

Neeraj Singal vs Union Of India & Ors on 29 May, 2023

Author: Satish Chandra Sharma

Bench: Chief Justice, Subramonium Prasad

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(CRL) 3512/2019 and CRL.M.A. 42947/2019 &
NEERAJ SINGAL

Through: Ms. Vasudha Sen & Mr.
Wadhwa, Advocates.

versus

UNION OF INDIA & ORS

Through: Mr. Apoorv Kurup, CGS
Mr. Ojaswa Pathak, A
Respondent No.1/ UO
Mr. Zoheb Hossain,
Gurnani & Mr. Kavish
Advocates for Respo

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

% 29.05.2023

1. The instant Writ Petition has been filed seeking for the following prayers:

"a. appropriate Writ Order or Direction (s) holding the investigation into the non-cognizable offence (s) under PMLA without seeking Order of the Magistrate as per Section 155 Cr.P.C. to be null and void ab-initio;

Or in the alternative, and without prejudice to the prayers supra, it may be held that such investigation without recording the F.I.R and without following the procedure under Sections 154, 156, 157, 172, Cr.P.C. etc are illegal non-est, null and void ab-initio; without jurisdiction; unconstitutional, arbitrary, violative of Article 14 and 21 of the Constitution of India;

b. appropriate Writ, Order or Direction (s) to quash the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/10/2023 at 23:45:23 investigation under PMLA conducted by the Respondent No. 2/3 Enforcement Directorate in F. No. ECIR/DLZO-II/06/2019 and

quashing of the said ECIR and all consequential proceedings arising therefrom being violative of the „procedure established by law and violative of Article 14,20 and 21 of the Constitution;

c. appropriate Writ, Order or Direction (s) to set aside/ quash the Summons dated 16.12.2019 bearing No. 3983 issued by the Respondent No. 3 in the impugned ECIR being F. No. ECIR/DLZO-II/06/2019;

d. a writ of declaration that the PMLA is not retrospective, i.e. it does not apply to offences which are alleged to have been committed prior to the concerned offence being added to the Schedule of the PMLA;

e. a writ of declaration or any other order in the nature of writ declaring Section 19 of the PMLA as unconstitutional, ultra vires and in violation of Article 14, Article 19 and Article 21 of the Constitution of India, 1950;

Pass such other or further order(s) or directions(s) as this Hon ble Court may deem fit and proper in the interest of justice."

2. At the outset, Mr. Zoheb Hossain has submitted before this Court that in light of the judgment delivered in Vijay Madanlal Choudhary & Others Vs. Union of India & Others, 2022 SCC OnLine SC 929, no further orders are required to be passed in the present Writ Petition.

3. Mr. Hossain has filed a table demonstrating that all the issues raised in the present Writ Petition stand answered by the judgment delivered in Vijay Madanlal Choudhary (supra).

4. He states that in Prayer 'a' the Petitioner has prayed for appropriate This is a digitally signed order.

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"456. As per the procedure prescribed by the 1973 Code, the officer in-charge of a police station is under an obligation to record the information relating to the commission of a cognizable offence, in terms of Section 154 of the 1973 Code . There is no corresponding provision in the 2002 Act requiring registration of offence of money-laundering. As noticed earlier, the mechanism for proceeding against the property being proceeds of crime predicated in the 2002 Act is a sui generis procedure. No comparison can be drawn between the mechanism regarding prevention, investigation or trial in connection with the scheduled offence governed

by the provisions of the 1973 Code. In the scheme of 2002 Act upon identification of existence of property being proceeds of crime, the Authority under this Act is expected to inquire into relevant aspects in relation to such property and take measures as may be necessary and specified in the 2002 Act including to attach the property for being dealt with as per the provisions of the 2002 Act. We have elaborately adverted to the procedure to be followed by the authorities for such attachment of the property being proceeds of crime and the follow-up steps of confiscation upon confirmation of the provisional attachment order by the Adjudicating Authority. For facilitating the Adjudicating Authority to confirm the provisional attachment order and direct confiscation, the authorities under the 2002 Act (i.e., Section 48) are expected to make an inquiry and investigate. Incidentally, when sufficient credible information is gathered by the authorities during such inquiry/investigation indicative of involvement of any person in any process or activity connected with the proceeds of crime, it is open to such authorities to file a formal complaint before the Special Court This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/10/2023 at 23:45:24 naming the concerned person for offence of money-laundering under Section 3 of this Act. Considering the scheme of the 2002 Act, though the offence of money-laundering is otherwise regarded as cognizable offence (cognizance whereof can be taken only by the authorities referred to in Section 48 of this Act and not by jurisdictional police) and punishable under Section 4 of the 2002 Act, special complaint procedure is prescribed by law. This procedure overrides the procedure prescribed under 1973 Code to deal with other offences (other than money-laundering offences) in the matter of registration of offence and inquiry/investigation thereof. This special procedure must prevail in terms of Section 71 of the 2002 Act and also keeping in mind Section 65 of the same Act. In other words, the offence of money-laundering cannot be registered by the jurisdictional police who is governed by the regime under Chapter XII of the 1973 Code. The provisions of Chapter XII of the 1973 Code do not apply in all respects to deal with information derived relating to commission of money- laundering offence much less investigation thereof. The dispensation regarding prevention of money laundering, attachment of proceeds of crime and inquiry/investigation of offence of money-laundering upto filing of the complaint in respect of offence under Section 3 of the 2002 Act is fully governed by the provisions of the 2002 Act itself. To wit, regarding survey, searches, seizures, issuing summons, recording of statements of concerned persons and calling upon production of documents, inquiry/investigation, arrest of persons involved in the offence of money-laundering including bail and attachment, confiscation and vesting of property being proceeds of crime. Indeed, after arrest, the manner of dealing with such offender involved in offence of moneylaundering would then be governed by the provisions of the 1973 Code - as there are no inconsistent provisions in the 2002 Act in regard to production of the arrested person before the jurisdictional Magistrate within twenty-four hours and

also filing of the complaint before the Special Court within the statutory period prescribed"

5. Mr. Zoheb Hossain submits that the question whether the offence of This is a digitally signed order.

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"448. Indeed, in the original 2002 Act, as enacted, the offence of money-laundering was made cognizable as a result of which confusion had prevailed in dealing with the said crime when the legislative intent was only to authorise the Authority under the 2002 Act to deal with such cases. That position stood corrected in 2005, as noticed earlier. The fact that the marginal note of Section 45 retains marginal note that offences to be cognizable and non-bailable, however, does not mean that the regular Police Officer is competent to take cognizance of the offence of money-laundering. Whereas, that description has been retained for the limited purpose of understanding that the offence of money-laundering is cognizable and non-bailable and can be inquired into and investigated by the Authority under the 2002 Act alone"

6. Mr. Hossain states that in prayer 'd', the Petitioner has sought a writ of declaration that the PMLA is not retrospective, i.e. it does not apply to offences which are alleged to have been committed prior to the concerned offence being added to the Schedule of the PMLA. He states that the same is covered by paragraph 270 of the judgment delivered in Vijay Madanlal Choudhary (supra), which reads as under:

"270. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money-laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, the criminal activity may have been committed before the same had This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/10/2023 at 23:45:25 been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act -- for continuing to

possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money-laundering is not dependent on or linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019); and the same has been merely explained and clarified by way of Explanation vide Finance (No. 2) Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all.."

7. Mr. Hossain submits that the Petitioner has sought a writ of declaration or any other order in the nature of writ declaring Section 19 of the PMLA as unconstitutional, ultra vires and in violation of Article 14, Article 19 and Article 21 of the Constitution of India, 1950 in prayer 'e'. He states that the same is covered by paragraphs 322 and 326 of the judgment delivered in Vijay Madanlal Choudhary (supra). Paragraphs 322 and 325 of the judgment delivered in Vijay Madanlal Choudhary (supra) read as under:

"322. Section 19 of the 2002 Act postulates the manner in which arrest of person involved in money-laundering can be effected. Subsection (1) of Section 19 envisages that the Director, Deputy Director, Assistant Director, or any other officer authorised in this behalf by the Central Government, if has material in his possession giving rise to reason to believe This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/10/2023 at 23:45:25 that any person has been guilty of an offence punishable under the 2002 Act, he may arrest such person. Besides the power being invested in highranking officials, Section 19 provides for inbuilt safeguards to be adhered to by the authorised officers, such as of recording reasons for the belief regarding the involvement of person in the offence of money-laundering. That has to be recorded in writing and while effecting arrest of the person, the grounds for such arrest are informed to that person. Further, the authorised officer has to forward a copy of the order, along with the material in his possession, in a sealed cover to the Adjudicating Authority, who in turn is obliged to preserve the same for the prescribed period as per the Rules. This safeguard is to ensure fairness, objectivity and accountability of the authorised officer in forming opinion as recorded in writing regarding the necessity to arrest the person being involved in offence of money-laundering. Not only that, it is also the obligation of the authorised officer to produce the person so arrested before the Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, within twenty-four hours. This production is also to comply with the requirement of Section 167 of the 1973 Code. There is nothing in Section 19, which is contrary to the requirement of production under Section 167 of the 1973 Code, but being an express statutory requirement

under the 2002 Act in terms of Section 19(3), it has to be complied by the authorised officer. ...

325. The safeguards provided in the 2002 Act and the preconditions to be fulfilled by the authorised officer before effecting arrest, as contained in Section 19 of the 2002 Act, are equally stringent and of higher standard. Those safeguards ensure that the authorised officers do not act arbitrarily, but make them accountable for their judgment about the necessity to arrest any person as being involved in the commission of offence of money-laundering even before filing of the complaint before the Special Court under Section 44(1)(b) of the 2002 Act in that regard. If the action of the authorised officer is found to be vexatious, he can be proceeded with and inflicted with punishment specified under Section 62 of the 2002 Act. The This is a digitally signed order.

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8. Mr. Hossain submits that the Apex Court has concluded the issue by This is a digitally signed order.

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"The challenge to the constitutional validity of Section 19 of the 2002 Act is also rejected. There are stringent safeguards provided in Section 19. The provision does not suffer from the vice of arbitrariness."

9. Mr. Hossain has further submitted that the contention of the Petitioner that Petitioner has been kept in dark regarding the contents of the ECIR and the basis/grounds of investigation stands covered by paragraph 457 of the judgment delivered in Vijay Madanlal Choudhary (supra), which reads as under:

"457. Suffice it to observe that being a special legislation providing for special mechanism regarding inquiry/investigation of offence of money-laundering, analogy cannot be drawn from the provisions of 1973 Code, in regard to registration of offence of money-laundering and more so being a complaint procedure prescribed under the 2002 Act. Further, the authorities referred to in Section 48 of the 2002 Act alone are competent to file such complaint. It is a different matter that the materials/evidence collected by the same authorities for the purpose of civil action of attachment of proceeds of crime and confiscation thereof may be used to prosecute the person involved in the process or activity connected with the proceeds of crime for offence of money-laundering. Considering the mechanism of inquiry/investigation for proceeding against the property (being proceeds of crime) under this Act by way of civil action (attachment and confiscation), there is no need to formally register an ECIR, unlike registration of an FIR by the jurisdictional police in respect of cognizable offence under the ordinary law. There is force in the stand taken by the ED that ECIR is an internal document created by the department before initiating penal action or prosecution against the person involved with process or activity connected with proceeds of crime. Thus, ECIR is not a statutory document, nor there is any This is a digitally signed order.

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10. Mr. Hossain submits that the Apex Court has concluded the issue by observing as under:

"(xviii)(a) In view of special mechanism envisaged by the 2002 Act, ECIR cannot be equated with an FIR under the 1973 Code.

ECIR is an internal document of the ED and the fact that FIR in respect of scheduled offence has not been recorded does not come in the way of the Authorities referred to in Section 48 to commence inquiry/investigation for initiating "civil action" of "provisional attachment" of property being proceeds of crime.

(b) Supply of a copy of ECIR in every case to the person concerned is not mandatory, it is enough if ED at the time of arrest, discloses the grounds of such arrest."

11. In light of the submissions made by Mr. Hussain, the petition stands disposed of in the aforesaid terms.

12. This Court is not going into merits of the present case. It is always open for the Petitioner to file appropriate Petition in accordance with law for the reliefs claimed which arise out of the facts of the present case.

SATISH CHANDRA SHARMA, CJ SUBRAMONIUM PRASAD, J MAY 29, 2023/B.S. Rohella This is a digitally signed order.

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