IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2023

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.32011 of 2017
and W.M.P.Nos.35168 & 35169 of 2017

Dr.Sadauavel Kailasam ...Petitioner

-Vs-

1.Directorate of Enforcement,
Rep. by its Director,
Ministry of Finance,
Department of Revenue,
Government of India,
H.I.U., 6th Floor, Lok Nayak Bhavan,
Khan Market,
New Delhi – 110 003.

2.The Additional Director,
Directorate of Enforcement,
Ministry of Finance,
Department of Revenue,
Government of India,
H.I.U., 6th Floor, Lok Nayak Bhavan,
Khan Market,
New Delhi – 110 003.

3.The Joint Director,
Directorate of Enforcement,
Shastri Bhawan, 3rd Floor, 3rd Block,
B-Wing, No.26, Haddows Road,
Chennai – 600 006.

4.The Assistant Director,
Directorate of Enforcement,
Ministry of Finance,
Department of Revenue,
Government of India,
H.I.U., 6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi – 110 003.

5.The Assistant Director,
Directorate of Enforcement,
Shastri Bhawan, 3rd Floor, 3rd Block,
B-Wing, No.26, Haddows Road,
Chennai – 600 006. ...Respondents

Prayer:- Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of declaration declaring that the search and seizure conducted by the respondents under Section 37 of the Foreign Exchange Management Act, 1999 on 01.12.2017 in the residential premises of the petitioner at No.16/11, Parthasarthy Gardens, Alwarpet, Chennai – 600 018, at the residential premises of the petitioner's parents at "Muruganadi", No.24, Kasturi Rangan Road, Teynampet, Chennai – 600 018 and the hospital premises at M/s.Aswene Soundra Hospital and Research Centre, No.24, Kasturi Rangan Road, Teynampet, Chennai – 600 018 is without jurisdiction, vitiated by malice in law and fact, abuse of authority, malafide exercise of power, violative of the fundamental rights of the petitioner under Article 14 and 21 of the Constitution of India, arbitrary and consequently direct the respondents 4 and 5 to return all the items and documents seized during the search operation under Section 37 of the Foreign Exchange Management Act, 1999.

For Petitioner : Mr.Vijay Narayan
Senior Counsel
for M/s.C.Uma

For Respondents : Mr.A.R.L.Sundaresan
Additional Solicitor General of India
Assisted by
Mr.A.Kumaraguru

O R D E R

The writ of declaration has been instituted to declare the search and seizure conducted by the respondents under Section 37 of the Foreign Exchange Management Act, 1999 on 01.12.2017 in the residential premises of the petitioner at No.16/11, Parthasarthy Gardens, Alwarpet, Chennai – 600 018, at the residential premises of the petitioner's parents at "Muruganadi", No.24, Kasturi Rangan Road, Teynampet, Chennai – 600 018 and the hospital premises at M/s.Aswene Soundra Hospital and Research Centre, No.24, Kasturi Rangan Road, Teynampet, Chennai – 600 018 is without jurisdiction, vitiated by malice in law and fact, abuse of authority, malafide exercise of power, violative of the Fundamental Rights of the petitioner under Articles 14 and 21 of the Constitution of India, arbitrary and consequently direct the respondents 4 and 5 to return all the items and documents seized during the search operation under Section 37 of the Foreign Exchange Management Act, 1999.

2.The petitioner states that he is the son of Late Justice P.S.Kailasam, former Chief Justice of the Hon'ble High Court of Madras and the Judge of the Hon'ble Supreme Court. The petitioner's mother is Mrs.Soundra Kailasam, a renowned Tamil Poet and a highly religious person. The petitioner is a law abiding citizen and have not violated any provisions of law. The petitioner is an Income Tax Assessee and regularly filing income tax returns by duly paying the applicable income tax.

3.Shockingly, the respondents 4 and 5, on the authorization dated 30.11.2017 issued by the 2nd respondent under Sections 37(1) & (3) of the FEMA read with Section 132 of the Income Tax Act, 1961 and Section 30 of CPC, 1908, authorizing the respondents 4 and 5 to conduct the search at "Muruganadi", 24/1, Kasturi Rangan Road, Teynampet, Chennai, and to visit the said place. The said address was the residence of the petitioner's parents which was kept under lock and key, ever since their demise. On ascertaining the fact that the petitioner, during the relevant point of time, was residing at No.16/11, Parthasarthy Gardens, Alwarpet, Chennai – 600 018, the fresh search warrant dated 01.12.2017 was issued by the 3rd respondent to search the premises at No.16/11, Parthasarthy Gardens, Alwarpet, Chennai – 600 018 and M/s.Aswene Soundra Hospital and Research Centre at No.24/1, Kasturi Rangan Road, Chennai. Despite the search conducted for the whole day on 01.12.2017, the officials did not find any material, proving any contravention to the provisions of the FEMA by the petitioner. During the search, foreign currencies equalling 1511 dollars were found. Since the said amount was less than the threshold limit of 2000 dollars, the amount was returned back to the petitioner by the Competent Authorities. The officials had seized three loose sheets containing the net worth statement of the petitioner, 500 GB desktop hard drive, two Mobile Phones along with the charger, one Apple IPAD belonging to the petitioner's daughter, being used to view photographs of the deceased wife of the petitioner, which were also seized.

4.From the hospital premises, certain documents were seized, the details of which are given in the panchanama prepared by the 4th respondent. However, none of those documents prove any violation of the provisions of the FEMA and therefore the entire search conducted by the officials went in futile.

5.On the same day on 01.12.2017 the summons in File No.T-3/24/HIU/2017 dated 01.12.2017 was issued by the 4th respondent under Sections 37(1) and (3) of FEMA, 1999 read with Section 131 (1) of the Income Tax Act, 1961 and Section 30 of C.P.C. was served on the petitioner stating as follows:

> *"Whereas your attendance is required in connection with the proceedings under the Foreign Exchange Management Act, 1999 in case of Sadayavel kailasam. You are hereby required to attend personally or through authorized representative at the office of the undersigned at the above mentioned address on 05.12.2017 at 11.00 hrs to give evidence and to produce books of account of other documents specified under the schedule and not to depart until you receive my permission to do so".*

The Schedule to the summons listed out details and documents sought for under the summons:-

SCHEDULE

(As per Annexure - "A" enclosed)

Annexure – A

1. *Copy of his passport*
2. *Details of the Companies/Trusts in and outside India, in which he is director/shareholder/Trustee.*
3. *Details of the foreign remittances made/received by him since the year 2005-06.*
4. *Details of his bank A/Cs inside and outside India.*
5. *Details of family.*
6. *Copy of the ITRs filed since 2005-06 onwards till date".*

6.The petitioner in response submitted a counter statement through his counsel on 01.12.2017 stating as follows:-

Under instructions from my client, Dr.Sadayavel Kailasam, residing at No.24, Kasturi Rangan Road, Teynampet, Chennai – 600 018.

Officials of the enforcement directorate searched the residence and office of my client, Dr.Sadayavel Kailasam. It was a completely *unjustified and unwarranted search. Nothing was found and nothing was seized.*

My client is an Income Tax Assessee for many years and has disclosed his assets and liabilities in the annual returns. He has no undisclosed asset. Yet the Enforcement Directorate, in excess of its jurisdiction, conducted a fishing and roving enquiry and, in the end, found nothing. My client has taken strong exception to the action of Enforcement Directorate and has lodged a strong protest, reserving his rights to take such legal action as may be necessary."

7.The learned senior counsel appearing on behalf of the writ petitioner mainly contended that, no incriminating materials were seized while conducting the raid in the premises of the petitioner. More than 5 years lapsed, still the respondents have not initiated any action under the FEMA 1999. The petitioner at the time of conducting search was possessing only 1511 dollars which was within the permitted limits and drawn through normal banking procedures and therefore there is no reason to believe for conducting search and seizure and thus the entire action of the respondents are in contravention to the provisions of FEMA.

8.It is contended that the requirement of the provisions of the FEMA has not been complied with while contemplating search and seizure in the premises of the petitioner. In the absence of "a reason to believe" any search conducted is to be construed as invalid and more so, there is no application of mind in the case of the petitioner and thus the action of the respondents is to be declared as void.

9.In support of his contention, the learned senior counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court of India in the case of ***Director General of Income Tax (Investigation), Pune and Others Vs. Spacewood Furnishers Private Limited and Others*** reported in ***(2015) 12 SCC 179***, wherein the Apex Court made the following observations:-

> ***3.****The issues that arise in the present appeal lie within a short circumference. As the warrant of authorisation under Section 132, which is required to be founded on a reasonable belief of the authorised official regarding the existence of the conditions*

precedent to the exercise of the power to issue the same, has been interdicted under Article 226 of the Constitution, the ambit of the power of the High Court to do so may be noticed at the outset.

4.*The "classical" notion of the extent of power that the High Court would have in the exercise of its writ jurisdiction to cause such interference is formulated in ITO v. Seth Bros. [ITO v. Seth Bros., (1969) 2 SCC 324 : (1969) 74 ITR 836] and Pooran Mal v. Director of Inspection (Investigation) [Pooran Mal v. Director of Inspection (Investigation), (1974) 1 SCC 345 : 1974 SCC (Tax) 114 : (1974) 93 ITR 505] . The parameters of permissible interference as laid down in the aforesaid two decisions have stood the test of time and continue to hold the field even today. We may, therefore, advert to ITO v. Seth Bros. [ITO v. Seth Bros., (1969) 2 SCC 324 : (1969) 74 ITR 836] in the first instance."*

8.2. *Such information must be in possession of the authorised official before the opinion is formed.*

8.3. *There must be application of mind to the material and the formation of opinion must be honest and bona fide. Consideration of any extraneous or* *irrelevant material will vitiate the belief/satisfaction.*

8.4. *Though Rule 112(2) of the Income Tax Rules which specifically prescribed the necessity of recording of reasons before issuing a warrant of authorisation had been repealed on and from 1-10-1975 the reasons for the belief found should be recorded.*

8.5. *The reasons, however, need not be communicated to the person against whom the warrant is issued at that stage.*

8.6. *Such reasons, however, may have to be placed before the Court in the event of a challenge to formation of the belief of the authorised official in which event the court (exercising jurisdiction under Article 226) would be entitled to examine the relevance of the reasons for the formation of the belief though not the sufficiency or adequacy thereof.*

10.The learned Senior Counsel for the petitioner drew the attention of this Court with reference to the counter affidavit filed by the respondents, wherein, they have not established any reason for the purpose of conducting search and seizure in the premises of the petitioner. Thus, the mandatory requirement of “reason to believe” has not been satisfied and application of mind is also lacking. Thus, the relief of writ of declaration is to be issued by this Court.

11.The learned Additional Solicitor General of India appearing on behalf of the respondents disputed the contentions raised by the petitioner by stating that it is in the preliminary stage the petitioner approached this Court. All the materials cannot be revealed during the course of investigation by the Competent Authorities. No doubt, the mandatory requirement of “reason to believe” is to be satisfied. More so, application of mind is also to be established. In the present case, during the investigation carried out pursuant to the recording of ECIR.No.05/DZ/2012 dated 07.02.2012, extensive searches were conducted by the respondents Department, which resulted in unearthing various incriminating materials / data recovered from digital devices. The incriminating materials / data retrieved from the digital devices depicts that Shri.Karti P.Chidambaram S/o.Shri.P.Chidambaram has received huge funds from in and outside India under the grab of professional consulting fees through a number of companies during the prevalent period when

FIPB approval to Aircel Limited was issued by the then Finance Minister. It is also further revealed during the course of the investigation of Aircel Maxis deal that Shri.Sadayavel Kailasam, a resident Indian, who is the maternal uncle of Shri.Karti P.Chidambaram has made huge foreign outward remittance / investments to the tune of USD Dollar 5 lakhs in Holben Holt Ltd., UK during June 2016 and June 2017. As such investigation under the provisions of FEMA, 1999 was commenced against Shri.Sadayavel Kailasam, the petitioner herein, for contravening various provisions of FEMA, 1999.

12.With reference to the cited above facts, the learned Additional Solicitor General of India reiterated that there was a "reason to believe" for invoking the provisions of FEMA and to conduct search in the premises. When the informations are collected and the Authority concerned found that there is a prima facie case and the reason to believe, ordered to conduct search and accordingly, the search and seizure was conducted into the premises of the petitioner and his professional places, hospital etc.

13.Counter reveals further that during investigation under FEMA that Shri.Karti P.Chidambaram is having various asserts in overseas countries and is closely associated with various overseas entities like Lorraine Mooney, Totus Tennis Ltd and Holben Hold Ltd., UK. It is also revealed during the investigation that the petitioner herein had effected various fund transfers from his personal accounts under the head of “financial derivatives and others, secondary income and educational purposes” during the period between August 2013 to November 2016. Since the petitioner herein had made transactions with suspicious overseas entities, on formation of “reason to believe” by the 2nd respondent, an authorisation for search warrant dated 30.11.2017 was issued by him to search the residential premises situated at Door No.24/1, Kasturi Rangan Road, Teynampet, Chennai and the hospital premises of the petitioner under Section 37(1) & (3) of FEMA, 1999 read with Section 132 of Income Tax Act, 1961 and Section 30 of CPC, 1908 on formation of reasons to believe that incriminating materials/valuable articles/documents etc., are secreted in the premises stated supra which cannot be unearthed otherwise by way of search. The reason to believe was also reduced in writing. However, the premises at Door No.24/1, Kasturi Rangan Road, Teynampet, Chennai was found to be under lock and key and the authorisation for search could not be executed in respect of the said premises. Hence, as contemplated under the proviso to Section 132 (1) of Income Tax Act, 1961, the 3rd respondent, under whose jurisdiction the petitioner herein resides, on formation of "reason to believe" and on the basis of materials available in his possession, had issued a fresh authorisation for search on the premises at Door No.16/11 Parthasarathy Gardens, Alwarpet, Chennai and at M/s.Aswene Soundara Hospital and Research Centre at No.24/1, Kasturi Rangan Road, Chennai. The search in the premises stated supra had resulted in seizure of various incriminating records and electronic devices, hard discs etc. The search was carried out in an orderly manner by adhering the powers conferred on the respondent Department under Income Tax Act, 1961 and a summon was also issued to the petitioner under Section 37 (1) & (3) of FEMA, 1999 read with Section 131 (1) of the Income Tax Act, 1961 and Section 30 of CPC, 1908 for his personal appearance on 05.12.2017 requiring him to give evidence and to produce the documents mentioned in annexure A of the summons. However, the petitioner has failed to produce documents and issued a notice on 04.12.2017 by claiming that the search held in his residential and hospital premises and the summons issued to the petitioner as illegal and the petitioner failed to cooperate with the Department for investigation.

14.With reference to the above action of the respondents, the learned Additional Solicitor General of India contended that in the event of a reason to believe based on certain factual informations received or collected, the Authorities Competent are empowered to conduct search by following the procedures as contemplated. In the present case, there is no procedural violations and the Authorities Competent scrupulously followed the procedures while conducting this act and provided opportunity to the writ petitioner to produce all the documents and cooperate with the officials for conducting appropriate investigation.

15.With regard to the contention of the petitioner, more specifically insufficiency of materials and non application of mind, it is stated that the 3rd respondent could have any information in his possession which could lead to the reason to believe that the petitioner had contravened to the provisions of FEMA, 1999, pursuant to which he could have issued fresh authorisation for search and that the fresh authorisation dated 01.12.2017 does not satisfy the requisite conditions and hence the whole search is vitiated and the documents are seized without any application of mind is incorrect and false. The 3rd respondent after satisfying the preconditions required under the provisions of the Act had issued fresh authorisation for search and the search was carried out in accordance with law.

16.The original files relating to the initiation of proceedings are placed before this Court. Regarding the delay on the part of the respondents, the learned Additional Solicitor General of India drew the attention of this Court with reference to the letter sent by the learned counsel for the petitioner, who in turn by letter dated 04.12.2017 has stated that they have approached the High Court of Madras by filing a writ petition and therefore no further action to be continued pursuant to the search conducted. On the one hand, the petitioner issued a letter through his counsel not to conduct further enquiry or investigation and on the other hand before this Court the petitioner has stated that the respondents, even after lapse of 5 years, have not initiated any action. Such a dual stand taken is impermissible and therefore the writ petition is to be rejected.

17.The mandatory condition contemplated under the Act regarding "reason to believe", the file indicates certain intelligence informations about various investments which has been partly narrated in the counter filed by the respondents. Since the writ petition has been filed at the preliminary stage, certain informations and materials referred in the original files in the interest of petitioner need not be recorded in the order passed in the present writ petition. The counter reveals that there may be more such instances which is to be unearthed and the intelligence informations provided are also to be enquired into further for the purpose of initiation of further action.

18.Nibbing the bud, the course cannot be done in a routine manner. Search is an initial action initiated pursuant to certain informations which provided reason to believe to the authorities to proceed with further information. Certain foreign investments or transactions which were identified through intelligence informations resulted in initiation of action under FEMA, 1999. Based on such informations search, warrant was issued under FEMA and the authorities competent followed the procedures, while conducting search. Further investigations are to be conducted and an opportunity was provided to the writ petitioner to produce all those documents with reference to the informations or otherwise. The petitioner instead of furnishing documents and statements have chosen to file the present writ petition. The original files reveals that the authorities have formed an opinion that there is a reason to believe, which is the condition stipulated in the Act and on satisfaction, they conducted a search and thereafter issued summons to the petitioner to respond and submit his explanations and documents. This being the factum established, this Court is of the considered opinion that the search and seizure conducted cannot be held as illegal or ultravires to the provisions of FEMA, 1999 and Income Tax Act and CPC. The petitioner is bound to respond and defend the facts in the manner known to law. There is a prima facie case established with reference to certain transactions and investments in foreign countries and certain details are also available in the file which require a detailed investigation and necessarily the petitioner has to cooperate for further investigation and establish his case with documents and evidences.

19.Accordingly, the petitioner has failed to establish any ground for interference and consequently, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

14.03.2023

cda/sha
Index : Yes/No
Speaking / Non Speaking Order
Neutral Citation : Yes/No

To

1.The Director,
Directorate of Enforcement,
Ministry of Finance,
Department of Revenue,
Government of India,
H.I.U., 6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi – 110 003.

2.The Additional Director,
Directorate of Enforcement,
Ministry of Finance,
Department of Revenue,
Government of India,
H.I.U., 6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi – 110 003.

3.The Joint Director,
Directorate of Enforcement,
Shastri Bhawan, 3rd Floor, 3rd Block,
B-Wing, No.26, Haddows Road,
Chennai – 600 006.

4.The Assistant Director,
Directorate of Enforcement,
Ministry of Finance,
Department of Revenue,
Government of India,
H.I.U., 6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi – 110 003.

5.The Assistant Director,
Directorate of Enforcement,
Shastri Bhawan, 3rd Floor, 3rd Block,

B-Wing, No.26, Haddows Road,
Chennai – 600 006.

S.M.SUBRAMANIAM. J.,

cda/sha

W.P.No.32011 of 2017

14.03.2023