IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

WP(C).No. 23197 of 2015 (Y)

PETITIONERS:
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1. K.M. MOHAMMED SHAFI,
   S/O.LATE MUHAMMED, KOTTACKAL HOUSE, MELPARAMBU VILLAGE
   KALANADU.P.O., KALANADU, KASARAGOD TALUK
   PIN - 671 317.

2. ABDULLA @ ABDULLA KUNHI,
   S/O.LATE MUHAMMED, DELI HOUSE, MELPARAMBU
   CHEMNADU VILLAGE, KALANADU.P.O., KASARAGOD DISTRICT
   KERALA, PIN - 671 317.

3. ABDUL LATHEEF @ C.B.LATHEEF, S/O.ABBAS,
   GARDEN VILLA, MELPARAMBU.P.O., KASARAGODE DISTRICT
   KERALA, PIN - 671 317.

   BY ADV. SRI.JOSHI N.THOMAS

RESPONDENTS:
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1. UNION OF INDIA,
   REPRESENTED BY ITS SECRETARY, DEPARTMENT OF REVENUE
   MINISTRY OF FINANCE, NORTH BLOCK, NEW DELHI - 110 011.

2. THE DIRECTOR OF ENFORCEMENT,
   DIRECTORATE OF ENFORCEMENT (FEMA)
   GOVERNMENT OF INDIA, LOK NAYAK BHAVAN, KHAN MARKET
   NEW DELHI - 110 003.

3. THE JOINT DIRECTOR,
   DIRECTORATE OF ENFORCEMENT (FEMA)
   GOVERNMENT OF INDIA, 3RD FLOOR, B BLOCK
   BMTC.TTMC BUILDING, SHANTI NAGAR, K.H.ROAD
   BANGALORE - 560 027.

4. THE ASSISTANT DIRECTOR,
   DIRECTORATE OF ENFORCEMENT (FEMA)
   GOVERNMENT OF INDIA, 3RD FLOOR, B BLOCK
   BMTC.T.T.M.C. BUILDING, SHANTI NAGAR, K.H. ROAD
   BANGALORE - 560 027.

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5. THE SPECIAL DIRECTOR (APPEALS) SOUTH ZONE (FEMA), AND COMMISSIONER OF INCOME TAX APPEALS V NO.121 MAHATMA GANDHI ROAD, NUNGAMBACKOM, CHENNAI - 600 034.

R1-R5 BY ADV. SRI.JAISHANKAR V.NAIR, CGC
SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 23197 of 2015 (Y)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1:	**TRUE COPY OF THE COMPLAINT NO.T-3/CP/7-BZ/07 DATED 20.12.2007 FILED BY THE 4TH RESPONDENT BEFORE THE DEPUTY DIRECTOR OF ENFORCEMENT, BANGALORE.**
EXT.P2:	**TRUE COPY OF ORDER RD/BZO/09/2013-14 DATED 3.7.2013 ISSUED BY THE 4TH RESPONDENT.**
EXT.P3:	**TRUE COPY OF APPEAL MEMORANDUM DATED 23.9.2013 FILED BEFORE THE 5TH RESPONDENT BY THE 4TH RESPONDENT.**
EXT.P4:	**TRUE COPY OF THE JUDGMENT DATED 12.2.2015 IN W.P.(C).NO.26809 OF 2014 (A) OF THIS HON'BLE COURT.**
EXT.P5:	**TRUE COPY OF AFFIDAVIT AND PETITION DATED 14.5.2015 SUBMITTED BEFORE THE 5TH RESPONDENT APPELLATE AUTHORITY.**
EXT.P6:	**TRUE COPY OF MEMORANDUM OF OBJECTION DATED 18.5.2015 SUBMITTED BY THE PETITIONERS.**
EXT.P7:	**TRUE COPY OF THE ORDER DATED 3.6.2015 IN SD(A)/CHE/13-14/26 OF 5TH RESPONDENT APPELLATE AUTHORITY.**
EXT.P8:	**TRUE COPY OF MEMORANDUM OF REVIEW PETITION DATED 3.7.2015 SUBMITTED BEFORE THE 5TH RESPONDENT APPELLATE AUTHORITY.**
EXT.P9:	**TRUE COPY OF THE POSTAL RECEIPT DATED 3.7.2015.**
EXT.P10:	**TRUE COPY OF ACKNOWLEDGMENT CARD DATED 6.7.2015 FROM THE OFFICE OF THE 5TH RESPONDENT APPELLATE AUTHORITY.**

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.A. TO JUDGE

JJJ

K. VINOD CHANDRAN, J.

W.P.(C) No. 23197 of 2015 (Y)

Dated this the 13th day of August, 2015

<u>J U D G M E N T</u>

The petitioners are aggrieved with Ext.P7 order of the Special Director (Appeals), Chennai, which is an order under section 17(4) of the Foreign Exchange Management Act, 1999 (for brevity 'FEMA').

2. Admittedly, there is an appeal provided to the Appellate Tribunal by way of Section 18 of FEMA and it is also an admitted fact that the petitioners have filed a review to the order at Ext.P7, under Section 28(2)(f) of FEMA. However, the learned counsel for the petitioner seeks to maintain the above writ petition purportedly on the compelling grounds of want of jurisdiction and the denial of the principles of natural justice. Definitely, the same can be entertained going by the decision of the Hon'ble Supreme Court in **Whirlpool Corporation v. Registrar of Trade**

Marks - 1998 (8) SCC 1 and **State of H.P. & others v. Gujarat Ambuja Cements Ltd - 2005 (6) SCC 499**.

3. Legal ground of lack of jurisdiction is urged on the factual matrix of the 4th respondent, the Assistant Director, having filed an appeal under Section 17 of FEMA, when the adjudicating officer is also an Assistant Director, Directorate of Enforcement (FEMA). Reliance is placed on the decision of the Hon'ble Supreme Court in **Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Another - (2007) 8 SCC 254**. The violation of the principles of natural justice is urged on the specific findings of the Special Director (Appeals), in paragraph 11, which indicates that the appellate authority refused to consider the objections of the petitioners in its entirety.

4. **Mohtesham Mohd. Ismail** was a case in which the appellate provisions under the repealed Foreign Exchange Regulation Act, 1973 (for brevity 'FERA') was

considered. The provisions in the repealed FERA and FEMA are in pari materia and the decision applies on all fours as to the legal aspect discussed therein, is the contention. Therein, the Special Director had passed an order, as the adjudicating authority under the FERA, which was challenged by the individuals who were imposed with penalty before the Board of Appeal. The Board having held against the Revenue, the Special Director who had passed the adjudicating order, i.e. the adjudicating authority itself, was before the High Court with an appeal. The Hon'ble Supreme Court held that the same could not be done since the Special Director, who was the adjudicating authority therein and who filed the appeal, was not notified as a representative of the Central Government.

5. The situation in the present case, however, stands on a different footing. The contention of the learned counsel for the petitioners is that both the adjudicating authority and the appellant are holding the same post. The

complaint before the adjudicating authority; itself is filed by the Assistant Director Grade I, Directorate of Enforcement who is authorised to file complaint under the Central Government notification no.1157(E)(22/2000) dated 26.12.2000 issued under Section 16(3) of the FEMA. The adjudicating order was passed by the Assistant Director of the Enforcement, who had been specifically notified as an authority under FEMA, though of the same designation, the officers hold separate distinct posts, one notified as an officer authorised to file a complaint under the provisions of the Act and the other notified as the Adjudicating Authority under the Act. The appeal to the Special Director (Appeals) was filed by the Assistant Director, who though having the same designation, is notified by the Central Government, as an officer representing the Central Government who would be competent to institute a complaint before the adjudicating authority and file such an appeal from the order of the adjudicating authority. In such circumstance, the claim of the petitioner that the appeal itself suffers from a defect insofar as the appellant having no jurisdiction to take up the matter before the Special Director (Appeals), has to be found against the petitioners.

6. With respect to violation of principles of natural justice, a reading of paragraph 11 would indicate that the appeal itself was filed only against one of the issues found by the adjudicating authority, which purportedly caused prejudice to the Department. The adjudicating authority having imposed penalty on the petitioners herein, found that the case is not one which warrants confiscation in terms of Section 13(2) of FEMA and hence, refrained itself from ordering confiscation of the seized amount. The penalty imposed was directed to be adjusted from the amounts seized but, the balance amount, after such adjustment, was to be refunded to the 3rd petitioner. The Central Government being specifically aggrieved by the said order which declined confiscation, was before the Special

Director (Appeals) in a properly instituted appeal, by an Officer who was notified as one representing the Central Government. It is the very same officer who filed the complaint before the adjudicating authority who had moved the appellate authority.

7. Admittedly, the petitioner did not file any appeal from the imposition of penalty as ordered by the adjudicating authority. The impugned order of the adjudicating authority was extracted in paragraph 10 where the four directions were noticed. The first three directions, numbered as 1 to 3, was the finding of guilt on the allegation of contravention of provisions of Section 3(c) of the FEMA, the imposition of penalty on the 3rd respondent coming to Rs.5,25,000/- and imposition of penalty on respondents 1 and 2 to the extent of Rs.1,00,000/- each. The fourth direction was the one which was challenged in an appeal by the Department before the Special Director (Appeals). The petitioners who were the respondents in the

appeal had attempted to make submissions with respect to the other three orders also, ie, regarding the finding of guilt and imposition of penalty. The same was declined to be considered by the Special Director (Appeals) since there was no appeal on that count, and the Department appeal was confined to the direction in which confiscation was declined. This Court does not find any violation of principles of natural justice and the course adopted by the Special Director (Appeals) is only proper. The said ground would also stand negatived. However, it is made clear that this does not preclude the petitioner from urging their contentions otherwise before the appellate authority itself in the review and even before the High Court in an appeal.

The writ petition would stand dismissed with the above observation. No costs.

Sd/-
K.VINOD CHANDRAN,
JUDGE

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