

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 31..10..2019

Orders Pronounced on: 13..11..2019

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition No.28453 of 2010

&

M.P.No.1 of 2010

P.Rosu Reddy

... Petitioner

-Versus-

1.The Special Director [Adjudicating Authority]
Directorate of Enforcement (FEMA),
Government of India,
Lok Nayak Bhavan, 6th Floor,
Khan Market,
New Delhi 110 003.

2.The Assistant Director,
Directorate of Enforcement (FEMA),
'Shastri Bhavan',
Nungambakkam,
Chennai 600 034.

.... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the proceedings relating to the interlocutory order impugned in this writ petition dated 26.11.2010 in File No.T-4/5 CHE/2009 on the file of the 1st respondent and to quash the same as illegal and violative of the principles of natural justice and for a direction to the 1st respondent to afford an opportunity of cross-examining the witnesses as per the petition dated 03.11.2010.

For Petitioner : Mr.B.Kumar,
Senior Counsel for
Mrs.R.Hemalatha

For Respondent(s) : Mr.N.Ramesh, CGSC for RR1
and 2

ORDER

This writ petition has been filed challenging the interlocutory order passed by the 1st respondent / adjudicating authority rejecting the request of the petitioner to cross-examine two witnesses, viz., (i) Shri.J.Ravikumar and (ii) Shri.Vijayakumar.

2. The brief facts leading to the filing of the writ petition are as follows:- An adjudication proceedings has been initiated against the petitioner for the alleged contravention of Section 3(d), 3(a), 4 & 8 of The Foreign Exchange Management Act, 1999 (in short, "the FEMA). The charge is that the petitioner entered into a financial transaction in India for acquiring and transferring of foreign exchange of US\$ 17,88,876 unauthorizedly in importing photocopying machines during the period 2004 to 2007 and also dealt with foreign exchange to an extent of Singapore \$ 50,000, acquired the same in Singapore in an unauthorized manner and deposited the same in a bank in Singapore unauthorizedly.

3. During enquiry, the 2nd respondent recorded the statements of more than 10 witnesses, thereafter, a show cause notice dated 27.08.2019 was issued to the petitioner. During enquiry, the petitioner had made a request to the adjudicating authority to cross examine the witnesses who have given statements before the 2nd respondent against him. However, the 2nd respondent had permitted the petitioner to cross examine 4 witnesses alone and the cross-examination was originally fixed on 13.08.2010 and adjourned to 16.08.2010. On that date no witness was cross examined. Thereafter, the petitioner made a request to cross examine two more witnesses and the adjudicating authority also permitted to cross examine two more witnesses. Accordingly, fresh summons were issued to all those witnesses for their appearance on 29.10.2010 at about 10.30 a.m. for cross-examination. On that date, only two witnesses namely, one Shri.J.Ravikumar, a Customs Clearing Agent and one Shri.Vijayakumar, a Former employee of the petitioner were present on the scheduled time. But, due to delay in the arrival of flight and heavy traffic in Delhi, the counsel for the petitioner could not appear before the adjudicating authority at 10.30 a.m. He, however, appeared at about 12.45 p.m. But, they were informed that the witnesses were waiting till 12.00 p.m. Since the counsel did not appear for the cross examination of the witnesses, witnesses were asked to go and there was no occasion for the cross examination of the witnesses. Immediately, the petitioner made a request to the 1st respondent to afford one more opportunity to cross examine the witnesses.

But, that request was rejected by the 1st respondent. It is this order which is now under challenge in this writ petition.

4. The 2nd respondent filed counter admitting the above factual aspects and contended that the cross examination was fixed at 10.30 a.m. on 29.10.2010 and two witnesses were also present. Though the witnesses were made to wait for an hour, neither the petitioner nor his counsel turned up. Not even a word was sent to the adjudicating authority about the delay in their arrival to cross-examine the witnesses. In the above circumstances, in their absence the statements were recorded from the witnesses. Since the witnesses could not be asked to wait indefinitely and in absence of any communication from the petitioner, the witnesses were allowed to leave the office at about 12.00 noon. Thereafter, the counsel for the petitioner appeared before the 1st respondent and informed the adjudicating authority that due to the delay in the arrival of flight and traffic congestion, he could not appear on time to cross examine the witnesses. According to the 2nd respondent, only due to the lethargic attitude of the petitioner, the witnesses were not cross examined and it was only a delaying tactics adopted by the petitioner and there is no bonafide in the reason assigned by the petitioner. Considering all those circumstances, the adjudicating authority has rightly rejected the request of the petitioner for the cross-examination of the witnesses. There is no merit in the writ petition and the same is liable only to be dismissed.

5. The learned senior counsel for the petitioner submitted that due to the delayed arrival of flight and heavy traffic congestions in New Delhi, the counsel for the petitioner could not appear before the adjudicating authority in time for the cross examination of the witnesses, however, the counsel was present before the adjudicating authority at 12.45 p.m. by the time the witnesses were not available. Having permitted the petitioner to cross examine the witnesses, the adjudicating authority ought to have considered the request of the petitioner for the cross examination of the witnesses on the next hearing. The delay was due to the unforeseen circumstances and the petitioner cannot be denied the valuable opportunity of cross examination of the crucial witnesses to substantiate his case. There was no mala fide on the part of the petitioner and in fact, the counsel for the petitioner had appeared before the adjudicating authority on the very same day at about 12.45 p.m. and filed a petition requesting the adjudicating authority to permit him to cross examine the witnesses on the next date of hearing. But, the adjudicating authority without considering the bona fide request of the petitioner and the necessity for the

cross examination of the witnesses rejected the request holding that the petitioner was adopting delaying tactics which is not factually correct. The petitioner is ready and willing to complete the cross examination of the witnesses in a single day, if he is permitted to cross examine the witnesses.

6. Per contra, the learned counsel for the respondents would contend that even though the petitioner was not entitled to cross examine the witnesses as per the law and the judgments of the Hon'ble Supreme Court, the adjudicating authority had fairly permitted the petitioner to cross examine the witnesses. But, only due to the lethargic attitude of the petitioner, cross examination of the witnesses could not be done and the adjudicating authority cannot be blamed for the same. The petitioner cannot ask for cross examination of the witnesses as a matter of right. Considering all those aspects only, the adjudicating authority has rejected the request of the petitioner and no illegality or irregularity can be attached to the same.

7. I have considered the rival submissions and also perused the records carefully.

8. It is an admitted fact that the adjudicating authority had permitted the petitioner to cross-examine six witnesses out of them only two witnesses were present for cross examination on 29.10.2010 at 10.30 a.m. It is also admitted that counsel for the petitioner appeared before the authority at 12.45 p.m. with a delay of nearly two hours. It is contended by the petitioner that his counsel could not appear before the adjudicating authority in time on the crucial day as there was a delay in the arrival of flight and there were also traffic congestions in New Delhi. It could be seen from the available records, that the witnesses were made to wait till 12.00 p.m. Since the counsel for the petitioner did not appear, the witnesses were allowed to leave. On reaching the office of the adjudicating authority, when the counsel filed a petition seeking one more opportunity for the cross examination of the witnesses, the adjudicating authority refused to accede to the request of the petitioner on the ground that when the matter was called neither the petitioner nor his counsel was available and there was also no communication from the petitioner side. Having been permitted the petitioner to cross examine the witnesses, now, it is not open to the adjudicating authority to contend that the petitioner had no right to cross examine the witnesses.

9. It is also not the case of the respondents that the counsel for the petitioner did not appear on the day when the

case was posted for the examination of the witnesses. It was only due to unforeseen circumstances, the counsel could not appear before the adjudicating authority in time. But, on the very same day at about 12.45 p.m. the counsel appeared before the adjudicating authority. Thus, it cannot be held that the petitioner had willfully failed to cross examine the witnesses with malafide intention. Considering the facts and circumstances of the case, this court is of the view that there was no malafide on the part of the petitioner and the delay was only due to the unforeseen circumstances. Considering the above circumstances, this court is of the considered opinion that permitting the petitioner to cross examine the witnesses viz., (i) Shri.J.Ravikumar and (ii) Shri.Vijayakumar would alone meet the ends of justice. Accordingly, this court is inclined to set aside the impugned interlocutory order. However, considering the fact that the witnesses, who belong to Chennai, were called upon all the way to New Delhi to give evidence before the adjudicating authority and they were made to wait there unnecessarily for the appearance of the counsel for the petitioner. Hence, it would be proper to direct the petitioner to compensate the above said witnesses for the ordeals they undergone in rushing to New Delhi to give evidence and the expenses incurred by them. Accordingly, the petitioner is directed to pay a sum of Rs.10,000/- each to both the witnesses.

10. In the result, this Writ Petition is allowed on condition that the petitioner shall pay a sum of Rs.10,000/- to each of the witnesses namely, (i) Shri.J.Ravikumar and (ii) Shri.Vijayakumar in the mode convenient to him within a period of two weeks from the date of receipt of a copy of this order. On such payment, the petitioner shall inform the same to the adjudicating authority who shall in turn issue fresh summons to the witnesses fixing a date and time for cross examination by the petitioner under intimation either to the petitioner or his counsel. On the date fixed for cross examination, the counsel for the petitioner shall conclude the cross examination of both the witnesses. On completion of cross examination of the witnesses, the adjudicating authority shall proceed with the adjudication proceedings and complete the same within a period of three months thereafter. No costs. Consequently, connected MP is closed.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

kmk

To

1.The Special Director [Adjudicating Authority]
Directorate of Enforcement (FEMA),
Government of India,
Lok Nayak Bhavan, 6th Floor,
Khan Market,
New Delhi 110 003.

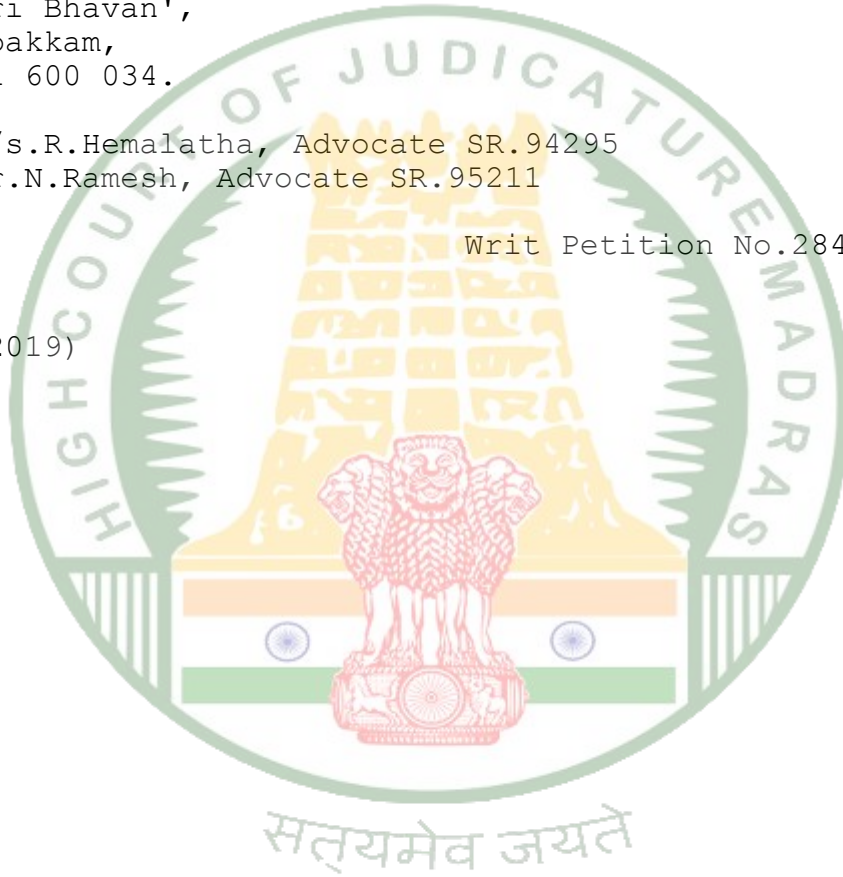
2.The Assistant Director,
Directorate of Enforcement (FEMA),
'Shastri Bhavan',
Nungambakkam,
Chennai 600 034.

+1cc to M/s.R.Hemalatha, Advocate SR.94295

+1cc to Mr.N.Ramesh, Advocate SR.95211

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BR(CO)
CB(18/12/2019)



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