

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition Nos.22344 & 31851 of 2017
and M.M.P.Nos.35007, 23424 & 23425 of 2017

Orders reserved on 29.01.2018	Orders pronounced on 19.02.2018
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Writ Petition No.22344 of 2017

Pradeep D.Kothari .. Petitioner

Vs.

1.The Assistant Director,
Directorate of Enforcement,
2nd & 3rd Floor, Murugesu Naicker Complex,
84, Greaves Road, Chennai-600 006.

2.Commissioner of Customs (Appeals-I),
The Competent Authority under FEMA 1999,
Custom House,
60, Rajaji Salai, Chennai-600 001.

3.Deputy Commissioner of Income Tax,
Company Circle II (4),
Room No.514, New Block,
121, M.G.Road, Nungambakkam,
Chennai-600 034.

4.Deputy Commissioner of Income Tax,
Corporate Circle 4 (2),
121, M.G Road, Nungambakkam,
Chennai-600 034.

.. Respondents

Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records relating to the impugned Seizure order No.1/2017 dated 27.06.2017 passed by the 1st respondent herein, and the petition seeking conformation of seizure dated 04.07.2017 filed by the first respondent before 2nd respondent and quash the same as unlawful, arbitrary and not sustainable in law.

For Petitioner : Mr.A.R.L.Sundaresan,
Senior Counsel
for M/s.A.L.Ganthimathi

For R1 : Mrs.G.Hema
SPC for Central Government

For RR2 to 4 : Mr.A.P.Srinivas,
Senior Standing Counsel

Writ Petition No.31851 of 2017

Pradeep D.Kothari

.. Petitioner

Vs.

- 1.Commissioner of Customs (Appeal-II),
The Competent Authority under FEMA 1999,
Custom House,
60, Rajaji Salai, Chennai-600 001.
- 2.The Assistant Director,
Directorate of Enforcement,
2nd & 3rd Floor, Murugesu Naicker Complex,
84, Greaves Road, Chennai-600 006.
- 3.Deputy Commissioner of Income Tax,
Company Circle II (4),
Room No.514, New Block,
121, M.G.Road, Nungambakkam,
Chennai-600 034.
- 4.Deputy Commissioner of Income Tax,
Corporate Circle 4 (2),
121, M.G Road, Nungambakkam,
Chennai-600 034.

.. Respondents

Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records relating to the impugned order F.P.No.1/2017 SEA dated 23.11.2017 passed by 1st Respondent herein confirming the Seizure order No.1/2017 dated 27.06.2017 of 2nd Respondent Under Sec.37(A) (1) of FEMA 1999 and quash the same as unlawful arbitrary and not sustainable in law.

For Petitioner : Mr.A.R.L.Sundaresan,
Senior Counsel
for M/s.A.L.Ganthimathi
For R1 : Mr.A.P.Srinivas,
Senior Standing Counsel

For R2 : Mrs.G.Hema
SPC for Central Government

For RR3 & 4 : Mrs.Hema Muralikrishnan,
Senior Panel Counsel

C O M M O N O R D E R

Both the writ petitions have been filed by the same petitioner and the relief sought for being interconnected, they were heard together and are disposed of by this common order.

2.Writ Petition No.22344 of 2017 has been filed challenging the order of seizure dated 27.06.2017, passed by the Assistant Director, stating that he has reason to believe that foreign exchange worth USD 352258.25 suspected to be held outside India in contravention of Section 4 of the Foreign Exchange Management Act, 1999 ("FEMA" for brevity) and the equivalent value of the property of the petitioner in India to the tune of USD 352258.25 (worth Rs.1,53,97,746/-) is liable to be seized in terms of provisions of Section 37A(1) of FEMA, read with Government of India notifications. Therefore, the first respondent ordered for seizure of the petitioner's Bank account to the tune of Rs.1,59,14,857/-

3.Writ Petition No.31851 of 2017 has been filed challenging the order passed by the Commissioner of Customs (Appeals-II) dated 23.11.2017, confirming the order of seizure passed by the Assistant Director as legal and proper.

4.Mr.A.R.L.Sundaresan, learned Senior Counsel appearing for the petitioner contended that the Assistant Director has invoked power under Section 37A of FEMA, which has penal consequences including civil imprisonment and such law cannot have retrospective application and no person can be convicted of any offence except for the violation of a law in force at the time of the commission of the act charged as an offence, as it is expressly prohibited under Article 20(1) of the Constitution of India. To support the above contention, several decisions were referred to in the affidavit filed in support of the writ petition. Apart from the above submissions, on facts, the learned Senior Counsel contended that the order of seizure is unsustainable in law. Challenging the order of the Commissioner, confirming the order of seizure, it is contended that, it is an ex-parte order, having been passed without affording opportunity to the petitioner to defend himself and there is gross violation of principles of natural justice.

5.It is submitted that, though it was brought to the notice of the Commissioner about the pendency of Writ Petition No.22344 of 2014 challenging the order of seizure, the impugned order came to be passed in a hurried manner without taking into consideration the contentions advanced by the petitioner. Therefore, the learned Senior Counsel would plead that one more opportunity may be granted to the petitioner to go before the Commissioner (Appeals) and make submissions on merits.

6.M/s.G.Hema, learned Senior Panel Counsel for the Enforcement Directorate submitted that, summons was issued to the petitioner under Section 37(1) of FEMA read with Section 131 of the Income Tax Act, 1961 and statement was recorded from him on 26.06.2016, wherein he had stated that proceeds were transferred to the Account of Xeniox Foundation and he has admitted credit in his account of Xeniox Foundation in HSBC Bank, Geneva.

7.The learned Senior Panel Counsel referred to the various other factual details as mentioned in paragraphs 5.3 and 6 of the counter affidavit filed by the Assistant Director.

8.It was submitted that the order of seizure requires to be placed for confirmation before the competent authority, Commissioner (Appeals) within thirty days from the date of seizure in terms of Section 37A(3) of FEMA and at that stage, Writ Petition No.22344 of 2017 was filed without availing the statutory remedy under FEMA.

9.Further, it is submitted that the language employed in Section 37(1) of FEMA does not provide an opportunity to the petitioner before issuing order of seizure. The Assistant Director has duly enclosed the relevant materials placed along with the petition filed before the competent authority (Commissioner (Appeals)) and provided copy to the petitioner.

10.Further, it is submitted that, when there is statutory remedy available to the petitioner, he has to avail such remedy and cannot bypass the remedy and file a writ petition. In support of such contention, the learned Senior Panel Counsel relied on the decisions of the Hon'ble Supreme Court in Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement reported in (2010) 4 SCC 722 and in the case of United Bank of India Vs. SatyawatiTondan & Ors. In SLP(C) No.10145 of 2010.

11. With regard to challenge to the order of the Commissioner (Appeals) confirming the order of seizure passed by the Assistant Director, it is submitted that the petitioner has statutory remedy under Sections 37A(4) and 37A(5) of FEMA and instead of availing the same, has filed Writ Petition No.31851 of 2017, challenging the order passed by the competent authority.

12. It is further submitted that the petitioner was given reasonable opportunity of personal hearing on four occasions by the competent authority. On the first hearing on 14.09.2017, the petitioner appeared and sought for adjournment. The matter was adjourned thrice thereafter, and the petitioner did not appear. Therefore, the competent authority, who was statutorily required to dispose of the petition within 180 days from the date of seizure (as per Section 37A(3) of FEMA) after granting reasonable opportunity to the petitioner, passed the impugned order, which is an appealable order and appeal lies to the Appellate Tribunal under the Smuggling and Foreign Exchange Manipulators Act, 1976 (Forfeiture of property). Therefore, it is submitted that the writ petition may not be entertained and the petitioner may be relegated to avail the appellate remedy available under the Act.

13. Heard the learned counsels for the parties, and carefully perused the materials placed on record.

14. Writ Petition No.22344 of 2014, challenging the order of seizure was filed on 17.08.2017 and listed for admission on 22.08.2017. On the said date, the learned Senior Panel Counsel for the Directorate of Enforcement and the Commissioner of Customs (Appeals-I) was directed to accept notice and file counter affidavit in two weeks. Subsequently, the matter was listed on 07.09.2017 and adjourned at the instance of the respondents for filing counter. On 05.10.2017, the Assistant Director filed his counter affidavit and at the request of the petitioner, the matter was adjourned to 24.10.2017. Subsequently, the matter adjourned to a further date on 17.11.2017 and further adjourned to 05.12.2017. On 04.12.2017, Writ Petition No.31851 of 2017 was filed, which was listed for admission on 08.12.2017, on which date, the learned counsels for the respondents accepted notice and the Court directed the matter to be tagged along with W.P.No.22344 of 2017. On 02.01.2018, when the case was heard, the learned Senior Counsel appearing for the petitioner submitted that the competent authority has come to the conclusion that the petitioner has violated the provisions of Section 4 of FEMA, mainly on the

ground that the petitioner failed to produce any evidence to show that the alleged amount has been repatriated to India.

15.It was further submitted that, the petitioner is in possession of documents/records to show that the amounts were repatriated to India, shown in the books of accounts and the amounts have suffered tax. The Court noted that these documents were not filed in the writ petition and adjourned the matter at the request of the petitioner to file an additional affidavit, duly supported by documents. Accordingly, an additional affidavit dated 08.01.2018, has been filed along with certain documents. The case was subsequently adjourned and finally heard on 29.01.2018.

16.On a perusal of the order passed by the competent authority, it is seen that the petitioner did not cooperate in the adjudication. Whatever may be the reasons assigned by them, the petitioner has a duty to participate in the proceedings and the explanation sought to be offered is not reasonable. It may be true that writ petition challenging the order of seizure dated 27.06.2017 was pending ever since 22.08.2017. However, there was no interim order granting stay of further proceedings. Mere pendency of the writ petition would not amount to keeping the further proceedings under abeyance. Therefore, the petitioner ought to have participated in the proceedings before the competent authority. Having not done so, the competent authority cannot be faulted for having proceeded in the matter and passing the order of confirmation.

17.A reading of the impugned order shows that paragraphs 1 to 3 are the contents of the petition filed by the Assistant Director. In paragraph 4, the competent authority records the dates on which hearing was fixed, etc. Paragraphs 5 to 7 is the finding recorded by the competent authority. It may not be necessary for this Court to go into the said aspect, as this Court cannot convert itself as an appellate authority over the findings of the competent authority, especially when there is an appeal remedy available before the Statutory Tribunal as provided under FEMA. However, the grievance of the petitioner appears to be that they were not afforded reasonable opportunity. It needs to be appreciated that the proceedings under FEMA are time bound. The competent authority has to pass orders within 180 days from the date of seizure. Therefore, there cannot be any gainsay that he should be liberal in grant of adjournments. On the other hand, opportunity to a party to represent their cause before a statutory authority should be an effective opportunity and not an empty formality.

18.It is no doubt true that the petitioner's counsel/petitioner did not appear for the personal hearing, nor sought for adjournment, though the competent authority was kind enough to adjourn the matter. Though the petitioner did not appear on 10.10.2017, one more opportunity was granted and the case was posted on 17.10.2017. Even for the said hearing, none appeared. Therefore, the competent authority proceeded ex-parte. In such a factual scenario, it has to be seen as to whether any indulgence should be granted to the petitioner.

19.Two reasons appeal to my mind to grant an opportunity to the petitioner. The first reason being that the allegation pertains to certain sum of money held in two Bank accounts outside India in Geneva, Switzerland in the year 2002. The assessments under the Income Tax Act were carried out and several other related proceedings under the Income Tax Act had arisen. In the meantime, orders were passed and action was initiated, etc. The authority under the FEMA comes into the picture for the first time in 2015. Thus, the entire issue does not appear to be a matter of recent origin, but even according to the Department, the funds were held in two Banks in the year 2002. Therefore, I am of the considered view that one more opportunity can be granted to the petitioner before the competent authority. The second reason being that one of the main grounds for coming to a conclusion (prima facie) that the petitioner has violated the provisions of Section 4 of FEMA is on account of the petitioner's failure to produce any evidence to show that the alleged amount has been repatriated to India, reflected books and suffered tax. The petitioner filed an additional affidavit dated 08.01.2018 placing certain factual details regarding the amount, which was lying in the foreign Bank account in 2002. Along with the additional affidavit, the petitioner has enclosed copy of the letters of HSBC dated 07.03.2016, 25.11.2014, enclosing the information regarding transfer of the petitioner's banking operation etc. In the light of the material, which has been placed before this Court, it would be necessary for the competent authority to consider the same as it may impact the proceedings by going to the root of the matter. However, I do not wish to express anything on the merits of the matter except to state that the petitioner should be afforded one more opportunity and place their objections to the confirmation of the order of seizure before the competent authority.

20.So far as the order of seizure is concerned, the petitioner cannot be stated to be aggrieved by such an order of seizure, as no amount has been withdrawn from the petitioner's Bank account. Since the order of seizure has already been confirmed by the order passed by the first respondent, the

question of interfering with the same at this juncture does not arise.

21.For all the above reasons, Writ Petition No.31851 of 2017 is allowed and the impugned order passed by the competent authority dated 23.11.2017 is set aside and the matter is remanded to the competent authority for fresh consideration. The competent authority shall fix a date for personal hearing, and on the said date, the authorized representative of the petitioner shall appear and place all materials for the consideration by the competent authority, who shall thereafter, proceed to hear and decide the matter in accordance with law.

22.Writ Petition No.22344 of 2017 is disposed of holding that the order of seizure shall continue and abide by the fresh orders to be passed by the competent authority in terms of the above direction. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

To

1.Commissioner of Customs (Appeal-II),
The Competent Authority under FEMA 1999,
Custom House,
60, Rajaji Salai, Chennai-600 001.

2.The Assistant Director,
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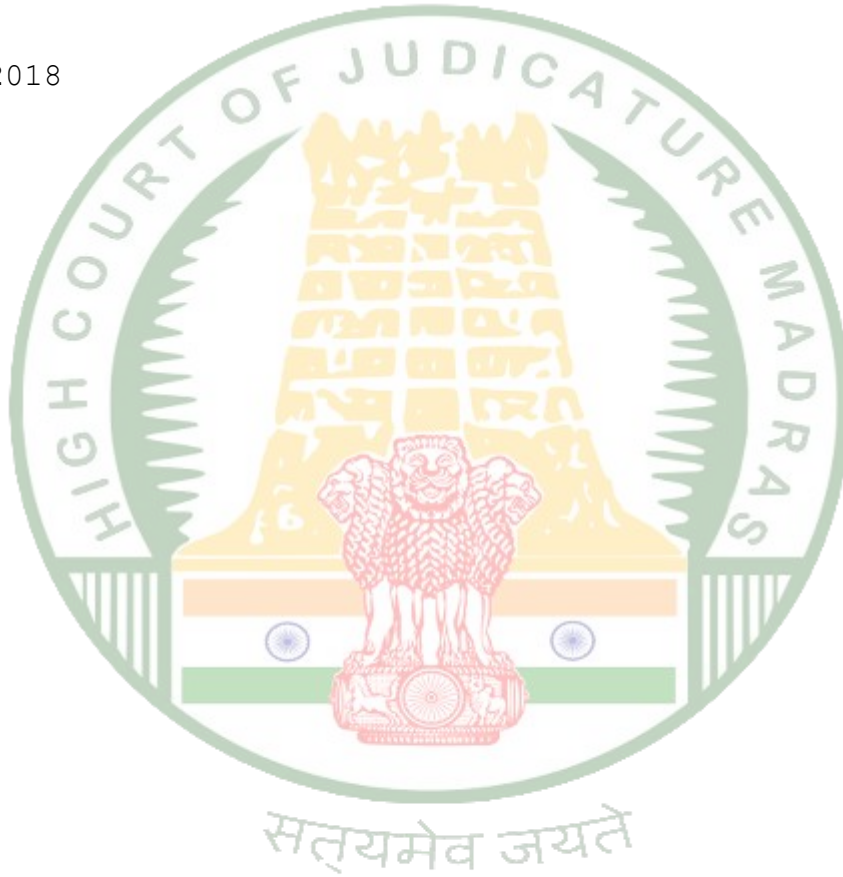
4. Deputy Commissioner of Income Tax,
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+ 1 cc to M/s.A.L.Ganthimathi Advocate, SR.12604

+ 1 cc to Mr.A.P.Srinivas Advocate, SR.12832

W.P.Nos.22344 & 31851 of 2017

kji(co)
nr 09/03/2018



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