IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 21.12.2022

PRONOUNCING ORDERS ON : 23.12.2022

Coram:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
AND

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P.Nos.9218 of 2009, 1316 & 1317 of 2010
and
MP.No.1 of 2009 in W.P.No.9218 of 2009
and MP.No.1 of 2010 in W.P.No.1316 of 2010
and M.P.No.1 of 2010 in W.P.No.1317 of 2010

W.P.No.9218 of 2009

Indian Overseas Bank
Represented by its
Deputy General Manager
Treasury (Foreign) Department
Central Office,762, Anna Salai
Chennai-2. .. Petitioner

. Vs .

Special Director of Enforcement
Government of India
Ministry of Finance
Department of Revenue
Jamabhoomi Chambers, 1st Floor
Salchand Hirachand Marg
Mumbai-1. ..Respondent

Writ Petition under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records relating to the proceedings of the respondent bearing No.ADJ/28/31/B/SDE/KNR/2007 FERA dt.12.03.09 quash the same.

W.P.No.1316 of 2010

Mrs.Banumathy B. .. Petitioner

. Vs .

1.Special Director of Enforcement
Government of India
Ministry of Finance
Department of Revenue
Jamabhoomi Chambers
1st Floor
Salchand Hirachand Marg
Mumbai-1.

2.Indian Overseas Bank
Rep.by its Chairman & Managing Director
762 Anna Salai
Chennai-2. ... Respondents

Writ Petition under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records relating to the proceedings of the 1st respondent bearing No.Adj.Order No.ADJ/28/31/B/SDE/KNR/2007 FERA dt.12.03.09 received by the petitioner on 06/10/09 quash the same.

W.P.No.1317 of 2010

G.Swaminathan .. Petitioner

. Vs .

1.Special Director of Enforcement
Government of India
Ministry of Finance
Department of Revenue
Jamabhoomi Chambers
1st Floor
Salchand Hirachand Marg
Mumbai-1.

2.Indian Overseas Bank
Rep.by its Chairman & Managing Director
762 Anna Salai
Chennai-2. ... Respondents

Writ Petition under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records relating to the proceedings of the 1st respondent bearing No.Adj.Order No.ADJ/28/31/B/SDE/KNR/2007 FERA dt.12.03.09 received by the petitioner on 06/10/09 quash the same.

For Petitioner (in all WPs) : Mr.F.B.Benjamin George

For Respondent (in W.P.No.9218/2009) : Mr.N.Ramesh Special Public Prosecutor (ED)

For Respondents (in W.P.Nos.1316 &1317/2010) : Mr.Rajnish Pathiyil Special Public Prosecutor (ED)

COMMON ORDER

The subject matter of challenge in all these three Writ Petitions pertains to the adjudication order passed by the Special Director of Enforcement in proceedings No.ADJ/28/31/B/SDE/KNR/2007 FERA dated 12.03.2009 imposing penalties payable by the petitioners in these Writ Petitions.

2. W.P.No.9218 of 2009, has been filed by the Indian Overseas Bank (IOB) and W.P.Nos.1316 and 1317 of 2010 have been filed by the employees of the IOB.

3. The brief facts of the case are as under:

3.1. During January 1993, the Reserve Bank of India (ROB) provided an information to the Enforcement Directorate to the effect that the bank for foreign trade of the USSR had transferred non-convertible rupee funds into convertible Vostro accounts of Bank of Ireland, UK with the IOB, Madras and in turn, the IOB had transferred about rupees four crores from this account to London. This transaction was found to be not in conformity with the exchange control regulations.

3.2. Based on the above information, the relevant records were collected and enquiry was conducted by the Enforcement Directorate. On enquiry, it was found that on 29.08.1981, Bank of Ireland sent a telex message to IOB informing them that they intend to put through some major transactions in the near future, on behalf of their clients M/s.Eastern Suburbs Limited through Dublin A/C No.216 with IOB. In continuation to the same, 12 cheques were issued. These cheques were issued by the Russion Bank in favour of M/s.Eastern Suburbs Limited. 4 out of the 12 cheques were cleared and it was credited to A/C No.216. As a result of the same, the non-convertible funds were credited to the convertible non-resident rupee account of the Bank of Ireland. The IOB through their letter dated 06.12.1991, requested the Bank of Ireland to furnish the particulars of M/s.Eastern Suburbs Limited. On receiving the reply from the Bank of Ireland, IOB realised that some fraud has been committed and hence during December 1991, IOB reported the details of the transactions to RBI. This was done by IOB since they realised that the source of the proceeds were out of non-convertible account of the Russian Bank.

3.3. Show Cause Notices were issued by the Enforcement Directorate to IOB, Canara Bank, Bank of Ireland and Indo International Limited UK. The following charges were framed against IOB and its employees.

i) for crediting the aforesaid sum of Rs.7,00,00,000/- to the rupee account of the Bank of Ireland, UK, a non-resident, thereby for having engaged in a transaction involving foreign exchange which was not in conformity with the terms of their authorisation granted under sec, 6(4) and 6(5) read with sec. 49 of the FERA 1973;

ii) for otherwise transferring foreign exchange to the Bank of Ireland, UK a person not being an authorised dealer in contravention of the provisions of sec. 8(1) of FERA 1973 read with para 10.3(ii), 10.12 and 10.17 of Chapter 10 of the Exchange Control Manual 1987 Edition Vol. I ("ECM" for short):

iii) for making the said payment to or for the credit of a person resident outside India, in contravention of Sec.9(1)(a) of FERA 1973; and

iv) for placing the said amount to the credit of a person resident outside India in contravention of the provisions of sec. 9(1)(e) of FERA, 1973.

v) Shri K. Balasubramanian, Former General Manager, Shri G. Swaminathan, Former Dy. Gen. Manager, Shri T. Jaggannathan, Officer, Rupee Section, Smt. Bhanumathi Balasubramanian, Funding Officer, Rupees Section, Shri K. Sandhanakrishnan, IOB, Madras were also charged under Section 68 of the Foreign Exchange Regulation Act, 1973 along with the Indian Overseas Bank.

vi) They were also asked to show cause as to why the blocked amount should not be confiscated to the Central Govt. account.

3.4. The Special Director of Enforcement conducted the enquiry and passed an order dated 12.03.2009 whereby a penalty of Rs.1,30,00,000/-, was imposed against IOB, Rs.4,30,000/-, was imposed against G.Swaminathan [Petitioner in WP.No.1317 of 2010] and a sum of Rs.2,15,000/- was imposed against Smt. B. Banumathi [Petitioner in WP.No.1316of 2010]. These penalties were imposed for violation of Sections 6(4), 8 (1), 9 (1)(a) and 9 (1)(e) of the Foreign Exchange Regulations Act, 1973 (hereinafter referred to as "FERA") . Aggrieved by the same, the bank and its employees have filed the above Writ Petitions.

4. Heard Mr.Benjamin George, learned counsel for the petitioner in all the writ petitions, Mr.N.Ramesh learned Special Public Prosecutor (ED) for the respondent in W.P.No.9218 of 2019 and Mr.Rajinish Pathiyil, learned Special Public Prosecutor (ED) appearing on behalf of the respondents in W.P.Nos.1316 and 1317 of 2010.

5. Mr.Benjamin George, learned counsel appearing on behalf of the petitioners submitted that the adjudication order passed by the 1st respondent is without jurisdiction. He further submitted that it was the IOB which was the whistle blower, who exposed the fraud and unfortunately, the bank and its employees have been punished by imposing penalty. The learned counsel further submitted that the Writ Petitions were entertained long back and it cannot be rejected at this stage on the ground of availability of an alternative remedy.

6. Per Contra, the learned Special Public Prosecutor appearing on behalf of the Directorate of Enforcement submitted that the adjudication order was passed after considering the objections given by the bank and its employees and the order passed by the Special Director of Enforcement, is well within the power and jurisdiction of the said authority. The learned counsel further submitted that this Court in exercise of its writ jurisdiction cannot get into disputed facts, more particularly when there is an effective alternative remedy available under Section 49(5)(a) r/w Section 19 of the Foreign Exchange Management Act, 1999 (hereinafter referred to as "“the FEMA”").

7. We have carefully considered the submissions made on either side and the materials available on record.

8. The proceedings were initiated by the Directorate of Enforcement by issuing Show Cause Notice to the concerned parties in the year 1993. The proceedings were initiated for violation of the provisions of FERA and when the FERA was in force. The FEMA replaced FERA and it was brought into force on 01.06.2000. Section 49 of the FEMA contains the sunset Clause. Section 49(4) of FEMA makes it abundantly clear that all offences committed under the repealed Act, shall continue to be governed by the provisions of the repealed Act, as if that Act has not been repealed. Section 49(5) of FEMA further makes it clear that any action taken under the repealed Act, insofar as it is not inconsistent with the provisions of FEMA, be deemed to have been done under the corresponding provisions of FEMA. The effect of the above provisions is that the order passed by the Special Director of Enforcement on 12.03.2009, in accordance with FERA, must be treated to be an order under FEMA and consequently, the appellate remedy available under FEMA will automatically apply and that is the reason why, even in the impugned proceedings dated 12.03.2009, the petitioners were informed that an appeal against the order dated 12.03.2009, will lie before the Appellate Tribunal in line with Section 19 r/w Section 49 (5)(a) of the FEMA.

9. Section 50 of the FERA provides that the adjudication as against any contravention of provisions of FERA must be adjudged by the Director of Enforcement or any other Officer of the enforcement not below the rank of an Assistant Director of Enforcement, specially empowered in this behalf by the order of the Central Government. In the instant case, there was no requirement for the Central Government to empower the Adjudicating Authority since the adjudication itself was done by the Special Director of Enforcement. In view of the same, there is no doubt in our mind that the Special Director of Enforcement had the power and jurisdiction to adjudicate for the contravention of the provisions of FERA and impose penalty. Consequently, it cannot be held that the Special Director of Enforcement lacks power or jurisdiction to pass the impugned order dated 12.03.2009.

10. The Adjudicating Authority has passed the order after giving sufficient opportunity to all the parties concerned. Hence, the impugned order dated 12.03.2009 does not suffer from violation of principles of natural justice.

11. The learned counsel appearing on either side made submissions touching upon the merits of the case. If we are to deal with the merits of the case, we have to necessarily get into disputed questions of fact. There is no absolute bar in High Court entering into disputed questions of fact and it will depend upon the facts of each case.

The law on this issue has been succinctly put by the Apex Court in ***NTPC Ltd. v. Mahesh Dutta*** reported in ***(2009) 8 SCC 339***.

12. In the instant case, on going through the materials placed before us and after carefully considering the order passed by the Special Director of Enforcement, we find that we have to necessarily deal with a lot of documents and get into disputed questions of fact. To avoid such a scenario, the enactment itself provides for further remedies under Section 19 of FEMA before the Appellate Tribunal and thereafter, under Section 35 of the Act, by way of filing a further Appeal before the High Court against the order passed by the Appellate Tribunal. These remedies have been provided to enable an aggrieved person to contest the order passed by the Adjudicating Authority, both on facts and on law. These appellate remedies cannot be bypassed and the doors of the High Court cannot be knocked straight away under Article 226 of the Constitution of India.

13. It is true that where the High Court has entertained a Writ Petition and it is pending for a long time, the Writ Petition should not be thrown out on the ground of alternative remedy. However, it is not an absolute rule and there are appropriate cases where the parties will have to be directed to avail an efficacious alternative remedy of appeal. That course can be adopted at any stage and even at the stage of Writ Appeal. In the present case, there is no lack of jurisdiction for the Special Director of Enforcement to pass the impugned order, there is no violation of principles of natural justice and this Court does not find any special circumstances to disregard the alternative remedy and to decide the dispute in this Writ Petition. Apart from these reasons, we have already held that the case requires determination of disputed facts based on documents and it will be fit and proper if this exercise is done before the Appellate Tribunal.

14. In the light of the above reasoning, we are not inclined to go into the merits of this case and deal with various factual issues that were raised on either side. We are inclined to relegate the petitioners to the Appellate Tribunal to work out their remedy in accordance with law and it will be left open to the petitioners to raise all the grounds before the Appellate Tribunal.

15. In the result, these Writ Petitions are disposed of with the following directions:

a) The petitioners are permitted to file appeal against the order passed by the Special Director of Enforcement in proceedings

No.ADJ/28/31/B/SDE/KNR/2007 FERA dt.12.03.2009, within a period of 45 days from the date of the receipt of copy of this order.

b) When these Writ Petitions were entertained, interim orders were passed and thereby, the operation of the order of the Special Director of Enforcement dated 12.03.2009 was stayed. Consequently, the penalty amount was not recovered from the petitioners during the pendency of the Writ Petitions. We are inclined to extend this interim protection till the appeal is filed before the Appellate Tribunal. After the appeal is filed, it is left open to the Appellate Tribunal to decide upon the continuation of the interim order.

c) The period that was spent during the pendency of these Writ Petitions shall be taken into account and given credit under Section 14 of the Limitation Act and if the appeal is filed within the time stipulated by this Court in Clause (a), the appeal shall be entertained and the same shall be dealt with on merits.

d) It is left open to the petitioners to raise all the grounds before the Appellate Tribunal and the same shall be considered on its own merits and in accordance with law and the order passed in these Writ Petitions will not have any bearing upon the final decision to be taken by the Appellate Tribunal and ;

e) If the petitioners do not file the appeal within the time limit fixed by this Court before the Appellate Tribunal, it shall be deemed that the petitioners are not availing the appellate remedy and the order passed by the Special Director of Enforcement, dated 12.03.2009 shall become final.

No costs. Consequently, connected miscellaneous petitions are closed.

(P.N.P., J.) **(N.A.V.,J.)**

23.12.2022
Internet : Yes/No
Index : Yes/No
Speaking order /Non-Speaking order
KP

To

1.Special Director of Enforcement
Government of India
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2.Indian Overseas Bank
Rep.by its Chairman & Managing Director
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P.N.PRAKASH,J.

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N. ANAND VENKATESH,J.

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Common Order in
W.P.Nos.9218 of 2009, 1316 & 1317 of 2010

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