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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2586 OF 2018

Ramesh Nanji Shah ..Petitioner
Vs.
The Director of Enforcement
& ors. ..Respondents

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Mr. Naren Thakore I/b. Jayesh Gawde for petitioner.
Mr. Pradeep S. Jetly for respondent Nos. 1 & 2.
Ms. Deepali Patankar, Honorary Asst. to GP I/b. Ms. P.H. Kantharia, GP for respondent No.3.

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CORAM : S.C. DHARMADHIKARI & M.S. KARNIK, JJ.
DATE : 7th FEBRUARY, 2019

P.C. :

The petitioner before us is aggrieved and dissatisfied with an order dated 24/11/2000, passed by the Special Director (Enforcement) exercising powers under the Foreign Exchange Management Act, 1999. This Special Director (Enforcement), Ministry of Finance, Government of India, Mumbai, is authorized by the law to adjudicate the show cause notice.

2. The procedural law which authorized him was the Foreign Exchange Regulation Act, 1973 (for short 'FERA').

3. It is alleged that the information was received by the Mumbai Zonal Office of the Enforcement Directorate from the Income Tax Department, Mumbai. A search was carried out on the basis of this information and the search was carried out in the premises of two commercial entities. The search was also carried out so as to obtain the details in regard to the business of the sister concerns. Even the residential premises of Shri Dhirajlal Nanji Shah @ Dhirubhai Shah of M/s. Time Video Group of Companies, was searched.

4. On the basis of certain documents, the Directorate then recorded the statements of Shri Dhirajlal N. Shah. He stated during the course of his deposition that his brother, the petitioner before us, was the author of the diary and certain documents. It is the petitioner, who had written the details of payments made by him to various persons in India during their visits abroad and that equivalent amounts paid to him by the said persons on the instructions of Ramesh N. Shah, the petitioner.

5. Thereafter, on 10th April, 1996, the statement of the petitioner was also recorded in which he stated that he was residing in Dubai where he was carrying out business in different names and that the documents seized by the Income Tax Department belonged to him and that the diary was in his handwriting and that those documents contained the transactions in Dubai. Thereafter, further search was carried out, statements were recorded and a show cause notice was issued.

6. We need not refer to the other developments pertaining to the invocation of the powers under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'COFEPOSA') and the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short 'SAFEMA').

7. Two show causes notices were issued. Both dated 24th November, 1997 by the Special Director, Mumbai.

8. We are in this Petition concerned with one show

cause notice issued to the petitioner Ramesh N. Shah for remitting or having caused to remit from Dubai Rs.14,67,61,503/- to Shri Dhirajlal N. Shah of M/s. Time Video, Mumbai, India, other than the authorised dealers, without any general or special exemption from the RBI and alleged contravention of provisions of Section 9(3) of the FERA Act.

9. The petitioner alleged that at a joint hearing of this show cause notice insofar as the petitioner was concerned, though in paragraphs 10 and 11 of the impugned order it is attempted to be shown that the show cause notice was served by Post to the petitioner, but the impugned order itself recites that it was received back in the Department's Office stating that the show cause notice received by the servant inadvertently and that he was not aware of the present whereabouts of the Ramesh Shah, the petitioner before us.

10. This show cause notice was purportedly served under Rule 10(c) of the Adjudication Proceedings & Appeals

Rules, 1974 by affixture on the front door of the premises namely 203, 2nd floor, Rachana, V.P. Road, Vile Parle (W), Mumbai. The petitioner, however, in this Petition, in the cause title, has mentioned his address as 705, B-Wing, Sheel Building, Lajpatrai Road, Vile Parle (W), Mumbai – 400 056.

11. The impugned order proceeds on the footing that no reply was received to the show cause notice and personal hearing in the case was fixed before the Special Director on 9/11/1998. Since the impugned order proceeds on the footing that the petitioner is duly served and reliance is placed on the findings in the impugned order particularly in paragraphs 19 and 20, we inquired from Shri Jetly, learned advocate appearing for the respondents, as to how the matter proceeded. His only reply was that the petitioner was duly served, but he made himself unavailable, first during investigation and subsequently for adjudication. He has not chosen to file any written reply to the show cause notice or make oral submissions during personal hearing. His conduct therefore dis-entitles him to any

discretionary or equitable relief.

12. Upon hearing Mr. Thakore, learned advocate appearing for the petitioner and Mr. Jetly, we are not satisfied with this response of respondent No.1. In the Memo of Petition, it is stated that since 1985, the petitioner was residing at Dubai, for that he was declared as Non Resident Indian ('NRI' for short) by the concerned authorities. In paragraph 3 of the Petition, details of his NRI accounts have been given. The petitioner, then, has listed the business activities in paragraph 4 and he would urge that during his stay at Dubai, the authorities in Dubai did not find any illegality in his business dealings. The petitioner being NRI was visiting India and residing with his mother, two brothers and sister. From Dubai he made several gifts to his family through two banks, details of which are set out.

13. Then petitioner in paragraph 9 mentions about raid carried out and the search and seizure operation at office and

residential premises of Time Group of Companies owned by petitioner's brother Dhirajlal Nanji Shah and Hasmukh Nanji Shah. The petitioner claims that he has no business interest or any connection with the said Group of Companies. Then, when he was on visit to India and residing with his brother Hasmukh Shah, at the address mentioned in the show cause notice, it is stated that a search was carried out at the brother's residence and some documents and papers belonging to the petitioner were seized.

14. Thereupon, the petitioner's statement was recorded not by the FERA Authorities, but the authorities under the Income Tax Act, 1961. The authorities under the Income Tax Act never called upon him to show cause for any violation or breach of law. Thereafter, from the impugned order it appears that the documents seized were forwarded to the Deputy Director of Enforcement Directorate, Mumbai.

15. Then, there are other proceedings concerning the

brothers which are mentioned and it is stated that the petitioner was in receipt of the summons from the Enforcement Directorate. However, the petitioner sought time from them to appear and he requested the Enforcement Directorate to record his statement in Dubai before Indian High Commissioner. Then the petitioner gave a affidavit dated 21st January, 1996 which was affirmed before the Indian High Commissioner, Dubai. The petitioner mentions that he gave certain explanation, then, refers to an order of preventive detention served on him. The petitioner was also interrogated and later on, arrested by the Enforcement Authorities, produced before the learned Metropolitan Magistrate's Court, Mumbai.

16. The petitioner retracted from his statement recorded by the authorities and thereupon, it is stated that the Department did not take any steps under aforementioned law but the SAFEMA. It is when the petitioner was investigated by the authorities under SAFEMA that time he was made aware of the show cause notice dated 24/11/1997. The petitioner says

that he was informed about the detention order under the COFEPOSA, but on 22nd March, 2018 this detention order dated 8th August, 1996 was sought to be executed after lapse of 22 years.

17. Hence, that order was also set aside by the Advisory Board set up and established under COFEPOSA. Then, petitioner became aware of the impugned order dated 24/11/2000. After he came to know of the same, he has specifically alleged that as he was placed in the above situation and having not been made aware of the show cause notice, the impugned order passed thereon is ex-parte and caused grave and serious prejudice to him.

18. Mr. Thakore submits that none of the grounds in the Writ Petition and specifically on the point have been controverted nor the above narrated factual position.

19. After hearing both sides we are satisfied that the

impugned order indeed caused serious prejudice to the petitioner. The penalty has been imposed on the petitioner under FERA Act and the consequences thereafter, are for everybody to see as FERA Act is a statute which fulfills the object and purpose of regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency. It purports to conserve the various foreign exchange resources of the country and the proper utilization thereof in the interests of the economic development of the country. This Act is now repealed by virtue of a new law namely, the Foreign Exchange Management Act, 1999, but even though repealed, the proceedings under FERA Act can continue. The provisions of the Act enable to carry out searches and confers powers to arrest as well. The violation of FERA is, thus a grave and serious issue. Its strict and stringent provisions enable the authorities to adjudicate into the breaches of the law, and thereafter, if proved, impose penalties. That is how the impugned order proceeds. The impugned order does not show that the petitioner was duly served, but deliberately did not appear or avoided to appear. Having received the show cause notice and related papers, he did not file any reply. He avoided even the service of the proceedings. The above is not the position emerging from the order itself. Rather the order is passed after observing that certain attempts to serve the petitioner were made but having not found him at the premises of one Hasmukh Shah, the order was passed in his absence. Once the factual position as stated in the Writ Petition is undisputed, then, this Writ Petition must succeed.

20. We allow the Petition by quashing and setting aside the impugned order.

21. The impugned order stands quashed and set aide only to the extent of the proceedings/show cause notice issued to the petitioner Ramesh N. Shah. It being a common order and referring to other show cause notices, we clarify that our order and direction shall not affect the legality and validity of these proceedings. The show cause notice issued to the petitioner shall

be decided de-novo and a fresh order can be passed as per the provisions of the FERA and Rules for adjudication made thereunder.

22. The show cause notice having been directed to be adjudicated denovo, it would be open for the petitioner to file a reply, if so advised. If the written reply is filed within a period of four (4) weeks from today, then, it shall be considered by the Adjudicating Authority in passing a fresh order of adjudication. It shall be made after granting a personal hearing to the petitioner. Let that be passed by the Adjudicating Authority as expeditiously as possible and in any event, within a period of three (3) months from the date the petitioner furnishes his written reply. In the event, no written reply is furnished, the petitioner would have to appear before the Authority and he can make oral submissions. The oral submissions then should be noted and in addition, if the petitioner desires to file written submissions, then, that opportunity be granted. However, from the date of the appearance of the petitioner, the proceedings be concluded within the time stipulated above.

23. Needless to clarify that the fresh order shall be a speaking order.

24. The Writ Petition is disposed of accordingly.

(M.S. KARNIK, J.) **(S.C. DHARMADHIKARI, J.)**