IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:08.04.2019

\+ **W.P.(C) 9337/2015 & CM APPL. Nos.21622/2015,27140/2017**

JUNAID IQBAL MOHAMMED MEMON ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner :Mr Parag P. Tripathi, Senior Advocate with Mr Saurabh Kripal, MsRanjeeta Rohatgi, Mr Abhishek Thakral, MsMishika Bajpai and Mr Girish Pikhale, Advocates.

For the Respondents :Mr Dev P. Bhardwaj, CGSC with Mr Jatin Teotia, Advocate for R-1/UOI.
Mr Amit Mahajan, CGSC with Ms Mallika Hiremath, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 22.09.2015 (hereafter 'the impugned order') passed by the Consulate General of India, Dubai, suspending petitioner's passport. The petitioner has been further directed to deliver his passport to the Consulate General of India, Dubai.

2. The petitioner states that he is a Non-Resident Indian (NRI) and has been residing permanently in UAE since 1993. He states that he has been carrying on business in property development and hospitality

in UAE since 2011. It is alleged that the petitioner has been involved in money laundering and has transferred the sale proceeds of assets in India, belonging to his father (Late Iqbal Mirchi), to foreign countries. Pursuant to these allegations, certain directives were issued to the petitioner by respondent no.3 (the Directorate of Enforcement – ED) and summons were further issued calling upon him to appear in person before the ED.

3. The petitioner's passport has been suspended on the ground that the petitioner has failed to appear in person before the concerned officers investigating the alleged violation of the provisions of Foreign Exchange Management Act, 1999 (hereafter 'FEMA').

4. The petitioner contends the action of the respondents to impound his passport is arbitrary inasmuch as it is not based on any relevant material and is completely contrary to the records. The petitioner further contends that he is an NRI and, thus, not covered by the provisions of FEMA. The respondents, on the other hand, contend that Section 3 of the FEMA covers resident, non-resident and foreignnationals and various Regulations of FEMA are also applicable tothe NRIs and Person Resident Outside India.

5. The limited controversy which falls for consideration of this Court is whether the action of the respondents to impound the passport of the petitioner is sustainable in law.

Factual Background

6. Pursuant to an order dated 26.03.2007 passed by the Supreme

Court in a writ petition filed by the petitioner (being W.P.(C) 531/2006 captioned *Junaid Iqbal Memon v. Union of India & Ors.*), a passport was issued to the petitioner.

7. Pursuant to the investigation conducted by the ED under the provisions of FEMA, ED issued certain directives by way of letters dated 10.04.2015to the petitioner calling upon him to furnish information in relation to four companies – M/s Vantage Enterprises Pvt. Ltd, M/s Rock Stone Reality & Hotels Pvt. Ltd., M/s Relators Hotels Projects Pvt. Ltd and M/s Horizon Estate Constructors Pvt. Ltd. The directives were issued to the petitioner under Section 37 of FEMA read with Section 133(6) of the Income Tax Act, 1961, in his capacity as being one of the Directors of the aforesaid four companies. It was further stated therein that the said information is required to be furnished within fifteen days from the receipt of the said letter.

8. The aforesaid letters were received by the petitioner on 16.04.2015. The petitioner replied to the aforesaid letters by a letter dated 21.04.2015 seeking further time of four weeks to furnish the requisite information sought by the ED.

9. Thereafter, ED sent another letter dated 15.05.2015 under Section 37 of FEMA read with Section 133(6) of the Income Tax Act, 1961 to the petitioner calling upon him to furnish the said information within seven days from the receipt of the letter. In response to the same, the petitioner sent a letter dated 20.05.2015stating that he is an NRI and has been residing in UAE since 1993 and further he does not have any business interest in India and therefore, the directives issued

to the petitioner are based on an incorrect presumption that the petitioner is a resident of India. In this view, the petitioner requested the ED to withdraw the directives dated 10.04.2015 and cease the ongoing investigation.

10. The petitioner claims that, nevertheless, by way of the letters dated 02.06.2015 and 03.06.2015, the petitioner submitted the requisite documents in terms of the directives dated 10.04.2015 for all the four companies.

11. Thereafter, summons dated 07.08.2015 were issued to the petitioner under the provisions of FEMA, wherein it was stated that the petitioner's attendance was required in connection with the proceedings under the FEMA. In view of the above, the petitioner was called upon to be present personally or through authorized representative at the office Assistant Director on 21.08.2015 to produce the relevant documents. It was further stated in the summons that non-compliance with the summons will attract a penalty under Section 13 of FEMA read with Section 272A(1) of the Income Tax Act, 1961. The petitioner replied to the aforesaid letter requesting four weeks time to file the necessary documents. The said request was accepted by the ED.

12. In the meanwhile, ED sent a letter dated 18.08.2015 to respondent no.2 (the Foreign Secretary, Ministry of External Affairs, Government of India) requesting to revoke the passport of the petitioner. In response, respondent no.2 sent a letter dated 21.08.2015 to the ED stating that *"necessary action has been initiated by this*

Ministry in this regard. CGI, Dubai has suspended the passport of Sheri Memonw.e.f 20/08/2015 for a period of 4 weeks which will be followed by a Show Cause Notice for impounding/revocation of his passport".

13. Thereafter, the petitioner sent a letter dated 21.09.2015 furnishing the details/documents as sought by the ED. The petitioner was further called upon to appear personally before the ED on 01.10.2015. The petitioner failed to appear personally and on 28.09.2015, the authorized representative of the petitioner appeared before the ED and sought for advancement of the scheduled proceedings for 01.10.2015 to 28.09.2015. The next date for the petitioner's appearance was fixed on 05.10.2015 but the petitioner again failed to appear in person on the said date. Consequently, fresh summons dated 05.10.2015 were issued to the petitioner calling upon him to appear in person on 19.10.2015.

14. In the meanwhile, the Consulate General of India, Dubai issued a letter dated 22.09.2015 suspending the passport (No. Z3076714) of the petitioner under Section 10(3)(c) of the Passports Act, 1967 (hereafter 'the Passports Act') for refusing to join the investigation carried out by the ED despite the issue of summons.

Reasons and Conclusion

15. It is the conceded position that the petitioner's passport was suspended solely on the request made by respondent no.3(ED). The said order was passed on the premise that the petitioner was avoiding

joining investigation being conducted under FEMA and the same warranted cancellation of the Passport under Section 10(3)(c) of the Passports Act.

16. Clause (c) of Section 10(3) of the Passports Actis relevant and is set out below:-

> "**10. Variation, impounding and revocation of passports and travel documents**
>
> xxxxxxxxxxxxxxxx
>
> (3) The passport authority may impound or cause to be impounded or revoke a passport or travel document,-
>
> xxxxxxxxxxxxxxxx
>
> (c) if the passport authority deems it necessary so to do in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public;"

17. Plainly, the concerned authority has not suspended the petitioner's passport on any concern regarding sovereignty, integrity of India, the security of India, friendly relations of India with any foreign country. It is contended that the petitioner's passport has been suspended in the interest of general public.

18. The question whether any investigation under FEMA would warrant cancellation of a passport under Section 10(3)(c) of the Passports Act was considered by the Division Bench of this Court in

Lalit Kumar Modi v. Union of India: (2014) 213 DLT 504 (Del). In that case, the Court had examined the provisions of FEMA and had noticed that there was a material difference between the provisions of FEMA and the Foreign Exchange Regulation Act, 1973 (FERA). It was noticed that under FEMA, there was no provision for arrest or criminal prosecution as provided under Section 35 and 56 of FERA. Further, the power to examine persons conferred on the officers of the Directorate of Enforcement under Section 39 of FERA also did not find place in FEMA.

19. It is also observed that violation of provisions of Section 13 of FEMA, as alleged in the present case, would result in the concerned officer making a complaint to the adjudicating authority under Section 16 of the FEMA. On such complaint being made, the adjudicating authority would hold such enquiry under sub-section (1) of Section 16 of FEMA. It is material to note that even at that stage, the person accused has the option to either appear in person or by taking the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the adjudicating authority by virtue of sub-section (4) of Section 16 of FEMA.

20. In view of the aforesaid Scheme, the Division Bench had repelled the contention that a passport could be suspended or revoked under Section 10(3)(c) of the Passports Act on account of non-appearance before the investigation proceedings under FEMA.

21. The Court had also noticed that provisions of FEMA do not entail custodial interrogation and, therefore, an alternative mode of

examination under video conferencing was an option available to the ED.

22. In the present case, the petitioner is a non-resident Indian and contends that the provisions of FEMA are inapplicable. Notwithstanding the aforesaid contention, MrTripathi, learned Senior Counsel for the petitioner had made a statement before this Court on 14.08.2018 that the petitioner would provide all documents as required by the respondents even though, according to the petitioner, the same are not required to be disclosed.

23. It is not disputed that in compliance with the aforesaid order, the petitioner has supplied all documents that were called for by the ED. This Court had, during the course of proceedings, also pointedly asked MrAmitMahajan, learned counsel for the respondents that whether there was any other document that was required by the ED. Although, he did not dispute that all documents had been provided, he nonetheless submitted that the petitioner was required to be confronted with certain documents and, therefore, his presence was necessary.

24. In this regard, it is relevant to note that the petitioner had voluntarily agreed to appear by teleconferencing and also make all arrangements for the same, however, that was not accepted. In this regard, the Division Bench of this Court in ***Lalit Kumar Modi*** (*supra*) had observed that FEMA did not entail custodial interrogation and, therefore, a request for an alternate mode of examination by video conferencing ought not to be shrugged aside. Paragraph 45 of the said decision is set out below:-

> "45. Furthermore, the object of the summons was to provide evidence and documents as stated above. All that had been provided by the appellant and the appellant was also ready and willing to be examined through video conferencing. We must say at this juncture that FEMA does not entail custodial interrogation and, therefore, a request for an alternative mode examination under video conferencing was certainly an option available with the Directorate of Enforcement and should not have been simply shrugged aside. We say so, even if it is assumed that the appellant did not have a genuine threat to his life as claimed by him."

25. This Court is of the view that the controversy involved in the present petition is covered by the decision of the Division Bench in ***Lalit Kumar Modi***(*supra*) and the petitioner's passport could not be suspended in public interest.

26. It is also relevant to note that in terms of Section 10(1)(e) of the Passports Act, a passport can be cancelled in cases where offence alleged to have been committed by the holder of passport is pending before a criminal court in India. Further, in terms of Section 10(3)(h) of the Passports Act, a passport can be cancelled if a warrant or summons for the appearance, or a warrant for the arrest, of the holder of the passport has been issued by a Court under any law for the time being in force.

27. It is also contended on behalf of MrMahajan that subsequent to the decision in ***Lalit Kumar Modi*** (*supra*), the provisions of Section 13 of FEMA had been amended and in terms of Sub-section 1(B) of Section 13, prosecution could be initiated by filing a criminal

complaint for violation under sub-section 1(A) of Section 13 and in terms of Sub-section 1(C) of Section 13, the delinquent could also be imprisoned for a term extending to five years. In view of this Court, the said amendments do not dilute the precedent value of the said decision. This is so because the criminal prosecution as contemplated under Section 13(1C) of FEMA can be commenced by filing a criminal complaint. Plainly, if such a complaint is filed and summons are issued by a competent court, the passport facilities provided to the accused could be withdrawn by virtue of Section 10(3)(h) of the Passports Act.

28. In view of the above, the impugned order suspendingthe petitioner's passport is set aside. However, it is clarified that respondent no.3/ED is not precluded from initiating any other proceedings as permissible in law.

29. The petition is disposed of in the above terms. All pending applications also stand disposed of.

VIBHU BAKHRU, J

APRIL 08, 2019
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