

(2023) 08 ATPMLA CK 0006

Appellate Tribunal Under Prevention Of Money Laundering Act

Case No: MP-PMLA-6356, 6357, 6358, 6359, 6360/COCHIN/2019, 6897, 6898, 6899, 6900, 6901/COCHIN/2020 , FPA-PMLA-3182, 3183, 3184, 3185, 3186/COCHIN/2019

Suma Soora

APPELLANT

Vs

Deputy Director, Directorate Of
Enforcement, Cochin

RESPONDENT

Date of Decision: Aug. 17, 2023

Acts Referred:

- Prevention of Corruption Act, 1988 - Section 13(1)(d), 13(2)
- Prevention Of Money Laundering Act, 2002 - Section 5, 5(1), 5(1)(b)

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

Bench: Division Bench

Advocate: R.K. Rawal, Aditya Singla, Sahil Sharma

Final Decision: Disposed Of

Judgement

FPA-PMLA-3182-3186/COCHIN /2019

By this appeal, a challenge has been made to the order dated 10.07.2019 passed by the Adjudicating Authority confirming the provisional attachment order dated 18.01.2019. The provisional attachment order was passed after registration of the FIR and charge-sheet thereupon on 25-01-2018 against appellant Shri T.O. Sooraj for the offence under Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (In short the Act of 1988). The ECIR for the offence under the Act of 1988 was earlier recorded on 12.02.2015. In the investigation, it is alleged that appellant Shri T.O. Sooraj was having assets of Rs. 11,84,25,530/-disproportionate of his known-sources of income during the check period from 01.01.2004 to 19.11.2014.

Learned counsel for the appellant submits that the offence under the Act of 1988 was added in the schedule by an amendment under the PMLA Act of 2002 (In short the Act of 2002) by the Amendment Act 21 of 2009. It was further amended by the Amendment Act 2 of 2013.

The check period to determine the alleged disproportionate assets to the known-sources of income relates to the period when the offence under the Act of 1988 was not a scheduled offence. In view of the above, the respondents could not have attached the property as the amendment brought in the year 2009 followed by an amendment of 2013 has not been given retrospective effect.

It is further stated that the properties in question were attached by the Trial Court by its order dated 19.03.2015 thus there was no reason for the Competent Authority to presume transfer, alienation or concealment of the property to frustrate the

proceeding of confiscation under Chapter III of the Act of 2002. The attachment of property was thus without application of mind. On the aforesaid grounds also, the impugned order deserves to be set aside.

The further argument is that the appellant Shri T.O. Sooraj had explained the sources of assets. It is not disproportionate to the known-sources of income and thereby the appellant has not committed any offence. Ignoring the aforesaid, the Adjudicating Authority has confirmed the Provisional Attachment Order. Thus on all the grounds raised above, the provisional attachment and the order passed by the Adjudicating Authority deserves to be set aside.

The learned counsel for the respondents has contested the appeal and submitted that the FIR for the offence under Section 13(1)(d) and 13(2) of the Act of 1988 was registered on 17.11.2014 i.e., much subsequent to the amendment under the Act of 2002 to make offence under the Act of 1988 to be scheduled offence. The amendments were notified in year 2009 and 2013. The ECIR was recorded on 12.02.2015. The FIR was registered in the year 2014 and the charge-sheet was filed on 25.01.2018. The Provisional Attachment Order was issued on 18.01.2019. The offence under the Prevention of Corruption Act was a scheduled offence at time of registration of FIR and the ECIR. It is now settled law of the land that the relevant date for taking note of the schedule offence under Act of 2002 would be when a case of money laundering is found. It can be when the accused project tainted property to be untainted or launder the proceeds. In the instant case, FIR was registered in November, 2014 followed by ECIR, thus there is no question of retrospective application of the Act of 1988.

The learned counsel for the respondents further submitted that order of Provisional Attachment dated 18.01.2019 was passed under Section 5(1) of the Act 2002. It is after recording reasons to believe in writing. The appellant was found in possession of the proceeds of crime and as provisions of the Act of 2002 stand-alone having overriding effect to the other enactment, the respondent had rightly exercised their authority to attach the property for which the Special Judge may have passed an order of attachment prior to it. The purpose of passing the attachment order by the Trial Court is different than by the respondent Department. The attachment of the proceeds of crime or value thereof is to make the property available for confiscation on the completion of trial and conviction therein for an offence under the PMLA Act, 2002. The trial for the offence under PMLA is separate than the trial in the predicate offence. Looking to the aforesaid and to avoid frustration of the proceeding of confiscation, the respondents rightly invoked Section 5(1) of the Act. The prayer is not to interfere in the order of the Adjudicating Authority confirming the provisional attachment.

It is further, argued that in the investigation by the vigilance and even under the Act of 2002, the property disproportionate to the known-source of income was found in the hands of appellant Shri T.O. Sooraj. The charge-sheet was filed after collecting the evidence for the aforesaid. At this stage, the Tribunal would not be competent to decide the issue finally as to whether the appellant was holding property disproportionate to known source of income rather it would be decided by the Special Court. If the known sources exists with the appellant, it would be considered in the trial and in case of acquittal of the appellant, the property would be released but if the conclusions of the Special Court remains adverse to the appellant holding an offence under Section 13(1)(d) and 13(2) of the Act of 1988, it would proceed to confiscate of the property under the Act of 2002. The prayer is accordingly to dismiss the appeal.

We have considered the rival submission of the parties and scanned the record carefully. The appellant has raised three issues to question the order passed by the Adjudicating Authority to confirm provisional attachment order.

The first issue is in reference to the application of the Act of 2002. It is in reference to the offence under the Prevention of Corruption Act, 1988. It was not a scheduled offence in the year 2002 but was added by the notification issued in the year 2009 followed by further amendment in the year, 2013. According to the appellant, the check period to find out disproportionate property to the known-sources of income is of the period prior to the amendment and therefore the Act of 2002 could not have been enforced to attach the property. It is for the reason that amendment of year 2009 and 2013 has not been given retrospective effect. We find no substance in the argument. The relevant date to find out the scheduled offence is the date when one projects tainted property to be untainted or involves oneself in money laundering and not the date of actual commission of predicate offence. The check period of income may be from the year 2004 to 2014 but the FIR was registered in the year 2014 and thereupon, ECIR was recorded on 12.02.2015. It is much subsequent to the amendment in the Act of 2002 to make an offence under the Prevention of Corruption Act to be a scheduled offence. In view of the above, we do not find that amendment under the Act by the notification of year 2009 or 2013 have been given retrospective effect in this case.

The second argument is on the facts. It is to show that no offence under Section 13 (1) (d) or 13 (2) of the Act of 1988 is made out. The appellant is not having disproportionate property to the known-sources. We find that facts available record *prima facie* shows a case of disproportionate property in the hands of the appellant to his known-sources. We would not like to go further in deep as the finding on the aforesaid would be recorded by the Special Court after completion of trial. In view of the above, we do not find any substance even in the second argument.

The third argument is in reference to Section 5(1) of the Act of 2002 and for ready reference the said provision is quoted as under.

(1) Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime;

(b) such person has been charged of having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding [one hundred and fifty days] from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule:

[Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be: Provided further that, notwithstanding anything contained in clause (b), any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in

money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.]

It is submitted that an order of attachment requires reasons to believe in writing and it should be on the basis of the material in possession that a person is in possession of proceeds of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may frustrate the confiscation of the property. An order of attachment presupposes the conditions referred to above and given under Clause (a) and (b) of sub Section (1) of Section 5. In the instant case, the respondents have failed to show any likelihood of concealment or transfer of the properties so as to frustrate the proceeding of confiscation rather the property in question was attached by the Special Court much prior to the order for provisional attachment. The Special Court attached the properties by its order dated 19.03.2015 thus there was no likelihood of transfer or concealment of the property. Ignoring the requirement and mandate of Section 5(1) of the Act of 2002, the order of provisional attachment was passed. It is no doubt that the provisions of the Act of 2002 are having over riding effect to other legislation in case of conflict but in this case we do not find any conflict between two legislations. The property can be attached by the respondent department under Section 5 of the Act of 2002 but it can be when they possess material to show that property may be concealed, transfer or be dealt with in any manner to frustrate the proceeding of confiscation. When the property was already attached by the Special Court, how it could have been transferred or concealed. We, therefore, find that reasons to believe were recorded without application of mind. The material to attract Clause (b) of Sub Section (1) of Section 5 of the Act of 2002 is missing.

Accordingly, the last argument raised by the appellant is accepted and accordingly the order of provisional attachment so also the order passed by the Adjudicating Authority are set aside. It is however with clarity that if, the Special Court withdraws the attachment order or the trial pursuant to the FIR is completed, the respondents would be at liberty to exercise their authority under Section 5 (1) of the Act of 2002 in case of an apprehension of concealment or transfer of property. With the aforesaid, appeal is disposed of.