IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 165 OF 2015

1. Mr. Darryl Bruce Thorpe,
   Son of Mr. Desmond Thorpe,
   Aged 63 years, married, retired,
   British Citizen, holder of OCI Card
   bearing No. A 280158 AND HIS WIFE

2. Mrs. Moira Thorpe,
   Wife of Mr. Darryl Bruce Thorpe,
   Aged 57 years, married, housewife,
   British citizen, holder of PIO Card bearing
   No.P0102230, both residents
   34, Stonecross Way, March,
   Cambidgeshire, England, U. K.
   PE15 9DH, and presently
   Residing at A/S-4, Holy Park,
   Colva, Salcete, Goa. …... Petitioners

V e r s u s

1. The Union of India,
   through the Ministry of Finance,
   Enforcement Directorate,
   6th floor, Lok Nayak Bhavan,
   Khan Market,
   New Delhi, 110 003, India.

2. The Assistant Director (Adjudicating Authority)
   Enforcement Directorate,
   Government of India,
   Having Office at 1st & 2nd Floor,
   Jeevan Vishwas, LIC Building,
   EDC Complex, Patto Plaza,
   Panaji, Goa.

3. The Assistant Director,
Enforcement Directorate,
Government of India,
Having Office at 1st and 2nd Floor,
Jeevan Vishwas, LIC Building,
EDC Complex, Patto Plaza,
Panaji, Goa. …... Respondents

Mr. Nigel d Costa Frias, Advocate for the Petitioner.
Mr. M. Amonkar, Asst. Solicitor General for Respondent no.1.
Mr. Nikhil Vaze, Advocate for the Respondents.

CORAM: F. M. REIS, &
M. S. SANKLECHA, JJ
DATE: 21ST APRIL, 2015.

ORAL JUDGMENT (PER M. S. SANKLECHA, J):

Rule.

Respondents waive service.

By consent returnable forthwith.

This petition under Article 226 of the Constitution of India seeks to quash:

a) The communication dated 17/11/2014 issued by the Respondent no.3 - Assistant Director of Enforcement Directorate, Government of India (Assistant Director) to the Manager, Bank of Baroda, Colva, Goa to freeze an Fixed Deposit of Rs.14.60 lakhs maintained by the petitioners in the bank; and

(b) Show Cause notice dated 18/12/2014 issued by the Respondent no.2-Assistant Director (Adjudicating Authority) calling upon the petitioners to show cause as to why penalty should not be imposed and the amount of Rs.14.60 lakhs being the fixed deposit with the bank of Baroda should not be confiscated under Section 13 (1) and 13 (2) of the Foreign Exchange Management Act, 1999 (FEMA), respectively.

3. The petitioners are British citizens holding the status of persons of Indian origin (P.I.O) and Overseas Citizens of India (O.C.I). The petitioners by a Purchase Deed dated 20/4/2006 purchased a property admeasuring 650 sq.metres in Village Panchayat of Colva (suit property). On purchase, the petitioners entered their names as owners in the survey records by mutation. On 30/1/2013, the petitioners by a Deed of Sale sold the suit property to one Mrs. Betty Ratos e Rodrigues. Thereafter the name of Mrs Betty R. Rodrigues was entered in the survey records as the owner of the suit property.

4. On 17/11/2014 the Assistant Director by a communication addressed to the Bank of Baroda, in exercise of his

powers under Section 37 of FEMA, directed the freezing of the petitioners Fixed Deposit with it. This was without any notice to the petitioners.

5. Thereafter on 18/12/2014, the impugned show cause notice was issued by the Adjudicating Authority. The impugned show cause notice called upon the petitioners to show cause why penalty under Section 13 (1) of FEMA and the amount of Rs.14.60 lakhs lying in Fixed Deposit should not be confiscated under Section 13 (2) of FEMA. The basis of the show cause notice was a complaint dated 4/12/2014 filed by the Assistant Director with the Adjudicating Authority alleging that the petitioners were involved in violating the provisions of FEMA and in particular Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulation 2000 (Regulation 2000) in having purchased agricultural property. It is also alleged in the complaint that sale of the suit property resulted in an a amount of Rs.14.60 lakhs being transferred and kept in fixed deposit with bank of Baroda at Colva. Thus the cause for seeking confiscation of the same.

6. The petitioners filed their reply dated 10/1/2015

and pointed out that the adjudication proceedings should be dropped as it is a case of harassment and without any basis. It is on 15/1/2015 that the petitioners learnt from Bank of Baroda that their fixed deposit of Rs.14.60 lakhs in Bank of Baroda had been frozen by the Assistant Director.

7. In the above circumstances, the petitioners have filed this petition on 18/2/2015. On merits the petitioners have contended that the impugned show cause notice has no basis in law and is not sustainable. The petitioners have also contended that the freezing of the petitioners' fixed deposit in Bank of Baroda by communication dated 17/11/2014 is bad in law and without jurisdiction.

8. Mr. Nigel Da Costa Frias, learned counsel for the petitioners in support of the petition submits that the show cause notice is without jurisdiction. The suit property was non- agricultural property in respect of which the petitioners had submitted zoning certificate which clearly mentions that the suit property is non-agricultural property. Thus the bar for purchase of agricultural property in terms of Regulations, 2002, has no application. Thus the

impugned order be quashed and set aside along with the communication dated 17/11/2014 freezing the petitioners fixed deposit account with the bank of Baroda.

9. As against the above, Mr. N. Vaze, learned counsel for the respondents states that the merits of the petitioners' contentions in respect of the impugned show cause notice dated 18/12/2014 could be considered by the Adjudicating Authority who has issued the show cause notice. The entire issue centres around investigation into facts of the nature of the suit property i.e. agricultural or not. Thus there is no warrant for the Court to interfere at this stage with the impugned show cause notice. So far as the freezing of the bank account is concerned, it was contended that the Assistant Director under Section 37 of FEMA has powers of the Income Tax Officers under the Income Tax Act 1961 and is entitled to freeze bank Account and this was done on 17/11/2014 in terms of Section 132 (3) of the Income Tax Act, 1961. Thus the communication dated 17/11/2014 is also valid in law and calls for no interference.

10. We have considered the rival submissions. So far

as the impugned show cause notice dated 18/12/2014 is concerned, the petitioners have filed a reply to the same. We find that the issue which arises for consideration in the show cause notice requires an investigation into facts. These can be raised before the Adjudicating Authority. Needless to state that the Adjudicating Authority would consider the contentions of the petitioners on its own merits and decide the validity of the show cause notice. At this stage we would not interfere with the show cause notice dated 18/12/2014 which has been issued to the petitioners and to which the petitioners have already filed their reply dated 10/1/2015. It would be open to the petitioners to file a further reply and make appropriate submissions contesting the show cause notice dated 18/12/2014. We would not at this stage interfere with the impugned show cause notice dated 18/12/2014.

11. However, so far as the communication dated 17/11/2014 is concerned, Mr. Vaze, learned counsel for the respondents-Enforcement Directorate states that power of freezing the bank account has been exercised by Assistant Director under Section 37 (3) of FEMA. The above provision empowers the Assistant Director to exercise powers under the Income Act 1961. Thus the

communication dated 17/11/2014 freezing the petitioners' fixed deposit account in Bank of Baroda is submitted to be in terms of Section 132 (3) of the Income Tax Act 1961. However, in terms of Sections 132 (8) of the Income Tax Act 1961 the life of such a freezing order is only 60 days. Admittedly, the period of 60 days have long expired after the communication dated 17/11/2014. Mr. Vaze, learned counsel for the Enforcement Directorate is not able to show any extension granted or any other communication thereafter freezing the account. Consequently, the communication dated 17/11/2014 is no longer valid in law and the same is quashed and set side. For the purpose of this petition we have not examined the larger issue viz. the scope of Section 37 of FEMA and its applicability even after the show cause notice has been issued by the Adjudicating Authority.

12. In view of the above, we do not interfere with the show cause notice dated 18/12/2014. However, the Adjudicating Authority shall dispose of the show cause noticed dated 18/12/2014 as expeditiously as possible after following the principles of Natural Justice.

13. Petition is partly allowed in as much as it is made

absolute in terms of prayer clause “b” i.e. the communication dated 17/11/2014 of the Assistant Director addressed to Manager, Bank of Baroda, Colva is quashed and set aside.

14. Petition disposed of in the above terms. No order as to costs.

M. S. SANKLECHA, J. F. M. REIS, J.

Ap/-