IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

Present: - Hon'ble Mr. Justice Subhendu Samanta.

C.R.R. No. - 2752 of 2018
With
IA No. CRAN 3 of 2019
(Old No. CRAN 1878 of 2019)
With
CRAN 4 of 2019
(Old No. CRAN 3215 of 2019)
With
CRAN 5 of 2019
(Old No. CRAN 3267 of 2019)
With
CRAN 6 of 2019
(Old No. CRAN 4095 of 2019)
With
CRAN 10 of 2021
With
CRAN 13 of 2022

IN THE MATTER OF

M/s Nik Nish Retail Ltd. & Anr.
Vs.
Assistant Director, Enforcement Directorate, Govt. of India & Ors.

For the petitioners : Mr. Ayan Bhattacharya, Adv.,
Mr. Meghajit Mukherjee, Adv.

For the Enforcement Directorate: Mr. Vipul Kundalia , Adv.,

Judgment on : 28.11.2022

Subhendu Samanta, J.

A regular case was registered at P.S.CBI BS&FC and FC Kolkata for offences punishable U/s 120B/420/409 of IPC read with Section-

13 of Prevention of Corruption Act. On the basis of the said FIR another case was registered by the Enforcement Directorate under the Provisions of Prevention of Money Laundering Act 2002.

The regular case registered by the CBI was quashed by Hon'ble High Court.

Now the question before this court in the instant criminal revision is **whether quashing of a regular case of "scheduled offence" shall automatically quashed the subsequent case registered under the provisions of PMLA Act.**

In a nutshell the fact of the case is that on the basis of a complaint made by the Vigilance Officer of the Union bank of India about the irregularities in the advance account of the petitioners of the said bank, a regular case No. RCBSK2009E0008 dated 11th September 2009 was registered at P.S.CBI BS&FC Kolkata for alleged offences punishable U/s 120B/420/409 of IPC and U/s 13 of Prevention of Corruption Act.

The Enforcement Directorate/ Respondent No. 1 on the basis of the aforesaid FIR registered ECLR No. 41/2009/KOL/PMLA dated 23rd December 2009 and in that initiated investigation under the provisions of PMLA.

After conclusion of investigation the P.S.CBI BS&FC Kolkata filed charge sheet before the Learned 14th MM Kolkata against the petitioners and 5 others for offences punishable U/s 120B read with Section 420 of IPC.

In parallel to that Criminal Proceeding the Union Bank of India proceeded to Ld. Debt Recovery Tribunal Kolkata against the petitioners for recovery of its due aggregating of Rs.- 15,57,72,600.15/-(TA Nos.322,323,324 of 2013).

In PMLA proceeding the respondent No.- 1,in exercise of its power U/s 5 of PMLA, passed a provisional attachment Orders

whereby and whereunder 8 immovable properties worth Rs.- 10.82 Crores were ordered to be provisionally attached and also respondent No. 1 filed application for confirmation of the aforesaid attachment order before the Adjudicating Authority PMLA vide a complaint U/s 5(5) of PMLA being O.C No. 421/2015 on 2nd March 2015.

Learned Adjudicating Authority, PMLA was pleased to confirm the aforesaid provisional attachment order.

Being aggrieved by the order passed by the Adjudicating Authority petitioner and other defendants filed appeals U/s 26 of PMLA before the Hon'ble Appellate Tribunal PMLA at New Delhi.

The Hon'ble Appellate Tribunal PMLA vide its judgment and Order Dated 15th July 2017 was pleased to set aside the above noted order of Learned Adjudicating Authority and the provisionl attachment order dated 4th February 2015 passed by the respondent was set aside. It is the findings of the Hon'ble Appellate Tribunal that the properties which were subject matter of attachments were acquired and possessed by the respective owners much before availing of loans and therefore, no "proceeds of crime" are invested in these properties and accordingly, properties cannot be attached U/s 5 of PMLA as the same are not purchased from the alleged "proceeds of crime". It was further observed that in the circumstances available the allegation of money laundering is prima facie found to be not sustainable for the purpose of attachment under the PMLA 2002.

In the criminal proceeding, Ld. Metropolitan Magistrate was pleased to frame charge against the petitioners and others for the offences punishable U/s 420/120B of IPC. The order of framing charge was challenged by the petitioner before the Ld. Chief Judge, City Sessions Court Calcutta. Ld. Chief Judge, vide its order Dated 5th July 2016 in CR No. 92 of 2016 was pleased to stay the operation of the order of framing of charge by the Learned M.M.

In the proceeding before the Learned DRT Kolkata the bank, and the present petitioner and others arrived at a settlement and filed joint application before the Tribunal; wherein the defendants (present petitioners and others) agreed to pay a sum of Rs. 6 Crores as full and final settlement of the dues claimed by the Union Bank of India. Hon'ble DRT Kolkata vide its order dated 27th October 2016 recorded the terms of settlement and allowed the defendants therein to pay the settled amount in satisfaction of the claim made by the Union Bank of India.

The enforcement Directorate, respondent No. 1 filed a complaint U/s 45 of PMLA (ML Case No.-2 of 2016) against the present petitioner and proforma respondents on 10th of November 2016 before the Learned Chief Judge City Sessions Court Calcutta. The said complaint records the offences U/s 420/120B IPC read with Section 13 Prevention of Corruption Act as noted in aforesaid FIR RCBSK2009E0008 dated 11th September 2009 being "scheduled offence" within the meaning of PMLA. Learned City Sessions Court while observing that RCBSK2009E0008 dated 11th September 2009 lead to the registration of ECIR No. 41/2009/KOL/PMLA dated 23rd December 2009, for the purposes of investigation under the PMLA,2002 was pleased to take cognizance of the offence U/s 4 of the PMLA and had issued processes to the petitioners and others in the said complaint.

On the strength of settlement before the Learned DRT Kolkata with the Union Bank of India, the present petitioners & others filed one CRR No. 1682 of 2018 before this Hon'ble Court to seek quashing of proceeding in above noted GR Case No. 2406 of 2011 arising Out of RCBSK2009E0008 dated 11th September,2009 arising pending before the Learned Metropolitan Magistrate 20th CBI Court Calcutta). This Hon'ble Court was pleased to quash the proceeding against the petitioners in connection with GR Case No. 2406 of 2011 vide its judgment and order dated 2nd August 2018.

By virtue of the facts above mentioned it is the submission of the petitioners that the very existence of scheduled offence is thus negated and accordingly the questions of existence of any "proceeds of crime" thereof does not arise. Such being the fact, the subsequent proceedings/case in connection under PMLA cannot survive and the same is liable to be quashed. It is the further prayer of the petitioner that the proceeding of PMLA case being ML case No. 2 of 2016 pending the Learned Chief Judge, City Sessions Court Calcutta would tantamount to gross abuse of process of court and would defeat the ends of Justice.

Accordingly, petitioner's pray for quashing ECIR No. 41/2009/KOL/PMLA dated 23rd December,2009 and proceeding arising therefrom (being M.L. Case 2 of 2016) pending before the ld. Chief Judge, City Sessions Court, Calcutta.

In support of his contention Ld. Advocate appearing on behalf of the petitioner cited decision passed by the Hon'ble Apex Court three Judges Bench in **Vijay Madanlal Chowdhury and Ors vs. Union of India and Ors.**

He further argued that the ratio of **Vijay Madanlal Chowdhury** was also accepted by the Hon'ble High Court at New Delhi in a bunch of cases of same nature. In a subsequent criminal appeal being No. 1254 of 2022 Hon'ble Supreme Court has adopted the ratio of **Vijay Madanlal Chowdhury** case**.**

So he argued that this being position of law, the instant ECIR case registered by the respondent No. 1 Enforcement Directorate and the M.L. case pending before the Learned Chief Judge, City Sessions Court, Calcutta required to be quashed.

Ld. Advocate appearing on behalf of the respondent No. 1 Enforcement Directorate submitted that by virtue of the PMLA case the property of huge amount was seized. Though the bank has arrived

at a settlement vide OTS before the DRT Kolkata but the criminal activities of the petitioners can not be wiped out. He further argued that huge amount of public money was involved in this case and the petitioners have deliberately committed the crime for which the proceeding under PMLA was initiated. He further argued that Hon'ble Supreme Court in different cases specifically directed that the High Court should not exercise its jurisdiction under 482 Cr.P.C. in economic offences. In support of his contention he cited a judgment of Telengana High Court passed in **Ishoonarang & Ors. Vs. State of Telengana & Ors.**

Heard the Ld. Advocates perused the petition as well as decisions by Hon'ble High Court.

In **Vijay Madanlal Chowdhury & Ors. Vs. Union of India and Ors.** Hon'ble Apex Court(three Judges Bench has formulated that –

> **Para 187 (v) (d)** ***The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry /trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled***

> ***offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.***

It further appears that Hon'ble Delhi High Court in a bunch of cases has adopted the same view of **Vijay Madanlal Chowdhury** case and quashed the ECIR case registered by the Directorate of Enforcement.

In Criminal appeal No. 1254 of 2022 **(Parvathi Collur and Anr. vs. State of Directorate of Enforcement)** Hon'ble Supreme Court has also adopted the same ratio of **Vijay Madanlal Chowdhury** case.

I have also perused the judgment of **Ishoonarang of Telengana High Court** cited by the respondent Enforcement Directorate. In Para- 48,49,50 of the said Judgment of Hon'ble Telengana High Court has held that –

> *48. The Enforcement Directorate has been investigating the present case like other cases where the company takes loan, purposefully defaults on the loans and in the end get away by paying OTS with the bank, where they pay only small percentage of the loan dues and thus cause undue loss to the bank while enriching themselves. It is at investigation stage. The petitioners have to cooperate with the Investigating Officer by appearing before him pursuant to the summons issued by the Enforcement Directorate.*
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> *49. In the present case also, the total OTS payment done by petitioner No. 4 is only a*

small fraction of total dues. The details of the same are specifically mentioned in the tabular form mentioned supra. The allegation against petitioner No. 4 is that it has caused a massive loss of Rs. 182.99 Crores to the public sector banks and the same is also specifically mentioned in the complaint dated 30.06.2018 and 29.02.2020 by the Central bank of India and Bank of Maharashtra. The said money ultimately belongs to the public and tax payers. Thus, prima facie, the petitioners have committed fraud not only against one or two banks, but against the public in general and it is a 'loan fraud' and it is an 'economic offence'.

50. Such economic frauds adversely affect the financial and economic well- being of the Nation and have implications which lie beyond the domain of a mere dispute between petitioner No. 4 and the above said banks. The mere fact that the banks which are already under stress to clear the NPAs from their books accepted the OTS, will not absolve the petitioners from criminal charges. The Apex Court in the above said judgments categorically held that in economic offences, it is not proper for the High Court to exercise its inherent powers under Section – 482 of the Cr.P.C to quash the FIRs/ charge sheets. It is nothing but stalling investigation/ enquiry initiated by the Authorized Officer under the provisions of PMLA.

The above finding of Hon'ble Telengana High Court is quite justifiable; but in considering this present facts and circumstances of the case and by virtue of ratio laid down in **Vijay Madanlal Chowdhury** the findings has no leg to stand.

Let me consider whether the offence under PMLA can stand alone by virtue of the provisions of law has laid in the statute itself as well as by the dictum of Hon'ble Apex court in **Vijay Madanlal Chowdhury.**

The offence of money laundering has been defined U/s 3 of PMLA 2002 Section 3 is read as follows-

> *(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.*

The proceeds of crime has defined U/s 2(u) of the said Act 2002.

> *2(u) "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]].*
>
> *[Explanation – For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained*

> *from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;]*

The Hon'ble Supreme Court in **Vijay Madanlal Chowdhury** has correctly pointed out that the offence U/s 3 of 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence.

Hon'ble Delhi High court is also of the same view in **Harish Fabiani & Ors. Vs. Enforcement Directorate and Anrs.** that **–**

> *The Undeniable sequitur of the above reasoning is that firstly, authorities under the PMLA cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed; secondly, the scheduled offence must be registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum; thirdly, in the event there is already a registered scheduled offence but the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or quashing of the criminal case of the scheduled offence, there can be no action for money laundering against not only such a person but also any person claiming through him in relation to the property linked to the stated scheduled offence.*

On the basis of the above discussion made by the Hon'ble Apex Court and Hon'ble High Courts. This court is a view that the pendency of PMLA case cannot be sustained at this juncture. Moreover, Hon'ble Appellate Tribunal PMLA is of specific finding that no proceeds of crime of the PMLA case has arisen from the regular case No. RCBSK2009E0008. The said regular case has already been quashed by this court. Thus, at the situation there is no proceeds of crime by virtue of order of quashing of the regular case.

The quashing of FIR of regular case automatically created a situation that the offences, stated and alleged in the FIR has no existence; thus the "Scheduled Offence" has also no existence after quashing of the FIR. When there is no "Scheduled Offence", the proceeding initiated under the provisions of Prevention of Money Laundering Act, 2002 cannot stand alone.

Thus, the question answered in affirmative.

Thus, I find it necessary to invoke the inherent power of this court enumerated U/s 482 Cr.P.C. to quash the ECIR case initiated under PMLA 2002. The pendency of the M.L. case No.- 2of 2016 before the Chief Judge, City Sessions Court, Calcutta would tantamount to be an abuse of process of court.

In result thereof the instant criminal revisional application has merit to entertain and it is allowed. The FIR registered by the respondent being ECIR No. 41/2009/KOL/PMLA dated 23rd December 2009 is hereby quashed.

All proceedings arising out from the said ECIR No. 41/2009/KOL/PMLA dated 23rd December 2009 are set aside.

The M.L. case No. 2 of 2016 arising out of the above mentioned ECIR Case pending before the Ld. Chief Judge, City Sessions Court, Calcutta along with connected applications/ proceedings thereof is hereby quashed.

Any connected CRAN application if pending along with this CRR is hereby also disposed of.

Any order of stay passed by this Court during the pendency of this CRR is also vacated.

(Subhendu Samanta, J.)