Before Jaswant Singh & Sant Parkash, JJ.

SEEMA GARG—*Appellant*

versus

THE DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT (PREVENTION OF MONEY LAUNDERING ACT), GOVT. OF INDIA, THE MIRAGE, 556-B, COOL ROAD, JALANDHAR, PUNJAB—*Respondent*

PMLA No.1 of 2019

March 03, 2020

A. ***Prevention of Money Laundering Act, 2002—Ss.2, 5, 8(3)(a) and 42—Indian Penal Code, 1860—Ss.177, 420, 465, 467, 468 and 471—Attachment of property involved in money laundering after expiry of 90 days—Held, as per clause (a) of Sub-Section (3) of Section 8 of PMLA, provisional attachment shall continue during investigation for a period not exceeding 90 days—Thus, order of attachment shall continue during investigation for a period not exceeding 90 days.***

Held that, as per clause (a) of Sub-Section (3) of Section 8 of the PMLA, the provisional attachment shall continue during investigation for a period not exceeding 90 days. The aforesaid period of 90 days has been increased to365 days w.e.f. 01.08.2019 vide amendment Act 7 of 2019. The concept of 90 days period during investigation was introduced w.e.f. 19.04.2018. In the case in hand, the Adjudicating Authority vide order dated 28.05.2018 (Annexure A-3) confirmed provisional attachment wherein it was ordered that attachment shall continue during investigation for a period not exceeding 90 days.

(Para 27)

B. ***Prevention of Money Laundering Act, 2002—Ss.2(1)(u) and 5—Attachment of property involved in money laundering—Held, property acquired prior to commission of scheduled offence i.e. criminal activity or introduction of PMLA cannot be attached unless property obtained or acquired from scheduled offence is held or taken outside the country—Further, `value of such property' does not mean and include any property which has no link direct or indirect with property derived or obtained from commission of scheduled offence i.e. alleged criminal activity.***

Held that, 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 & Another v. Directorate of Enforcement and Others 2019 (3) RCR (Criminal) 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.

(Para 31)

Further held that, we find and hold that 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.

(Para 38)

C. *Prevention of Money Laundering Act, 2002—S.5—Attachment of property involved in money laundering—Recording of reasons mandatory.*

Held that, Section 5(1) specifically requires that Director or any other officer authorized by him shall record reasons in writing on the basis of material in his possession that he has reason to believe that proceeds of crime are likely to be concealed, transferred or dealt with. Like PMLA, there are a number of enactments viz. Income Tax Act, 1961, Customs Act, 1962, Central Goods and Services Tax Act, 2017 where there is requirement of recording of reasons prior to taking particular action like arrest, search, seizure of goods/records, attachment of bank accounts etc.

(Para 40)

Jagmohan Bansal, Advocate
for the Appellant(s) (in all the cases).

Satya Pal Jain, Senior Advocate, Additional Solicitor General

of India assisted by
Arvind Moudgil, Senior Counsel, Govt. of India,
Dheeraj Jain, Senior Counsel, Govt. of India and
Lokesh Narang, Retainer Counsel, E.D.
For the respondent(s)-Directorate of Enforcement (in all cases).

JASWANT SINGH, J.

(1) By this common order, three PMLA Appeals No. 1-3 of 2019, involving common questions and filed against common impugned order dated 09.08.2019 **(Annexure A-7)** are disposed of.

(2) All the three Appellants under Section 42 of Prevention of Money Laundering Act, 2002 (for short 'PMLA') are seeking quashing of Order dated 09.08.2019 **(Annexure A-7)** passed by Ld. Appellate Tribunal for SAFEMA, FEMA, NDPS, PMLA & PBPT Act, New Delhi (for short 'Tribunal') whereby appeals of the Appellants assailing confirmation of provisional attachment order have been dismissed.

(3) Brief facts as borrowed from Appeal No. 1 of 2019 are that on the basis of an FIR No. 126 dated 26.7.2013 registered at PS Division N. 5, Ludhiana under Section 177, 420, 465, 467, 468, 471 of IPC, against M/s Jaldhara Exports (a proprietorship concern of Raman Garg), Ludhiana alleging fraudulent refund of VAT during February-March' 2013, Respondent-Enforcement Directorate on 14.8.2013 registered an Enforcement Case Information Report (for short 'ECIR'). The Deputy Director-Respondent vide order dated 13.12.2017 provisionally attached Plot No. 800, Street No. 2, Baba Gajja Jain Colony, Moti Nagar, Ludhiana belonging to Smt. Seema Garg (Appeal No. 1/2019) & Smt. Sangeeta Garg (Appeal No. 3/2019) and Flat No. 11A, Empire Residential Project, SAS Nagar belonging to Saiyrah Garg (Appeal No. 2/2019). The Respondent praying confirmation of provisional attachment filed a complaint before Adjudicating Authority which culminated into order dated 28.5.2019. The Adjudicating Authority confirmed the attachment for a period of 90 days during the pendency of investigation or pendency of the proceeding before a court under PMLA. The Appellants filed appeal before Tribunal which vide impugned order dated 9.8.2019 **(Annexure A-7)** dismissed all the appeals.

(4) The Appellants have raised three fold arguments, namely, i) at the time of expiry of 90 days from the date of confirmation order investigation was pending; ii) property in question was purchased

much prior to not only commission of alleged offence but also introduction of PMLA; iii) there is non-compliance of the requirement of recording of reasons prior to provisional attachment of property.

(5) Mr. Bansal, counsel for the Appellant in the synopsis as well during the course of arguments elaborating his contentions raised in appeal pleaded that Adjudicating Authority as per Section 8(3)(a) of PMLA confirmed provisional attachment for a period of 90 during the pendency of investigation and as per provisional attachment order and replies filed before Tribunal, investigation is pending till date, thus provisional attachment order stands ceased to exist. Criminal Complaint against Raman Garg and others has been filed for criminal trial but no criminal complaint under PMLA has been filed against Appellants.

(6) The property involved in Appeal No. 1 & 3 of 2019 was purchased in 1991 and property involved in Appeal No. 2 of 2019 was purchased in 2012, whereas alleged scheduled offence was committed in February-March' 2013, thus property in question cannot be treated or declared as proceeds of crime. As per definition of 'Proceeds of Crime' under Section 2(1)(u) of the PMLA especially in view of explanation inserted by Section 192 of Finance Act, 2019, property to be called as proceeds of crime must be directly or indirectly obtained or derived from the scheduled offence unless property derived or obtained from scheduled offence is held or taken outside the country, in which case property equivalent in value held in India may be attached. The Phrase 'value of such property' cannot be read as 'property of equivalent value' and if findings of Tribunal and argument of Respondent is accepted, it would culminate into phrase 'value of such property' and 'Property of equivalent value' with same connotation and same meaning, whereas two different phrases are specifically used for different situations. He further contended that last limb of Section 2(1)(u) i.e. 'or where such property is taken or held outside the country then the property equivalent in value held within the country' was inserted by Section 145 of Act of 2015. There was no need to carry out amendment by Act of 2015 if property of equivalent value was to be 'proceeds of crime' in any or every case. He further contended that if contention of Respondent is correct, there was no need to insert even first limb and it was sufficient to declare any property held or possessed as 'proceeds of crime'. There was no need to trace out 'source of property' and for Adjudicating Authority to call upon persons to explain source of property. He supported his argument

with judgment of Andhara Pradesh High Court in the case of ***M/s Satyam Computer Services Limited*** versus ***Directorate of Enforcement, Government of India and others***[1] and judgment of Delhi High Court in the case of ***Abdullah Ali Balsharaf & Another*** versus ***Directorate of Enforcement and Others***[2].

(7) As per Section 5 of PMLA, property may be attached if it is 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 present case, concededly the property in question is mortgaged with bank, thus there was no possibility to transfer or deal with property to frustrate PMLA proceedings, however Respondent has recorded a stereotyped and whimsical finding that he has reason to believe that property is 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. The Respondent did not even bother to make difference between words conceal, transfer or otherwise deal with and acting in a casual & whimsical manner used all the three phrases in the attachment order. Had there been actual reason to believe, supported with material in possession, the Respondent should have used specific phrase/word i.e. either conceal or transfer or manner in which Appellant was likely to deal with property. Thus, there was no reason to believe to attach the property and its attachment is bad in the eye of law. In support of his contention, counsel for the Appellant cited judgment of Delhi High Court in the case of ***Sanjay Agarwal*** versus ***Union of India and others***[3].

(8) On behalf of Respondent initially matter was argued by Mr. Chetan Mittal, Sr. Advocate and thereafter it was argued by Mr. Satya Pal Jain, Additional Solicitor General assisted by Mr. Arvind Moudgil and Mr. Lokesh Narang.

(9) Mr. Mittal countering argument of Appellant contended that there are three limbs of Section 2(1)(u) and all the three limbs are independent. Properties in question do not fall in first and third limb but second limb squarely covers all the properties in question irrespective of their date of purchase. The explanation inserted by amending Act of 2019 does not advance cause of the Appellant as it

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[1] 2019 (3) Andh LD 472
[2] 2019 (3) RCR (Criminal) 798
[3] 2018 (5) RCR (Criminal) 507

only clarifies scope of first limb and second limb is intact. As per second proviso to Section 5(1) of the PMLA, any property of any person may be attached under Section 5 of the PMLA which shows that it is irrelevant that property is directly or indirectly connected with scheduled offence or not. The property even though is not connected with scheduled offence still may be attached as value of property derived from commission of scheduled offence. Mr. Mittal in support of his contentions cited judgment of Delhi High Court in the case of ***Abdullah Ali Balsharaf & Another*** versus ***Directorate of Enforcement and Others***[4].

(10) As per written submissions and oral arguments, Mr. Satya Pal Jain gave a totally different shape to the earlier set of arguments & allegations and twisted the findings of Tribunal. Mr. Jain contended that Appellants had mortgaged their property to Allahabad Bank to secure cash credit limit of Rs.2 Crore for M/s Jaldhara Exports, which committed offence under Section 420, 467 and 471 of IPC, thus immovable property has been used to commit scheduled offence. The offence was committed during February' 2013 to March' 2013 and during said period offence under Section 420, 467 and 471 was a scheduled offence. In the original PMLA, no time limit for continuing attachment during the pendency of investigation was prescribed, however time limit of 90 days was prescribed under the PMLA w.e.f. 19.4.2018 whereas criminal complaint under Section 44 & 45 of PMLA before the Special/Designated Court has been filed on 22.12.2017 i.e. much before the amendment. Therefore, Appellant is not entitled to benefit of time limit introduced w.e.f. 19.4.2018.

(11) Mr. Jain further contended that as per judgment of Hon'ble Delhi High Court in the case of The ***Deputy Director, Directorate of Enforcement, Delhi*** versus ***Axis Bank and others in Crl. Appeal No. 143/2018*** property even though not obtained or derived from scheduled offence yet falls within phrase 'value of such property' as used in Section 2 (1)(u) of PMLA.

(12) The provisions of 2nd proviso to Section 5(1) are applicable to property even acquired prior to coming into force of provision itself and property may be owned or in possession of a person other than charged of having committed scheduled offence. Andhara Pradesh High Court has considered vires of Section 5, 8 and 24 of the PMLA in the case of ***B. Rama Raju*** versus ***UOI*****, MANU/AP/0125/2011** and

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[4] **2019** (3) RCR (Criminal) 798

upheld the same.

(13) Having scrutinized record of the case and heard arguments of both sides, we find that it would be appropriate to look into the scheme of the PMLA before adjudication of issues involved. The Phrase 'proceeds of crime' has been defined under Section 2(1)(u) of the PMLA and the same is reproduced 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.
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> There are three limbs of Section 2(1)(u) of the PMLA namely:
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> i) Any property derived or obtained directly or indirectly as a result of criminal activity relating to scheduled offence;
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> ii) Value of property derived or obtained from criminal activity;
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> 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.

(14) The first limb deals with property directly or indirectly obtained from criminal activity. The third limb is applicable where property obtained from criminal activity is held or taken outside India. In case property derived/obtained from criminal activity is held or taken outside India, property of equivalent value held in India or abroad would be proceeds of crime. The second limb, which is the core issue involved in present appeals covers 'value of property' derived/obtained from criminal activity.

(15) The phrase 'property' has been defined under Section 2(1)(v) of the PMLA which is reproduced as under:

Section 2(1)(v) "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Explanation- For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

(16) As per above Sub-Section; property includes movable, immovable, tangible, intangible, deeds and instruments evidencing title/interest in assets or property. Patent, copyright, goodwill are best example of incorporeal/intangible assets.

(17) The power and mechanism including checks and balances qua provisional attachment of property and confirmation thereof are specified under Section 5 & 8 of the PMLA which are extracted below:

Section **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 authorised 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 or complaint has been made or 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 not below the rank of Deputy Director authorised 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, alongwith 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.

Section 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 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 has 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 58-B or sub-section (2-A) 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 (1-A) 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 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 trail of the case in such manner as may be prescribed.

[Emphasis supplied]

(18) As per Section 5 of the PMLA, any property of any person involved in money laundering may be provisionally attached. The attachment may be made after filing of police report or complaint with respect to scheduled offence, however where attachment is immediately required, it may subject to compliance of inbuilt safeguards, be made even prior to filing of police report or complaint qua scheduled offence. The following safeguards in the form of checks and balances are prescribed under Section 5 of the PMLA:

i) Attachment order can be passed only by Director or any Officer not below the rank of Deputy Director authorized by Director;

ii) The Officer must record reasons to believe that any person is in possession of any proceeds of crime which are likely to be concealed, transferred or dealt with in any manner which may result in frustrating proceedings relating to confiscation;

iii) The reasons must be based upon the material in his possession;

iv) The Officer shall forward copy of provisional attachment order alongwith material to Adjudicating Authority;

v) The Officer shall within 30 days of attachment file complaint with Adjudicating Authority for confirmation of provisional attachment.

(19) As per Section 8 of the PMLA, the Adjudicating Authority shall serve notice upon the person whose property has been attached calling upon him to indicate source of his income, earning or assets out of which or by means of which he has acquired attached property. The Adjudicating Authority after considering representation shall record a finding whether properties are involved in money laundering or not. The attachment shall continue during investigation for a period not exceeding 90 days (amended to 365 days by Act 7 of 2019) or pendency of criminal proceedings relating to offence under PMLA before Competent Court. The provisional attachment shall become final on conclusion of the trial and confiscation of attached property by

Special Court. If on the conclusion of trial, Court finds that offence of money laundering has not taken place or property is not involved in money laundering, it shall release the property.

(20) As per scheme of the PMLA, after recording of ECIR, two sets of proceedings are initiated in case of commission of offence of money laundering, namely provisional attachment of property at the end of Enforcement Department and criminal trial before Special Court. Section 3 defines offence of money laundering and Section 4 prescribes punishment for money laundering. Section 3 and 4 of PMLA are extracted below:

> **Section 3. Offence of money-laundering.** – 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 offence of money-laundering.
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> Explanation – For the removal of doubts, it is hereby clarified that, -
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> (i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-
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> (a) concealment; or
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> (b) possession; or
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> (c) acquisition; or
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> (d) use; or
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> (e) projecting as untainted property; or
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> (f) claiming as untainted property, in any manner whatsoever;
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> (ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by

its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

Section 4. Punishment for money-laundering.- Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine: Provided that where the proceeds of crime involved in money- laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.

(21) Section 3 defines offence of money laundering, the scope of which has been enlarged from time to time. It covers not only the person who has committed scheduled offence i.e. predicate offence but also every person who is directly or indirectly concerned with concealment, possession, acquisition, use, projecting as untainted property or claiming as untainted property. As per Explanation (ii) of Section 3, the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime. Section 4 prescribes punishment which shall not be less than three years but may extend to seven years.

(22) Section 44 of the PMLA provides for trial of offence by Special Court. Section 44 is extracted below:

Section 44. Offences triable by Special Courts.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or;

(b) a Special Court may, upon a complaint made by an

authority authorised in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial: Provided that after conclusion of investigation, if no offence of money laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed;

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), as it applies to a trial before a Court of Session.

Explanation- For the removal of doubts, it is clarified that, -

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers

including the power under clause (b) of sub- section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43.

(23) As per Section 44 of the PMLA, offence under the Act is triable by Special Court which as per Section 43 of the PMLA is Court of Session. If the Court trying scheduled offence is different from Special Court trying offence under the PMLA, the Court trying scheduled offence shall commit the case to Special Court. The jurisdiction of Special Court under PMLA does not depend upon orders passed in respect of scheduled offence and trial of both offences by same Court is not construed as joint trial although conducted together by Special/same court.

(24) From the reading of above quoted Sections, it is evident that two sets of proceedings are initiated under PMLA after recording of ECIR. In first set of proceedings, initiated by Enforcement Department, property i.e. proceeds of crime are provisionally attached and in second set of proceedings criminal complaint is filed before Special Court which has power to convict the accused and confiscate attached properties.

(25) The conceded facts emerging from record are that two Appellants had purchased their property in 1991 and one Appellant in 2011. The alleged offence of fraudulent availment of VAT refund was committed in February-March' 2013 and PMLA came into force w.e.f. 1.7.2005. As per FIR of scheduled offence, ECIR and different orders passed by Respondents, M/s Jaldhara Exports, a proprietorship concern of Raman Garg fraudulently obtained VAT refund from VAT authorities without actual export of goods. The properties in question are lying mortgaged with bank since 2009. As per impugned order, the Respondent is empowered to attach any property, thus property even though purchased in 1991 could be attached. Concededly, the Appellants are neither arrayed as accused in scheduled offence nor criminal complaint filed before Special Court under PMLA. The Respondent has already filed criminal complaint under PMLA against Raman Garg and others before Special Court, however admittedly investigation is still pending. The Respondent has not filed any criminal complaint under Section 3 of PMLA against Appellants and a period of even 365 days from the date of confirmation order passed by Ld. Adjudicating Authority has already expired.

(26) From the conceded position and arguments of both sides, we

find that following questions arise for our adjudication:

> i) Whether provisional attachment of property is sustainable after the expiry of 90 or 365 days from the date of order passed by adjudicating authority?
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> ii) Whether property acquired prior to enactment of PMLA i.e. prior to 1.7.2005 can be provisionally attached under Section 5 of the PMLA?
>
> iii) Whether phrase 'value of such property' occurring in definition of 'proceeds of property' includes any property of any person irrespective of source of property?
>
> iv) Whether officer attaching property is required to record reason that property is likely to be concealed, transferred or dealt with in any manner which may frustrate proceedings relating to confiscation?

(27) Q.(i). As per clause (a) of Sub-Section (3) of Section 8 of the PMLA, the provisional attachment shall continue during investigation for a period not exceeding 90 days. The aforesaid period of 90 days has been increased to 365 days w.e.f. 01.08.2019 vide amendment Act 7 of 2019. The concept of 90 days period during investigation was introduced w.e.f. 19.04.2018. In the case in hand, the Adjudicating Authority vide order dated 28.05.2018 **(Annexure A-3)** confirmed provisional attachment wherein it was ordered that attachment shall continue during investigation for a period not exceeding 90 days.

(28) The Respondent has pleaded that amendment prescribing 90 days period during investigation came into force w.e.f. 19.04.2018 and complaint under Section 44 & 45 of PMLA was filed on 22.12.2017 before Special Court, thus Appellants are not entitled to benefit of amendment made w.e.f. 19.04.2018. In the adjudication order, it was ordered that attachment shall continue during investigation for a period not exceeding 90 days. It was Appellants who challenged said order before Tribunal, thus Respondent cannot take any plea contrary to order of Adjudicating Authority, thus contention of Respondent that Appellant is not entitled to amended provision is misconceived and accordingly rejected.

(29) The Respondent in its reply before Tribunal as well during the course of arguments before this Court conceded that investigation is still pending and although complaint stands filed against only Raman

Kumar and Others but not present Appellants. As investigation even against Raman Kumar and Others is still pending, Adjudicating Authority ordered to continue attachment for 90 days during the pendency of investigation. The Appellants were neither arrayed as accused in police case (FIR relating to scheduled offence) nor in the complaint filed before Special Court, thus the Appellants are entitled to benefit of time period cap prescribed by Section 8 (3)(a) of PMLA. The 90 days period prescribed under Section 8(3)(a) has been enlarged to 365 days w.e.f. 01.08.2019. In the present case even 365 days period has expired but investigation is still pending, thus Appellants are entitled to benefit of 90/365 days cap and provisional attachment order stands ceased to exist by operation of law.

(30) Q.(ii) & (ii) are inter-liked, thus considered and adjudicated together. As discussed here above, there are three limbs of Section 2(1)(u) of the Act of 2002 namely:

i) Any property derived or obtained directly or indirectly as a result of criminal activity relating to scheduled offence;

ii) Value of property derived or obtained from criminal activity;

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.

(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 & Another*** versus ***Directorate of Enforcement and Others***[5] 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,

[5] 2019 (3) RCR (Criminal) 798

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.

(36) Andhara Pradesh High Court in the case of ***Satyam Computer Services*** (Supra) has expressed view similar to our above expressed view, however Delhi High Court in the case of ***Axis Bank*** (Supra) has expressed contrary view which we do not subscribe because Delhi High Court has declared/treated words 'value of such property' and 'property equivalent in value held within country' at par which cannot be countenanced in view of scheme and object of the Act.

(37) There may be a case where a person accused of commission of scheduled offence, on account of destruction or disposal of property, is having no property. Non-availability of property derived from scheduled offence does not immune an accused from offence of money

laundering committed under Section 3 of the PMLA. As per scheme of the Act, there is criminal liability of an accused apart from civil liability of attachment of property, thus object of the Act is not defeated merely on the ground that property derived from crime is not available for attachment. The property derived from legitimate source cannot be attached on the ground that property derived from scheduled offence is not available. There are so many scheduled offences where property may or may not be involved because every scheduled offence is not committed for the sake of property e.g. offence relating to wild animals, waging war against Government of India, murder, attempt to murder, offences under Arms Act. There is a long list of offences under different enactments where property is normally not involved still these are scheduled offences and punishable under Section 3 & 4 of PMLA.

(38) Accordingly, we find and hold that 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.

(39) Q. Whether officer attaching property is required to record reason that property is likely to be concealed, transferred or dealt with in any manner which may frustrate proceedings relating to confiscation?

(40) Section 5(1) specifically requires that Director or any other officer authorized by him shall record reasons in writing on the basis of material in his possession that he has reason to believe that proceeds of crime are likely to be concealed, transferred or dealt with. Like PMLA, there are a number of enactments viz Income Tax Act, 1961, Customs Act, 1962, Central Goods and Services Tax Act, 2017 where there is requirement of recording of reasons prior to taking particular action like arrest, search, seizure of goods/records, attachment of bank accounts etc.

(41) Before dealing with question involved, it would be appropriate to notice enunciation of law by various courts on the question of recording of reasons.

(42) In ***Barium Chemicals Ltd.*** versus ***Company Law Board***[6], the Supreme Court pointed out, on consideration of several English and Indian authorities that the expressions "is satisfied", "is of

[6] AIR 1967 SC 295

the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. The Supreme Court while construing Section 237 of the Companies Act, 1956 held in Para 64 as under:

> " 64. The object of S. 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted S. 637 (i) (a) it knew that government would entrust to the Board its power under S. 237 (b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there

must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with S. 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in subclauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute. "

[Emphasis supplied]

(43) In ***Income-tax Officer, Calcutta and Ors.*** versus ***Lakhmani Mewal Das***[7], the Supreme Court construed the expression "reason to believe" employed in Section 147 of the Income-Tax Act, 1961 and observed that the reasons for the formation of the belief must

[7] AIR 1976 SC 1753

have a rational connection with or relevant bearing on the formation of the belief. 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 the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence. Hon'ble Court has observed as under:

> "The reasons for the formation of the belief contemplated by Section 147(a) of the Income-tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the I.T.O. and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the I.T.O. on the point as to whether action should be initiated for reopening the assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.
>
> The reason for the formation of the belief must be held in good faith and should not be a mere pretence. "

[Emphasis supplied]

(44) In ***Bhikhubhai Vithalabhai Patel and others*** versus ***State of Gujarat***[8], Hon'ble Supreme Court construed the expression "is of the opinion" and observed in Paras 32 and 33 as under:

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[8] AIR 2008 SCC 1771

" 32. We are of the view that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17 (1) (a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers. The basic principles in this regard are clearly expressed and explained by Prof. Sir William Wade in Administrative Law (Ninth Edn.) in the chapter entitled 'abuse of discretion' and under the general heading the principle of reasonableness' which read as under:

The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law

permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed.

33. The Court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The Court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute. "

[Emphasis supplied]

(45) From the reading of above enunciation of law, it is evident that an authority required to record reasons prior to initiating any action is duty bound to record reasons in writing which cannot be mere formality but should be germane and relevant to the subjective opinion formed by authority. Reasons recorded are subject to judicial review and court may look into material which made basis of reasons recorded.

(46) As per Section 5 of the PMLA, Director or any other Officer authorized by him is duty bound to record reasons on the basis of material in his possession that proceeds of crime are likely to be concealed or transferred or in any other way dealt with which may frustrate any proceedings relating to confiscation.

(47) Counsel for the Appellant contended that property in question was admittedly purchased in 1991 and since 2009 is lying mortgaged with bank, thus there was no question of transfer or sale of said property. The alleged offence was committed in 2013 whereas property was attached on 13.12.2017. There was nothing on record

to show that if property is not attached, the proceedings of confiscation would be frustrated. The authorities are bound to be specific and cannot simply reiterate words and phrases used in the Section which is source of power. The Respondent in the present case while passing provisional attachment order has simply held that properties 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 and matter is under investigation.

(48) We are at one with counsel for the Appellant on the question that authorities under the Act are bound to be specific while exercising power conferred under Section 5 of the PMLA. Words used in the order cannot be *verbatim replica* of words used in Section 5 of the PMLA. The Respondent in the present case while passing attachment order dated 13.12.2017 (Para 51) has reproduced contents of Section 5 of the PMLA whereas Respondent was bound to point out possibility of concealment or transfer or manner in which property is likely to be dealt with. Delhi High Court as pointed out by counsel for Appellant in the case of ***Sanjay Agarwal*** (Supra) while dealing with detention under COFEPOSA has held that simply taking the words of Section 3(1) of COFEPOSA and repeating it as part of grounds would not constitute a finding arrived after an application of mind. Delhi High Court has observed in Para 42 and 43 as under:

> "42. However, that is not the case here. It is apparent to the Court that the Detaining Authority was unclear about the grounds on which it should authorise the detention of Mr. Sanjay Agarwal. This is evident from the reading of para 34 where repeatedly the word 'or' is used to separate out the different grounds. This is suggestive of two things: first, the Detaining Authority was unsure if the facts brought on record constituted one or more of these grounds; and second, there was in fact non-application of mind as simply taking the wording of the Section 3 (1) COFEPOSA and repeating it as part of the grounds would not constitute a finding arrived at after an application of mind.
>
> 43. The differences in the wording used between the order of detention and the grounds of detention are too stark to simply be dismissed as typographical errors. The casualness in this kind of an approach has been earlier adversely

commented upon by the Supreme Court in Jagannath Misra (supra). In that case too there was confusion as to the use of the conjunctive 'and' and the disjunctive 'or' and the Court, in that regard, observed as under:

> "Where a number of grounds are the basis of a detention order, we would expect the various grounds to be joined by the conjunctive "and" and the use of the disjunctive "or" in such a case makes no sense. In the present order however we find that the disjunctive "or" has been used, showing that the order is more or less a copy of Section 3 (2) (15) without any application of the mind of the authority concerned to the grounds which apply in the present case."

[Emphasis supplied]

(49) In the present case, concededly property was purchased in 1991 and mortgaged with bank in 2009. The alleged offence was committed in 2013 whereas attachment order was passed in December' 2017. There is nothing on record to show that Appellants after 2009 or 2013 attempted to dispose of property in question which prompted the Respondent to pass attachment order. The Respondent has simply taken wording of Section 5(1) of the PMLA and reiteration of these words would not constitute recording of reasons that if property is not attached, it may result in frustrating any proceedings of confiscation. The Respondent was bound to record the reasons on the basis of material in his possession that property is likely to be concealed or transferred or dealt with in any manner. Use of all the words i.e. concealed, transferred or dealt with in any manner shows that Respondent was not specific with respect to possibility of action of Appellant which would have frustrated proceedings of confiscation. It further shows that there was no application of mind and Respondent simply picked up words from Section 5 of the PMLA and inserted in the order. Accordingly, we hold that Respondent has passed attachment order without recording the reasons on the basis of material in his possession that property in question was likely to be concealed, transferred or dealt with in any manner which would frustrate confiscation proceedings.

(50) To be fair to the Ld. Counsel for Respondent, we would like to notice that an ancillary argument was raised that property was mortgaged with bank and cash credit limit of Rs. 2 Crore was used by M/s Jaldhara Export which fraudulently availed VAT refund. Firstly, the aforesaid fact was not even raised before Tribunal leaving aside

Adjudicating Authority and it cannot be raised in appeal filed by Appellant. Secondly, the allegation against Jaldhara Export is that it took VAT refund without actual export of goods which has no relevancy with cash credit limit availed on the basis of security furnished by Appellant. It is not case of bank fraud, thus said argument is totally out of context, misconceived & irrelevant, therefore rejected.

(51) In view of above discussion, we summarise our findings as below:

i) In case investigation is pending, filing of complaint against others is not sufficient to deprive any person from benefit of time cap of 365 days,

ii) Property acquired prior to commission of scheduled offence i.e. criminal activity or introduction of PMLA cannot be attached unless property obtained or acquired from scheduled offence is held or taken outside the country.

iii) Director or any other officer authorised by him is bound to record reasons which must be specific and mere reproduction of wording of Section 5 is not sufficient.

(52) In view of our above findings, present appeals deserve to be allowed and accordingly, we allow all the three appeals and set aside impugned order dated 9.8.2019 passed by Tribunal.

(53) Since the main cases itself have been decided, no orderes are required to be passed in the pending miscellaneous applications if any, and the same stands disposed of.

(54) A copy of this order be placed on the files of connected appeals.

Ritambhra Rishi