

* **THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 30th September, 2010

% Judgment Pronounced on: 4th October, 2010

+ **LPA No. 397/2010**

DR. S. RAMAKRISHNA Appellant

Through: Mr. C. Mukund with Ms. Firdouse
Qutbwani, Advs.

versus

ENFORCEMENT DIRECTORATE & ORS. Respondents

Through: Mrs. Rajdeepa Behura with
Mr. M.P. Singh, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

Invoking the jurisdiction of this Court under Clause 10 of the Letters Patent, the appellant/petitioner (hereinafter referred to as 'the appellant') has called in question the warrantableness of the order dated 21st April, 2010 passed by the learned Single Judge in WP (C) No. 4311/2007.

2. The facts which are imperative to be expounded are that the Special Director, Enforcement Directorate (ED), as pleaded by the appellant, initiated a proceeding against the appellant on 22nd August, 2002 under the Adjudication Proceedings and Appeal Rules, 1974 (for short 'the 1974 Rules') and eventually passed the final order on 17th February, 2005 whereby he imposed a penalty of Rs.50 lakhs for contravention of Sections 18(2) and 18(3) of the Foreign Exchange Regulation Act, 1973 (for short 'the FERA'). Being grieved by the aforesaid order, the appellant preferred

an appeal before the Appellate Tribunal of Foreign Exchange (for short 'the tribunal') whereby the tribunal, on 2nd January, 2006, while considering the application for a pre-deposit, passed an order on 7th February, 2006 requiring the appellant to furnish an unconditional bank guarantee of Rs.25 lakhs in favour of the Special Director, ED within 45 days as the condition precedent for hearing of the appeal. The appellant, as set forth, filed an application for modification of the order relating to pre-deposit which was dismissed and eventually, the appeal was dismissed by the tribunal on 19th January, 2007.

3. Before the writ court, it was contended that the initiation of the proceeding under the FERA on 22nd August, 2002 was after the expiry of the 'sunset' period on 31st May, 2002 as envisaged under Section 49(3) of the Foreign Exchange Management Act, 1999 (for short 'the FEMA') and, therefore, the whole proceeding was vitiated in law and, hence, the condition of pre-deposit as imposed by the tribunal was totally unjustified. It was urged before the learned Single Judge that a notice to show-cause was issued on 28th February, 2000 by the Special Director, ED requiring the appellant to explain why the adjudication proceedings under Section 51 of the FERA should not be held against him for the alleged violation of Section 18(2) read with Section 18(3) of the FERA and to the said show-cause notice, the appellant filed his reply/show-cause on 23rd December, 2000 and, thereafter, on 27th March, 2001, a second show-cause notice was issued requiring the appellant to explain why the adjudication proceedings should not be held against him and eventually, on 22nd August, 2000, a date of hearing was fixed and, therefore, it is to be construed that the proceeding was initiated

after the expiry of the 'sunset' period on 31st May, 2002 which was impermissible.

4. It was also canvassed that if Rule 3 of the 1974 Rules is scrutinized in proper perspective, it would not remotely convey that there was commencement of proceeding as contemplated under Section 49(3) of the FEMA as there is a reference to Section 51 of the FERA. Before the learned Single Judge, emphasis was laid on the 11th Report of the Standing Committee of Finance (1998-99) on the Bill preceding FEMA, the minutes of the 32nd sitting of the Standing Committee on Finance held on 9th December, 1998 and the Rajya Sabha Debates held on 8th December, 1999 to bolster the contention that the intention of the legislature was not to permit continuance of the proceedings under the FERA after the cut-off date. Reliance was placed on *S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd.*, (2008) 2 SCC 492 and *Bachraj Bengani v. A.K. Roy*, 2009 IV AD (Del) 333.

5. The learned Single Judge, after hearing the learned counsel for the parties and after scanning the anatomy of Section 51 of FERA, Rule 3 of the 1974 Rules, the language employed on the notice dated 28th February, 2000 and notice dated 27th March, 2001 and after placing reliance on the ratio in *Videocon International Ltd.* (supra) and the decisions in *Deputy Director, Enforcement Directorate, Madras v. Naina Maricair*, AIR 1990 Madras 22 and *Bhaskaran Pillai v. Enforcement Directorate*, 1978 Kerala LT 436, came to hold as follows: -

“31. The considered view of this Court, is that in the instant case, the Adjudicating Officer took notice of the contravention when he issued the notices on 28th February, 2000 and 27th March, 2001 to the Petitioner. This was within the sunset period. Therefore, the proceedings were not bad in law on that score.

32. Consequently, there is no error committed by the Adjudicating Officer in communicating on 22nd August, 2002 that the proceedings would continue under FERA, 1973. The contention of the learned counsel for the Petitioner on this aspect is accordingly rejected.”

6. After so holding, the learned Single Judge directed that if the appellant deposits a sum of Rs.1 lakh within four weeks from the date of the order, the appeal shall be heard by the tribunal on merits.

7. We have heard Mr. C. Mukund, learned counsel for the appellant, and Mrs. Rajdeepa Behura, learned counsel for the respondents.

8. Mr. Mukund, learned counsel, assailing the defensibility of the order, submitted that the learned Single Judge has fallen into error by relying on the concept of cognizance though the controversy pertained to the commencement of proceedings for contravention. It is urged by him that the interpretation placed by the learned Single Judge on Section 49(3) of the FEMA is fundamentally fallacious since it has to have nexus with Section 51 of the FERA which deals with adjudication. Pyramiding the said submission, it is canvassed by him that mere issue of notice to show cause would not tantamount to commencement of adjudication process. It is his further submission that for interpreting the provision contained in Section 49(3) in

its basic quintessentiality, it is necessitous to peruse the debates in the House before the FEMA came into force for the intention of the legislature was that FERA should not visit like a ghost.

9. Mrs. Rajdeepa Behura, learned counsel appearing for the respondents, submitted that the order passed by the learned Single Judge is absolutely impeccable as the language employed in Section 49(3) of FEMA is clear as crystal and when the language used in a statute is clear, the question of referring to the debate in the Houses of the Parliament is not warranted. It is her further submission that Rules 3(1) and 3(4) are to be read in a purposive manner to convey the meaning of initiation of the proceedings till the adjudication as all the steps are in one chain and does not permit appreciation and scanning in isolation. It is urged by her that the reliance placed by the learned Single Judge on *Videocon International Ltd.* (supra) cannot be faulted inasmuch as the Apex Court has dwelled upon the concept of taking cognizance and the said principle would also apply to the process of initiation of adjudication. To buttress her submission, she has commenced us to the decisions in *Bhaskaran Pillai* (supra), *Naina Maricair* (supra), *R. Sivarajan and Others v. Deputy Director, Enforcement Directorate, and Another, 1987 (12) ECC 256* and *Monotosh Saha v. Special Director, Enforcement Directorate and Another, 2008 (11) JT 146*.

10. To appreciate the rival submissions raised at the bar, we may refer with profit to Section 49 of FEMA which deals with repeal and saving. Subsections (3) and (4), which are relevant for our purpose, read as follows:

“(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.”

11. Section 79 of FERA confers power on the Central Government to make rules for carrying out the provisions of the said Act. A set of rules has been framed which has been called the 1974 Rules. Rule 3 of the said Rules reads as follows:

*“3. **Adjudication proceedings.** – (1) In holding an inquiry under section 51 for the purpose of adjudging under section 50 whether any person has committed contravention as specified in section 50, the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why adjudication proceedings should not be held against him.*

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.

(3) If, after considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that adjudication proceedings should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or after authorised representative.

(4) On the date fixed, the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence alleged to have been committed by such person indicating the provisions of the Act or of the rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place.

(5) The adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to a future date; and in taking such evidence the adjudicating officer shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (1 of 1872).

(6) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the adjudicating officer, the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

(7) If, upon consideration of the evidence produced before the adjudicating officer, the adjudicating officer is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of section 50:

Provided that the notice referred to in sub-rule (1), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.”

12. Section 51 on which immense emphasis and reliance has been placed upon by Mr. Mukund deals with the power to adjudicate. The said provision reads as follows: -

“For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the

provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.”

13. The submission of Mr. Mukund, learned counsel for the appellant, is that the command of Section 49(3) of FEMA is that no adjudicating officer shall proceed under Section 51 of FERA and that deals with enquiry and eventually imposition of penalty if he finds that there has been any contravention. The learned counsel would submit that the enquiry commences when he starts the process of adjudication and in the case at hand, the adjudication had commenced after the sunset period. In essence, the proponent of Mr. Mukund is that there is a mandatory command prescribing a cut-off date by way of limitation and after the expiry of the said period no action is envisaged and in the case at hand, the adjudicating officer in actuality took action on 22nd August, 2002 which is beyond the prescribed period.

14. It is worth noting that Section 49(3) of FEMA uses the words “no adjudicating officer shall take notice of any contravention under Section 51 of the repealed Act.” The words used ‘shall take notice of’ has its own signification. Section 51 postulates holding of an enquiry in the prescribed manner. Rule 3 of this Rule deals with adjudication proceedings. The Rule

stipulates various stages in the adjudication proceeding. Rule 3 lays down that in holding an enquiry under Section 51 for adjudication, the adjudicating officer is required, in the first instance, to issue a notice to such person requiring him to show-cause within such period as may be specified in the notice. Thereafter, the adjudicating officer after considering the show-cause/reply, as required under sub-rule (4) of the said Rule, was required to explain to a person proceeded against or his lawyer or the authorized representative about the contravention and thereafter proceed as per the rule. In *Naina Maricair* (supra), a Division Bench of the High Court of Madras was dealing with the question whether the show cause notice issued under Rule 3 is the commencement of adjudication proceeding under Section 51 of FERA or not. The Bench, after referring to the various provisions of the Act and Rule 3, eventually expressed the view thus:

“A reading of the rule would show that the rule contemplates that the Enforcement Officer shall initially place before the adjudicating officers materials which would make out contravention of any of the provisions of the Act. On that, the adjudicating officer issues a show cause notice to the person wherein the nature of the offence alleged to have been committed by him is to be stated. The person is called upon to show cause, if any, as to why adjudication proceedings ought not to be held. In the event of a person showing sufficient cause, which the adjudicating Officer accepts, the proceedings under Section 51 of the Act come to an end. If, however, no cause is shown or the cause shown is unacceptable, the proceedings continue and the person is required to appear before the adjudicating officer, either in person or through his lawyer. The oral enquiry then commences. Under Rule 3(4) the adjudicating officer is to explain to the person or his counsel, as the case may be, the offence

that is alleged to have been committed by such person, indicating the provisions of the Act. Then the person is given an opportunity to produce oral or documentary evidence and on the consideration of the evidence placed before the adjudicating officer suitable orders are passed. The only document that is supplied to the person which contains the materials placed against him as also the contravention, is the show cause notice issued under Rule 3(1). The second notice under Rule 3(3) is a mere intimation of the date of hearing for the further proceedings.”

After so stating, the Bench proceeded to hold as follows:

“Section 51 calls upon the adjudicating officer to hold an enquiry in the prescribed manner. Rule 3 prescribed the manner. If the enquiry is to commence only from Rule 3(3) stage, there could be no statutory basis for the adjudicating officer to issue notice under Rule 3(1) or decide whether or not to accept the cause shown by the person and pass consequential orders, either dropping the proceedings or continuing the proceedings.”

15. In ***Videocon International Ltd.*** (supra), the Apex Court was dealing with the term ‘cognizance’ and in that context, their Lordships expressed the view as follows:

“19. The expression “cognizance” has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means “become aware of” and when used with reference to a court or a Judge, it connotes “to take notice of judicially”. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. *“Taking cognizance” does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.”*

Thereafter, the Apex Court referred to Section 190 of the Code of Criminal Procedure which empowers the Magistrate to take cognizance of an offence in certain circumstances and Section 204 which deals with the issue of process and stated thus:

“24. From the above scheme of the Code, in our judgment, it is clear that 'Initiation of Proceedings', dealt with in Chapter XIV, is different from 'Commencement of proceedings' covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

In the said case, after referring to a catena of decisions, their Lordships held thus:

“36. Undoubtedly, the process was issued on 3-2-2003. In our judgment, however, it was in pursuance of the cognizance taken by the Court on 24-5-2002 that a subsequent action was taken under Section 204 under Chapter XVI. Taking cognizance of offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings.

37. Order of issuance of process on 3-2-2003 by the court was in pursuance of and consequent to taking cognizance of an offence on 24-5-2002. The High Court, in our view, therefore, was not right in equating taking cognizance with issuance of process and in holding that the complaint was barred by law and criminal proceedings were liable to be quashed. The order passed by the High Court, thus, deserves to be quashed and set aside.”

16. We have reproduced the aforesaid paragraphs from ***Videocon International Ltd.*** (supra) as Mr. Mukund has submitted that the said decision is not applicable to the adjudicatory proceeding as it relates to taking of cognizance. It is worth noting that their Lordships have opined that taking cognizance means application of mind by the Magistrate to the suspected commission of an offence and the same is done prior to commencement of criminal proceeding and further taking cognizance is the *sine qua non* or the condition precedent for holding a valid trial. Quite apart from the above, their Lordships have held that initiation of proceeding must precede commencement of proceeding. Section 51 of FERA deals with holding an enquiry. The enquiry, we are disposed to think, has insegregable nexus with the issue of a show-cause as the rule so mandates. Thus, the

reliance placed on by the learned Single Judge on the decision rendered in ***Videocon International Ltd.*** (supra) cannot be found fault with.

17. We have already referred to the decisions in ***Bhaskaran Pillai*** (supra) and ***Naina Maricair*** (supra) and we are in agreement with the said view. As the language employed in the Rule deals with various steps and Section 49(3) employs the terms ‘shall take notice of’, the period prescribed has to be computed from the date the contravention is taken notice of by the adjudicating officer. If the said words are not given their requisite meaning and not read in the real context, it would cause violence to the language of the statute.

18. The learned counsel for the appellant vehemently contended that the various debates prior to the coming into force of the Act should be perused as the best way to interpret a statute is to understand why it was enacted and with that knowledge a provision has to be read.

19. In this regard, we may refer with profit to the decision in ***Chief Justice of A.P. v. L.V.A. Dikshitulu, AIR 1979 SC 193*** wherein it has been held thus –

“The primary principle of interpretation is that a Constitutional or statutory provision should be construed ‘according to the intent of they that made it’ (Code). Normally, such intent is gathered from the language of the provision. If the language of the phraseology employed by the legislation is precise and plain and thus by itself, proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean, or evocative or can reasonably bear meaning more than one, the rule of

strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved and the consequences that may flow from the adoption of one in preference to the other possible interpretation.”

20. In **Kehar Singh v. State (Delhi Administration)**, AIR 1988 SC 1883,

it was held thus –

“During the last several years, the 'golden rule' has been given a goby. We now look for the 'intention' of the legislature or the 'purpose' of the statute. First we examine the words of the statute. If the words are precise and cover the situation on hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision but of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences.”

21. In *Sri Jeyarama Educational Trust and others v. A.G. Syed*

Mohideen and others, (2010) 2 SCC 513, the Apex Court has held thus –

“It is now well settled that a provision of a statute should have to be read as it is, in a natural manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popular meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the legislature or the lawmaker, a court should open its interpretation tool kit containing the settled rules of construction and interpretation, to arrive at the true meaning of the provision. While using the tools of interpretation, the court should remember that it is not the author of the statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be.”

22. In the case at hand, the language employed in Section 49(3) is absolutely clear, precise and certain and does not admit of any other interpretation and the legislative intention is absolutely clear. The legislative purpose is that the adjudicating officer shall not take notice of any contravention after the expiry of period of two years from the date of commencement of FEMA. What is submitted by Mr. Mukund is that the date of commencement of hearing for adjudication should be reckoned as the date. The said interpretation is not in accord with the language employed in the statute. It is the sacrosanct duty of the court to interpret the law, to

examine the words of the statute and on an examination of the same in a studied manner, we are unable to persuade ourselves to accept the submission of the learned counsel for the appellant.

23. It is so as the first show-cause notice, which was issued on 28th February, 2010, clearly shows application of mind to the proceeding which is sought to be adjudicated. The entire allegations have been brought on record. Similarly, from the second show-cause notice, it is clear as day that the entire allegations were put to the appellant. There cannot be any dispute over the same. The word 'enquiry' used in Section 51 has its own significance and the enquiry commences from the stage of issue of a notice to show-cause under Rule 3(1) and such an interpretation is in accord with the terms of Section 49(3) of FEMA.

24. *Ex-consequenti*, the appeal, being sans substance, deserves to be dismissed and, accordingly, it is so directed. However, regard being had to the facts and circumstances, we extend the period of deposit as directed by the learned Single Judge till 30th November, 2010. On such deposit being made, the tribunal shall proceed with the hearing of the appeal. There shall be no order as to costs.

CHIEF JUSTICE

MANMOHAN, J

OCTOBER 04, 2010
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