**APPELLATE TRIBUNAL, PREVENTION OF MONEY LAUNDERING ACT AT NEW DELHI**

**Date of Decision: 18.10.2017**

**FPA-PMLA-1196/BBS/2016**

SS Earth Movers ... Appellant/Applicant

Versus

The Joint Director
Directorate of Enforcement, Bhubaneswar ... Respondent

**Advocates/Authorized Representatives who appeared**

For the appellant : Shri Dayan Krishnan, Sr. Advocate
Shri Vijay Pal Dalmia, Advocate
Shri Pavit Singh Katoch, Advocate
Shri Rajat Jain, Advocate

For the respondent : Ms. Shilpi Satyapriya Satyam, Advocate

**CORAM**

**JUSTICE MANMOHAN SINGH : CHAIRMAN**
**SHRI G.C. MISHRA : MEMBER**

**JUDGEMENT**

**FPA-PMLA-1196/BBS/2016**

1. The present appeal is filed against the order dated 01.12.2015 (impugned order) passed by the Adjudicating Authority in the Original Application No. 29 of 2015, filed by the Joint Director, Directorate of Enforcement, Bhubaneshwar (hereinafter also referred as "Respondent") under section 17(4) of the PMLA, wherein the appellant is arrayed as Defendant no. 5.

2. The brief facts are that on 18.11.2009 the FIR No. 54 of 2009 was registered at P.S. Balasore Vigilance, inter alia, for offences under Section

13 (2) read with 13(1) (d) PC Act and Section 120-B r/w section 21 MMRD Act and Section 3 of Forest Conservation Act, 1980 IPC against certain officials of Mines Department of Orissa and a partner of M/s Serajuddin & Co., that is Defendant No. 1 before the Adjudicating Authority, on a complaint filed by the Dy. S.P. Vigilance Cell Unit alleging irregularities at Garuda Block mines Joda in Keonjhar. The appellant was not named in the FIR.

3. FIR No. 55 of 2009 registered on 19.11.2009 at P.S. Balasore Vigilance, inter alia, for offences under Section 13(2) read with 13(1)(d) PC Act and Section 420, 201 and 120-B IPC S. 21 MMRD Act r/w S. 3 of Forest (Conservation) Act, 1980 against certain officials of Mines Department of Orissa and M/s Serajuddin & Co., that is Defendant No. 1 before the Adjudicating Authority, on a complaint filed by the Dy. S.P. Vigilance Cell Unit alleging irregularities at Balda Block Iron Ore mines in Keonjhar. The appellant was not named in the FIR.

4. Charge sheets in FIR Nos. 54 and 55 of 2009 registered at P.S. Balasore Vigilance are filed on 31.03.2012 alleging a loss of Rs. 625,13,87,640/- and Rs. 698,21,79,141/-, respectively to the Government Exchequer. The appellant was not named in the charge sheets.

5. Enforcement Case Information Report No. BSZO/06/2014 dt. 12.12.2014 registered based on FIR Nos. 54 and 55 of 2009 registered at P.S. Balasore Vigilance. The appellant was not named in the ECIR.

6. On 6th July, 2015 the Respondent recorded “Reason to Believe” for conducting search and seizure purportedly in compliance with Section 17(1) of the PMLA. No “reasons” recorded with respect to the appellant herein. The said position has not been denied by the respondent. Even we

have seen the contents of "Reason to Believe" and found that nothing has been alleged about the appellant.

7. It is the contention of the appellant that on 9th July, 2015 the Search was conducted at the office premises of the appellant at 1110, Thadagam Road, Coimbatore-641001 in violation of statutory requirements and constitutional norms. Section 17(1) read with Rule 3(1)/Form-I and Rule 4(2)/Form-II of the Prevention of Money Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005 and had seized the following documents/records from the premises of the appellant:

(a) Income Tax Returns and the Balance Sheet and Profit and Loss A/c;

(b) Work Order with mine owners (Srejaudeen & Co.) (b1 & b2);

(c ) Work Order with contractors and sub-contractors (c1 & c2);

(d) Copy of the immovable property in the name of individuals and in the name of company namely M/s SS Earth Movers & Resources, etc.;

(e) Soft Copy of Financial Statements uploaded in the pen drive from Tally Software for the period from 2011-12 to 2013-14 iro M/s Earthmovers and Resources for the period from 2012-13 to 2013-14 could not be uploaded as it is available in Odisha Office of M/s SS Earth Movers;

(f) Service tax related documents.

8. The ED on 31.07.2015 filed an application under Section 17 (4) of PMLA seeking permission of the Adjudicating Authority to retain records seized during search conducted on 9.7.2015, inter alia, at the premises of

the appellant herein. In the said application, it was mentioned that there were reason to believe that proceed of crime must also be at the premises of the appellant therefore it was raided.

9. The Adjudicating Authority by the impugned order dated 01.12.2015 has allowed the application permitting the ED to retain the records seized in search conducted on 9.7.2015, inter alia, at the premises of the appellant herein, holding that there is "no requirement of reasons to be supplied at the time of conducting search". The Adjudicating Authority states that there is reason to believe that records of proceeds of crime may have been secreted in the premises of the appellant. ED stand with respect to the appellant that it was a transporting contractor of M/s Triveni Earth Movers Pvt. Ltd. for transportation of iron ore in mine of Defendant no. 1.

10. In order to know the position as to whether actually there is 'reasons to believe' recorded against the appellant in the combined order passed on 5th July, 2016 or if recorded, copy was served to the appellant, the file from the Adjudicating Authority was summoned. We have examined the file. There was no 'reasons to believe' recorded against the present appeal appellant as per material available on file. It appears to us that there is only one order on 6th July, 2015 for recording the reasons to believe wherein there was no reference against the present appellant. Even, the counsel for the respondent was requested to produce the copy of 'reasons to believe' recorded, if any, but nothing was produced before us. There is also no material that any copy was served. It was also to be examined accused parties, the reasons are recorded. It is mandatory under section 17(1) to record the reasons if the party is going to be raided being action is in serious nature. Even as per record, the seizure memo prepared under Rule 4(2)/Form II in respect of appellant was not complied

strictly although with regard to other accused party, the said procedure apparently has been complied with.

11. It is apparent therefore, the authorisation for search and seizure was wholly illegal as it did not authorize a specific officer and specific premises to be searched as mandated under Section 17(1) of the PMLA read with Rule 3(1). Additionally, it was not even in the form prescribed in Rule 3(1)/Form I. Even, there was no communication of reason to believe to the appellant as per record. The following judgement clearly supports our view points raised in this appeal. The relevant portion of the judgement are:

> *a). The judgments delivered by the Supreme Court and many High Courts in wheels it is held that the authorities are bound to communicate the reason to believe recorded to the affected person judgments referred to P.P Abdullah Vs. Competent Authority 2007 2 SCC 510 para 7 to 8 wherein it has been held by the Apex Court that reason to believe must be communicated along with counter affidavit at least and the authorities are bound to place the same before the court to check the veracity of the same and to come to the conclusion whether such reason to believe are relevant or germane or not.*
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> *b). In the case of **CIT & Ors. v. Oriental Rubber Works**, [(1984) 1 SCC 700], while considering the powers of retention of seized documents under Section 132 of the Income Tax Act, 1962, wherein the reasons for retention were required to be recorded in writing, but nowhere required to communicate those reasons to the aggrieved person, as in the case of Section 17 of PMLA, there is no express requirement for communicating the reasons so recorded, the Hon'ble Supreme Court held that irrespective of there being no such requirement in the statute, the concerned officer is bound to communicate the said reasons, as the failure to communicate shall materially prejudice the person so searched under the provisions of Section 132 of the aforesaid Act. The relevant extract from the judgment is as under:*
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> > *"4. ...On a plain reading of the aforesaid provisions it will he clear that ordinarily the books of account or other documents that may be seized under an authorisation issued under Sub-sections (1) of Section 132 can be retained by the authorised officer or the concerned Income-fax Officer for a period of one hundred and eighty days from the date of seizure, where after the person from whose custody such books or documents have been seized or the person to whom such books or documents belong becomes entitled to the return of the same unless the reasons for any extended*

*retention are recorded in writing by the authorized officer/the concerned Income Tax Officer and approval of the Commissioner for such retention is obtained. In other words two conditions must be fulfilled before such extended retention becomes permissible in law:' (a) reasons in writing must be recorded by the authorised officer or the concerned Income-fax Officer seeking the Commissioner's approval and (b) obtaining of the Commissioner's approval for such extended retention and if either of these conditions is not fulfilled such extended retention will become unlawful and the concerned person (i.e. the person from whose custody such books or documents have been seized or the person to whom these belong) acquires a right to the return of the same forthwith.* ***It is true*** *that Sub-section (8) does not in terms provide that the Commissioner's approval or the recorded reasons on which it might be based should be communicated to the concerned person but in our view since the person concerned is bound to be materially prejudiced in the enforcement of his right to have such books and documents returned to him by being kept ignorant about the factum of fulfillment of either of the conditions it is obligatory upon the Revenue to communicate the Commissioner's approval as also the recorded reasons to the person concerned. In the absence of such communication the Commissioner's decision according his approval will not become effective."*

*c). In the case of C.B.* ***Gautam vs. Union of India (1993(1) SCC 78)****, a Constitution Bench of the Hon'ble Supreme Court of India held that the reasons to be recorded in writing shall not only be incorporated in the order but also shall be communicated to the affected parties. The relevant extract from the judgement is as under:*
*"Sec. 269UD(1), in express terminology, provides that the appropriate authority may make an order for the purchase of the property for reasons to be recorded in writing'. Sec. 269UD(2) casts an obligation on the authority that it "shall cause a copy of its order under sub-s. (1) in respect of any immovable property to be served on the transferor". It is, therefore, inconceivable that the order which is required to be served by the appropriate authority under sub-s. (2) would be the one which does not contain the reasons for the passing of the order or is not accompanied by the reasons recorded in writing. It may be permissible to record reasons separately but the order would be an incomplete order unless either the reasons are incorporated therein or are served separately along with the order on the affected party. Reasons for the order must be communicated to the affected party. "*

*This decision has been followed in various judgments by various Courts, including the Hon'ble Supreme Court of India.*

*d). The Hon'ble Supreme Court, in the case* ***of M. P. Industries Ltd. v. IPO****, [(1970) 2 SCC 32], while dealing with the powers under Section 34(1) of the Income Tax, 1922, which required the officer to have 'reason to believe', has held that the expression 'reason to believe' in Section 3 does not*

*mean purely subjective satisfaction on the part of the Income Tax Officer and that the belief must be held in good faith and it cannot be merely a pretence. It was further held by the Supreme Court that it is open to the Court to examine whether the reasons for the believe have a rational connection or an element bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the Section.*

*e). The Supreme Court, in the case of* ***Mohammad Aslam Merchant v. Competent Authority****, [(2008) 14 SCC 186], while dealing with similar requirements under Section 68H of the Narcotics Drugs and Psychotropic Substances Act, has held that both the statutory elements, namely, "reason to believe" and "recording of reasons" must be premised on the materials produced before him and that such materials must have been gathered during the investigation carried out in terms of Section 68-E or otherwise. It was further held that indisputably, therefore, he must have some materials before him and that if no such material had been placed before him, he cannot initiate a proceeding.*

*f). The Hon'ble High Court of Andhra Pradesh, in the case of* ***K. Munivelu v. The Government of India and Ors.*** *[AIR1972AP318], while dealing with the terms "Reason to Believe" and "suspects", with respect to Section 3 (2) of Essential Commodities Act, 1955, which deals with the power of the authorized officer to enter and search the premises and the seizure thereof, and the Andhra Pradesh Coarse Grains (Export) Control Order, 1965, has held that the term* ***"Reason to believe"*** *is* ***a much stronger expression than the word "suspect"*** *and further observed from the meanings attributed to the words "suspect" and "reason to believe", that it is evident that the initial stage for believing the existence of a certain thing or an alleged fact is suspicion. After suspecting the existence of a thing, condition or a statement of fact, you collect information and then examine that information and come to a final conclusion on the basis of that information, that such a thing, condition or statement of a fact exists. All these ingredients are prerequisite for forming any opinion based on "Reason to Believe".*

*g). The Hon'ble High Court of Andhra Pradesh, in the case of* ***K. Munivelu v. The Government of India and Ors****., referred to the judgment of the Division Bench of the Andhra Pradesh High Court, in the case of* ***Sriram Durga Prasad (P.) Ltd. Visakhapatnam v. Deputy Collector. Customs Dept.*** *Visakhapatnam, 1965: "AIR1965AP294."*

12. The search did not follow the Prevention of Money Laundering (Forms, Search and Seizure or Freezing and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005, mandated by Section 17(1) of the PMLA.

13. No reasons to believe have been recorded or disclosed for authorizing the officers for search and seizure at the appellant's premises prior to the search as mandated under Section 17(1) of the PMLA. "Reason to believe" dated 6.7.2015 does not specify any reasons with respect to the appellant.

14. Even no reasons can be supplied/disclosed by the respondent for the first time in its application made to the Adjudicating Authority under Section 17(4) of the PMLA. Reference may be made to the "Reason to Believe" document annexed by the respondent with its Section 17(4) application and the OA.

15. It is well settled that if a statute prescribes a particular manner of doing a thing it must be done in that manner alone, and no other. Not following the statutory requirements makes the action null and void. Reference may be made to recent judgment of the Hon'ble Supreme Court in State of Rajasthan V. Mohinuddin Jamal Alvi, (2016) 12 SCC 608, paragraph 4 decided on 4th May, 2016 and P.P. Abdullah v. Competent Authority, (2007) 2 SCC 510 paragraphs 7, 8 & 9 decided on 14th December, 2006.

> *4. As per the aforesaid Section 20-A, no information about the commission of offence under TADA is to be recorded by the police without the prior approval of District Superintendent of Police. The specific authority which is named under sub-Section (1) of Section 20A is District Superintendent of Police. In the present case, it is on record that the approval that was taken was of Additional Director General of Police Mr. Shyam Partap Singh Rathore. The TADA Court has treated the said approval as valid because of the reason that approval is given by an authority which is higher than the District Superintendent of Police. The question, therefore, is as to whether it is only District Superintendent of Police whose approval will meet the requirements of law or it can be given by an Officer higher in rank. This question is no more res integra and is settled by a series of judgments of this Court. It*

*is not necessary to give account of all those judgments as in the latest judgment rendered by this Court in Hussein Ghadially vs. State of Gujarat, all the previous precedents are taken note of and on that basis, this Court has reiterated the position in law that even an authority higher in rank would not be competent to give the approval as required under sub-Section(1)of Section 20-A of the TADA Act. The same has been interpreted in the said judgment in the following manner: (SCC pp-438-40, para 21)*

> *"21. A careful reading of the above leaves no manner of doubt that the provision starts with a non obstante clause and is couched in negative phraseology. It forbids recording of information about the commission of offences under TADA by the Police without the prior approval of the District Superintendent of Police. The question is whether the power of approval vested in the District Superintendent of Police could be exercised by either the Government or the Additional Police Commissioner, Surat in the instant case. Our answer to that question is in the negative. The reasons are not far to seek:*
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> *21.1 We say so firstly because the statute vests the grant approval in an authority specifically designated for the purpose. That being so, no one except the authority so designated, can exercise that power. Permitting exercise of the power by any other authority whether superior or inferior to the authority designated by the Statute will have the effect of re-writing the provision and defeating the legislative purpose behind the same - a course that is legally impermissible. In Joint Action Committee of Air Line Pilots' Association of India V. Director General of Civil Aviation (2011) 5 SCC 435, this Court declared that even senior officials cannot provide any guidelines or direction to the authority under the statute to act in a particular manner.*
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> *21.2. Secondly, because exercise of the power vested in the District Superintendent of Police under Section 20-A (1) would involve application of mind by the officer concerned to the material placed before him on the basis whereof, alone a decision whether or not information regarding commission of an offence under TADA should be recorded can be taken. Exercise of the power granting or refusing approval under Section 20-A (1) in its very nature casts a duty upon the officer concerned to evaluate the information and determine having regard to all attendant circumstances whether or not a case for invoking the provisions of TADA is made out. Exercise of that power by anyone other than the designated authority viz. the District Superintendent of Police would amount to such other authority clutching at the jurisdiction of the designated officer, no matter such officer or authority purporting to exercise that power is superior in rank and position to the officer authorised by law to take the decision.*

*21.3. Thirdly, because if the Statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited. That proposition of law first was stated in Taylor v. Taylor and adopted later by the Judicial Committee in Nazir Ahmed v. King Emperor and by this Court in a series of judgments including those in Rao Shiv Bahadur Singh & Anr. v. State of Vindhya Pradesh, State of Uttar Pradesh v. Singhara Singh, Chandra Kishore Jha v. Mahavir Prasad, Dhananjaya Reddy v. State of Karnataka and Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd. The principle stated in the above decisions applies to the cases at hand not because there is any specific procedure that is prescribed by the Statute for grant of approval but because if the approval could be granted by anyone in the police hierarchy the provision specifying the authority for grant of such approval might as well not have been enacted."*

*7. Learned counsel submitted that it has been expressly stated in Section 6(1) that the reason to believe of the Competent Authority must be recorded in writing. In the counter-affidavit it has also been stated in para 8 that the reasons in the notice under section 6(1) were recorded in writing. In our opinion this is not sufficient. Whenever the statute requires reasons to be recorded in writing, then in our opinion it is incumbent on the respondents to produce the said reasons before the court so that the same can be scrutinized in order to verify whether they are relevant and germane or not. This can be done either by annexing the copy of the reasons along with the counter-affidavit or by quoting the reasons somewhere in the counter-affidavit. Alternatively, if the notice itself contains the reason of belief, that notice can be annexed to the counter-affidavit or quoted in it. However, all that has not been done in this case.*

*8. It must be stated that an order of confiscation is a very stringent order and hence a provision for confiscation has to be construed strictly, and the statue must be strictly complied with, otherwise the order becomes illegal.*

*9. In our opinion, the facts of the case are covered by the decision of this Court in Fatima Mohd. Amin v. Union of India. In the present case the contents of the notice, even if taken on face value, do not disclose any sufficient reason warranting the impugned action against the appellant as, in our opinion, the condition precedent for exercising the power under the Act did not exist. Hence, the impugned orders cannot be sustained.*

16. Under these circumstances, the order against the present appeal is set aside. The application filed pertaining under section 17(4) of PMLA against the appellant is accordingly dismissed. The documents seized from

the premises of the appellant shall be returned forthwith. The file summoned from the Adjudicating Authority be returned back by the registry to the Adjudicating Authority as early as possible.

17. As far as other parties are concerned, we are not expressing any opinion on merit. As and when their appeals are heard, they are liberty to raise their plea.

18. The appeal is allowed, the impugned order against the appellant is set-aside/modified qua the appellant under section 26 of the Act.

19. No costs.

**(Justice Manmohan Singh)**
**Chairman**

**(G.C. Mishra)**
**Member**

**New Delhi,**
**18th October, 2017**
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