IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO. D-5260 of 2015

Present:-
Mr. Justice Sajjad Ali Shah, Chief Justice
Mr. Justice Muhammad Junaid Ghaffar.

Shoaib Ahmed Shaikh and others ---------------------------- Petitioners
Versus
Federation of Pakistan & others ------------------------------- Respondents

C. P. NO. D-3890 of 2015

M/s Axact Pvt. Ltd. & another --------------------------------- Petitioners
Versus
Federation of Pakistan & others ------------------------------- Respondents

Date of hearing: **03.12.2015**

Date of judgment: **04.01.2016**

Petitioners: **Through Mr. Abid S. Zuberi and Ayan Memon Advocates.**

Respondent No. 1 **Through Mr. Salman Talibuddin Additional Attorney General of Pakistan and Mr. Asim Mansoor Khan DAG.**

Respondent No. 3 **Through Mr. Zahid Jamil Advocate.**

Respondent No. 4 **Through Mr. Salahuddin Gandapur and Mr. Shahab Usto, Advocates.**

Respondent No.6: **Through Mr. Khalid Hayat, Advocate**

J U D G M E N T

Muhammad Junaid Ghaffar, J. Both these petitions involve somewhat similar controversy, hence, they have been taken up for hearing together and are being decided through this common judgment. In CP No.D-3890 of 2015, the petitioners have impugned seizure /freezing of their accounts as well as sealing of the business premises and the equipment lying therein. Whereas, in CP No.D-5260 of 2015, the petitioners have challenged vires of certain provisions of the Anti-Money Laundering Act, 2010, ("AMLA Act"), and have also impugned order dated 29.7.2015, passed by the learned District & Sessions Judge, Karachi South, whereby, the FIA authorities have been granted permission to freeze the bank accounts of the petitioners under the AMLA Act.

2. Briefly stated, the case of the petitioners is that they claim to be a leading Information Technology Company, having several independent and diverse business units, which also includes launching of BOL Television and BOL News. It is further stated that pursuant to an Article published in New York Times on 18.5.2015, respondent No.3, conducted raid on the business premises of the petitioners and various equipment, including computers and other information technology related material was impounded, whereafter FIR No. 07 of 2015 was lodged against the petitioners, and others. Subsequently, the petitioners No. 1 & 2 were arrested on 27.5.2015. It is further stated that on 30.5.2015 respondent No. 4 moved an application under AMLA Act, before Judicial Magistrate, Karachi South, seeking permission for attachment of properties which was dismissed for lack of jurisdiction, and, thereafter, on 11.6.2015 the same respondent moved another identical application before District & Sessions Judge, Karachi South, which was also dismissed on 12.6.2015 for failure to comply with the provisions of Section 21(2) of the AMLA Act. Thereafter, the respondent Nos. 2 & 4 submitted an interim charge sheet in FIR No.7 of 2015, wherein, it was stated that a separate complaint under Section 21(2)(a) of the AMLA Act, shall be submitted after completion of legal formalities. It is further submitted that the respondent No.4, thereafter surreptitiously, on 7.6.2015, claiming to be an Officer authorized under Section 24 of the AMLA Act, submitted an application under Section 155 Cr.P.C read with Section 21 of the AMLA Act, before District & Sessions Judge, Karachi South, and on 18.6.2015, the respondent No. 4 was granted permission to investigate the case. Subsequently, the petitioners filed C.P. No. D-3890 of 2015 before this Court, whereby the action(s) taken by respondent /FIA, were challenged, including freezing of bank accounts, and assets, wherein, notices were issued, It is further stated that in the meanwhile, on 24.7.2015, respondent No. 4 filed Cr.Misc. Application No. 913 of 2015 in Complaint No.16 of 2015 dated 16.6.2015, before the District & Sessions Judge, Karachi South, under Section 8 of the AMLA Act and on the same date, the learned District Judge passed an order to the effect that as to whether, a notice is required to be issued to the accused persons or not, whereafter, impugned order 29.7.2015 was passed, whereby, the said application was granted, and Investigation Officer was granted permission in terms of Section 8 of the AMLA Act, to freeze the accounts of the petitioners and to proceed further, without any notice to the petitioner. Such order has now been impugned through C.P No.D-5260 of

2015. In addition to the impugned order, the petitioners have also challenged vires of certain provisions of the AMLA Act, as being contrary to the Constitution.

3. Mr. Abid S. Zuberi learned Counsel for the petitioner has contended that the respondents had initially directed the Bankers of the petitioners to freeze the accounts without any lawful authority and order from any Court, and despite having knowledge regarding pendency of C.P. No.D-3890 of 2015 on which notices were already issued to them, they have surreptitiously and without informing the District & Sessions Judge, regarding pendency of such proceedings, have obtained the impugned order, whereby, the bank accounts of the petitioners have been frozen under the AMLA Act. He has further contended that even otherwise, though, there is no order regarding freezing of the property / business premises of the petitioners, the respondents have denied any access to the said premises and have in fact practically taken over the entire business premises of the petitioners. Learned Counsel has further contended that after dismissal of Misc. Application by the Judicial Magistrate as well as the District & Sessions Judge and filing of interim Challan in FIR No. 7 of 2015, there was no justification for the respondents to continue with the freezing of the accounts. He has further submitted that all along, the accounts were practically frozen since the day of lodging of the FIR, without any lawful authority and or order, whereas, the petitioners have been unable to pay even salaries of their employees and such conduct of the respondents has crippled the entire business operation of the petitioners. Learned Counsel further submitted that the impugned order has been obtained through fraud, as the learned District & Sessions Judge, Karachi South, was never informed about the proceedings pending before this Court, and, further even otherwise, the District & Sessions Judge could not have passed the impugned order without granting an opportunity of being heard to the petitioners. Learned Counsel has further submitted that though Section 8 of the AMLA Act, does not provides for issuance of a notice mandatorily to the petitioners, however, propriety demands that notwithstanding this, a notice should have been issued as it violates the fundamental principle, that nobody should be condemned unheard. In support of his contention the learned Counsel has relied upon the cases reported in *Choudhry Muhammad Akram Warraich V. Chairman, National Accountability Bureau, Islamabad and others (2010 YLR 2766), Choudhry Shujat Hussain V. The*

State (1995 SCMR 1249), and *Nisar Ahmed V. The State (PLD 1971 SC 174).*

4. Conversely Mr. Salman Talibuddin, learned Additional Attorney General has contended that the petitioners had earlier filed a Suit bearing No. 854 of 2015 in which somewhat similar prayer was made, whereas, the plaint in the said Suit was rejected under Order VII Rule 11 CPC by a learned Single Judge of this Court against which no appeal was preferred, and therefore, instant petitions are not maintainable. He has further contended that the respondents have not seized / sealed the entire building premises, and, it is only to the extent of the freezing of bank accounts, that the impugned order dated 29.7.2015 has been passed, whereas, the respondents are in the process of retrieving huge data from the computers installed in the said building premises, and therefore, as a measure of abundant precaution, and to avoid theft of data, a very limited access has been allowed to the petitioners. Learned Additional Attorney General has further contended that the petitioner No.3 claims to be engaged in the business of Education related services, whereas, the Memorandum and Articles of Association filed before the Security and Exchange Commission of Pakistan, does not states so, which amounts to violation of the statutory provisions of the Companies Ordinance, 1984. He also referred to Sections 206 and 305 of the Companies Ordinance 1984 in this regard, and relied upon the case of *Light Metal and Rubber Industries Pvt. Limited and others V. Sarfraz Quaudri (2011 CLD 1485) and Government of Sindh and another V. Mst. Sirtaj Bibi and another (PLD 2001 Karachi 442).*

5. Mr. Zahid Jamil, learned Counsel for respondent / (FIA) has contended that the petitioners are engaged in illegal business activities, including selling of fake degrees, whereas, the respondents have acted in accordance with law and have properly filed a separate challan / complaint in respect of the alleged violation of the AMLA Act and on an application under Section 8 of the AMLA Act, the impugned order has been passed, whereby, permission has been granted to freeze the bank accounts of the petitioners. He has further contended that the petitioners have alternate remedy, as the matter is to be further proceeded under the AMLA Act by the Investigating Officer, and, if they are successful in discharging the onus on them, the freezing order can be recalled, upon satisfaction of the Investigation Officer. Insofar as issuance of notices is

concerned, the learned Counsel has contended that there is no provision in the AMLA Act to grant any audience to the accused persons, before an order, permitting freezing of accounts can be passed as otherwise it would defeat the very purpose of AMLA Act. Per learned Counsel similar provisions exists in the Prevention of Money-laundering Act, 2002, in India for this purpose and there are several judgments of the Indian jurisdiction, whereby, it has been held that no prior notice is mandatory to the accused persons, before passing of any such order and the learned District & Sessions Judge, after relying upon such precedents has been pleased to pass the impugned order. He has relied upon the case of*1. M. Saraswathy 2. R. Devadass V. The Registrar Adjudicating Atrocity (Under Prevention of Money Laundering Act, 2002) (Crl. O.P. No. 2240 of 2011) passed by the Madras High Court, Gautam Khaitan &another V. Union of India and another (W.P.(C) 8970 of 2014 passed by Delhi High Court, Alive Hospitality and Food Pvt. Limited V. Union of India (C/SCA/4171/2012) passed by the Gujarat High Court* and *A. Akramunnisa Ghori Vs. The Chairperson Prevention of Money Laundering, Union of India, New Delhi (Writ Petition Nos. 1912, 2870, 13421 and 22062 of 2011 passed by the Madras High Court.*

6. On merits of the case, the learned Counsel has contended that in fact the petitioners were involved in extortion of money from local as well as international customers, who were desirous of obtaining degrees required for their promotions, and other service benefits in continuing their jobs, whereas, the premises in question is exceptional in nature, as a very sophisticated system of computers linked with servers having a very huge capacity of data base of approximately 700 Terra Bytes have been installed, and retrieval of such data is a very tedious and a time consuming exercise. Learned Counsel has contended that if any access is allowed to the petitioners or their representatives, there is a great possibility that the data is washed out or corrupted, as all the computers installed in the entire premises are linked with main frame servers and can be accessed from any of the computers installed therein, therefore, the respondents /FIA, for the time being have restricted the access to such area, where the computers and servers are installed. He has further submitted that even otherwise the FIA authorities are empowered under Section 5(5) of the FIA Act, 1974, to attach any such property which is a subject matter of investigation, and therefore, the respondents are fully justified in freezing the accounts as well as denial of access to the

premises in question, till such time the data is retrieved by them. Per learned Counsel the entire computers and servers are case property, and are required in further investigation of the case, therefore, the petitioners cannot be allowed access to such computers. He has further contended that even otherwise, the premises in question is not owned by the petitioners, therefore, they have no locus standi in the instant matter to seek any favorable orders regarding access to the business premises in question.

7. We have heard both the learned Counsel as well as the learned Additional Attorney General, and have perused the record. By consent of all, both the petitions are being finally decided at Katcha peshi stage.

8. At the very outset, we may observe that both the learned Counsel have argued their respective cases at length and in detail, whereas, much stress has been laid by them on the factual aspect of the case, including the chronological events that has so far happened in the instant matter. With respect, we would like to observe that these being Constitutional Petitions, did not require such factual assertion, whereas the decision of this case is not dependent nor is required to be decided by considering the factual aspect of the matter. In our opinion there are only two issues which are to be addressed in the instant petitions, one being, that whether the impugned order dated 29.7.2015, whereby, the learned District & Sessions Judge, has granted permission to the Investigation Officer, on an application under Section 8 of the AMLA Act, to provisionally attach the bank accounts of the petitioners could be passed without issuance of any notice to the petitioners, and the second, that as to whether the property / building premises of the petitioners, which according to them has also been sealed / frozen despite clear finding in the impugned order to the contrary, has in fact been sealed / seized or not. To have a better understanding of the controversy in hand, it would be advantageous to refer to certain provisions of the AMLA Act, including Section 2(a) and Sections 8 & 9 of the said Act which reads as under:-

> "2(a) "attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under section 8;"
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> 8. Attachment of property involved in money laundering.—(1) The investigating officer may, on the basis of the report in his possession received from the concerned investigating agency, by order in writing, with prior permission of the Court, provisionally attach property which he reasonably believes to be proceeds of crime or involved in money laundering for a period not exceeding ninety days from the date of the order.

> 9. Investigation.—(1) The investigating officer shall, not later than seven days from the date of attachment made under sub-section (1) of section 8 or, seizure of property under section 14 or section 15, serve a notice of not less than thirty days on the person concerned. The notice shall call upon such person 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 8, or, seized under section 14 or section 15, 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 forfeited to the Federal 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 be more than one person, such notice shall be served upon all persons holding such property."

9. Perusal of the aforesaid provisions reflects that "attachment" means prohibition of transfer, conversion, disposition or movement of property by an order issued under section 8, whereas, Section 8 provides the entire mechanism for attachment of property involved in money laundering, wherein, the investigating officer on the basis of a report in his possession received from the concerned investigating agency, by order in writing, with prior permission of the Court, can provisionally attach property, which he reasonably believes to be proceeds of crime or involved in money laundering for a period not exceeding 90 days from the date of such order, and thereafter, if such permission is granted, then in terms of Section 9 of the AMLA Act, the investigating officer shall not later than seven days from the date of order of attachment made under sub-section (1) of Section 8, serve a notice of not less than 30 days on the person concerned, and such notice shall call upon the person 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 8 and 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 forfeited to the Federal Government. In the instant matter after passing of the impugned order dated 29.7.2015 the concerned investigation officer has already issued notices dated 15.8.2015 under Section 9 of the AMLA Act which have also been impugned through instant petitions and vide order dated 15.9.2015, we had directed that proceedings emanating from such show cause notice, subject matter of this petition may be continued but no final order should be passed by be respondents. Again on 27.10.2015, we had further observed that since

an interim order has been passed, the effect of attachment order will remain extended till the petition is decided and not on expiry of 90 days thereon. The precise contention raised on behalf of the petitioners is to the effect that since proceedings regarding attachment of bank accounts and the properties in question were pending before this Court by way of C.P. No. D-3890 of 2015, it was incumbent upon the respondents / FIA authorities, to disclose such fact before the District & Sessions Judge before obtaining any permission under Section 8 of the AMLA Act. In fact this appears to be the entire case of the petitioners, as according to them such failure on the part of the respondents / FIA, renders the impugned order to be of no legal effect. Though it has been admitted on behalf of the petitioners that the law does not provide for issuance of any such mandatory notice, but according to them proprietary demands so. However, we are not inclined to agree with such contention and would like to observe that insofar as disclosure regarding pendency of C.P. No. D-3890 of 2015 is concerned; the same was perhaps not done so, as it was in respect of somewhat different issue, and was not exactly a matter under the AMLA Act and the proceedings thereof, whereas, the proceedings under the AMLA Act were initiated subsequently and afresh by FIA, independently of any such proceedings pending before this Court as alleged. Therefore, if they have not disclosed any facts before the learned District & Sessions Judge, it would not ipso facto, render the impugned order a nullity in the eyes of law, as subsequently, the impugned order has been passed against which the petitioners can avail the remedy as provided under the law. We do not see any such consequence, emanating in the given facts that failure to make such disclosure would be, that the impugned order cannot be sustained. This under no circumstances seems to be justifiable to us to such an extent.

10. Insofar as issuance of notice to the petitioners before passing of an order of attachment under Section 8 of the AMLA Act is concerned, it appears to be an admitted position that the law does not provide for any such issuance of notice and therefore, it cannot be claimed as a matter of right by the petitioners. Moreover, the proceedings initiated under the AMLA Act, as they appear from the perusal of various provisions of the Act, in fact relate to money laundering, and if the investigating officer is prima facie of the view that there are some proceeds lying in the bank accounts, which according to him are proceeds of money laundering, then on an application under Section 8 of the AMLA Act, if the Court

before granting permission to attach the property/accounts, would mandatorily issue notice to the concerned person, and cannot dispense with such notice as contended on behalf of the petitioners, then perhaps it would defeat the entire purpose of such attachment. It is but natural, that once a notice is issued to a concerned person before passing of an attachment order, the immediate and natural action would be to withdraw such money from the bank account. No sane person having money in his account either be it of proceeds of crime or otherwise, would like to keep his money anymore in the bank account, once a notice is issued to him under the AMLA Act, before passing of an attachment order. The legislative intent in enacting Section 8 appears to be that the investigating officer has not been given any unbridled powers to attach any bank account, as he may deems fit. In fact section 8 provides a rider to such exercise of powers by the investigating officer, as first, he has to approach the competent Court of jurisdiction and place material before such Court, on the basis of which he seeks permission for an attachment order, and, the Court, thereafter is required to grant such permission in writing through an order which in the instant matter has been done by the learned District & Sessions Judge. We do not see any reason to upset such order, only on the ground that no notice was issued to the petitioners, and, further that some facts were not brought before the concerned Court. Since an order for attachment has already been passed in respect of the Bank accounts in question, setting aside of the same for want of notice would be of no utility, except allowing the petitioners to operate the accounts and withdraw money, which ultimately if proved to be money, obtained through proceedings of crime, would render the entire proceedings as infructous. This we cannot do for the simple reason that it requires a justification based on the factual aspect of the matter that as to whether the money lying in the bank accounts is actually earned through proceeds of crime or otherwise. This exercise has to be carried out in the manner as provided under the AMLA Act, and not under our writ jurisdiction.

11. It would also not be out of place to mention that subsequent to passing of order of attachment under section 8, there is a complete mechanism and an opportunity for a concerned person under section 9 of the AMLA Act, to justify that the money lying in the attached accounts, is in fact earned lawfully, and is not in any manner connected, with proceeds of crime. The petitioners instead of availing such remedy, have

approached this Court and seek setting aside of the attachment order, which in fact would permit them to withdraw money from such accounts. However, in our view this could not be entertained and the petitioners must avail the remedy as provided under the statute. The only legal ground urged, as discussed earlier, is that no prior notice was issued before passing of the attachment order, which we are of the considered view, is not mandatory in the given facts and circumstances of this case, as it would defeat the very purpose of an attachment order under the AMLA Act,

12. It may further be observed that mere passing of a provisional attachment order under Section 8 of the AMLA Act does not in any manner prejudices the petitioners. Firstly, such order of attachment will loose its efficacy after a maximum period of 90 days, if the proceedings are not finalised in accordance with the Act ibid. Secondly, the petitioners have been asked to come forward and justify that the money lying in the provisionally attached accounts is not earned through proceeds of crime. Thirdly, the Investigation Officer after completion of the proceedings under Section 9 of the Act, is further required under Sub-Section (3) to approach the Court for confirmation of the provisional attachment order. The legislature has provided for a complete mechanism for redressal of the grievance of the petitioners, and, therefore, these petitions also appear to be premature in nature as the petitioners have bypassed the remedy provided in law, and have invoked the Constitutional jurisdiction of this Court. The petitioners cannot be allowed to challenge a provisional attachment order which is yet to be confirmed, whereas, the petitioners have been given a fair opportunity to present their case and satisfy the Investigation Officer as well the trial Court that the money lying in these accounts has got nothing to do with the alleged offence. The petitioner's rights are evenly protected, notwithstanding the provisional attachment order; otherwise, as discussed earlier, it would frustrate the entire proceedings initiated by the respondents. In the instant matter, proceedings have been initiated against the petitioners for having allegedly committed an offence under Section 3 of the AMLA Act, and have not been finalised as yet, whereas, it has been alleged that the money lying in their Bank Accounts provisionally attached, has been earned through proceeds of crime. Therefore, in the circumstances, at this stage of the proceedings, there appears to be a reasonable cause for the respondents to believe that an

offence has been committed. This Court in its writ jurisdiction cannot throw out the case of the respondents as is being sought on behalf of the petitioners, hence, the impugned order cannot be interfered with at this stage of the case. This is a peculiar legislation and in such matters it is always an Ex-parte attachment which is appropriate, in order to facilitate the preservation of proceeds of alleged crime, which even otherwise appears to one of the purposes of the AMLA Act. It is in fact mere existence of belief which is to be there, and not that the adequacy or efficiency of the material is to be examined at the time of provisional attachment of the property.

13. Insofar as the property / business premises in question is concerned, it has been categorically stated at the bar as well as in the comments filed by FIA, that they have not sought any order from the District & Sessions Judge with regard to attachment of the property, and, neither such property has been attached by them. In fact the impugned order by itself reflects that the petitioners have not been restrained from enjoying the immovable property, provisionally attached, through the impugned order. The relevant finding reads as under:-

> "so I am in agreement with the submissions made by the learned SPP that fact that a post facto hearing is provided under section 8 of the AML Act 2010 rules-out, by necessary implication, the requirement to issuance of notice and hearing at the stage of provisional attachment under section 8 of the AML Act 2010 because it is the only provisional permission to the investigation officer to attach the properties / assets to which he (I.O.) reasonably believes to be proceeds of crime of involved in money laundering within the meaning of AML Act, 2010 and rest of the powers are with the court to decide and determine the issue within the four corners of law after conducting the full-fledged trial, hence the application in hand so moved by the applicant / complainant is hereby allowed whereby the properties / assets / accounts of the bank as per annexed list with the application / complaint are attached provisionally and to ensure compliance of subsection (2) of section 8 of the AML Act 2010 and <u>he will not disturb / prevent to any person so interested in the enjoying of the immovable properties provisionally attached under subsection (1) of Section 8 of the AML Act 2010 from such enjoying till further orders</u>. Let a copy of this order be sent to the applicant / complainant to imitate the action as described in subsection (2) of section 8 of the AML Act 2010 for further proceedings and ensuring compliance as directed in terms of this section." (Emphasis supplied)

14. In view of the aforesaid observations in the impugned order and the statement made at bar, as well as through comments, it appears that insofar as the immoveable property is concerned, the petitioners have not been restrained from enjoying such property, whereas, even otherwise, the attachment as defined in section 2(a) of the AMLA Act, is only to the extent, that it prohibits transfer, conversion, disposition or movement of such property, whereas, insofar as denial of access to such property is concerned, as observed herein above, it is only to the extent of carrying out the investigation and retrieval of data from the servers / computers,

that the FIA authorities have denied petitioners from accessing the premises freely, so that nobody could make an attempt to delete and or erase any such data from the computers. This in our opinion appears to be a fair act on the part of the FIA, as otherwise there is an apprehension that during investigation, the data could be tampered with, if a free access is allowed to the servers and or the computers, installed in the premises. In such circumstances, we would direct FIA to complete their investigation as well as the exercise of retrieval of data from the servers / computers as early as possible and within a reasonable time, after which the petitioners would be entitled to have access to the area in the property where such computers / servers have been installed.

15. In view of herein above facts and circumstances of the case, we do not see any merits in both the petitions which are accordingly dismissed. Since interim orders were passed by us, whereby we had restrained the investigation officer from proceedings any further pursuant to notices under section 9 of the AML Act, the period of 90 days of attachment order would start from the date of announcement of this judgment and not from the date of attachment order.

16. Both petitions are dismissed.

Dated: 04.01.2016

Judge

Chief Justice