IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.2398 of 2017

Arising Out of PS. Case No.- Year-1111 Thana- District-

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HDFC Bank Limited Chotisaraiyaganj, Jawahar Lal Road, Muzaffarpur Through Authorized Signatory Namely Mr. Prashant Kumar, Manager- Legal At Present Posted at HDFC Bank Limited, Exhibition Road, P.S. Gandhi Maidan, Districdt- Patna 800001.

... ... Petitioner/s

Versus

1. Government Of India, Ministry Of Finance, Department Of Revenue, Directorate of Enforcement Represented by Deputy Director of Enforcement, Patna Zonal Office, Bank Road, Chandrapura Palace, Patna-800001
2. Adjudicating Authority (Under PMLA) Roon No. -25, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi- 110003.
3. The Director, Directorate of Enforcement, Loknayak Bhawan, 6th Floor, Khan Market, New Delhi- 110003.
4. The Special Director, I/C, Central Region, Directorate of Enforcement, Loknayak Bhawan, 6th Floor, Khan Market, New Delhi- 110003.
5. Mr. Rajesh Kumar Agrawal, S/o Late Govind Prasad Agrawal, Flat No. GA and GB, Madhusudan Garden, K K Sahu Lane, Kedarnath Road, P.S. Muzaffarpur Town, Muzaffarpur- 842001

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Sandeep Kumar, Advocate Mr. Dayanand Singh, Advocate Mr. Rohit Raj, Advocate
For the Respondent/s	:	Mr. A. B. Mathur, CGC
For the Intervener	:	Mr. Gautam Kejriwal, Advocate Mr. Alok Kumar Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT
Date : 28-06-2021

A brief background of this application under Articles 226 and 227 of the Constitution of India is that respondent No.5 Rajesh Kumar Agrawal, Proprietor of M/S. Maa Tara Agency

had put in, the referred three immovable properties purchased through registered sale deed dated 13.10.2019 and two registered sale deeds dated 31.08.2016 as mortgage for securing the overdraft loan facility from the petitioner HDFC Bank Limited. For the purpose aforesaid, written agreements were executed between the petitioner and respondent No.5 on 05.08.2013 and thereafter on 24.08.2016 vide Annexure-1 and Annexure2.

2. Thereafter two FIRs were lodged on 13.12.2016. First was Gaya Civil Lines P.S. Case No.339 of 2016 registered under Sections 419/420/467/468/469/471/120B of the Indian Penal Code. The informant Shashi Kumar, the Proprietor of Firm Shiva Agro Industries alleged that he had a bank account, in the Bank of India, G.B. Road Branch, Gaya, opened on 12.11.2016 bearing A/C. No. 447520110000742. Younger brothers of the informant, namely, Shailesh Kumar and Rajnish Kumar, had also separate bank accounts opened on 07.09.2016 in the same branch. On 07.12.2016 the informant inquired from the bank about debit and credit status in the said accounts and it was noticed that huge cash were deposited in the said accounts by some fake persons and money was transferred to some other accounts.

It is worth to mention that demonetization was enforced on 08.11.2016. The statement of the bank account enclosed with the FIR would reveal that from 12th of October, 2016 to 18th November, 2016 huge transactions of credit and debit were there.

Another FIR was Gaya Civil Lines P.S. Case No.340 of 2016 registered under the identical sections of the Penal Code on the report of one Rajesh Kumar making identical averment in the FIR that Rajesh and his wife Rubi Kumari had opened bank account on 07.09.2016 in the same branch of Bank of India. On 07.12.2016 they were informed about the huge transaction of credit and debit in their account by some unknown person. The bank statement shows that in between 15th September, 2016 to 17th of November, 2016 huge deposit of cash and transfer of the money to some other accounts was made.

3. During investigation it surfaced that from the FIR referred accounts money was transferred to the Bank account of M/S. Maa Tara Agency of respondent No.5 too. Hence, involvement of respondent No.5 and others in money laundering was prima facie found established. Thereafter, the Enforcement Directorate registered Enforcement Case Information Report (ECIR) No. PTZO/05/2016 on 26.12.2016.

The Deputy Director of Enforcement by the impugned order dated 18.09.2017 provisionally attached the above referred three mortgaged properties besides bank accounts etc of respondent No.5 in exercise of power under Section 5 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the 'PMLA'). Those properties are mentioned in para 17.2 Items Nos. 3, 4 and 5 of the impugned order dated 18.09.2017 at Annexure-3 corresponding to Annexure D to the counter affidavit.

4. The petitioner, before filing of this criminal writ application, on 17.11.2017 filed a written objection before the Deputy Director, Directorate of Enforcement, against the order of provisional attachment ventilating his grievance on the ground that the petitioner has preferential claim over the mortgaged property under Section 31B of Recovery of Debts and Bankruptcy Act,1993.

5. The petitioner has further sought for issuance of certiorari to quash the show-cause notice contained in OC No.826 of 2017 dated 18.10.2017 at Annexure-5 whereby the petitioner was asked by the Deputy Director, Directorate of Enforcement, to appear before the Adjudicating Authority under PMLA of 2002.

6. Mr. Sandeep Kumar, learned counsel for the petitioner, submits that under Section 5 of the PMLA, 2002 only "proceeds of crime" can be provisionally attached if the authority has reason to believe that the property is "proceeds of the crime". Such "reason to believe" presupposes material in the possession of the authority concerned for such belief and the reason is to be recorded in writing. According to learned counsel the property-in-question was acquired much prior to the alleged act of scheduled offences under PMLA. Hence, those do not come within the mischief of "proceeds of crime". As such, the entire exercise of the respondent-authorities suffers from arbitrariness against the mandate of law and as such is violative of the legal right of the petitioner.

7. Mr. Anshay Bahadur Mathur, learned counsel appearing for respondent Nos.1 to 4, does not dispute the factual position that the property in question were acquired by respondent No.5 prior to the date on which the alleged act of money laundering was committed and the said properties were mortgaged with the petitioner bank prior to the alleged date of the act of money laundering or institution of the FIRs or a case by the Enforcement Directorate. However, learned counsel strenuously contends that the property-in-question is covered

under the definition of "proceeds of crime" in Section 2(1)(u) of the PMLA.

8. Mr. Gautam Kejriwal, learned counsel for respondent No.5, goes in line with the petitioner that the properties in question were not covered under the definition of the "proceeds of crime" as they were acquired and mortgaged much prior to the alleged date of commission of the scheduled offence. Moreover, respondent No.5 has already approached before the Debt Recovery Tribunal, Patna, under Section 17 of the Securitization and Reconstruction of Financial Assents and Enforcement of Secutiry Interest Act, 2002, against the petitioner bank challenging both the quantification of liability and on the ground of various illegalities committed while exercising power under the said Act for enforcing security interest against the assets of respondent No.5.

F I N D I N G S

9. Section 2(1)(u) of the Prevention of Money Laundering Act defines "proceeds of crime" as follows:

> ***" 'proceeds of crime' means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or when such***

property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

[Explanation.- For the removal of doubts, it is hereby clarified that "proceeds of crime" including property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;] (Explanation added by the Finance (No.2) Act, 2019, Section 192(iii) w.e.f. 01.08.2019)"

10. It is evident that there are three limbs of Section 2(1)(u) of the Act.

I. Any property derived or obtained, directly or indirectly, as a result of criminal activity relating to the scheduled offence; or

II. Value of property derived or obtained from criminal activity; or

III. Property equivalent in value held in India or outside, where property obtained or derived from criminal activity is taken or held outside the country.

Thus, the property purchased prior to commission of

scheduled offence does not fall within ambit of first limb of the definition.

The respondent Nos.1 to 4 in their supplementary counter affidavit have specifically stated that rupees one crore forty-six lacs and twenty thousand came in the bank account of M/S. Maa Tara Agency as “proceeds of crime”. The balance which was found in the account was of rupees thirty-five lacs fifty-four thousand five hundred eighty-two only and the rest amount of rupees one crore ten lacs sixty-five thousand four hundred eighteen was utilized in the business of M/S. Maa Tara Agency and is not available.

11. From perusal of the impugned order and counter affidavit filed by respondent Nos.1 to 4 as well as the oral stand taken by learned counsel for respondent Nos.1 to 4 it appears that the respondents were of the view that since no tainted property of respondent No.5 was available for attachment the property which was acquired by untainted money could also be attached and, accordingly, it was attached assuming that the case falls within Limb No.II above.

12. In my view, the property derived from legitimate source cannot be attached on the ground that property derived from scheduled offence is not available for attachment. Limb

No.II above is confined to value of property derived or obtained from criminal activity and not any property of the person alleged to be involved in money laundering. Otherwise the legislature would not have defined the "proceeds of crime", which was attachable under Section 5 of the PMLA. Indisputably, the property-in-question were acquired by respondent No.5 not from the alleged tainted money; rather it was acquired when there was no allegation of any act of money laundering committed by respondent No.5. Therefore, the properties-in-question do not fall within the mischief of second limb as "value of property derived or obtained from criminal activity".

13. Since no property of respondent No.5 was found outside the country, which was "proceeds of crime", there was no question of attachment of property equivalent in value held in India. If any property of respondent No.5 acquired from tainted money would have been found in any country outside India, then any property in India including the property-in-question to the extent of equivalent value of the property outside India could have been attached under the 3rd limb.

14. The explanation added to the definition of phrase 'proceeds of crime' widens the scope of 'proceeds of crime'.

However, would be attracted only when the money launder appears to have committed any other scheduled offence also than the offence under inquiry/investigation and the property was derived as a result of the activity in the said scheduled offence.

15. Therefore, in my view, the properties-in-question cannot be termed as 'proceeds of crime". Hence, could not have been attached in exercise of power under Section 5 of the PMLA. Therefore, the act of provisional attachment of the properties of respondent No.5 by respondent-authorities suffers from arbitrariness and in flagrant violation of mandate of Section 5 of the PML Act, 2002. A similar issue was there before a Division Bench of Punjab and Haryana High Court in **Seema Garg V. Deputy Director, Directorate of Enforcement** reported in **2020 SCC Online P & H 738**. The Hon'ble High Court elaborately considered the issue and held as follows:

> ***"31. Property purchased prior to commission of scheduled offence leaving aside date of enactment of PMLA, does not fall within ambit of first limb of definition of 'proceeds of crime', however it certainly falls within purview and ambit of third limb of the definition. Counsel for both sides have cited judgment of Delhi High Court in the case of Abdullah Ali Balsharaf v.***

Directorate of Enforcement (2019) 3 RCR (Cri) 798 to support their contention. As per said judgment, if property derived or obtained from scheduled offence is taken or held outside India, the property of equivalent value held in India or abroad may be attached irrespective of date of purchase. We fully subscribe to the opinion expressed by Delhi High Court. We find that third limb of definition 'proceeds of crime' covers property equivalent to property held or taken outside India, thus date of purchase of property which is equivalent to property held outside India, is irrelevant. Any property irrespective of date of purchase may be attached if property derived or obtained from scheduled offence is held or taken outside India.

32. The moot question arises that whether property of equivalent value may be attached where property derived or obtained from scheduled offence is not held or taken outside India. If any property is permitted or held liable to be attached irrespective of its date of purchase, it would amount to declaring second and third limb of definition of 'proceeds of crime' one and same. As pointed out by counsel for Appellants, the third limb of definition clause was inserted by Act 20 of 2015. The aforesaid 3rd limb has been further amended w.e.f. 19.04.2018 enlarging the scope. The question arises that if phrases 'value of such property' and 'property equivalent in value held

within the country or abroad' are of same connotation and carry same meaning, there was no need to insert third limb in the definition of 'proceeds of crime'. The amendment made by legislature cannot be meaningless or without reasons. Use of different words and insertion of third limb in the definition cannot be ignored or interpreted casually. Every word chosen by legislature deserves to be given full meaning and effect. Accordingly, words 'value of such property' and 'property equivalent in value held within the country or abroad' cannot be given same meaning and effect. Had there been intention of legislature to include any property in the hands of any person within the ambit of proceeds of crime, there was no need to make three limbs of definition of proceeds of crime. It was very easy and convenient to declare that any property in the hands of a person who has directly or indirectly at any point of time had obtained or derived property from scheduled offence. There was even no need to declare property derived or obtained from scheduled offence as proceeds of crime. The legislature w.e.f. 01.08.2019 has inserted explanation in Section 2(1)(u) of the PMLA. As per Mr. Mittal, counsel for the Respondents, the said explanation enlarges scope of first limb of definition 'proceeds of crime' and does not affect second limb of definition. We find some substance in the contention of Respondents, however it is

trite law that entire scheme of the Act must be read as a whole/in its entirety and every provision should be read in such a manner that it makes other provisions and scheme of Act coherent and meaningful. A provision cannot be read in isolation. The definition part does not create rights and liabilities, thus it should be examined in the light of other sections which create rights and liabilities. As per Section 8(1) of the PMLA, the Adjudicating Authority has to serve notice calling upon the person to indicate the source of his income, earning or assets out of which or by means of which he has acquired the property attached under Section 5 of the PMLA. Seeking explanation about source of property and furnishing explanation is meaningless if property inspite of genuine and explained source may be attached. As per Section 24 of the PMLA, burden to prove that property is not involved in money laundering is upon the person whose property is attached. There is no sense on the part of any person to discharge burden qua source of property if any property may be attached, irrespective of its source.

33. As per Section 8(6) of the PMLA, where the Special Court finds that offence of money laundering has not taken place or property is not involved in money laundering, it shall release such property. If contention of Respondent is upheld, there would be no need of recording

findings by Special Court with respect to property attached being proceeds of crime, no sooner it is held that offence of money laundering has been committed, then the Special Court would be bound to confiscate every attached property because every property in the hand of a person, who had obtained or derived property from scheduled offence, would be proceeds of crime.

34. We deem it appropriate to examine contention of Respondents from another angle i.e. offence of money laundering as defined under Section 3 of the PMLA. As per Section 3 of the PMLA, any person who has directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is involved in concealment, possession, acquisition or use or projecting as untainted property or claiming as untainted property shall be guilty of an offence. If property purchased prior to commission of alleged offence or property not derived or obtained from commission of scheduled offence is declared as proceeds of crime, every person who is concerned with sale, purchase, possession or use of said property would be guilty of offence of money laundering. A person who is not connected with commission of scheduled offence as well property derived from said offence but had dealt with any other property of a person, who had committed scheduled offence, would fall within the ambit of Section 3 of the PMLA, which cannot be

countenanced in law. There would be total chaos and uncertainty. The authorities would get unguided and unbridled powers and may implicate any person even though he has no direct or indirect connection with scheduled offence and property derived from thereon but has dealt with any other property (not involved in scheduled offence) of the person who has derived or obtained property from scheduled offence. It would amount to violation of Article 20 and 21 of Constitution of India.

35. In our considered opinion, to understand true meaning of second limb of definition of 'proceeds of crime', it must be read in conjunction with Section 3 and 8 of the PMLA. If all these sections are read together, phrase 'value of such property' does not mean and include any property which has no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e. the alleged criminal activity. 'Value of such property' means property which has been converted into another property or has been obtained on the basis of property derived from commission of scheduled offence e.g. cash is received as bribe and invested in purchase of some house. House is value of property derived from scheduled offence. Cash in the hands of an accused of offence under Prevention of Corruption Act, 1988 is property directly derived from scheduled offence, however if some movable

or immovable property is purchased against said cash, the movable or immovable property would be 'value of property' derived from commission of scheduled offence. If a person gets some land or building by committing cheating (Section 420 of IPC) which is a scheduled offence and said building or land is sold prior to registration of FIR or ECIR, the property derived from scheduled offence would not be available, however money generated from sale or transfer of said property in the form of cash or any other form of property may be available. The cash or any other form of property movable or immovable, tangible or intangible would be 'value of property' derived from commission of scheduled offence."

16. I adopt the view of the Division Bench of Punjab and Haryana High Court in preference to the single Judge judgment of Delhi High Court in **Deputy Director of Enforcement V. Axis Bank and others** relied upon by learned counsel for respondent Nos.1 to 4 for the simple reason that the issue directly involved herein was there before the Punjab and Haryana High Court and not before the Delhi High Court. Finally, this Court finds that the phrase "value of such property" does not mean and include any property which have no link direct or indirect with the property derived or obtained from commission of scheduled offence i.e., the alleged criminal

activity.

17. Mr. Sandeep Kumar, learned counsel for the petitioner, next contends that the petitioner being secured creditors in respect to the three immovable properties of respondent No.5 which is subject matter of provisional attachment order as such the petitioner has preferential claim over that property consistent with the mandate of Section 31B of Recovery of Debts and Bankruptcy Act, 1993, as well as Section 26-E of SARFAESI Act, 2002.

18. To contra Mr. Anshay Bahadur Mathur, learned counsel for respondent Nos.1 to 4, contends that under SARFAESI Act and the amended provisions of the Recovery of Debts and Bankruptcy Act, 1993, a secured creditor has preferential claim over the property-in-question against other creditors and alikes. The PML Act talks about "proceeds of crime" and not about any debt etc. Therefore, PML Act operates in a different field. It is also a special statute. Hence, by virtue of the provisions of Section 71 of the Act it has also got an overriding effect over any other law.

F I N D I N D S

Section 26-E of the SARFAESI Act reads as follows:

"26-E. Priority to secured creditors.-

Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation.- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

The aforesaid provision is effective from 21.06.2002 when SARFAESI Act was enforced.

Section 71 of the PML Act, 2002 reads as follows:

"71. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

The PML Act, 2002 was enforced on 01.07.2005.

Section 31B of Recovery of Debts and Bankruptcy Act, 1993, brought on 01.09.2016, reads as follows:

> ***"31-B. Priority to secured creditors.- Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.***
>
> ***Explanation.- For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."***

19. A conjoint reading of the aforesaid provisions of SARFAESI Act and Bankruptcy Law makes it clear that the secured creditors have preferential right of realization of their dues against all other debts and government dues. Provisional

attachment of the "proceeds of crime" under Section 5 of the PML Act is not an exercise for recovery of government dues of any nature; rather it is an exercise to seize /confiscate the property acquired by unlawful means of money laundering. Therefore, both the laws SARFAESI and Bankruptcy Act on the one hand; and PML Act on the other; operates in two different fields. The SARFAESI Act and Bankruptcy Act would give preferential claim to the secured creditors only against any other debts or government claim; whereas PML Act talks about attachment and confiscation of 'proceeds of the crime' acquired by tainted money of money laundering. Therefore, the two statutes neither covers the same field nor overlaps against each other. Since SARFAESI Act only protects the interest of secured creditors against other debts and government dues. There is no substance in the submission of learned counsel for the petitioner that for the aforesaid reason the action of attachment/confiscation by authorities under PML Act could be faulted with.

20. Learned counsel for respondent Nos.1 to 4 vehemently contended that since the petitioner has got alternative statutory remedy, this writ application is premature in view of the self-imposed limitations by the judicial

pronouncements that when there is alternative remedy, the Writ Court would not interfere in the matter. Learned counsel has drawn attention of the Court to the provisions of Section 8 (1) of the Prevention of Money-Laundering Act, 2002, wherein the petitioner would appear and submit his response against the provisional attachment order and the adjudicating authority would pass necessary order after considering the show cause of the petitioner. Petitioner has further got remedy under sub-section 8 of Section 8 of the P.M.L. Act for restoration of the confiscated property if a case is made out. Further the petitioner has remedy before the Appellate Tribunal under Section 26 of the P.M.L. Act, 2002.

21. Learned counsel for the petitioner submits that the petitioner has sought for issuance of writ of certiorari and has stated on oath that the petitioner has got no efficacious alternative remedy for redressal of his grievance.

22. Now the question before the Court is whether in the facts and circumstances of the case, the petitioner should be relegated to the cumbersome litigation before the referred statutory body.

23. It is well settled by a catena of judicial pronouncements that the jurisdiction of the High Court under

Article 226 of the Constitution of India is broad, plenary, equitable and discretionary one. It is equally settled that the writ jurisdiction of the High Court cannot be completely excluded by statute. However, certain self-imposed limitations are there. To illustrate the High Court should not act as Court of Appeal or entertain disputed question of fact while exercising writ jurisdiction under Article 226. Ordinarily, the High Courts should refrain to exercise jurisdiction under Article 226 if alternative remedy is there to the petitioner.

However, in **State of U.P. Vs. Mohd. Nooh**, reported in **AIR 1958 SC 86**, a Constitution Bench of the Hon'ble Supreme Court observed " *in the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (***Halsbury's Laws of England, 3rd Edn., Vol.11, Page 130 and the cases cited there**)."

In the case of **C.I.T. Vs. Chhabil Dass Agarwal**, reported in **(2014)1 SCC 603**, the Hon'ble Supreme Court observed as follows:

"15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal Vs.Supt. of Taxes, reported in AIR 1964 SC 1419, Titagarh Paper Mills Co. Ltd. Vs. State of Orissa, reported in (1983) 2 SCC 433 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still

holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

In **Ram and Shyam Com. Vs. State of Haryana**, reported in (**1985) 3 SCC 267**, the Hon'ble Supreme Court said that *"if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility"*.

24. In the case on hand what is noticeable that the statutory authority under Section 5 of the P.M.L.A., 2002 has not acted in accordance with the provisions of the enactment in question rather acted in defiance of the fundamental principles of judicial procedure and in total violation of the principles of natural justice. The relevant portion of Section 5(1) of the P.M.L.A., 2002, reads as follows:

"5. Attachment of property involved in Money- Laundering- (1) Where the Director or any other officer not below the rank of Deputy Director authorized by the Director 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; and

(b) 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 eighty days from the date of the order, in such manner as may be prescribed:"

Identical provision of seizure or freezing of illegally acquired property under Chapter V-A of the N.D.P.S.Act, 1985 was under consideration before the Hon'ble Apex Court in **Aslam Mohammad Merchant Vs. Competent Authority**, reported in **(2008)14 SCC 186**, the Hon'ble Supreme Court said that for "reason to believe" there must be direct nexus between the property sought to be forfeited with the

income etc. derived by way of contravention of any provisions of the N.D.P.S. Act. For the purpose, there must the material before the authority concerned and such material must have been gathered during investigation carried out in terms of Section 68E or otherwise. Thereafter, issuance of show cause notice is essential so as to fulfill the requirement of natural justice. Such notice should contain the value of the property held by the person concerned. His non-source of income, earning or assets and any other information or material available as a result of the report from any officer making the investigation under Section 68E or otherwise. The judgment in **Aslam Mohammad Merchant Case** was followed by a Divisional Bench of this Court in **L.P.A. No.02 of of 1997** disposed off with connected L.P.As on 13.08.2015 wherein the Court observed that "*in our view it is well established that the existence of material is a condition precedent for forming a reason to believe. For the purpose, there has to be a preliminary enquiry which would furnish ground for "reason to believe" the preliminary enquiry has to lead to the reason to believe that the properties are illegally acquired properties*."

25. What can be provisionally attached under Section 5(1) of the P.M.L. Act is a 'proceeds of crime' and to establish

that the property attached is ‘proceeds of crime’, there must be material in possession of the authority to ventilate that the authority had “reason to believe”. In the case on hand, the authority appears to have passed the order contained in Annexure-3 in flagrant violation of the mandate of Section 5(1) of the P.M.L.A, 2002, as there was no material before the authority to come to the conclusion that the property-in-question was ‘proceeds of crime’ or such ‘proceeds of crime’ was likely to be concealed, transferred etc. The authorities did not enter into an enquiry to find out any material that the property in question was ‘proceeds of crime’ nor opted for a show cause notice to the petitioner or respondent No.5 to give an opportunity of hearing before making provisional attachment, order at Annexure-3. Under the N.D.P.S. Act, freezing of property is akin to provisional attachment order vide definition of ‘freezing’ in Section 68 B(e) of the N.D.P.S.Act.

26. As has been noticed above, the property in question was not proceeds of crime as defined under the Prevention of Money-Laundering Act nor the impugned order reveals that there was a direct nexus between the property in question and the proceeds of crime. Therefore, evidently, there was no material before the authority concerned to have “reason

to believe" that the property in question was proceeds of crime. Only perfunctory recording of the fact that the authority has "reason to believe" and has material before him for such belief would not suffice unless there is evident material for such belief. Therefore, this is a case wherein the statutory authority has not acted in accordance with the provisions of the enactment. The authority has passed the impugned order in flagrant violation of the principles of natural justice. In the circumstance, asking the petitioner to go before the statutory forum would amount to sending the petitioner from "Caesar to Caesar's wife". If the impugned orders contained in Annexures-3 & 5 would not be quashed, it would amount to recognizing the illegality brought to the notice of the Court. In the circumstances aforesaid consistent with the judicial pronouncements noticed above, this is a fit case wherein this Court should exercise its jurisdiction under Article 226 of the Constitution of India.

27. Accordingly, the impugned order at Annexure-3 stands quashed to the extent of immovable properties mentioned in paragraph-17.2 Item No.III i.e. Flat No. GA Madhusudan Garden, Item No.IV i.e. Flat No.GB Madhusudan Garden and Item No.V i.e. house at Kanhauli Vishundat bearing Holding No.656 Ward No.48 R.K.Puram Road No.2 P.S.-Mithanpura. All

the three properties are in the town of Muzaffarpur. Consequently, the show cause notice at Annexure-5 also stands quashed to the extent of the properties above.

28. This writ application, accordingly, stands allowed, without any cost.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	AFR
CAV DATE	24.06.2021
Uploading Date	29.06.2021
Transmission Date	