

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

Date of decision: 1st FEBRUARY, 2012

+ **LPA 669/2011**

% **DIRECTORATE OF ENFORCEMENT** **...Appellant**

Through: Ms. Rajdipa Behura, Adv.

Versus

SUBHASH MULJIMAL GANDHI **..... Respondent**

Through: Mr. S. Vasudev & Mr. Rajbir Singh,
Adv.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The challenge in this Intra-Court Appeal is to the judgment dated 4th May, 2011 of the Learned Single Judge allowing W.P.(C) No. 4542/2010 preferred by the respondent and directing the appellant to pay to the respondent simple interest @ 6% per annum on the sum of ₹7,75,000/- from the date of seizure i.e. 3rd January, 2003 till 31st December, 2007 and @9% per annum from 1st January, 2008 till 1st December, 2008. Notice of this appeal was issued and the operation of the judgment of the Learned Single Judge stayed. The counsels have been heard.

2. The writ petition was filed by the respondent pleading that the appellant had on 3rd January, 2003 seized ₹ 7,75,000/- in Indian currency and foreign currency equivalent to ₹96,000/- from the custody of the respondent and initiated inquiry under the provisions of Foreign Exchange Management Act 1999 (FEMA); that the adjudicating authority vide order dated 28th June, 2004 forfeited the seized currency and also imposed a penalty of ₹5 lacs on

the respondent; that the respondent filed an appeal before the Appellate Tribunal for Foreign Exchange and which appeal was allowed vide order dated 17th December, 2007 which order has attained finality but the seized currency was not returned inspite of repeated request and ultimately the Indian currency was released only on 1st December, 2008 and foreign currency on 02.02.2009. The respondent thus averred in the writ petition that his monies having been wrongfully withheld by the appellant, he was entitled to interest @ 24% per annum thereon from the date of seizure i.e. 3rd January, 2003 till return on 1st December, 2008 and 02.02.2009 respectively. It was also the contention of the respondent that in fact under Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 the return/refund should have been accompanied with interest @6% per annum.

3. It is apposite to at this stage set out Rule 8 which is as under:-

“8. ‘Payment of interest on the seized Indian currency:- (i) Where it is found after completion of the investigation that the Indian currency seized under section 37 of the Act is not involved in the contravention and is to be returned, the same shall be returned to such persons together with interest at the rate of 6% per annum from the date of seizure till the date of payment.

(ii) Where it has been found during the course of adjudication that the seized Indian currency is not relevant for such adjudication, the Adjudicating Authority may pass such order returning such Indian currency together with interest at the rate of 6% per annum to such person.”

4. The appellant contested the writ petition contending that under Rule 8 (supra) it was only the adjudicating authority which could have awarded interest @ 6% per annum and the adjudicating authority having not awarded

such interest, no direction even under Rule 8 could be issued in writ jurisdiction.

5. The Learned Single Judge in the judgment impugned before us has held the respondent entitled to interest under Rule 8 and accordingly allowed the writ petition on aforesaid terms. Interest @6% on seized amount was allowed till 31.12.2007 to give time of about fifteen days after order dated 17.12.2007 for payment and @9% thereafter.

6. The appellant has challenged the order before us on two grounds. Firstly, it is contended that Rule 8 (supra) applies to seizure of Indian currency under Section 37 of the Act and was not attracted to the present case where the seizure was by the Police and the seized monies handed over to the appellant subsequently on the directions of the Court. Secondly, it is reiterated that interest under Rule 8 could be awarded by the adjudicating or the Appellate Authority only and the said authorities having not awarded any interest the same cannot be claimed by way of writ petition. Reliance is placed on *Suganmal Vs. State of Madhya Pradesh* AIR 1965 SC 1740 and on *UOI Vs. M/s Orient Enterprises* (1998) 3 SCC 501 and on judgment dated 20.09.2010 of the Division Bench of this Court in W.P.(C) No.2812/2007 titled *Neeraj Kumar Vs. Commissioner of Central Excise* to contend that writ petition for award of interest simplicitor is not maintainable.

7. The respondent has filed a reply to the appeal and in which it has rightly been stated that the pleas as are sought to be taken now were not taken before the Learned Single Judge; rather the appellant before the Learned Single Judge had itself pleaded Rule 8 to contend that the interest envisaged thereunder was at 6% only and thus the claim of the respondent for interest at 24% per annum could not be allowed.

8. Be that as it may, the said pleas being legal, we are inclined to consider the same.

9. The order in the present case for return of seized currency was during the course of adjudication. While Rule 8(i) applies to return of seized currency after completion of investigation. Rule 8 (ii) applies to return of seized currency during adjudication. Again, while Rule 8(i) uses the words “shall be returned with interest at the rate of 6% per annum.....”, Rule 8 (ii) uses the words “may pass such order returning together with interest at the rate of 6% per annum.....”. The use of different words “shall” and “may” in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case it is in the discretion of adjudicating authority whether interest is to be paid or not. In the present case the Appellate Tribunal for Foreign Exchange while allowing the appeal of the respondent and which had the effect of the respondent becoming entitled to return of the seized currency, did not award any interest to the respondent. Rather there is no discussion whatsoever on the aspect of interest. It is not even known whether interest was claimed by the respondent before the Appellate Tribunal. The settled position in Law (see *Santa Sila Devi Vs. Dhirendra Nath Sen* AIR 1963 SC 1677) is that if the order / judgment is silent on a particular aspect, that relief is deemed to have been declined. It thus has to be necessary held that the Appellate Tribunal did not deem it appropriate to award any interest under Rule 8(ii) to the respondent (The Appellate Tribunal had partly allowed the appeal of the respondent and had affirmed the finding of guilt of the respondent on some other aspects). The respondent if was

aggrieved by non grant of interest had available to him the remedy of further appeal under Section 35 of FEMA to this Court. That appeal was not availed of.

10. Next is the question of applicability of Rule 8. It is expressly made applicable to seizure under Section 37 of FEMA of Indian currency. Section 37 is the omnibus provision regarding seizure be it for contravention of whichsoever provisions. The seizure in the present case was admittedly not by the Directorate of Enforcement (DOE) but by the Police. However, Section 38 of the Act provides for empowerment of other officers including Police to affect such seizure. The proceedings in the present case pursuant to initial seizure by Police were admittedly by FEMA. In this view of the matter, it is irrelevant whether initial seizure was by the police or by DOE and seizure is deemed to be under Section 37 of FEMA. However, FEMA does carve out a distinction between Indian currency and foreign currency. The Rules aforesaid enable the adjudicating authority to direct payment of interest @6% per annum while passing order for return of Indian currency only and do not empower the adjudicating authority to direct payment of any interest while directing return of foreign currency. Thus there can be no order for payment of interest on return of seized foreign currency under Rule 8(ii) supra.

11. The position which thus unfolds is that interest at the rate of 6% per annum under Rule 8 could have been awarded to the respondent on the seized Indian currency only. The learned Single Judge has however applying the said Rule also awarded interest on the seized foreign currency and which cannot be sustained. The Division Bench of this Court in *Neeraj Kumar* (supra) has held that a writ remedy cannot be availed to circumvent the non

grant of interest by the authority, Commissioner, Central Excise in that case. It was also observed that in any event a writ petition for award of interest simplicitor was not maintainable in view of the availability of alternate remedy by way of appeal or by way of a suit.

12. Else the position is squarely covered by *Suganmal* and *M/s Orient Enterprise* (supra) and this writ petition in the nature of enforcement of a civil liability that is claim for interest in the nature of compensation for wrongful retention of money is not maintainable. It is not as if payment of interest under Rule 8 (ii) was mandatory (as under Rule 8(i)) and which could be enforced by way of a writ petition. The impugned judgment awarding interest under Rule 8(i) qua Indian currency also can thus not be sustained.

13. We may also mention that we have recently vide judgment dated 13th January, 2012 in LPA 27/2012 titled *Virender Sharma v. Directorate of Enforcement* also dealt with some other aspects of the matter.

14. This appeal accordingly succeeds and is allowed. The judgment of the learned Single Judge is set aside, axiomatically W.P.(C) No.4542/2010 preferred by the respondent is dismissed.

No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

FEBRUARY 01, 2012

‘PP’..