



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2021

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN

Writ Petition Nos. 20224, 20330 and 20356 of 2021
and

WMP. Nos. 21478, 21480, 21571, 21603, 21604 and 21903 of 2021

WP No. 20224 of 2021

Ramu Annamalai Ramasamy

.. Petitioner

Versus

1. The Special Director
Directorate of Enforcement
Southern Regional Office
"Shastri Bhawan"
III Block, Third Floor
No.26, Haddows Road
Chennai - 600 006
2. The Joint Director of Enforcement
Directorate of Enforcement
2nd & 3rd Floor, 'C' Block
Murugesu Naicker Complex
No.84, Greaves Road
Chennai - 600 006
3. The Deputy Director
Directorate of Enforcement
2nd & 3rd Floor, 'C' Block
Murugesu Naicker Complex
No.84, Greaves Road
Chennai - 600 006

.. Respondents

WP No. 20330 of 2021

Palaniyapan Ramasamy

.. Petitioner

Versus

1. Union of India
represented by The Secretary to the Government
Ministry of Finance
Department of Revenue
New Delhi



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2. The Special Director
Directorate of Enforcement
Southern Regional Office
Shastri Bhawan
III Block, Third Floor
No.26, Haddows Road
Chennai - 600 006
3. The office of the Joint Director,
Directorate of Enforcement (Chennai Zone)
II & III Floors, 'C' Block
Murugesu Naicker Office Complex
No.84, Greaves Road
Chennai
Tamil Nadu - 600 006

.. Respondents

WP No. 20356 of 2021

R. Umaiyal Radhai

.. Petitioner

Versus

1. The Special Director
Directorate of Enforcement
Southern Regional Office
Shastri Bhawan
III Block, Third Floor
No.26, Haddows Road
Chennai - 600 006
2. The Deputy Director
Directorate of Enforcement
Southern Regional Office
Shastri Bhawan
III Block, Third Floor
No.26, Haddows Road
Chennai - 600 006
3. The office of the Joint Director
Directorate of Enforcement (Chennai Zone)
II & III Floors, 'C' Block
Murugesu Naicker Office Complex
No.84, Greaves Road
Chennai
Tamil Nadu - 600 006

.. Respondents



WP No. 20224 of 2021:- Petition filed under Article 226 of The Constitution of India praying to issue

(i) Writ of Declaration to declare the entire search operation held in the premises conducted on 02.09.2021 and 03.09.2021 as null and void being violative of Article 21 of The Constitution of India and further declare all statements recorded on the 02.09.2021 and 03.09.2021 as null and void

(ii) Writ of Mandamus directing the respondents (1) not to cause any physical, mental or verbal harassment to the petitioner during the pendency of investigation on the proceedings in File No.T-3/CEZO-1/24/2021 dated 03.09.2021 (2) to furnish copies of statements given earlier by the petitioner under Section 37 of the Foreign Exchange Management Act, 1999 and (3) to conduct the proceedings in File No. T-3/CEZO-1/24/2021 dated 03.09.2021 in the presence of the Advocate appointed by the petitioner

(iii) Writ of Mandamus directing the first respondent to transfer the investigation in File No.T-3/CEZO-1/24/2021 dated 03.09.2021 to any other officer other than the third respondent so that the investigation is conducted in a free, fair and impartial manner.

WP No. 20330 of 2021:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records relating to the impugned proceedings in File No: T-3/CEZO-1/24/2021 dated 08.09.2021 on the file of the third respondent herein, quash the same thereby directing the third respondent to produce before this Court the entire material evidence pertaining to the said proceedings, expunge the same, to treat the petitioner in a fair manner as envisaged under the Act.

WP No. 20356 of 2021:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records relating to the impugned proceedings in File No: T-3/CEZO-1/24/2021 on the file of the third respondent herein, quash the same thereby directing the third respondent to produce before this Court the entire material evidence pertaining to the said proceedings, expunge the same, to treat the petitioner in a fair manner as envisaged under the Act.

For Petitioner : Mr. Nithyaesh & Vaibhav
in WP No. 20224 of 2021

Mr. Muralikumaran
for Mr. E. Balamurugan
in WP No. 20330 of 2021



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Mrs. Narmadha Sampath
in WP No. 20356 of 2021

For Respondents : Mr. N. Ramesh
Special Public Prosecutor
for Enforcement Directorate
in all the Writ Petitions

COMMON ORDER

These three analogous writ petitions have been filed under Article 226 of the Constitution of India and the issues involved are similar in nature. Hence, it is convenient to dispose of them by this common order. These petitions would, however, be referred to as first, second and third writ petitions.

2.1. The first writ petition viz., WP No. 20224 of 2021 has been filed praying to issue a Writ of

(i) Declaration to declare the entire search operation held in the premises of the petitioner on 02.09.2021 and 03.09.2021 as null and void being violative of Article 21 of The Constitution of India and further declare all statements recorded on 02.09.2021 and 03.09.2021 as null and void;

(ii) Mandamus directing the respondents not to cause any physical, mental or verbal harassment to the petitioner during the pendency of investigation relating to the proceedings in File No.T-3/CEZO-1/24/2021 dated 03.09.2021, to furnish copies of statements given earlier by him under Section 37 of the Foreign Exchange Management Act, 1999 and to conduct the said proceedings in the presence of the Advocate appointed by him; and

(iii) Mandamus directing the first respondent to transfer the investigation in File No.T-3/CEZO-1/24/2021 dated 03.09.2021 to any other officer other than the third respondent so as to conduct the investigation in a free, fair and impartial manner.

2.2. The second and third writ petitions viz., WP Nos. 20330 and 20356 of 2021 have been filed praying to issue a Writ of Certiorari and Mandamus to call for the records from the third respondent relating to the proceedings in File No.T-3/CEZO-1/24/2021 and consequently direct the third respondent to produce the entire material evidence pertaining to the said proceedings, expunge the same and treat the petitioners in a fair manner as envisaged under the Foreign Exchange Management Act, 1999.

3. The petitioner in the first writ petition is the



Director of a Company called M/s. GI Technology Private Limited situated at No.12, Prithvi Avenue First Cross, R.A. Puram, Chennai-600 028. His brother by name Palaniyapan Ramasamy, who is the petitioner in the second writ petition, is running a business in the name and style of M/s.GI Retail Private Limited at C9, Thiru-vi-ka Industrial Estate, Guindy, Chennai, for the past 13 years. The petitioner in the third writ petition is the wife of the petitioner in the first writ petition.

4. The averments made in the affidavit filed in support of the first writ petition in nutshell are set out hereunder:

4.1 Pursuant to the summons issued by the Enforcement Directorate, the petitioner viz., Ramu Annamalai Ramasamy in the capacity as a Director of M/s. G.I Technology Private Limited, appeared for enquiry in relation to the affairs of the company M/s.Wirecard India Private Limited, on four occasions i.e., on 23.03.2021, 29.03.2021, 31.03.2021 and 01.04.2021, answered the queries raised and furnished all the documents called by the department. His brother Palaniyapan Ramasamy, who is also a Director of the said company and the Principal Officer Sathish Babu appeared for enquiry on five occasions and gave their statements to the third respondent.

4.2. However, on 02.09.2021, at about 8.30 am, a group of about ten persons, claiming themselves to be the officials from the Enforcement Directorate, entered into the house of the petitioners in the first and third writ petitions reportedly to carry out a search under Section 37 of the Foreign Exchange Management Act, 1999 (in short, 'The FEMA Act'). Immediately upon entering the house, they snatched the mobile phones of the inmates and asked the children of the petitioners to log off their online classes and handover the laptops to them, as a result of which, the children could not attend the classes online for two days nor they were allowed to be sent to their grandmother's place. The search went on for 36 hours, during the course of which, the petitioner in the first writ petition was harassed, humiliated and made to comply with the taunts of the officials of the Enforcement Directorate. Such horrific events, according to the petitioners, unfolded in front of their children and family members, which has caused permanent scar in the lives of all the family members. Even a request made by the petitioner in the first writ petition to spare his wife, who is suffering from osteoporosis and who has nothing to do with the affairs of the company, has not been heeded to and she was not allowed to leave the house.

4.3. During the course of search, there were various restrictions imposed. The petitioner in the first writ petition was not even allowed to drink water nor allowed to attend to his natural call without the permission of the officials. He was



asked to stand and forced to sit on the floor while answering the queries raised to him in front of his family members. The Panchanama drawn was silent with regard to the time of visit by the officers and the time of their leaving his premises of the petitioners, which would throw much light about the manner in which the search was conducted. It is also stated that past midnight, around 3.30 am on 03.09.2021, the officials typed out a statement and made the petitioner in the first writ petition to sign it under threat and coercion without giving him time to read the contents thereof. Even the petitioner was intimidated by the third respondent with dire consequences of slapping cases under the provisions of the Prevention of Money Laundering Act, 2002, if he were not to agree and sign the statement typed by the officials. In similar fashion, statement was obtained from his wife as well (petitioner in the third writ petition) who is in no way connected to the business carried on by him. Thus, according to the petitioner in the first writ petition, he was harassed, humiliated and treated as a criminal without taking note of his status and position in his personal as well as official life, leaving him traumatised and fragile during the course of such search conducted in his premises.

4.4. It is further averred that during the search operation, which commenced from 08.30 am on 02.09.2021, the officials of the Enforcement Directorate removed the cables of some of the CCTV cameras in the premises of the petitioner obviously to avoid recording of their actions. They have also removed the hard disk of the CCTV cameras and deleted some portions and inserted a morning day clipping in freeze mode, instead of recording the events unfolded from the time of search. On 02.09.2021 at about 11.45 pm, one Dr.Sachin Kumar, Deputy Director of Enforcement Directorate, visited the search premises and started interrogating the petitioner in the first writ petition with a bunch of papers brought from outside. The petitioner was asked to read the contents of certain documents, which he did. However, when he sought for copies of the statements recorded, it was declined by the officers. In the Panchanama, it was recorded as if the statement of the petitioner was obtained voluntarily without any threat, coercion or inducement, which is factually incorrect. The petitioner has retracted his signed statements typed out by the officers on 02.09.2021 and 03.09.2021 and he is ready to establish that those statements were obtained out of coercion. He was left in a huge mental agony and fear caused by the unprecedented manner in which he was treated by the officials under the guise of investigation. Notwithstanding the search held on 02.09.2021 and 03.09.2021, the petitioner was also directed to appear for enquiry on 14.09.2021. Therefore, he is before this court with this writ petition viz., WP.No.20224 of 2021.



5. The averments made in the second and third writ petitions are verbatim the same as those contained in the first writ petition with respect to the manner in which the search was conducted and the petitioners were treated by the officials and the constant threat and intimidation exercised on them. Thus, according to the petitioners, the statements of the petitioners were obtained by threat and coercion during the course of search conducted on 02.09.2021 and 03.09.2021 and hence, the same will have no binding effect in any manner. It is also stated by the petitioner in the second writ petition that he was issued with summons dated 08.09.2021, to which, he filed his reply on 09.09.2021.

6. The main grievance projected by the petitioners in these three writ petitions is that the motive behind the search of their premises is to implicate them in some false case under the provisions of the Prevention of Money Laundering Act, 2002. They were made to sign some documents and give statements under threat and coercion. They were also directed to appear for enquiry, as and when called. Thus, the petitioners are in constant fear for their life and properties at the hands of the officials of the Enforcement Directorate. Apprehending that those documents and statements may be relied upon by the Enforcement Directorate in the proceedings initiated against them, the petitioners have come up with these writ petitions for the reliefs stated supra.

7. The respondents have filed separate, but identical counter affidavit in all the three writ petitions, disputing various averments made by the petitioners.

7.1.1. It is inter alia stated in the counter affidavit filed in the first writ petition that based on credible information that the petitioner viz., Ramu Annamalai Ramasamy and his group of companies, without any general and special permission from the Government of India or RBI, have acquired huge foreign exchange/assets in overseas and have also received foreign direct investments in the companies wherein he is exercising control, in violation of the FEMA Act and hence, proceedings were initiated against the petitioner in the first writ petition and his group of companies. Pursuant to the same, summons under section 37 of the FEMA Act r/w Section 132 of the Income Tax Act, 1961, was issued to GI Technology (P) Ltd on 17.03.2021. On receipt of the same, the petitioner, who is the Managing Director and is responsible for the conduct of business of the said company, appeared before the third respondent on 22.03.2021, 29.03.2021 and 31.03.2021 and tendered his free and voluntary statement. According to the said statement, the petitioner along with his brother Palaniyapan Ramasamy (petitioner in the second writ petition) are promoters/directors



in M/s.GI Technology Pvt.Ltd and M/s.G.I Retail Pvt.Ltd; the petitioner along with his family members is holding the majority shares in Hermes i-tickets Pvt Ltd. through GI Retail Private Limited; in his capacity as director of GI Retail Pvt.Ltd, the shares owned by the minority shareholders in Hermes i-tickets Pvt.Ltd were purchased vide share agreement dated 09.09.2015 and thereby, he and his family members became 100% owners of Hermes i-tickets Pvt.Ltd; the shares of Hermes i-ticket Pvt.Ltd. were subsequently, sold to Emerging Markets Investment Fund IA (EMIF 1A) a company incorporated in Mauritius through share agreements dated 25.03.2015, 21.05.2015, 07.09.2021 and 16.09.2021 by the petitioner in his capacity as Director of GI Retail Pvt Ltd. for a paltry sum; immediately within few days of the completion of sale of shares of Hermes i-tickets Pvt.Ltd to EMIF 1A, Mauritius by the petitioner and his brother, EMIF 1A, Mauritius has invested EUR 1,000,000/- (Euro one million) in M/s.GI Technology Pvt. Ltd, through subscription agreement dated 24.09.2015; thereafter, within a few weeks of acquisition of Hermes i-tickets Pvt Ltd. by EMIF 1A, Mauritius, the said shares were sold by EMIF 1A, Mauritius to Wirecard AG, Germany group for a huge consideration and the petitioner also transferred the remaining shares of Hermes i-tickets Pvt Ltd. held in GI Retail Pvt Ltd. directly to Wirecard AG, Germany Group; subsequently, a subsidiary / group company of Wirecard AG Germany viz., Wirecard Acquiring and Issuing GMBH, entered into an agreement dated 27.10.2015 with GI Technology Pvt.Ltd for investment of 14 million Euro. Therefore, there was a serious suspicion and cloud over the acquisition / transfer of shares of Hermes i-tickets Pvt.Ltd to EMIF 1A, Mauritius for a paltry sale consideration.

7.1.2. The counter affidavit further proceeds to state that credible information was also received by the respondent department from its foreign counter parts for conducting joint investigation regarding the suspicious transaction between the group companies of Wirecard AG Germany and EMIF 1A, Mauritius. It is learnt that financial service commission, Mauritius has also suspended the business license of EMIF 1A, Mauritius with effect from 16.10.2020 restraining it to operate and transact any business. Therefore, search warrant under Section 37 of the FEMA Act read with Section 132 of the Income Tax Act was issued and search was conducted on 02.09.2021 and 03.09.2021 at the office and residential premises of the petitioner. During such search, incriminating documentary and electronic evidence, including e-mails were recovered and the statement of the petitioner was recorded.

7.1.3. It is also stated that though the petitioner appeared on three occasions before the third respondent and rendered his statement, he was very evasive and non-cooperative and that, failed to furnish true facts and relevant documents



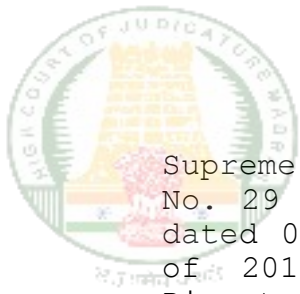
pertaining to sale of shares of Hermes i-tickets Pvt.Ltd to EMIF 1A. Denying the allegation raised by the petitioner about the manner in which he was treated at the time of search, it is stated that the petitioner was treated in a dignified and humanitarian manner and neither the petitioner nor his family members was ill-treated at any point of time during the course of search. His statement was recorded without any coercion and undue influence. Thus, according to the respondents, the petitioner has approached this court only with a malice intention to stall the investigation into the financial irregularities / contravention committed by him and his group of companies under the provisions of the FEMA, Act and as such, he is not entitled to the relief as claimed.

7.1.4. It is specifically pointed out in the counter affidavit that the department did not receive any letter correspondence officially seeking copies of the petitioners' statements dated 02.09.2021 and 03.09.2021. However, the statements whatever deposed by the petitioner were recorded and have been shown to him and the same had been read by the petitioner and were duly signed by him. Therefore, the allegation of violating the principles of natural justice and fundamental rights, is not sustainable. It is further submitted that during the entire search procedure dated 02.09.2021 and 03.09.2021, the officials had maintained requisite dignity and decorum, not amounting to any kind of humiliation or violation of the human rights and fundamental rights as guaranteed to the petitioner under the Constitution of India. The respondent department thus exercised their duties and powers in a fair manner as conferred under the provisions of FEMA Act and other relevant laws.

7.2. Similar averments have been made by the same respondents in the counter affidavit filed in the second and third writ petitions.

8.1.1. The learned counsel for the petitioner in the first writ petition submitted that the proceedings under Section 37 of the FEMA Act is akin to the powers traceable under the Income Tax Act, 1961 and shall be exercisable subject to the limitations as laid down under sub section 3 of Section 37 of the FEMA Act and hence, the petitioner has not challenged the summons issued to him.

8.1.2. The learned counsel further submitted that as found under Section 136 of Income Tax Act, the proceedings before the Income Tax Authority shall be deemed to be a judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code and the same cannot be conducted without the assistance/presence of a lawyer to represent the petitioner. Placing reliance on the order dated 25.04.2012 passed by the



Supreme Court in Crl.MP No. 10117 of 2012 in Writ Petition (Crl) No. 29 of 2012 in Vijay Sajnani v. Union of India and the order dated 04.04.2019 passed by this Court in WP Nos.33158 and 33163 of 2018 (B. Narayanaswamy v. Deputy Director, Enforcement Directorate, Chennai Zone and others), the learned counsel submitted that the presence of the advocate is necessary at the time of enquiry pursuant to the summons issued under Section 37 of the FEMA Act, though the preliminary investigation cannot take place before the court of justice and hence, the petitioner should have been permitted to have a lawyer to assist them in the course of investigation conducted against him.

8.1.3. Placing reliance on the additional affidavit filed by the petitioner in the first writ petition, the learned counsel submitted that during the pendency of this writ petition, the third respondent sent summons dated 30.09.2021 to the wife and mother of the petitioner to appear for enquiry on 06.10.2021 along with documents scheduled therein. When the same was brought to the notice of this Court on 05.10.2021, this court directed the respondents to file their counter and adjourned the matter to 22.10.2021. However, on 05.10.2021, the third respondent passed an order under Section 37 of the FEMA Act directing the wife and mother of the petitioner to furnish the particulars relating to the company viz. M/s.Wirecard India Private Limited and others, besides sending a summons to Veerappan Narayanan, father-in-law of the petitioner to appear for enquiry on 11.10.2021. The said summons dated 05.10.2021 were sent through mail and addressed to his premises located in Mylapore, Royapettah and Namakkal, which were let out for rent. Further, the mother-in-law of the petitioner viz., Namagiri, was also issued with summons dated 05.10.2021 for her appearance on 25.10.2021. According to the learned counsel, the summons dated 05.10.2021 were issued to the in-laws of the petitioner knowing fully well that they are not the residents of India and their NRO accounts were frozen by the respondents with the sole intention to harass the petitioner. Therefore, the learned counsel sought for declaration, declaring the search and seizure actions resorted to by the respondents as invalid and ultra vires the Constitution of India.

8.1.4. The learned counsel appearing for the petitioner also submitted that the power of the respondents to investigate into the matter, does not confer any right to harass the petitioner and at the stage of enquiry, the petitioner cannot be treated as accused and inflicted with mental and physical injury. It is further submitted that the fundamental right provided to the petitioner under Articles 20 and 22 of the Constitution of India, cannot be allowed to be thwarted by the respondents under the garb of investigation. According to the learned counsel, investigation must be free, fair and absolutely



impartial, without any sort of harassment as adumbrated under Article 21 of The Constitution of India. Whereas in the present case, the officials of the Enforcement Directorate abused and misused their power at all stage of the investigation and subjected the petitioner to acute mental agony and harassment. The third respondent, during the course of search in the premises of the petitioner, has recorded the statements of the petitioner under threat and coercion. Further, the panchnama was silent about the visit of the third respondent and his officers, which creates suspicion about the motive behind the search operation and the same does not depict the true picture of the activities that had taken place at that time. Therefore, the petitioner has no faith in the third respondent and he will not get justice or fair treatment if the investigation is allowed to be continued by the third respondent. Stating so, the learned counsel prayed for a declaration to declare the statements recorded by the third respondent during the course of search conducted on 02.09.2021 and 03.09.2021 as null and void and will not bind on the petitioner in any manner, besides a direction to the first respondent to transfer the investigation from the third respondent to any other officer.

8.2. The learned counsel for the petitioner in the second writ petition further contended that similar search was conducted in the premises of the petitioner on 02.09.2021 and 03.09.2021 as done in the premises of the petitioner in the first writ petition, which went on for 36 hours; and the officials of the third respondent have exceeded their scope and harassed the petitioner and his family members under the guise of investigation; and the CCTV cameras available in the neighbourhood would substantiate the averment that the officials stayed at home of the petitioner for 36 hours. It is also submitted that the summons was issued in respect of the matter relating to M/s.Wirecard AG, Germany; the plaintiff viz., M/s.GI Retail Private Limited filed a suit in CS.No.194 of 2019 against the said Germany company; and this court after having observed that there is a malice or malafide intention on the part of the defendant in deliberately causing damage or injury to the plaintiff, granted an interim order in their favour, which order was not challenged before the supreme court, till date. The learned counsel further submitted that the officials failed to divulge the status of the complaint nor the case pending before them; the petitioner apprehends that he may be implicated in a false case and subjected to hardship, such as, freezing, arrest, etc.; and already the respondent department has frozen the lockers of the petitioner's wife, wherein her seethanam jewels alone are there. Therefore, the learned counsel sought to quash the summons issued against the petitioner, call for the materials collected during the search on 02.09.2021 and 03.09.2021 and expunge the same and treat him in a fair manner



as envisaged under the FEMA Act.

8.3. That apart, the learned counsel for the petitioner in the third writ petition submitted that the petitioner is the wife of the petitioner in the first writ petition and her husband was treated as accused in the criminal case and was subjected to ill-treatment and harassment in front of their family members, which would cause damage to his personal as well as professional life. The learned counsel further submitted that during the search operation, the officials have obtained statements from her husband by exercising threat, coercion and undue pressure and hence, the same cannot be used as evidence in the proceedings initiated against him. Thus, the learned counsel sought a similar relief as in the second writ petition viz., to quash the proceedings and call for the entire materials collected during the course of search and expunge the same and treat the petitioner in a fair manner.

9.1. Referring to the counter affidavits filed by the respondents, the learned Special Public Prosecutor for the respondents would contend that though the petitioner in the first writ petition appeared before the third respondent thrice, he was evasive and wholly non-cooperative and that, he failed and neglected to furnish true facts and relevant documents. Despite the undertaking given by him, he did not produce the documents pertaining to sale of shares of Hermes i-tickets Pvt Ltd to EMIF 1A, which created a strong and reasonable case with respect to the transactions done by the petitioners in the first and second writ petitions, while carrying on the business of GI Retail Pvt Ltd. The learned counsel further submitted that during the course of search, the petitioners and their family members were treated in a dignified manner and they have given their statements voluntarily without any coercion or undue influence by the officials of the Enforcement Directorate.

9.2. The learned Special Public Prosecutor further proceeded to contend that the officers under the FEMA Act have got power to exercise all the rights for investigation, which includes issuance of summons, recording the statement of the witness, search and seizure etc. Such power exercised by the respondents is akin to the provisions conferred under the Income Tax Act, 1961. In this case, after following all the procedures as contemplated under law, the respondents have resorted to the search in the premises of the petitioners and seized the documentary evidence. Such search was made based on credible information. Therefore, the action so taken by the respondents cannot be called in question by the petitioners.

9.3. The learned Special Public Prosecutor also contended that the proceedings before the Appellate Tribunal and the



Special Director (appeals) as contemplated under Section 28 of the Act alone shall be deemed to be judicial proceedings under Sections 193 and 228 of the Indian Penal Code, whereas, in the instant case, the respondents have invoked Section 37 of the FEMA Act, which explicitly cannot be construed as a judicial proceedings. As such, the prayer of the petitioner in the first writ petition to have the assistance of a lawyer during the course of investigation cannot be countenanced. According to the learned counsel, the FEMA Act has not chosen to apply the concept of summons used either under the Code of Civil procedure or under the Code of Criminal Procedure, but has chosen to apply analogous provisions found in the Income Tax Act and therefore, assistance of a lawyer of the choice of the petitioner cannot be permitted. In this context, the learned Special Public Prosecutor placed reliance on the decisions of the Supreme Court in Suborno Bose v. Enforcement Directorate and another [(2020) (2) MLJ 646]; and Poolpandi and others v. Superintendent, Central Excise and others [CDJ 1992 SC 149] and this court in P.Giribabu and another v. The Deputy Director of Enforcement, Directorate of Enforcement, Chennai [CDJ 2010 MHC 2832].

9.4. The learned Special Public Prosecutor further contended that on the basis of credible information, summons were issued to the petitioners, which was followed by search of their premises; and the petitioners were neither arrested nor taken into custody by the respondents. While so, the question of infringement of their fundamental rights will not arise. To substantiate the same, the learned counsel referred to the decision of the Supreme Court in Justice K.S. Puttaswamy (Retired) vs. Union of India and others [2017 SCC Online SC 996].

9.5. Turning to the allegation that the Panchanama drawn by the enforcement officials was silent about the time of visit by the officers and the time of leaving the premises of the petitioners, the learned Special Public Prosecutor would contend that the same will not be any avail to the petitioners to succeed in these writ petitions. Even assuming that Panchanama does not contain material particulars, it will in no manner affect the credibility of the case of the respondents. In this context, the learned Special Public Prosecutor placed reliance on the decision of the Delhi High Court in M/s. Mdir Resorts Private Limited v. Commissioner of Income Tax and others [2013 SCC Online Del 5174 : (2014) 361 ITR 407].

9.6. In effect, it is contended by the learned Special Public Prosecutor appearing for the respondents that these writ petitions are filed by the petitioners to stifle the investigation lawfully conducted by the respondents by following the provisions contained under the FEMA Act and the Rules made thereunder. The respondents and the officials of the Enforcement



Department have maintained absolute dignity and decorum during the course of search in the premises of the petitioners and they have not subjected the petitioners to any form of harassment, as alleged. On the basis of credible information, the search was conducted and several incriminating materials were unearthed. The evidences collected during the course of search, have to be examined further to take the investigation to a logical end. Therefore, according to the learned counsel, the respondents have discharged their duties in accordance with the provisions of the FEMA Act, which warrant no interference at the hands of this court.

10. Heard the learned counsel appearing for the respective petitioners as well as the learned Special Public Prosecutor appearing for the respondents and also perused the materials available on record.

11.1. At the outset, it needs to be noted that the FEMA Act, which is a legislation for regulating the economic aspect, has been passed to consolidate and maintain law relating to foreign exchange, external trade and payments and for promoting orderly development of foreign exchange. Concededly, the petitioners have knocked the doors of this court by filing these writ petitions, against the proceedings initiated under section 37 of the FEMA Act and consequential action of investigation conducted by the third respondent. Therefore, it would be more appropriate to reproduce section 37 of the FEMA Act, which reads as under:-

"37. Power of search, seizure, etc. - (1) the Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.

(2) Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.

(3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act."



11.2. Since section 37(3) of FEMA Act applies the provisions of Section 131 of the Income Tax Act, it is necessary to extract the said provision as well, which reads as follows:

''131. Power regarding discovery, production of evidence, etc.-

(1) The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals) and Chief Commissioner or Commissioner shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908) when 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 banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.

(1A). If the Director General or Director or Joint Director or Assistant Director or Deputy Director or the authorised officer referred to in sub-section (1) of section 132 before he takes action under clauses (i) to (v) of that sub-section, has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the income-tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other income-tax authority.

(2) (omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f.1.4.1989).

(3) Subject to any rules made in this behalf, any authority referred to in sub-section (1) (or sub-section (1A) may impound and retain in its custody for such period as it thinks fit any books of account or other documents produced before it in any proceeding under this Act:

Provided that an Assessing Officer or an Assistant Director or Deputy Director shall not-



(a) impound any books of account or other documents without recording his reasons for so doing, or

(b) retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or Director General or Commissioner or Director therefor, as the case may be."

12.1. It is the principal grievance of the petitioners in all the three writ petitions that during the search operations on 02.09.2021 and 03.09.2021, the officials of the Enforcement Directorate obtained statements from the petitioners under threat and coercion; and such copies of statements recorded from them, were not furnished to the petitioners. The panchnama was silent about the visit of the third respondent and his officers, which creates suspicion about the motive behind the entire search operations and the same does not depict the true picture of the activities that had taken place at that time. The ill-treatment meted out by the family of the petitioners more particularly petitioners, is in total violation of Article 21 of the constitution of India. The officials of the Enforcement Directorate behaved rude and they were handling the petitioners as criminals, harassed and humiliated with third degree methods in front of their family members and all the officials present. Thus, according to the petitioners, the act of the third respondent in the dramatized search operations and making detention of the petitioners and their family for about 36 hours thereby causing mental agony, is illegal and unconstitutional; and the statements given by the petitioners on 02.09.2021 and 03.09.2021 to the officers, were only under threat and duress and hence, the same cannot be used against them in any proceedings.

12.2.1. Adding further, it is stated that the petitioner in the first writ petition has not challenged the summons issued under section 37 of the FEMA Act, as the said proceedings is like powers under the Income tax Act. The proceedings under the Income Tax Act, 1961 before an Income Tax authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 IPC. Explanation 2 to section 193 IPC states that investigation directed by law, preliminary to a proceeding before a court of justice, is a stage of judicial proceedings, though the investigation cannot take place before the court of justice. Therefore, presence of an advocate/ lawyer is must at the time of enquiry pursuant to the summons issued under section 37 of FEMA Act.



12.2.2. To buttress the said submission, the learned counsel placed reliance on the order dated 25.04.2012 passed by the Supreme Court in CrI.MP No. 10117 of 2012 in Writ Petition (CrI) No. 29 of 2012 in Vijay Sajnani v. Union of India, wherein it was held that "to answer the queries raised by the Customs Authorities pursuant to the issuance of summons under Section 108 of The Customs Act, the petitioners therein were permitted to have the assistance of a lawyer during interrogation.

12.2.3. In the order dated 04.04.2019 passed by this Court in WP Nos.33158 and 33163 of 2018 (B. Narayanaswamy v. Deputy Director, Enforcement Directorate, Chennai Zone and others), this Court held as follows:-

"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:-

.....

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 enquiry. Sub-section 4 of Section 50 specifically indicates that every proceedings under 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 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 228 of the Indian Penal Code.

15.

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



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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 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 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 LJ 1760 as follows:-

.....

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."

12.3. The petitioner in the first writ petition also sought to declare the proceedings initiated against him under section 37 of the FEMA Act and the statements obtained from him during the course of search, as null and void, besides seeking a direction to the first respondent to transfer the investigation



from the third respondent to any other officer. Whereas the petitioners in the second and third writ petitions sought to quash the proceedings initiated under section 37 of the FEMA Act and direct the third respondent to produce the entire material evidence pertaining to the said proceedings, expunge the same and treat the petitioners in a fair manner as envisaged under the FEMA Act.

13.1. Repudiating the averments made in these writ petitions, it is the stand of the respondents that though the petitioner in the first writ petition appeared on three occasions before the third respondent and rendered his statements, he was very evasive and non-cooperative and failed to furnish true facts and relevant documents pertaining to sale of shares of Hermes i-tickets Pvt Ltd to EMIF 1A. Stoutly denying the allegations raised by the petitioners that their statements were recorded by exercising coercion and undue influence, it is stated that the petitioners and their family members were treated in a dignified and humanitarian manner and neither the petitioners nor their family members were ill-treated and harassed at any point of time during the course of search. In fact, the petitioners have given their statements voluntarily. Hence, the present writ petitions have been filed, only with an intent to stall the investigation into the financial irregularities / contravention committed by the petitioners under the provisions of the FEMA Act.

13.2. Referring to the decision of the Supreme Court in Suborno Bose (supra), the learned Special Public Prosecutor submitted that the proceedings initiated by the respondent authorities against the petitioners under the provisions of the FEMA Act, cannot be found fault with, as the petitioners are alleged to have committed the financial irregularities running to crores of rupees by transferring the shares of Hermes i-tickets Pvt.Ltd to EMIF 1A, Mauritius. For better appreciation, the relevant paragraphs of the said decision are usefully extracted below:

"11. The High Court has opined that the contravention referred to in Section 10 (6) by its very nature is a continuing offence. We agree with that view. It is indisputable that the penalty provided for such contravention is on account of civil obligation under the FEMA Act or the rules or regulations or direction or order made thereunder. If the delinquency is a civil obligation, the defaulter is obligated to make efforts by payment of the penalty imposed for such contravention. So long as the imported goods remained uncleared and obligation provided under the rules and regulations



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to submit Bill of Entry was not discharged, the contravention would continue to operate until corrective steps were taken by the Company and the persons in charge of the affairs of the Company. The High Court has adverted to the exposition in *Chairman, SEBI vs. Shriram Mutual Fund and another*, (2006) 5 SCC 361. In this decision, while dealing with the question as to whether mens rea is essential for imposing penalty for breach of civil obligations, the Court adverted to the dictum in *Director of Enforcement vs. M.C.T.M. Corporation Pvt Ltd.*, and others (1996) 2 SCC 471, which in turn had quoted the exposition in *Corpus Juris Secundum*, Vol.85, page 580, paragraph 1023.....

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

In the same judgment, the Court has also taken note of the decision in *M/s. Gujarat Travancore Agency, Cochin vs. Commissioner of Income Tax, Kerala, Erunakulam*, (1989) 3 SCC 52, which had opined that the intention of the legislature such as the one under consideration is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although element of coercion is present is the penalty. In *Securities and Exchange Board of India vs. Cabot International Capital Corporation*, (2005) 123 Comp Cases 841 Bom), the Court delineated principles as follows:-

47. Thus, the following extracted principles are summarised;

(A) Mens rea is an essential or sine quo non for criminal offence

(B) A straitjacket formula of mens rea cannot be blindly followed in each and every case. The scheme of a particular statute may be diluted in a given case.

(C) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contradistinction to criminal or quasi-criminal proceedings, the determination is of the breach of the civil obligation by the offender. The words 'penalty' by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant



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consideration being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.

(D) Mens rea is not essential element for imposing penalty for breach of civil obligation or liabilities

(E) There can be two distinct liabilities, civil and criminal, under the same Act.

As aforementioned, the contravention referred to in Section 10 (6) of the FEMA Act is a continuing actionable offence. If so, the Company and the persons managing the affairs of the Company remain liable to take corrective measures in right earnest. Considering the admitted fact that the appellant took over the management of the Company on 22.10.2001 and was fully alive to the default committed by the Company, yet failed to take corrective steps in right earnest. Notably, being conscious of such contravention, the appellant had sought indulgence of the authorities for more time. It must follow that the appellant cannot now be heard to contend that no liability could be fastened on him individually. Instead, regulation 6 of the FEMA Regulations provides for the period within which the foreign exchange ought to be surrendered if the Company was not wanting to take delivery of the goods imported. That, however, does not mean that the contravention ceased to exist beyond the specified period. On the other hand, after the specified period as predicated in regulation 6 had expired, it would be a case of deemed contravention until rectified.

.....

14. Be that as it may, once it is held that the contravention is a continuing offence, the fact that the appellant was not looking after the affairs of the Company in the year 2000 would be of no avail to the appellant until corrective steps were taken in right earnest after his taking over the management of the Company and in particular after becoming aware of the contraventions. The appellant has placed reliance on the dictum of this Court in M/s. Hindustan Steel Ltd., vs. State of Orissa, (1969) 2 SCC 627 (paragraph 8). This decision has been distinguished in the case of Shriram (supra) as can be discerned from paragraph 34 of the reported judgment, which reads thus:-

"34. The Tribunal has erroneously relied on



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the judgment in Hindustan Steel Limited vs. State of Orissa (1969) 2 SCC 627 which pertained to criminal/quasi-criminal proceedings. That Section 25 of the Orissa Sales Tax Act, which was in question in the said case, imposed a punishment of imprisonment upto six months and fine for the offences under the Act. The said case has no application in the present case, which relates to imposition of civil liabilities under the SEBI Act and the Regulations and is not a criminal/quasi criminal proceedings."

13.3.1. With regard to the claim of the petitioners for presence of the Advocate during investigation, the respondents denied the same, relying on the decision in Poolpandi (supra), in which, the supreme court held as follows:

"11. We do not find any force in the arguments of Mr.Salve and Mr.Lalit that if a person is called away from his own house and questioned in the atmosphere of the customs office without the assistance of his lawyer or his friends his constitutional right under Article 21 is violated. The argument proceeds thus: if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering question, it amounts to mental torture. We are unable to agree. It is true that large majority of persons connected with illegal trade and evasion of taxes and duties are in a position to afford luxuries on lavish scale of which an honest ordinary citizen of this country cannot dream of and they are surrounded by persons similarly involved either directly or indirectly in such pursuits. But that cannot be a ground for holding that he has a constitutional right to claim similar luxuries and company of his choice. Mr. Salve was fair enough not to pursue his argument with reference to the comfort part, but continued to maintain that the appellant is entitled to the company of his choice during the questioning. The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution



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in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the 'just, fair and reasonable test' we hold that there is no merit in the stand of appellant before us.

12.

13. The judgment under challenge in Criminal Appeal No. 476 of 1986 deals with several questions raised by the respondent, and the appeal has been pressed by Mr. Tulsi as against that part which allows the presence of a lawyer when the respondent is interrogated. It has been rightly contended on behalf of the appellant that the relevant provisions, in this regard, of the FERA and the Customs Act are in pari materia and the object of the two Acts is also similar. As pointed out earlier, the case of Ramanlal Bhogilal (supra) was one arising under FERA. Consequently, Criminal Appeal No. 476 of 1986 has to be allowed against that part of the judgment of the Delhi High Court which dealt with the right of the respondents to have their lawyer during their interrogation."

13.3.2. This court in P.Giribabu (supra), was of the opinion that "the relief sought for by the petitioners seeking permission to be accompanied by an advocate of his choice when he appears before the respondent in pursuant of the summons issued under Section 37 of The Foreign Exchange Management Act, 1999 (FEMA) and recording of statement in the presence of an Advocate who will be present beyond the hearing distance, does not require any consideration".

13.4. As regards the allegation of violating the fundamental rights, etc, it is the categorical stand of the respondents that on the basis of credible information, summons were issued to the petitioners and the same were followed by search of their premises. The petitioners were neither arrested nor taken into custody by the respondents. Therefore, the question of infringement of their rights under any provision of law, will not arise. The decision of the Supreme Court in Justice K.S. Puttaswamy (Retired) (supra), will come to aid the said stand. The relevant portion of the said decision is extracted below:

".....A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to



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subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the fourth amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20 (3) would be defeated by the statutory provisions for searches."

13.5. In regard to the petitioners' case that Panchanama drawn by the Enforcement officials was bereft of material particulars, it is stated by the respondents that it need not be gone into by this court as the same will not in any manner affect the credibility of the case of the respondents. The Delhi High Court in M/s. Mdir Resorts Private Limited (supra), held as follows:-

"24. Panchanama is an important document because it informs the person from whose premises the articles are seized or the person searched as to the name of the person or the building etc., where the search was carried out and the officers who were authorised and had carried out the search and the articles, if any, seized. We are informed that copy of the warrant of search is only shown to the occupant or persons against whom it is issued and their signatures obtained but no copy is furnished to them. Any search and seizure operation invades constitutionally protected and cherished right of privacy. Administrative lapse even of minor nature when there is invasion of the said right does lead to criticism and allegations. It will be salutary and proper that a copy of the search warrant be furnished to the occupant of the person searched. This would curtail any allegation of interpolation, addition of names etc., However, in the facts of the present case, we do not think that the lapse or failure in the panchanamas affects the validity of the search or nullifies notice under Section 153A of the Act. It certainly would not affect initiation of search which is the starting point and pre-condition for invoking Section 153A of the Act. Panchanama is drawn when the search stands concluded finally or temporarily. The effect of the said lapse on merits or to the value or degree of importance to be given to the material seized is a matter of appraisal and merits and not a question to be examined and answered in these writ petitions....."



13.6. Ultimately, the learned Special Public Prosecutor appearing for the respondents submitted that the petitioners have not rendered their co-operation to the respondent authorities and they were evasive; one of the petitioners made an attempt to flee away, which was thwarted by the respondent authorities; and they have done transactions with the foreign company involving several crores of rupees in contravention of the provisions of the FEMA Act. Therefore, according to the respondents, the petitioners are not entitled for any relief and these writ petitions are liable to be dismissed.

14.1. There cannot be any dispute that the Enforcement Directorate has power to issue summons under Section 37, if it is satisfied that the purpose has relevance to the issue in which the summons was issued. Such power given to them under Section 37 is the same as that of an Income Tax Officer under the Income Tax Act in terms of Section 131 and the same is available to deal with the discovery of materials in contravention of foreign exchange violations. The provisions of the Income Tax Act giving power of summons, search and seizure etc., for the purpose of investigation to the relevant authorities will apply analogously to the Enforcement Directorate under the FEMA Act. There is no necessity to disclose the particulars even at the time of summons, which will enable a person to manipulate or conceal the required particulars. The summoning authority need not disclose the nature of the enquiry / investigation to the person so summoned. The issuance of summons will in no way affect the rights of the person, as it is only for the preliminary investigation and for production of documents before the authority for further investigation. Section 37(1) of FEMA Act contemplates power to search by the Director of Enforcement and his other officers. Section 37(3) contemplates that the officers referred to under sub section (1) shall exercise like powers which are conferred on the Income Tax authorities under the Income Tax Act 1961.

14.2. A Division Bench of this Court in V.Datchinamurthy and another -vs- Assistant Director of Inspection (Intelligence), I.T.Department and another [1984 Vol.149 I.T.R. 341], explained the power conferred on an Income-tax Officer under Sections 131 and 132 of the Income Tax Act. In page 356, it was observed as under:

"It is thus manifest that there is great latitude allowed to the ITO in the collection of materials and he does not act as a court at that stage. There are no two parties before him, and the procedure in the adversary system of proceedings cannot be applied to him. However, the ITO, before he uses the materials so collected, is bound to give the necessary opportunity to the assessee to



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test the evidence, to adduce any evidence in rebuttal and to explain the facts that appear against him. Thus, it is clear that the ITO cannot be asked to put on, or be thrust with, the garb of a court, even at the stage of collection of evidence. There can be no reasonable apprehension of the ITO not utilising the favourable materials appearing in such evidence. The Supreme Court has examined this aspect in *Suraj Mall Mohta and Co. -vs- A.V.Visvanatha Sastry* (1954) 26 ITR 1, at page 13 and pointed out the rights available to the assessee under the I.T.Act as contrasted with the rights available under the Taxation on Income (Investigation Commission) Act, 1947 (Act No.XXX of 1947). It was pointed out that while in the proceedings under Act No.XXX of 1947, the assessee would be entitled only to get copies of that portion of the materials, which were brought on record and which were going to be used against him, the portion of the material which was in his favour and which had not been brought on record may not be available to him. In contrast, it was observed that there was fullest right of inspection under ordinary law and the Civil Procedure Code available to an assessee in order to meet the case made against him. We cannot assume that the ITO is not likely to act in accordance with law and give directions to him. Therefore, the apprehension of the Federation at this stage appears to be absolutely misconceived."

15. In the context of what has been indicated above, this court is now required to examine the issues involved herein. Though the petitioner in the first writ petition has at the first instance stated in the affidavit that he has not challenged the summons issued under section 37 of FEMA Act, he differently couched the prayer to declare the search operations pursuant to the summons issued and the statements obtained from him, as null and void. On the other hand, the petitioners in the second and third writ petitions have sought to quash the summons issued by the respondent department. Such prayers cannot be countenanced by this Court.

16. In *Standard Chartered Bank and others v. Directorate of Enforcement and others* [(2006) 4 SCC 278] which arose out of the violations of FERA Act, the Supreme Court spelt out the parameters in entertaining a writ petition against initiation of adjudication proceedings. Para 25 of the said decision may be profitably extracted as under:



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''25. The prayer for the issue of a writ of prohibition restraining the authorities under the Act from proceeding with the adjudication and the prosecution is essentially based on the constitutional challenge to the relevant provisions of the Act on the ground that they violate Articles 14 and 21 of the Constitution. Once we have held, as the High Court did, that the provisions are constitutional, the basis on which the writ of prohibition is sought for by the appellants disappears. It is settled by the decisions of this Court that a writ of prohibition will issue to prevent a tribunal or authority from proceeding further when the authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of natural justice; or proceeds to act under a law which is itself ultra vires or unconstitutional. Since the basis of the claim for the relief is found not to exist, the High Court rightly refused the prayer for the issue of a writ of prohibition restraining the authorities from continuing the proceedings pursuant to the notices issued. As indicated by this Court in State of U.P. -vs- Brahm Datt Sharma (1987) 2 SCC 179 when a show cause notice is issued under statutory provision calling upon the person concerned to show cause, ordinarily that person must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at this stage unless the notice is shown to have been issued palpably without any authority of law. On the facts of this case, it cannot be said that these notices are palpably without authority of law. In that situation, the appellants cannot successfully challenge the refusal by the High Court of the writ of prohibition prayed for by them."

17. The Supreme Court in C.Sampath Kumar v. Enforcement Officer [(1997) 8 SCC 358], while deciding the case in respect of Section 40 of the FERA, held that when a person is summoned and examined under Section 40, it cannot be presumed that a statement will be obtained under pressure or duress and such a statement obtained does not infringe the constitutional guarantee of protection against self-incrimination under Article 20(3) of the Constitution. Therefore, the concept of applying the theory of self-incrimination even at the stage of investigation in case of violation of FEMA Act cannot be raised to the level of an investigation of a criminal offence protected by Articles 20(3) and 21 of the Constitution.



18. In T.T.V.Dinakaran -vs- Enforcement Officer, Enforcement Directorate [1995 (80) ELT 745 (Mad)], the attempt to challenge the summons served under section 40 was repelled by this Court. In paragraph 11, it was stated as follows:-

11. '..... Moreover, if the summons is taken into consideration it is stated therein that the petitioner's attendance is necessary to give evidence and/or to produce documents in an investigation being made by the respondent under the FERA Act. So far as the documents mentioned are concerned, it is mentioned the petitioner's passport, petitioner's account books relating to his accounts in India and abroad and his property details. If we take into consideration the required documents mentioned in the schedule, the enquiry relates only to the petitioner in respect of his involvement in some transaction under the FERA Act. If the investigation relates to any other person, then the authorities would have mentioned the documents relating to the concerned third parties or the transaction between the petitioner and those third parties. Hence, I am of the view that the non-mentioning of the (nature) of investigation and the purpose of the requirement of documents do not vitiate the summons in any manner."

19. It is settled law that the summons issued under Section 37 of the FEMA Act, by the officers of the Enforcement Directorate, cannot be questioned by way of a writ. When there is suspicion with regard to the involvement of the petitioners in any of the transactions which are prohibited under the FEMA Act, it is open to the respondent authorities to summon them for enquiry. Since the documents are pertaining to them, it cannot be said that the investigation has no nexus with the documents called for from the petitioners. When an investigation is commenced, it is not possible for the authorities to come to the conclusion with regard to the involvement or the non-involvement of any person until the enquiry is completed. During the enquiry, if the authorities get any information with regard to the involvement of any other individual, those individuals can also be summoned by the concerned officer in order to complete the enquiry. When the Act specifically mentions that the proceedings taken by the authorities are judicial proceedings, it is not open to the petitioners to challenge the summons issued pursuant to the said proceedings, as ab initio void. Consequently, the petitioners cannot claim any right under Article 21 of the Constitution of India and Section 24 of the Evidence Act, as they are not accused. Further, they are not entitled for having the assistance of an advocate at the stage



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of initial and preliminary investigation by the officials of the respondents, as it was held in catena of judgments that a person against whom summons have been issued, is not to be accompanied by an advocate, when he appears before the authorities and that, recording of statement in the presence of advocate is not allowed. Above all, this court is of the view that when the third respondent and his officers are discharging their functions and duties in accordance with the powers conferred under the FEMA Act, the same cannot be questioned by the petitioners on the grounds raised herein. At the same time, it cannot be lost sight that a person who is summoned to appear before the Enforcement Directorate, is not an accused of the criminal case and hence, he/she should be treated in a dignified and humanitarian manner; and the authorities should act strictly as per the provisions of the relevant statute.

20. As mentioned earlier, based on the credible information received, the respondent authorities initiated the proceedings under the provisions of the FEMA Act against the petitioners for the alleged foreign transactions done by them involving several crores of rupees. Pursuant to the same, summons were issued under section 37 of the FEMA Act to the petitioners, calling upon them to appear for preliminary enquiry and for submission of documents mentioned in the schedule thereunder. Consequently, search was conducted in their premises. During the course of search, the officers of the third respondent obtained statements from the petitioners and seized materials from the premises. According to the petitioners, they were ill-treated and humiliated and subjected to harassment; and the statements obtained from them during the course of search, were under threat and coercion and the same would be used as material evidence, in the proceedings initiated against them; and hence, they have come up with these writ petitions for the larger reliefs as stated supra. However, it is reiterated on the side of the respondents that the entire search operations conducted in the premises of the petitioners on 02.09.2021 and 03.09.2021 were recorded and the statements were obtained from the petitioners without any threat or coercion; and in connection with the said proceedings, the petitioners were neither arrested nor taken into the custody by the respondent officials. Therefore, this court is of the opinion that the submissions so made on the side of the respondents would be sufficient enough to meet the grievance expressed by the petitioners.

21. Thus, the overall analysis of the facts and circumstances of the case and also having regard to the settled legal proposition that 'fair and just investigation is a hall mark of any investigation and it is not the duty of the investigating officer to strengthen the case of the prosecution



by withholding the evidence collected by him; and an impartial and fair opportunity in the proceedings initiated, is the legal right of the accused and justice can be ensured only if the rules of procedure are diligently adhered to', this court is inclined to dispose all these writ petitions, in the following terms:

(i)The copies of the statements obtained from the petitioners during the course of search conducted in their premises on 02.09.2021 and 03.09.2021 be furnished to the petitioners, within a period of two weeks from the date of receipt of a copy of this order, so as to enable them to file their versions to the third respondent, within a period of two weeks thereafter;

(ii)On such filing by the petitioners, the third respondent shall consider the same on merits;

(iii)the petitioners are directed to cooperate with the respondent officials for enquiry; and

(iv)it is made clear that the respondent authorities are free to proceed further, but strictly in accordance with law.

22. With the aforesaid directions, these writ petitions stand disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-II)

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Sub Assistant Registrar

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To

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4. The Secretary to the Government,
Ministry of Finance Department of Revenue,
New Delhi.

WP Nos. 20224, 20330
and 20356 of 2021

GPL (CO)
SU (15/12/2021)