

(2019) 05 DEL CK 0153

In the Delhi High Court

Case No : Civil Writ Petition No. 5511 Of 2019, Civil Miscellaneous Application
No. 24214, 24215 Of 2019

Wave Hospitality Private Limited

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 30-05-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 21, 226, 227

Prevention Of Money-Laundering Act, 2002 — Section 5(1), 5(5), 8(3), 8(5), 8(6), 26, 42, 50

Code Of Criminal Procedure, 1973 — Section 482

Citation : (2019) 262 DLT 93 : (2020) 1 AD(Delhi) 338 : (2019) 176 DRJ 207 :
(2019) 369 ELT 500

Hon'ble Judges : Rajendra Menon, CJ;Brijesh Sethi, J

Bench : Division Bench

Advocate : Vikram Chaudhary, Ravinder Singh, Raveesha Gupta, Rishabh Surana, Harshit Sethi, Nikhil Rohatgi, Narayani Bhattacharya, Tushar Mehta, Amit Mahajan, D.P. Singh, Kanu Aggarwal, Manu Mishra, Mallika Hiremath

Judgement

Rajendra Menon, CJ

CM APPL. 24215/2019 (exemption)

Allowed, subject to just exceptions.

W.P.(C) 5511/2019 & CM APPL. 24214/2019

1. Challenge in this writ petition filed under Articles 226 and 227 of the Constitution of India is to an order passed on 28.03.2019 by which provisional attachment order has been passed by the competent statutory authority invoking the second proviso to Section 5(1) of the Prevention of Money-Laundering Act, 2002 (hereafter referred to as 'the PMLA').

2. It is the case of the petitioner that the aforesaid act of the Enforcement Directorate in attaching the property provisionally valued to the tune of more

than Rs.120 crores is gross misuse and blatant abuse of the provisions of law whereby in an arbitrary and capricious manner circumventing all provisions of law the impugned action has been taken.

3. Apart from challenging the impugned order, prayer is also made for declaring Section 5(1), 5(5), 8(3), 8(5) and 8(6) of the PMLA to be unconstitutional, arbitrary and ultra vires of Articles 14, 19 and 21 of the Constitution of India. It is also pointed out that identical petitions not only challenging the provisional orders of attachment but constitutional validity of the statutory provisions are pending before this Court and in the matter of attachment made certain interim protections have been granted.

4. Accordingly, when the matter was taken up by us for consideration on 27.05.2019, Shri Tushar Mehta, learned Solicitor General along with Shri Amit Mahajan, learned Central Government Standing Counsel raised a preliminary objection with regard to maintainability of the petition. It was the case of the Union of India in the preliminary objection raised by means of a short affidavit filed through Shri Surender Malik, Deputy Director, Directorate of Enforcement that against a provisional attachment order passed under the PMLA, petitioner has an efficacious alternate remedy of showing cause to the provisional attachment order before the competent adjudicating authority where proceedings for adjudication with regard to the provisional attachment would be held and in case the provisional attachment is confirmed, the statutory remedy of appeal is available to the petitioner.

5. Shri Tushar Mehta, learned Solicitor General argued that grant of relief under Article 226 of the Constitution is a discretionary relief and if circumstances are available to show that because of the conduct and various other facts that may be brought on record, a particular petitioner is not entitled to the discretionary relief, the writ petition can be dismissed on the ground of availability of statutory remedy against the impugned action. He points out that for the present a provisional attachment order at the stage of issuing show-cause notice is resorted to, after show-cause is filed the order that may be passed by the adjudicating authority can be subjected to appeal under Section 26 before the Appellate Tribunal and thereafter under Section 42 before this Court and therefore for reasons in detail indicated in the affidavit, it is submitted that this Court should not interfere into the matter. The circumstances based on which the preliminary objection is raised is detailed in paras 6, 7, 8, 9 and 10 of the affidavit in question which reads as under:

"6. It is submitted that the Petitioner Company is almost in its entirety held by a company called M/s Wave Impex Pvt. Ltd. It has specifically come on record that M/s Wave Impex Pvt. Ltd. is owned and controlled by Aditya Talwar and Deepak Talwar. It has also come on record that the proceeds of crime has been invested in the attached property by Aditya Talwar and Deepak Talwar through the web of companies (sic) owned and controlled by them.

7. That the examination of the Aditya Talwar was required in the instant case. He has been summoned u/s 50 PMLA to appear before the ED on 11.02.2019, 18.02.2019 and 28.02.2019. All the three Summons were sent to Aditya Talwar to his two email Ids atalwar@dtaindia.com and atalwar@kautilya.sg available with the Respondent. The first Summon was delivered at atalwar@kautilya.sg. However, it could not be delivered at another email address atalwar@dtaindia.com as per "Delivery Status Notification" which stated that it was not delivered. In case of second Summon, it was sent to both of the above said emails of Aditya Talwar and delivered at atalwar@kautilya.sg. The third Summon was also sent to Aditya Talwar through both of the aforesaid email Ids. In this case the "Delivery Status Notification" sent by both of the email teams stated that it was not delivered. That simultaneously, a Copy of all the three Summons were also sent By Hand to 6/14, Shanti Niketan, New Delhi, which Aditya Talwar had declared as his permanent residence in his Passport No. Z3367247 and his last known address in India.

8. It is submitted that later, the documents recovered during investigation by the Respondent revealed that Aditya Talwar had acquired the citizenship of Antigua and Barbuda in October, 2017 as evident from his passport bearing number AB006672 but the said document did not contain his address.

9. That however, the said claim was not certain since the UAE Residence Permit of Aditya Talwar dated 07.05.2017, prior to the issuance of the said Passport, already showed the said passport bearing number AB006672.

10. That the Police Clearance Certificate of UAE dated 04.11.2018 shows his nationality as Indian with the passport bearing number AB006672 of Antigua, contrary to the latest company filings in Singapore where his nationality is shown as Antiguan and Barbudan."

6. When these objections were filed and when this matter was considered by us on 27.05.2019, Shri Vikram Chaudhary, learned Senior Counsel assisted by Shri Ravinder Singh, learned counsel sought for time to file a short rebuttal to the objection and therefore the matter was directed to be listed today. Today, we find that the petitioner has filed a short response to the affidavit filed by the respondent and the Union of India has also filed a short affidavit bringing on record certain additional facts. As far as the additional facts brought on record by the Union of India is concerned, they are detailed in paras 2, 3, 4 and 5 of the affidavit filed today and the same reads as under:

"2. The proceeds of crime amounting to Rs. 272 crores approximately came into the accounts of M/s Asia Field Ltd. and M/s Gilt Asset Management Ltd. Aditya Talwar is the beneficial owner of both these companies.

3. The Shareholding pattern of the Petitioner Company is as follows:

S.No.

Holder

Percentage

1.

Wave Impex Pvt. Ltd

71.64

2.

Asia Pac Alternative Investment Pte. Ltd.

14.39

3.

Asia Field Ltd.

2.72

4.

IDFS Trading Pvt. Ltd

11.25

4. The primary holding of the Petitioner Company is thus of the above mentioned companies; namely, Asia Pac Alternative Investment Pte. Ltd., Wave Impex Pvt. Ltd., Asia Field (sic) Ltd. and IDFS Trading Pvt. Ltd.

5. Besides M/s Asia Field Ltd. as stated above, Aditya Talwar is also the 100% shareholder of Asia Pac Alternative Investment Pte. Ltd. and Wave Impex Pvt. Ltd. Thereby, the primary holding of the Petitioner Company is of Aditya Talwar."

7. The petitioner responds to the aforesaid objection by pointing out that this petition is by Wave Hospitality Pvt. Ltd., a company registered under the Companies Act, a separate legal entity, a juristic person entitled to have its own rights and liabilities, so also entitled to own property in its name, it is said that it is the petitioner company which is aggrieved by attachment of its property and merely because some proceedings are initiated against the shareholders of the company like Shri Deepak Talwar or Aditya Talwar, the same cannot come in the way of the company ventilating their grievance and exercising their constitutional right to protect their property.

8. Placing reliance on a judgment of the Supreme Court in the case of Electronics Corporation of India Ltd. & Ors. v. Secretary, Revenue Department, Govt. of Andhra Pradesh & Ors., (1999) 4 SCC 458, it is said that a clear distinction must be drawn between the company and its shareholder even though the shareholder may be a different person in the eyes of law, a company registered under the Companies Act is a distinct entity other than the legal entity or entities that hold the shares. Referring to paras 15, 16, 17, 18 and 19 of the aforesaid judgment, learned counsel argues that in this case the objection of the respondents with

reference to the conduct of the shareholders cannot be a ground for dismissing the petition by upholding the preliminary objection. Reference in this regard is also made to a Division Bench judgment of this Court in the case of Digital Radio (Mumbai) Broadcasting Ltd. v. Union of India, 2015 SCC OnLine Del 10705 wherein also various judgments referred to by the Supreme Court and the judgment of Electronics Corporation of India Ltd. & Ors. (supra) have been referred to and in para 24 the learned Division Bench held as under:

"24. That would take us to the argument raised by the respondent that the corporate veil can be pierced to find who in fact is running or controlling the company. In the recent decision of the Supreme Court in *Balwant Rai Saluja* (supra) the concept of piercing the corporate veil was considered in detail and after examining several decisions including those of courts in England it was concluded that the doctrine of piercing the veil allows the court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. But, the Supreme Court cautioned that this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. It was also held that the intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company and, therefore, the application of the doctrine would depend upon the peculiar facts and circumstances of each case."

9. Apart from referring to the aforesaid legal position, Shri Vikram Chaudhary, learned Senior Counsel argues that as far as the allegations with regard to acts of Mr. Deepak Talwar or Mr. Aditya Talwar are concerned, it is said that none of them are petitioners before this Court. The petition is by an independent juristic entity which is distinct from its members or shareholders and even with regard to the so-called conduct of Mr. Deepak Talwar and Mr. Aditya Talwar emphasized by the respondents in their preliminary objection, it is stated that Mr. Deepak Talwar is already in the process of invoking his legal remedies and his bail application is pending adjudication before this Court and is listed for hearing today. Copies of orders passed have been brought on record as 'Annexure P9'. That apart, it is stated that earlier Mr. Deepak Talwar had filed a habeas corpus petition which was withdrawn on 04.04.2019. It is further said that Smt. Deepa Talwar, wife of Mr. Deepak Talwar has been granted interim protection by way of anticipatory bail in the subjected case by the designated court itself and a copy of the same is filed as 'Annexure P11'. As far as Mr. Aditya Talwar s/o Mr. Deepak Talwar is concerned, that pursuant to his being summoned under Section 50 of the PMLA he has also invoked the jurisdiction of this Court under Section 482 Cr.P.C. and the proceedings are pending before this Court. Accordingly, it is said that as far as the allegations with regard to Mr. Aditya Talwar absconding and not co-operating in the investigation process is concerned, it is stated that they are not correct. He has already invoked the legal remedies available to him and that apart, once the right of the petitioner company is taken away in an illegal

manner, the company can always invoke the jurisdiction of this Court.

10. Shri Tushar Mehta, learned Solicitor General during the course of hearing in support of his contention invited our attention to a judgment of the Hon'ble Supreme Court in the case of Parbatbhai Aahir Alias Parbatbhai Bhimsinhbhai Karmur & Ors. vs. State of Gujarat & Anr., (2017) 9 SCC 641 and the principles carved out by the Supreme Court in para 17 of the said judgment to say that in exercising inherent jurisdiction under Section 482 Cr.P.C. or discretionary jurisdiction under Article 226 of the Constitution, the High Court can decline to grant any relief in cases where the Court is satisfied that the process of law has been put into motion to circumvent certain action being taken by certain authorities. Reliance is also placed in support of the aforesaid contention on another judgment of the Supreme Court in the case of Satya Pal Anand vs. State of Madhya Pradesh & Ors., (2016) 10 SCC 767 to say that the well established principle of invoking remedy in a writ petition which is the extraordinary discretionary remedy can be denied in a given case where efficacious statutory remedy is available and there are material to show that possibility of the process of law being misused is not ruled out. It is canvassed that in this case the process of law is being misused in the name of the company for protecting the illegal transaction made which have been invested in the companies in question and the property acquired by the company is nothing but proceeds of crime. Further reliance is placed on a judgment of this Court in the case of Desh Ram Pal vs. State, DRJ 1992 (24) 206 and a judgment of the Madras High Court in the case of Mohan Gupta vs. The Enforcement Officer reported in (2010) 3 MWN (Cr.) 217.

11. We have heard learned counsel for the parties at length and we have considered the rival contentions. We are conscious of the fact that challenging the constitutional validity of various provisions of the PMLA, various writ petitions are pending before this Court and taking note of certain earlier judgments of this Court, some interim protections have been granted and we are also informed that all these petitions are coming up for hearing on 09.07.2019. The petitioner in this case also is claiming similar benefit. However, in the light of the preliminary objection raised, the moot question which requires consideration at this stage is as to whether in the facts canvassed by Shri Tushar Mehta, learned Solicitor General, this Court should interfere into the matter considering the preliminary objection raised by him and the vehement submission made in support thereof at the time of hearing.

12. Even though this petition is by the petitioner M/s Wave Hospitality Pvt. Ltd. and the law laid down by the Supreme Court in the cases referred to by Shri Vikram Chaudhary, learned Senior Counsel, it is clearly laid down that there has to be a clear distinction between a company and its shareholders, a company registered under the Companies Act is a legal person, separate and distinct from its individual members. We cannot lose sight of the fact that with regard to applicability of this principle, an exception in the form of applying the theory of

lifting of the veil can be invoked and there are catena of judgments which hold that the principle of lifting of the veil theory can be applied. This concept has been discussed in para 24 of the judgment rendered by the Division Bench of this Court in Digital Radio (Mumbai) Broadcasting Ltd. & Anr. (supra) and in para 24 the observations made have already been reproduced above.

13. It is clear from the aforesaid that even though the theory of a company or a corporate entity being a separate juristic legal person different from its shareholders has been approved but lifting of the corporate veil theory can be applied and the corporate veil can be pierced to find out as to who in fact is running or controlling the company and in case it is found on piercing the veil that the company is being managed by certain individuals, this Court can very well refuse to apply the doctrine in the peculiar facts and circumstances of a particular case. If we take note of the facts of the present case, prima facie in nature, as has come on record, we find that the petitioner herein is Wave Hospitality Pvt. Ltd. and it is their case before us that their property to the tune of more than Rs.120 crores are being attached. As far as the shareholding pattern of petitioner company is concerned, as reproduced hereinabove in para 3 of the short affidavit filed by the respondents today, it is clear that 71.64% share in the petitioner's company is owned by Wave Impex Pvt. Ltd. and the other shareholders in the petitioner's company are Asia Pac Alternative Investment Pvt. Ltd., Asia Field Ltd. and IDFS Trading Pvt. Ltd. Asia Field Ltd. is owned by Aditya Talwar and as far as Asia Pac Alternative Investment Pvt. Ltd. is concerned, it is said that 100% shareholding of this company and Wave Impex Pvt. Ltd. are primarily held by Aditya Talwar. Proceedings are being held against this individual and there is material to show that he has not co-operated in the investigation. If the shareholding pattern of the petitioner company and its shareholding companies are taken note of and if the proceeds of the crime amounting to Rs.272 crores on investigation seems to have come into the shareholders of companies owned by Aditya Talwar and if we apply the theory of lifting of the veil, we have no iota of doubt that the petitioner company is controlled and managed by certain individuals like Deepak Talwar and Aditya Talwar who have substantial stakes and control over the petitioner company and the allegations are with regard to money laundering and siphoning of illegally earned proceeds of crime into the accounts of the shareholding companies like Asia Field Ltd. and various other companies of which the beneficial owner is Aditya Talwar. If these factors are prima facie established from the record and if the law laid down by the Supreme Court in the case of Parbatbhai Aahir Alias Parbatbhai Bhimsinhbhai Karmur & Ors. (supra) and Satya Pal Anand (supra) with regard to exercise of discretionary jurisdiction or inherent jurisdiction in such matters are considered, we are of the considered view that the exercise of discretion in the matter of issuing a writ or matter of granting equitable relief is a remedy in equity and we can always refuse to exercise our jurisdiction in case we find that the conduct of the parties or persons invoking jurisdiction of this Court are not genuine or bona fide, possibilities of misusing the process of law cannot be ruled out and when

the action taken itself is subjected to efficacious procedural safeguard under the statute itself by way of efficacious alternate remedy, this Court can always refuse to exercise its discretionary jurisdiction.

14. In our considered view, if we take note of the preliminary objections raised by the respondents and we apply them in the peculiar facts and circumstances of this case, we have to hold that it is not an appropriate case where the discretion, extraordinary in nature available to this Court should be exercised in favour of persons against whom there are serious allegations of money laundering and who are prima facie found to be not co-operating in the matter of investigation and enquiry into the matter.

15. Even though Shri Vikram Chaudhary, learned Senior Counsel had tried to indicate before us that all these allegations are false, in the peculiar facts and circumstances of this case, we are of the considered view that it is not appropriate for us to interfere into the matter when petitioner can very well show-cause to the provisional attachment order passed, demonstrate its bona fides before the competent adjudicating authority and after the competent adjudicating authority passes an appropriate order, the same can be challenged in accordance with law and therefore conscious of the fact that various writ petitions challenging the constitutional validity of the said provisions are pending before this Court and we had granted some interim relief in this case, at this stage, looking to the totality of the facts and circumstances of the case, we are not inclined to exercise our extraordinary jurisdiction and interfere into the matter.

16. We dismiss the petition with liberty to the petitioner to show-cause to the impugned action taken and take recourse to such remedy as is permissible under law.

With the aforesaid, the writ petition stands dismissed. The pending application also stands disposed of.