



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.12.2022

CORAM

THE HON'BLE Mr. JUSTICE **C.V.KARTHIKEYAN**

W.P.No.34401 of 2022
and
W.M.P.Nos.33864 & 33866 of 2022

Maria Selvam

.. Petitioner

Vs.

Competent Authority
[SAFEM (FOP) A & NDPSA]
Sahastri Bhawan, New Building Complex, 4th Floor,
No.26, Haddows Road,
Nungambakkam,
Chennai – 600 006.

.. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records on the file of the respondent and quash the notice issued under Section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 [“SAFEM (FOP) and NDPS Act”] in F.No.OCA/MDS/2917/2004 dated 27.08.2004.



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2

For Petitioner

.. Mr.N.V.Balaji

For Respondent

.. Mr.K.S.Jaya Ganeshan

ORDER

This writ petition has been filed in the nature of Certiorari seeking to quash the notice issued under Section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 in F.No.OCA/MDS/2917/2004 dated 27.08.2004.

2.The petitioner had led a very interesting life. He originally joined Indian Air Force in the year 1973. He was discharged from service in the year 1988. He could have been of some further service to the country, but had taken a conscious decision to act in such a manner that the tentacles of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, were attracted to his activities and he was detained under the COFEPOSA.

3.A writ petition had been filed seeking to quash the said proceedings, but an order to his disadvantage was passed by a Division Bench of this



Court and subsequently, by the Hon'ble Supreme Court. The detention continued and was upheld. The petitioner then had to face an enquiry for the activities, which drew the said prosecution.

4.The allegation against him was that he had smuggled computer processors into this Country. In the year 2004, on 27.08.2004 a notice under Section 6(1) of the SAFEM (FOP) A was issued. The petitioner claims ignorance and innocence of all charges levelled against him. He claims that he had attended the enquiry and further claims that he had submitted all necessary documents to the respondent and therefore, claims the privilege of the prosecution case being closed against him, though no such order had been passed.

5.The petitioner, in this writ petition seeks exemption from even replying to the show cause notice.

6.In this connection, the learned counsel for the petitioner placed reliance on a string of judgments. Since the learned counsel put an effort to do that research, it is obligatory on the part of this Court to examine the



ratio laid down in those judgments.

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7.The first judgment produced by the learned counsel is of the Bombay High Court reported in **2010 SCC OnLine Bom 2133, Shirish Harshavadan Shah Vs. Deputy Director, E.D., Mumbai**. That case related to the Foreign Exchange Regulation Act, 1947, the Foreign Exchange Regulation Act, 1973 and the Foreign Exchange Management Act, 1999, with respect to acts and omissions said to have been done in the year 1980. The Division Bench of the Bombay High Court had examined a judgment of the Hon'ble Supreme Court **Government of India Vs. The Citedal Fine Pharmaceuticals Madras** reported in **1989 (42) E.L.T 515 : (1989) 3 SCC 483** and had followed the proposition held therein that even if there is no time limit fixed, it is presumed any enquiry should be completed within a reasonable period of time.

8.The Hon'ble Supreme Court in the said judgment namely, **Government of India Vs. The Citedal Fine Pharmaceuticals Madras**, had further qualified that particular statement. It had been very clearly stated that “*what would be reasonable period would depend upon the facts of each*



case”. There cannot be a fixed time limit given. Neither can there be an examination of the time limit. It all depends on the facts and circumstances of each case.

9. In the instant case, the petitioner has been issued with a notice on 18.11.2022 calling him to appear in person or through video conference or through any other mode or to send a representation through e-mail by 4.30 p.m on 22.12.2022 (today) with respect to the allegations against him. The petitioner does not want to appear. The petitioner claims that he had already forwarded every material, and therefore places an obligation on the respondent to examine those materials, and pass an order. If they do so, the allegation against them would be that they had passed an order without giving sufficient opportunity of being heard. The respondent has now given that opportunity to the petitioner to put forth his case. The petitioner claims that owing to the considerable delay, the entire notice stands vitiated. To repeat, they would stand vitiated only depending on the facts and circumstances of each case.



10.The learned counsel for the petitioner also relied on an another judgment of the Bombay High Court in ***W.P.No.12904 of 2019 dated 22.10.2020, Parle International Limited Vs. Union of India and others***, in which, the Bombay High Court again examined the issue of delay and in that particular case, a delay of 13 years post issuance of show cause notice and submission of reply and held that the delay is untenable and that any decision based on the said delay would be invalid.

11.That was an issue under the Companies Act, 1956. The petitioner company had been registered under the Companies Act, and had to file returns. It was the claim of the petitioner, that they had availed CENVAT credit on inputs and capital goods under CENVAT credit Rules of different years. The show cause notice was issued overlooking such factual aspect. It was interfered with by the Bombay High Court.

12.In the instant case, the petitioner smuggled computer processors. It is quite a serious offence. Preventive detention had been upheld by the High Court and had been further upheld by the Hon'ble Supreme Court. The detention was to prevent him from further indulging himself with the acts of



smuggling. The prosecution for the act of smuggling will necessarily have to proceed. For that purpose, the respondent had issued a show cause notice. The petitioner however claims that he should be exempted from such hearing. I am not inclined to quash the notice issued.

13.The learned counsel for the petitioner then relied on a judgment of the Punjab and Haryana High Court reported in **(2018) 362 ELT 388, GPI Textiles Limited Vs. Union of India and Others**. The High Court had relied on a judgment of the Hon'ble Supreme Court in **State of Punjab Vs. Bhatinda District Co.op. Milk P. Union Limited** reported in **2007 (217) E.L.T. 325**, wherein, the Hon'ble Supreme Court had expressed an *opinion* that when no period of limitation is provided for exercise of power, a notice issued more than five years thereafter can be said to be unreasonable.

14.In the instant case, the issuance of the notice was part of a continuous process. The petitioner had been issued with notice. He had replied. For further clarifications, the respondent had called the petitioner again to appear through video conference or in person. The petitioner would not be put to any harm by appearing through video conference. Probably, he



has other work at 4.30 p.m, today, but he should also give priority to the proceedings. It must be again stated that the Hon'ble Supreme Court has been very careful in their wordings. They had only stated that their statement is an *opinion* and which depends on the facts and circumstances of each case.

15.The learned counsel relied on yet another case reported in **1983 ELT 44, Bhagwandas S. Tolani Vs. B.C.Aggarwal and others**. In that case, again a learned Single Judge had stated his opinion. That *opinion* is certainly not binding on this Court. It will depend on the facts and circumstances of each case as stated by the Hon'ble Supreme Court. An opinion cannot be termed as a binding ratio.

16.The learned counsel then relied on the judgment of this Court in **Tablets (India) Ltd. Vs. Assistant Commissioner, Chennai** reported in **2018 (11) G.S.T.L. 162 (Mad.)**, passed by a learned Single Judge of this Court and placed specific reliance on paragraphs 13 to 16, which are extracted below:



“13.As pointed out earlier, the impugned show cause notices do not stated that the proceedings have been initiated based upon the audit report. What is interesting to note from the counter-affidavits is that the Department/Assessing Officer did not accept the audit objections, but contested the same. In other words, the Department was of the firm view that the availment of the benefit of the said exemption notification as approved by the Department in the petitioner's case was proper. Nevertheless, on such contest, the audit objections were converted into Statement of Fact Verification (SFV). This conversion appears to have taken place during the period 1994-95 as could be seen from SFV No.313/94-95 i.e much before the opportunity of personal hearing granted to the petitioner on 19.01.1996. Even at that juncture, the respondent did not put the petitioner on notice about the audit objections and the contest by the Department on such audit objections.

14. In the counter affidavit, it has been further stated that since the settlement memo was not received from the CERA, the case was kept in the Call Book. Once again, the petitioner was kept in dark and was not intimated about these proceedings, which were



taking place administratively. For 22 years, the matters remained in cold storage and all of a sudden, a notice was issued to the petitioner on 28.2.2017 directing them to appear for a personal hearing on 22.3.2017. This has necessitated the petitioner to come before this Court.

15. When the cases came up for hearing on the earlier dates, this Court directed the respondent to file an affidavit to show as to whether the transfer of the case to the Call Book was informed to the petitioner. Accordingly, the additional counter affidavit dated 13.11.2017 has been filed accepting the fact that there is no intimation to the assessee about the transfer of the show cause notices to the Call Book. Thus, absolutely the petitioner had no knowledge as to what was the reason for not passing the adjudication order on the impugned show cause notices. Though an opportunity of personal hearing was offered on 19.1.1996, it has to be seen as to whether this could be a reason for not being able to pass an order within the time permitted under [Section 11A\(11\)\(a\)](#) of the said Act.

16. Admittedly, the reason for impossibility of adjudicating the show cause notices cannot be put



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against the assessee, as the Department was contesting the audit objections. Therefore, this Court is convinced that the reasons contained in the counter affidavit as well as in the additional counter affidavit do not justify the action in keeping the impugned show cause notices pending without being adjudicated for 22 years.

17.The learned Single Judge had examined the show cause notice. The show cause notice did not indicate that the proceedings had been initiated on the basis of an audit report. The issuance of the show cause notice itself was found at fault.

18.The duty of the petitioner is to show cause, as to why further proceedings should not be initiated against him. The respondent will have to take a decision on the basis of the explanation / materials submitted. This Court cannot sit as an Appellate Authority over the issuance of the show cause notice or examine it in judicial review. The facts of the judgment relied are distinguishable.

19.The last judgment relied on by the learned counsel for the petitioner is ***M/s.J.M.Baxi & Co. Beach Road Pondicherry – 605 001 Vs. The Government of India and others*** reported in ***(2016) 336 ELT 285***. The



learned counsel pointed out the relevant portion as paragraph No.16, which is as follows:-

“16. In the order of adjudication dated 07.01.2000, there is nothing to indicate as to what transpired from 23.5.1995 up to 07.01.2000, except for two dates. One is a letter dated 23.10.1999 where the appellant sought an injury to be inflicted upon them voluntarily, reminding the Department of the pendency of the show cause notice. The next date is 04.01.2000 when a personal hearing took place. Therefore, the order of adjudication certainly had not taken place within a reasonable period. Though the statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything in respect of which no period of limitation is prescribed, should be done at least within a reasonable time. What is reasonable time, would depend upon the facts and circumstances of each case. In cases of this nature, where the weight of the cargo discharged by the vessel of a Steamer Agent is questioned, it is not possible for a Steamer Agent to defend themselves against the show cause notice long after the vessel had sailed. Therefore, the third question of law is also be



answered in favour of the appellant.”

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20. There again it had been observed that *“Though the statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything in respect of which no period of limitation is prescribed, should be done at least within a reasonable time. What is reasonable time, would depend upon the fact and circumstances of each case”*.

21. That was a case, where a Steamer Agent was asked to explain about the cargo, which had been discharged by a vessel.

22. In the instant case, the issue is still serious. The petitioner is accused of smuggling the computer processors. If he wants to clear his name, he should participate in the enquiry. The choice is purely his. The notice was dated 18.11.2022 calling upon the petitioner to attend an enquiry at 4.30 p.m (16.30 hours) on 22.12.2022 (today). The matter has been taken up at 11.30 hours. The reasons for not filing the writ petition earlier is not stated.



The tactic of filing a writ petition and bringing it on the very day of hearing of the show cause notice is deprecated. I am not inclined to grant any relief to the petitioner.

23.This Writ Petition stands dismissed, with costs of Rs.50,000/- (Rupees Fifty Thousand Only) payable to the Tamil Nadu State Legal Services Authority, Chennai. Consequently, connected miscellaneous petitions are closed.

24.After the costs amount was indicated, the learned counsel for the petitioner made a representation stating that the petitioner is living in poor condition and therefore requested for cancellation of the costs. Since costs were indicated, the Court will have to adhere to imposition of costs. The amount can be reduced. The amount is reduced to Rs.10,000/- (Rupees Ten Thousand only) payable to the Tamil Nadu State Legal Services Authority, Chennai.

22.12.2022

Index:Yes/No



15

Internet: Yes/No
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To

Competent Authority
[SAFEM (FOP) A & NDPSA]
Sahastri Bhawan, New Building Complex, 4th Floor,
No.26, Haddows Road,
Nungambakkam,
Chennai – 600 006.



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C.V.KARTHIKEYAN,J.

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17

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