

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Writ Jurisdiction)

DATED : 22nd SEPTEMBER, 2015

S.B. : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

WP(Crl.) No.02 of 2015

Petitioner : Eastern Institute for Integrated
Learning in Management University
through its Acting Vice Chancellor,
Shri R. P. Sharma,
8th Mile, Budang,
Malabassey,
West Sikkim.

versus

Respondents : 1. The Joint Director,
Directorate of Enforcement,
Government of India,
CGO Complex,
3rd MSO Building, 6th Floor,
DF Block, Salt Lake,
Kolkata.

2. The Enforcement Officer,
Directorate of Enforcement,
Government of India,
CGO Complex,
3rd MSO Building, 6th Floor,
DF Block, Salt Lake,
Kolkata.

3. The Registrar/Administrative Officer,
Adjudicating Authority,
Jeevan Deep Building,
Room No.26, 4th Floor,
Parliament Street,
New Delhi.

Eastern Institute for Integrated Learning in Management University
 VS.
The Joint Director, Directorate of Enforcement and Others

**Petition under Articles 226/227
 of the Constitution of India read with
 Section 482 of the Code of Criminal Procedure**

Appearance

Mr. Shakeel Ahmed, Advocate with Ms. Chitra Sharma, Mr. Yogesh Kumar Sharma and Mr. S. P. Bhutia, Advocates for the Petitioner-University.

Mr. Karma Thinlay Namgyal, Central Government Advocate with Mr. Thinlay Dorjee Bhutia, Advocate for the Respondents No.1 to 3.

Mr. Banibrata Dutta, Assistant Director, for Respondents No.1 and 2.

J U D G M E N T (ORAL)

Wangdi, J.

1. In this Writ Petition, the Petitioner, namely, Eastern Institute for Integrated Learning in Management University, seeks to quash and set aside the show cause notice dated 03-02-2015, Annexure P/2, issued by the Respondent No.3 under Sub-Section (1) of Section 5 of the Prevention of Money-Laundering Act, 2002 (for short "PMLA") and the subsequent proceedings consequential thereto.

2. Shorn of all details, the principal ground seeking to quash the impugned show cause notice

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

issued under Section 8 of the PMLA by the Respondent No.3 is that it was issued by a Bench of the Adjudicating Authority constituted under Clause (b) of Sub-Section (5) of Section 6 of the PMLA which did not have a Judicial Member. As per the Petitioner-University, a bare reading of Sections 6, 8 and 11 of PMLA read with Regulations 21 and 22, would reveal that the Respondent No.3 discharges judicial function exercising judicial powers. As a judicial mechanism under PMLA, the Respondent No.3 is vested with the powers of a Civil Court as provided under the Code of Civil Procedure, 1908, in matters enumerated under Section 11 of the PMLA and Regulations 21 and 22. Thus, the proceedings before the Respondent No.3 are deemed to be judicial proceedings within the meaning of Sections 193 and Section 228 of the Indian Penal Code, 1860, and, therefore, such proceedings by natural corollary ought to have the trappings of a Court which can only be achieved by the presence of a Judicial Member. As per the Petitioner-University, this was all the more essential considering the far-reaching consequences that would flow from the adjudication of

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

the Respondent No.3 having regard to the serious charge of the Enforcement Directorate against the Petitioner-University. The case of the Petitioner-University is that due to impugned order of attachment passed as a consequence of the show cause notice, has caused the University immense hardship firstly, because the Petitioner-University was deprived of an opportunity of hearing and secondly, that the order having been passed *ex parte* was *de hors* judicial consideration as the Bench which passed the order did not have a Judicial Member.

3. At the time of arguments, Mr. Shakeel Ahmed, Learned Counsel for the Petitioner-University, re-emphasised the aforesaid proposition and urged that such was the intention of the Legislature can be clearly made out from Sub-Sections (2) and (3) of Section 6 of the PMLA. On this, he would refer to ***L. Chandra Kumar VS. Union of India and Others : (1997) 3 SCC 261***; ***Union of India VS. R. Gandhi, President, Madras Bar Association : (2010) 11 SCC 1*** and ***Tamil Nadu Generation and Distribution***

Eastern Institute for Integrated Learning in Management University

VS.

The Joint Director, Directorate of Enforcement and Others

Corporation Limited VS. PPN Power Generating Company

Private Limited : (2014) 11 SCC 53.

4. It was the submission of Mr. Ahmed that Clause (b) of Sub-Section (5) of Section 6 read conjointly with Sub-Section (3) of Section 6 of the PMLA, would necessarily require every Bench constituted should have one Member who is a Judicial Member. He submits that presently the post of the Judicial Member is lying vacant and the Central Government has not bothered to fill up that post for a very long time. The show cause notice and the subsequent proceedings having thus been issued by and conducted by a Bench which did not consist of a Judicial Member, were rendered invalid and unsustainable in law.

5. Mr. Karma Thinlay Namgyal, Learned Central Government Counsel, appearing on behalf of the Respondents, on the other hand, would submit that PMLA does not make it mandatory for a Bench to be constituted by a Judicial Member as one of its Members. As per him, Section 6 provides for the

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

composition of an Adjudicating Authority and, as per Clause (a) of Sub-Section (3), it no doubt provides that a person shall be qualified for appointment as a Member of the Adjudicating Authority in the field of law if he is qualified to be a District Judge and also if he has been a Member of the Indian Legal Service who held a Grade I post. However, Clause (b) of Sub-Section (5) of Section 6 of the PMLA, on the other hand, provides that the Chairperson may constitute the Adjudicating Authority with one or two Members as he may deem fit. This provision that prescribes the quorum, does not mandate that one of the Members of the Adjudicating Authority must necessarily be a Judicial Member. The Learned Central Government Counsel submits that there is a distinction between the words “Adjudicating Authority” appearing in Sub-Section (1) and “a Bench” appearing in Sub-Section (5) of Section 6 of the PMLA and Sub-Clauses thereunder. Reference was also made to Sub-Sections (7) and (13) of Section 6 with which we need not delay ourselves as it appears to be irrelevant for the purpose of deciding this Writ Petition.

Eastern Institute for Integrated Learning in Management University

VS.

The Joint Director, Directorate of Enforcement and Others

6. I have carefully considered the rival submissions of the Learned Counsel for the parties, records produced before me and the citations placed at the bar.

7. On a bare reading of Section 6 and Sub-Sections thereunder, I find substance in the submission of the Learned Central Government Counsel that there is no mandate that a Bench to be constituted by the Chairperson of the Adjudicating Authority under Sub-Section (5) of Section 6, must necessarily have one Member who is a Judicial Member. Sub-Sections (1) and (2) of Section 6 prescribes the constitution and composition of the Adjudicating Authority. Sub-Section (3) of Section 6 prescribes the eligibility conditions for persons to be appointed as the Members of the Adjudicating Authority. We may reproduce below Sub-Sections (1), (2) and (3) and Clauses (a) and (b) of Sub-Section (5) of Section 6 of the PMLA—

“6. Adjudicating Authorities, composition, powers, etc.—(1) The Central Government shall, by notification, appoint [an Adjudicating Authority] to exercise jurisdiction, powers and authority conferred by or under this Act.

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

(2) An Adjudicating Authority shall consist of a Chairperson and two other Members:

Provided that one Member each shall be a person having experience in the field of law, administration, finance or accountancy.

(3) A person shall, however, not be qualified for appointment as Member of an Adjudicating Authority,—

(a) in the field of law, unless he—

(i) is qualified for appointment as District Judge; or

(ii) has been a member of the Indian Legal Service and has held a post in Grade I of that service;

(b) in the field of finance, accountancy or administration unless he possesses such qualifications, as may be prescribed.

.....

(5) Subject to the provisions of this Act,—

(a) the jurisdiction of the Adjudicating Authority may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority may deem fit;

.....”

8. Sub-Section (5) of Section 6 clearly sets out the jurisdiction of the Adjudicating Authority to be

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

exercised by Benches. Clause (b) of Sub-Section (5) specifically prescribes the strength of an Adjudicating Authority which the Chairperson shall constitute as he may deem fit. To this extent, I have no hesitation in concurring with the submission of the Learned Central Government Counsel.

9. However, on a deeper consideration of the provision, it would appear that the constitution of the Bench by the Chairperson under Clause (b) of Sub-Section (5) of Section 6, would depend upon the nature of the *lis* to be decided. This would be apparent from the very words used in Clause (b) of Sub-Section (5) of Section 6 whereby it provides that a “Bench” may be constituted “as the Chairperson of the Adjudicating Authority may deem fit”. This provision, in my view, is quite distinct from Sub-Section (3) of Section 6 as it is quite obviously an omnibus provision prescribing the composition of the “Adjudicating Authority”.

10. In *Tamil Nadu Generation and Distribution Corporation Limited* (supra) in which reliance was placed

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

upon ***Kihoto Hollohan VS. Zachillhu and Others : 1992 Supp***

(2) SCC 651, it has been held as under:-

“59. In view of the aforesaid categorical statement of law, we would accept the submission of Mr Nariman that the tribunal such as the State Commission in deciding a lis, between the appellant and the respondent discharges judicial functions and exercises judicial power to the State. It exercises judicial functions of far-reaching effect. Therefore, in our opinion, Mr Nariman is correct in his submission that it must have essential trapping of the court. This can only be achieved by the presence of one or more judicial members in the State Commission which is called upon to decide complicated contractual or civil issues which would normally have been decided by a civil court. Not only the decisions of the State Commission have far reaching consequences, they are *final* and *binding* between the parties, subject, of course, to judicial review.”

11. The passage in ***Kihoto Hollohan*** (supra) relied upon to arrive at the above finding is found reproduced in paragraph 58 of the ***Tamil Nadu Generation and Distribution Corporation Limited*** (supra) which we may also reproduce below:-

“58. Again in para 99, it is observed as follows: (*Kihoto Hollohan* case, SCC p.707)

“99. Where there is a lis—an affirmation by one party and denial by another—and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court. In *Associated Cement Companies Ltd. v. P.N. Sharma* this Court said: (AIR p.1606, para 33 : SCR pp. 386-87)

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

“33... The main and the basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power. ... There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding.’ ”

12. In *L. Chandra Kumar* (supra), it has been held that —

“95. It must be remembered that the setting up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would, by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of Judicial Members and those with grassroot experience would best serve this purpose. To hold that the Tribunal should consist only of Judicial Members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that Administrative Members are chosen from amongst those who have some background to deal with such cases.” [underlining mine]

Eastern Institute for Integrated Learning in Management University

VS.

The Joint Director, Directorate of Enforcement and Others

13. In my considered opinion, what emerges from the above with certainty is that in a case where serious questions of law and fact arise, as in the present case, it is essential that one of the Members of the Bench constituted under Clause (b) of Sub-Section (5) of Section 6 of PMLA by the Chairperson of the Adjudicating Authority should be a Judicial Member as he “with his judicial experience would, by virtue of his specialised knowledge, would be better equipped to dispense with speedy and efficient justice”. This appears to be import of the words “as the Chairperson of the Adjudicating Authority may deem fit”.

14. It is an admitted position that the post of a Judicial Member under Respondent No.3 is still lying vacant and that the impugned show cause notice was issued and the order under challenge passed in the absence of such a Member. Apart from what have been observed earlier, in a proceeding of the present kind, where orders were passed *ex parte* by the Adjudicating Authority in the absence of the Petitioner-University, it would have been essential for a Judicial

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

Member to be part of the Bench considering the nature of the *lis* before it to ensure that the orders are passed in satisfaction of all the principles relevant and acceptable in law. *Prima facie*, therefore, I am of the view that the order does not appear to pass the muster of the law laid down in ***Tamil Nadu Generation and Distribution Corporation Limited*** (supra).

15. Having observed as above, I am, however, not inclined to quash the proceedings at this stage for the reasons that follow hereafter.

16. The Petitioner-University, apart from showing technical flaws in the constitution of the Bench, concededly has been unable to place anything before this Court to indicate that they have been prejudiced in any manner. It is also conceded that the Petitioner-University has not yet responded to the show cause notice. Under such circumstances, I am of the considered opinion that it would be appropriate for the Petitioner-University to approach the Adjudicating Authority first and place all his grievances before it.

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

17. However, in order to allay the apprehensions expressed by the Petitioner-University, it would be sufficient to direct the Respondent No.1 to first take up with the appropriate Ministry for appointment of a Judicial Member under Clause (a) of Sub-Section (3) of Section 6. As expressed in *Tamil Nadu Generation and Distribution Corporation Limited* (supra), the matter needs to be considered with grave urgency by the appropriate Central Authority.

18. Considering the fact that the provisional order of attachment was passed on 09-01-2015 followed by the impugned show cause notice issued upon the Petitioner-University on 03-02-2015 calling upon the Petitioner to be present on 06-04-2015, it would be essential that the Judicial Member is appointed expeditiously by the appropriate authority.

19. In the above facts and circumstances, it is directed that –

- (i) The Respondent No.1 shall take appropriate steps with the concerned authorities of the Central Government for

Eastern Institute for Integrated Learning in Management University
vs.
The Joint Director, Directorate of Enforcement and Others

appointment of the Judicial Member of the Adjudicating Authority urgently within a period of 3 (three) months and not later than that;

- (ii) On appointment of the Judicial Member, the Chairman of the Adjudicating Authority shall constitute the Bench consisting of a Judicial Member keeping in view the observations made above having regard to the nature of the *lis* and the anxiety expressed by the Petitioner-University.
- (iii) Soon after it is constituted, the Bench shall then issue notice upon the Petitioner-University and the Petitioner-University shall appear before the Bench and place before it all grievances expressed in the Petition; and
- (iv) Since the proceedings before the Adjudicating Authority was stayed by this Court by order dated 02-04-2015, the period of attachment prescribed under Sub-Section (1) of Section 5 shall exclude the period spent during the pendency of the case before this Court.

20. In the result, the Writ Petition is allowed in part.

Eastern Institute for Integrated Learning in Management University
VS.
The Joint Director, Directorate of Enforcement and Others

21. No order as to costs.

Sd/-
(S. P. Wangdi)
Judge
22-09-2015

Approved for reporting : **Yes**

Internet : **Yes**