

(2023) 08 ATPMLA CK 0004

Appellate Tribunal Under Prevention Of Money Laundering Act

Case No: MP-PMLA-12611, 12612/KOL/2023, FPA-PMLA-6297/KOL/2023

Sanjay Basu

APPELLANT

Vs

Assistant Director Directorate Of
Enforcement, Kolkata

RESPONDENT

Date of Decision: Aug. 17, 2023

Acts Referred:

- Prevention Of Money Laundering Act, 2002 - Section 6(15), 8(1), 8(6), 17, 24, 50(2), 50(3)
- Adjudicating Authority (Procedure) Regulations, 2013 - Regulation 21

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

Bench: Division Bench

Advocate: Manu Sharma, Adit S. Pujari, Srisatya Mohanty, Abhyuday Sharma, Shaurya Mittal, Saransh Bhardwaj, Mamta Saini

Final Decision: Disposed Of

Judgement

FPA-PMLA-6297/KOL/2023

By this Appeal, a challenge has been made to the order dated 18th July, 2023 passed by the Adjudicating Authority dismissing the application filed by the Appellant to seek cross examination of Kumari Purnima, Assistant Director, Directorate of Enforcement.

The Learned Counsel for the Appellant submits that the Adjudicating Authority caused a notice under Section 8(1) of the Prevention of Money Laundering Act, 2002 (in short "the Act of 2002"). It was sent alongwith reasons to believe recorded by the Adjudicating Authority. The reply to it was to be filed on 18th May, 2023.

On the receipt of the copy of the notice, reply to it was filed alongwith an application to seek cross examination of Ms. Kumari Purnima Assistant Director, Directorate of Enforcement. The said application has been dismissed ignoring the valuable right of the Appellant to cross examine the witness. The right of cross examination is not only the part of procedural law but of the principle of natural justice. The Adjudicating was under an obligation to apply principle of natural justice as per the mandate of the Act of 2002 and The Adjudicating Authority (Procedure) Regulations, 2013 (in short the Regulation of 2013).

The specific reference to Section 6(15) of the Act of 2002 and Regulation 21 of 2013 have been given. As per Section 6(15) of the Act of 2002 the Adjudicating Authority is not bound by the procedure laid down in the code of civil procedure but would be guided by the principle of natural justice. Regulation 21 of the Adjudicating Authority (Procedure) Regulations, 2013 provides for examination of witness. However, in the instant case, the impugned order has been passed by the Adjudicating Authority in

ignorance of the provision of the Act of 2002 and the Regulation of 2013.

The Learned Counsel for the Appellant has narrated the case to justify cross examination of the witnesses. Para 4 (a) to (j) of the Appeal are quoted hereunder for ready reference. It narrate the facts on which the reliance has been placed by the Appellant.

(a) Pincon Spirit Ltd. (now in Liquidation), which was a company listed with the BSE Limited as well as the National Stock Exchange of India Limited had engaged the Appellant and his firm, namely M/s. AQUILAW, as its advocates/solicitors/law firms/ which were engaged by Pincon Spirit Ltd. (now in Liquidation). The Appellant and M/s AQUILAW had rendered legal services of various kinds such as appearing in court, advising in conferences, etc., to the said company from time to time until 2017, when the company ceased to operate.

(b) At a particular point of time between 2014 to 2017, the Appellant had received a sum of Rs. 83,25,000/- from Pincon Spirit Ltd. (now in Liquidation) as advance on account of legal fees, from time to time. Out of such sum of Rs. 83,25,000/-, an amount of Rs. 13,25,000/- was credited to the Appellant's revenue account since legal services were concluded. As there was no way of ascertaining the professional fees for the continuing legal services rendered to the company by the Appellant, the remaining sum of Rs. 70,00,000/- was lying as "advance against fees" for ongoing continuing legal services provided since a long time subject to negotiation/finalization with the company. The same was also reflected in the Income Tax Returns of the Appellant. Pertinently, there are no further transactions between the Appellant and Pincon Spirit Ltd. (now in Liquidation). Additionally, the Appellant's law firm, M/s. AQUILAW, also received a sum of Rs. 23,00,000/- from Pincon Spirit Ltd. (now in Liquidation) as professional legal fees. Such fact is an admitted position by both the Appellant as well as the Respondent and is not a matter of challenge.

(c) All of a sudden, to his utter surprise, the Appellant, for the first time received a Summon dated 25th August 2021 issued by the Respondent under Section 50(2) and 50(3) of the PMLA, in connection with the subject ECIR directing the Appellant to appear before the Respondent's office in Kolkata on 30th August, 2021 along with various documents and information, including details of transactions undertaken with Pincon Group of Companies/Directors.

(d) Subsequently, between 25th August 2021 to 26th May 2022, the Respondent issued 6 additional Summons(s)/Letter(s) to the Appellant seeking physical appearance of the Appellant along with voluminous documents/information from time to time. A bare perusal of the multiple Summon(s)/Letter(s) issued by the Respondent seeking (i) appearance, (ii) documents, (iii) information and then again, (iv) additional information, would elucidate the one-point agenda of the Respondent to harass the Appellant through its abrasive conduct. The Respondent has continuously sought the same information/documents from the Appellant one multiple occasions. However, the Appellant being a law-abiding citizen, has complied with all such Summon(s)/Letter(s) issued by the Respondent by not only undergoing long hours of examination at the office of the Respondent on 21st September, 2021, but also by providing all information/documents sought for by the Respondent in a bonafide manner from time to time when such information/documents were sought. True copies of all summon(s) and letter(s) issued by the Respondent and subsequent replies of the Appellant are annexed herewith and collectively marked as Annexure A/4 (Colly.).

(e) In the meantime, the Appellant came across a public announcement made by one Mr. Binay Kumar Singhania, Liquidator of Pincon Spirit Ltd. (now in Liquidation) on 15th

November 2021 in the English Daily Newspapers, namely, "Business Standard" and "Financial Express". The said public announcement notified that Pincon Spirit Ltd. went into liquidation on and from 30th September, 2019 pursuant to the directions of the Hon'ble National Company Law Tribunal, Kolkata Bench and Mr. Binay Kumar Singhania was appointed as the Liquidator of Pincon Spirit Ltd. (now in Liquidation). The Liquidator sought for the debtors of Pincon Spirit Ltd. (now in Liquidation) to come forward and make payment of any outstanding amount due and payable to the company in Liquidation. Copies of the said public announcements dated 15th November, 2021 published in the English Daily Newspapers, namely, "Business Standard" and "Financial Express" are annexed herewith and collectively marked as Annexure A/5 (Colly.).

(f) As already stated above, during the Appellant's engagement as an advocate of the company between 2014 to 2017, apart from receiving fees for completed assignments, the Appellant received a sum totaling Rs. 70,00,000/- as advance fees against various continuing legal services from the Pincon Spirit Ltd. (now in Liquidation) from time to time which remained unfinished, and as such, the Appellant thought it appropriate to remit the amount lying with him in favour of the Liquidator pursuant to the said public announcement. Accordingly, pursuant to the said public announcement, the Appellant approached Mr. Binay Kumar Singhania, Liquidator of Pincon Spirit Ltd. (now in Liquidation) vide e-mail dated 15th November 2021 to explain the position by which the sum of Rs. 70,00,000/- was still lying as advance in the books of the Appellant and his wish to remit the same to the aforesaid Liquidator. In response, vide e-mail dated 16th November 2021, the Liquidator forwarded the bank account details of Pincon Spirit Ltd. (now in Liquidation) and instructed the Appellant to remit the amount of Rs. 70,00,000/- in the said bank account. In terms of the direction of the Liquidator, the Appellant remitted the entire amount of Rs. 70,00,000/- through RTGS having transaction ID UTIBR520211116000359821 dated 16th November 2021 and vide letter dated 16th November 2021 intimated the Liquidator about such remittance, which was duly acknowledged by the Liquidator, and sent the same by an email dated 16th November 2021. Following which, vide a letter dated 9th December, 2021, the Appellant informed the Respondent authority about the remittance of Rs. 70,00,000/- made by him into the bank account of Pincon Spirit Ltd. (now in Liquidation) in terms of the direction of Mr. Binay Kumar Singhania, Liquidator. Copies of e-mails dated 15th November 2021, 3 emails dated 16th November 2021 and a letter dated 9th December 2021 are annexed herewith and collectively marked as Annexure A/6 (Colly.).

(g) Even after receiving the aforesaid letter dated 9th December 2021, the Respondent has continuously harassed the Appellant by issuing fresh Summon(s). It is stated that the Appellant supplied all information and documents explaining the transaction between the Appellant, M/s. AQUILAW and the said Pincon Spirit Ltd. (now in Liquidation) in relation to the fees received against professional legal services. Therefore, there was no further scope for the Respondent to summon the Appellant in connection with the subject ECIR. However, the Respondent travelled beyond the scope of its investigation/enquiry of the subject ECIR and issued fresh Summon(s) and also sought further information/documents which were not relevant to the Respondent's investigation/enquiry and/or the Appellant's or M/s AQUILAW's professional relationship vis-à-vis Pincon Spirit Ltd. (now in Liquidation).

(h) A glaring example of the Respondent's high handedness would be evident from the Summon(s) dated 31st January 2022 and 10th February 2022, whereby, the Respondent cast a wide web in furtherance of its fishing and roving expedition by seeking break-up of all professional fees received, retainer fees received/paid by the Appellant and by/through AQUILAW in the last five years. It is submitted that such information sought

by the Respondent was unnecessary and had no bearing with the subject ECIR or the Appellant's professional relationship with Pincon Spirit Ltd. (now in Liquidation), and is also per se privileged information. The Respondent had no reason whatsoever to seek information about the Appellant's other professional engagements, which had nothing to do with the ongoing investigation/enquiry vis-à-vis Pincon Spirit Ltd. (now in Liquidation). Furthermore, vide Summon dated 10th March, 2023, the Respondent for the last 10 Financial Years from FY 2012-22. It would be important to highlight here that the Appellant's professional relationship with Pincon Spirit Ltd. (now in Liquidation) started from about 2014 and ceased on or about 2017. Clearly, the Respondent, with a vested motive of harassing the Appellant has sought such documents/information which have no relevance to the Respondent's ongoing investigation/enquiry.

Another material infirmity is that the Respondent, under the pretext of carrying out the said purported investigation/enquiry, has repeatedly issued different summons seeking the same information/documents that were already supplied to the Respondent by the Appellant in previous responses. The same is evident from a perusal of Summon dated 26th May 2022. However, to extend cooperation to the Respondent's ongoing investigation/enquiry, the Appellant continued to supply all information/documents sought for by the Respondent repeatedly in a bona fide manner.

(i) Despite continued cooperation of the Appellant, on 1st March 2023, to the utter shock of the Appellant, at about 7:15/7:30 am, more than fifteen officers from the Respondent's office and innumerable armed CAPF officers stormed into the Appellant's residence. As stated earlier, the Appellant resides with his wife and minor child at his home. The Appellant was informed that the officers had come to conduct search and seizure at his residence in connection with the subject ECIR and was directed to extend cooperation in the process. The officers thereafter started the process of search and seizure at about 7:30 am. During the said process, the officers snatched away all the electronic devices that were in the Appellant's and his wife's possession. They also snatched away the electronic devices of the Appellant's minor child and domestic help(s). The entire process continued for about 30 long hours during which the Respondent found no incriminating material against the Appellant or M/s AQUILAW. Thus, the Respondent failed to seize any proceeds of crime and/or any material that was wrongly suspected to be found at the Appellant's residence in connection with the subject ECIR.

(j) The Appellant states that since the Respondent and its officers could not recover anything during the search and seizure, hence, they took away his and his wife's electronic devices including laptops and mobile handsets despite his wife having no connection to the subject ECIR whatsoever. Needless no mention, by virtue of her being an established corporate-commercial and real estate lawyer, her engagement with listed companies as an Independent Director and having a leadership position in a leading industry chamber, both her electronic devices much like the Appellant's devices, contain very critical, confidential and privileged information and documents pertaining to her aforesaid engagements.

It is submitted that the Appellant is not connected with the offence alleged against any of the accused. He has not been named in the FIR. The search and seizure under Section 17 of the Act of 2002 was yet conducted. It was only to harass Appellant for the reason that he is a Standing Counsel of the State of West Bengal and defending the case before the Apex Court. Since the Appellant and his wife were targeted by the Respondent to cause harassment, it became necessary to seek cross examination of Ms. Kumari Purnima, Assistant Director, Directorate of Enforcement. The application

has been dismissed ignoring the provisions of the Act and Rules apart from the facts.

The Learned Counsel for the Appellant has referred the judgment of this Tribunal in the case of Dr. U.S. Awasthi v/s. the Adjudicating Authority in Appeal bearing No. FPA-PMLA-5382/DLI/2023 decided by the order dated 31st January, 2023. The cross examination of the officer who seized the laptop and the mobile phone of the Appellant and his wife was sought in reference to the facts of this case. In view of the above, the Appellant should have been allowed to cross examine the witnesses.

We have considered the submission of the Learned Counsel for the Appellant. It is not in dispute that cross examination is part of the principles of natural justice but it cannot be sought as a rule in the summary proceeding before the Adjudicating Authority under the Act of 2002.

An order of seizure is required to be confirmed within 180 days failing which it stands lapsed. We are not recording our opinion that intention of the Appellant is to delay the proceedings but acceptance of the prayer of cross examination may cause delay thus proper scrutiny of prayer is to be made. The detailed judgment on it was given by this Tribunal in the case of Dr. U.S. Awasthi (Supra). The reference of Section of 6(15) of the Act of 2002 and Regulation 21 of the Adjudicating Authority (Procedure) Regulations, 2013 were given therein. The relevant paras of the judgment are quoted hereunder:-

“25. Section 6(15) makes it clear that Adjudicating Authority would not be bound by the procedures laid down by the Code of Civil Procedure but shall be guided by the principles of natural justice. It would be open for the Adjudicating Authority to regulate its own procedure subject to other provision of Act. Regulation 21 of the Adjudicating Authority (Procedure) Regulation 2013 quoted above however provides for application of Code of Civil Procedure for issuance of commission for examination of witnesses and documents etc.

26. As per Regulation 21, the Adjudicating Authority has power to issue commission for examination of witnesses and documents etc. Regulation 21 does not talk about the cross examination of witnesses and otherwise it is provided under the Evidence Act and not under CPC. The Evidence Act has not been made applicable however right of cross examination is recognized as part of principle of natural justice thus can be allowed in an appropriate case even if Evidence Act is not applicable. Thus we are of the view that cross examination of the witnesses can be allowed by the Adjudicating Authority if case is made out. We would refer to the judgment cited by both the parties on the aforesaid issue but before that we would comment on nature of the proceedings before the Adjudicating Authority.

27. The perusal of the provisions of the Act of 2002 would demonstrate that the ED can register ECIR in a case of money-laundering and proceed for investigation and file prosecution complaint before the Special Court. The Trial thereupon may result in acquittal or conviction. The aforesaid is one part of the proceedings which can be taken under the Act of 2002. The other part of the Act of 2002 refers to the attachment, adjudication and confiscation of property involved in money-laundering. It is under Chapter III of Act, 2002. The attachment of property may result in confiscation but in case of acquittal of the accused, the attached property is to be released in view of the Section 8(6) of the Prevention of Money Laundering Act, 2002.

“Section 8(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.”

28. The attachment of the property is mainly for the purpose of protecting it till the Trial is completed by the Special Court. The Provisional Attachment Order is passed after applying the procedure given under the Act to protect the property. It can be confirmed by the Adjudicating Authority. The attached property can be confiscated by the Special Court in case of conviction. Thus attachment is mainly to protect the property during the intervening period of the Trial by the Special Court. In the background aforesaid, we need to analyze as to whether right of cross examination is to be given as a rule or would be an exception in the proceedings for attachment. It is considered to be summary proceedings and to be completed within time frame. The attachment of the property remain subject to find outcome of the tribal by the Special Court. In such proceedings, cross examination has not been recognized as a rule.

29. We have already recorded our opinion that the cross examination is part of principle of natural justice but not in all the circumstances therefore we are not required to elaborately discuss the judgment referred by the learned Counsel for the Appellant. However we record our clarification that a chance of cross examination cannot be sought as a rule and in all the circumstances, rather it can be in a given case.

30. In the case of Shri K.L. Tripathi v/s. State Bank of India & Ors, Supra the Apex Court has referred to the basic concept of fair play in administrative, judicial or quasi-judicial proceedings.

Para 32 & 33 are quoted hereunder:-

"32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement.

33. The party who does not want to controvert the veracity of the evidence from or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. Where there is no dispute as to the facts, or the weight to be attached on disputed facts but only an explanation of the acts, absence of opportunity to cross-examination does not create any prejudice in such cases."

It is informed that there is an interim order of the High Court on the judgment referred above.

In the light of Section 6 (15) of the Act of 2002 and Regulation of 2013, we need to analyze as to whether Appellant should have been allowed to cross examine Kumari Purnima, Assistant Director, Directorate of Enforcement.

The purpose of the cross examination is to extract the truth from the statement of the witnesses recorded in examination-in-Chief. In the instant case, Ms. Kumari Purnima has not deposed statement as witness so as to be cross examined. As per the Indian

Evidence Act, right of cross examination is on examination of witness, which does exist in this case. The Appellant wants to cross examine the witness to prove his innocence.

As per Section 24 of the Act of 2002, the burden of proof lies on the accused and the preposition of reverse burden has been held constitutionally valid by the Apex Court in the case of "Vijay Madanlal Choudhary V/s. Union of India" reported in 2022 SCC OnLine SC 929. By the cross examination, the Appellant wants to shift burden of proof. The question framed and given to the Tribunal during the course of arguments shows it. It is hit by Section 24 of the Act of 2002 and for ready reference the provision is quoted hereunder:-

Section 24. Burden of Proof.- In any proceeding relating to proceeds of crime under this Act, -

(a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money laundering.

In view of the above, we could not satisfy ourselves to allow the prayer of cross examination of a person whose statement has not even been recorded either before the Adjudicating Authority or in the process of the search and seizure. The cross examination of witnesses necessarily need examination-in-chief which is missing in this case. Therefore, we are unable to accept the prayer of the Appellant to allow cross examination of Kumari Purnima, Assistant Director, Directorate of Enforcement.

This order would however not construe to endorse action of the Respondent rather it would be decided by the Adjudicating Authority. The Appellant would be having liberty to raise all the issues to draw attention of the Adjudicating Authority which may include the status of the Appellant and his wife as a lawyer and his engagement as a lawyer by the State of the West Bengal. It may also that he is not responsible for any act of M/s. PINCON and offence of money laundering. The Appellant would also be at liberty to raise all the related issue before the Adjudicating Authority to question search and seizure. With the aforesaid observations, this Appeal is disposed of without causing interference in the impugned order passed by the Adjudicating Authority.