IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3017 OF 2019

ALMT Legal ….Petitioner

V/s.

Union of India & Ors. …Respondents

Mr. Vikram Nankani, Senior Advocate with Mr. Chaitanya Mehta, Mr. Tushar Hathiramani and Ms Sonal Aggarwal i/b Dhruve Liladhar & Co. for Petitioner.
Mr. Sandesh Patil for Respondent No.2 (ED).
Mr. Prasad Shenoy a/w Mr. Parag Sharma, Ms Aditi Phatak and Ms Kirti Ojha i/b BLAC & Co. for Respondent No.3 (RBI).

CORAM : K.R. SHRIRAM &
A.S. DOCTOR, JJ
DATED : 19th SEPTEMBER 2022

P.C. :

1 Petitioner is a law firm and its partners are all qualified and enrolled as Advocates under the Advocates Act 1961.

2 One Mrs. Meerabai Dawson, British Citizen of Indian origin inherited certain properties in India from her parents. Mrs. Meerabai Dawson by a Will dated 30th November 1993, bequeathed pound sterling £ 2001/- to Shri Venugopala Swami (Sankarapuram Swamigal Jayanthi Utsava Committee) in Madras (now Chennai), to be invested and the income earned therefrom to be used for providing one free meal a day to as many destitute people of Madras as possible. Rest and residue of estate was bequeathed unto the Salvation Army of 101, Queen Victoria Street, London E.C.4.

3 Mrs. Meerabai Dawson died on 16th December 2001. The Will dated 30th November 1993 was filed for granting of probate before the Hon'ble High Court at Ipswich, England and probate was granted on 11th March 2002. Relying on this probate, the Executors of the Will applied for administration of Mrs. Meerabai Dawson's estate in India. The Executors of the Will engaged petitioner as legal counsel for the disposal of the estate in India of Mrs. Meerabai Dawson and repatriate sale proceeds to Salvation Army, U.K. For this purpose, the Executors granted a Power of Attorney dated 15th May 2006 in favour of one Mr. Sameer Tapia and two erstwhile associates of petitioner firm empowering them to execute the sale of the Indian properties forming part of the Indian estate of Mrs. Meerabai Dawson. One of the major property Mrs. Meerabai Dawson inherited from her parents, who were resident Indians, was a landed property at Adayar, Chennai. It was found that there were many encroachers in the said property. To cut the matter short, at the time of selling the property, petitioner settled with all the encroachers and that left finally surplus of about Rs.5,01,47,271/- (Rs.4,65,00,000 + Rs.36,47,271/-) equivalent to pound sterling £ 651,588/- at exchange rate then prevailing. Petitioner deposited the sale consideration of immovable properties and credits of Mrs. Meerabai Dawson into its clients' account and on or about 26th February 2008 transferred the amount into the savings bank account that petitioner had opened in the name of Executors to the Will of Mrs. Meerabai Dawson. Petitioner thereafter repatriated the total sum of

Rs.5,01,47,271/- in two tranches, a sum of Rs.4,65,00,000/- on 3rd November 2009 and Rs.36,47,271/- on 8th September 2010 to the account of M/s Salvation Army, United Kingdom. The amounts were deposited in the account opened with The Royal Bank of Scotland NV, Chetpet, Chennai and the repatriation /remittance were also made through Royal Bank of Scotland, NV.

4 The Enforcement Directorate issued a show cause notice dated 5th October 2017, almost 7 to 8 years after the repatriation, calling upon petitioner to show cause as to why adjudication proceedings as contemplated under Section 16 of Foreign Exchange Management Act, 1999 (FEMA) should not be held against them in the manner as provided in the Foreign Exchange Management (Adjudication Procedure and Appeal) Rules 2000. According to the Enforcement Directorate, i.e., respondent no.2, petitioner repatriated the sale proceeds of Rs.5,01,47,271/- to M/s Salvation Army without obtaining prior permission of RBI as required under the FEMA and Regulations thereof. That RBI confirmed that no permission was given for repatriation of sale proceeds of Mrs. Meerabai Dawson, person resident outside India and that acquisition and transfer of immovable property by her heirs residing outside India would be covered under Regulation 8 of the Notification No.FEMA/21/2000 RB dated 3rd May 2000 and further such transfer of immovable property in India requires prior permission of RBI. Therefore, petitioner has contravened the provisions of Section 6(3)(i) of FEMA read with Rule 8 of FEMA (Acquisition and Transfer of Immovable

Property in India) Regulations 2000 (FEMA Regulations) and thereby petitioner has rendered itself liable to be proceeded against under Section 13(1) read with Section 42(1) of FEMA.

Therefore, the contravention, according to respondent no.2, committed by petitioner is of the provisions of Section 6(3)(i) of FEMA read with Rule 8 of the said Regulations 2000.

These two provisions have been reproduced in the show cause notice and they read as under :

> *"Whereas Section 6(3) of FEMA reads as under:*
>
> *(3) without prejudice to the generality of the provisions of sub-section (2) the Reserve Bank may, by regulation, prohibit, restrict or regulate the following-*
> *(a).........*
> *(b)..........*
> *.............*
> *..............*
> *(i) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;*
>
> *And Whereas Regulation 8 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations 2000 read as under:*
>
> *Prohibition on transfer of immovable property in India : Save as otherwise provided in the Act or regulations, no person resident outside India shall transfer any immovable property in India."*

5 We are at a loss to understand how petitioner has contravened these provisions. First of all Section 6(3) of FEMA is only an enabling provision which provides that without prejudice to the generality of the provisions of sub-Section (2) of Section 6 of FEMA, RBI may by regulation, prohibit, restrict or regulate, and under clause (i), acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by

a person resident outside India.

6 According to respondent no.2, RBI has prohibited, restricted and/or regulated the acquisition of transfer of immovable property in India by a person resident outside India. As per the said Regulation 8 of FEMA Regulations, the provision relied upon by respondent no.2, says ‘save as otherwise provided in the Act or regulations, no person resident outside India shall transfer any immovable property in India’. That has nothing to do with repatriation of any sale proceeds. Therefore, if the Regulation or Act provides anywhere that a person resident outside India shall transfer any immovable property in India, it is permissible. As we will see later, it was permissible.

7 It is settled law that issuance of a show cause notice is not an empty formality. Its purpose is to give a reasonable opportunity to the affected persons to contend that they have not committed any breach. Proper opportunity should be given to the person likely to be affected by the order proposed to be made a notice of the action intended to be taken, inform him about the materials on the basis of which the appropriate authority proposes to take action and give a fair and reasonable opportunity to such person to represent his case and to correct or controvert the material sought to be relied upon against him. Paragraph 8 of a judgment of this court in ***Jugal Kishore Jajodia Vs. S. C. Prasad, Chief Engineer & Ors.***[1] reads as under:

> *8. It is settled law that issuance of a show-cause notice is not an empty formality. Its purpose is to give a reasonable opportunity to the affected persons to contend that the apparent*

1. (2021) 439 ITR 132 (Bom)

consideration as per the agreement to sell is the market price or that there is no undervaluation because of peculiar facts. The appropriate authority should give to the person likely to be affected by the order proposed to be made a notice of the action intended to be taken, inform him about the materials on the basis of which the appropriate authority proposes to take action for pre-emptive purchase and give a fair and reasonable opportunity to such person to represent his case and to correct or controvert the material sought to be relied upon against him. Hence, in the show-cause notice under Section 269UD of the Act, provisional conclusions are required to be briefly specified. These provisional conclusions are required to be briefly specified so that the affected persons could correct or controvert the same effectively. If a vague show- cause notice is given without specifying anything as has been done in this case or without specifying the grounds for holding that the property is required to be purchased under Section 269UD of the Act, then it can be held that reasonable opportunity of showing cause has not been given. The transferor and transferee would be totally unaware of the grounds which had prompted the appropriate authority to arrive at prime facie conclusion that the power under Section 269UD(1) of the Act was required to be exercised and the property should be compulsorily purchased. The Division Bench of Gujarat High Court in Om Shri Jigar Association vs. The Union of India and others [(1995) 80 Taxman 514/1994] 209 ITR 608 at paragraphs 7,8 and 9 held as under :-

"7. In our view, considering the findings given above, it is not necessary to deal with the aforesaid contention exhaustively. However, it should be noted that issuance of a show-cause notice is not an empty formality. Its purpose is to given a reasonable opportunity to the affected persons to contend that the apparent consideration as per the agreement to sell is the market price or that there is no undervaluation because of peculiar facts. Therefore, before taking any action under section 269UD(1) of the Income-tax Act, the appropriate authority should give to the person likely to be affected by the order proposed to be made a notice of the action intended to be taken, inform him about the material on the basis of which the appropriate authority proposes to take action for pre-emptive purchase and give a fair and reasonable opportunity to such persons to represent his case and to correct or controvert the material sought to be relied upon against him. Hence, in the show-cause notice under section 269UD of the Income-tax Act, provisional conclusions are required to be briefly specified. If a vague show-cause notice is given without specifying anything or the grounds for holding that the property is required to be purchased under section 269UD of the Income-tax Act, then it can be held that reasonable opportunity of showing cause against an order for pre-emptive purchase being made by the appropriate authority was not given, because the transferor and the transferee would be totally unaware of the grounds which had prompted the appropriate authority to arrive at prime facie conclusion that the power under section 269UD(1) of the Income-tax Act was required to

be exercised and the property should be compulsorily purchased. Issuance of a show-cause notice is the preliminary step which is required to be undertaken before giving opportunity of hearing under Section 269(UD)(1)of the Income-tax Act.

8. While considering the contents of show-cause notice in the matter arising in connection with a disciplinary proceeding under the Punjab Civil Services (Punishment and Appeal) Rules, 1952, the Supreme Court has in the case of B.D. Gupta v. State of Haryana, (1973) 3 SCC 149 : AIR 1972 SC 2472 observed as under (at page 2474) :

"There is nothing, however, in the 'Show-Cause Notice' of 26th October 1966 to indicate clearly that the dissatisfaction of Government with the appellant's reply of 18 December 1956 had nothing to do with Charge 1(a). <u>The 'Show-Cause-Notice' merely states in vague general terms that the appellant's reply to the charges and allegations was unsatisfactory.</u> Even if we were to assume, though there is no reasonable ground for this assumption, that Government did not have in mind the contents of Charge 1(a) while serving this 'Show-Cause-Notice', <u>there is nothing in the 'Show- Cause-Notice' to give any indication that the particular allegations regarding which the appellant had failed to furnish a satisfactory explanation were referable only to Charge 1(b). The notice is vague on other grounds as well.</u> As one reads the first paragraph of the notice, the questions that at once assail one's mind are many : In what way was the explanation of the appellant unsatisfactory ? Which part of the appellant's explanation was so unsatisfactory ? On what materials did the Government think that the appellant's explanation was unsatisfactory ? <u>It is to our mind essential for a 'Show-Cause-Notice' to indicate the precise scope of the notice and also to indicate the points on which the officer concerned is expected to give a reply.</u>

9. The same would be the position here. It would be difficult for the transferor and the transferee to show cause as to why the property should not be compulsorily purchased or to point out that there is no undervaluation of the property or even if there is undervaluation, it is because of the peculiar facts regarding the property."

(Emphasis Supplied)

It is essential for a show cause notice to indicate the precise scope of the notice and also to indicate the points on which the recipient of the show cause notice give a reply.

8 In our view, there is nothing in the show cause notice to give any indication as to what are the allegations to which petitioner should furnish a statutory explanation. In paragraph 9 of the show cause notice, it is stated that without obtaining the prior permission of RBI, petitioner has repatriated the sale proceeds to M/s Salvation Army but the provisions relied upon in the show cause notice by respondent no.2 has nothing to do with repatriation of any sale proceeds. Further, Regulation 8 of the said Regulation only provides 'save as otherwise provided in the act or regulations no person resident outside India shall transfer any immovable property in India'. It does not refer to any acquisition.

9 Respondent no.2 has relied upon Section 6(3)(i) and Regulation 8 to make the charge against petitioner but has not considered sub-Section (5) of Section 6 of FEMA, which permits a person resident outside India to hold, own, transfer any immovable property situated in India, if such property was inherited from a person, who was resident in India.

Sub-Section (5) of Section 6 of FEMA reads as under:

> *"6(5) <u>A person resident outside India may hold, own, transfer</u> or invest in Indian currency, security or <u>any immovable property situated in India if such</u> currency, security or property was acquired, held or owned by such person when he was resident in India or i<u>nherited from a person who was resident in India</u>."*
>
> *(Emphasis supplied)*

As could be seen from the show cause notice itself the admitted position is Mrs. Meerabai Dawson held immovable property in India, which she inherited from her parents, who were resident in India. The Executors of the Will of Mrs. Meerabai Dawson only disposed the immovable property that she had inherited from her parents who were residents in India, and repatriated the sale proceeds to the beneficiaries of her Will. The beneficiaries did not transfer any property in India from respondent no.2 to allege breach of Regulation 8.

Moreover, petitioner was, admittedly, only the power of attorney holder and legal counsel of the Executor's of the Will of Mrs. Meerabai Dawson and therefore, cannot be held liable in the facts of the present case.

10 In the circumstances, we are inclined to exercise our jurisdiction under Article 226 of the Constitution of India and quash and set aside the impugned show cause notice dated 5th October 2017. Consequently, the impugned notices dated 27th September 2019 and 17th October 2019 are also quashed and set aside.

11 Petition disposed. No order as to costs.

(A. S. DOCTOR, J.) **(K.R. SHRIRAM, J.)**