



IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C). NO.14166 OF 2015

(In the matter of an application under
Articles 226 and 227 of the Constitution of India)

Deepak Gupta ***Petitioner***

-versus-

***The Adjudicating Authority, New
Delhi-1 and others*** ***Opp. Parties***

Advocate for the Parties :

For Petitioner : Mr. Gouri Mohan Rath, Advocate

For Opposite Parties : Mr. Subrat Sarangi, Advocate
(For Opposite Party No.3)
Mr. Bibekananda Nayak, CGC
(For Enforcement Directorate)
Mr. B.K. Padhi, CGC

**CORAM:
JUSTICE K.R. MOHAPATRA**

Heard and disposed of on 07.08.2024

J U D G M E N T

1. This matter is taken up through hybrid mode.
2. Petitioner in this writ petition assails the initiation proceeding under Section 8 of the Prevention of Money Laundering Act, 2002 (for brevity 'the Act, 2002') and consequential show cause notice dated 19th June, 2015 under Annexure-5. He further prays to keep the said proceeding in

abeyance till completion of trial in VGR No.05 of 2013 pending in the Court of learned Special Judge, (Vigilance), Keonjhar.

3. Mr. Rath, learned counsel for the Petitioner submits that the initiation proceeding under Section 8 of the Act, 2002 is *per se* illegal as the Petitioner being an accused in the proceeding under the Act 2002 is compelled to disclose the sources of income, earning or assets, out of which or by means of which, he has acquired the property, provisionally attached. He can make such a disclosure only at the stage of recording of the statement of the accused. Trial under the Act, 2002 is continuing and it has not yet reached the stage of recording the accused statement. At this stage, if the Petitioner discloses his defence, it will be utilized against him to prove the charges, which is indirect violation of Article 20(3) of the Constitution of India. He, therefore, submits that the proceedings initiated under Section 8 of the Act, 2002 should wait till completion of the trial in VGR No.05 of 2013 (*supra*). It is further submitted that in the case of ***Vijay Madanlal Choudhary and others -v- Union of India and others***, reported in ***2022 SCC OnLine SC 929***, Hon'ble Apex Court held the provisions of the Act, 2002 to be *intra vires*. But, at para-159, Hon'ble Supreme Court observed as under:

“159. In the context of the 2002 Act, it must be remembered that the summon is issued by the Authority under Section 50 in connection with the inquiry regarding proceeds of crime which may have been attached and pending adjudication before the Adjudicating Authority. In respect of such action, the designated officials have been empowered to summon any person for collection of information and evidence to be presented before the Adjudicating Authority. It is not necessarily for initiating a prosecution against the noticee as such. The power entrusted to the designated officials under this Act, though couched as

investigation in real sense, is to undertake inquiry to ascertain relevant facts to facilitate initiation of or pursuing with an action regarding proceeds of crime, if the situation so warrants and for being presented before the Adjudicating Authority. It is a different matter that the information and evidence so collated during the inquiry made, may disclose commission of offence of money-laundering and the involvement of the person, who has been summoned for making disclosures pursuant to the summons issued by the Authority. At this stage, there would be no formal document indicative of likelihood of involvement of such person as an accused of offence of money-laundering. If the statement made by him reveals the offence of money-laundering or the existence of proceeds of crime, that becomes actionable under the Act itself. To put it differently, at the stage of recording of statement for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime is, in that sense, not an investigation for prosecution as such; and in any case, there would be no formal accusation against the noticee. Such summons can be issued even to witnesses in the inquiry so conducted by the authorised officials. However, after further inquiry on the basis of other material and evidence, the involvement of such person (noticee) is revealed, the authorized officials can certainly proceed against him for his acts of commission or omission. In such a situation, at the stage of issue of summons, the person cannot claim protection under Article 20(3) of the Constitution. However, if his/her statement is recorded after a formal arrest by the ED official, the consequences of Article 20(3) or Section 25 of the Evidence Act may come into play to urge that the same being in the nature of confession, shall not be proved against him. Further, it would not preclude the prosecution from proceeding against such a person including for consequences under Section 63 of the 2002 Act on the basis of other tangible material to indicate the falsity of his claim. That would be a matter of rule of evidence.”

(emphasis supplied)

3.1 It is his submission that the Petitioner was in custody when notice under Section 8(1) of the Act, 2002 was issued to show cause as to why the provisional order of attachment should not be made final. In the said notice to show cause the Petitioner was asked to disclose the sources of 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 of the Act, 2002. Thus, it would amount to a confessional statement and may be utilized against him during trial. Since the onus of proof of the charges is on the prosecution, the Petitioner should not be compelled to make a disclosure with regard to the sources of income, earning or assets, out of which or by means of which, he acquired the property attached. It has also been clarified so in the case of *Vijay Madanlal Choudhary* (supra), wherein Hon'ble Supreme Court has categorically held that *"However, if his/her statement is recorded after a formal arrest of the Enforcement Directorate Official, the consequences of Article 20(3) of Constitution of India and Section 25 of the Evidence Act may come into play to urge that the same being in the nature of confession shall not be proved against him."* Thus, the aforesaid observations of Hon'ble Supreme Court makes it clear that the Petitioner should not have been compelled to disclose the sources of income, earning and assets, by which he has acquired the property attached under Sub-Section (1) of Section 5 of the Act, 2002. He, therefore, submits that the writ petition should be allowed by suspending the proceedings initiated under Section 8 of the Act, 2002 till the trial in VGR No.05 of 2013 pending before learned Special Judge, (Vigilance), Keonjhar is completed.

4. Mr. Nayak, learned counsel for Enforcement Directorate submits that the Petitioner was not in custody at the time, notice to show cause under Annexure-5 was issued. The proceeding under Section 8 of the Act, 2002 is civil in nature. By filing this writ

petition, the Petitioner essentially assails the validity of the provision under Section 8 of the Act, 2002, which has already been held *intra vires* by Hon'ble Supreme Court in the case of **Vijay Madanlal Choudhary** (supra). The plea raised by the Petitioner with regard to the recording of statement, while in custody of the Enforcement Directorate does not arise as the Petitioner was not in custody at that point of time. Since he was never in custody of Enforcement Directorate, the aforesaid observations referred to by Mr. Rath, learned counsel for the Petitioner has no application in the instant case. He, therefore, submits that the writ petition, being devoid of any merit, should be dismissed.

5. Heard learned counsel for the parties.
6. Perused the materials available on record, provisions of the Act as well as the case law cited.
7. Before delving into the rival contentions of the parties, it must be made clear that *vires* of the Act, 2002 was in question before Hon'ble Supreme Court in the case of **Vijay Madanlal Choudhary** (supra), which has been held *intra vires*.

7.1 Section 8(1) of the Act reads as under:

“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, 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 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.”

8. Pursuant to the provisional order of attachment of the property of the Petitioner under Section 5(1) of the Act, 2002, a proceeding under Section 8 of the Act, 2002 has been initiated. As required, under Section 8(1) of the Act, 2002, notice to show cause under Annexure-5 was issued to the Petitioner calling upon him to indicate his sources of 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 of the Act, 2002. Thus, after provisional attachment of the property under Section 5(1) of the Act, 2002, it is incumbent on the Adjudicating Authority to issue notice to the person whose property has been provisionally attached calling upon him to show cause in terms of Section 8(1) of the Act. As such, there is no procedural error in issuing of such notice.

9. Mr. Rath, learned counsel for the Petitioner essentially assails that such a proceeding should not have been initiated or continued during continuance of VGR No.05 of 2013, which was then pending before learned Special Judge, (Vigilance), Keonjhar. Pendency of VGR No.05 of 2013 has nothing to do with initiation

or continuance of the proceeding under Section 8(1) of the Act, 2002 as the Adjudicating Authority is under legal obligation to issue such notice.

10. The next question that arises for determination is that whether the Petitioner should be compelled to disclose the sources of his income, earning or assets, out of which or by means of which, he has acquired the property under provisional attachment. It is submitted that while in custody in VGR No.05 of 2013, the Petitioner was compelled to make a statement with regard to the sources of income, earning and assets, out of which he acquired the property under provisional attachment. It is also submitted that the same is in violation of Article 20 (3) of the Constitution of India. The issue raised by Mr. Rath, learned counsel for the Petitioner has already been clarified by Hon'ble supreme Court at para-159 of the *Vijay Madanlal Choudhary* (supra). It has been clarified that if his/her statement is recorded after a formal arrest by the Enforcement Directorate Official, the consequences of Article 20(3) of the Constitution of India or Section 25 of the Evidence Act may come into play to urge that the same, being in nature of confession, shall not be proved against him. Mr. Rath, learned counsel fairly concedes that the Petitioner was never taken to custody by the Enforcement Directorate. Thus, the Petitioner was not in custody of the Enforcement Directorate, while notice under Annexure-5 was issued. As such, the question of the violation of Article 20 (3) of the Constitution of India or section 25 of the Evidence Act does not arise at all.



11. In view of the discussions made above, this Court is of the considered opinion that neither initiation of the proceeding under Section 8 of the Act, 2002 nor issuance of notice to show cause under Section 8(1) of the said Act vide notice dated 19th June, 2015 under Annexure-5 is illegal.

12. Accordingly, this writ petition, being devoid of any merit, stands dismissed. The Adjudicating Authority is at liberty to proceed with the proceeding under Section 8 of the Act, 2002.

13. While computing the period of one hundred and eighty days *vis-à-vis* the interim order passed in this case, the Adjudicating Authority shall keep in mind the third proviso to Sub-Section 5(1) (b) of the Act, 2002.

14. Interim order dated 28th August, 2015 passed in Misc. Case No.13754 of 2015 stands vacated.

15. It is open to the Petitioner to file his show cause reply, if not filed in the meantime, within a period of ten days hence.

Urgent certified copy of this judgment be granted on proper application.

(K.R. Mohapatra)
Judge

High Court of Orissa, Cuttack
The 7th Day of August, 2024/ Madhusmita