(2023) 12 ATPMLA CK 0008

Appellate Tribunal Under Prevention Of Money Laundering Act

Case No: MP-PMLA-13718, 13719, 13720, 13721, 13722, 13723/DLI/2023, FPA-PMLA-6775, 6776, 6777/DLI/2023

Pradeep Kumar Garg		APPELLANT
	Vs	
Deputy Director, Directorate Of Enforcement		RESPONDENT

Date of Decision: Dec. 4, 2023

Acts Referred:

- Prevention Of Money Laundering Act, 2002 - Section 3, 6, 6(3), 6(7), 8, 8(1), 17, 17(1), 17(2), 19, 26
- Income Tax Act, 1961 - Section 34, 34(1)(a), 132, 132(1)

Hon'ble Judges: Munishwar Nath Bhandari, Chairman; Rajesh Malhotra, Member

Bench: Division Bench

Advocate: Hardik Sharma, Rachit Bansal, Ankita Gautam

Final Decision: Dismissed

Judgement

FPA-PMLA-6775 to 6777/DLI/2023 in OA-962/2023.

1. These three appeals have been filed under section 26 of the Prevention of Money Laundering Act, 2002 (Act of 2002) to challenge an interim order

passed by Adjudicating Authority on 26.10.2023 in OA-962/2023. By the impugned order, all the miscellaneous applications preferred by the appellant

have been dismissed.

2. The learned counsel for the appellant submitted that F.I.R. no. RC 2182022A0010 was registered on 06.07.2022 by Central Bureau of Investigation

against Jagdish Kumar Arora and other accused persons. It was alleged that officials of Delhi Jal Borad, with the intension to provide undue favour to

M/s NKG infrastructure Ltd., made it eligible. It was in a tender for which company was otherwise not eligible. It was by making a new note-sheet

dated 08.04.2018 and thereby allowed for opening of its financial bid. Thereby the said company, in pursuance to conspiracy, bagged tender worth Rs.

38,02,33,080/-. In pursuance to the FIR, ECIR/DLZO-I/45/2022 was recorded by ED on 28/09/2022 and it initiated a probe against the

suspected/accused persons under PMLA, 2002. Thereafter searches were conducted by ED on 24/07/2023 and 09/08/2023 at the premises of various

persons including the appellant under Section 17 of PMLA and seized certain records, documents and electronic devices.

3. On 28/07/2023, ED filed Original Application bearing OA 962/2023 against seven persons including the present appellant Pradeep Kumar Garg. It

was to seek retention of the seized digital devices, documents and records. Ld. Adjudicating Authority issued notice to the appellant and others under

Section 8 (1) PMLA.

4. On 03/10/2023, present appellant filed four miscellaneous applications in said OA no. 962 of 2022. MA no. 10 of 2023 for permission to cross

examine Ms. Smriti Tripathi, the applicant in OA; Shri Vijay Kumar, Assistant Director, ED, who conducted search and seizure at the premises of the

applicant; and two punch witness namely Shri Pritam Anand and Shri Vimalesh Kumar Akela. MA no. 8 of 2023 pertains to stay the proceedings till

such time the Coram of the Authority, as stipulated under Section 6 (7) of PMLA is completed. MA No. 9 was to seek inspection of the record and

MA No. 11 was for Reason to Believe.

5. All the miscellaneous application were disposed of by Ld. Adjudicating Authority vide common order dated 26/10/2023 and aggrieved by the same,

respondent no. 6 Pradeep Kumar Garg has filed the appeals.

The appeal no. 6775/23 is to seek cross examination of the persons.

6. The appellant made an application to seek permission to cross examine Ms. Smriti Tripathi the applicant in OA; Shri Vijay Kumar, Assistant

Director, ED, who conducted search and seizure at the premises of the applicant; and two punch witness namely Shri Pritam Anand and Shri

Vimalesh Kumar Akela.

7. The detail questions to cross examination of the four persons have been given in miscellaneous application no.10/2023 in O.A. No. 962/2023

annexure A-5, which are as under:-

In respect of Ms. Smiriti Tripathi, the original applicant in the O.A. and Shri Vijay Kumar, Assistant Director ED:

1. That the retention of the digital devices, document/ records seized has been sought on the basis of presumptions and assumptions, without

there being any nexus with the alleged Scheduled offence,

2. The seizure was done without any analysis and without any purpose of the same with the investigation in the ECIR.

3. She or the officer Authorized on her behalf to conduct the search did not even record the evidence/statement of any person before the

search and the seizure was made. Hence, cross examination of Ms. Simiriti Tripathi, the Original Applicant is required to be done in for fair

adjudication in the present case.

4. It has been stated that the devices, documents, records, etc. has been retained by invoking Section 17 PMLA without proper investigation

and rather only proforma words in the statute are reproduced and not even a reasoned retention order has been passed. However, it is the

case of the Applicant that the pre-requisites of the Section 17 of the PMLA have not been satisfied in the present case and thus in order to

prove the requirements of invocation of Section 17 PMLA, were not satisfied, Ms. Simiriti Tripathi and Shri Vijay Kumar are required to be

cross examined on, inter alia, the following aspects:

4.1 On what basis she came to the opinion to authorized the search of residential premises of the respondent who is not even named as an

accused in the FIR lodged in the scheduled offence?

4.2 On what material she came to the opinion that the records/properties seized are attributed to the proceeds of crime/ related to proceeds

of crime, since the same has not been specified in the Original Application?

4.3 How the Ld. Deputy Director reached the conclusion that the alleged offence of Money Laundering has been committed in the present

case when not even a single witness has been examined?

4.4 Admittedly as stated in para 9 of the OA, scrutiny of the seized documents/records (including digital records) is under process which

shall take time to complete and that the relevance of the documents seized has to be checked and decided. Then on what basis, the Ld.

Deputy Director came to the conclusion for retention of the seized documents/records (including digital records)?

4.5 How the Ld. Deputy Director reached the conclusion that there exists a prima facie case showing connivance and involvement of the

Applicants/ Respondent No. 6 with the other Respondents in the offence of money laundering?

4.6 What tangible and credible evidence indicative of involvement of the respondents in any process or activity connected with the

â€žproceeds of crime‟ has come on record in terms of para 284 of the judgment titled Vijay Madanlal Choudhary v. Union of India, 2022

SCC Online SC 929?

4.7 Why Retention orders and the Authorizations are not attached to the RUDs?

4.8 What was the amended scope of conduct of search and seizure operations?

4.9 Whether there was any specified criteria for seizure of documents, records, digital devices etc. at the said premises or the documents,

records etc. were seized en-masse without even checking etc.

4.10 Whether contents of digital device i.e., the mobile phone of respondent no. 6 were checked before searching?

5. Ms. Simiriti Tripathi, the original applicant, mentioned in the O.A and Shri Vijay Kumar, Assistant Director, ED authorized by Ms. Simiriti

Tripathi are to be confronted with various material to show that the conclusions arrived at by her are incorrect.

For the cross examination of the punch witnesses namely Shri Pritam Anand and Vimalesh Kumar Akela, they are required for cross examination on

following grounds:-

a) Which ED official called him and whether he knew t h e s a i d ED official before hand?

b) When and how was he contacted by the above ED official?

c) Where was he located, when he was contacted by the above ED official?

d) How much time did it take for him to reach the place of search?

e) Whether he was told the purpose as to why he was being called by the above ED official?

f) Whether he was aware of his role as Pancha and he understood the process of search and seizure and why it was being done?

g) Whether he was given any sets of instructions by the above ED official who called him to witness such search, seizure?

h) Were there any factors that might have influenced his observation during the process as recorded in the Panchnama?

i) Whether the Panchnama was written at the spot in his presence? Whether he signed the Panchnama voluntarily after reading and

understanding the contents of the Panchnama or he was forced to signed the Panchnama?

j) Manner in which the seized documents and device were retrieved and whether the contents of the same were perused prior to seizure?

k) Whether the Panchnama was recorded in language as dictated by him?

8. The appellant has framed the issues for cross examination, however, prayer for cross examination of persons named in the application was not

accepted by the Adjudicating Authority and therefore the impugned order has been challenged.

9. The prayer to seek cross examination of the Officers and Panchas has been seriously contested by the respondents and accordingly we would deal

with the issue after considering the rival submissions.

10. Before we address the issue, it would be relevant to refer that proceedings under section 8 of the Act of 2002 are summary in nature. Once the

order of provisional attachment of the properties is issued, copy of it is to be sent to the Adjudicating Authority for passing order within 180 days from

the date of the order of provisional attachment.

11. The Adjudicating Authority, before proceeding further in reference to the seizure, is to draw a show cause notice. It should contain reasons to

believe and thereupon to be served to the person whose properties have been attached. It is to seek his reply and the period for it has been given

under the Regulation. Thus, the proceedings by the Adjudicating Authority is to be completed within time-frame.

12. Keeping in mind the time frame, the Adjudicating Authority determine the schedule for disposal of the case and for which initially opportunity to

file reply within 30 days from the date of show cause notice is given. If the additional time is sought and granted, then period may be greater than 30

days for filing reply. The Department then file rejoinder, if so wishes and the entire process takes considerable time and therefore matter is to be kept

immediately for final hearing so that order may be passed within 180 days of the date of provisional attachment order. The fact aforesaid is relevant

for determination of the issue raised by the appellant to seek cross examination of the persons.

13. The cross examination is generally sought at the stage leaving hardly any time for the Adjudicating Authority to pass the final order. It is aimed to

seek lapse of the attachment. It is however a fact that cross examination is a part of principle of natural justice. Thus, in a given case, it should be

allowed and for that purpose, we may refer the facts of case.

14. It is a case where appellants made an application to seek cross examination of four persons. It is without their statement either during the course

of investigation or otherwise, because cross-examination pre-supposes statement of the persons sought to be cross examined. It is a fact that no

statement of any of the persons named by the appellant were recorded. In absence of statement, there would be no question of cross examination of

the witness as cross examination pre-supposes examination in Chief of the witness. Thus, application for the cross examination was made only to gain

time so that attachment order may lapse. The cross examination is permitted in quasi-judicial proceedings when the testimony of the witness is

recorded and relied by the parties.

15. In view of the above, when statement of witness sought to be cross-examined does not exist, question of cross examination would not arise. The

issue of principle of natural justice in reference to cross examination was decided by the Apex Court in the case of Kanungo & Company V/s

Collector of Customs & Others reported in 1972 SC 2136. Para 12 of judgement is quoted here under:-

12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such

breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it

was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries

were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our-opinion, the

principles of natural justice do not require that in matters like this the persons who have given information should be examined in the

presence of the appellant or should be allowed lo be cross-examined by them on the statements made before the Customs Authorities.

Accordingly we hold that there is no force in the third contention of the appellant.

16. The judgement of the Apex Court in Kanungo & Company (Supra) was relied by the Apex Court in the case of Telestar Travels Private Ltd V/s

Enforcement Directorate 2013 9 SCC 549. Delhi High Court also addressed the same issue in the case of Arun Kumar Mishra Vs Union of India and

Another LPA/99/2014 in following words:-

â€œ11.We have further enquired from the senior counsel for the appellant that even if the appellants are right in their contention of having

a right to cross-examine the persons whose oral testimony is intended to be used against the appellants and even if the Adjudicating

Authority is wrongly depriving the appellants of the said right, is it not open to the appellants to, if at all aggrieved by the orders of the

Adjudicating Authority, to take up the said aspect in appeal under Section 26 of the Act against the said orders and which right of the

appellants has been protected in the impugned order by the learned Single Judge also.

12. The senior counsel for the appellant, though not controverting the aforesaid legal position, contends that if the appellants have a right

in law to cross-examine the witnesses whose testimonies are intended to be used against the appellants, why should this Court not interfere

at this stage itself instead of allowing the Adjudicating Authority to proceed on a futile exercise and which will only result in multiplicity of

proceedings.

13. We are unable to agree. The Adjudicating Authority is currently seized of the complaints. We, at this stage, do not know as to which way

the order of the Adjudicating Authority will go. It cannot also be said at this stage whether the Adjudicating Authority even if deciding

against the appellants will rely upon the material before it qua which the appellants claim a right of cross-examination. All this can be

known only when the Adjudicating Authority passes an order and qua which if the appellants are aggrieved, the appellants shall have their

statutory remedy.

Any interference by us at this stage in the proceedings of which the Adjudicating Authority is seized is thus uncalled for and would result in

a situation which the Supreme Court has warned the High Courts to avoid.â€

17. We do not find that denial of opportunity of cross examination has caused any prejudice to the appellant. It is for the reason that statements of the

persons sought to be cross examined were not recorded, so as to rely on their testimony.

18. It is apart from the fact that the Regulation does not provide for cross examination of a person whose statement or the testimony was not recorded

or relied at any time. The appellant has cited many judgements on the principle of natural justice and we agree with the proposition of Law, but cross

examination in summary proceedings cannot be claimed as rule.

19. In the light of the aforesaid, there was no reason to allow cross examination of the persons who can otherwise be cross examined by the appellant

in the Criminal Trial, if prosecution produced them as witness and their statement are recorded in the Court. For all the reasons given above, we do

not find any illegality in the order of the Adjudicating Authority to deny cross examination of the persons named by the appellant.

The appeal No. 6776/2023 PMLA-6776 for supply of copy of â€œReasons to Believeâ€ recorded under Section 17 of the Act.

20. As per miscellaneous application no. 11 of 2023 annexure A-5 it is stated that copy of reasons to believe recorded under Section 17 (1) of the

PMLA has not been served along with the Show Cause Notice. It is stressed that Section 17(1) of PMLA makes it clear that after the Director/

Officer authorised by the Director not below the rank of Deputy Director has reasons to believe that an offence of money laundering has been

committed, he may authorize any officer subordinate to him for search and seizure. The reasons to believe to search the residential premises of the

applicant was not served. It was when applicant is not named as an accused in the FIR for the Commission of Scheduled Offence. At the time of the

commission of the alleged Schedule Offence, he was in jail from 13.10.2016 to 01.06.2018 in another matter registered by CBI in RC 10/2016. The

notice inviting tender was floated on 15.12.2017 and bids were submitted on 07.02.2018. As per allegation, new note sheet dated 08.04.2018 was

prepared with an intention to provide undue favour to M/s NKG Infrastructure Ltd. to make it technically eligible. When appellant was in judicial

custody then there was no reason to believe for initiating the action against the appellant for searching his premises.

21. This issue has been raised by the appellant against denial of a copy of reasons to believe recorded under section 17(1) of the Act of 2002. It is

otherwise a fact that the appellant was served with a copy of reasons to believe while issuing show cause notice by the Adjudicating Authority as

envisaged under section 8 (1) of the Act of 2002.

22. The Adjudicating Authority issued notice to the Appellants under Section 8(1) to show cause as to why the retention of digital devices,

documents/records seized as per details contained in the Original Application and the accompanying documents be not permitted. A copy of the

reasons to believe recorded by the Adjudicating Authority was also served as mentioned therein. Instead of filing a reply to the show cause notice, the

Appellants moved an application before the Adjudicating Authority seeking a copy of the reasons to believe recorded under Section 17 of the Act.

23. The Appellant submitted that in absence of reason to believe, he would not be able to give effective response to the O.A. filed by the E.D seeking

confirmation of retention of the documents, devices etc. seized during the course of search and seizure on 24.07.2023 and 09.08.2023. It is alleged that

application to seek copy of the reason to believe has been dismissed by the Adjudicating Authority in ignorance of the provisions of law and thereby

grave injustice was caused. In absence of the reasons to believe, the Appellant was deprived to contest the matter effectively before the Adjudicating

Authority.

24. The Learned Counsel for the Appellant submits that the Appellant has not been named as accused either in the FIR or ECIR yet search was

conducted followed by the seizure of the documents and record and therefore it was imperative on the Respondent to supply copy of reason to believe

for conducting search and seizure against the Appellant.

25. It is also stated that in absence of service of the copy of reason to believe recorded under Section 17(1) of the Act of 2002, the proceedings would

not be irregular but illegal in view of the judgment of the Delhi High Court in the case of J. Sekar V/s. Union of India & Ors., W.P. (C) 5320/2017

decided by the Division Bench of Delhi High Court on 11th January, 2018. The Learned Counsel for the Appellant has further relied on the judgment

of the Apex Court in case of CIT, West Bengal â€" III and Ors. V/s. Oriental Rubber Works (1984) 1 SCC 700. The Supreme Court has mandated

for supply of reason to believe for seizure and retention of documents under Section 132 of the Income Tax Act, 1962. It was held that though the

provision does not mandate for supply of reason to believe but it is necessary to supply reason to believe recorded by the Authority so that assessee

may properly defend his case. A further reference of the judgment of the Constitutional Bench of the Apex Court in the case of C.B. Gautam v/s.

Union of India And Ors. reported in (1993) 1 SCC 78 has been given. The specific reference of para No. 31 & 33 was given to show that the similar

provision were given interpretation to emphasize service of the copy of the reason to believe for effective opportunity of hearing to the Appellant.

26. The argument is raised even in reference to Section 19 of the Act of 2002 where Apex Court in the case of Pankaj Bansal v/s. Union of India,

2023 SCC OnLine 1244 gave interpretation to Section 19 and held that reason of arrest is required to be conveyed to the accused before he is

arrested.

27. The Learned Counsel for the Appellant submitted that the Adjudicating Authority summarily dismissed the application ignoring the judgment cited

by the Appellant and Section 17 of the Act of 2002 thus impugned order deserves to be set aside.

28. The detailed arguments were made by the Learned Counsel for the Respondent to contest the Appeal and would be referred during the course of

discussion. It is to avoid repetition of the facts.

29. We have gone through the impugned order and the material available on record. The facts on record show that an ECIR was recorded on

28.09.2022 on the strength of the FIR dated 06.07.2022. The search under Section 17 of the Act of 2002 was conducted on 24.07.2023 and

09.08.2023.

30. The Appellant was served with the show cause notice alongwith the reasons to believe under Section 8(1) of the Act of 2002 by the Adjudicating

Authority. The Appellants were called upon to file reply to it. It would not be out of place to mention that the complaint/O.A. was sent to the

Adjudicating Authority within thirty days the seizure under Section 17(1) of the Act, 2002. The Appellant instead of filing reply to the show cause

notice, moved an application to seek copy of reason to believe recorded under Section 17(1) of the Act of 2002. The question for our consideration is

as to whether copy of reason to believe recorded in writing under Section 17(1) was to be supplied to the Appellant. To analyze the issue, we may

refer to Section 17 & 8 of the Act of 2002 and both provisions are quoted hereunder:-

Section 17 Search and seizure. â€

(1) Where [the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section,] on

the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any personâ€

(i) has committed any act which constitutes money-,

or

(ii) is in possession of any proceeds of crime involved in money-laundering, or

(iii) is in possession of any records relating to money-laundering,

[(iv) is in possession of any property related to crime] then, subject to the rules made in this behalf, he may authorise any officer

subordinate to him toâ€

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime

are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where

the keys thereof are not available;

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or [property, if required or] make or cause to be made extracts or copies therefrom;

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for

the purposes of any investigation under this Act:

[(1A) where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze

such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer

making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A)

of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.]

(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure, [or upon issuance of a

freezing order] forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the

Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons

and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be

concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is

located and seize that evidence:

Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

[(4) The authority, seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall,

within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record

or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating

Authority.]

â€œSection 8 Adjudication.-

(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-

section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an [offence under section 3 or

is in possession of proceeds of crime], he may serve a notice of not less than thirty days on such person calling upon him to indicate the

sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of

section 5, or, seized [or frozen] under section 17 or section 18, the evidence on which he relies and other relevant information and

particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering

and confiscated by the Central Government;â€

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy

of such notice shall also be served upon such other person:

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such

property.

(2) The Adjudicating Authority shall, afterâ€

(a) considering the reply, if any, to the notice issued under sub- section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf, and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in

money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be

given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order

in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or [record seized or

frozen under Section 17 or section 18 and record a finding to that effect, where upon such attachment or retention of the seized property]

or record shallâ€

(a) continue during [investigation for a period not exceeding [three hundred and sixty-five days] or] the pendency of the proceedings

relating to any [offence under this Act before a court or under the corresponding law of any other country, before the competent court of

criminal jurisdiction outside India, as the case may be; and]

[(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of Section 8 or Section 58B or sub-

section (2A) of section 60 by the [Special Court].

[Explanation.- For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the

investigation is stayed by any court under any law for the time being in force shall be excluded.]

(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.]

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been

committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of

money-laundering shall stand confiscated to the Central Government.]

(6) Where on conclusion of a trail 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.]

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed

offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the

Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3)

of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of

money-laundering after having regard to the material before it.]

(8) Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be

prescribed may also direct the Central Government to restore such confiscated property or part thereof a claimant with a legitimate interest

in the property, who may suffered a quantifiable los as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered

the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering]:

[Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such

properties during the trial of the case in such manner as may be prescribed.]â€

31. Section 17(1) mandates that the Directors or any other officer not below the rank of Deputy Director authorized by him on the basis of information

in his possession, has reason to believe and reason of such belief to be recorded in writing that any person has committed an act of money laundering

or in possession of proceeds of crime etc. may make a search. Sub section 2 of Section 17 requires that immediately after search and seizure or upon

issuance of a freezing order, a copy of reason so recorded alongwith the material would be send to the Adjudicating Authority in a sealed envelope. It

would be in the manner, as prescribed. The Adjudicating Authority would keep reason and material for such period, as may be prescribed.

32. The reason for search and seizure is to be based on the information that person has committed an act of money laundering or is in possession of

proceeds of crime involved therein and so on. The authorized officers then enter and search any building, place and vessel etc. and seize the records

and the property etc. The authorized officer may even examine a person on oath which is found to in control of any record or property relevant to the

case. The retention of the property would not be beyond a period of 180 days from the date of seizure and freezing. Its continuance would be subject

to confirmation of retention by the Adjudicating Authority within the period given above and unless the Adjudicating Authority permits retention of

property and documents etc. beyond the period of 180 days, it would be returned to the person concern. For the purpose of retention of the property or

seized material, the proceedings under Section 8(1) is to be drawn where a show cause notice is issued by the Adjudicating Authority. It should be

accompanied with reason to believe that the person has committed an offence under Section 3 of the Act of 2002 or is in possession of the proceeds

of crime etc. The show cause notice under Section 8(1) should not be of less than 30 days to call upon the reply. We find that the reasons to believe

was conveyed to the Appellant while serving a show cause notice by the Adjudicating Authority as was recorded by it. That suffice the purpose and

compliance of the judgment of the Apex Court in the case of CIT v/s. Oriental Rubber Works (supra). Para 4 of the said judgment is quoted

hereunder:-

â€œ4. In order to decide the aforesaid contention it will be desirable to set out the material provisions of section 132 of the Act, namely,

sub-sections (8), (10) and (12) thereof, which run as follows:

132. (8) The books of account or other documents seized under sub- (1) or sub-section (1-A) shall not be retained by the authorised officer

for a period exceeding one hundred and eighty days from the date of the seizure unless the reasons for retaining the same are recorded by

him in writing and the approval of the Commissioner for such retention is obtained:

Provided that the Commissioner shall not authorise the retention of the books of account and other documents for a period exceeding thirty

days after all the proceedings under the Indian Income-tax Act, 1922 (XI of 1922), or this Act in respect of the years for which the books of

account or other documents are relevant are completed.

(10) If a person legally entitled to the books of account or other documents seized under sub-section (1) or sub-section (1-A) objects for any

reason to the approval given by the Commissioner under sub-section (8), he may make an application to the Board stating therein the

reasons for such objection and requesting for the return of the books of account or other documents.

(12) On receipt of the application under sub-section (10) the Board may, after giving the applicant an opportunity of being heard, pass

such orders as it thinks fit.

On a plain reading of the aforesaid provisions it will be clear that ordinarily the books of account or other documents that may be seized

under an authorisation issued under sub-section (1) of section132 can be retained by the authorised officer or the concerned Income-tax

officer for a period of one hundred and eighty days from the date of seizure, whereafter the person from whose custody such books or

documents have been seized or the person to whom such books or documents belong becomes entitled to the return of the same unless the

reasons for any extended retention are recorded in writing by the authorised officer/the concerned Income Tax Officer and approval of the

Commissioner for such retention is obtained. In other words two conditions must be fulfilled before such extended retention becomes

permissible in law: (a) reasons in writing must be recorded by the authorised officer or the concerned Income-tax Officer seeking the

Commissioner's approval and (b) obtaining of the Commissioner's approval for such extended retention and if either of these conditions is

not fulfilled such extended retention will become unlawful and the concerned person (i.e. the person from whose custody such books or

documents have been seized or the person to whom these belong) acquires a right to the return of the same forthwith. It is true that sub-

section (8) does not in terms provide that the Commissioner's approval or the recorded reasons on which it might be based should be

communicated to the concerned person but in our view since the person concerned is bound to be materially prejudiced in the enforcement

of his right to have such books and documents returned to him by being kept ignorant about the factum of fulfilment of either of the

conditions it is obligatory upon the Revenue to communicate the Commissioner's approval as also the recorded reasons to the person

concerned. In the absence of such communication the Commissioner's decision according his approval will not become effective.â€

33. The Apex Court, while giving interpretation to Section 132(1) of the Income Tax Act held that if the seize material is to be retained then reasons

are to be recorded in writing by the officers concerned and seek approval of the Commissioner for extended retention and in case of extended

retention, person acquires a right to get a copy of Commissioner‟s approval and reasons recorded so that no prejudice is caused. In the instant case, to

seek retention of the record and documents beyond 30 days, the proceedings under Section 8(1) of the Act was taken and there the Appellant was

served with show cause notice alongwith reasons to believe to disclose all the relevant facts and material to seek retention beyond the period of 30

days and confirmation of it within 180 days. The Appellant was thus not only supplied reason to believe recorded by the Adjudicating Authority but all

the material to invite him as to why the retention of seized material may not be confirmed. It is a case where Appellant was supplied material based on

which search and seizure was conducted.

34. The show cause notice otherwise discloses all the relevant materials to seek retention of the seized material. The appellant has submitted that at

the time of commission of alleged offence, he was in jail thus there could not have reasons to believe of his involvement in the crime. The respondent

submitted that appellant was the Director of the Company involved in the crime and was the key person of the company, thus, search and seizure

under Section 17(1) of the Act of 2002 was conducted. In case of J. Sekar v/s. Union of India & Ors. (Supra), the Division Bench of Delhi High

Court has not addressed the issue in reference to Section 17(1) of the Act of 2002 but was in reference in Section 5(1) of the Act of 2002. The

provisions may be having similar language but purpose of the proceedings under two provisions are altogether different. One pertains to the

attachment of the property till conclusion of the trial, if the attachment order is confirmed by the Adjudicating Authority and other is for retention. The

retention of the documents or device would remain for the period given by the Adjudicating Authority and in fact if the investigation is completed

followed by the prosecution complaint, justification of retention of documents subsequent to it may require to be addressed by the Adjudicating

Authority on merits. It is looking to the facts that if the material seized became part of the prosecution complaint with a copy thereupon to the

Appellant then an appropriate order can be passed by the Adjudicating Authority for release. We are however refraining ourselves to comment on it

because matter is pending before the Adjudicating Authority.

35. We may refer to the judgment of the Apex Court in the case of Narayanyappa & Ors. v/s. Commissioner of Income Tax (1967) 1 SCR 590

wherein similar issue in reference to the Income Tax Act came up for consideration before the Apex Court. Therein also, the reasons led to initiate

the proceedings under Section 34 of the Income Tax Act was not supplied and therefore a challenge to it was made before the Apex Court where

argument were found to be misconceived and held that the process of assessment and reassessment start from the issuance notice to the assessee

and prior to it, the action of the Income Tax officer for recording the reasons for obtaining the sanction of the Commissioner are administrative in

nature and not quasi- judicial. The para 4 of the said judgment is quoted hereunder for ready reference:-

â€œ4. It was also contended for the appellant that the Income Tax Officer should have communicated to him the reasons which led him to

initiate the proceedings under Section 34 of the Act. It was stated that a request to this effect was made by the appellant to the Income Tax

Officer, but the Income Tax Officer declined to disclose the reasons. In our opinion, the argument of the appellant on this point is

misconceived. The proceedings for assessment or re-assessment under Section 34(1)(a) of the Income Tax Act start with the issue of a notice

and it is only after the service of the notice that the assesse, whose income is sought to be assessed or re-assessed, becomes a party to those

proceedings. The earlier stage of the proceeding for recording the reasons of the Income Tax Officer and for obtaining the sanction of the

Commissioner are administrative in character and are not quasi-judicial.â€

36. In the case of Biswanath Bhattacharya V/s. union of India (2014) 4 SCC 392, the Apex Court addressed the same issue and relied the earlier

judgment in the case of S. Narayanyappa & Ors. (Supra). Para 16 of the said judgment is quoted hereunder:-

â€œ16. We reject the submission of the appellant for the following reasons.

Firstly, there is no express statutory requirement to communicate the reasons which led to the issuance of notice under Section 6 of the Act.

Secondly, the reasons, though not initially supplied along with the notice dated 4-3-1977, were subsequently supplied thereby enabling the

appellant to effectively meet the case of the respondents. Thirdly, we are of the opinion that the case on hand is squarely covered by the

ratio of Narayanappa case. The appellant could have effectively convinced the respondents by producing the appropriate material that

further steps in furtherance to the notice under Section 6 need not be taken. Apart from that, an order of forfeiture is an appealable order

where the correctness of the decision under Section 7 to forfeit the properties could be examined. We do not see anything in the ratio of

Ajantha Industries case which lays down a universal principle that whenever a statute requires some reasons to be recorded before

initiating action, the reasons must necessarily be communicated.â€

37. The perusal of Section 17 provides that for the purpose of search and seizure, the Directors or other Officers not below the rank of Deputy

Director may proceed for search and seizure based on the information in his possession and has reasons to believe that any person has committed any

Act which constitute money laundering and is in possession of any proceeds of crime involved in money laundering etc., the Authorised Officer may

enter and search the building, place, vessel, vehicle etc. and thereupon take further action as given under Section 17(1) of the Act which includes

seizure of records and property. However it would remain in operation for a period of thirty days unless the officer file an application requesting

retention of such records and property before the Adjudicating Authority and at this stage the Adjudicating Authority would serve a show cause notice

alongwith the reasons to believe to the parties effected by it. The Adjudicating Authority would supply complete material to the parties concern to

seek their response to show cause notice where the reasons to believe recorded by the Adjudicating Authority are also supplied thus the stage prior to

the initiation of Section 8(1) of the Act of 2002 is administrative in nature and the parties are not affected indefinitely unless the order is confirmed by

the Adjudicating Authority but before confirmation, an opportunity of hearing is provided after disclosure of material and reasons to believe. In our

opinion the issue raised by the Learned Counsel for the Appellant is covered by the judgment of the Apex Court in the case supra and were not cited

before the Delhi High Court in the case of J. Sekar (Supra).

38. We further find that the judgment of the Division Bench of Delhi High Court in the case of J. Sekar v/s. Union of India & Ors. (Supra) is pending

consideration before the Apex Court where the operation of the order has been stayed though according to the Appellant, ratio of the judgment would

apply however what we find that the matter is sub-judice before the Apex Court on the subject thus any direction may have serious repercussion

because if the Appeal preferred by the Respondent is allowed by the Apex Court with a finding that reasons to believe recorded at the initial stage of

the 5(1) of the Act of 2002 are not required to be supplied as otherwise reasons to believe are given by the Adjudicating Authority under Section 8(1)

of the Act of 2002, it would have consequence in case Appeal is allowed with a direction to supply reasons to believe. In the peculiarity of the case

and the discussions made above, we do not find any illegality in the order to deny the copy of the reasons to believe recorded under Section 17(1) of

the Act of 2002 and otherwise kept in the sealed envelope by the Adjudicating Authority.

The appeal No 6777/2023 is to seek stay of the proceedings till Adjudication Authority is constituted with required coram.

39. The issue raised by the appellant is against the coram of the Adjudicating Authority. The learned counsel for the appellant submitted that presently

there is one Member in the Adjudicating Authority whereas as per section 6 of the Act 2002, it should consist of Chairman and two other Members

and out of it, one member should be having experience in the field of law. At present, only one Member is acting as Adjudicating Authority, thus it is

lacking in coram.

40. Section 6 (3) provides for the qualification for appointment of the Member and one of the qualification is that the Member should be a District

Judge, or a person from the field of law, or a Member of Indian Legal Service. The qualification given in the Regulation is that a Member may also

come from the field of Finance, Accountancy, Administration etc. The constitution of the Adjudicating Authority is suffering from â€œcoram non

judiceâ€ as only Member exist and passed the order without proper constitution of the Authority.

41. The learned counsel submits that while the learned Adjudicating Authority relied on the Judgement of Delhi High Court in the case of J Sekar

Versus Union of India & Another in W.P. (C) 5320/2017 dated 11.01.2018, but failed to rely on the same judgement on the other issue. Thus, one and

the same judgement was relied by the Adjudicating Authority on one issue while denying its application on the other issue.

42. We have considered the submission made by the learned counsel for the appellant and find that the issue raised by the appellant has already been

settled by Delhi High Court in the case of Gold Craft Properties Pvt. Ltd. V/s Directorate of Enforcement 2023 DHC 6887 DB. The Division Bench

of the High Court found that even one Member of the Adjudicating Authority is competent to pass the order.

43. The Delhi High Court in the case of Aprajita Kumari and Another Vs. Joint Director, Enforcement Directorate and Another in WP (C) 3008/2016

decided the same issue. It was even in the case of K. Rethinam Versus Union of India and Ors. in WP No. 8115/2017. It was held that Single

Member can pass an order and it is not necessary that said member should be from the Judicial side. It can be an Administrative Member as well.

44. The same view was taken by Karnataka High Court in the case of Dyani Antony Paul V/s Union of India WP No. 38642/2016 dated 11.12.2020.

45. In view of the above, we do not find any illegality in the impugned order to deny stay of the proceedings till the Adjudicating Authority is

constituted with the coram. In fact, one member of the Adjudicating Authority constitute the coram of the Authority.

46. In sequel to our above finding, all the appeals are hereby dismissed being devoid of any merit.