

Alaknanda Realtors Pvt Ltd And Ors vs Deputy Director, Directorate Of ... on 12 September, 2022

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 12243/2022, CM APPL. 36701/2022 (Stay)

ALAKNANDA REALTORS PVT LTD AND ORS Petitioner

Through: Mr. S. Nandrajog, Sr. Adv. wit
Mr. H. S. Bhullar, Ms. Lalima
Ghosh and Mr. Ankit Chauhan,
Adv.

versus

DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT

..... Respond

Through: Mr. Zoheb Hossain, Adv. for ED wi
Mr. Vivek Gurnani, Adv.

92

+ W.P.(C) 12244/2022, CM APPL. 36703/2022 (Stay)

WARIACH MANAGEMENT PRIVATE LIMITED AND ORS

..... Pet

Through: Mr. S. Nandrajog, Sr. Adv. wi
Mr. H. S. Bhullar, Ms. Lalim
Ghosh and Mr. Ankit Chauhan,
Adv.

ENFORCEMENT OF DIRECTORATE

..... Responden

Through: Mr. Zoheb Hossain, Adv. for ED wit
Mr. Vivek Gurnani, Adv.

93

+ W.P.(C) 12245/2022, CM APPL. 36705/2022 (Stay)

CONISTON DEVELOPERS PVT LTD AND ORS Petitioner

Through: Mr. S. Nandrajog, Sr. Adv. wi
Mr. H. S. Bhullar, Ms. Lalim
Ghosh and Mr. Ankit Chauhan,
Adv.

versus

ENFORCEMENT OF DIRECTORATE

..... Respondent

Through: Mr. Zoheb Hossain, Adv. for ED wit
Mr. Vivek Gurnani, Adv.

Signature Not Verified

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By:NEHA

W.P.(C) 12243/2022 & connected matters

Page 1 of

Signing Date:13.09.2022

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94

+ W.P.(C) 12246/2022, CM APPL. 36707/2022 (Stay)
MAJOR RANDEEP WARIACH Pe
Through: Mr. S. Nandrajog, Sr. Adv. wi
Mr. H. S. Bhullar, Ms. Lalim
Ghosh and Mr. Ankit Chauhan,
Adv.
versus

DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT

..... Respond
Through: Mr. Zoheb Hossain, Adv. for ED wi
Mr. Vivek Gurnani, Adv.

95

+ W.P.(C) 12258/2022, CM APPL. 36730/2022 (Stay)
CARNOUSTIE MANAGEMENT INDIA PVT LTD Petitioner
Through: Mr. S. Nandrajog, Sr. Adv. wi
Mr. H. S. Bhullar, Ms. Lalim
Ghosh and Mr. Ankit Chauhan,
Adv.
versus

DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT

..... Respond
Through: Mr. Zoheb Hossain, Adv. for ED wi
Mr. Vivek Gurnani, Adv.

96

+ W.P.(C) 12265/2022, CM APPL. 36756/2022 (Stay)
STUPA CONSULTING PRIVATE LIMITED AND ORS.
.....
Through: Mr. S. Nandrajog, Sr. Adv. wi
Mr. H. S. Bhullar, Ms. Lalim
Ghosh and Mr. Ankit Chauhan,
Adv.
versus

DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT

..... Respondent

Signature Not Verified

Digitally Signed

By:NEHA

Signing Date:13.09.2022

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W.P.(C) 12243/2022 & connected matters

Page 2

Through: Mr. Zoheb Hossain,
Mr. Vivek Gurnani, A

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 12.09.2022

1. This batch of petitions assail the validity of the Provisional Attachment Order ["PAO"] passed by the respondent Directorate. A challenge is further laid to the proceedings initiated by the Adjudicating Authority for confirmation in terms of the provisions made in the Prevention of Money Laundering Act, 2002 ["PMLA"].

2. Mr. Nandrajog, learned Senior Counsel appearing in support of the writ petition, has drawn the attention of the Court to the orders passed in W.P.(C) 1473/2021, W.P.(C) 3605/2022, W.P.(C) 6018/2022, W.P.(C) 1126/2022 and W.P.(C) 1473/2021 to contend that the principal allegations in the ECIR were levelled against one Carnoustie Management India Pvt. Ltd. against whom five separate PAOs came to be made. Learned Senior Counsel pointed out that Carnoustie Management India Pvt. Ltd. had assailed the validity of the aforesaid PAOs before this Court and which challenge has been duly entertained by this Court and interim orders made to the effect that while it would be free for the Adjudicating Authority to pass a final order, the same would not be implemented without the leave of the Court. Before this Court it is common ground that the principal ground on which Carnoustie Management India Pvt. Ltd. assailed the validity of the PAOs was in light of the judgment rendered by a learned Judge of the Court in *Vikas WSP and Others vs. Directorate Enforcement and Another* [2020 SCC Online Del 1732], where it was held that once the period of 180 days from the date of issuance of the PAO expires, the Adjudicating Authority would be rendered *functus officio*. The Court notes that the decision in *Vikas WSP* forms subject matter of challenge in a Letters Patent Appeal in which too interim orders of protection operate. However, insofar as the present batch is concerned, it is pertinent to note that the writ petitioners assail separate PAOs which have come to be passed and none of them raise issues resting on the principles enunciated in *Vikas WSP*.

3. One of the other issues which was addressed before the Court related to the competence and jurisdiction of the Adjudicating Authority proceeding further bearing in mind the fact that it presently comprises of a single member. It was the submission of learned Senior Counsel who contended that a single member cannot possibly be recognised to be an Adjudicating Authority duly constituted in terms of Section 6 of the PMLA. The Court is also informed that a similar challenge is pending consideration before the High Court for the State of Telangana in *M/s Indus Rivers Health Sciences Limited*.

4. However and as was rightly pointed out by Mr. Hossain, the issue of whether a single member can act as the Adjudicating Authority has been duly considered and answered by a Division Bench of the Court in *J. Sekar V Union of India* [2018 SCC OnLine Del 6523], where the following observations came to be made:-

"Composition of the AA and AT

79. The Court next takes up the question of the composition of the AA on which extensive arguments were advanced by the learned counsel for the Petitioners. In this context, it must be noticed that under Section 6 PMLA, the AA is supposed to consist

of the Chairperson and two other members - one of whom shall be a person having experience in the field of law. Section 6(3) further sets out what the qualifications for appointment as a member of an AA should be. One of those qualifications is that the person has to be qualified for appointment as a District Judge or a person in the field of law or a member of an Indian Legal Service. The other qualification is possession of a qualification in the field of finance, accountancy or administration as may be prescribed. It is, therefore, not the case that all the members of the AA should be judicial members.

80. It is seen that under Section 5 PMLA, the jurisdiction of the AA "may be exercised by the Benches thereof". Under Section 6(5)(b) PMLA, a Bench may be constituted by the Chairperson of the AA "with one or two members" as the Chairperson may deem fit. Therefore, it is possible to have single-member benches. The word „bench therefore does not connote plurality. There could, even under Section 6(5)(b) PMLA, be a „single member bench . When Section 6(6) PMLA states that a Chairperson can transfer a member from one bench to another bench, it has to be understood in the above context of there also being single- member benches.

81. The Court is unable to agree with the submission that since the Adjudicating Authority (Procedure) Regulations 2013 requires every order-sheet to have the signatures of the Chairperson and members constituting the bench, it necessarily means that every matter has to be heard by a bench comprising the Chairperson and members. This would be an erroneous interpretation which is contrary to the main provision of the PMLA itself, viz., Section 6(5)(b) PMLA. Likewise, under Rule 3 of the Prevention of Money-laundering (Appointment and Conditions of Service of Chairperson and Members of the Adjudicating Authorities) Rules 2007, although it states that the AA should have three members, that has to be read along with Section 6(5)(b) that there can be single- member benches. A contrary interpretation would actually frustrate the working of the AA. The Court, therefore, rejects the contention of the Petitioners that there cannot be any single-member benches of the AA.

82. It was then contended on the strength of the decisions in *L. Chandrakumar v. Union of India* (1997) 3 SCC 261; *Eastern Institute for Integrated Learning v. Joint Directorate* 2016 Cri LJ 526, *Vishal Exports Overseas Ltd. v. Union of India* (decision dated 9th March 2016 of the Gujarat High Court in SCA No. 13949 of 2014) and *Uday Navinchandra Sanghani v. Union of India* (decision dated 1st April 2016 of the Gujarat High Court SCA No. 10076/2015) that even that Single Member has to necessarily be a Judicial Member (JM) and not an Administrative Member (AM).

83. The reliance on *L. Chandrakumar v. Union of India* (supra) is misplaced. There the question was whether the ousting the jurisdiction of the High Court and vesting the powers of the High Court in a Tribunal is constitutionally valid. That is not what is sought to be done under Section 8 PMLA. It is only to provide an internal judicial review of the orders passed by the authorities under Section 5(1) PMLA. The AA

under Section 8 PMLA cannot, therefore, be equated with an Administrative Tribunal under the Administrative Tribunals Act 1985 (ATA). The Central Administrative Tribunal under the ATA was vested with the powers originally with a High Court under Article 226 of the Constitution. Those were Tribunals under Article 323-B of the Constitution of India. The AA is not that kind of a Tribunal at all. The Court is, therefore, unable to agree with judgments of the learned Single Judges of the Sikkim and Gujarat High Courts in this context.

84. There are other reasons why the Court finds that the aforementioned decisions of the learned Single Judges of the Sikkim and Gujarat High Courts cannot be concurred with. They fail to notice that under Section 25 PMLA, an appeal is provided for from the order of the AA before the AT. Even so, such an AT is not the equivalent to the High Court since an appeal against the order of the AT is provided to the High Court itself. Thus, the hierarchy of judicial review authorities under the PMLA presents a very different scheme from what is found in other statutes, particularly the ATA.

85. Under the PMLA, however, we first have a decision by an authority under Section 5(1) PMLA. Then we have a review of that decision by the AA under Section 8 PMLA. Then we have an appeal against that decision to the AT under Section 25 PMLA. These authorities, i.e. the AA and the AT, need not be entirely manned only by JMs. They can be AMs as well.

86. No two tribunals are alike. The National Company Law Tribunal (NCLT) comprises of both JMs and AMs. The circumstances under which the Supreme Court insisted that a Bench of the NCLT should be presided over by a JM is that the NCLT seeks to exercise the powers earlier vested in a High Court. That is not the case as far as the PMLA is concerned. Neither the AA nor the AT exercises the power that would otherwise be available to a High Court. That power, in fact, remains with the High Court in an expanded capacity. Under Section 42 PMLA, an appeal is provided to the High Court, both on questions of law as well as on facts. That makes it a full-fledged appeal, the scope of which would be wider than the exercise of powers of a judicial review by a High Court under Article 226/227 of the Constitution.

Summary of conclusions

87. This Court summarizes its conclusions as under:

(i) The second proviso to Section 5(1) PMLA is not violative of Article 14 of the Constitution of India; the challenge in that regard in these petitions is hereby negated.

.....

(vii) There can be single-member benches of the AA and the AT under the PMLA. Such single-member benches need not mandatorily have to be JMs and can be AMs as well."

5. Although the Court is aware that the aforesaid decision has been placed in abeyance in an appeal preferred by the Directorate, albeit preferred with respect to certain unrelated aspects of that decision, it also bears in mind the salutary principle that while a stay of a judgment may defer its enforcement inter partes, it does not efface the dictum thereof. In any case, it would be improper for this Court to either consider or tread down a path different from what was laid down in *J. Sekar* merely on the ground that a stay has been granted on the appeal of the Directorate.

6. The principal apprehension of the petitioners which was then expressed was that if the Adjudicating Authority were permitted to continue further, it may also result in them facing the spectre of being deprived of possession of the properties in question if ultimately the PAO is confirmed. That is an issue which would clearly be governed by the principles laid down by three learned Judges of the Supreme Court in the recent decision of *Vijay Madanlal Choudhary and Others v. Union of India and Others* [2022 SCC OnLine SC 929], where the following observations came to be made:-

"304. The other grievance of the petitioners is in reference to the stipulation in sub-section (4) of Section 8 providing for taking possession of the property. This provision ought to be invoked only in exceptional situation keeping in mind the peculiar facts of the case. In that, merely because the provisional attachment order passed under Section 5(1) is confirmed, it does not follow that the property stands confiscated; and until an order of confiscation is formally passed, there is no reason to hasten the process of taking possession of such property. The principle set out in Section 5(4) of the 2002 Act needs to be extended even after confirmation of provisional attachment order until a formal confiscation order is passed. Section 5(4) clearly states that nothing in Section 5 including the order of provisional attachment shall prevent the person interested in the enjoyment of immovable property attached under sub-section (1) from such enjoyment. The need to take possession of the attached property would arise only for giving effect to the order of confiscation. This is also because sub-section (6) of Section 8 postulates that where on conclusion of a trial under the 2002 Act which is obviously in respect of offence of money-laundering, 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. Once the possession of the property is taken in terms of sub-section (4) and the finding in favour of the person is rendered by the Special Court thereafter and during the interregnum if the property changes hands and title vest in some third party, it would result in civil consequences even to third party. That is certainly avoidable unless it is absolutely necessary in the peculiar facts of a particular case so as to invoke the option available under sub-section (4) of Section 8.

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."

7. In view of the aforesaid principles and which would clearly bind the Adjudicating Authority also, the apprehension expressed clearly stands allayed.

8. Accordingly, the writ petitions shall stand disposed of with liberty reserved to the petitioners to appear before the concerned Adjudicating Authority and take all objections as may otherwise be permissible in law. While the Adjudicating Authority shall be free to proceed further in accordance with the provisions made in Section 8 of the PMLA, insofar as the question of take-over of possession is concerned, the action of the respondents shall be guided by the principles laid down in Vijay Madanlal.

9. All contentions of respective parties, on merits, are otherwise kept open.

YASHWANT VARMA, J.

SEPTEMBER 12, 2022/bh