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

Date of Decision: 10th January, 2023

+ **W.P.(C) 125/2023 and CM APPL. 473/2023, 474/2023**

DR. U.S. AWASTHI

..... Petitioner

Through: Mr. Dayan Krishnan Sr Advocate
with Mr. Alok Kumar, Ms. Garima
Soni, Mr. Rohil Pandit and Mr.
Abhinav Shukla, Advocates.
(M:8447654889)

versus

ADJUDICATING AUTHORITY PMLA & ANR. Respondents

Through: Mr. Zoheb Hossain, Mr. Vivek
Gurnani, Ms. Sejal Aneja, Advocates.
(M: 9910794077)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present writ petition challenges the impugned order dated 13th December, 2022 passed by the Adjudicating Authority (PMLA), by which the application of the Petitioner - Dr. U. S. Awasthi seeking permission to cross-examine the three persons, namely, Sh. Rajiv Saxena, Sh. Amarendra Dhari Singh @ A.D. Singh, and Sh. Sushil Kumar Pachisia, has been rejected with the following observations: -

“12. 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.

13. Therefore, in the aforesaid facts and circumstance, I am of the view that no meaningful purpose will be served by cross examination of the persons sought and the request is not acceded to for the reasons discussed in the preceding paras.

3. The brief background of the matter is that the Central Bureau of Investigation registered FIR being **RC no. 221/2021/E/0009** dated 17th May, 2021 against the Petitioner. The said RC also contained certain scheduled offences under the Prevention of Money Laundering Act, 2002 (*hereinafter 'PMLA'*). The ECIR bearing **No. ECIR/DLZ0-1/43/2021** dated 20th May, 2021 was, thereafter, registered by Respondent no. 2 - Enforcement Directorate (*hereinafter 'ED'*) and investigation under the PMLA was commenced. A provisional attachment order **No.15/2022** was issued by the ED on 22nd September, 2022, wherein investment to the tune of Rs.42,15,01,623/- of the Petitioner and investment to the tune of Rs.8,80,17,793/- of the Petitioner's spouse were provisionally attached as

'proceeds of crime'. A show cause notice dated 25th October, 2022 was, thereafter, issued under Section 8(1) of the PMLA. At that stage, the Petitioner filed the application dated 25th November, 2022 seeking right to cross-examine the above-mentioned witnesses.

4. The premise on which the application has been filed is that under Section 11 of the PMLA, the Adjudicating Authority has to mandatorily adhere to the provisions of the Code of Civil Procedure, 1908 (*hereinafter* 'CPC'), and hence, grant the Petitioner the right to cross-examination. The said application has been rejected by the Adjudicating Authority by the impugned order dated 13th December, 2022, and the operative portion of the same has been extracted hereinabove.

5. Mr. Dayan Krishnan, Id. Sr. Counsel appearing for the Petitioner submits that the concept of cross-examination is not alien to PMLA proceedings. The Petitioner has filed the application on 25th November, 2022 at the initial stage itself, within a month of the issuance of the show cause notice dated 25th October, 2022. Thus, it is not the intention of the Petitioner to, in any manner, delay the proceedings. In proceedings before the Adjudicating Authority, it cannot be argued that cross-examination would not be permitted in any manner. He has further argued that there has been a retraction by one of the witnesses in respect of statements given before the Income Tax Department. Thus, in certain situations, the persons affected ought to be allowed to avail of the right of cross-examination.

6. According to Mr. Krishnan, Id. Sr. Counsel, in terms of the judgment of the Hon'ble Supreme Court in *K.L. Tripathi v. State Bank of India, (1984) 1 SCC 43*, the right of cross-examination is an inevitable part of fair play in any judicial or quasi-judicial proceedings.

7. Reference is made by Mr. Krishnan, Id. Sr. Counsel to Section 11 of the PMLA which vests powers of the Civil Courts in the Adjudicating Authority. On a query from the Court, as to whether the impugned order would be appealable to the Appellate Tribunal, he submits that under Section 26 of the PMLA it is only 'an order under this Act' which is appealable, and not a procedural order. Reference is made to the Prevention of Money-Laundering (Appeal) Rules, 2005 which define an 'order' under Rule 2(g) as an order passed by the Director under Section 13(2) of the Act or an order passed by the Adjudicating Authority under Section 8 of the Act, and no other order. Therefore, the impugned order in the present case is not an appealable order.

8. He submits that, in any event, following the principles laid down in ***Whirlpool Corporation v. Registrar of Trademarks, Mumbai & Ors. (1998) 8 SCC 1***, in case of the violation of principles of natural justice, or any such similar issue, the writ remedy can be availed of by the aggrieved person. The relevant paragraphs of the said judgment are extracted below:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective

and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

9. On the other hand, Mr. Zoheb Hossain, Id. Counsel appearing for the ED, submits that the order passed by the Adjudicating Authority is nothing but an order in exercise of the powers under Section 8 of the PMLA. Thus, the same is appealable. He disputes the fact that the Adjudicating Authority is strictly bound by the provisions of CPC. Reliance is placed upon Section 6(15) of the Act, as also, Section 11, to argue that the Adjudicating Authority may be vested with the power of Civil Courts, but the same need not be mandatorily followed and it can be governed by its own procedure.

10. It is further submitted by Mr. Hossain, Id. Counsel that the Id. Division Bench of this Court in *LPA 99/2014* titled *Arun Kumar Mishra v. Union of India and Anr*, was dealing with a similar situation of rejection of right to cross-examination, and therein, the Id. Division Bench has observed that the Petitioners herein would be capable of availing their statutory remedies, once the final order of the Adjudicating Authority is passed.

11. He further argues that the Appellate Tribunal entertains appeals against the orders rejecting requests for cross-examination. He relies upon

the decision dated 19th December, 2022 passed by the Appellate Tribunal in *Abbeys Realcon LLP v. Directorate of Enforcement PMLA, FPA-PMLA-5526/DLI/2017 & FPA-PMLA-5227/DLI/2017*, in support of this submission.

12. Finally, he relies upon the recent order of this Court in *Sanjay Jain (IN JC) v. Directorate of Enforcement, W.P.(C) 17784/2022*, wherein the Court permitted even a non-party to file an appeal before the Appellate Tribunal on the ground that a person who is affected by an order would be a 'person aggrieved'. Thus, as per Mr. Hossain, the Petitioner ought to be relegated to the alternative remedy.

13. The Court has perused the impugned order passed by the Adjudicating Authority in the present case. At the outset, this Court deals with the issue of maintainability.

Maintainability:

14. The provision governing Appeals under the PMLA is Section 26, which reads as under:-

“26. Appeal to Appellate Tribunal. — (1) Save as otherwise provided in sub-section (3), the Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal.

(2) Any [reporting entity] aggrieved by any order of the Director made under sub-section (2) of section 13, may prefer an appeal to the Appellate Tribunal.

(3) Every appeal preferred under sub-section (1) or sub-section (2) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or Director is received and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1) or sub-section (2), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Director, as the case may be.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of filing of the appeal.”

Thus, appeals under this provision lie against ‘an order’ of the Adjudicating Authority ‘under this Act’.

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 Id. 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.

Cross-examination under PMLA:

24. Before parting with the present petition, the Court notes the disconcerting language used in the impugned order, while rejecting the application for cross-examination and terming the same as ‘noise being caused’.

25. This Court wishes to emphasise that cross-examination is an integral feature of due process and reasonable opportunity. In **K.L.Tripathi (supra)**,

the Supreme Court has observed as under:

*“32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, **right of cross-examination must inevitably form part of fair play in action** but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, **by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly.** This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement”*

26. The right to cross-examination may be invoked by any person who wishes to cross-examine a witness. There has to be a reasonable basis for seeking the said right which would have to be seriously considered by the Adjudicating Authority and not merely in a routine or an indignant manner. The powers of the Adjudicating Authority are spelt out in Section 11 of PMLA, which are the ‘same powers’ as those of a civil court trying a suit, in respect of certain aspects such as discovery and inspection, enforcing attendance of persons, directing production of records, receiving evidence on affidavits, etc. For the purposes specified in Section 11, the proceedings are deemed to be ‘judicial proceedings’. However, it is also clarified in

Section 6 as under:

“6. Adjudicating Authorities, composition, powers, etc.—

(1) to (14).....

(15) The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to regulate its own procedure.”

27. Thus, while the Adjudicating Authority has all the powers of a civil court, it is free to regulate its own procedure. Cross-examination need not be permitted in every case. At the stage of Section 8 proceedings, if cross examination is permitted in every case, it may result in delay and defeat the purpose of the said adjudication. However, whenever deemed necessary, the opportunity of cross-examination ought to be afforded. It cannot be presumed that the said request is to delay or scuttle. The request for cross examination must be examined seriously and not in a routine manner. The language used by the Adjudicating Authority, in the impugned order, leaves a lot to be desired.

28. In view of the above discussion, the Petitioner is relegated to the Appellate Tribunal under PMLA for agitating the challenge to the impugned order. Since the entire process of adjudication is to be concluded within 180 days, the present writ petition is directed to be transmitted by the Registry to the Appellate Tribunal, so that the same can be taken up in an expeditious manner. Considering that it is a short application seeking permission to cross examine, the Appellate Tribunal shall decide the challenge to the said order

or the application for cross-examination, within a period of two weeks from the date of first listing.

29. In the present case, though not spelt out, during the course of hearing before this Court, one of the reasons for seeking cross examination is due to the alleged retraction by one particular witness of the statements made by him to the Income Tax Department. This submission shall be considered by the Tribunal.

30. It is clarified that the period during which the present writ petition remained pending before this Court as also the period of two weeks granted to the Appellate Tribunal to adjudicate the appeal shall also stand excluded from the 180 days period to be computed under the Proviso to Section 5 of the PMLA.

31. Needless to add, the observations of this Court shall not bind the Appellate Tribunal which shall decide the appeal on its own merits.

32. List before the Appellate Tribunal on 18th January, 2023.

33. With these observations, the writ petition, along with all pending applications, if any, is disposed of.

34. Copy of this order along with the electronic record be sent by the Registry to the Registrar, Appellate Tribunal for Forfeited Property (ATFP), through email [Email: registrar-atfp@gov.in].

**PRATHIBA M. SINGH
JUDGE**

**JANUARY 10, 2023
MR/hh**