
(2023) 08 ATPMLA CK 0002

Appellate Tribunal Under Prevention Of Money Laundering Act

Case No: MP-PMLA-12380, 12381/MUM/2023, FPA-PMLA-6185/MUM/2023

Bimla Devi

APPELLANT

Vs

Deputy Director, Directorate Of
Enforcement

RESPONDENT

Date of Decision: Aug. 23, 2023

Acts Referred:

- Prevention Of Money Laundering Act, 2002 - Section 3, 5, 5(1), 8(4), 8(5), 8(7), , 73

Hon'ble Judges: Munishwar Nath Bhandari, Chairman; V. Anandarajan, Member

Bench: Division Bench

Advocate: Ankur Chawla, Adit Pujari, Aamir Khan, Shivam Tandon, Aditya Singla, Peehu Hooda, Mahesh Agarwal

Final Decision: Allowed

Judgement

FPA-PMLA-6185/MUM/2023

1. Vide this order, the application filed by the appellant/applicant on 05.07.2023 for grant of stay on the operation of the order dated 17.10.2019Â

passed by the learned Adjudicating Authority under the Prevention of Money Laundering Act, 2002 (PMLA, 2002) and also for stay of the Eviction

Notice dated 27.06.2023 issued to the appellant/applicant is proposed to be disposed of.

2.The relevant facts, in brief, are that subsequent to the order dated 06.06.2023 passed by the learned Adjudicating Authority confirming the

Provisional Attachment Order (PAO) dated 27.12.2022 passed by the Deputy Director, Enforcement Directorate, Mumbai in ECIR number

ECIR/02/MBZO-II/2018, a notice dated 27.06.2023 was issued to the appellant/applicant under section 8(4) for eviction of the appellant/applicant and

her family members from the property in question, i.e., house with land admeasuring 1 Bigha, 10 Biswa bearing No. 11 & 12 (old), New No. 5, Part of Mustatil No.104, Killa No.12, Village Dera Mandi, Tehsil Mehrauli, New Delhi, and to take physical possession thereof. The said notice was received by the appellant/applicant on 30.06.2023. It is prayed that stay of the operation of the impugned order of the Adjudicating Authority be granted, as also an interim stay of the aforesaid Eviction Notice.

3.It is submitted by the learned counsel for the appellant/applicant that the property in question is a residential property which is occupied by the appellant/applicant and her entire joint family, including her grandchildren. Taking physical possession of the said immovable property by the respondent department will render the family homeless as neither the appellant/applicant nor her family members have any other place of residence. It is submitted that the property is already under attachment and there is no ground for the respondent department to assume that the appellant/applicant will try to alienate the property or create any third-party interest in it.

4.It is further contended by the learned counsel that the appellant/applicant has not been named as an accused either in the scheduled offence or in the PMLA offence. The property in question is the personal property of the appellant/applicant, and the consideration for the purchase of the property amounting to Rs.17.5 lakh was paid by cheque, for which a loan of Rs.20 lakh was availed from the Bank of Nainital. The property has nothing to do with the proceeds of crime and there is no connection whatsoever of the appellant/applicant with the alleged proceeds of crime, as it is an admitted fact that the appellant/applicant has not been arrayed as an accused. The Directorate's case is that the loan taken from the bank was repaid within a short period of time, and there are cash deposits in the account of the appellant/applicant. In this regard, it is claimed that the appellant/applicant's daughter-in-law had remitted the amounts to her.

5.The Ld. counsel for the appellant/applicant further submitted that the property was attached primarily based on the statement claimed to have been made by the appellant/applicant's son, the main accused in the case, to the effect that he had acquired the same out of the proceeds of crime.

It is contended by the appellant/applicant that in fact no such statement was made by the appellant/applicant's son (now deceased) and the property

in question is the personal property of the appellant/applicant. It is further contended that the Eviction Notice issued to the respondent is in the teeth

of the order of the Hon'ble Supreme Court in *Vijay Madanlal Choudhary and Ors. v. Union of India*, Special Leave Petition (Criminal) No. 4634 of

2014 wherein it was inter alia held that physical possession can only be taken under exceptional circumstances and not in the ordinary course. With

regard to the valuation of the property adopted by the respondent department, the appellant/applicant submits that the same is based on the valuation

carried out by a private evaluator and has been done without considering the circle rates fixed by the government.

6. The learned counsel for the respondent department, on the other hand, has strongly contested the application. A detailed

written reply to the application was filed on behalf of the respondent on 20.07.2023, wherein the following broad contentions have been raised:

â€¢ That the applicant has been non-cooperative and has failed to respond to summonses which is causing difficulty in the process of investigation

since her cooperation is necessary to unearth the larger conspiracy.

â€¢ That the sweep of section 5(1) is not limited to the accused persons and will apply to any person involved in any process or activity connected

with the proceeds of crime. As such, whether the appellant/applicant herself has been accused in the predicate offence or in the PMLA offence is not

a relevant consideration.

â€¢ That the appellant/applicant has failed to explain the legitimate sources of her income. Her late son, Shri Amit Bhardwaj also did not have any

other source of income apart from the Bitcoins received from investors. In his statement recorded on 30.04.2018, he admitted that he had invested

around 30 AED (Dirhams) for purchasing the property in question. Therefore, the same was directly purchased from the proceeds of crime.

â€¢ That the valuation report of the government-approved valuer clearly shows that the property in question has been purchased at a heavily

undervalued rate and the difference between the actual value and registered value of the plot has been paid in cash to conceal the proceeds of crime

and to project the same as untainted property.

â€¢ If possession of the property is not taken immediately, there is every chance that the applicant will damage, alienate or dispose of the property and

it will be difficult for the respondent to trace the ownership of the property and take possession thereof. Moreover, if the property is sold to some

bonafide purchaser who purchases it in good faith without notice of attachment, it will give rise to several new proceedings, and recovery of

possession of the property will be delayed.

â€¢ That late Shri Amit Bhardwaj and his family members had indulged in blockchain and cryptocurrency mining technology. They are in possession

of huge sums of money in the form of crypto currency which is stored in wallets and which constitute proceeds of crime. The family members of the

late Amit Bhardwaj are not disclosing the details of login ID, password etc. Therefore, the respondent has reason to believe that the applicant will

diverge, channelise and place the amount in said crypto-currency wallets which may cause difficulty to the respondent in tracing and unearthing the

proceeds of crime.

â€¢ That the Honâ€ble Apex Court in its decision in the case of Vijay Madan Lal Choudhary has not barred taking physical possession of the property

altogether but has allowed the same in exceptional cases which are to be considered on a case-to-case basis. The present case, which involves

substantial loss of public funds, use of modern technology, etc., warrants serious attention and is a case of exceptional nature. It should not be viewed

as a typical instance of money laundering.

7. During oral arguments, the learned counsel for the respondent reiterated that the amount of Rs.17.5 lakh claimed to be purchase consideration paid

for the land by the appellant/applicant is a gross under- valuation and as per the valuation report obtained by the department, the value of the property

is 4.5 crore. It is submitted that the property is located in a prime area where property prices are very high and purchase transaction cited by the

appellant/applicant is a sham transaction. The learned counsel for the department has again placed reliance on the sworn statement stated to have

been made by the appellant/applicant's son, the primeâ€ accusedâ€ inâ€ theâ€ case,â€ toâ€ theâ€ effectâ€ thatâ€ theâ€ propertyâ€ hadâ€ been

acquired by him out of the proceeds of crime.

8. We have given careful consideration to the rival submissions made from the two sides. The text of relevant provision, namely, section 8(4) of the

PMLA, 2002 which is sought to be invoked by the respondent department in order to take immediate possession of the property in question is extracted

below for the sake of ready reference:

8. Adjudication. (1) The Director or any

(2).....

(3).....

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any

other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section

(1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have

the same effect as if the property had been taken possession of.

9. Upon a plain reading of the above provision, it would appear that sub-section (4) of section 8 mandates the respondent directorate to take

immediate possession of the property in question once the provisional attachment order has been confirmed by the Ld.

Adjudicating Authority.

The words used by the legislature, i.e., "shall forthwith take the possession of the property attached under section 5" would seem to indicate that

upon such confirmation of the provisional attachment order, action on the part of the respondent department to take possession is not only to be

immediate but is also mandatory. However, the vires of this provision came to be challenged before the Hon'ble Apex Court in the case of Vijay

Madanlal Choudhary (supra). The Hon'ble Supreme Court upheld the validity of the provision based upon the harmonious interpretation that taking

possession of the property before a formal order of confiscation is passed merely on the basis of confirmation of provisional attachment order should

be an exception and not the rule, and that the issue will have to be considered on a case-to-case basis. The relevant part of the order is extracted below:

305. Indisputably, statutory Rules have been framed by the Central Government in exercise of powers under Section 73 of the 2002 Act regarding the manner of taking possession of attached or frozen properties confirmed by the Adjudicating Authority in 2013, and also regarding restoration of confiscated property in 2019. Suffice it to observe that direction under Section 8(4) for taking possession of the property in question before a formal order of confiscation is passed merely on the basis of confirmation of provisional attachment order, should be an exception and not a rule. That issue will have to be considered on case-to-case basis. Upon such harmonious construction of the relevant provisions, it is not possible to countenance challenge to the validity of sub-section (4) of Section 8 of the 2002 Act.

306. The learned counsel appearing for the Union of India, had invited our attention to the recommendations made by FATF in 2003 and 2012 to justify the provision under consideration. The fact that non-conviction based confiscation model is permissible, it does not warrant an extreme and drastic action of physical dispossession of the person from the property in every case "which can be industrial/ commercial/ business and also residential property, until a formal order of confiscation is passed under Section 8(5) or 8(7) of the 2002 Act. As demonstrated earlier, it is possible that the Special Court in the trial concerning money-laundering offence may eventually decide the issue in favour of the person in possession of the property as not being proceeds of crime or for any other valid ground. Before such order is passed by the Special Court, it would be a case of serious miscarriage of justice, if not abuse of process to take physical possession of the property held by such person. Further, it would served no purpose by hastening the process of taking possession of the property and then returning the same back to the same person at a late date pursuant to the order passed by the Court of competent jurisdiction. Moreover, for the view taken by us while interpreting Section 3 of the 2002 Act regarding the offence of money-laundering, it can proceed only if it is established that the person has directly or indirectly derived or obtained proceeds of crime as a result

of criminal activity to or relatable to a scheduled offence or was involved in any process or activity connected with proceeds of crime.

307. It is unfathomable as to how the action of confiscation can be resorted to in respect of property in the event of his acquittal or discharge in

connection with the scheduled offence. Resultantly, we would sum up by observing that the provision in the form of Section 8 (4) can be resorted to

only by way of an exception and not as a rule. The analogy drawn by the Union of India on the basis of decisions of this Court in Divisional Forest

Officer v. G.V. Sudhakar Rao, Bishwanath Bhattarcharya, Yogendra Kumar Jaiswal v. State of Bihar, will be of no avail in the context of the scheme

of attachment, confiscation and vesting of proceeds of crime in the Central Government provided for in the 2002 Act.â€

10. Further, in its order dated 28.08.2022 passed in Union of India & Anr. v. Ganpati Dealcom Pvt. Ltd. Civil Appeal No. 5783/2022, the Honâ€ble

Supreme Court, had occasion to dwell further upon the matter so as to illustrate what type of cases might constitute cases of â€œexceptionalâ€ nature

for the purposes of section 8(4) of the PMLA, 2002. The relevant paragraphs of the said judgment are quoted hereunder:

â€œ17.27. In Vijay Madanlal Choudary & Ors v. Union of India, SLP (Civ.) No. 4634 of 2014 and others, this Court dealt

with confiscation proceedings under Section 8 of the Prevention of Money Laundering Act, 2002 (â€œPMLAâ€) and limited the application of

Section 8 (4) of PMLA concerning interim possession by authority before conclusion of final trial to exceptional cases. The Court distinguished the

earlier cases in view of the unique scheme under the impugned legislation therein. Having perused the said judgment, we are of the opinion that the

aforesaid ratio requires further expounding in an appropriate case, without which, much scope is left for arbitrary application.

17.28. From the above discussion, it is manifest that the Courts have read down the provisions of civil forfeiture to be dependent on the underlying

criminal prosecution to temper the harsh consequences envisaged under such provisions. No doubt, such reading down was mandated to ameliorate

harsh consequences of confiscatory laws which otherwise would have allowed the State agencies to take over the property without seriously pursuing

criminal prosecutions. At this stage, we can only recommended that the utility of independent provisions of forfeiture, distinct from criminal

prosecution, needs to be utilized in a proportional manner, looking at the gravity of the offence. Few examples which may pass the muster of

proportionality for having such stringent civil forfeiture, may relate to crimes involving terrorist activities, drug cartels or organized criminal activities.

As we have discussed, the application of such a provision to numerous other offences which are not of such grave severity, would be of serious risk

of being disproportionate, if procedures independent of criminal prosecution are prescribed. We may note that the proportionality of separate

confiscation procedure prescribed under 2016 Act, has not been argued herein. Accordingly, we leave the aforesaid question of law open.â€

Thus, the current legal position derived from the pronouncements of the Apex Court is that taking physical possession of the provisionally attached

property upon confirmation of such attachment order by the Adjudicating Authority is to be resorted to by the respondent department only in

exceptional cases and not in the ordinary course and that some of the illustrative cases which may constitute cases of exceptional nature where

possession can be taken are cases involving terrorist activities, drug cartels or organized criminal activities.

11.InÂ ourÂ consideredÂ view,Â noÂ exceptionalÂ circumstancesÂ ofÂ such gravity have been brought out by the respondent department in

the case before us. The respondentâ€™s contest to the application for protection against Â dispossession is based on considerations such as failure of

the appellant/applicant to explain the sources of acquisition to the satisfaction of the respondent department, undervaluation of the property, admission

by the prime accused that the property represents proceeds of crime, the perceived danger of alienation, the technologically sophisticated nature of the

alleged offence, etc. These issues, though undoubtedly of great importance in determining whether an offence of money laundering under the Act is

made out, and, if so, the quantum of the proceeds of crime, do not make out a case of â€œexceptional circumstancesâ€ wherein possession of the

property should be taken immediately. Needless to state, the property is already under attachment which effectively prohibits its transfer, conversion,

disposition, movement etc.

12. Furthermore, the property in question is stated to be a residential property under the occupation of the appellant/applicant and her family, including grandchildren, a fact which has not been contested by the learned counsel for the respondent department. Dispossession of such a property would, in our view, certainly amount to "extreme and drastic action" as observed by the Hon'ble Supreme Court in the case of Vijay Madanlal Choudhary (supra).

13. That being the case, we are satisfied that this is a fit case for issue of interim orders as prayed for by the appellant/applicant. Accordingly, the Eviction Notice dated 27.06.2023 issued under section 8(4) by the respondent directorate is hereby stayed and the respondents are directed not to take any coercive action in pursuance thereof for the possession of the property in question.

The order of provisional attachment issued by the respondent directorate and confirmed by the learned Adjudicating Authority shall, however, remain unaffected by this order and shall continue to remain in force. Consequently, the appellant/applicant shall continue to remain restrained from taking any action for transfer, conversion, disposition, movement, or creating any encumbrance on the property in question in any manner whatsoever.

Furthermore, it is also hereby clarified that this order shall not have any bearing on the outcome of any criminal proceedings pending or contemplated against the appellant/applicant under PMLA, 2002.

14. In light of the above discussions, the application filed by the appellant/applicant is allowed in so far as the prayer for stay of the notice of eviction under section 8(4) stands allowed subject to observations as above.