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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 3109/2023 & CM APPL. 12095/2023, 19827/2023**

KANKIPATI RAJESH

..... Petitioner

Through: Mr. Amit Khemka, Mr. Ashwani Taneja, Ms. Shreya Shandilya & Mr. Sandeep Dash, Advocates. (M: 9920427458)

versus

ADJUDICATING AUTHORITY, PREVENTION OF MONEY

LAUNDERING ACT, 2002 & ORS.

..... Respondents

Through: Mr. Zoheb Hossain, Special Counsel
Mr. Vivek Gurnani, Ms. Sejal Aneja,
& Mr. Baibhav, Advocates for ED.
(M: 9999711099)
Mr. Anurag Ahluwalia, (CGSC), Ms.
Avshreya Pratap Singh Rudy
Advocates for R-3. (M: 9810001315)

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% **21.04.2023**

1. This hearing has been done through hybrid mode.
2. The present writ petition has been filed challenging the impugned order dated 6th March, 2023 passed by the Respondent No.1 - Adjudicating Authority, under the Prevention of Money Laundering Act, 2002 (PMLA) by which the Petitioner's application for right to cross examine witnesses has been rejected.
3. The brief background of this petition is that the Petitioner - Kankipati Rajesh had purchased two immovable properties in Surat, Gujarat for a

particular sale consideration. An FIR was lodged under the Prevention of Corruption Act, 1988 and proceedings from the same are pending trial in Ahmedabad. The Petitioner was arrested, thereafter, by the CBI in RC No. 221/2023/E0018. The Petitioner was again arrested by the Respondent No.2 - Directorate of Enforcement (ED) on 6th August, 2022 and proceedings under PMLA were commenced by the ED. The Petitioner was subsequently granted bail.

4. Pursuant to proceedings under the PMLA, Provisional attachment order was passed on 3rd October, 2022 by the Respondent No.1 whereby the two properties of the Petitioner were attached. In the said proceedings before the Adjudicating Authority, the Petitioner filed an application seeking permission to cross-examine the three persons whose statements were relied upon by the ED. The said application was decided by the impugned order dated 6th March, 2023. The operative portion of the impugned order reads as under:

“5. Having perused the contents of the submissions of the defendant, it is evident the fact and circumstances of the case leading to the attachment has been brought on record by the Complainant along with there lied upon documents which has been adversely used against the defendant and have been confronted to the defendant. These documents admittedly have been disclosed to the defendants who have been given the liberty to dispute and refute as these findings are based on material which forms part of the Original Complaint and relied upon documents. Moreover, the disclosure of the documents to the Appellants and the opportunity given to rebut and explain the same is a substantial compliance with the principle of natural justice that being so there is and can be no prejudice to the Appellant nor is any

demonstrated by the Appellant before the bench. Regarding the cross examination of Shri Jigar Hirjibhai Dudhat, whose statement has been recorded, and a copy also been provided, the opportunity has been given to the defendant to rebut and explain the same. If there is a deficiency in the argument of the Complainant solely based on the statement without any corroborative evidence, the Defendant is at liberty to highlight in course of argument/ by way of written submission. Similarly, if no questions have been asked from Shri Vallabh Mavjibhai Khunt and Kantibhai Shamjibhai Ramani regarding their presence while finalizing the deal under reference, it may be pointed out in the written submission refuting the inference drawn on the basis of statement of a single partner. However, the Defendant has himself admitted that Shri Jigar Dudhat was holding the power of attorney on behalf of other partners and he only had handled the sale of property at silver business point. In the background of aforesaid facts, the refusal to permit the cross examination of the aforesaid two persons along with Shri Jigar Dudhat cannot on the principle of Evidence Act facts be found fault with.

6. Further, here the limited question is with reference to investment in the property indicating the source of income earning or assets out of which or by means of which the defendants have acquired the property attached under sub section (1) of section 5 of the Prevention of Money Laundering Act (15 of 2003) 2002 the evidence on which the defendant rely and other relevant information and particulars and show cause why all or any of such property should not be declared to be the properties involved in Money Laundering and consequently why the attachment order should not be confirmed. Adhering to the principle of natural justice the submissions made by the defendants with reference to their reply in the context of the property attached will be based on

examination of facts with evidence brought on record. Although the Act does not mandate the recording of reasons in writing and communication of the same a copy of the reasons recorded u/s 8(1) has already been supplied to the defendant. In this context reference is made to the order of Hon'ble Madurai Bench of Madras High Court in W.P.(MD)No. 11454 of 2018 (G. Gopalakrishnan V. Deputy Director, Directorate of enforcement, Chennai) which has taken into consideration the order of Hon'ble High Court of Delhi in J. Sekar V. Union of India &Ors.

7. Further, the application of principles of natural justice have to be tested on the touchstone of higher principle, namely prejudice and in the scheme of PMLA this authority can safely come to the conclusion that no prejudice is caused to the defendants by not acceding to their request of cross examination, On principles of natural justice, In G. Gopalakrishnan v/s Deputy Director, Directorate of Enforcement, Chennai before Hon'ble High Court of Madras (W.P.(MD) No.11454 of 2018) has further observed as under-

“21. In Chairman, Board of Mining Examination v. Ramjee, (1977) 2 SCC 256, the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure- all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as mere artifact. Nor can they fit into a rigid

mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.”

8. Moreover, when a person is charged with serious offences of money laundering affecting the financial status of the nation, cannot be heard to complain about violation of principles of natural justice on the basis of own self-serving perception that he/she being victimized by State action. If such complaint is to be taken note of at every stage of action taken by the authorities concerned, it will not sub serve the due process of law set in motion against the alleged offenders under the statute. It is always open the accused of the alleged offenders to make more noise about the so called violation of principles of natural justice and such noise can be heard quite often in these type of matters with a view to drag the proceedings and scuttle the efforts of the authorities concerned to pin down the offenders to the crime in furtherance of the provisions of the Act. Ultimately it boils down to the fact that interference by this Authority on the ground of violation of principles of natural justice at every stage for the asking, would ultimately end in stifling the efforts of the authorities in implementing the provisions of the PMLA for which it is enacted.

9. Moreover, in the case of Abbeys Realcon LLP versus Directorate of Enforcement PMLA, New Delhi in FPA-PMLA-5226/DLI/2022 on the issue of cross-examination has ordered on 19.12.2022, operative part of which is as under:-

“

Therefore, sufficient safeguard has been provided and looking to the nature of proceedings, cross examination cannot be permitted as a rule rather it can be as an exception. A case of exceptional nature is not made out herein. Thus, we do not find any reason to cause interference with the order of the Ld. Adjudicating Authority.

We cannot ignore even one more aspect of the matter arising out of the cross examination of the witnesses. It cannot be disputed that Special Court would try the matter under the Act of 2002 against the accused and the few witnesses summoned for cross examination are even the accused in the case. If those accused are summoned for cross examination, they may be required to open their defence at a premature stage, while the defence can be opened by them in the case when tried by the Special Court. The cross examination in these proceedings may have serious consequences against those who are accused.

Looking to the scope of attachment proceedings, cross examination can be permitted only as an exception and not as a rule, otherwise it may delay the proceedings, resulting in lapse of proceedings and causing serious consequences even against the accused, if they are forced to disclose their defence at a premature stage.

In the light of all these reasonings, we do not find it to be a fit case to accept the prayer of the appellant to allow cross examination of the witnesses.””

5. The submission of Mr. Khemka, Id. Counsel for the Petitioner is that the Respondent No.1 has used the same language as was frowned upon by this Court in *W.P.(C) 125/2023* titled “ *Dr. U.S. Awasthi v. Adjudicating Authority PMLA & Anr.*”. He points out that the language used is also almost identical and the paragraph from the order in U.S. Awasthi case has been simply duplicated and repeated in the impugned order. Mr. Khemka, Id. Counsel also submits that the rejection of the application for cross examination is untenable even on merits. He points out that despite the fact that the Respondent No.1 was informed of the pendency of this writ petition before this Court, the Respondent No.1 has gone ahead and passed the final order of confirmation of the provisional attachment dated 29th March , 2023.

6. Mr. Zoheb Hossain, Id. Counsel for the Respondent No.2, on the other hand, submits that the Respondent No.1 is an independent official who is not being defended by the ED. However, he submits that insofar as the use of identical language is concerned, he is unaware as to whether the order passed by this Court in *Dr. U.S. Awasthi (supra)* was before the Respondent No.1 when the impugned order was passed or not. Mr. Khemka, Id. Counsel submits that order in *Dr. U.S. Awasthi (supra)* was in fact cited before the Respondent No.1.

7. It is noticed that the application for cross examination has been primarily rejected on facts, by the Respondent No.1 but it is the presence of paragraph 8 in the impugned order which is being complained against by Mr. Khemka, Id. Counsel as being an identical to the paragraph as was contained in the *Dr. U.S. Awasthi (supra)* judgment.

8. It is now the settled position that the order under challenge being an order passed by the Adjudicating Authority, PMLA is appealable under

Section 26 of the PLMA. This provision has been considered by this Court in *Dr. U.S. Awasthi (supra)* wherein the Court under similar circumstances interpreted the order rejecting application for cross examination passed by the Adjudicating Authority, PMLA as appealable under Section 26 of the PMLA. The observations of the Court in *Dr. U.S. Awasthi (supra)* are set out below:

“15. The Prevention of Money-Laundering (Appeal) Rules, 2005 define ‘order’ to read as under:-

“2. Definitions.-(1) In these rules, unless the context otherwise requires,-

(g) "order" means an order passed by the Director under sub-section (2) of section 13 of the Act or by the Adjudicating Authority under section 8 of the Act, as the case may be;”

The Petitioner’s contention is that in terms of the Prevention of Money-Laundering (Appeal) Rules, 2005, only orders under Section 13(2) and Section 8 of PMLA are appealable to the Appellate Tribunal. As per the Petitioner, an order passed in an application seeking cross-examination is merely a procedural order, and not one under either of the provisions specified in Section 26.

16. The powers of the Adjudicating Authority, under Section 8 of PMLA, are quite vast. The said provision stipulates the various steps to be taken, prior to the passing of the final order by the Adjudicating Authority. The Adjudicating Authority has to consider the show cause notice, the reply of the notice/s, hear the aggrieved person, as also, the Director or any officer authorised on his behalf, take into account all relevant materials placed before it, and thereafter, by an order record a finding whether any or all of the property is involved in money laundering under Section 8(2) of the Act. After arriving at a conclusion

under Section 8(2), the Adjudicating Authority is to decide the question as to whether the attachment has to be confirmed or modified or detached under Section 8(3) of the PMLA.

17. *The entire process has to be concluded within 180 days from the date of issuance of the show cause notice, provisional attachment order under Section 5 of the PMLA. Thus, the proceedings before the Adjudicating Authority have to proceed in a speedy manner and go through the various steps provided under Section 8 of PMLA.*

18. *An application for cross-examination filed before the Adjudicating Authority would be an integral part of the process of adjudication and would not be alien to Section 8 proceedings, when considered in this above statutory scheme and context.*

19. *However, the question here is whether a writ petition is to be entertained against such an order. While there can be no doubt that in case of violation of principles of natural justice or jurisdictional errors, a writ petition can be entertained, as per the settled legal position in **Whirlpool Corporation (supra)**. However, the entertaining of a writ petition while an Appellate Tribunal is fully functional, in the opinion of this Court ought not to be done in each and every case.*

20. *The Appellate Tribunal under the PMLA is dealing with the orders passed by the Adjudicating Authority on a day-to-day basis. The order dated 19th December, 2022 passed in **Abbeys Realcon LLP (Supra)** does demonstrate that orders refusing cross-examination are being challenged before the Appellate Tribunal by way of an appeal.*

21. *Dealing with the issue raised by ld. Sr. Counsel as to the interpretation of the expression 'an order under this Act', this Court is of the opinion that when the Appellate Tribunal can entertain an appeal against the final order passed by the Adjudicating Authority, any interim orders or procedural orders*

passed as part of the process of adjudication would, thus, be 'orders under this Act'. It is not to say that against each such order an appeal would be liable to be entertained. It is for the Appellate Tribunal to decide as to whether an appeal ought to be entertained at all. Construing Rule 2 of the Prevention of Money-Laundering (Appeal) Rules, 2005 to the contrary would, in fact, mean that parallel proceedings would continue in writ petitions against procedural orders and before the Appellate Tribunal, once the final order is passed. This could lead to conflicting orders and lack of uniformity and consistency in dealing with the procedures to be followed by the Adjudicating Authority and other authorities under the PMLA.

22. *In Arun Kumar Mishra (supra), the Id. Division Bench while dealing with a similar order of the Adjudicating Authority rejecting a request for cross-examination observed as under:*

“11. We have further enquired from the senior counsel for the appellant that even if the appellants are right in their contention of having a right to cross-examine the persons whose oral testimony is intended to be used against the appellants and even if the Adjudicating Authority is wrongly depriving the appellants of the said right, is it not open to the appellants to, if at all aggrieved by the orders of the Adjudicating Authority, to take up the said aspect in appeal under Section 26 of the Act against the said orders and which right of the appellants has been protected in the impugned order by the learned Single Judge also.

12. The senior counsel for the appellant, though not controverting the aforesaid legal position, contends that if the appellants have a right in law to cross-

examine the witnesses whose testimonies are intended to be used against the appellants, why should this Court not interfere at this stage itself instead of allowing the Adjudicating Authority to proceed on a futile exercise and which will only result in multiplicity of proceedings.

13. We are unable to agree. The Adjudicating Authority is currently seized of and in seisin of the complaints. We, at this stage, do not know as to which way the order of the Adjudicating Authority will go. It cannot also be said at this stage whether the Adjudicating Authority even if deciding against the appellants will rely upon the material before it qua which the appellants claim a right of cross-examination. All this can be known only when the Adjudicating Authority passes an order and qua which if the appellants are aggrieved, the appellants shall have their statutory remedy. Any interference by us at this stage in the proceedings of which the Adjudicating Authority is seized is thus uncalled for and would result in a situation which the Supreme Court has warned the High Courts to avoid. Reference may also be made to Union of India Vs. Kunisetty Satyanarayana AIR 2007 SC 906 reiterating that the reason why ordinarily a writ petition should not be entertained against a mere show cause notice is that at that stage the writ petition may be held to be premature— a mere show cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no

jurisdiction to do so and it is quite possible that after considering the reply to the show cause notice or after holding an enquiry, the authority concerned may drop the proceedings. It was further held that a writ lies only when some right is infringed and a mere show cause notice does not infringe the right of any one and it is only when a final order adversely affecting the party is passed, that the said party can be said to be having any grievance. The Supreme Court held that the writ jurisdiction being discretionary, should not ordinarily be exercised by quashing a show cause notice.”

23. Thus, in view of the scheme of the PMLA and the provisions of Section 26 of the Act as also the decision of the *Id. Division Bench in Arun Kumar Mishra (supra)*, this Court is of the opinion that the Petitioner ought to be relegated to the Appellate Tribunal for assailing the impugned order dated 13th December 2022.”

9. The Appellate Tribunal, PMLA is currently constituted and is functioning. The impugned order would be appealable to the Appellate Tribunal. Thus, this Court is not inclined to entertain the present writ petition. The Petitioner is relegated to avail of its Appellate remedy in accordance with law.

10. However, this Court would like to specifically note that it appears that the Respondent No.1 has failed to take into consideration the observations of this Court in the *U.S. Awasthi (supra)* case where the use of such disconcerting language as contained in paragraph 8 of the impugned order, has been frowned upon by this Court. Repeated use of templated

paragraphs, as though the principles of Natural Justice are mere rhetoric, is not permissible. The present order shall be treated as a warning to the concerned authority to not use such language as extracted below in its orders, failing which the Court would be constrained to direct action to be taken. For the sake of reference and clarity the objectionable paragraph in the impugned order is again extracted below:

*“It is always open the accused of the alleged offenders to **make more noise** about the so called violation of principles of natural justice and **such noise can be heard quite often in these type of matters with a view to drag the proceedings and scuttle the efforts of the authorities concerned to pin down the offenders to the crime in furtherance of the provisions of the Act. Ultimately it boils down to the fact that interference by this Authority on the ground of violation of principles of natural justice at every stage for the asking, would ultimately end in stifling the efforts of the authorities in implementing the provisions of the PMLA for which it is enacted.***”

Copy of this order be brought to the notice of the Respondent No.1, by Mr. Zoheb Hossein.

11. The Appellate Tribunal, PMLA shall ensure that the Respondent No.1. shall abide by the principles of natural justice as also the observations of this Court given in *Dr. U.S. Awasthi (supra)*. The Appellate Tribunal, PMLA would take the above observations into consideration and pass appropriate directions.

12. The Petitioner is permitted to approach the Appellate Tribunal, PMLA within a period of one month. The period during which the present writ petition was pending shall be deductible from the period of limitation for filing of the appeal.

13. The Appellate Tribunal, PMLA shall consider the appeal on facts as to whether the cross examination was rightly rejected by the Respondent No.1 or not. The observations of this Court *qua* the language of the impugned order used would not have a bearing on the merits of the case.

14. The Petitioner is also free to approach the Appellate Tribunal, PMLA against the confirmation order dated 29th March, 2023 passed by the Respondent No.1.

15. With these observations, this petition, along with all pending applications, is disposed of.

PRATHIBA M. SINGH, J.

APRIL 21, 2023

dj/kt