeding with the investigation. The ED can as well investigate to find out whether an offence has been made out or not. The said power is not in dispute. On the basis of any suspicion that a criminal activity has resulted in accrual of crime proceeds in the form of either money or property, the ED is entitled to investigate. However, in the present case, ECIR was registered in the year 2014 on the basis of crime registered by the CBI. The CBI has filed charge sheet in 2014 but the ED is still continuing investigation. The only reason given by Enforcement Directorate is that the petitioner has appeared only two times earlier to the orders of this Court in Criminal Petition No. 9588 of 2022.

25. It is not in dispute that till the date of hearing the present petition, the petitioner had appeared more than ten times. The details of outstanding and all the alleged criminal acts of the petitioner are subject matters of civil cases pending, CBI charge sheet and also the arbitration proceedings. There is nothing which is to the exclusive knowledge of this petitioner regarding the liability that arose to be payable to MMTC.

26. The very basis for launching investigation under the Act of 2002 is the undertaking given by this petitioner to pay an amount of Rs.181.39 Crores which admittedly was on account of dollar-rupee fluctuation and in accordance with the MOU earlier entered into in between MMTC and MBS jewelers. It is apparent that the ED is groping in the dark without laying a foundation and after nearly 10 years of registration of ECIR stating that they are trying to find out whether any offence is made out or not, valuable time and resources of ED are wasted. No doubt, as argued by the learned Additional Solicitor General of India, relying on the judgment in the case of Neeharika Infrastructure Pvt. Ltd., v. State of Maharashtra and others (2021) LL SC 211 that investigation into crimes is the prerogative of the police officer and the Court should be cautious and circumspect to interfere invoking the jurisdiction under the inherent powers at

the stage of investigation.

The Hon'ble Supreme Court in *Vijay Madanlal Choudhary and others v. Union of India and others* 2022 SCC OnLine 929 at paragraphs 283 and 284 held as follows:

"283. Even though, the 2002 Act is a complete Code in itself, it is only in respect of matters connected with offence of money-laundering, and for that, existence of proceeds of crime within the meaning of Section 2(1)(u) of the Act is quintessential. Absent existence of proceeds of crime, as aforesaid, the authorities under the 2002 Act cannot step in or initiate any prosecution.

284. IN other words, the Authority under the 2002 Act, is to prosecute a person for offence of money-laundering only if it has reason to believe, which is required to be recorded in writing that the person is in possession of "proceeds of crime".

27. The Hon'ble Supreme Court in the case of *R.Nagender Yadav v. The State of Telangana* in Criminal Appeal No.2290 of 2022 held that a complaint disclosing civil transaction may also have a criminal texture. But the High Court must see whether the dispute which is in substance of a civil nature is given a cloak of a criminal offence. In such a situation, if civil remedy is available and is in fact adopted, the High Court should have quashed the criminal proceeding to prevent abuse of process of Court. In the case of *Indian Oil Corporation v. NEPC India Limited and others* (2006) 6 Supreme Court Cases 736 the Hon,ble Supreme Court held-

"12.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

13.

"It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

28. Every commercial activity where an outstanding arises would not fall within the ambit of Section 3 of the Act. It is not merely criminal activity relating to commission of a predicate offence but property has to be derived directly or indirectly as a result of such criminal activity to be tried and prosecuted under Section 3 of the Act. In the present case, no such property is derived or obtained either directly or indirectly by the petitioner herein either involving in criminal activity or handling any such property derived as a result of criminal activity. The question of concealing or being in possession or acquiring such property does not arise. The amount accrued as discussed earlier is on account of dollar- rupee fluctuation and it cannot in any manner be held that the petitioner had derived or obtained any property. Though, it was agreed that differential amount of rupee dollar fluctuation would be paid, at most it can be termed as an outstanding which can be recovered in a civil suit and by no stretch of imagination can it be called as 'Proceeds of Crime' or the outstanding amount can be called as 'property' as defined under Section 2(1)(v) of the Act.

29. Viewed from any angle, when there is no criminal activity nor any property which is derived as a consequence of criminal activity, I am of the firm opinion that the proceedings in ECIR/05/HYZO/2014 cannot be permitted to continue.

30. Accordingly, the proceedings in ECIR/05/HYZO/2014 are hereby quashed.

31. Criminal Petition is allowed. Consequently, miscellaneous applications, if any, shall stand disposed.