

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 25.04.2018	Delivered on 05.06.2018
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CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
W.A.No.476 of 2017
and
C.M.P.No.7203 of 2017

India Cements Ltd.,
Coromandel Tower,
93, Santhome High Road,
Karpagam Avenue,
RA Puram, Chennai - 600 028.

...Appellant/Petitioner in WP

versus

1.Union of India
Rep. by its Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.Deputy Director,
Directorate of Enforcement
4th Floor, Kaiser-I-Hind,
Currimbhoy Road,
Ballard Estate, Mumbai - 400 001.

... Respondents/Respondents in WP

PRAYER: Appeal filed against the order passed by this Court dated 02.03.2017 passed in W.P.No.1748 of 2017.

WP.No.1748 of 2017:Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of the 2nd respondent dt 4.11.2016 bearing Ref. F. No.T-4/11-B/ DD/VMS/2015/3101 and quash the same.

For Appellant : Mr.P.R.Raman, Senior Counsel
for Mr.C.Seethapathy

For Respondents : Mr.G.Rajagopal
Additional Solicitor General
Assisted by Mrs.G.Hema,
Special Public Prosecutor

J U D G M E N T

R.SUBRAMANIAN, J.

1. This intra-Court appeal has been filed by the petitioner in W.P.No.1748 of 2017 challenging the dismissal of the said Writ Petition by the learned Single Judge on 02.03.2017.

The facts that led to the filing of the Writ Petition are as follows:-

2. The 2nd respondent in the appeal issued a show cause notice to the appellant and others on 27.02.2015, alleging certain contraventions of the provisions of Section 3(a) and 4 of the Foreign Exchange Management Act, 1999. The appellant sent a reply to the said show cause notice on 19.06.2015. After the receipt of the reply, the 2nd respondent issued the impugned proceedings dated 04.11.2016 requiring the appellant to appear for a personal hearing on 24.11.2016 at 14.00 hours. It is this notice that is challenged by the appellant before the Writ Court.

3. The sum and substance of the contentions of the appellant before the Writ Court were that the Authority viz., the 2nd respondent chose to issue a notice for personal hearing dated 04.11.2016 without adhering to Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. According to the appellant, Rule 4 requires the 2nd respondent to form an opinion on the objections raised by the petitioner in its explanation dated 19.06.2015 and record his reasons for taking further proceedings. It is the further contention of the petitioner that the reasons so recorded should be communicated to the petitioner to enable him to understand the scope of the impending enquiry. According to the petitioner, the non-recording of reasons and its non-communication is fatal to the proceedings, hence the impugned proceedings dated 04.11.2016 should be quashed by issue of a Writ of Certiorari.

4. The claim in the Writ Petition was resisted by the respondents, contending that the interpretation placed by the petitioner on Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 is erroneous. All that is required by the said Rule is that the adjudicating Authority viz., the 2nd respondent should form an opinion on the explanation of the noticee and if the Authority concludes that despite the explanation offered, a further enquiry should be undertaken, he shall issue a notice fixing the date for appearance of the noticee. The Rule, according to the respondents, does not in its terms require recording of reasons which are the foundation for the formation of the opinion

regarding further proceedings and communication of the same to the noticee.

5. It was also contended that sub-Rule 4 of Rule 4 makes it obligatory on the part of the adjudicating Authority to explain to the noticee or his legal practitioner or his chartered accountants, the contraventions alleged to have been committed indicating the provisions of the Act or the Rules in respect of which, the contravention is alleged to have taken place. Therefore, according to the respondents, the requirement of communication of the reasons for arriving at a *prima facie* conclusion to proceed with further enquiry contemplated under sub-Rule 3 of Rule 4 cannot be read into the provisions.

6. The learned Single Judge who heard the Writ Petition along with other cases, after elaborate discussions of the rival contentions with reference to the provisions of the Rules, concluded that such a requirement of communication of the reasons which forms the basis of the opinion are not mandatory. The learned Single Judge also took note of the fact that the adjudicating Authority had furnished the petitioners a copy of his proceedings dated 04.11.2016, wherein, he had, after considering the explanation offered by the petitioners concluded that the contents of the complaint and the reply necessitate an in-depth examination and that an enquiry should be held in this case. The learned Single Judge was of the opinion that this would satisfy the requirements of Rule 4(3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. On the above conclusion, the learned Single Judge dismissed the Writ Petition. Aggrieved, the petitioner in W.P.No.1748 of 2017 has come forward with this appeal.

7. We have heard Mr.P.R.Raman, learned Senior Counsel appearing for C.Seethapathy, learned counsel for the appellants and Mr.G.Rajagopal, learned Senior Counsel, learned Additional Solicitor General of India appearing for the respondents.

8. Mr.P.R.Raman, learned Senior Counsel appearing for the appellant would vehemently contend that furnishing of reasons for the opinion after consideration of the explanation of the petitioner is mandatory in view of the provisions of Rule 4(3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. Referring to the language of sub-Rule 3 of Rule 4 which reads as follows:

"(3) After considering the cause, if any, shown by such person, the Adjudicating Authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal

practitioner or a chartered accountant duly authorised by him."

Mr.P.R.Raman, would contend that the words "after considering the cause, if any, shown by such person, the Adjudicating Authority is of the opinion that an inquiry should be held," the learned Senior Counsel would contend that the Rule requires the adjudicating Authority to form an opinion on the basis of the explanation submitted by the noticee and once such an opinion is formed, the noticee should be furnished with a copy of the reasons, so as to enable him to know the basis on which the Authority has decided to proceed with the enquiry.

9. This according to him, would prevent arbitrary decisions on the part of the adjudicating Authority in proceeding with an enquiry. The learned Senior Counsel would however concede that those reasons cannot be a subject matter of challenge. He would also rely upon the judgments of the Division Bench of the Bombay High Court in *Shashank Vyankatesh Manohar Vs. Union of India and another* in W.P.No.5305 of 2013 dated 7th August 2013 and in *Lalit Kumar Modi Vs. Special Director, Directorate of Enforcement* in W.P.No.1703 of 2013 dated 6th February 2014.

10. Relying heavily upon the observations of the Bombay High Court in *Shashank Vyankatesh Manohar Vs. Union of India and another* referred to *supra* Mr.P.R.Raman, would contend that non-furnishing of the reasons would jeopardise the appellant and would have the effect of vitiating the further proceedings in the enquiry. The learned counsel would draw our attention to the following observations of the Bombay High Court made in *Shashank Vyankatesh Manohar Vs. Union of India and another* cited *supra*.

"In view of such serious consequences which would be inflicted upon the noticee against whom the adjudication order may be passed under Section 13 of the Act, the safeguards provided by sub-rules (1), (2) and (3) of Rule 4 of the Adjudication Rules must be presented with dire penal consequences of being imprisoned for six months, apart from other liabilities and adverse consequences. Merely because the imprisonment would be in a civil prison and not in a criminal prison, would be no consolation to the person who was not responsible for contravention of FEMA."

11. The learned Senior Counsel would also point out that the judgment of the Bombay High Court in *Shashank Vyankatesh Manohar Vs. Union of India and another* cited *supra* was followed by another Division Bench of the Bombay High Court in *Lalit Kumar Modi Vs. Special Director, Directorate of Enforcement* referred

to supra. By relying upon the observations of the Bombay High Court in the above two judgments, the learned Senior Counsel would contend that a duty is cast upon the adjudicating authority to record its reasons for arriving at an opinion to proceed with the enquiry and communicate such reasons to the noticee to enable the noticee to put forth his defence. In the absence of strict compliance of the provisions of sub-Rule 3 of Rule 4, the Authority cannot proceed with the enquiry. The learned Senior Counsel would further submit that the learned Single Judge erred in not following the ratio of the decisions of the Division Benches of the Bombay High Court.

12. Mr.P.R.Raman, learned Senior Counsel would also point out that the Special Leave petition filed by the Union of India challenging the judgment in *Shashank Vyankatesh Manohar Vs. Union of India and another* referred to supra was rejected by the Hon'ble Supreme Court on 04.07.2014. A downloaded record of the proceedings of the Hon'ble Supreme Court has also been produced before us.

13. Contending contra Mr.G.Rajagopal, learned Additional Solicitor General of India would submit that the language of sub-Rule 3 does not impose an obligation on the adjudicating Authority to communicate the reasons that weighed with him in forming an opinion to proceed further with the enquiry. He would point out that even in *Shashank Vyankatesh Manohar Vs. Union of India and another* cited supra, the Bombay High Court in paragraph 14 of the judgment has observed as follows:

"This forming of opinion need not be a detailed consideration of all the submissions but must show application of mind to the objections raised by the noticee. In case the objections are such as would require detailed consideration, the authority concerned can dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order."

14. Relying upon the above observations of the Division Bench of the Bombay High Court, Mr.G.Rajagopal, learned Additional Solicitor General of India would submit that the proceedings dated 04.11.2016, a copy of which had been duly served on the appellant would satisfy the requirements of law inasmuch as the adjudicating Authority has said that he is of the opinion that the allegations made in the complaint need in-depth examination, in the light of the reply to the show cause notice.

15. The sum and substance of the contentions of Mr.G.Rajagopal, learned Additional Solicitor General of India is that the mandatory requirement of recording reasons and communication of such reasons to the noticee cannot be read into the provisions of sub-Rule 3 of Rule 4 of the Rules relating to adjudication proceedings. He would also contend that if such requirement is read into the Rules, there is always a possibility of a noticee contending that the adjudicating Authority had reached a pre-conclusion regarding the merits of the matter. He would also submit that the Division Bench of the Bombay High Court had in fact observed that the communication of the reasons will not give a cause of action to the noticee to challenge them. He would also point out that the explanation of the noticee runs to several pages and contains several minute details which will have to be definitely examined by the adjudicating Authority. Inviting, our attention to sub-Rule 4 of Rule 4 which reads as follows:

"(4) On the date fixed, the Adjudicating Authority shall explain to the person proceeded against or his legal practitioner or the chartered accountant, as the case may be, the contravention, alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, direction or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place."

the learned Additional Solicitor General of India would contend that sub-Rule 4 provides enough safeguards to the noticee, inasmuch as the adjudicating Authority is bound to explain to the noticee or his legal practitioner or his chartered accountant as the case may be, the contravention alleged to have committed by such persons with reference to the provisions of the Act or of the Rules, Regulations, notifications etc., Therefore, according to him, the claim of the petitioner that there should be a preliminary conclusion on the basis of the explanation submitted and the same should be communicated to the noticee before conduct of the enquiry cannot be countenanced.

16. We have considered the rival submissions. The only question that arises in this appeal is as to whether the adjudicating Authority is bound to record his reasons for formation of an opinion under sub-Rule 3 of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 in writing and also communicate the same to the noticee if required by the noticee before proceeding with an enquiry.

17. No doubt true, a Division Bench of the Bombay High Court in *Shashank Vyankatesh Manohar Vs. Union of India and another* cited *supra* had read into the Rules, the requirement of such recording of reasons and communication of it to the noticee. We are unable to persuade ourselves to agree with the conclusions of the Division Bench of the Bombay High Court. It is not seen from the report as to whether the provisions of sub-Rule 4 of Rule 4 were considered by the Bombay High Court.

18. As rightly pointed out by the learned Additional Solicitor General of India, such a requirement does not appear on a plain reading of the Rules. We have already extracted sub-Rule 3 of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. Sub-Rule 1 of Rule 4 requires the adjudicating Authority to issue a show cause notice for the purposes of adjudicating as to whether any person has committed any contravention of the provisions of the Foreign Exchange Management Act. Sub-Rule 2 of Rule 4 requires the show cause notice issued under sub-Rule 1, to indicate the nature of contravention alleged to have been committed by him. Sub-Rule 3 of Rule 4 provides that if after considering the cause shown by the noticee, the adjudicating Authority is of the opinion that an enquiry should be held, he shall issue a notice fixing the date for appearance of that person either personally or through legal practitioner or a chartered accountant, duly authorised by him.

19. On a plain reading of the provisions, as already stated, we are unable to cull out a requirement of recording of reasons and communication of such reasons to the noticee, even at the stage of consideration of the reply to the show cause notice. Sub-Rule 4 of Rule 4 imposes an obligation on the adjudicating Authority to explain to the noticee or to his legal practitioner or to his chartered accountant, the contraventions alleged to have been committed with reference to the provisions of the Act, of the Rules, Regulations, notifications or any condition subject to which an authorisation is issued by the Reserve Bank of India, in respect of which the contravention is alleged to have taken place.

20. The primary reason behind the conclusions of the Bombay High Court appear to be the serious consequences, which would be inflicted upon the noticee against whom an adjudication order may be passed under Section 13 of the Act. The consequences of a factual finding relating to contravention that may be reached by the adjudicating Authority after a full fledged enquiry, cannot, in our considered opinion, form the basis for the Court to read into the provision something more than what is required on a plain reading of the provision. Even the Bombay High Court in paragraph 14 has said that the adjudicating Authority can

dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order.

21. A perusal of the proceedings of the 2nd respondent dated 04.11.2016, a copy of which has admittedly been handed over to the petitioner/ appellant would show that the adjudicating Authority has done precisely this, postponing the consideration of the objections to be taken up at the time of the final enquiry as the objections in his opinion would require detailed consideration.

22. The reasonings of the Bombay High Court in *Shashank Vyankatesh Manohar Vs. Union of India* and another cited supra were substantially followed by another Division Bench of the same Court in *Lalit Kumar Modi Vs. Special Director, Directorate of Enforcement* cited supra. The learned Single Judge has also taken note of the judgment of this Court in *Ramakrishna Settu Vs. The Special Director, Directorate of Enforcement, Southern Region, Sastri Bhavan, Chennai -600006* rendered in W.P.No.20592 of 2014 dated 25.08.2014, wherein, this Court has set out the scope of the enquiry to be conducted by the adjudicating Authority under the provisions of the Foreign Exchange Management Act, 1999. This Court had in the said judgment observed as follows:

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 under sub-rule (3) or 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 in its expression 'opinion' appears to be very elastic.

23. This Court had in fact disagreed with the interpretation of the Division Bench of the Bombay High Court in *Shashank Vyankatesh Manohar Vs. Union of India* and another cited supra. Mr.P.R.Raman, learned Senior Counsel appearing for the appellant

would draw our attention to the judgment of the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. Vs. Income-Tax Officer and Others* reported in (259) ITR 19, wherein, the provisions of Section 148 of the Income Tax Act were considered and the Hon'ble Supreme Court held that while reopening an assessment under Sections 147 and 148 of the Income Tax Act, the Assessee whose assessment is sought to be reopened is entitled to seek from the Assessing Officer, the reasons recorded for reopening the assessment.

24. We don't think the principles enunciated by the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. Vs. Income-Tax Officer and Others* cited *supra* which turned on the interpretation of the provisions of Sections 147 and 148 of the Income Tax Act could be applied to the case on hand. The provisions of Sections 147 and 148 of the Income Tax Act empower the Authorities to reopen completed assessments and while doing so, the Hon'ble Supreme Court has held that the Authorities are bound to disclose the reasons for reopening a completed assessment. From the Rules framed under the Foreign Exchange Management Act, 1999, we find that such a requirement comes in at a later point of time and sub-Rule 4 of Rule 4 casts a duty on the adjudicating Authority to explain the nature of the contraventions with reference to the legal provisions etc., to the noticee or his legal practitioner or his chartered accountant as the case may be. When such a provision has been made in the very Rules, reading into those Rules, something which is not contemplated, in our considered opinion may not be just and proper.

25. A learned Single Judge of this Court in *Ramakrishna Settu Vs. The Special Director, Directorate of Enforcement, Southern Region, Sastri Bhavan, Chennai -600006* cited *supra* has explained the scheme of an enquiry under the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. The said observations are as under:

"9. A careful look at the provisions of sub-rules (1) to (12) of Rule 4 would show that the enquiry by the respondent, comprises of five stages, which are as follows:-

"1. The issue of show cause notice of a duration of not less than ten days, calling upon the person to show cause as to why an enquiry should not be held, for any contravention.

2. The issue of a notice fixing the date for the appearance of the person, if after considering the cause shown by the person to the show cause notice, the adjudicating authority is of the opinion that an enquiry should be held.

3. The explanation of the adjudicating authority in person, either to the noticee or to his authorised representative, the contravention committed by the noticee with reference to the provisions of the Act or the Rules or the Regulations.

4. Giving an opportunity to the noticee to produce such documents or evidence and the summoning and enforcing of the attendance of any person.

5. Passing of the orders.""

26. We find ourselves in complete agreement with the views of the learned Single Judge in *Ramakrishna Settu Vs. The Special Director, Directorate of Enforcement, Southern Region, Sastri Bhavan, Chennai -600006* case cited *supra*. We are unable to persuade ourselves to agree with the decisions of the Bombay High Court inasmuch as they read into the provision, the requirement which is not contemplated under the Rules. We are therefore of the view that the adjudicating Authority is not under any statutory obligation to communicate his reasons for forming an opinion to conduct an enquiry under sub-Rule 3 of Rule 4 of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. We may draw an analogy with the provisions of the Prevention of Money-Laundering Act, 2002. Section 5(1) of the said Act as amended by the Amendment Act, 2012 reads as follows:

"(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purpose of this section, has reason to believe (the reason for such belief to be recorded in writing) on the basis of material in his possession, that"

27. Whenever a statute requires a particular thing to be done in a particular manner, it is a trite position of law that it should be done in that manner alone and not otherwise. The provisions of sub-Rule 3 of Rule 4 in contra distinction to the

provisions of the Section 5(1) of the Prevention of Money-Laundering Act, 2002, do not require the reasons to be recorded in writing. If we are to read into the provision, such a requirement, the same in our considered opinion would lead to disastrous results, where notices under various enactments which provide for enquiry on the basis of a subjective satisfaction of the adjudicating Authority or the enquiry officer or the Disciplinary Authority would take a stand that those Authorities should also record their reasons for forming an opinion and communicate the same.

28. We therefore, agree with the conclusion of the learned Single Judge and we see no merits in this appeal. The appeal is therefore dismissed. However, there will be no order as to costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

dsa

To

1.The Secretary,
Department of Revenue,
Ministry of Finance,
New Delhi.

2.The Deputy Director,
Directorate of Enforcement,
4th Floor, Kaiser-I-Hind,
Currimbhoy Road,
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+1 cc to Mr.C.Sethapathy Advocate sr 34618

+1 cc to Mrs.G.Hema Special Public Prosecutor sr 34607

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