

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2015

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

W.P.Nos.30802 to 30804 of 2015
and
M.P.Nos.1 to 1 of 2015 (3 in nos.)

Sri Naveen Sriram ... Petitioner in all W.Ps

Vs.

1. The Special Director,
Directorate of Enforcement
(Under FEMA, 1999)
Southern Regional Office,
Shastri Bhavan, 3rd Block,
3rd Floor, No.26, Haddows Road,
Chennai - 600 006.

2. The Special Director,
Directorate of Enforcement
(Under FEMA, 1999)
6th Floor, Lok Nayak Bhavan,
Khan Market,
New Delhi - 110 003.

... Respondents 1 and 2 in
all W.Ps

Prayer in W.P.No.30802 of 2015 :

The Writ Petition, filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for records pertaining to the order, dated 03.09.2015, passed by the first respondent in F.No.T-4/07 BAN/2011, and to quash the same and further, to direct the first respondent to comply with the order, dated 06.06.2014, passed by this Court in W.P.No.14639 of 2014, in a letter and spirit.

Prayer in W.P.No.30803 of 2015 :

The Writ Petition, filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, directing the first respondent to furnish documents as per the letter, dated 23.03.2015, issued in connection with F.No.T-4/07 BAN/2011, dated 13.12.2011, in compliance with the procedures contemplated under FEMA (Adjudication and Appeal Rules, 2000).

Prayer in W.P.No.30804 of 2015 :

The Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, directing the first respondent to furnish requested copies for cross-examination of Officials of STCL and complainant, as per the letter, dated 05.08.2015, in connection with F.No.T-4/07 BAN/2011, dated 13.12.2011, in compliance with the procedures contemplated under FEMA (Adjudication and Appeal Rules, 2000).

For Petitioner in all W.Ps. : Mr.B.Kumar,
Senior Counsel, for
M/s.S.Ramachandran Associates
For Respondents in all W.Ps.: Mr.M.Dhandapani

COMMON ORDER

As the issue involved, and the parties in these Writ Petitions are one and the same, and the relief sought herein are also inter-connected, these Writ Petitions are taken up together and disposed of vide this common order.

2. The present Writ Petitions are second round of litigation after the disposal of W.P.No.14639 of 2014, by this Court on 06.06.2014.

3. The facts of the case in brief are as follows:-

i) A complaint was filed against the petitioner, by one K.Sudeesh Kumar, Assistant Director, Directorate of Enforcement, Bangalore, before the respondents, pursuant to which, a show cause notice was issued to the petitioner on 13.12.2011. After the receipt of the said show cause notice, the petitioner submitted his reply on 30.05.2012. Thereafter, the petitioner also filed Writ Petition No.14639 of 2014, seeking a Writ of mandamus, forbearing the respondents from holding the adjudication proceedings, and this Court, by placing reliance on the judgment rendered by the High Court of Bombay in re (Shashank Vyanktesh Manohar Vs. Union of India and the Directorate of Enforcement) reported in (2013) 5 ALLMR 551, disposed of the said Writ Petition on 06.06.2014. For better appreciation, the operative portion of the order is extracted hereunder :-

" Para No.10. In view of the above stated position, I am of the view that the respondents have failed to issue the notice by giving reasons for having decided to proceed with the enquiry. Therefore, the respondents are directed to issue second notice, giving reasons for proceeding with

the enquiry. The respondents shall also afford an opportunity of personal hearing to the petitioner. The respondents are first to form opinion and after recording reasons, whether to proceed against the petitioner with regard to the show cause notice, they have to furnish the same to the petitioner along with the reasons so recorded, atleast 15 days prior to the date of personal hearing. The petitioner is also at liberty to submit explanation as against the reasons for proceeding with the enquiry to be issued by the respondents. It is made clear that the petitioner shall also co-operate with the adjudication proceedings. This will not given any right to the petitioner to challenge the reasons given for the continuation of proceedings. He can only give further explanation and proceed with the pending enquiry."

ii) After the disposal of the Writ Petition with the observations, as quoted supra, an order was passed by the first respondent on 25.07.2014, in connection with the petitioner's letter, dated 19.06.2014, which is stated to have been passed in compliance of the abovesaid order, dated 06.06.2014, passed by this Court. Statements stated to have been made by the petitioner that he wanted to file supplementary reply along with documents, seeking suitable and sufficient opportunity of being heard, were also recorded in the order, dated 25.07.2014. In pursuance thereof, notice of personal hearing was fixed, and heeding to the request made by the petitioner, hearings were adjourned to the following dates; 03.11.2014, 05.01.2015, 19.03.2015 and 03.09.2015, and on the last occasion, i.e. on 03.09.2015, the first respondent, passed the following order:-

"Shri Raghu Hulikal, Authorized Representative of Noticee 4 (i) appeared for the personal hearing and drew attention of letter, dated 05.08.2015 and 11.08.2015, wherein, copies of certain documents were sought by them. In response to this, the Adjudicating Authority made clear that all the relied upon documents have been supplied and the acknowledgments are available on record and requested the Authorized Representatives to furnish his submissions on merits of the case. At this juncture, the learned Advocate requested time upto 25.09.2015 to file their supplementary replies. The Adjudicating Authority made it clear that this personal hearing is the last

opportunity for hearing in person and that the supplementary replies will be taken on record, if the same is filed on or before 25.09.2015, and thereafter, the procedures stand to be concluded. The Authorized Representative accepted to the time schedule."

4. Impugning the aforesaid proceedings, Writ Petition No.30802 is filed, seeking a consequential direction to the first respondent to comply with the order, dated 06.06.2014, passed by this Court in W.P.No.14639 of 2014, i.e., by furnishing the copies of the opinion formed before fixing the date of personal hearing. Writ Petition No.30803 of 2015 is filed, seeking mandamus, directing the first respondent to furnish documents, as requested by the petitioner, by his letter, dated 23.03.2015 and Writ Petition No.30804 of 2015 is filed, seeking direction to the first respondent to furnish requested copies for cross-examination of Officials of STCL and complainant.

5.Mr.B.Kumar, learned Senior Counsel for Mr.S.Ramachandran, learned counsel, appearing for the petitioner, submitted that the order, dated 06.06.2014, passed by this Court in W.P.No.14639 of 2014, has not been complied with by the respondents in letter and spirit, and without even assigning any reasons for not furnishing the documents to the petitioner, the impugned order came to be passed against him. It is the specific contention of the learned Senior Counsel that, as the respondents are in exclusive possession of certain documents, the request made by the petitioner to furnish such documents, ought to have been considered by them, being Adjudicating Authorities. It is also the specific contention of the learned Senior Counsel that the Officials of STCL are sole cause for the entire mess, as they were in charge of the transaction and the petitioner stood only as a guarantor. Hence, the learned Senior Counsel contended that the respondents ought to have given sufficient opportunity to the petitioner to cross-examine the Officials of STCL and complainant. To buttress the said contention, the learned Senior Counsel placed reliance on the judgment rendered by the Hon'ble Apex Court in re (Telstar Travels Pvt. Ltd., Vs. Enforcement Directorate) reported in (2013) 9 S.C.C. 549.

6. Per contra, Mr.M.Dhandapani, learned counsel appearing for respondents submitted that, there is due compliance of the order, dated 06.06.2014, passed by this Court in W.P.No.14639 of 2014. Much water has flown under the bridge. Therefore, the ratio laid down in the unreported judgment rendered by the learned Single Judge of this Court in W.P.No.20592 of 2014, dated 25.08.2014, in re (Ramakrishna Setty Vs. Special Director,

Directorate of Enforcement, Shastri Bhavan, Chennai) would govern the case. Even on the interpretation of Rule 4 (3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000, (hereinafter referred to as 'FEMA'), the said case would be applicable, as taken note of by this Court in the case of (Ramamohan Rao Mynampati Vs. Special Director, Adjudicating Authority, Directorate of Enforcement and others) in W.P.No.7533 and 7534 of 2015, dated 15.09.2015.

7. The learned counsel further submitted that the complaint was made on 20.09.2011, and more than four years have lapsed since then, and the petitioner has been procrastinating the proceedings, without allowing the respondents to conclude the adjudication proceedings. The learned counsel furthermore submitted that the provisions of Indian Evidence Act do not have any appliance to the proceedings initiated under FEMA, and in support of this proposition, the learned counsel has placed reliance on the decision of the Hon'ble Apex Court in re (Kanungo & Company Vs. Collector of Customs and others) reported in A.I.R. (1982) S.C. 2136, which has been followed by the learned Single Judge of this Court in W.P.No.18096 of 2013, dated 30.08.2013, in re (Ramakrishna Setty Vs. Special Director, Directorate of Enforcement, Shastri Bhavan, Chennai and another).

8. Therefore, the learned counsel submitted that no interference is required at this stage, and by summing up his submissions, he submitted that in pursuant to the impugned order, dated 03.09.2015, orders have been reserved, and what is required is the passing of verdict in the final proceedings. If the petitioner is aggrieved by the final orders that is to be passed, he can workout his remedy by way filing an Appeal.

9. Heard the rival submissions made on either side, and this Court also gone through the authorities cited by them and perused the materials available on record.

10. From the facts narrated supra, one thing is apparent to this Court. Though the complaint was filed as early as on 20.09.2011, adjudication process is not yet over. Coming to the aspect regarding non-compliance of the order, dated 06.06.2014, passed by this Court in W.P.No.14639 of 2014, this Court is afraid that it is not open to the petitioner to complain at this length of time. Admittedly, the order, dated 25.07.2014, which is stated to have been passed in compliance of the order, dated 06.06.2014, in W.P.No.14639 of 2014, has not been challenged by the petitioner. On the contrary, the petitioner appeared for enquiry, and made certain statements, which were also recorded.

11. Fact, that the petitioner sought for certain documents, and also requested for cross-examination of Officials of STCL, would per se show his understanding of the order passed. It is also seen that, this Court, while passing the order on 06.06.2014, in W.P.No.14639 of 2014, did not take into consideration of the earlier order, dated 25.08.2014, passed in W.P.No.20592 of 2014, which fact was unfortunately, not brought to the notice of this Court. In the said order, it has been held as follows :-

"Para 10. Therefore, the scheme of Section 4 actually provides opportunities at the every stage to the noticee. The forming of an opinion at the stage of show cause notice and receipt of reply, as provided in sub-rule (3) of Rule 4, is almost akin to the forming of an opinion by a disciplinary authority to hold or not an enquiry, upon receipt of a reply to a charge memo in a disciplinary proceeding. Therefore, I do not think that there is any scope for expanding Rule 4 (3) to mean that the forming of the opinion as required in Rule 4 (3) has to be reflected by an order in writing containing reasons. The interpretation given by the Division Bench of the Bombay High Court to the expression "opinion" appears to be very elastic.

11. Be that as it may, the petitioner had allowed several things to pass, before he came up with the above writ petition. When the petitioner came up with the above Writ Petition, the stage of Rule 4 (3) had already been passed. The enquiry had actually come, at the time when the petitioner moved this Court, to the stage of Rule 4 (8). Therefore, it is not possible now to put the clock back or rewind the proceedings back to the stage of Rule 4 (3).

12. After all, the requirement of Rule 4 (3) even if the interpretation given by the Division Bench of the Bombay High Court is taken to be correct, should be seen only as part of the principles of natural justice. Since the petitioner had crossed the stage of Rule 4 (3) and the entire enquiry is now over and orders reserved, the petitioner should be taken to have waived the requirement. "

12. Following the aforesaid principles, this Court, while dealing with the scope of Rule 4 (3) of FEMA in Ramamohan Rao Mynampati's case (referred to supra) held as follows:-

"Para No.10. The facts narrated are not in dispute. While dealing with the enactment of this nature, which is adjudicatory, the Court has to see the underlying object behind it. It is not as if the first respondent lacks jurisdiction. The petitioner cannot be said to be a person aggrieved at this stage as there is no civil consequence involved. The opinion has been formed by the first respondent based upon available materials, which are not controverted. It is the specific case of the petitioner himself, as recorded earlier, that he was working with the concern in different capacities. Section 42 of the Act has to be seen contextually. It deals with the contravention by the company with the consent and connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company as the case may be. Merely because a person was not a director, but in other capacity, with a role attributable to neglect, the rigour of Section 42 of the Act would not be taken away. Adjudication is with reference to the petitioner qua the affairs of the concern. Reliance has been made on the decision rendered by the Apex Court in Gunmala Sales Private Limited Vs. Anu Mehta and Others ((2015) 1 SCC 103). There is obviously a difference between Section 141(1) and 141(2) of the Negotiable Instruments Act. That is not the case herein. The procedure contemplated under the Negotiable Instruments Act and the FEMA are totally different. In the earlier enactment, complaint is a private one. In the case on hand, it is only an adjudication. A judicial proceeding is different from a quasi-judicial. Therefore, the submission made by the learned senior counsel for the petitioner in this regard cannot be countenanced. Law is quite settled that even in a penal statute, the rule of purposive interpretation can be followed, taking into consideration of the social objective and rationale behind it (see Rajinder Singh Vs.

State of Punjab ((2015) 6 SCC 477)). Suffice it to state that on the facts of the case, as expressed by the petitioner himself before the first respondent, he cannot come out of the purview of Section 42 of the Act.

Para No.11. Coming to the other decision of the Bombay High Court in Shashank Vyankatesh Manohar Vs. Union of India and the Directorate of Enforcement (2013 (5) ALLMR551), it has to be seen on the context on which it has been followed. The opinion has been formed by the adjudicating authority on the facts of the present case. Such opinion being subjective, has to be considered from the over all perspective. Once we say it is a prima facie opinion, the duty of the Court is to see whether such materials are available or otherwise would have weighed in the mind of the adjudicating authority to proceed further."

13. However, this Court is not willing to go into the said issue, as it is not necessary in this proceeding. Incidentally, this Court is also not willing to go into the merits of the orders passed earlier in the collateral proceedings. Suffice it is to state that, it is not open to the petitioner to complain regarding the non-compliance of the order, dated 06.06.2014, passed in W.P.No.14639 of 2014, without even challenging the order, dated 25.07.2014, in the manner known to law. Further, as held by this Court in W.P.No.20592 of 2014, it is very difficult to put the clock back at this stage, especially, when other than the petitioner and his concern, all other noticees have been examined already. Hence, the order, impugned herein cannot be quashed.

14. Insofar as the prayer sought for in W.P.No.30803 of 2015 is concerned, viz. the petitioner's request for furnishing documents, it is seen that, admittedly, the documents relied upon by the respondents have been furnished to the petitioner, and though it is the case of the petitioner that the respondents are in exclusive possession of certain documents, which they may rely upon in the offing for the purpose of concluding the adjudication proceedings, this Court is afraid that, such requirement is beyond the principles governing natural justice. It is not the case of the respondents that they are going to rely on the documents behind the back of the petitioner. In fact, the learned counsel for the respondents submitted that the documents relied upon by other noticees/witnesses were also given to the petitioner, and in any case, the documents having

not given, will not be relied upon. Therefore, this Court has no hesitation to hold that the petitioner is not entitled to seek for documents, which are otherwise required for the purpose of completing the adjudication proceedings.

15. As regards the prayer sought for in W.P.No.30804 of 2015, viz., direction upon the first respondent to furnish requested copies for cross-examination of Officials of STCL, it is no doubt true that the Hon'ble Apex Court, in the judgment reported in Telstar Travels Pvt. Ltd.'s case (supra) has taken note of its intra Court's decision rendered in Kanungo's Case (supra), and held that the question of permitting the parties to cross-examine has to be decided on the facts and circumstances of each case. Further, the question as to whether such failure has led to a prejudice affecting the decision made against such a party has also to be considered on the facts of each case.

16. Reverting to the facts of the case on hand, it is seen that final orders are yet to be passed. Even otherwise, furnishing copies of the documents produced by the witnesses, which are relied upon by the respondents in the order to be passed would amount to substantial compliance with the principles of natural justice. In this connection, it would be quite apposite to refer to the decision rendered by the Hon'ble Apex Court in Telstar Travels Pvt. Ltd., case (supra) which is extracted hereunder :-

" Para No.28. Coming to the case at hand, the adjudicating authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants, the adjudicating authority also placed reliance upon the documents produced by Miss Anita Chotrani and Mr Raut. These documents were, it is admitted, disclosed to the appellants, who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the adjudicating authority to permit cross-examination of the witnesses producing the documents cannot even on the principles of the Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and

explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected."

17. One more factual aspect, that requires to be considered in this case is that whether the petitioner should be provided an opportunity of being heard, before concluding the enquiry. Though it is the contention of the respondents that the petitioner took part in the adjudicating proceeding in pursuant to the show cause notice issued to him, and thereafter, he appeared for personal hearing on 20.08.2014, and thereafter, at his request, hearings were adjourned to the following dates, i.e., on 03.11.2014, 05.01.2015, 19.03.2015 and 03.09.2015, and only thereafter, enquiry has been concluded though in his absence, as he has not availed of the opportunities given to him, and that amounts to the grant of sufficient opportunities, the said contention cannot be accepted, as the petitioner has challenged the very said order, dated 03.09.2015, much prior to the date of personal hearing.

18. Thus, considering the abovesaid aspects, this Court is inclined to direct the respondents to issue another notice to the petitioner, by fixing a date for personal hearing. If the documents produced by other noticees/witnesses, are to be relied upon and not furnished to the petitioner, the same shall be furnished by the respondents together with the statements recorded from them (witnesses) even before the date of such hearing.

19. In the result, Writ Petitions are disposed of accordingly. The respondents shall conclude the adjudication proceedings within a period of eight weeks from the date of receipt of a copy of this order. However, there shall be no order, as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Special Director,
Directorate of Enforcement
(Under FEMA, 1999)
Southern Regional Office,
Shastri Bhavan, 3rd Block,
3rd Floor, No.26, Haddows Road,
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2. The Special Director,
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+ 3 ccs to Mr.S. Ramachandran, Advocate SR.53626

W.P.Nos.30802 to 30804 of 2015

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