*** THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN**
AND
THE HON'BLE MRS JUSTICE SUREPALLI NANDA

+ C.M.S.A. No.6 OF 2020

% Date:27-09-2022

M/s.VANPIC Ports Private Limited

... Appellant

v.

$ The Directorate of Enforcement, Rep. by Assistant Director, Hyderabad

... Respondent

! Counsel for the appellant : Mr. Atul Nanda, learned Senior Counsel appearing for Mr. Tarun G. Reddy

^ Counsel for respondent : Mr. T.Surya Karan Reddy, learned Additional Solicitor General of India for Mr.Anil Prasad Tiwari, learned Standing Counsel for Enforcement Directorate

< GIST:

➢ **HEAD NOTE:**

? **CASES REFERRED**:

1. 2018 SCC OnLine Del 6523
2. (2021) 6 SCC 707
3. 2022 SCC OnLine SC 929
4. (1961) 2 SCR 241 : AIR 1961 SC 372 : (1961) 41 ITR 191
5. (1967) 1 SCR 90 : AIR 1967 SC 523 : (1967) 63 ITR 219
6. (1992) Supp 1 SCC 335
7. (1976) 3 SCC 757 : AIR 1976 SC 1753 : (1976) 103 ITR 437
8. (2015) 11 SCC 628 : (2015) 320 ELT 45
9. 2018 SCC OnLine Del 6523
10. (2022) 7 SCC 370 : 2022 SCC OnLine SC 561
11. (2011) 3 SCC 581
12. (1985) 4 SCC 573
13. (2014) 4 SCC 392
14. (2016) 3 SCC 183

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN
AND
THE HON'BLE MRS JUSTICE SUREPALLI NANDA

CIVIL MISCELLANEOUS SECOND APPEAL No.6 of 2020

JUDGMENT: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. Atul Nanda, learned Senior Counsel for Mr. Tarun G. Reddy, learned counsel for the appellant and Mr. T. Surya Karan Reddy, learned Additional Solicitor General of India for Mr. Anil Prasad Tiwari, learned standing counsel, Enforcement Directorate for the respondent.

2. This is an appeal under Section 42 of the Prevention of Money Laundering Act, 2002 assailing the order dated 26.07.2019 passed by the Appellate Tribunal for Prevention of Money Laundering Act at New Delhi (briefly, 'the Appellate Tribunal' hereinafter) in FPA-PMLA-751/DLI/2014 to the limited extent of continuation of attachment of the property of the appellant. A consequential prayer has been made by the appellant for a direction to the respondent to release the said property from attachment.

Facts:

3. Appellant is a company and is a Special Purpose Vehicle for implementation of the Vodarevu and Nizampatnam Ports and Industrial Corridor Project, also known as VANPIC Project. VANPIC Project is a Government to Government project conceptualised by virtue of an arrangement between Government of Andhra Pradesh and Government of Ras al Khaimah, one of the emirates of United Arab Emirates. For the purpose of VANPIC Project, appellant i.e., VANPIC Ports Private Limited and another Special Purpose Vehicle by the name VANPIC Projects Private Limited had acquired 13,221.69 acres of land in all, including assigned and patta land.

4. A Division Bench of the then Andhra Pradesh High Court passed an order dated 10.08.2011 in W.P.No.794 of 2011 directing investigation by Central Bureau of Investigation (CBI) into allegations of investments, in the nature of bribes, into companies allegedly controlled by Y.S.Jagan Mohan Reddy, S/o late Dr Y.S.Rajasekhara Reddy, the then Chief Minister of Andhra Pradesh.

5. Pursuant to the order dated 10.08.2011, CBI registered Rc.No.19(A)/2011-CBI-Hyderabad under Sections 120B, 409, 420 and 477A of the Indian Penal Code, 1860 (IPC) and under Section 13(2) read with Section 13(1)(c) and (d) of the Prevention of Corruption Act, 1988.

6. Allegation made by the CBI in the FIR is that Government of Andhra Pradesh under the leadership of the then Chief Minister late Dr. Y.S.Rajasekhara Reddy had granted undue favours/benefits/concessions to certain individuals and companies as a *quid pro quo* for investments made by the said individuals and companies in the companies promoted by Mr. Y.S.Jagan Mohan Reddy, S/o late Dr. Y.S.Rajasekhara Reddy.

7. Thereafter, Enforcement Directorate registered Enforcement Case Investigation Report (ECIR) bearing No.9/HZO/2011 dated 30.08.2011 for investigation under the provisions of the Prevention of Money Laundering Act, 2002 (briefly referred to hereinafter as 'PMLA'). CBI has

filed several charge sheets pursuant to the FIR lodged by it in respect of each instance of an alleged *quid pro quo*. It is stated that the present case pertains to the VANPIC Project in respect of which CBI filed a charge sheet, being charge sheet No.9 dated 13.08.2012 wherein the other Special Purpose Vehicle VANPIC Projects Private Limited has been arrayed as accused No.10 for alleged commission of offences under Section 120B read with Sections 409, 420, 467, 468, 471 and 477A IPC. It is stated that appellant, VANPIC Ports Private Limited, has not been arrayed as accused in the said charge sheet.

8. On the basis of CBI charge sheet, respondent passed provisional attachment order No.1 of 2014 dated 04.03.2014, whereby 1416.91 acres of patta land forming part of the VANPIC Project and in which appellant has an interest, was provisionally attached by the respondent. Thereafter, respondent filed original complaint No.276 of 2014 dated 27.03.2014 before the adjudicating authority.

9. Adjudicating authority issued show cause notice dated 04.04.2014 under Section 8(1) of PMLA to the appellant, in response to which appellant submitted reply dated 06.07.2014.

10. Adjudicating authority vide the order dated 19.08.2014 confirmed the provisional attachment order.

11. Aggrieved by the same, appellant preferred an appeal under Section 26 of PMLA before the Appellate Tribunal which was registered as FPA-PMLA-672/DLI/2014, M/s. VANPIC Ports Private Limited v. Deputy Director, Enforcement Directorate.

12. While the above appeal was being heard, respondent passed another provisional attachment order No.6 of 2017 dated 28.07.2017 provisionally attaching 11,804.78 acres of assigned lands forming part of the VANPIC Project and in which both the appellant and VANPIC Projects Private Limited have interest.

13. Following the same, respondent filed original complaint No.811 of 2017 dated 14.08.2017 before the adjudicating authority. Again adjudicating authority issued notice to show cause dated 31.08.2017 to the appellant. Responding to the show cause notice, appellant submitted reply dated 16.11.2017. It is alleged that without considering the reply of the appellant, adjudicating authority vide the order dated 15.01.2018 confirmed the provisional attachment order No.6 of 2017 dated 28.07.2017.

14. Aggrieved by the above, appellant along with VANPIC Projects Private Limited preferred an appeal against the order dated 15.01.2018 before the Appellate Tribunal which has been registered as FPA-PMLA-2202/Hyderabad/2018, VANPIC Ports Private Limited and another v. Joint Director, Directorate of Enforcement, Hyderabad. Similar appeals were filed by other aggrieved parties. All the appeals were heard together by the Appellate Tribunal and were disposed of by a common judgment and order dated 26.07.2019.

15. While the Appellate Tribunal had arrived at favourable conclusions with regard to the appellant on almost all aspects, such as, *prima facie* there was no *quid pro quo*; provisional attachment and confirmation order were contrary to the provisions of PMLA; confirmation order suffered from non-application of mind and violation of the principles of natural justice; and that no purpose would be served by continuing the attachment. Nonetheless Appellate Tribunal directed continuance of the attachment and relegated the appellant to the forum of Special Court under PMLA.

16. Appellant has stated that during the pendency of appeal against the provisional attachment order whereby 1416.91 acres of patta land was attached, respondent took over physical possession of the entire 13,221.69 acres of land, including 11,804.78 acres under provisional attachment order No.6 of 2017 dated 28.07.2017.

17. Aggrieved, present appeal has been preferred.

Submissions:

18. Mr. Atul Nanda, learned Senior Counsel for the appellant, at the outset, has given a broad overview of the facts of the appeal and summary of the case. He submits that charge sheet No.9 dated 13.08.2012 filed by the CBI itself is erroneous and cannot stand judicial scrutiny. Appellant is not in possession of any proceeds of crime as defined in Section 2(1)(u) of PMLA. Therefore, the provisional attachment order as well as the original complaint cannot be sustained as those seek to justify attachment by labelling the returns from entirely legitimate and untainted arms length commercial transactions as proceeds of crime. He thereafter submits that no case for attachment of the property was made out by the Enforcement Directorate. He has referred to Section 5 of PMLA which deals with attachment of property involved in money laundering. Referring to sub-section (1), he submits that condition precedent for provisional attachment of property or confirmation thereof is *reason to believe* by the competent officer of the Enforcement

Directorate that the concerned person is in possession of any proceeds of crime and that 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. In the absence of such *reason to believe* which must be recorded in writing, there cannot be any attachment of property, provisional or otherwise. In the present case there was no *reason to believe* by the attaching authority on both counts.

18.1. Learned Senior Counsel has drawn the attention of the Court to the provisional attachment order, more particularly to paragraph 21 thereof, and submits therefrom that the respondent did not record his *reasons to believe* based on material in his possession that the appellant was in possession of any proceeds of crime and that such proceeds of crime were likely to be concealed etc., thereby frustrating any proceedings for confiscation of such proceeds of crime. Though an attempt was made to cure such jurisdictional defect in the original complaint,

even the same failed to satisfy the test of Section 5 of PMLA. Such an omission goes to the root of the matter. He, therefore, submits that there was no rational basis for ordering provisional attachment of property of the appellant and confirming the same.

18.2. Mr. Nanda, learned Senior Counsel for the appellant has referred to the decision of the Appellate Tribunal in detail and submits therefrom that Appellate Tribunal had correctly returned findings favourable to the appellant. A specific finding was recorded that the Memorandum of Understanding (MoU) dated 11.03.2008 pertaining to VANPIC Project was adhered to in letter and spirit. Any deviation cannot give rise to presumption of illegality in such a big project, that too, between country to country. Similar observations have been made in respect of the draft concession agreement dated 11.07.2008. Neither the agreement nor the MoU have been cancelled though a rival political party was in power in the State of Andhra Pradesh between 2015 – 2019. He submits that in paragraph 30, Appellate Tribunal rendered a conclusive

finding that allegation that VANPIC Projects Private Limited is merely a private company exclusively owned by one Mr. Nimmagadda Prasad is not a valid submission as the records would reveal otherwise. VANPIC Project was initiated as a Government to Government project whereby the Government of Ras al-Khaimah continued to be the principal stakeholder. VANPIC Project is not solely controlled by Mr. Nimmagadda Prasad; all lands were purchased/alienated for the VANPIC Project at the market rate fixed by the Government; and in most cases appellant had paid the amount fixed by the Government with additional amount as goodwill. Government had the right to resume the land if the land was used for any other purpose. Therefore, Appellate Tribunal held that it would be difficult to conclude that there was manipulation on the basis of materials available on record. Though a few discrepancies could not be ruled out, it would not mean that there were no talks and discussions by the Government of Andhra Pradesh with the parties before execution of concession agreement. Significantly,

Appellate Tribunal held that investments made by the appellant in the companies of accused No.1 were genuine investments and not bribes. Therefore, according to the Appellate Tribunal, respondent could not have concluded that such investments are illegal gratification for purported undue favours from the Government of Andhra Pradesh.

18.3. Learned Senior Counsel has drawn the attention of the Court to paragraph 74 of the impugned order and submits that Appellate Tribunal has held that respondent had not recorded valid *reason to believe* as per requirement of Section 5(1) of PMLA. Therefore, adjudicating authority ought not to have issued notice under Section 8(1) of PMLA, leave alone confirm the provisional attachment order. Appellate Tribunal further pointed out non-compliance to the mandatory requirements of PMLA by the respondent; no copy of *reason to believe* was served upon the appellant and even opportunity of hearing was not given to the appellant despite specific objection. Appellate Tribunal observed

that according to the respondent, the properties were not *per se* involved in money laundering, but have been attached merely to secure the value of the alleged proceeds of crime.

18.4. Drawing the attention of the Court to paragraphs 20 and 21 of the provisional attachment order, learned Senior Counsel submits that respondent had quoted un-amended Section 5(1) though the said provision came to be amended with effect from 15.02.2013. This itself reflects complete non-application of mind by the respondent.

18.5. Proceeding further, learned Senior Counsel submits that Appellate Tribunal pointed out serious lacunae in the provisional attachment order as well as in the confirmation order. Therefore, Appellate Tribunal held that attachment of property and confirmation of attachment is not justified.

18.6. According to learned Senior Counsel natural consequence of such findings returned by the Appellate Tribunal would have been to set aside the attachment

order and return the attached property to the appellant. But instead of doing so, Appellate Tribunal adopted a strange procedure by relegating the appellant to the Special Court to get the property released from attachment and till such time, directed that attachment should continue.

18.7. Strongly assailing such conclusions and findings of the Appellate Tribunal, learned Senior Counsel for the appellant submits that the final direction is not only contrary to the materials on record but also contrary to the reasonings and findings given by the Appellate Tribunal itself. If the reasonings and findings were logically followed, Appellate Tribunal could not have given such direction which is therefore illegal, arbitrary and reflects non-application of mind.

18.8. Mr. Nanda, learned Senior Counsel has submitted a compilation of case laws, including the decision of the Delhi High Court in **J.Sekhar v. Union of India**[1], in support of his contention that the expression *reason to believe*

[1] 2018 SCC OnLine Del 6523

cannot be a mere rubber stamping of the opinion already formed by someone else. The *reason to believe* must be noted down by the concerned officer in the file at every stage. Failure to disclose at the inception *reason to believe* as recorded in the notice under Section 8(1) of PMLA would not be a mere irregularity but an illegality which would vitiate the entire proceedings and cause the order of provisional attachment to be rendered illegal.

19. Mr. T.Surya Karan Reddy, learned Additional Solicitor General of India appearing for the respondent, at the outset, has referred to sub-section (8) of Section 8 of PMLA, more particularly to the third proviso thereto and submits that the decision of the Appellate Tribunal is a correct one and calls for no interference. He submits that Section 8 of PMLA deals with adjudication on receipt of complaint by the adjudicating authority after provisional attachment of the property. Under sub-section (8), the Special Court may direct the Central Government to restore confiscated property or part thereof to the claimant having legitimate interest in the property. As per the third

proviso, the Special Court may consider the claim of the claimant for the purpose of restoration of property during trial.

19.1. In the course of his submissions, learned Additional Solicitor General of India has referred to paragraphs 50, 160 and 171 of the impugned order and submits that Appellate Tribunal had adopted a very balanced and judicious approach. According to him, the appeal is premature and should not be entertained.

20. In response, Mr. Nanda submits that respondent has not preferred any appeal against the impugned order of the Appellate Tribunal *vis-à-vis* the key findings pertaining to the appellant. If the respondent has accepted such findings, logically the same should lead to de-attachment of the property.

20.1. In so far reliance placed by learned Additional Solicitor General of India on sub-section (8) of section 8 of PMLA, learned Senior Counsel for the appellant submits that sub-section (8) of Section 8 will come into play only

after the attached property is confiscated to the Central Government on conclusion of trial. At that stage, Special Court may direct the Central Government to restore the confiscated property or a part thereof to the claimant having legitimate interest in the property. Therefore, this provision will come into play only after conclusion of trial, which is yet to commence. However, in so far the third proviso is concerned, it is submitted that reliance placed thereon is totally misplaced in as much as the third proviso was inserted with effect from 19.04.2018. That apart the third proviso runs contrary to the main part of sub-section (8). Even then also, the third proviso would come into play only during trial before the Special Court, which is yet to commence. The above provisions are not at all applicable to the facts of the present case and therefore submissions made by learned Additional Solicitor General cannot be sustained.

20.2. Learned Senior Counsel has also relied upon the decisions of the Supreme Court in **Opto Circuit India Limited**

v. Axis Bank[2] and **J.Sekar @ Sekar Reddy v. Directorate of Enforcement**[3]. After conclusion of the hearing, learned Senior Counsel for the appellant submitted a memo containing written submissions which have been duly considered.

21. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the materials on record and the decisions cited at the bar.

Statutory Framework and Analysis:

22. Prevention of Money Laundering Act, 2002 (already referred to as 'PMLA') is an Act to prevent money laundering and to provide for confiscation of properties derived from or involved in money laundering and for matters connected therewith or incidental thereto.

22.1. Section 2 of PMLA defines various words and expressions appearing in PMLA. According to Section 2(1)(p) the expression "money laundering" has the

[2] (2021) 6 SCC 707
[3] (2022) 7 SCC 370 : 2022 SCC OnLine SC 561

meaning assigned to it in Section 3 which deals with the offence of money laundering. Section 3 says that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money laundering.

22.2. Thus for commission of the offence of money laundering, essential preconditions are - (i) involvement in any process or activity connected with the proceeds of crime; and (ii) projecting it as untainted property. This is further clarified by the Explanation below Section 3.

22.3. "Proceeds of Crime" is defined under Section 2(1)(u) which reads as under:

> **Section 2(1)(u)** '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 where 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' include 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.

22.4. Thus, proceeds of crime would mean 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 where such property is taken or held outside the country then the property equivalent in value held within the country or abroad. The Explanation clarifies that proceeds of crime would include 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.

22.5. Section 2(1)(y) defines "scheduled offence" to mean (i) offences specified under Part A of the Schedule; or (ii) offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or

more; or (iii) offences specified under Part C of the Schedule.

23. Section 5 deals with attachment of property involved in money laundering. Section 5 is 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 authorised 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;
>
> Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorized to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report complaint has been made of filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in (first proviso), any property of any person may be attached under this section if the Director or any other officer nor below the rank of Deputy Director authorized by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.]

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the 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 order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under [sub-section (3)] of Section 8, whichever is earlier.

> (4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.
>
> **Explanation:-** For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.
>
> (5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

23.1. Sub-section (1) of Section 5 says that where the Director or any other officer authorised by the Director not below the rank of Deputy Director has *reason to believe*, the reason for such belief should 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 etc., which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III, 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. It may be

mentioned that Chapter III of PMLA comprising of Sections 5 to 11 deals with attachment, adjudication and confiscation. As per the first proviso to sub-section (1) of Section 5, no such order of attachment shall be made in relation to a scheduled offence unless a report is forwarded under Section 173 of the Code of Criminal Procedure, 1973 (CrPC) or a complaint is filed to investigate the offence mentioned in the Schedule. The second proviso says that if the officer has *reason to believe* which reason must again be recorded in writing on the basis of material in his possession that if such property involved in money laundering is not attached immediately, the non-attachment of the property would likely frustrate any proceedings under PMLA. The third proviso deals with computing the period of one hundred and eighty days.

23.2. As per sub-section (2), the Director or the authorised officer shall immediately after attachment under sub-section (1), forward a copy of the order along with the material in his possession to the adjudicating authority in the prescribed manner and the adjudicating authority

shall keep such order and material for such period as may be prescribed.

23.3. Sub-section (3) clarifies that every order of attachment made under sub-section (1) shall cease to have effect after expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) of Section 8, which we will advert to a little later, whichever is earlier. Again by way of clarification, sub-section (4) says that nothing in Section 5 shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

23.4. While we are on sub-section (4) of Section 5 of PMLA, we may mention that this provision came up for consideration before the Supreme Court in **Vijay Madanlal Choudhary v. Union of India**[4]. One of the grievances expressed before the Supreme Court in the aforenoted case, rather challenge made, pertained to the stipulation in sub-section (4) of Section 8 providing for taking over

[4] 2022 SCC OnLine SC 929

possession of the property. It was in that context, Supreme Court held that the principle set out in Section 5(4) of PMLA needs to be extended even after confirmation of provisional attachment order until a formal confiscation order is passed. We will deal with this aspect in the later part of the judgment.

23.5. As per sub-section (5), the Director or the authorised officer who has provisionally attached the property under sub-section (1) shall within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the adjudicating authority.

24. This brings us to Section 8 which deals with adjudication. Section 8 is extracted in its entirety:

> **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, it 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 [2][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:

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, after--

(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, whereupon such attachment or retention or freezing of the seized or frozen property] or record shall--

(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 (1-A) 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 trial 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 of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss 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.

24.1. As per sub-section (1) of Section 8, on receipt of a complaint under sub-section (5) of Section 5 or applications under other provisions, 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, it may after notice call upon the person concerned 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, the evidence on which he relies etc and show cause why all or any of such properties should not be declared to be properties involved in money laundering and confiscated by the Central Government.

24.2. In terms of sub-section (3), if adjudicating authority decides 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 etc. Once attachment is confirmed, the attachment shall continue for various periods as provided thereunder and shall become final after an order of confiscation is passed

by the Special Court. Sub-section (4) enables the Director or the authorised officer to take over possession of the attached properties once provisional attachment is confirmed. Sub-sections (5) to (8) deal with situations on conclusion of trial of an offence under PMLA by the Special Court. This stage is yet to be reached in the present case.

24.3. However, since learned Additional Solicitor General had referred to sub-section (8) of Section 8 in support of his contention that appellant has the remedy of de-attachment or release of the property under the said provision, we may briefly refer to the same as well. Sub-section (8) is culmination of the steps contemplated under sub-section (5). Sub-section (5) says that on a conclusion of a trial of an offence under PMLA, if the Special Court finds that the offence of money laundering has been committed, it shall order that the property involved in money laundering be confiscated to the Central Government. However, under sub-section (6) if 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. Sub-section (7) deals with a situation where the trial cannot be conducted by reason of death of the accused or the accused being declared as a proclaimed offender or for any other reason. In such a situation, on an application by the Director or by a person claiming to be entitled to possession of property in respect of which order has been passed under sub-section (3) of Section 8 Special Court shall pass appropriate order regarding confiscation or release of the property. This leads us to sub-section (8). Sub-section (8) contemplates a situation where the property stands confiscated to the Central Government under sub-section (5). The Special Court may direct the Central Government to restore such confiscated property or a part thereof to a claimant with legitimate interest in the property who may have suffered quantifiable loss as a result of the money laundering. The first proviso says 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 taking reasonable precautions and is not involved in the offence of money laundering. Second proviso however provides that even during the trial, the Special Court may consider the claim of the claimant for the purpose of restoration of such property, if it thinks fit.

24.4. A bare reading of sub-section (8) of Section 8 would show that it will come into play only after the Special Court has confiscated the attached property to the Central Government after conclusion of trial. Therefore, the second proviso appears to be contrary to the intent of the main provision of sub-section (8) since it deals with restoration of attached property during the trial whereas the main provision deals with a situation on conclusion of trial. However, we need not labour much on this aspect. As already noticed above, sub-sections (5) to (8) of Section 8 deal with the attached property, either to be confiscated or to be released, after conclusion of trial by the Special Court. The said stage is yet to be reached in the present

case and in this appeal we are only concerned with the order passed by the Appellate Tribunal.

25. Chapter VI comprising Sections 25 to 42 deals with Appellate Tribunal. Section 25 says that the Appellate Tribunal constituted under sub-section (1) of Section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against orders of the adjudicating authority. As per sub-section (1) of Section 26 the Director or any person aggrieved by an order made by the adjudicating authority under PMLA may prefer an appeal to the Appellate Tribunal. The procedure to be followed by the Appellate tribunal is laid down in sub-section (2) to sub-section (6) of Section 26.

25.1. Section 42 provides for appeal to High Court. Section 42 reads as under:-

> **42. Appeal to High Court:**- Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order:

> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
>
> *Explanation.*--For the purposes of this section, "High Court" means--
>
> (i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
>
> (ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

25.2. Thus, as per Section 42, any person aggrieved by a decision or order of the Appellate Tribunal may file an appeal to the High Court within the prescribed period of sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order. As per the proviso, the High Court may allow an appeal to be filed beyond the initial period of sixty days but not exceeding further period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within

the initial period of limitation. Therefore, an appeal under Section 42 can be on a question of law (need not be a substantial question of law) or on fact.

26. Though the present appeal has been preferred under Section 42 of PMLA on a number of questions of law, the core issue is whether the Appellate Tribunal had erred by abdicating its adjudicatory functions while relegating the appellant to the Special Court to seek release of the attached property after having found the attachment to be illegal?

27. Before we proceed to deal with the orders of the provisional attachment, the adjudicating authority and that of the Appellate Tribunal to answer the question so framed, it would be apposite to dilate on the expression *reason to believe* which is the *sine qua non* for provisional attachment of a property under sub-section (1) of Section 5 or for issuance of notice under sub-section (1) of Section 8 by the adjudicating authority for continuation of attachment under sub-section (3) of Section 8.

28. From a careful analysis of sub-section (1) of Section 5, it is evident that the requirement of law is that the competent attaching authority must have *reason to believe*, which must be recorded in writing, on the basis of material in his possession that any person is in possession of any proceeds of crime and that such proceeds of crime are likely to be concealed etc which may result in frustrating any proceeding relating to the confiscation of such proceeds of crime before he provisionally attaches such property for the limited period not exceeding one hundred and eighty days. Again before issuing notice under sub-section (1) of Section 8, the adjudicating authority must have *reason to believe* that the noticee has committed an offence under Section 3 of PMLA or is in possession of proceeds of crime.

29. Thus the *sine qua non* for exercising power under sub-section (1) of Section 5 is that the attaching authority must have *reason to believe*, which must be recorded in writing. Such *reason to believe* must be formed on the

basis of material(s) in his possession that any person is in possession of proceeds of crime and that such proceeds of crime are likely to be concealed etc. Therefore the material in possession of the attaching authority must pertain to the above two aspects and on the basis of such materials he must form the *reason to believe*. In other words, the *reason to believe* must have a direct nexus or live link with the materials in possession pertaining to the above aspects.

29.1. Likewise, the *sine qua non* for exercising jurisdiction under sub-section (1) of Section 8 is that the adjudicating authority must have *reason to believe* that the noticee to whom the notice is to be issued has committed an offence under Section 3 (offence of money laundering) or that he is in possession of proceeds of crime. Unless this condition precedent is complied with, the adjudicating authority would have no jurisdiction to issue notice under sub-section (1) of Section 8 upon receipt of complaint under sub-section (5) of Section 5. This *reason to believe* under sub-section (1) of Section 8 must be that of the

adjudicating authority who must form his own *reason to believe* independent of the *reason to believe* formed by the attaching authority while carrying out provisional attachment under sub-section (1) of Section 5. Therefore, the *reason to believe* must be present at both the stages and that *reason to believe* at the stage of Section 5(1) would not suffice for invoking jurisdiction under Section 8(1) for which the adjudicating authority must form its own independent *reason to believe* having regard to the two aspects mentioned in Section 8(1) of PMLA.

29.2. At this stage, we may refer to the decision of the Delhi High Court in **J.Sekhar v. Union of India** (1 supra). After analysing the provisions of sub-section (1) of Section 5 and sub-section (1) of Section 8 of PMLA, a Division Bench of Delhi High Court held that the *reason to believe* at every stage must be noted down by the officer in the file. While the *reason to believe* recorded at the stage of passing the order of provisional attachment under Section 5(1) of PMLA may not be communicated forthwith to the person adversely affected thereby at that stage, the

reasons as recorded in the file have to accompany the complaint filed by such officer within thirty days before the adjudicating authority under Section 5(5) of PMLA. Delhi High Court further held that a copy of such complaint accompanied by the reasons, as found in the file, must be served by the adjudicating authority upon the person affected by such attachment after the adjudicating authority adds its own reasons why he *prima facie* thinks that the provisional attachment should continue. Thereafter, it has been held as follows:

> 75. There are two *reasons to believe*. One recorded by the officer passing the order under Section 5(1) PMLA and the other recorded by the adjudicating authority under Section 8(1) PMLA. Both these *reasons to believe* should be made available to the person to whom notice is issued by the adjudicating authority under Section 8(1) PMLA. The failure to disclose, right at the beginning, the aforementioned *reasons to believe* to the noticee under Section 8(1) PMLA would not be a mere irregularity but an illegality. A violation thereof would vitiate the entire proceedings and cause the order of provisional attachment to be rendered illegal.

29.3. Thus, what the Delhi High Court has held is that both the *reasons to believe* under Section 5(1) and under Section 8(1) should be made available to the affected

person. Failure to disclose *reasons to believe* to the noticee under Section 8(1) of PMLA would not be a mere irregularity but an illegality, a violation thereof would vitiate the entire proceedings and cause the order of provisional attachment to be rendered illegal.

30. The expression *reason to believe* has been subjected to numerous judicial pronouncements. It is an expression of considerable import and finds place in a number of statutes – fiscal, penal etc. However, the expression *reason to believe* is not defined in the PMLA. But this expression is explained in Section 26 IPC as per which a person may be said to have *reason to believe* a thing, if he has sufficient cause to believe that thing but not otherwise. In the context of the Customs Act, 1962, it confers jurisdiction upon the proper officer to seize goods liable to confiscation under sub-section (1) of Section 110 of the said Act.

31. Under Section 34 of the Indian Income Tax Act, 1922, if the Income Tax Officer had *reason to believe* that

by reason of the omission or failure on the part of an assessee to make a return of his income or to disclose fully and fully all material facts necessary for his assessment for that year, income chargeable to tax had escaped assessment for that year, the Income Tax Officer could initiate the process for re-opening of assessment. In **Calcutta Discount Company Limited v. Income Tax Officer**[5], Supreme Court held that:

> The expression "reason to believe" postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income Tax Officer: the forum of decision as to the existence of reasons and the belief is not in the mind of the Income Tax Officer. If it be asserted that the Income Tax Officer had reason to believe that income had been under-assessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the Income Tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief; in other words, the Income Tax Officer must on information at his disposal believe that income has been under-assessed by reason of failure to fully and truly disclose all material facts necessary for

[5] (1961) 2 SCR 241 : AIR 1961 SC 372 : (1961) 41 ITR 191

> assessment. Such a belief, be it said, may not be based on mere suspicion: it must be founded upon information.

32. In **S.Narayanappa v. Commissioner of Income Tax, Bangalore**[6], Supreme Court again had the occasion to examine this expression in the context of Section 34 of the Indian Income Tax Act, 1922. Reiterating what was held in **Calcutta Discount Company Limited** (supra), it was pointed out that the expression *reason to believe* does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The belief must be held in good faith: it cannot be merely a pretence. It is open to the Court to examine the question as to whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief. To that extent, action of the Income Tax Officer in starting proceedings under section 34 is open to challenge in a court of law.

33. Supreme Court in **Sheo Nath Singh v. Assistant Appellate Commissioner of Income Tax, Calcutta**[7] held that there can be no manner of doubt that the words *reason to*

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[6] (1967) 1 SCR 90 : AIR 1967 SC 523 : (1967) 63 ITR 219
[7] (1992) Supp 1 SCC 335

believe suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief. Court can always examine this aspect though sufficiency of the reasons for the belief cannot be investigated by the Court.

34. In **Income Tax Officer v. Lakhmani Mewal Das**[8], Supreme Court held that the grounds or reasons which lead to the formation of the belief that income chargeable to tax has escaped assessment must have a material bearing on the question of escapement of income from assessment. Once there exists reasonable grounds for the Income Tax Officer to form such belief, that would be sufficient to clothe him with jurisdiction. Sufficiency of the grounds, however, is not justiciable. The expression *reason to believe* does not

[8] (1976) 3 SCC 757 : AIR 1976 SC 1753 : (1976) 103 ITR 437

mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith and cannot be a mere pretence. It is open to a Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant. Elaborating further, Supreme Court held that rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of income from assessment in that particular year. Supreme Court sounded a note of caution by observing that though the powers of the Income Tax Officer to re-open assessment are wide, those are not plenary; the words of the statute are 'reason to believe' and not 'reason to suspect'.

35. **Tata Chemicals Limited v. Commissioner of Customs (Preventive), Jamnagar**[9] was a case where Supreme Court explained the meaning of the expression *reason to believe*

[9] (2015) 11 SCC 628 : (2015) 320 ELT 45

as appearing in section 110 of the Customs Act, 1962. Supreme Court has opined that the said expression does not connote the subjective satisfaction of the officer concerned. For such a power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law, the belief must be that of an honest and reasonable person based upon reasonable grounds. If the authority acts without jurisdiction or there is no existence of any material or conditions leading to the belief, it would be open to the Court to examine the same though sufficiency of the reasons for the belief cannot be investigated.

36. A Division Bench of the Delhi High Court in **J.Sekhar v. Union of India** (1 supra) was examining challenge to the *vires* of Section 5(1) of PMLA. In that context Delhi High Court held that *reason to believe* cannot be a rubber stamping of the opinion already formed by someone else. The officer who is supposed to write down his *reason to believe* has to independently apply his mind. It cannot be a mechanical reproduction of the words in the statute.

When an authority judicially reviewing such a decision peruses such *reason to believe*, it must be apparent that the officer penning the reasons had applied his mind to the materials available on record and has on that basis arrived at his *reason to believe*; the process of thinking of the officer must be discernible. The reasons have to be made explicit. It is only the reasons that can enable the reviewing authority to discern how the officer formed his *reason to believe*.

37. Let us now deal with the provisional attachment order passed under sub-section (1) of Section 5. After adverting to the factual backdrop and referring to the provisions of PMLA including Section 5(1), Joint Director, Enforcement Directorate held as follows:

> **21. NOW THEREFORE**, on the basis of material in my possession as per Annexure-R and in exercise of the powers conferred upon me under section 5(1) of 'the PMLA, 2002' (15 of 2003), the authority vested in me by the Authorisation dated 07.02.2007 and its addendum dated 12.10.2011 issued by the Director of Enforcement in exercise of his powers under sub-section (1) of section 5 of 'the PMLA, 2002' (15 of 2003), I hereby order for provisional attachment of the properties as per Annexure – 'A' and further order that the same shall not be transferred, disposed, parted with or

otherwise dealt with in any manner, whatsoever, by the holders having ownership and/or possession until or unless specially permitted to do so by the undersigned.

37.1. Thus, the Joint Director held that on the basis of material in his possession and exercising powers conferred upon him under Section 5(1) of PMLA and on the basis of the authority vested in him, he ordered provisional attachment of the properties as per Annexure A. In so far the appellant i.e., VANPIC Ports Private Limited is concerned, the property attached by the Joint Director is at Sl.No.35 of Annexure A and reads as under:

35	561.1996 acres of land in Prakasham district in Andhra Pradesh as per Annexure – L[1] enclosed with the attachment order	M/s.Vanpic Ports Pvt. Ltd.	Rs.23.23 crore

37.2 From the above it is evident that the Joint Director while exercising power under Section 5(1) failed to record his *reason to believe* (there is no reference to it in the provisional attachment order) that petitioner is in possession of proceeds of crime in the form of the attached property and that such proceeds of crime are likely to be

concealed etc., which may frustrate any proceeding relating to confiscation of such proceeds of crime.

38. The above order of provisional attachment was forwarded by the Joint Director to the adjudicating authority by way of a complaint under sub-section (5) of Section 5 of PMLA which was numbered as O.C.No.276 of 2014. By the order dated 19.08.2014, the provisional attachment order was confirmed. Before the adjudicating authority an argument was advanced on behalf of the appellant that there were no *reason to believe* for provisional attachment under sub-section (1) of Section 5. In the absence of *reason to believe* attachment could not be sustained. To this, adjudicating authority in paragraphs 4 and 5 of the adjudication order mentioned that as per the provisions of Section 5 of PMLA reasons are required to be recorded in writing by the complainant (attaching authority) but these are not required to be conveyed to the defendant. Similarly, no reasons are required to be either recorded in writing or conveyed to the defendant under Section 8 by the adjudicating authority.

39. The above order of the adjudicating authority confirming provisional attachment came to be challenged by the appellant before the Appellate Tribunal. It may not be necessary to traverse through the long factual narrative but confine only to those aspects where the Appellate Tribunal dealt with the legality or otherwise of the provisional attachment order as confirmed by the adjudicating authority.

40. In paragraph 74 of the impugned order dated 26.07.2019, Appellate Tribunal noted that the Joint Director i.e., the attaching authority did not record *valid reason to believe* as per requirement of Section 5(1). After extracting paragraph 21 of the provisional attachment order, Appellate Tribunal noted that the provisional attachment order merely paraphrases the language of the section as a mere formality which does not amount to valid *reason to believe.* It was held as follows:

> 74. From the Provisional Attachment Order in the present appeals, it is evident that the Respondent No.1, i.e. the Joint Director, Directorate of Enforcement, has not recorded valid *"reason to believe"* as required. The mandatory pre-requisite

for provisional attachment required by Section 5(1) is missing in the present case. It is submitted on behalf of appellant that in the above thereof the Adjudicating Authority ought not to have even issued notice under S. 8(1) of the Act, leave alone confirm the Provisional Attachment Order. The relevant para-21 of Provisional Attachment Order is reproduced hereunder:

> *"21. NOW THEREFORE, on the basis of material in my possession as per Annexure - R and in exercise of the powers conferred upon me under section 5(1) of 'the PMLA, 2002' (15 of 2003), the authority vested in me by the Authorization dated 07.02.2007 and its addendum dated 12.10.2011 issued by the Director of Enforcement in exercise of his powers under sub-section (1) of section 5 of 'the PMLA, 2002'(15 of 2003), I hereby order for provisional attachment of the properties as per Annexure – 'A' and further order that the same shall not be transferred, disposed, parted with or otherwise dealt with in any manner, whatsoever, by the holders having ownership and/or possession until and unless specifically permitted to do so by the undersigned."*[i]
>
> *[Emphasis supplied]*

The Provisional Attachment Order shows that mere the language of section has been mentioned in the "*reason to believe*" after recording the facts and statement under section 50 of the Act, though the officer concerned has to be satisfied as per requirements of Sections 5(1)(a) of the PMLA by referring the details of investigation about the attachment of properties and proceed of crime for each head, a merely formality does not amount to valid reason to belief.

41. The Appellate Tribunal examined the order of the adjudicating authority and held that the adjudicating authority overlooked the fact that the provisional

attachment order suffered from serious jurisdictional infirmity and held as follows:

> 84. The Adjudicating Authority did not notice the said fact or ignored the same to the effect that the Provisional Attachment Order suffered from serious infirmity including, *inter alia,* for failing to comply with the mandatory preconditions under Section 5 (1) (b) of the PMLA. Under the circumstances, the following observations in the Impugned Order are completely shocking:
>
> > *"But it is seen these case laws do not apply to the provisions of the PMLA. As per the provisions of Section 5 of the PMLA reasons are required to be recorded in writing by the Respondent No.1 but these are not required to be conveyed as it is to the defendants. It is further seen that while framing the PAO and O.C., these have been conveyed in the PAO and O.C. and that meets the ends of Justice in as much as defendants know what is case against them."*
> >
> > [Emphasis supplied]
>
> 85. The said observations are contrary to law laid down by the Hon"ble Supreme Court of India wherein it was held that recording of reasons *"is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated."*
>
> [Emphasis supplied]

42. Appellate Tribunal also considered the objection of the appellant regarding the procedure adopted in the hearing and not allowing the appellant to file rejoinder and

concluded that the order passed by the adjudicating authority suffers from violation of the principles of natural justice (para 136).

43. Thereafter, Appellate Tribunal adverted to the show cause notice issued by the adjudicating authority to the appellant under Section 8(1) and noted that the show cause notice was issued in a mechanical manner without application of mind and no valid reasons were mentioned in the show cause notice. It has been held as follows:

> 137. The Notice to Show Cause dated 04.04.2014 under section 8(1) of the Act (hereinafter the "**Show Cause Notice**") issued by the Registrar of this Adjudicating Authority to the Appellants was contrary to Section 8 (1) of the PMLA, for the reason that a Notice to Show Cause, under Section 8 (1) of the Act, can only be issued (following receipt of a Complaint under Section 5 (5) of the Act) after the Adjudicating Authority forms a *"reason to believe that any person has committed an offence under Section 3 or is in possession of proceeds of crime"*.
>
> 138. A bare perusal of the Show Cause Notice would show that the Learned Registrar has issued the same in a mechanical manner without even affording an opportunity to the Adjudicating Authority to apply its mind. No valid reasons are mentioned on the notice itself or any separate order is passed before issuance of notice which is requirement as per settled law.

43.1. Thus, from the above it is evident that Appellate Tribunal found that the notice under Section 8(1) was not in conformity with the requirement of the statute and that the adjudicating authority did not form any *reason to believe* that the noticee had committed an offence under Section 3 or is in possession of proceeds of crime. Therefore, the very foundation for issuance of notice under Section 8(1) was absent. Applying the decision of the Delhi High Court in **J.Sekhar v. Union of India** (1 supra), the above omission strikes at the very root of the matter rendering the adjudication proceedings as well as the provisional attachment order illegal.

44. Various other flaws vitiating the order of the adjudicating authority were pointed out by the Appellate Tribunal observing that the same reflected non-application of mind. Appellate Tribunal opined that no purpose would be served by continuing with the attachment. Since the trial before the Special Court may take a number of years, therefore, the State Government may take a stand about

the project. However, despite saying so Appellate Tribunal adverted to Section 8(8) of PMLA including the second proviso and relegated the appellant to the Special Court to seek release of the attached property holding that till such time attachment would continue. Though Appellate Tribunal extracted Section 8(8) of PMLA, it did not say that it had passed the order of relegation on the basis of the aforesaid provision. Relevant portion of the order of the Appellate Tribunal is as under:

> 160. As far as attachment as per details mentioned in preceding paras of head vii) and viii) with regard to attachment of Rs.23.23 crores of VANPIC Port Pvt. Ltd. i.e. about 561 acres land and Rs.27.72 crores spent by VANPIC Project Pvt. Ltd i.e. about 855 acres of land is concerned, it is vacant land. The possession is not with the appellants who being a partner with RAK has spent huge amount. MOU and agreement have already been executed with regard to VANPIC Project. The said project was in the interest of public. Government of Andhra Pradesh is not the party in the present appeals. This Tribunal is not aware about the stand of the Andhra Pradesh Government as to whether it is still interested in the said project as the same was *prime facie* between Government to Government. It is also not aware as to whether Government is now agreeable to Nimmagadda Prasad and its group as a partner with RAK or not. Therefore, it is not proper to give any findings in this regard, otherwise it would amount to enforcement of MOU and agreement. However, *prima facie*, this Tribunal is of the

opinion that no purpose would be served to continue the attachment as the said project was originally meant for public welfare of Hyderabad. The said project has already been delayed for more than ten years. The trial, if conducted if charges are framed, may take number of years. Therefore, the State Government has to take the stand about the said project. If necessary, the State Government may obtain the advice from Central Government, but the Chief Minister should not involve himself in said process directly or indirectly.

161. The amended provision of Section 8(8) of PMLA along with two proviso are reproduced hereunder:-

> *"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 of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss 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.]*

162. In view of peculiar facts and circumstances, the appellants are granted liberty to approach the Special Court

> on this issue. It is directed that Government of Andhra Pradesh may also appear before the Special Court and raise its specific stand so that the appropriate order be passed by the Special Court. Till that time, the attachment shall continue.

45. During the hearing, it was stressed by Mr. Nanda, learned Senior Counsel for the appellant that in so far the findings recorded by the Appellate Tribunal, as extracted supra, are concerned, no appeal has been filed by the Enforcement Directorate, and therefore, such findings returned by the Appellate Tribunal have attained finality. Learned Additional Solicitor General of India could not also point out as to whether any appeal has been preferred against the findings returned by the Appellate Tribunal against the respondent.

46. If we look at the findings returned by the Appellate Tribunal *vis-à-vis* the provisional attachment order and the order of the adjudicating authority on one hand and the conclusions of the Appellate Authority on the other hand, it is evident that the conclusions are not consistent with the findings returned by the Appellate Tribunal;

rather wholly inconsistent. Appellate Tribunal has held that while carrying out the provisional attachment, the attaching authority did not record *reason to believe* that the petitioner is in possession of any proceeds of crime and that such proceeds of crime were likely to be concealed, transferred etc., which may frustrate any proceedings relating to confiscation of such proceeds as is the mandatory requirement under Section 5(1) of PMLA. Appellate Tribunal also found fault with the approach adopted by the adjudicating authority in overlooking the above conditions. The show cause notice under Section 8(1) of PMLA was issued in a mechanical manner without application of mind and without forming any *reason to believe* that the noticee had committed an offence under Section 3 or was in possession of proceeds of crime. The adjudicating authority did not record any reason that the provisional attachment should continue. These are jurisdictional errors which have been clearly pointed out by the Appellate Tribunal. The above requirements being the foundation for attachment - either provisional or

confirmation or continuation, in the absence thereof the provisional attachment order as well as the confirmation order of the adjudicating authority would be illegal, null and void, being without jurisdiction. Consequently, the natural corollary flowing from the findings would be that such property should be released from attachment. Instead of doing that, Appellate Tribunal relegated the appellant to the forum of Special Court to seek de-attachment after itself observing that the trial before the Special Court, if conducted, may take number of years.

47. Supreme Court in **Opto Circuit** (supra) was dealing with a matter arising out of PMLA, more pertinently the challenge related to freezing of accounts on instruction of the Enforcement Directorate. In that context, Supreme Court observed that the scheme of PMLA is well intended. While it seeks to achieve the object of preventing money laundering and to bring to book the offenders, it also safeguards the rights of the persons who would be proceeded against under PMLA by ensuring fairness in procedure. It was in that context that Supreme Court

emphasised the need to follow the laid down procedure under PMLA observing that when a statute provides a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner.

48. In **J.Sekar @ Sekar Reddy**, Supreme Court adverted to its earlier decision in **Radheshyam Kejriwal v. State of West Bengal**[10] and culled out the ratio of the said decision. It has been held amongst others that adjudication proceedings and criminal proceedings are independent in nature to each other.

49. Before parting with the record, we may revert back to the decision of the Supreme Court in **Vijay Madanlal Choudhary** (supra). As noted in the earlier part of the judgment, one of the grievances raised before the Supreme Court, rather challenge made, pertained to the stipulation in sub-section (4) of Section 8 providing for taking over possession of the property. We have already extracted sub-section (4) of Section 8 and analysed the said provision which basically says that when the provisional

[10] (2011) 3 SCC 581

order of attachment is confirmed, the Director or the authorised officer shall forthwith take possession of the attached property. Relying on the principle set out in Section 5(4) of PMLA which according to the Supreme Court needs to be extended even after confirmation of provisional attachment order until a formal confiscation order is passed, Supreme Court has held that the stipulation in sub-section (4) of Section 8 is required to be invoked only in exceptional situations. Merely because the provisional attachment order 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. This is what the Supreme Court has held:

> **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.

49.1. After holding so, Supreme Court clarified that taking over of 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. It has been held as follows:

> **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.

49.2. Elaborating further, Supreme Court held that physical dispossession of the person from the property, which is an extreme and drastic action, in every case is unwarranted. Supreme Court has opined that it is possible that the Special Court may eventually decide the issue in favour of the person in possession of the property as not being proceeds of crime or for any other valid ground. Therefore, it would be a case of serious miscarriage of justice, if not an abuse of the process, to take physical possession of the property before an order is passed by the Special Court. Relevant findings are as under:

306. The learned counsel appearing for the Union of India, had invited our attention to the recommendations made by FATF in 2003 and 2012 to justify the provision under consideration. The fact that non-conviction based confiscation model is permissible, it does not warrant an extreme and drastic action of physical dispossession of the person from the property in every case — which can be industrial/ commercial/ business and also residential property, until a formal order of confiscation is passed under Section 8(5) or 8(7) of the 2002 Act. As demonstrated earlier, it is possible that the Special Court in the trial concerning money-laundering offence may eventually decide the issue in favour of the person in possession of the property as not being proceeds of crime or for any other valid ground. Before such order is passed by the Special Court, it would be a case of serious miscarriage of justice, if not abuse of process to take physical possession of the property held by such person. Further, it would serve no purpose by hastening the process of taking possession of the property and then returning the same back to the same person at a later date pursuant to the order passed by the Court of competent jurisdiction. Moreover, for the view taken by us while interpretating Section 3 of the 2002 Act regarding the offence of money-laundering, it can proceed only if it is established that the person has directly or indirectly derived or obtained proceeds of crime as a result of criminal activity relating to or relatable to a scheduled offence or was involved in any process or activity connected with proceeds of crime.

307. It is unfathomable as to how the action of confiscation can be resorted to in respect of property in the event of his acquittal or discharge in connection with the scheduled offence. Resultantly, we would sum up by observing that the provision in the form of Section 8(4) can

> be resorted to only by way of an exception and not as a rule. The analogy drawn by the Union of India on the basis of decisions of this Court in *Divisional Forest Officer* v. *G.V. Sudhakar Rao*[11], *Biswanath Bhattacharya v. Union of India*[12], *Yogendra Kumar Jaiswal* v. *State of Bihar*[13], will be of no avail in the context of the scheme of attachment, confiscation and vesting of proceeds of crime in the Central Government provided for in the 2002 Act.

Conclusion:

50. Therefore, viewed in the above context and considering all aspects of the matter, we are of the opinion that while the Appellate Tribunal is correct in holding that the provisional attachment order and the order of the adjudicating authority confirming attachment suffered from fundamental flaws, thus being without jurisdiction, it fell short of declaring such orders as illegal; it further fell in error in relegating the appellant to the forum of Special Court to seek release of the attached property as it amounts to abdicating its authority and allowing an illegality to continue.

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[11] (1985) 4 SCC 573
[12] (2014) 4 SCC 392
[13] (2016) 3 SCC 183

51. That being the position, we are of the unhesitant view that the appeal of the appellant deserves to be allowed. The appeal is accordingly allowed. Therefore, the question framed above is answered in favour of the appellant and against the respondent.

52. Consequently, we direct the respondent to release the attached property i.e., 561.1996 acres of land in Prakasham district in Andhra Pradesh as per Annexure – L^1 enclosed with the provisional attachment order, to the appellant.

Miscellaneous applications, pending if any, shall stand closed. There shall be no order as to cost.

UJJAL BHUYAN, CJ

SUREPALLI NANDA, J

27.09.2022
pln

Note: LR copy be marked.
(By order)
pln