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W.P.Nos.13114 & 25098 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.11.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.Nos.13114 & 25098 of 2022
and
W.M.P.Nos.12478 & 24047 of 2022

W.P.No.13114 of 2022

The Assistant Director,
Office of the Joint Director,
Directorate of Enforcement,
Chennai Zone-II,
III Block, III & IV Floor, Shastri Bhawan,
No.26, Haddows Road,
Chennai - 600 006.

...Petitioner

Vs.

1.Nesamanimaran Muthu

2.Commissioner of Customs (Appeals-I),
Competent Authority u/s 37A(2) of
FEMA, 1999,
60, Rajaji Salai, Custom House,
Chennai - 600 001.

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the file of the 2nd respondent, in F.P.No.01/2022 order dated 13.04.2022 in Petition No.04/2022 and quash the same as unsustainable, illegal and violative of principles of natural justice.



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W.P.Nos.13114 & 25098 of 2022

For Petitioner : Mr.N.Ramesh,
Special Public Prosecutor

For R1 : Mr.B.Kumar, Sr. Counsel
for Mr.G.Guruprasath

For R2 : Mr.V.Sundareswaran,
Senior Panel Counsel

W.P.No.25098 of 2022

The Assistant Director,
Office of the Joint Director,
Directorate of Enforcement,
Chennai Zone-II,
III Block, III & IV Floor, Shastri Bhawan,
No.26, Haddows Road,
Chennai - 600 006.

...Petitioner

Vs.

1.Commissioner of Customs (Appeals-I),
Competent Authority u/s 37A(2) of
FEMA, 1999,
60, Rajaji Salai, Custom House,
Chennai - 600 001.

2.Southen Agrifurane Industries
Private Limited (SAIPL),
MGM Centre, No.1, 9th Street,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

3.Nesamanimaran Muthu

4.MGM Anand

...Respondents



W.P.Nos.13114 & 25098 of 2022

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the file of the 1st respondent, in order F.P.No.05/2022 dated 25.07.2022 and quash the same as unsustainable, illegal and violative of principles of natural justice.

For Petitioner	: Mr.N.Ramesh, Special Public Prosecutor
For R1	: Mr.V.Sundareswaran, Senior Panel Counsel
For R3	: Mr.B.Kumar, Sr. Counsel for Mr.S.Wilson
For R2 & R4	: Mr.S.Ramachandran, M/s.T.Kokilavane, Mr.G.Guruprasath

COMMON ORDER

Since the issue raised in these writ petitions is common, with the consent of learned counsel appearing for both sides, both these writ petitions were heard together and are disposed of by this common order.

2. The petitioner in both the writ petitions is the Assistant Director, Office of the Joint Director, Directorate of Enforcement, Chennai Zone-II, Chennai.



W.P.Nos.13114 & 25098 of 2022

3. The first respondent in W.P.No.13114 of 2022 and the third respondent in W.P.No.25098 of 2022 is one and the same, who is the alleged contravener. Hence, for better understanding, he may be referred to as 'the alleged contravener'.

4. It is the case of the petitioner department that the alleged contravener was either the Director or the Managing Director of the Tamil Nadu Mercantile Bank during the period between 2003 and 2008.

5. Insofar as the financial years 2005-2006 and 2006-2007 are concerned, according to the petitioner department, the alleged contravener had violated the provisions of Section 4 of the Foreign Exchange Management Act, 1999 (in short, FEMA Act).

6. Therefore, the petitioner department had issued summons initially on 09.03.2021, which, according to the petitioner, was not responded by the alleged contravener. Therefore, it necessitated the petitioner department to issue a notice on 07.06.2021 and even to this notice, no response has been given by the alleged contravener.



W.P.Nos.13114 & 25098 of 2022

7. Thus, by invoking the power under Section 37A(1) of the FEMA Act, the Authorized Officer of the department passed an order on 27.12.2021 in respect of the first case, where only the shares of the alleged contravener have been attached in the Company which is running in India. In respect of the second case, the Authorized Officer passed an order on 30.03.2022, where the shares as well as some immovable properties of the alleged contravener were attached.

8. The attachment orders passed by the Authorized Officer under Section 37A(1) of the FEMA Act were set aside by the Competent Authority on 13.04.2022 in respect of W.P.No.13114 of 2022 and on 25.07.2022 in respect of W.P.No.25098 of 2022.

9. These two orders passed by the Competent Authority are under challenge respectively in these writ petitions.

10. It is pointed out by Mr.B.Kumar, learned Senior Counsel appearing for the alleged contravener that, when the first writ petition i.e., W.P.No.13114 of 2022 was moved during the Vacation Court on 18.05.2022, it was the submission made on the behalf of the petitioner



W.P.Nos.13114 & 25098 of 2022

department that, the Appellate Tribunal was not functioning for a long time and since the alleged contravener may possibly divert these Indian assets amounting to Rs.294 Crores, it would cause great loss to the Government and would also affect the ongoing investigation. Therefore, by considering the submission made by the petitioner department, a learned Judge of this Court passed an order on 18.05.2022, granting interim stay of the operation of the impugned order dated 13.04.2022, he contended.

11. The learned Senior Counsel would also submit that, insofar as the second writ petition i.e., W.P.No.25098 of 2022 is concerned, when it came up for admission, an interim order of stay of the impugned order dated 25.07.2022 was granted by this Court on 19.09.2022.

12. Citing these developments, the learned Senior Counsel would point out that, these writ petitions were entertained and the interim orders of stay were granted in both these writ petitions on the ground that the Tribunal was not functioning, since the Chairman of the Tribunal was not appointed. However, the Chairman of the Tribunal was appointed on 22.09.2022, who is none other than the former Hon'ble Chief Justice of this Court and he has also taken charge on 26.09.2022. Therefore, from



W.P.Nos.13114 & 25098 of 2022

26.09.2022, since the Tribunal has been functioning with the Chairman, the reason cited by the petitioner department for entertaining these writ petition and to get an interim order of stay, at the time of admission of these two writ petitions are no more available to the petitioner. Thus, the petitioner should exhaust the appeal remedy, which is statutorily provided under Section 37A(5) of the FEMA Act. Thus, the petitioner department may be driven to go before the Appellate Authority, where on merits, they can seek the remedy by filing an appropriate appeal, the learned Senior Counsel contended.

13. On the other hand, Mr.N.Ramesh, learned Special Public Prosecutor appearing for the petitioner department would submit that, no doubt, on the date when these two writ petitions were moved, the Tribunal was not functioning and that was the main reason for the petitioner department to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. However, only on considering the merits of the case, this Court had granted interim orders of stay in respect of these two writ petitions and by virtue of the interim orders granted, the orders passed by the Authorized Officer under Section 37A(1) of the FEMA Act are restored. Therefore, the petitioner department's interest is



W.P.Nos.13114 & 25098 of 2022

protected as of now. Otherwise, the alleged contravener may meddle with the shares as well as the immovable properties, which are the subject matters of these two writ petitions, he contended.

14. The learned Special Public Prosecutor would also submit that, while passing the impugned orders, the Competent Authority has not considered the plea raised by the petitioner department and in this regard, since no consideration has been shown by the Competent Authority, it can only be construed as an order passed without following the principles of natural justice and on that ground, even without exhausting the appeal remedy, the petitioner department can straight away approach this Court by moving these writ petitions.

15. The learned Special Public Prosecutor would further contend that, filing these writ petitions without preferring an appeal is not a ground to reject these writ petitions at this stage. Since both these writ petitions were moved before 26.09.2022, i.e., before the date on which the Chairman of the Tribunal has taken charge, the ground raised by the alleged contravener that these writ petitions cannot be entertained by citing the reason that no appeal remedy has been exhausted before filing these



W.P.Nos.13114 & 25098 of 2022

writ petitions, is unjustifiable.

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16. I have considered the rival submissions made by the learned counsel for the respective parties and have perused the materials placed before this Court.

17. Insofar as the factual matrix as to whether the Tribunal was functioning before 26.09.2022 is concerned, there is no dispute as the Tribunal was not functioning, since the Chairman, who is the former Hon'ble Chief Justice of this Court, was appointed only in the last week of September, 2022 and he has taken charge of the Tribunal only on 26.09.2022.

18. These two writ petitions were filed and moved on 16.05.2022 and 14.09.2022 respectively and on these two occasions, the Tribunal, admittedly, was not functioning. Therefore, there was every justification on the part of the petitioner department to move these writ petitions during the relevant point of time. However, the Tribunal has started functioning from 26.09.2022 and since the said Tribunal is a National Level Tribunal headed by a former Chief Justice of the High Court and which is also an effective



W.P.Nos.13114 & 25098 of 2022

appeal forum statutorily established under the provisions of the FEMA Act, in the considered opinion of this Court, the petitioner has to prefer an appeal only before such Tribunal.

19. In this context, there is a limitation of 45 days to prefer an appeal before the Tribunal, as prescribed under Section 19(2) of the FEMA Act. Insofar as W.P.No.13114 of 2022, the Competent Authority had passed the order on 13.04.2022 and insofar as W.P.No.25098 of 2022, the order was passed on 25.07.2022. Thereafter, both these writ petitions were filed on 16.05.2022 and 14.09.2022 respectively, which is well within the prescribed limit of 45 days to prefer an appeal from the date of receipt of the order by the parties concerned.

20. Hence, if at all the petitioner is now driven to go before the Tribunal by invoking Section 37A(5) of the FEMA Act, the petitioner department can very well file an appeal, as it is within the limitation only. In this regard, if the petitioner department wants some more time to prefer appeals in the prescribed format, the same can also be granted by this Court by extending the limitation of 45 days to a reasonable period.



W.P.Nos.13114 & 25098 of 2022

21. The reason for this Court to come to such a conclusion to drive the petitioner department to go before the Tribunal is that, as against the order to be passed by the Appellate Tribunal, further appeal remedy is also provided under the Act in Section 35 of the FEMA Act, where any person aggrieved against an order or decision of the Appellate Tribunal may prefer an appeal to the High Court within a period of 60 days from the date of communication of the appeal order.

22. Therefore, the parties aggrieved against the order to be passed by the Tribunal can very well invoke the further appeal provision under Section 35 of the FEMA Act to prefer an appeal to the High Court. Therefore, instead of filing a second appeal, the petitioner has taken the route of filing the appeal by way of these two writ petitions, which is not acceptable.

23. Thus, the very remedy available to both the parties to go before the Appellate Tribunal would be unnecessarily lost, which would go against the very scheme of the Act, under which, the order to be passed by the Authorized Officer has to be approved by the Competent Authority and the order of the Competent Authority has to be evaluated by the Tribunal



W.P.Nos.13114 & 25098 of 2022

under Section 37A(5) of the FEMA Act, as against which, the aggrieved person can prefer an appeal before the High Court. This kind of hierarchy of forums provided for the parties to redress their grievances cannot be permitted to be omitted, which would result in loss of chance to the other party to invoke the appeal remedy before the other forum.

24. Therefore, this Court has no hesitation to hold that, since the Tribunal has been functioning with the Chairman from 26.09.2022, the petitioner can prefer an appeal before the Tribunal against the impugned orders and in this regard, this Court feels that some reasonable time, i.e., 45 days, can be granted to the petitioner department to prefer an appeal before the Tribunal.

25. At this juncture, the learned Special Public Prosecutor for the petitioner submits that, till the time the petitioner approaches the Tribunal, the protection given by this Court by way of interim order of stay, shall be continued, otherwise the alleged contravener may meddle with the attached properties.

26. In this context, the learned Senior Counsel appearing for the



W.P.Nos.13114 & 25098 of 2022

contravener, on instructions, given an undertaking before this Court that, the alleged contravener would not encumber or meddle with the subject properties of the attachment orders, which are impugned herein.

27. By taking note of the said undertaking given by the learned Senior Counsel on behalf of the alleged contravener, this Court is inclined to pass the following orders:-

(i) Since the petitioner department can very well file an appeal under Section 37A(5) of the FEMA Act before the Appellate Tribunal, both these writ petitions cannot be proceeded further by this Court to decide the issue on merits by invoking the extraordinary power under Article 226 of the Constitution of India.

(ii) The petitioner department is granted liberty to prefer an appeal before the Tribunal under Section 37A(5) of the FEMA Act, within a period of 45 days from the date of receipt of a copy of this order, where it is open to the petitioner to seek for any interim order.

(iii) Till such time, i.e, till the petitioner approaches the Tribunal, there shall be an interim protection to the effect that the alleged contravener shall not exploit the movable and immovable properties which are attached in the impugned orders and in this regard, the undertaking



W.P.Nos.13114 & 25098 of 2022

given on behalf of the alleged contravener by the learned Senior Counsel shall form part of this order.

(iv) It is clarified that if any immovable properties are already mortgaged for getting any working capital for running the Company by the alleged contravener, in view of the time lapse, such mortgage can be renewed and no fresh transaction of any mortgage or any encumbrance shall take place. This is also subject to the attachment made by the petitioner department through the impugned orders.

28. With these directions, both these Writ Petitions are dismissed.
No costs. Consequently, connected miscellaneous petitions are closed.

16.11.2022

Index:Yes

Speaking order

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Note: Issue order copy on 22.11.2022



W.P.Nos.13114 & 25098 of 2022

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R. SURESH KUMAR, J.

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W.P.Nos.13114 & 25098 of 2022

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