

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CRM(M) No. 160/2020

Reserved on : 07.08.2024

Pronounced on: 14.08.2024

Ahsan Ahmad Mirza, Aged about 52 years

S/o Mr. Mohi-ud-Din Mirza,

R/o H.No.05 Mirza Bagh, Nigeen, Srinagar

...Petitioner(s)

Through:- Mr. Shariq J. Reyaz, Advocate with
Mr. M.Syed Bhat, Advocate

V/s

Directorate of Enforcement

Government of India,

(Represented through its Deputy Director)

Srinagar Zonal Office, Durrani House

Durrani House, Raj Bagh, Srinagar-190008

...Respondent(s)

Through:-Mr. .S.V.Raju ASGI with
Mr. Zoheb Hossein and Manin Jain
Special Counsel (through virtual mode)
Mr. T.M. Shamshi, DSGI with
Mr. Faizan and Ms. Rehana Qayoom,
Advocates
Ms. Monika Kohli, Advocate
(through virtual mode)

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. In this petition filed under Section 482 of the Code of Criminal Procedure, 1973, the petitioner seeks quashing of a complaint filed by the respondent against him alleging commission of offence of

money laundering under Section 3 of the Prevention of Money Laundering Act, 2002 [“PMLA”] as also the impugned prosecution launched against the petitioner pursuant to the order of cognizance dated 2nd December, 2019. The petitioner also prays for quashing of order dated 18th March, 2020 passed by the Designated Special Court (the Court of Principal Sessions Judge, Srinagar), whereby the charges have been framed against the petitioner.

2. The short point that is raised by the learned counsel for the petitioner is that the complaint is eventually instituted by the respondents for prosecution of the petitioner under Section 3 and 4 of PMLA and what is alleged against the petitioner is misappropriation of funds of JKCA with criminal conspiracy with other accused persons and that the funds so misappropriated have been laundered by layering them into other bank accounts thereby generating proceeds of crime within the meaning of Section 2(1)(u) of PMLA.
3. It is submitted that with regard to the aforesaid allegation of misappropriation of JKCA funds, the CBI has already registered an FIR for commission of offences under Sections 120-B, 406 and 409 RPC. Both the aforesaid offences i.e. S.406 and S.409 RPC, it is contended, are not the scheduled offences as defined under Section 2(y) of PMLA. It is, thus, argued that commission of scheduled offence is a *sine qua non* for offence of money laundering and,

therefore, in the absence of commission of scheduled offence, there could be no proceeds of crime and no offence under PMLA. It is argued that the very basis of launching prosecution against the petitioner for commission of offence of money laundering defined under Section 3 and punishable under Section 4 of PMLA was that Section 120-B RPC is a scheduled offence and, therefore, in view of the law laid down by this Court in its judgment dated 15th October, 2019 passed in WP(C) No.2780/2019 titled **Ahsan Ahmad Mirza v. Enforcement Directorate and others**, registration of case under PMLA was permissible. However, the legal position enunciated by a Single Bench of this Court is now no longer a good law in view of the issue having been decided by the Hon'ble Supreme Court in **Pavana Dibbur v. Directorate of Enforcement, AIR 2024 SC 117**. In the said case, the Supreme Court has held as under:-

“27. While we reject the first and second submissions canvassed by the learned senior counsel appearing for the appellant, the third submission must be upheld. Our conclusions are:

a. It is not necessary that a person, against whom the offence under Section 3 of the PMLA is alleged, must have been shown as the accused in the scheduled offence;

b. Even if an accused shown in the complaint under the PMLA is not an accused in the scheduled offence, he will benefit from the acquittal of all the accused in the scheduled

offence or discharge of all the accused in the scheduled offence. Similarly, he will get the benefit of the order of quashing the proceedings of the scheduled offence;

c. The first property cannot be said to have any connection with the proceeds of the crime as the acts constituting scheduled offence were committed after the property was acquired;

d. The issue of whether the appellant has used tainted money forming part of the proceeds of crime for acquiring the second property can be decided only at the time of trial; and

e. The offence punishable under Section 120-B of the IPC will become a scheduled offence only if the conspiracy alleged is of committing an offence which is specifically included in the Schedule.”

It is, thus, argued that the facts, as alleged in the complaint filed by the respondent, ex facie do not disclose commission of offence of money laundering, in that, the money alleged to have been laundered by the petitioner is not generated/derived from a criminal activity relating to a scheduled offence.

4. As is held in **Pavana Dibburr (supra)**, conspiracy to commit an offence, which is not a scheduled offence, will not make such offence punishable under Section 120-B RPC(IPC) a scheduled offence. Offence under Section 120-B shall become a scheduled offence only if the conspiracy alleged is of committing an offence

which is specifically included in the schedule. It was, thus, urged that in the instant case the conspiracy alleged is of committing offences under Section 406 & 409 RPC, which are both non-scheduled offences.

5. *Per contra*, the stand of the respondent, as was articulated by Mr. S.V. Raju, learned Additional Solicitor General of India, is that though the CBI charge-sheet filed before the competent Court of law is in respect of offences under Section 120-B, 406 and 409 RPC, yet a perusal of the CBI charge-sheet would reveal the ingredients of commission of scheduled offences punishable under Section 411 and 424 RPC. It is, thus, argued that in view of the fact that as per the CBI charge-sheet, the scheduled offences under Sections 411 and 424 RPC are also made out and, therefore, there is no escape for the petitioner from facing prosecution under PMLA when he has been found to have indulged in activities connected with the proceeds of crime, an offence under Section 3 of PMLA and punishable under Section 4 of PMLA.
6. Having heard learned counsel for the parties and perused the material on record, the questions that call for determination in this petition are as under:-
 - i) Whether for registration of a case for offence of money laundering defined under Section 3 and punishable under Section 4 of PMLA and launching of prosecution before the

designated Special Court, registration of an FIR/case for scheduled offence is a condition precedent and a sine qua non?

- ii) Whether the Enforcement Directorate can examine the case registered or the charge-sheet filed by the investigating agency in respect of commission of various offences under IPC/RPC and reach at an independent opinion that apart from the offence alleged, offence(s) scheduled under PMLA is/are also made out to assume jurisdiction to register ECIR and launch prosecution in respect of offence of money laundering under Section 3 punishable under Section 4 of PMLA?

- 7. The facts, as are projected before this Court by both the sides, are not in dispute. On the allegations of misappropriation of funds by JKCA, the Police Station Ram Munshi Bagh, Srinagar (J&K) had registered an FIR No.27/2012 dated 10.03.2012 under Section 120-B, 406 and 409 of the Ranbir Penal Code, 1989 ["RPC"]. The FIR was registered against the petitioner and one Mohd. Saleem Khan, the then office bearers of the JKCA. During the course of investigation by the police and on the intervention made by this Court, investigation in the FIR was transferred to the Central Bureau Investigation (CBI).
- 8. Upon completion of investigation, the CBI has filed a charge-sheet against six accused persons including the petitioner for commission

of offences under Sections 120-B, 406 and 409 RPC, which is pending consideration before Chief Judicial Magistrate, Srinagar. It is not in dispute that Sections 406 and 409 RPC/IPC are not the scheduled offences. As is the legal position amply clarified by the Supreme Court in **Pavana Dibbur's case** (supra), offence punishable under Section 120-B RPC or IPC shall not be a scheduled offence unless conspiracy alleged is of committing an offence specifically included in the schedule. Viewed thus, the charge-sheet, which is pending trial before the Chief Judicial Magistrate, Srinagar is not in respect of any offence, which is specifically included in the schedule of PMLA.

9. Going by the charge sheet filed by the CBI, it is evident that offence of money laundering, as defined under Section 3 of PMLA, is not made out. For commission of offence of money laundering under Section 3 of PMLA, it is required to be demonstrated that the accused has directly or indirectly, knowingly or unknowingly involved in any process or activity connected with the proceeds of crime. Such activity could be concealment possession, acquisition or use of the proceeds of crime and projecting it as untainted property.
10. "Proceeds of crime" is defined in Section 2(1)(u) clearly means any property derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence. Coming

to the charge-sheet presented by the CBI before the CJM, Srinagar, no scheduled offence is disclosed to have been committed. From a plain reading of Section 3 PMLA, it appears that offence under Section 3 PMLA can only be committed after a scheduled offence is committed. It is, thus, trite that commission of a scheduled offence is sine qua non for existence of proceeds of crime and commission of offence of money laundering under Section 3 of the PMLA Act.

11. In the case of **Vijay Madal Lal Choudhary v. Union of India, (2022) SCC Online SC 929**, Hon'ble Supreme Court in paragraph No.253 has held thus:-

“53. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her,

there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular [Section 2\(1\)\(u\)](#) read with [Section 3](#). Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now."

12. From a reading of paragraph No.253 reproduced herein above, it clearly comes out that the authorities under PMLA cannot resort to action against any person for money laundering only on the assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed unless the same is registered with jurisdictional police or pending enquiry by way of complaint before the competent forum.
13. In the instant case, indisputably, the jurisdictional police, the CBI has not registered any case for commission of any scheduled offence. Enquiry by way of complaint before the CJM, Srinagar is also not in respect of any scheduled offence. In the absence of there being any case registered for commission of scheduled offence or any case pending enquiry or trial in respect of scheduled offence, authorities under PMLA have no jurisdiction to register ECIR and launch prosecution for offence of money laundering under Sections 3/4 of PMLA. When there is no scheduled offence having been registered or pending enquiry or trial, there are no proceeds of

crime and, thus, there is no offence of money laundering under Section 3 of the Act.

14. Argument of Mr. Raju, learned Additional Solicitor General of India that the Enforcement Directorate is not bound by the conclusions drawn by the CBI and it can independently look into the material contained in the charge-sheet to come to a conclusion that the petitioner has committed a scheduled offence to justify registration of case under PMLA, cannot be accepted for more than one reasons. The Enforcement Directorate is not an authority or investigating agency in any manner superior to CBI, nor is it vested with or conferred the power and jurisdiction to sit in appeal against the investigation made and the conclusion drawn by the later. The Enforcement Director being a parallel investigating agency in respect of crimes under PMLA must accept the investigation carried by another investigating agency and the conclusion drawn by the said agency in respect of commission of the offences other than the offences under PMLA.

15. The CBI has investigated the matter and presented charge-sheet before the Chief Judicial Magistrate, Srinagar for commission of offences, which are not specifically mentioned in the schedule. It is now for the Court of Chief Judicial Magistrate to consider the entire material collected during investigation and determine as to what offences are disclosed to have been made out against the accused

arraigned therein. The Enforcement Directorate, if so permitted, may approach the Chief Judicial Magistrate and canvass before it that apart from the offences of Section 120-B, 406 and 409 RPC, scheduled offences like Section 411 and 424 RPC are also made out. If the Court of Chief Judicial Magistrate frames charges against the petitioner for any of the scheduled offences, it shall be open for the Enforcement Directorate to register fresh ECIR and launch prosecution against the petitioner, if he is found to have been involved in the commission of offence of money laundering under Section 3 PMLA. The Enforcement Directorate cannot be permitted to preempt the outcome of an exercise, which is yet to be undertaken by a competent Court of law at the stage of charge/discharge. As on date, the charge-sheet presented by the CBI is only respect of Section 120-B, 406 and 409 RPC, which are admittedly not the scheduled offences.

16. From a perusal of the complaint filed by the respondent before the Designated Special Court it clearly transpires that the ECIR was registered and prosecution was launched by the respondents only on the assumption that Section 120-B RPC in respect of which there was a case registered by the CBI against the petitioner was a scheduled offence.
17. To justify their stand, the respondents placed reliance upon a judgment of this Court in Ahsan Mirza (*supra*). As explained above,

the legal position has undergone a change with the Hon'ble Supreme Court laying down authoritatively in **Pavana Dibbur's case** that offence punishable under Section 120-B of IPC will become a scheduled offence only if the conspiracy alleged is of committing an offence which is specifically included in the schedule. The conspiracy alleged in the charge-sheet filed by the CBI before the Chief Judicial Magistrate is of commission of offence under Section 406 and 409 RPC, which are both non scheduled offences.

18. That being the clear position emerging from the facts and circumstances of the case, it cannot be said that notwithstanding the fact that there is no case registered or charge-sheet filed before the competent Court of criminal jurisdiction for commission of scheduled offence, the Enforcement Director can still register and launch prosecution for the offence of money laundering under Sections 3/4 of PMLA on the assumption that the material collected by the investigating agency(CBI) does disclose commission of scheduled offence. The Enforcement Directorate cannot be allowed assume jurisdiction of the competent Court of criminal jurisdiction and arrived at conclusions different from those arrived at by CBI which has investigated the matter and presented the charge sheet before the learned CJM, Srinagar.

19. With a view to maintaining harmony and to avoid contradictory stand by the two investigating agencies operating in their independent fields, it is necessary that Enforcement Directorate respects the decision of the CBI unless it is varied or modified by a competent Court of criminal jurisdiction.
20. For the foregoing reasons, I find merit in the plea of the learned counsel for the petitioner and regret my inability to accept the argument of learned Additional Solicitor General of India which he very vehemently projected before me. This petition is, accordingly, allowed. The complaint, the charge-sheet and the charges framed by the designated Special Court (Principal Sessions Court, Srinagar) vide order dated 18.03.2020 are quashed. It is, however, made clear that notwithstanding quashing of the charges, it shall remain open to the Enforcement Director to register ECIR afresh and launch prosecution against the petitioner under Section 3 of the PMLA if ultimately the Court of Chief Judicial Magistrate, Srinagar frames charges for offence/offences, which are specifically mentioned in the schedule of PMLA.

(Sanjeev Kumar)
Judge

Srinagar.
14.08.2024
Vinod.

Whether the order is speaking : Yes
Whether the order is reportable: Yes