

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 20.03.2019

Delivered on 04.04.2019

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.Nos.33158 and 33163 of 2018
and
W.M.P.No.38470 & 38480 of 2018

B.Narayanaswamy .. Petitioner in both the W.Ps.

vs.

1. Deputy Director,
Enforcement Directorate
Chennai Zone,
Ministry of Finance,
Department of Revenue,
2nd and 3rd Floor, C Block,
Murugesu Naicker Complex,
84, Greaves Road,
Thousand Lights,
Chennai - 600 006.

2. The Joint Director,
Enforcement Directorate
Chennai Zone,
Ministry of Finance,
Department of Revenue,
2nd and 3rd Floor, C Block,
Murugesu Naicker Complex,
84, Greaves Road,
Thousand Lights,
Chennai - 600 006.

3. Enforcement Directorate
Through its Director,
6th Floor, Lok Nayak Bhawan,
Khan Market,
New Delhi.

..Respondents in both the W.Ps.

W.P.No.33158/2018 is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus to direct the 1st respondent to not cause any physical, mental or verbal harassment to the petitioner during the pendency of the investigation in the proceedings in file No.ECIR/CEZO/05/2016 pending before the 1st respondent.

W.P.No.33163/2018 is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Mandamus to direct the 1st respondent to re-record the statement to be tendered under Section 50 of the Prevention of Money Laundering Act and conduct the proceedings in File No.ECIR/CEZO/05/2016 pending before it in camera and in presence of an Advocate appointed by the petitioner.

For Petitioner
in both the W.Ps. : Mr.V.C.Janardhanan

For Respondent
in both the W.Ps. : Ms.Hema,
Special Public Prosecutor
(Directorate of Enforcement)

COMMON ORDER

W.P.No.33158/2018 is filed for a Mandamus directing the first respondent, not to cause any physical, mental or verbal harassment to the petitioner during the pendency of investigation in the proceedings in File No.ECIR/CEZO/05/2016.

2. W.P.No.33163/2018 is filed for a Mandamus directing the first respondent to re-record the statement to be tendered under section 50 of the Prevention of Money Laundering Act and conduct the proceedings in File No.ECIR/CEZO/05/2016 in camera and in presence of the Advocate appointed by the petitioner.

3. The petitioner in both the writ petitions is one and the same.

4. The case of the petitioner in both the writ petitions is as follows:

He is the Director in M/s.Best & Crompton Engineering Projects Limited, engaged in the business of Engineering, procurement, construction and trading. The Central Bureau of Investigation, Bangalore, registered F.I.R. on 01.02.2016 against M/s. Best & Crompton Engineering Projects Limited and

its Managing Director for the offence under Section 120B read with Sections 420, 468 and 471 of the Indian Penal Code on the basis of a complaint given by the Central Bank of India. On the basis of the above said F.I.R, the Enforcement Directorate, registered a case in ECIR.No.CEZO/05/2016 dated 27.04.2016, alleging that a prima facie case for the offence of money laundering under sections 3 and 4 of the Prevention of Money Laundering Act appears to have been made out. On completion of investigation by the Central Bureau of Investigation, a charge sheet was filed on 15.06.2017 before the Additional Chief Metropolitan Magistrate, Egmore, Chennai. The petitioner herein is arrayed as Accused No.4 therein. The petitioner has been complying with the summons issued by the first respondent, being promptly appearing for enquiry by rendering utmost cooperation. On 02.11.2018, the petitioner received summons from the first respondent to appear in person on 22.11.2018. However, on 15.11.2018, the petitioner received telephonic summons from the first respondent to appear in person on 16.11.2018. Due to medical emergency involving the petitioner's mother, he was not able to do so and informed the same to the concerned official and requested him to permit the petitioner to appear on 19.11.2018. When the petitioner appeared before the first respondent, to his shock and surprise, they confronted the petitioner in an aggressive manner and compelled him to make statements, which they desired in writing, against certain persons, who are in no manner related to

the petitioner or the on-going enquiry. The petitioner was intimidated by the 1st respondent. They also threatened to cause physical harm and injury to the petitioner if the petitioner did not agree to give the said statement. As the petitioner refused to make such false statement, the 1st respondent had resorted to barbaric treatment by beating the petitioner with lathi. The petitioner was subjected to third degree torture and harassment. Out of fear and apprehension, the petitioner unwillingly relented to give written statement which were not voluntary, naming certain persons who were not involved in the transactions. The petitioner was unable to recover immediately. He issued a letter dated 06.12.2018 to the respondent to retract the statement which was obtained from him on 19.11.2018. The act of the first respondent is expressly illegal and unconstitutional. The facts enunciated above would reveal that the first respondent was not only biased but also detriment in making false case so as to secure the convention as per their desire for the reasons best known to them. The act of the first respondent in torturing the petitioner and causing mental treatment is grossly in violation of Article 21 of the Constitution of India and the Prevention of Money Laundering Act. The statement made by the petitioner on 19.11.2018, on threat and duress, cannot be used against him in any other proceedings. Therefore, the present writ petitions are filed with the reliefs as stated supra.

5. A counter affidavit is filed by the respondents wherein it is stated as follows:

i) Criminal cases in RC No. 4(E)/2016/CBI/BS&FC/BLR dated 01.02.2016, RC No.04/2017/ CBI/BS&FC/BLR dated 03.02.2017 and RC No.14/ 2018/CBI/BS&FC/BLR dated 11.07.2018 were registered by CBI, BS & FC, Bangalore, under Section 120-B r/w 420, 468 & 471 of IPC against Shri Kalyan Srinivasa Rao, Managing Director, M/s.Best & Crompton Engineering Projects Ltd., Sterling Road, Nungambakkam, Chennai - 600 034 (hereinafter referred to as BCEPL), the other Directors of the Company including the petitioner herein and the Company BCEPL and others who entered into a criminal conspiracy hatched amongst themselves at Chennai and Hyderabad and other places during the period from 2010- to 2013 for defrauding/cheating a Consortium of Banks led by the Central Bank of India. The other two banks in consortium are Andhra Bank, Zonal Office, Chennai and the Corporation Bank, Zonal Office, Chennai. In furtherance to their criminal conspiracy, the said persons had induced Central Bank of India, Corporate Finance Branch, Chennai by submitting fraudulent LC (Letter of Credit) Documents, without any physical movement of goods and unlawfully availed the credit facilities/ enhancement, for which, they were otherwise, not eligible and then diverted the said loan amount for

purposes other than for which, it was sanctioned and caused a wrongful unlawful loss to the extent of Rs.364 Crores as on 19.11.2013 and correspondent unlawful wrongful gain to themselves at the expense of public exchequer.

ii) The above information disclosed commission of offences punishable under 120-B, 420 & 471 of IPC, 1860 which are the Scheduled Offences under the Prevention of Money Laundering Act, 2002. On the basis of the aforesaid information, a prima facie case for an offence of money laundering under Section 3 of the Prevention of Money Laundering Act, 2002 (herein after referred to as PMLA, 2002) punishable under Section 4 of the Act, appears to have been made out. A case is therefore, recorded vide ECIR No.CEZO/05/2016 on 27.04.2016 and has been taken up for investigation under the provisions of the PMLA, 2002 and the Rules framed thereunder.

iii) The petitioner is one of the Directors of the Company BCEPL and was in-charge of the day to day affairs of the company. He has been arrayed as Accused No.4 of the Charge Sheet dated 15.06.2017, filed by CBI, BS & FC, Bangalore, before the Court of Additional Chief Metropolitan Magistrate, Egmore Chennai for commission of offences under Section 120B read with Sections 420, 465 and 471 of IPC against BCEPL based in Chennai and Hyderabad. During the course of investigation under PMLA, 2002 against BCEPL and their key officials, the petitioner herein had earlier appeared on

08.06.2017 and rendered his voluntary statement on the same day before the respondent No.1 herein.

iv) In furtherance to the search conducted on 08.10.2018, in the residential premises of the petitioner, the petitioner was summoned to appear before the Respondent No.1 herein on 16.11.2018, but upon considering the petitioner's request, he was asked to appear on 19.11.2018 as per his convenience. The petitioner herein had appeared on 19.11.2018 and during his appearance he had given a voluntary statement in his own handwriting, after understanding the provisions of Section 50 of the PMLA, 2002. In his statement dated 19.11.2018 he had explained about his functions as Director in BCEPL in a detailed manner. On perusal of documentary evidences collected during the searches, the petitioner herein had explained about their relevance. The petitioner herein had written the said statement in his own handwriting and specifically stated that it was rendered on voluntary basis without any threat, force or coercion under the provisions of Section 50 (2) & (3) of PMLA, 2002. The petitioner has been issued with Summons under Section 50(2) & (3) of PMLA, 2002 only on the basis of materials available on records, collected during the investigation.

v) The petitioner herein has given all his statements voluntarily without any force, threat or coercion. The petitioner herein is the promoter Director of BCEPL and has held a key position in conducting the affairs of the company

BCEPL. It is a fictitious averments made by the petitioner herein stating that he was made to write false statements about certain persons, who are in no manner involved with the investigation.

vi) It is submitted that the persons who were summoned under Section 50 of the Prevention of Money Laundering Act is only for the purpose of collection of evidence and to know the complicity of the persons so summoned to the crime. Only after collecting evidence and statements from the persons so summoned and if it is established after completion of investigations that the person is involved in the crime of Money Laundering, he will be treated as an accused and the prosecution complaint will be filed against such person. Till filing of the prosecution complaint, no person shall be treated as accused of the offence of Money Laundering. The investigation under the provisions of PMLA, 2002 has been conducted only to identify the proceeds of the crime and the properties involved in Money Laundering as well as to identify the persons involved in the offence of money laundering. The petitioner herein is one among such persons and has been named by the key officials of BCEPL as the person chiefly instrumental in cheating/ defrauding the Banks in Consortium by producing false, fictitious and fraudulent documents fabricated precisely for such purpose.

vii) The investigation proceedings under PMLA, 2002 is conducted by following due process of law. The Statements given by the key officials of

BCEPL is written/given voluntarily without any force. All the proceedings of search under Section 17(1) and serving of Summons and examination under Section 50(2) & (3) of PMLA, 2002 and there were no illegality in conducting the proceedings as averred by the petitioner herein. The summons were issued to the petitioner herein, requiring his attendance to give evidence and to produce records, which were in his possession, for necessary examination and verification for the purpose of ongoing investigation under Prevention of Money Laundering Act, 2002. Every proceeding under sub-sections (2) and (3) of Section 50 of Prevention of Money Laundering Act, 2002 shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860.

6. Learned counsel for the petitioner contended as follows:

Under the guise of enquiry, the Investigating Officer cannot harass the petitioner physically, mentally and verbally. The power to investigate does not mean power to harass. Even at the stage of enquiry, the petitioner cannot be treated as an accused and inflicted with physical and mental harassment, that too, for the purpose of extracting statement against his will. Fundamental rights provided under Articles 20 and 22 of the Constitution of India to the petitioner as a citizen of this country, cannot be thwarted under the guise of enquiry. The proceedings under section 50 of the provision of Money

Laundrying Act, 2002 is deemed to be a judicial proceedings within the meaning of Sections 193 and 223 of the Indian Penal Code as found under sub clause 4 of Section 50 itself. Therefore, such judicial proceedings cannot be conducted without the assistance/presence of a lawyer on the side of the petitioner. Explanation 2 to Section 193 of Indian Penal Code contemplates that investigation, directed by law, preliminary to a proceedings before a Court of justice, is a stage of judicial proceedings, though the investigation cannot take place before the Court of justice. Therefore, the presence of lawyer is a must at the time of enquiry in pursuant to the summons issued under Section 50 of the said Act. The petitioner has specifically averred in the affidavit filed in support of the writ petition that the Enquiry Officer has caused severe harassment to the petitioner and therefore, the relief sought for in these writ petitions have to be granted, thereby protecting the constitutional rights guaranteed to the petitioner.

7. In support of his submission, the learned counsel relied on a decision of the Gujarat High Court reported in ***Manu/GJ/0015/2017 (Jignesh Kishorbhai Bhajiawala vs. State of Gujarat and Ors.)*** and the Division Bench decision of the Delhi High court made in ***LPA.607/2016 dated 24.05.2018 (Competition Commission of India and another vs. Oriental Rubber Industries Private Limited), 1978(2) SCC 424 (Nandini Satpathy v. P.L.Dani***

and another).

8. Per contra, the learned counsel appearing for the respondents submitted as follows:

a) These writ petitions are not maintainable at the stage of issuance of summons itself. All the allegations made by the petitioner against the Investigating Officer are utter false and only made to sustain these writ petitions, as an afterthought. The present stage of the enquiry is only at a preliminary stage by issuing summons to persons to find out whether such persons are involved in money laundering. Therefore, at the stage of enquiry, presence of an advocate is not required. Only after collecting the evidence and statement from the persons so summoned and if it is established after completion of investigation that a person is involved in a crime of money laundering, he will be treated as an accused and complaint will be filed against him. Till the filing of the complaint, no persons will be treated as an accused of the offence of money laundering and therefore, the presence of an advocate, at the time of enquiry, cannot be permitted.

b) In support of her contention that these writ petitions are not maintainable against the summons, the learned counsel relied on the following decision:

i) MANU/TN/1994/2013 (M/Shobana Vs. The Assistant Director)

ii) MANU/AP/0339/2014 (Kolakalapudi Brahma Reddy v. Union of India & Ors)

iii) WP.(Crl.)856/2016 & Crl.M.A.Nos.4702, 4704, 10527, 12181/2016) Virbhadra Singh & anr. Vs. Enorcement Directorate & anr.)

iv) The order made in W.A.No.1168 and 1169/2018 by this Court dated 10.07.2018.

c) In support of her submission that the counsel cannot be accompanied with the noticee during summon proceedings, the learned counsel relied on the following two decisions:

i) MANU/TN/0458/2010 (E.Giribabu vs. Deputy Director of Enforcement)

ii) Crl.O.P.No.30066/2011 dt.01.08.2013 (Haji Ali Vs. Deputy Director, Directorate Enforcement)

9. Heard the learned counsel for the petitioner and the learned counsel appearing for the respondents. I have given my careful consideration to the facts and circumstances of the case and the submissions made by both sides in support of their respective case.

10. Both these writ petitions are filed for Mandamus. In the first Writ

Petition, a direction is sought for to the first respondent, not to cause any physical, mental and verbal harassment to the petitioner during the pendency of investigation. In the second Writ Petition, one more direction is sought against the first respondent to re-record the statement to be tendered under Section 50 of the Prevention of Money Laundering Act and conduct the proceedings *in camera* and in the presence of an advocate appointed by the petitioner. Going by the above prayer sought for in these writ petitions, it is evident that the petitioner has not challenged the summons issued under Section 50 of the Prevention of Money Laundering Act 2002 and on the other hand, he seeks for conducting the enquiry in the presence of an Advocate appointed by him and to re-record the statement to be made by him under the above said provisions of law. The grievance of the petitioner is that under the guise of investigation, the first respondent caused physical, mental and verbal harassment to the petitioner. Therefore, it is evident that the contention of the learned counsel for the respondents as if these writ petitions are filed against the summons is not correct. Since the prayer is for issuing mandamus as stated supra, this Court is of the view that these writ petitions are maintainable. In other words, the petitioner has not questioned the competency of the first respondent in issuing the summons and make enquiry under Section 50 of the said Act and on the other hand, it is his grievance that such enquiry cannot be conducted by causing physical, mental and verbal

harassment. Therefore, in order to avoid such harassment, the petitioner seeks for the presence of a lawyer. So, only for that purpose, these writ petitions are filed.

11. Since this Court finds that these writ petitions are not filed challenging the summons, the decisions relied on by the learned counsel for the respondents viz., i) *MANU/TN/1994/2013 (M/Shobana Vs. The Assistant Director)*, ii) *MANU/AP/0339/2014 (Kolakalapudi Brahma Reddy v. Union of India & Ors)* and iii) *WP.(Crl.)856/2016 & Crl.M.A.Nos.4702, 4704, 10527, 12181/2016) Virbhadra Singh & anr. Vs. Enorcement Directorate & anr.*), are not applicable to the present facts and circumstances of the case.

12. Now, let me come to the issue as to whether the presence of a lawyer is required at the time of enquiry, as sought for by this petitioner. Before answering the said question, it is better to consider the scope and ambit of the proceedings under Section 50 of the Prevention of Money Laundering Act, 2002.

13. Section 50 of the said Act reads as follows:

50. Powers of authorities regarding summons, production of documents and to give evidence,

etc.-

(1) The Director shall, for the purposes of section 13, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;
- (c) compelling the production of records;
- (d) receiving evidence on affidavits;
- (e) issuing commissions for examination of witnesses and documents; and
- (f) any other matter which may be prescribed.

(2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.

(3) All the persons so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make

statements, and produce such documents as may be required.

(4) Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

(5) Subject to any rules made in this behalf by the Central Government, any officer referred to in sub-section (2) may impound and retain in his custody for such period, as he thinks fit, any records produced before him in any proceedings under this Act:

PROVIDED that an Assistant Director or a Deputy Director shall not-

(a) impound any records without recording his reasons for so doing; or

(b) retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the Joint Director.

14. The above said provisions of law make it clear that powers are conferred on the authorities to summon persons whose attendance is necessary to give evidence or produce any record during the course of investigation or proceedings and such persons, so summoned have to appear before the Officer and to state the truth of the subject of the summons. Such authority is also

empowered to impound records. Therefore, there is no quarrel about the competency and power conferred on such authority to summon a person and enquire. Sub- Section 4 of Section 50 specifically indicates that every proceedings under Sub-Sections 2 and 3 shall be deemed to be a judicial proceedings within the meaning of Section 193 and section 228 of the Indian Penal Code. Therefore, it is apparent that summoning a person and enquiring him under section 50 of the said Act is in the nature of a judicial proceedings, within the meaning of Section 193 and Section 228 of the Indian Penal Code.

15. Section 193 of I.P.C. reads as follows:

Punishment for false evidence.—

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine,

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1: A trial before a Court-martial is a

judicial proceeding.

Explanation 2: An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

16. Perusal of Explanation 2 to Section 193 IPC would clearly indicate that an investigation directed by law is a stage of judicial proceedings before a Court of Justice though that investigation may not take place before the Court of Justice. In other words, as per Explanation 2, it is to be presumed that such investigation is taking place before the Court of Justice. Consequently, it is apparent that the proceedings under Sub-Sections 2 and 3 of Section 50 of the said Act is a judicial proceedings before the Court of justice, though such proceedings is not taking place before the Court of Justice.

17. The respondents have categorically admitted in the counter that the persons who were summoned under Section 50 of the said Act is only for the purpose of collecting evidence and to know the complicity of the persons so summoned to the crime and that, only after collecting evidence and statements from the persons so summoned and if it is established after completion of investigation that the person is involved in the crime of Money Laundering, he will be treated as an accused and prosecution complaint will be

filed against him. Therefore, there is no dispute to the fact that at the time of making an enquiry under Sections 50(2) and 50(3) of the said Act, the persons so summoned, unless are found to have been involved in the crime of Money Laundering, cannot be treated as an accused at the stage of enquiry itself. Under the above circumstances, now, the question that would arise is as to whether the presence of a lawyer is required at the time of making such enquiry. The above said question has been extensively considered by the Gujarat High Court in **Jignesh Kishan Bai** case reported in **Manu/GG/0015/2017**, wherein the learned Judge in an identical circumstances, in respect of summons issued under Section 50 of the said Act, has observed at paragraph Nos. 22 and 23, by relying on the decision of the Madras High Court reported in 1986 (Crl.L.J.)1760, as follows:

22. Thus, I am of the view that where the Investigating Agency seeks to interrogate a suspect during the preliminary investigation prior to filing of the complaint and the suspect applies for permission to be represented by a lawyer, or seeks permission to allow the lawyer to remain present, if not within hearing range, but within visible distance, the Investigating Agency should adopt the following modus operandi:-

"(1) He is not bound to grant the request for the presence of a lawyer during the questioning;

(2) But, at the same time, he must bear in mind that the presence of the lawyer will avoid any adverse criticism of any confession that may be made by the petitioner during interrogation. [See: Jagir Singh and another v. The State, MANU/TN/0013/1985MANU/ TN/ 0013/1985 : 1986 Cr.L.J. 841]"

23. In the aforesaid context, I may quote an interesting observations made by a learned Single Judge of the Madras High Court in the case of Jagir Singh (supra) as regards the provisions of Advocates Act, 1961 and the right of the advocate of audience before an authority. The observations as contained in para 4 reads as under:

"The second aspect to be borne in mind is the provision of the Advocates Act, 1961, which enables the Advocates the right of audience. Sec. 30 of the Act deals with the rights of Advocates to practise and the same is as follows -

"Subject to the provisions of this Act, every Advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which the Act extends --

(i) in all Courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."

As per the above section, an investigating officer,

being a person not authorised to take evidence, is not a forum before which an advocate has got a right of audience. Learned counsel for the petitioners submits that it is customary on the part of advocates to present bail applications, etc., on behalf of the accused and the right of advocate to appear before the police officers had become recognised. Whatever may be the practice, under the Advocates Act, an advocate is not entitled to any right of audience before any forum other than those set out in S. 30. The Supreme Court in *Nandini Satpathi's case*, MANU/SC/ 0139/1978MANU/SC/0139/ 1978 : AIR 1978 SC 1025 : (1978 Cri LJ 968), cautions that police station lawyer' system is an abuse which breeds other vices."

18. Thereafter, the learned Judge, considered the question whether the discretionary relief of presence of lawyer should be granted to the applicant or not, by considering the decision of the Apex Court in *Nandhini Sarpathin's case* reported in *AIR 1978 SC 1025* and the decision of the Calcutta High Court in the case of *Mahendra Jain vs. Union of India* reported in *2003 Cri.LJ 1464*. At paragraph Nos.12, 13, 19 and 20, it is observed as follows:

12. According to me, a protection of a citizen must have to be better protection than an accused.

One can be called as 'accused' when there is a prima facie case against him. But in case of a citizen to prima facie case had then born. Unless and until there is a check and balance, possibility of misuse of power cannot be ruled out. Thus the protection under Article 21 is given by the Constitution of India to the people at large. It is now been reiterated universally and the country has given a formal shape of law to give such protection. Thus a concept of the protection of human rights have been developed on the basis of the international covenant of civil and political rights. Article 7 of the same provides no one shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. On 8th January, 1984 an Act was promulgated in our country following such international convention which is known as Protection of Human Rights Act. The ratio of the Supreme Court judgment was restricted during the era when the rigour of FERA (Foreign Exchange Regulation Act) was the policy of the country, presently the Ministry of Commerce, Government of India introduces various relaxations following economical policy and trend of commercial globalisation. It is universally accepted

position. Therefore, the outlook of the authorities in the year 1992 cannot fit in the year 2002. There is sea change in between the two periods.

13. Article 20 of the Constitution of India is made for protection of the person in respect of conviction for offences. Article 22 is made for protection against arrest and detention in certain cases. The real applicable Article in the present case is Article 21. As per Article 21 no person shall be deprived of his life or personal liberty except according to procedure established by law. This is not an idle formality. If such Article is read alongwith Article 19(1)(g) which is made for the right of the citizens in any profession, or to carry on any occupation, trade or business, the true import will come court. Therefore, the basic feature of the Constitution cannot be ignore or flunged away from the river of protection. The Supreme Court judgment is categorical in respect of Article 22 about consultation with a legal practitioner. Whether legal practitioner can or cannot be present as an Observer was the prime question at the time of enquiry or investigation. However, the judgment is anterior to the Act come into force. Such Act gives protection of 'human rights' reiterating the right protected under Article

21 of the Constitution of India and on the basis of the International conventions. Therefore presently a test under such Act is required to be made if at all any complaints are made.

....

....

19. According to me, there are two ways of looking into the matters. One way is the right of interrogation and another way is right of human dignity. Therefore it is expected that the authorities should keep a sense of proportion or balance in dealing with the matter. In case of any disbalance Court has every right to justify whether the authority has crossed limit of interrogation or whether the petitioners are falsely implicated them in the garb of protection of human right. The affidavit on behalf of the authority is full of evasive denials. Therefore, whether any torture or third degree or any in-human method has been applied for the purpose of extracting statements in the name of interrogation cannot be tested nor it can be said that the apprehension and/or allegations are without any basis. It is true to say that the interrogating officers should have appropriate right for the purpose of interrogation but such right should not exceed the limit of the human right. Therefore, a bare denial cannot be an

appropriate reply to the charges. The cases of the petitioners are not to stop the summons but to proceed with the summons in the proper manner. Such submission cannot be said to be unfair. What is the difficulty for the authorities to proceed with the enquiry or investigation during the office hours. Therefore, the next question will obviously come that when the persons are interested to have to be interrogated as against summons at the same time apply to the writ jurisdiction to get appropriate order of interrogation within reasonable time and in presence of the observer there must have been fear of terrorising themselves? It appears to me that if it had been proceeded in proper manner, the interrogation would have been completed by now. But even inspite of such interim order being passed the authority reluctantly refused to interrogate even in such manner with a plea that the court curtailed the power. Therefore, at the time of final hearing court may feel that interrogation is not the basic interest of such respondents but interrogation as per their sweet will is the basic interest which is other name of terror. There is no law which say that as against the summons Customs authorities will proceed for interrogation as per their sweet will forcibly keeping in their custody for indefinite

period. If it is done then it has to be construed as informal custody. Therefore, the law relating to accused in a custody has to be expressly or impliedly, applicable. If accused can get all benefits under Article 21 of the Constitution a person in such informal custody can say that he is also entitled to get relief under Article 21 of the Constitution of India. It cannot be said that the authority will behave in violation of Article 21 without declaring one as accused and Court will give premium to such illegality. This is not true interpretation of the ratio of the judgment reported in MANU/SC/0339/1992 : 1992CriLJ 2761 (supra).

20. Now a days, custodial violence is not unknown to the people and Court cannot refrain from taking any Judicial notice. If such violation exceeds the personal right and liberty as given under Article 21 of the Constitution of India, the writ Court is justifiable entertain, the writ petition and pass an appropriate order. It is significant to note that custodial violence is not an ordinary violence even if one has been taken in the custody as against any criminal charges. The declaration has to be made whether the person concerned is formally accused or not. It is not be misused for extracting statements by force. It is, further important to say,

that the present policy of the Government does not permit the authorities to behave in such a manner. As has already been said, previously there was a rigour on the part of the authority in respect of interrogation under the Customs Act. But by the introduction of the policy of liberalization, the Government thought about commercial viability intentionally. I am not for a moment say that interrogation will not be there. But its application should not be in such a manner that a wrong message should not go to the people attached to the commercial activities. If one wants to flout the law a case has to be made out on the basis of an appropriate reason to believe. Such reason to believe cannot be a weapon of fishing out the evidence by taking the person in the informal custody, torturing him for an indefinite period and extracting statements to make an evidence to fit the purpose.

19. Further, the learned Judge, cited various orders of the Apex Court relied upon by the writ petitioner therein at paragraph Nos. 29 and 35, wherein, in all those cases, the presence of a lawyer was permitted with respective petitioner therein, while attending the enquiry in pursuance to the summons, however, by making it clear that such lawyer should stay at a visible place but beyond the hearing distance from the place of interrogation.

Ultimately, the learned Judge allowed the writ petition and directed the 2nd respondent therein to permit the Advocate of the applicant to be present during interrogation of the applicant and that the Advocate should be made to sit at a distance beyond hearing range but within the visible distance.

20. I am in full agreement with the above view of Gujarat High Court. I find that the above said decision has extensively considered all the points of law raised in the present case as well. Further in **1978(2) SCC 424 (Nandini Satpathy vs. P.L.Dani and another)**, the Apex Court has observed at paragraph Nos. 63 and 64 has observed as follows:

63. *Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The Miranda decision has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and section 161(2) will be obviated by*

this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to police-station-lawyer system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will was the project.

64. Not that a lawyer's presence is a panacea for all problems of involuntary self-incrimination, for he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

21. The Division Bench of Delhi High Court in its decision made in L.P.No.607/2016 dated 24.05.2018 has observed at paragraph Nos.19, 22 & 23

as follows:

19. Under the regime of the Competition Act, there can be no doubt that the DG is authorized to record evidence. Section 36(2) of the Act provides the DG powers similar to that of a Civil Court and allows him to take evidence. Section 36 is given further content through Regulation 41 and 43 of the CCI Regulations (reproduced in relevant part above), which also clarifies that the DG is authorized under the Competition Act to take evidence. That being the case, the DG would fall under Section 30(ii) of the Advocates Act, as being a person “legally authorized to take evidence”. Therefore, advocates under Section 30 would have the right to practice before such individual. That being the case, what the Court must then discern is whether the Act contains any restriction or prohibition on advocates from appearing before the DG during its investigations. Facially, the Court notices that there is no such restriction in the Act or the Regulations. Neither does the appellant’s argument that the Act in specifically providing for the right of legal representation before the Commission (through Section 35), impliedly rejects such a right before the DG, persuade this Court. The right of practice of an advocate and the right of a litigant to engage the services of an advocate being

firmly entrenched in the Advocates Act and through the Constitution, restrictions on such a right must be clearly spelt out in the legislation. In the absence of such express stipulation, this Court cannot impliedly read in such a restriction in the statute.

....

....

22. Since the DG's powers are so far-reaching and the consequences of an investigation by the DG so drastic, it would necessary that the right of a party/person to be accompanied by an advocate during the investigations by the DG, when the latter is collecting or recording evidence, not be taken away. This Court, therefore, finds that the Learned Single Judge's reliance on Google (supra) as well as the decision in Punjab National Bank (supra), to hold that when the consequences of an enquiry or investigation are severe and drastic, the right of a person to be accompanied or represented by an advocate cannot be extinguished, stands to reason and cannot be faulted with.

23. At the same time, this Court is alive to the concerns raised by the CCI that if parties are allowed to be accompanied or represented by advocates in investigations before the DG, the efficacy of the investigation may be hampered and

the collection of evidence may become onerous or cumbersome. The concern of CCI, furthermore that during the course of investigation and recording of evidence of a witness, the active participation of a counsel may not be conducive to the larger public interest in promoting competition, because the likelihood of a counsel cautioning (either orally, or through non verbal communication) a witness from making or refraining from making a statement. In that regard, the Commission or the DG, as the case may be, lay prescribe, in the order, during the course of proceeding, when a request for representation by counsel is made, an appropriate procedure to be followed during such investigation, where the counsel may be allowed to accompany the party, but not continuously confer with him when the DG is taking his or her testimony or asking questions. Therefore, while the party is allowed his right to be accompanied by an advocate, the DG's investigations are not unnecessarily hindered. The Commission having regard to the appropriate best practices across jurisdictions in antitrust matters may formulate such procedures and incorporate them in regulations; till then, it is open to the DG to make appropriate procedural orders. This court feels additionally that this precautionary note is essential, because often there can be situations

where the prominent presence of a counsel might hinder questioning of the witness by the investigating officers or the Director General. Apart from non-verbal communication, the counsel might restrict the element of surprise that is essential when collecting such evidence. Therefore, the DG shall ensure that the counsel does not sit in front of the witness; but is some distance away and the witness should be not able to confer, or consult her or him. The Court does not deem it necessary or appropriate to say more on this aspect of the matter, leaving it to the Commission to decide the appropriate course.

22. No doubt, the learned counsel for the respondents relied on two decisions of this Court made in the case of (i) MANU/TN/0458/2010 (E.Giribabu vs. Deputy Director of Enforcement) and ii) Crl.O.P.No.30066/2011 dt.01.08.2013 (Haji Ali Vs. Deputy Director, Directorate Enforcement) in support of her contentions that advocate presence cannot be permitted. In the first case, this Court decided the matter on 26.03.2010. However, perusal of the Gujarat High Court judgment made in **Jignesh Kishan Bai case** would show that various orders of the Supreme Court were passed subsequently permitting the presence of the advocate, however, with a condition that he should sit at visible distance but beyond hearing distance from the place of enquiry. Insofar

as the 2nd decision of this Court is concerned, though the same is dated 01.08.2013, it was a single line rejection order without there being any discussion of position of law. Therefore, I am of the view that the above said decisions cannot help the respondents in any manner. Further, it is to be noted that Section 30 of Advocates Act, 1961, which deals with right of Advocate to practise, specifically entitles every Advocate whose name is entered in the State roll, as of right to practise, including before any person legally authorised to take evidence. When such being the right conferred on the Advocate, the respondents cannot curtail such right, if the petitioner seeks such assistance. But at the same time, it should also be borne in mind that presence of such lawyer should not be a hindrance to the enquiry either by his interference with queries or by his prompting the person, who is being examined, to say this way or that way. If that is permitted then it would defeat the very object and purpose of enquiry. However, the object of permitting the lawyer to be present at the time of enquiry is to see that such enquiry is conducted without giving any room for complaint as if the statement was obtained from the person so summoned under threat or coercion or harassment or physical torture.

23. Therefore, I am of the view that the petitioner must be permitted to have his choice of lawyer to be present along with him at the time of

interrogation/enquiry, however, by making it clear that such lawyer should sit within a visible distance but beyond hearing distance.

24. The next question that should arise for consideration is as to whether the statement already recorded from the petitioner's have to be eschewed and consequently, whether the first respondent should be directed to re-record the statement from the petitioner in the presence of an Advocate. I do not think that the above said relief need to be granted to the petitioner in view of his categorical averment made in the affidavit filed in support of the second writ petition in W.P.No.33163/2018 stating that he had issued a letter to the respondents on 06.12.2018 retracting his statement which was obtained afresh from out of coercion on 19.12.2018. When such retraction has already taken place, the law will have to take its own course to decide about the veracity of the statement already obtained from the petitioner and the effect of such retraction, at the appropriate time, during the proceedings. However, if the petitioner needs to appear for any further enquiry, in view of the above stated facts and circumstances and the findings rendered by this Court, the first respondent shall permit the lawyer to be present with the petitioner at the time of interrogation, however, making it clear that such lawyer should be made to sit at visible distance at the back of the petitioner but beyond hearing distance from the place of interrogation. In other words, the seating arrangement of the petitioner and his lawyer should

be made in such a way that both should not have eye contact with each other.

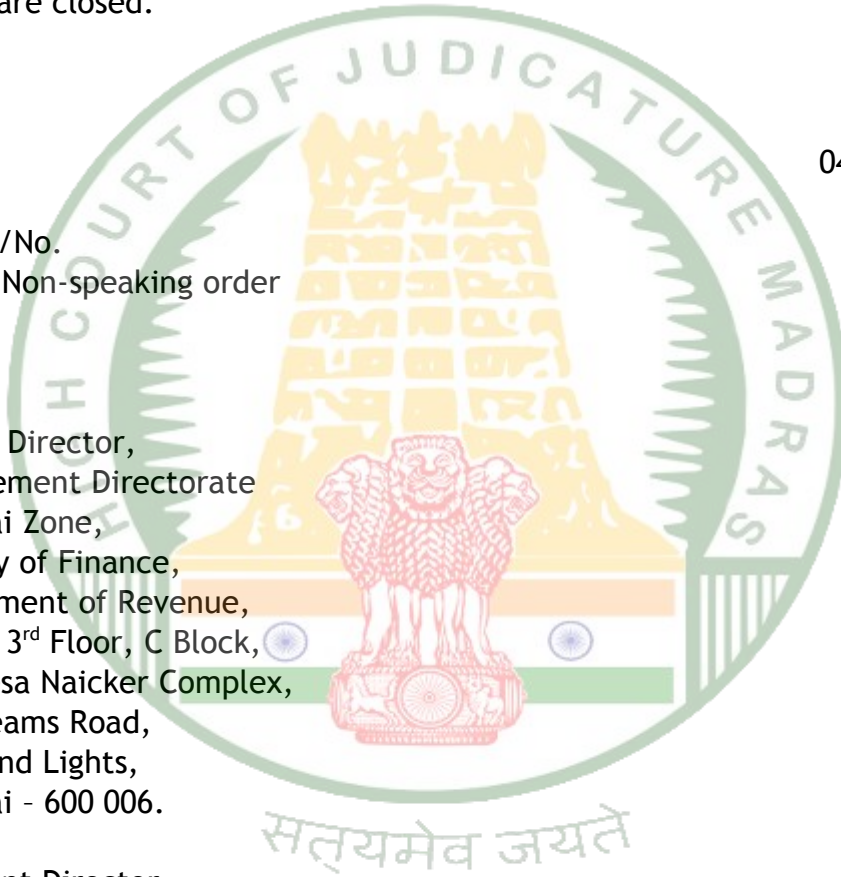
25. With the above findings and directions, both the writ petitions are disposed of accordingly. No costs. Consequently, connected miscellaneous petitions are closed.

04.04.2019

Index:Yes/No.
Speaking/Non-speaking order
vsi

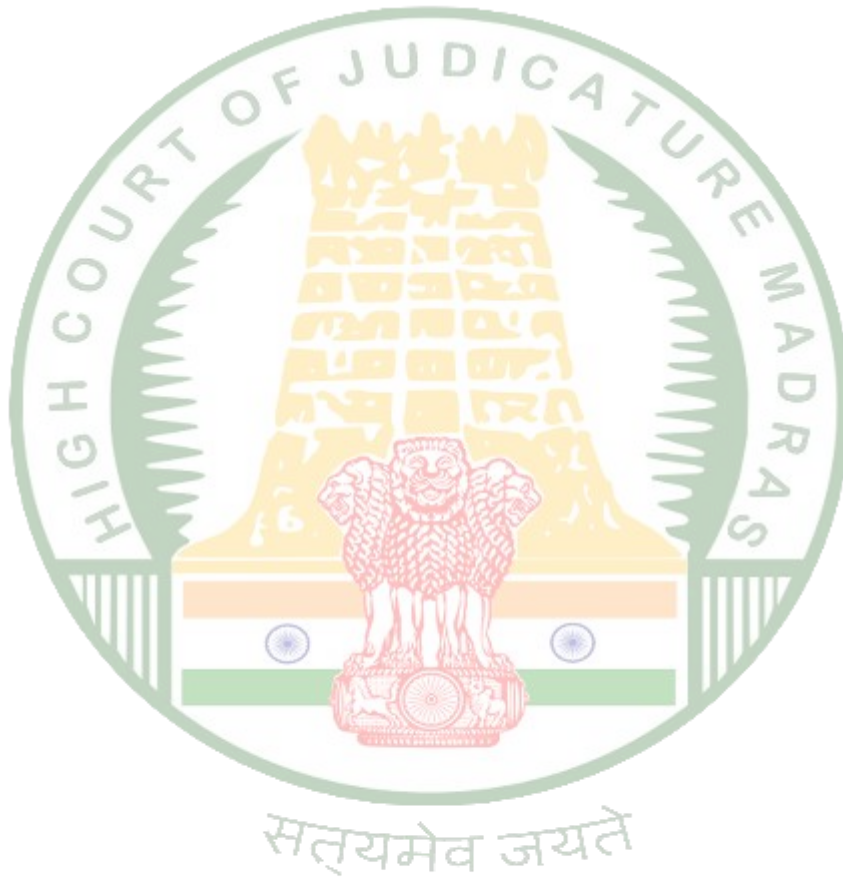
To

1. Deputy Director,
Enforcement Directorate
Chennai Zone,
Ministry of Finance,
Department of Revenue,
2nd and 3rd Floor, C Block,
Murugesha Naicker Complex,
84, Greams Road,
Thousand Lights,
Chennai - 600 006.
2. The Joint Director,
Enforcement Directorate
Chennai Zone,
Ministry of Finance,
Department of Revenue,
2nd and 3rd Floor, C Block,
Murugesha Naicker Complex,
84, Greams Road, Thousand Lights,
Chennai - 600 006.



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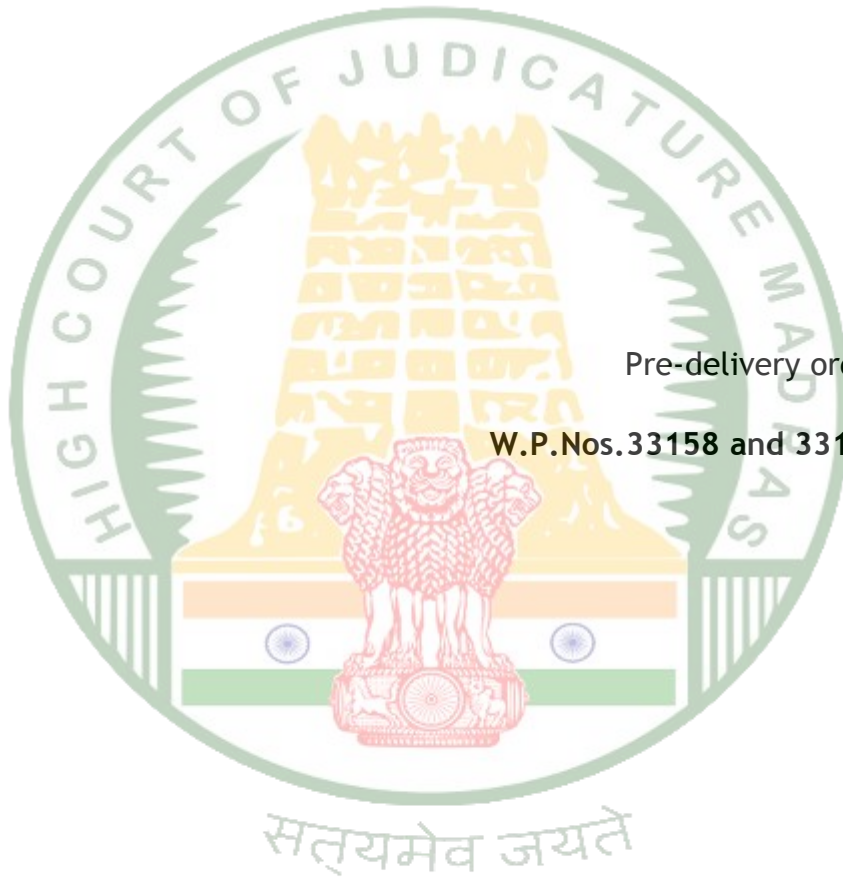
3. The Director,
Enforcement Directorate
6th Floor, Lok Nayak Bhawan,
Khan Market,
New Delhi.



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K.RAVICHANDRABAABU,J.

Vsi



Pre-delivery order made in

W.P.Nos.33158 and 33163 of 2018

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