(2018) 08 ATPMLA CK 0004

In the Appellate Tribunal Under Prevention Of Money Laundering Act

Case No : MP-PMLA-3236/MUM/2017, FPA-PMLA-1681/MUM/2017

Vivek Mathias APPELLANT

Vs

Deputy Director, Directorate Of Enforcement, Mumbai RESPONDENT

Date of Decision : 13-08-2018

Acts Referred:

Prevention Of Money Laundering (Issuance Of Provisional Attachment Order) Rules, 2013 — Rule 3(2)
Code Of Civil Procedure, 1908 — Section 64, Order 38 Rule 10
Prevention Of Money Laundering Act, 2002 — Section 2(1)(u), 3, 5, 5(5), 8, 8(1), 8(2), 8(3), 8(6), 8(8), 9, 26
Transfer Of Property Act, 1882 — Section 53A, 54, 55
Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 — Section 19
Evidence Act, 1872 — Section 81

Citation : (2018) 08 ATPMLA CK 0004

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Rajiv Nayar, Arshdeep Singh, Akshay Gupta, Manish Jha, Rajeev Awasthi

Judgement

,,

MP-PMLA-3236/MUM/2017(STAY) & FPA-PMLA-1681/MUM/2017,,

1. The appellant has filed the Prevention of Money Laundering Act, present appeal under Section 26 of the 2002 against the Order dated 01.12.2016.",,

2. In the impugned order, the Adjudicating Authority has arrived on a conclusion in its order in Original Complaint No. 612/2016 dated 1st December,",,

2016, in confirming the Provisional Attachment Order No. 11/2016 dated 11th June, 2016.",,

3. The Original Complaint No. 612/2016 was filed against Shri Vijay Mallya, M/s Kingfisher Airlines Ltd. & Ors., under Section 5(5) of the PMLA,",,

2002, wherein certain properties (movable & immovable properties) have been attached provisionally under Provisional Attachment Order No.",,

11/2016 dated 11.06.2016, under Section 8(3) of the PMLA, 2002.",,

4. Admittedly, the Enforcement Directorate, Mumbai has registered a case against Shri Vijay Mallya, M/s Kingfisher Airlines Ltd. (KAL) and others",,

under Prevention of Money Laundering Act (PMLA), 2002, in the matter of IDBI Loan of Rs. 900 Crore.",,

5. The properties mentioned in the aforesaid Provisional Attachment Order have been provisionally attached under Section 5(5) of PMLA, and the",,

same has been duly confirmed by the Adjudicating Authority in its order in Original Complaint No. 612/2016 dated 01/12/2016, which also includes the",,

property as mentioned by the Appellant.,,

6. It is submitted on behalf of respondent no. 1 that the impugned provisional attachment has been made by invoking provision of Section 2(1)(u) of,,

PMLA, 2002, which empowers the Complainant (an authority under PMLA) to attach properties of equivalent value of Proceeds of crime to the",,

offender. Hence, during the course of investigation, various properties held/ owned/acquired by Shri Vijay Mallya, including those through various",,

companies and/or special purpose vehicle, which were controlled directly or indirectly by him, through dummy Directors appointed by him were",,

identified, which included the subject property held in the name of M/s United Breweries (Holdings) Ltd.",,

7. The Adjudicating Authority has confirmed the attachment order. The same has been challenged by the appellant on various grounds.,,

8. Admittedly, the appellant was not impleaded as defendant in the proceedings before the Adjudicating Authority by the Respondent no. 1 nor any",,

notice was issued to the appellant. The appellant was not given any opportunity of hearing as per the mandatory provision of Section 8(2) of the,,

PMLA.,,

9. The appellant was not arrayed in the FIR or charge sheeted. He was not involved in schedule offence. No prosecution complaint is pending against,,

the appellant.,,

10. The few facts as per the case of appellant in nut-shell are as under:-,,

i) The appellant is a citizen of India and has been a Non-Resident Indian for his entire lifetime, having lived in Hong Kong, Japan, USA, UK and",, Monaco. The appellant is currently residing at Europa Residence, Place des Moulins, MC 98000, Monaco. The appellant is engaged in the business of",,

banking and hedge funds for the last 24 years.,,

ii) In December, 2011, the appellant was desirous of purchasing residential property in Bangalore. In this regard, the appellant, through his broker, one",,

Sh. Nicky Sawhney alias Rajan Kumar Sawhney, came across a real estate project by the name of â??Kingfisher Towersâ?, being jointly developed",,

by Respondent No. 5 and 8 (herein referred to as the â??said projectâ?). The said project was being developed at property bearing number Municipal,,

NO. 24 (Old Nos. 24 and 33), situated in Grant Trunk, now known as Vittal Mallya Road, Corporate Division No. 61, Ward No. 76 of Shanthi Nagar",,

Range, Bangalaore-560001 and admeasuring about 17,953.76 sq. mtrs. (hereinafter referred to as the â??said landâ??).",,

iii) The appellant entered into discussions and negotiations with Respondent No.5 for the purchase of flats/apartment(s) in the said project. In the,,

course of the aforesaid negotiations and discussions Respondent No. 5 represented and assured the appellant that it was the full and absolute owner,,

and in possession of all the part and parcel of the said land (including the existing structure thereat) where the said project was being developed.,,

Further that, Respondent No. 8 being desirous of developing the same, had entered into a joint Development Agreement dated 26.04.2010 with",,

Respondent No. 5, undertaking to develop the said project and to deliver 55% of the total saleable super built-up area in the proposed",,

buildings/structures to Respondent No. 5, and in consideration thereof, Respondent No. 5 agreed to transfer to Respondent No. 8, 45% or such portion",,

of undivided share of said land as would be proportionate to the saleable super built-up area falling to the share of Respondent No. 8 in the said,,

project.,,

iv) Consequently, after arms-length discussions and negotiations, the appellant entered into six agreements with Respondent No. 5 & 8 for the",,

purchase of the two apartments bearing No. 17B and 19B in the said project (hereinafter collectively referred to as â??said flatssâ?) and the,,

proportionate undivided area in the said land. The following agreements were executed among the appellant, Respondent No. 5 and 8 (hereinafter",,

collectively referred to as the â??said agreementsâ??):,,

a. Two Agreements to sell dated 30.01.2012, one each for the said flatss;",,

b. Two Construction Agreements dated 30.01.2012, one each for the said flatss; and",,

c. Two Side Letters dated 30.01.2012, one each for the said flats.",,

By the aforesaid two Agreements to Sell, the appellant acquired under each such Agreement, 8321/767870th Undivided right, title and interest and",,

ownership in the said Lands (hereinafter referred to as â??the proportionate undivided area I the said landâ?) and vide the aforesaid two Construction,,

Agreements, the appellant acquired the right to get the said flats constructed by the Respondent No. 5 and 8.",,

Copies of the aforesaid six Agreements all dated 30.01.2012 are filed .,,

v) The consideration payable by the appellant towards the Agreements to sell dated 30.01.2012 was Euro 8,05,461/-, equivalent to Rs.5,24,84,000/-",,

(Rupees five crores twenty four lakh eighty four thousand only) towards each Agreement for the proportionate undivided area in said land; and the,,

consideration payable by the appellant towards the Construction Agreements dated 30.01.2012 was Euro 30,19,539/-, equivalent to Rs.19,67,53,000/-",,

(Rupees nineteen crore sixty seven lakh fifty three thousand only) towards construction of each of the said flats. Thus, the cumulative consideration",,

payable by the appellant towards acquiring the legal and complete right, title and interest of the said flatss and the proportionate undivided area in the",,

said land was Euro 76,50,000/-, equivalent to Rs.49,84,74,000/-(Rupees forty nine crore eighty four lakh seventy four thousand only) (hereinafter",,

referred to as the â??entire Purchase Considerationâ??).,,

vi) As per the said Agreements, the appellant paid the entire purchase consideration to Respondent No. 5, amounting Euro 7,650,000/-(equivalent to",,

Rs.49,84,74,000/-) on 22.02.2012. Further, at the request of Respondent No. 5 and 8, the entire purchase consideration was remitted to an escrow",,

account of HDFC Bank Limited (Respondent No. 9 herein), since it was represented to the appellant, that the Respondent No. 9 was a creditor of",,

Respondent No. 5. The entire purchase consideration was remitted through legal banking channels from the overseas account of the appellant. In light,,

of the execution of the said Agreements and the payment of full consideration by the appellant, the latter became the beneficial owner of the said flats",,

and the proportionate undivided area in the said land and acquired rights in the said flatss, inter alia, highlighted in the Agreements to Sell dated",,

30.01.2012.,,

Copies of the Certificate of Foreign Inward Remittance bearing serial number 1332982 dated 23.02.2012, Receipt dated 24.02.2012 issued by",,

Respondent No. 5 and the Party Advice dated 23.02.2012 in respect of payment of purchase consideration by the appellant are filed.,,

vii) The appellant paid the entire purchase consideration from his own personal bank account having funds from his independent sources and earnings,",,

which had no relation whatsoever with any of the respondents named above nor was the purchase consideration part of, directly or indirectly, any",,

transaction(s) with the respondents named above. In this regard, the appellant has filed Confirmation of Transfer dated 14.02.2017 issued by the",,

banker of the appellant confirming that the purchase consideration was paid by the appellant from his personal bank account consisting of his personal,,

funds.,,

viii) The appellant paid the entire purchase consideration upfront to lock the purchase price at the time of execution of the said Agreements and to,,

ensure that the consideration is not subjected to any escalation in the future. Further, the entire purchase consideration was made inclusive of existing",,

VAT and Service Tax, as applicable on the purchase transaction and it was also agreed that the appellant shall not be liable to pay any additional taxes",,

on the purchase transaction, including any upward revision to existing taxes and that in case of any upward revision, the same was to be paid by the",,

purchase consideration. Therefore, to keep himself immune from any price escalation (which usually takes place in the construction sector) and from",,

any upward revision in taxes, the appellant agreed to pay the entire purchase consideration upfront. This issue was discussed during the negotiations",,

between the parties and was also specifically highlighted by the appellant in his emails dated 29.12.2011, 26.01.2012 and 30.01.2012 addressed to the",,

representative of the Respondent No. 5, Mr. Shashikanth V., who was negotiating on its behalf with the appellant. Print out of the emails dated",,

29.12.2011, 26.01.2012 and 30.01.2012 are filed.",,

ix) After execution of the said Agreements and payment of the entire purchase consideration, disputes arose amongst the appellant, Respondent No. 5",,

and Respondent No. 8, in the year 2013. It is submitted that Respondent No. 5

had deliberately miscalculated the Service Tax and VAT leviable and",,

payable in respect of the purchase of said flatss, which was not only in contravention of the said agreements but was also contrary to the applicable",,

law. Thus, being under the legitimate belief that Respondent No. 5 had unjustly enriched himself as aforesaid, the appellant herein brought the issue to",,

the Respondent No. 5 and 8â?s notice and demanded that the same be resolved as per law. The appellant has also ascertained that the Respondents,,

had sold out certain common areas in certain floors linking the three towers in the said project to certain interested purchasers. However, the said",,

respondents persisted with their position and aggrieved by the same, the appellant herein was constrained to initiate Arbitration proceedings on",,

11.09.2013 by filing a petition under the Arbitration and Conciliation Act, 1996, before Justice (Retd.) G. Patri Basavana Goud, the Ld. Arbitrator,",,

seeking the following reliefs:,,

â??a. To refund to the Petitioner Rs.2,21,00,000/- (Rupees two crore twelve lakh only) (Rupees one crore six lakh against each apartment",,

set out in the Schedule Property), the excess amount charged to petitioner alongwith interest at 18% per annum from the date of receipt, i.e.,",,

22.02.2012 till date of award;,,

b. To render to the petitioner proper accounts of actual VAT and service tax paid in respect of the Schedule Property;,,

c. To refund the amounts equivalent to the reduction in the super built-up area due to the alleged sale of common area to the proposed,,

purchasers of apartment, alongwith interest at 18% per annum from the date of receipt, i.e., 22.02.2012 till date of award;",,

d. Pay interest at 18% per annum on the above amounts from the date of award till date of payment;,,

e. To award cost/s towards arbitration proceedings;,,

f. Pass such other order/s as this Honâ??ble Arbitrator deems fit to grant in the circumstances of the case, including the costs of the",,

petition, in the interest of justice and equity.â??",,

Therefore, at the conclusion of the arbitration proceedings, the same were decided by the Arbitral Tribunal against the appellant herein, vide its Final",,

Award dated 22.04.2016. Copies of the appellantâ?s petition dated 10.09.2013 under the Arbitration and Conciliation Act, 1996, separate Defence",, Statements dated 05.12.2013 filed by the respondents 5 and 8 herein, and the Final Award dated 22.04.2016 passed by the Arbitral Tribunal are filed.",,

11. It is addressed the oral arguments on behalf of the respondent no. 1 in the present appeal and has also filed in its written-submission. The following,,

issues are raised:-,,

11.1 The appellant has no locus standi to file the present appeal as appellant was neither the defendant before Adjudicating Authority nor he can any,,

rightful claim.,,

11.2 The appellant has attempted to help the accused person by entering into the so-called agreement for the purchase of the flats in Kingfisher,,

Tower which has already been attached and the attachment is confirmed by the Adjudicating Authority.,,

11.3 Only agreements for the seven flats out of hundreds of flats in Kingfisher towers and that too in the year 2012 not before not thereafter were,,

executed in spite of prohibition by way of Corporate guarantee not to sell, create third party right etc. in the year 2010 given to the consortium of",,

banks.,,

11.4 The connivance of the appellant with accused Vijay Mallya is apparent from the fact that the winding up petitions filed by the consortium bank,,

26.03.2012 in COP No. 57/2012, before the Honâ?ble Karnataka High Court which were widely published both in print as well as electronic media",,

and the people were well aware of the fraud committed by Vijay Mallya. However, the appellant despite of pendency of application in the winding up",,

petition, rather the appellant entered into an agreement dated 30.01.2012 and paid money.",,

11.5 In the agreement dated 05.04.2012, there is an arbitration clause and if the appellant has any grievances against Mallya he must invoke arbitration",,

clause and merely by entering in to agreement that too unregistered he has no claim in attached property which is not even fully constructed, then how",,

he can ask for possession or execution of sale deed.,,

11.6 In April, 2010 a Lenders meeting was held between the Respondents Bank, certain other banks and KAL. In the said meeting, it was decided to",,

recast the debts of KAL. In pursuance of the same, the Respondent Banks and the KAL entered into a Master Debt Recast Agreement dated",,

December 21, 2010 (MDRA). Simultaneous with the execution of the MDRA, various other agreements were entered into between KAL and the",,

Respondent Banks, inter-alia to secure and create securities pursuant to the MDRA and as contemplated under the MDRA (Financing Documents).",,

11.7 Any encumbrance created in favour of any third party is breach of such undertaking is non-est and void. The agreement, therefore, is null and",,

void in view of the corporate guarantee.,,

11.8 The appeal is no maintainable in view of the decree dated 19.01.2017 is passed by the Debt Recovery Tribunal against these very assets,,

including the flatss in question directing KAL, Dr. Vijay Mallya and KFIL to jointly and severally pay the sum of Rs. 6203,35.03,879.42 alongwith",,

further interest at 11.5% yearly. Therefore, the said decree which has attained finality as such cannot be interfered. There is an arbitration award in",,

favour of the Consortium Bank. The appellant has prima facie not made out a case for this Court to consider the reliefs claimed in the instant appeal.,,

In case the prayer is allowed, it would result in according priority to their claims over those of other secured creditors of the appellant which is",,

impermissible in law.,,

11.9 Even the Honâ?ble Division bench of Karnataka High Court wherein the order of winding up is challenged the Honâ?ble High Court vide order,,

dated 25.4.2017 observe that the official liquidator is requested not to precipitate the matter during the pendency of the appeal.,,

11.10 The appellant for the same relief had already filed an application before the Honâ?ble Division Bench of Karnataka High Court and the same is,,

pending adjudication, therefore, the appellant cannot be allowed to go for forum shopping. The UBHL has filed the interlocutory application before",,

Karnataka High court prosing to sell the assets to re pay the debts and in the list of assets UBHL has also included the present flats then how the,,

appellant making any claim over it. The Official Liquidator had filed its reply in response to the application filed by the appellant before the Karnataka,,

High Court opposing their application.,,

11.11 During the course of investigation, it was observed that the appellant had entered into an â??Agreement to Sellâ? to purchase a flats in the said",,

tower and had alleged made payments the same as was agreed between them with the developers of â??Kingfisher Towersâ?. The appellant based,,

on their â??Agreement to Sellâ? claimed to have 8321/767870th undivided right, title, interest and ownership in the said Lands i.e. the proportionate",,

undivided area in the said land where the tower is located. Apparently, the towers have not yet been completely constructed and the parties had only",,

entered into an agreement to sell the said property. There appears to be no sale deed entered into, nor the said agreement was registered with the",,

Statutory Authority authenticating the genuinity of the said transaction. Section 54 of the Transfer of Property Act, which very categorically states",,

that â?" â??Contract for Sale â?" A contract for sale of immovable property is a contract that a sale of such property shall take place on terms,,

settled between the parties. It does not itself create any interest in or charge on such property.â??,,

11.12 In the case of Crest Hotel Ltd. Vs. Asstt. Superintendent of Stamps, AIR 1994 Bom 229, the Honâ??ble Bombay High Court has held that:-",,

â??It is well settled that a contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled,,

between the parties. It does not, of itself, create any interest in or charge on such property. It is thus clear that an agreement for sale is",,

merely a document creating a right to obtain another document of sale on fulfillment of terms and conditions specified therein. It does not,",,

of itself, create any interest in or charge on such property. On the strength of such an agreement a buyer does not become the owner of the",,

property. The ownership remains with the seller. It will get transferred to the buyer only on execution of the sale deed by the seller. What the,,

buyer gets from an agreement for sale is only a right to obtain a sale deed executed in his favour. If the seller refused to comply, the buyer",,

is entitled to enforce that obligation by filing a suit for specific performance see Padma Nair v. The Deputy Collector, Valuation and Stamp",,

Duty, W.P. No. 2586 of 1988 dated 28th July, 1993, since reported in 1994 Mh.L.J.â??",,

11.13 In the case of B. Rama Raju Vs. Union of India & Ors. 2011 SCC Online AP 152 i,n which the constitutional validity of Section 5 and 8 of the",,

PMLA was challenged, the Division Bench of Andhra High Court as follows:-",,

â??37. It further requires to be noticed that not only from the second proviso to Section 9 of the Act but on general principles of law as,,

well, a person deprived of the property in his ownership, control or possession on account of confiscation proceedings under the Act, has a",,

right of action against transferor of such property to recover the value of such property.â??,,

11.14 In the case of Suraj Lamp & Industries vs. State of Haryana & Ors. [(2012) 1 SCC 656 very aptly observed as follows:-,,

â??18. It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (duly stamped and,,

registered as required by law), no right, title or interest in an immovable property can be transferred.",,

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements,,

of Sections 54 and 55 of the Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property,,

(except to the limited right granted under Section 53-A of the Transfer of Property Act). According to the Transfer of Property Act, an",,

agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the Transfer of Property Act enacts",,

that the sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or,,

charge on its subject matter.,,

Since, there is no Registered Sale deed nor there is any handing over of the possession of the flats/property to the appellant since the building is still",,

under construction.,,

11.15 The above fact was also corroborated in the statement of Shri Manoj Kumar, an employee of M/s UB Group dated 02.06.2016, wherein he has",,

interalia, stated that â??Kingfisher Tower is a single tower consisting of thirty five floors of which from basement to four floors, consist of parking.",,

This tower is purely residential property and the details of the flats owned by M/s UBHL are mentioned in the sharing agreement dated 04.11.2010.,,

On being asked, he states that the tower is presently under construction. Out of all these flats, for seven flats, agreement to sell have been entered",,

with different parties. However, the sale deed has not been executed as there is a restraint Order from the Honâ?ble High Court of Karnataka,",,

Sl.

No.",Date,Particulars

1.,26.04.2010,"Joint Development Agreement between M/s United Breweries Holdings Ltd. (Respondent No. 5) and M/s Prestige Estates

Projects Pvt. Ltd. (Respondent No. 8)

2.,"29.12.2011

26.01.2012

30.01.2012","Negotiations between Appellant and Respondent No. 8/Respondent No. 5 vide emails regarding purchase of property

3.,30.01.2012,"Agreements executed among the Appellant, Respondent No. 5 and 8 for sale of Flats No. 17B and 19B and proportionate undivided

area in the underlying land -

Â· Two Agreements to Sell dated 30.01.2012, one each for the

said Flatss

Â· Two Construction Agreements dated 30.01.2012, one each for

the said Flatss

Â· Two Side Letters dated 30.01.2012, one each for the said Flatss

4.,23.02.2012,"Entire sale consideration remitted to M/s HDFC Bank Ltd.

(Respondent No. 9)

Payment documents @ pg. 348/349

5.,10.09.2013,"Arbitration proceedings initiated by the Appellant against

Respondent No. 5 and Respondent No. 8

Â· Appellantâ??s Claim Statement

Â· Respondent No. 5â??s Statement of Defence

Â· Respondent No. 5â??s Statement of Defence

6.,29.07.2015,"FIR registered for predicate offence. Not named in FIR

Â· Not on record

7.,29.01.2016,"ECIR No. ECIR/03/MBZO/2016 registered.

Â· Not on record

Â· Appellant not named in the ECIR

8.,22.04.2016,Final Award in Arbitration proceedings

9.,11.06.2016,"Provisional Attachment Order No. 11/2016

Â· Not on record

Â· Under-construction flatss (including those purchased by the

Appellant) in Kingfisher Towers attached

10.,"July, 2016",Appellant made enquiries regarding status of construction

11.,07.07.2016,"Appellant issued Legal Notice to Respondent No. 5 and 8, seeking

specific performance of agreements regarding purchase of flatss

and seeking supply of ED documents re attachment

Â· No response from either

12.,27.09.2016,"Appellant wrote to ED seeking details of the attachment

Â· No response from ED

13.,01.12.2016,Confirmation Order passed by the Adjudicating Authority

14.,20.12.2016,"On gaining knowledge of the Confirmation Order, the Appellant

applied for certified copy of the same

15.,30.12.2016,Certified copy received by the Appellant

16.,21.02.2017,Appeal filed before this Tribunal

HDFC BANK Party Advice cum

Date: 23 Feb 2012

Invoice No. 912022200148

Dear Customer

In accordance with details shown below we have effected following transactions your Account 0009035000212",,

Particulars,Amount in INR,

Transactions Reference no. 912022200148

Inward remittance details â?" EUR7650000@65.1600 Remittance name

1/VIVEK MATHIAS Beneficiary Name UNITED

BEWERIES(HOLDINGS)LIMITED","498,474,0 0.00 Credit",

Govt. Service Tax as per sub rule(7B) of Rule 6 of

the Service Tax (Amendment) Rules","5,000.00 Debit",

Govt. Education Cess and Secondary & Higher

Education Cess â?" 3% on Service Tax",150.00 Debit,

Grand Total,"498,468,850.00",

31. The proviso of Section 8(1) and 8(2) of PMLA, 2002 are read as under:-",,

â??Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a",,

copy of such notice shall also be served upon such other person:,,

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such",,

property.,,

(2) The Adjudicating Authority shall, after â?"",,

(a) considering the reply, it any, to the notice issued under sub-section (1);",,

(b) hearing the aggrieved person and the Director or any other officer authorized by him in this behalf, and",,

(c) taking into account all relevant materials placed on record before him,",,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in",,

money-laundering:,,

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be",,

given an opportunity of being heard to prove that the property is not involved in money-laundering.,,

32. It is evident from the material available on record and from the Impugned Confirmation Order that the Enforcement Directorate/Respondent No. 1,,

and the Adjudicating Authority were aware that the Appellant was a â??Claimantâ? to the said Property in terms of proviso to Section 8(2), PMLA.",,

The interest in the property by the appellant is not denied on behalf of the respondent no. 1 during hearing, except it was stated that the appellant was",,

not necessary party, therefore no notice was required to be issued. The said arguments are wholly contrary to law and facts involved in the present",,

appeal as the respondent no. 1 was aware who failed to investigate further in the matter.,,

33. Despite of having full knowledge about the transaction, Respondent No. 1 and the Adjudicating Authority failed to issue notice to the Appellant or",,

to afford a hearing to her, during the adjudication proceedings. Thus, the

Respondent No. 1 and the Adjudicating Authority have failed to comply with",,

the mandatory statutory requirement of the Proviso to Section 8(2), PMLA. The mandatory notice has not been issued. After recording the statement",,

of Manoj Kumar, an employee of M/s. U.B. Group, no further investigation appears to have been done. The appellant had interest in the flat in",,

question but no mandatory notice required under section 8(2) was served. Section 8(2) is a mandatory provision, it is mandated under the proviso that",,

if property is claimed by a person other than accused, he shall also be given an opportunity of being heard to prove that the property is not involved in",,

money laundering. Despite of clear language of the act, no notice was given. The prescribed period has already been expired. The appellant is no",,

doubt claimant in the attached property. It is not understood why the requisite notice was not issued by the respondent no. 1 and Adjudicating,,

Authority. Despite being Appellantâ?s claim to the said Property, Respondent No. 1 failed to fulfill its statutory duty, in terms of Rule 3(2) PML",,

(Issuance of Provisional Attachment Order) Rules, 2013, to supply a copy of the Provisional Attachment Order to the Appellant at the time of the",,

issuance of the same to the best reason known to respondent no. 1. It appears that after realizing its mistakes, the respondent no. 1 is now trying to",,

justifying its lapse.,,

34. Respondent No. 1 was having the details regarding the purchase of the said Property and was in possession of the relevant documents. Thus, the",,

said Property could not have been attached as â??proceeds of crimeâ?, even if one were to invoke the concept of â??equivalent valueâ? as the",,

consideration paid for the purchase of the said Property had been remitted to HDFC Bank Ltd. (Respondent No. 9 herein), which was Defendant No.",,

8 before the Adjudicating Authority and Respondent No. 1 was aware of this fact at the time of issuing the provisional attachment order.,,

35. It is argued by the appellant that the respondent no. 1 has already attached the other properties of Vijay Mallya. There is no specific plea why the,,

flats were attached under the concept of equivalent value without the notice and knowledge of the appellant.,,

36. It is not the case of respondent no. 1 that the said amount which was in possession of the appellant was not proceed of crime. Even, there is no",,

evidence or any material on record to show for the sake of argument that the appellant has received the said amount from main accused and,,

thereafter it was deposited with the bank in order to help him. No such findings are rendered. Even many pleas/objections are raised first time in the,,

written-submissions as those were not the part of pleadings of respondent no. 1.,,

37. The Respondent-ED even prima facie is not able to establish any collusion/ connection of the Appellant with UBHL or Kingfisher Airlines Ltd. or,,

Mr. Vijay Mallya. Therefore, none of the decisions referred on behalf of respondent no. 1 are applicable to the facts of the present case.",,

38. Next contention on behalf of respondent no. 1 is that the Agreement to Sell in favour of the Appellant is not registered. There is no sale deed, thus,",,

the Appellant does not have any interest in the subject-property which is still under construction and possession has not been given to the Appellant.,,

39. The said arguments have no force as at the stage of adjudication under Section 8, PMLA and the onus upon any Claimant is only to show that the",,

attached property is not involved in money laundering. It is not even the Respondentâ?s case that the subject property is involved in money laundering,",,

rather it is the â??value thereofâ?. It is not even the case of the Respondent that the Appellant is involved, in any manner, in the offence of money",,

laundering. No such contention has been raised, except in the Written Submissions filed by the counsel of the respondent no. 1. New case in the",,

written-submission cannot be set-up. There is no allegation that the money deposited in the bank by the appellant was tainted money or any cash,,

deposit was made. All the payments were made through banking channel. Many of contentions raised in the written submissions are not part of the,,

pleadings of respondent no.1.,,

40. It appears from the material that the Appellant has executed Agreements to Sell, Construction Agreements and has also paid the full purchase",,

consideration. Furthermore, all these documents were executed much prior to the registration of ECIR and FIR in the captioned Original Complaint.",,

The Appellant has paid sufficient Stamp Duty on the Agreements to Sell and the Construction Agreements. It is not a civil dispute. It is also a matter,,

of fact and it has come on record that the entire amount has already been paid. In the present case, the appellant definitely is a claimant and the flats",,

were attached without any notice and hearing of the appellant nor any opportunity was given to raise his stand.,,

41. Even at the stage of Section 8(8), PMLA, that is, confiscation, the only requirement upon a claimant to seek restoration of the subject-property is",,

only to show that he has a â??legitimate interestâ? in the subject-property. Even otherwise, the right acquired by an Agreement to Sell holder would",,

prevail over a subsequent statutory attachment as hold in the case of Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan & Anr.,",,

(1990) 3 SCC 291.,,

42. The respondentâ?s contention that the flats are not constructed and possession has not been handed over. It is stated by the appellant who,,

specifically made the statement that the subject-property/Flats have been fully constructed and is ready for delivery and even the vendor is ready to,,

hand-over possession of the subject property, but it could not be given due to attachment order. The winding up was only passed in the year 2017. In",,

2012, merely the said petition was passed.",,

43. Even otherwise, it is settled law that the rights in any asset of a company acquired by any person prior to initiation of the winding-up proceedings",,

against the said company are absolute and cannot be defeated by the winding-up proceedings, subject to the transaction being an arms-length",,

transaction.,,

44. There is also no force in the submission of the respondent no. 1 that there was a connivance between the appellant and the accused parties as the,,

filing of the winding of petition was published in the print as well as electronic media.,,

45. In the case of Laxmi Raj Shetty and another vs. Tamil Nadu reported in (1988) 3 S.C.C. 319 in para â?" 25 the Honâ??ble Supreme Court hold that,,

the courts cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence unless proved by evidence,,

aliunde and presumption cannot be drawn under section 81 of the Evidence Act.,,

46. In the present, the presumption can be attached that the appellant was aware about the news published in 2012 about the pendency of winding up",,

petition. The funds were paid during the period 2012 to 2017 and the prayer in the winding up petition was allowed in 2017.,,

47. In the present case, the Agreement to Sell entered into by the Appellant with M/s UBHL is of the year2012 (i.e. prior to even the initiation of the",,

winding-up proceedings) and the entire purchase consideration was duly paid in the year 2015(i.e. much prior to the subject Provisional Attachment,,

Order). It is not even the Respondent EDâ?s has established prima facie case that the purchase of the subject Property vide inter alia the Agreements,,

to Sell was not an arms-length transaction.,,

48. In Vannarakkal Kallalathil Sreedharan Vs. Chandramaath Balakrishnan & Anr. (1990 (3) SCC 291)a Bench of two Judges considered a question,,

identical to the question raised before us. The question was whether the sale prevailed over the attachment. The facts were that 80 cents of land were,,

agreed to be sold in favour of the appellant under an agreement dated October 9, 1978. Before the sale deed was executed, a third party in execution",,

of a decree got the property attached on November 16, 1978. The sale deed was executed on November 23, 1978.",,

49. On the above facts, it was held as under :",,

â??We may first draw attention to some of the relevant statutory provisions bearing on the question. Order XXXVIII Rule 10 of the Code of,,

Civil Procedure provides that attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties,,

to the suit. Under Sec. 40 of the Transfer of Property Act, a purchaser under a contract of sale of land is entitled to the benefit of an",,

obligation arising out of that contract and it provides that that obligation may be enforced inter alia against a transferee with notice. Sec.,,

91 of the Trusts Act also recognises this principle that the transferee with notice of an existing contract of which specific performance can,,

be enforced must hold the property for the benefit of the party to the contract. These are equitable rights though not amounting to interest in,,

immovable property within the meaning of Sec. 54 of the Transfer of Property Act which declares that a contract of sale does not create an,,

interest in the property. On this line of reasoning it has been held by the Madras High Court that the purchaser of (sic under) an antecedent,,

agreement gets good title despite attachment.â??,,

Their Lordships then considered that the same view has been taken by the Bombay and Calcutta High Courts. The view taken by Punjab & Haryana,,

High Court in Mohinder Singh Vs. Nanak Singh (AIR 1971 P & H, 381) was overruled. It was observed as under :",,

â??In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore Cochin in the aforesaid cases appears",,

to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of,,

property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot",,

be free from the obligations incurred under the contract for sale. Sec. 64 C.P.C. no doubt was intended to protect the attaching creditor,",,

but if the subsequent conveyance is in pursuance of an agreement for sale which was before the attachment, the contractual obligation",,

arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be,,

allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching,,

creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-,,

debtor. We cannot, therefore, agree with the view taken by the Punjab & Haryana High Court in Mohinder Singhâ??s case.â??",,

50. In the above case this Court has gone even to the extent that not only a sale deed but even an agreement of sale will prevail over attachment,,

before judgment made subsequent to such agreement for sale. I do not want to express any opinion with regard to the case of an agreement for sale,",,

but I am of the confirmed opinion that a sale deed having been executed prior to attachment before judgment, though registered subsequently will",,

prevail over attachment before judgment.,,

51. Even in the case of B. Rama Raju Vs. UOI decided by (DB) of High Court of Judicature, Andhra Pradesh at Hyderabad, the Judgment reported",,

in 2011 S.C.C on lines AP-152 in para â?" 103 and 104, it was hold as under:-",,

â??103 Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of,,

criminal activity relating to a scheduled offence, where a person satisfies the adjudicating authority by relevant material and evidence",,

having a probative value that his acquisition is bona fide, legitimate and for fair market value paid therefor, the adjudicating authority must",,

carefully consider the material and evidence on record (including the reply furnished by a noticee in response to a notice issued under,, Section 8 (1) and the material or evidence furnished along therewith to establish his earnings, assets or means to justify the bona fides in",,

the acquisition of the property); and if satisfied as to the bona fide acquisition of the property, relieve such property from provisional",,

attachment by declining to pass an order of confirmation of the provisional attachment; either in respect of the whole or such part of the,,

property provisionally attached in respect whereof bona fide acquisition by a person is established, at the stage of the Section 8(2) process.",,

A further opportunity of establishing bona fide acquisition of property or that the property in question is not proceeds of crime involved in,,

money-laundering is available and mandated, prior to the adjudicating authority passing an order of confiscation, under Section 8(6).",,

104. Proceedings for attachment and confiscation of proceeds of crime are a process distinct and dissimilar to the process for prosecution,,

of the offence of money-laundering. Deprivation of property involved in money-laundering is the sanction in the first process while,,

deprivation of personal liberty is the sanction enjoined in conviction for the offence. Mens rea is not a jurisprudentially non-derogable,,

adjunct for visitation of civil consequences and therefore the legislative policy in this area is eminently within the domain of legislative,,

choice. This challenge must therefore fail. Challenge to dispossession before conviction of the accused:,,

52. It is clear from the above that two proceedings, one is before this tribunal and other proceedings where the criminal complaint pending before the",,

Special Court (where the trial of schedule offence is being conducted) are distinct.,,

53. The next submission of the respondent no. 1 is that in view of other proceedings pending, the impugned order cannot be interferred. The",,

proceedings relied upon by the ED are the following:,,

a. O.A. No. 766/2013 before the Honâ??ble Debts Recovery Tribunal;,,

b. Writ Petition No. 38870/2013, 39048-39052/2017 and 39053/2017;",,

c. O.S.A. No. 5/2017; and,,

d. Interlocutory Application No. 1/2018 in O.S.A. No. 5/2017, as referred in Para 21.",,

54. The said arguments have no force as the said proceedings have no bearing

whatsoever on the adjudication of the present Appeal for the,,

determination of which, this Tribunal ought only to determine the following:",,

i) Issue 1 - Whether the Appellant has committed any offence under Section 3 of the Prevention of Money Laundering Act, 2002",,

(â??Actâ??)?,,

ii) Issue 2 - Whether the subject property is proceeds of crime and the Appellant is in possession of proceeds of crime?,,

55. With regard to issue 1, it is not even the case of the Respondent that the Appellant has committed any offence under Section 3 or is in any manner",,

involved in the commission of the same. The Appellant is the purchaser of the subject property, for which he paid the complete consideration through",,

duly documented legal banking channels, even prior to the date of registration of the FIR or the ECIR.",,

56. On second issue, it is admitted position that the subject property has been attached as â??value thereofâ?. The Appellant has vested rights in the",,

subject property prior to the attachment by Respondent-ED. It is the case of the appellant the same could never have been attached as â??value,,

thereofâ? of the proceeds of crime. At the time of issuance of the Provisional Attachment Order there is no Confirmation Order that any proceeds of,,

crime have flowed to UBHL.,,

57. The next submission of the respondent is that since the application of the appellant is pending before the Honâ?ble Court, therefore, the matter",,

should not be heard.,,

58. It is not denied by the appellant that the appellant has filed the application before the Honâ?ble High Court of Karnataka for registering the sale,,

deed and possession of the flats. The said application is still pending. This tribunal is not passing any direction either to execute the sale deed nor the,,

order of handing over the possession of the flats to the applicant as this tribunal has no jurisdiction to pass such orders.,,

59. This tribunal is only to determine whether the subject Property falls within the ambit of the Act or to whether the subject Property is involved in,,

money laundering. Thus, there is no force in submission of the respondent no. 1 this tribunal has no jurisdiction to even cannot consider the said issue",,

and these proceedings should not continue till disposal of the said proceedings where the prayer for execution of sale deed is pending.,,

60. The proceedings before the Debt Recovery Tribunal were inter alia between the secured creditor banks and M/s United Breweries [Holdings],,

Ltd., under a special enactment for recovery of dues.",,

61. The appellant is not seeking relief of delivery of possession or registration of Sale Deed from this. As such also, all submissions regarding the",,

Corporate Guarantee and the Master Debt Recast Agreement are wholly irrelevant at this stage.,,

62. Even respondent-ED has for the first time has argued about the issue of Guarantee and a Master Debt Recast Agreement (â??MDRAâ?) who,,

has failed to place the same on record.,,

63. As far as the Corporate Guarantee is concerned, it is submitted on behalf of the appellant that HDFC bank was not even a party to the said",,

Corporate Guarantee and therefore, the same has no relevance to the present Appeal. The corporate guarantee is executed between UBHL and",,

certain secured creditors. The same is not registered either with the Ministry of Companies Affairs or the jurisdictional Registrar of Assurances and,,

hence no public knowledge can be imputed to the Appellant.,,

64. The next submission of the respondent ED is that if the Appellant has any grievances against Mr. Vijay Mallya, the appellant must invoke the",,

arbitration clause contained in the agreement. The said submission has no force as the Agreement to Sell has been entered into by the Appellant with,,

M/s UBHL and not with Mr. Vijay Mallya. The Appellant may invoke the said arbitration clause against M/s UBHL in the event of breach of any,,

covenants of the said Agreement, including non-handing over of possession or non-execution of sale deed in favour of the Appellant in due course.",,

The said aspect cannot be determined in the present proceedings.,,

65. The Appellant is not seeking any direction from this Tribunal that the Appellant be handed over the possession of the subject Property nor that the,,

sale deed(s) in respect of the subject Property be executed by M/s UBHL in favour of the Appellant as the scope of the present Appeal is limited to,,

the determination as to whether the subject Property are involved in money-laundering or not. Thus, the existence of the said arbitration clause cannot,",,

in any way, be an impediment to the adjudication of the present Appeal.",,

66. The Respondent EDâ?s next submission is that if the present Appeal is entertained by this Tribunal, it would result in according priority to the",,

Appellantâ?s claims over the claims of other secured creditors is wholly misconceived. It is a matter of fact that the appellant is neither seeking any,,

direction from this Tribunal that the Appellant be handed over the possession of the subject Property nor that the sale deed(s) in respect of the subject,,

Property be executed by M/s UBHL in favour of the Appellant. The scope of the present Appeal is limited to the determination as to whether the,,

subject Property is involved in money-laundering or not.,,

67. In the present case, the Agreement to Sell entered into by the appellant with M/s. UBHL is dated 30.01.2012 (i.e. prior to even the initiation of the",,

winding up proceedings) and the entire purchase consideration was duly paid by 22.02.2015 (i.e. much prior to the subject Provisional Attachment,,

Order). It is the case of the appellant that the purchase of the subject property vide inter alia the Agreement to Sell dated 30.01.2012 is an arms-length,,

transaction. At that time even winding-up petition was not pending, prima facie, it appears the question of helping anyone and knowledge does not",,

arise as the winding up petition was filed on 26.3.2012 before the Honâ?ble High Court of Karnataka. The objection raised by the respondent no. 1 is,,

baseless.,,

68. As regard to plea as to whether right of the appellant would prevail over the rights of the other secured creditors, no opinion is being expressed.",,

The said aspect would be considered by the Court where the prayer of execution of sale deed is pending or before the Special Court who is also,,

empowered to pass such order under the proviso of amended provision of section 8(8) of the Act (Act of 2018). All secured creditors including DRT,,

and banks are at liberty to raise the objection as per law as admittedly this tribunal is not deciding the fate of title of the flat in question.,,

69. The second proviso of sub-section 8 of section 8 has been incorporated by the Act, 13 of the 2018. Both proviso of section 8(8) are read as",,

under:-,,

â??Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good fath and has,,

suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.,,

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such",, properties during the trial of the case in such manner as may be prescribed.â??,,

70. From the entire gamut of the matter, it is evident that the appellant was the claimant in the flats. By making the entire payment, the appellant is",,

become stake-holder as the amount paid by the appellant was not proceed of crime. The appellant is also not involved in the money laundering. The,,

question of link and nexus in the criminal activities directly or indirectly does not arise.,,

71. As far as the impugned order dated 1.12.2016 is concerned, the same is not sustainable in law and the facts of the present case. The same is set-",,

aside against the appellant with regard to flats in question. The provisional order is also quashed accordingly by allowing the appeal.,,

72. However, it is clarified that this tribunal has decided the appeal pertaining to the order passed on the attachment of flats allegedly purchased by the",,

appellant. The finding shall have no bearing with regard to merit of other proceedings pending against the accused parties including extradition,,

proceedings. It is alleged that the flats in question is one of the assets in which the Official Liquidator is appointed, therefore, the appellant, the",,

respondent nos. 3, 5 and 8, unless the final order is passed in his favour, shall not create third party interest directly or indirectly.",,

73. No costs.,,

