IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.04.2024

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.374 of 2024
and
W.M.P.Nos.423 & 424 of 2024

Citi Bank N.A
Rep. By Its Authorised Signatory,
M.Paramasivam, Director
Global Subsidiaries Group,
2nd Floor, No.163, Anna Salai,
Chennai-600 002. ... Petitioner

Vs.

Directorate Of Enforcement,
Through Special Director,
Directorate Of Enforcement,
Chennai,
South Regional Office,
Government Of India,
Shastri Bhawan, III Floor, III Block, B Wing,
26 Haddows Road, Chennai-600 006. ... Respondent

Prayer :- Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorarified mandamus, to call for the records pertaining to Impugned order dated 11.12.2023 in F.No.T- 4/SRO /SDE/ BGZO/ 09/ 2023 passed by the Respondent which are connected with proceedings emanating from Show- cause Notice bearing F. No.T-4/SRO/SDE/ BGZO/ 09/2023 dated 09.06.2023,including a copy of reasons recorded by the Respondent while forming an opinion to proceed with inquiry against the Petitioner in terms of Rule 4 (4) of the Foreign Exchange management (Adjudication Proceedings and Appeal) Rules, 2000 and quash the impugned order dated 11.12.2023 passed by the Respondent and consequently direct the Respondent to Communicate the reasons basis which it formed an opinion to proceed with inquiry against the Petitioner in terms of Rule 4 (4)of the Foreign Exchange Management (Adjudication proceedings and Appeal) Rules, 2000 and thereafter conduct the remaining proceedings in accordance with the foreign Exchange management (Adjudication Proceedings and Appeal)Rules, 2000.

For Petitioner : Mr.B.Kumar, Senior Counse for
Mr.Nihant Joshi

For Respondent : Mr.Rajnish Pathiyil

<u>O R D E R</u>

The present writ petition has been filed challenging the impugned Order dated 11.12.2023 in F.No.T- 4/SRO /SDE/ BGZO/ 09/ 2023 passed by the Respondent which are connected with proceedings emanating from Show- cause Notice bearing F. No.T- 4/SRO/SDE/ BGZO/ 09/2023 dated 09.06.2023.

2. The learned Senior Counsel, appearing for the petitioner would

submit that the spirit of Rule 4(3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000 (herein after referred to as the "Rules"), has not been adhered to and therefore, subsequent proceedings are to be held as null and void. In the event of communicating the reasons recorded for proceeding with the action, the petitioner would be in a position to defend their cases and therefore, the importance of Rule 4(3) of the Rules is to be considered by this Court.

3. The rules of natural justice to be complied with in this context is of paramount importance. Therefore, violation of Rules 4(3) of the Rules and the consequential technical circulars of the year 2014 would make difference in the proceedings. Thus, the writ petitions are to be considered.

4. The learned Senior counsel would mainly contend that the issues pertaining to Rule 4(3) of the Rules are well enumerated by the Bombay High Court in the case of ***Shashank Vyankatesh Monohar Vs. Union of India, reported in 2014(1) Maharashtra Law Journal 838***. The said judgement has been confirmed by the Supreme Court in SLP and consequently, Enforcement Directorate issued circular of the year 2014. Cogent reading of the judgement and the circular would reveal that the

issues are no more res integra and to be followed scrupulously while taking a decision to proceed with the enquiry under Rule 4 of the Rules.

5. The distinction has been drawn with reference to the judgement of the Bombay High Court and the Division Bench of the Madras High Court, in the case of ***India Cements Limited Vs. Union of India, reported in CDJ in 2018 MHC 3298***. In this context, the judgement of the learned Single Judge of this Court, in the case of ***Ramakrishna Settu Vs. The Special Director, Directorate of Enforcement, reported in CDJ 2014 MHC 3886,*** has been referred, wherein the learned Single Judge considered the interpretation offered by the Bombay High Court on Rule 4(3) of the Rules. The learned Single Judge has made a finding that the interpretation given by the Hon'ble Division Bench of the Bombay High Court to the expression "as opinion appears to be very elastic".

6. The learned senior counsel would submit that the judgement of the Madras High Court is factually distinguishable and therefore, cannot be equated with the interpretation offered by the Bombay High Court on Rule 4(3) of the Rules. Thus, the judgement of the Bombay High Court holds the field and to be followed for the purpose of considering the cases falling

under Rule 4(3) of the Rules.

7. In support of the Bombay High Court judgement, the learned Senior Counsel for the petitioner would further rely on the judgement of Delhi High Court in the case of ***J.P.Morgan India Pvt. Ltd Vs. Special Director, Directorate of Enforcement, reported in CDJ 2021 DHC 683.*** However, in the said judgement the Delhi High Court has scrupulously followed the interpretation offered by the Bombay High Court and therefore, no further discussion on the said judgement may be required. So also the Kolkata High Court in the case of ***Nillesh Parekh Vs. Union of India, reported in MAT 478 of 2022,*** also followed the Bombay High Court judgement. When Rule 4(3) has been interpreted harmoniously by the Bombay High Court, which is followed by the Delhi High Court and the Kolkata High Court, the Madras High Court alone need not deviate and the interpretation given by the Bombay High Court and it is to be followed.

8. The learned counsel for the respondent, would submit that the circular issued by the Department in implementation of the Bombay High Court judgement cannot be relied upon. The departmental circulars are not binding on the persons or quasi judicial authorities or Courts and therefore,

in that view of the matter, the circulars/instructions issued by the Board would not assist them. The said proposition has been laid down by the Hon'ble Supreme Court in the case of ***Commissioner of Central Exercise, Bhopal Vs. Minwool Rock Fibres Limited, reported in CDJ 2012 SC 141.*** In the case of ***Commissioner of Central Excise Vs. Ratan Melting and Wire Industries, reported in 2008(13) SCC 1***, the constitution Bench of the Hon'ble Supreme Court of India held as follows:-

> *"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."*

9. With reference to the principles laid down by the Hon'ble Supreme Court regarding the enforceability of the departmental circulars, which all are issued based on the judgements, the learned counsel for the respondent would solicit the attention of this Court with reference to the principles laid down by the Division Bench of the Madras High Court in the case of ***India Cements Limited*** cited supra. Relevant Paragraphs of the said judgement reads as under:

> *"16. We have considered the rival submissions. The only question that arises in this appeal is as to whether the adjudicating Authority is bound to record his reasons for formation of an opinion under sub-Rule 3 of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 in writing and also communicate the same to the noticee if required by the noticee before proceeding with an enquiry.*
>
> *17. No doubt true, a Division Bench of he Bombay High Court in Shashank Vyankatesh Manohar Vs. Union of India and another cited supra had read into the Rules, the requirement of such recording of reasons and communication of it to the noticee. We are unable to persuade ourselves to agree with the conclusions of the Division Bench of the Bombay High Court. It is not seen*

from the report as to whether the provisions of sub-Rule 4 of Rule 4 were considered by the Bombay High Court.

18. As rightly pointed out by the learned Additional Solicitor General of India, such a requirement does not appear on a plain reading of the Rules. We have already extracted sub-Rule 3 of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. Sub-Rule 1 of Rule 4 requires the adjudicating Authority to issue a show cause notice for the purposes of adjudicating as to whether any person has committed any contravention of the provisions of the Foreign Exchange Management Act. Sub-Rule 2 of Rule 4 requires the show cause notice issued under sub-Rule 1, to indicate the nature of contravention alleged to have been committed by him. Sub-Rule 3 of Rule 4 provides that if after considering the cause shown by the noticee, the adjudicating Authority is of the opinion that an enquiry should be held, he shall issue a notice fixing the date for appearance of that person either personally or through legal practitioner or a chartered accountant, duly authorised by him.

19. On a plain reading of the provisions, as already stated, we are unable to cull out a requirement of recording of reasons and communication of such reasons to the noticee, even at the stage of consideration of the *reply to the show cause notice. Sub-Rule 4 of Rule 4 imposes an obligation on the adjudicating Authority to explain to the noticee or to his legal practitioner or to his chartered accountant, the contraventions alleged to have been committed with reference to the provisions of the Act, of the Rules, Regulations, notifications or any condition subject to which an authorisation is issued by the Reserve Bank of India, in respect of which the contravention is alleged to have taken place.*

20. The primary reason behind the conclusions of the Bombay High Court appear to be the serious consequences, which would be inflicted upon the noticee against whom an adjudication order may be passed under Section 13 of the Act. The consequences of a factual finding relating to contravention that may be reached by the adjudicating Authority after a full fledged enquiry, cannot, in our considered opinion, form the basis for the Court to read into the provision something more than what is required on a plain reading of the provision. Even the Bombay High Court in paragraph 14 has said that the adjudicating Authority can dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order.

21. A perusal of the proceedings of the 2nd *respondent dated 04.11.2016, a copy of which has admittedly been handed over to the petitioner/ appellant would show that the adjudicating Authority has done precisely this, postponing the consideration of the objections to be taken up at the time of the final enquiry as the objections in his opinion would require detailed consideration.*

...

26. We find ourselves in complete agreement with the views of the learned Single Judge in Ramakrishna Settu Vs. The Special Director, Directorate of Enforcement, Southern Region, Sastri Bhavan, Chennai -600006 case cited supra. We are unable to persuade ourselves to agree with the decisions of the Bombay High Court inasmuch as they read into the provision, the requirement which is not contemplated under the Rules. We are therefore of the view that the adjudicating Authority is not under any statutory obligation to communicate his reasons for forming an opinion to conduct an enquiry under sub-Rule 3 of Rule 4 of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. We may draw an analogy with the provisions of the Prevention of Money-Laundering Act, 2002. Section 5(1) of the said Act as amended by the Amendment Act, 2012 reads as follows:

(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the

Director for the purpose of this section, has reason to believe (the reason for such belief to be recorded in writing) on the basis of material in his possession, that#

27. Whenever a statute requires a particular thing to be done in a particular manner, it is a trite position of law that it should be done in that manner alone and not otherwise. The provisions of sub-Rule 3 of Rule 4 in contra distinction to the provisions of the Section 5(1) of the Prevention of Money-Laundering Act, 2002, do not require the reasons to be recorded in writing. If we are to read into the provision, such a requirement, the same in our considered opinion would lead to disastrous results, where notices under various enactments which provide for enquiry on the basis of a subjective satisfaction of the adjudicating Authority or the enquiry officer or the Disciplinary Authority would take a stand that those Authorities should also record their reasons for forming an opinion and communicate the same."

10. The learned counsel for the respondent would contend that the judgement of the Madras High Court is the later judgement, which is to be followed since the judgements relied on by the petitioners are referred and the interpretation of Rule 4(3) was considered. The spirit of Rule 4(3) is to be holistically understood with reference to the earlier and subsequent

procedures contemplated under Rule 4. Rule 4(3), cannot be read in isolation so as to carve out an additional opportunity, which is otherwise not contemplated under Rule 4(3).

11. Procedures are to be read as it is and the Court cannot expand the scope of the procedures so as to provide any additional opportunity or otherwise. In the absence of any challenge, scope of the procedures contemplated under the Rules are to be followed as it is and any expansion would result in derailing of the procedures, which is otherwise contemplated under the Rules. Inconsistency may also arise in such circumstances, which exactly arose in the present case. The inconsistency in interpretation arose on account of the expansion of Rule 4(3) offered by the Bombay High Court. Bombay High Court, while interpreting Rule 4(3), expanded the scope by stating that the term "The adjudicating authority is of the opinion that an enquiry should be held, would mean that the opinion formed must be communicated to the person concerned, enabling them to defend the case". Therefore, in the opinion of this Court, it amounts to an expansion, providing an additional opportunity to the person to get the copy of the opinion recorded in writing by the adjudicating authority in the file, which is not contemplated under Rule 4(3).

12. Let us now consider the scope of Rule 4 in entirety. Rule 4 denotes **“Holding of enquiry”**.

13. Rule 4(1) states that, “*For the purpose of adjudicating under section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, the Adjudicating Authority shall, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.”* Therefore, Rule 4(1) indicates that a show cause notice is to be issued by the adjudicating authority within such period as may be specified in the notice stating that why an enquiry should not be held against the person.

14. Rule 4(2) states that “*Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him*.” Therefore, the show cause notice issued to the person would contain the nature of contraventions and the materials based on which the show cause notices were issued. Therefore, the show cause notice cannot be construed as blanket, but the contraventions or the nature

of contraventions, which all are intimated to the persons enabling them to respond to the show cause notice. On receipt of the show cause notice, the addressee is at liberty to respond to such show cause notices. On receipt of such explanations/objections, documents if any submitted by the addressee, the adjudicating authority has to invoke Rule 4(3) of the Rules.

15. Rule 4(3) commences by stating that " *After considering the cause, if any, shown by such person, the Adjudicating Authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him.*"

16. Let us examine the spirit and intent of Rule 4(3). On issuance of show cause notice by the adjudicating authority along with the materials relating to contraventions and on receipt of the explanations from the persons/addressee, the adjudicating authority under Rule 4(3) has to consider the cause if any shown by such person. That would indicate that the explanation submitted is to be considered. On such consideration, if the

adjudicating authority is of an opinion that an enquiry should be held, then he shall issue notice. Therefore, the opinion under Rule 4(3) is to be construed as personal satisfaction of the authority to proceed further and such personal opinion formed by the adjudicating authority must be recorded in the file so as to ensure that further proceedings are not continued without considering the explanations and the materials available on record. In other words, the show cause notice issued relating to contraventions explanations submitted by the addressee are considered together and an opinion is formed for the purpose of conducting an enquiry.

17. A question arises, as to mere forming of an opinion would be a ground to penalize a person. It is an opinion which is to be construed as prima facie for the purpose of proceeding with the hearing opportunity and such an opinion formed, even as per the Bombay High Court judgement, is not appealable and would not provide any cause for challenging the said opinion. When such an opinion of the adjudicating authority is not appealable and not challengeable, then communicating the same would be a futile exercise because the persons were already intimated about the contraventions and they have submitted their explanations at the first instance and further defence would arise only on commencement of

enquiry proceedings by the adjudicating authority. Therefore, the scope of Rule 4(3) cannot be expanded unnecessarily so as to provide an additional cause by intimating the opinion formed by the adjudicating authority to proceed with the personal hearing.

18. On forming of an opinion under Rule 4(3), the adjudicating authority shall issue a notice fixing a date for the appearance of the person, either personally or through his legal practitioner. Therefore, the opinion is the point, where the enquiry commences and such an opinion formed would not be a ground to penalize a person. The opinion is formed by the adjudicating authority to proceed with the personal hearing and not for any other purposes. Therefore, intimating such an opinion formed by the adjudicating authority to the persons are unnecessary and not contemplated under Rule 4(3). Therefore, Rule 4(3) cannot be interpreted beyond its scope and the procedures contemplated under Rule 4 in entirety are to be considered holistically to understand whether a fair opportunity has been provided to the persons or not.

19. Rule 4(4) stipulates that *"On the date fixed, the Adjudicating Authority shall explain to the person proceeded against or his legal*

practitioner or the chartered accountant, as the case may be, the contravention, allowed to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, directions or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place." Therefore, the adjudicating authority is duty bound to explain to the person proceeded against or his legal practitioners about the contraventions alleged to have been committed. Communicating the formation of opinion and the reasons will be informed to the person or his legal representative by the adjudicating authority under Rule 4(4) of the Rule. On receipt of such materials from the adjudicating authority on the hearing date the person concerned is at liberty to defend his/her case by following the procedures as contemplated under Rule 4(5) to 4(12) of the Rules.

20. When Rule 4(4) unambiguously contemplates that the reason for proceeding with the adjudication must be informed to the persons or to the legal practitioners or to the Chartered Accountants, and the such information should be provided along with the allegations and the provisions of the Act and Rules. The said rules contemplates providing of

information to the persons and therefore, Rule 4(3) cannot be construed as violating the Rules of Natural Justice or contravening any of the provisions of law. Rule 4(3) and Rule 4(4) should be read constructively so as to understand that a fair opportunity has been provided. Communicating the opinion of the adjudicating authority under Rule 4(3) may not be required since the adjudicating authority is bound to provide all such information along with the provisions under Rule 4(4) of the Rules. Therefore, Rule 4(3) cannot be read in isolation and it is to be read along with Rule 4(4) for constructively interpreting the procedures so as ensure that fair opportunity has been provided under the Rules and the Rules of Natural Justice has been complied with.

21. Though this Court had an opportunity to consider the Bombay High Court Judgement, relied on by the Delhi High Court and the Kolkata High Court, the later judgement of the Division Bench of the Madras High Court is more relevant with reference to the spirit of Rule 4 in entirety including Rule 4(3). The scope of rules/procedures cannot be expanded by the High Court in exercise of the powers of the judicial review under Article 226 of the Constitution of India. The procedures, as contemplated under the Rules, are to be read as it is and any expansion providing

additional opportunity, would undoubtedly cause prejudice to any one of the parties and would provide further cause for the purpose of prolonging and protracting the proceedings. The practice of prolonging and protracting the enquiry proceedings by approaching the High Court at each stage cannot be appreciated. Once the proceedings are commenced, the adjudicating authorities are expected to follow the procedures scrupulously and the persons concerned are bound to cooperate and defend their case by availing the opportunities to be provided in accordance with the Rules in force.

22. In view of the fact that the judgement of the Division Bench of the Madras High Court, in the case of India Cements Limited, sited supra, is the latest judgement, wherein the interpretation of Rules 4(3) offered by the Bombay High Court was considered, this Court is bound by the decision of the Division Bench of High Court of Madras.

23. When the interpretation offered by the Bombay High Court, in ***Shashank Vyankatesh Monohar*** case has not been followed by the division bench of Madras High Court, the validity of the circular lapses automatically. Therefore, the Enforcement Directorate has to issue suitable

orders cancelling the circular.

24. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

30.04.2024

Index : Yes
Speaking Order
Neutral Citation : Yes
(sha)

To

Directorate Of Enforcement,
Through Special Director,
Directorate Of Enforcement,
Chennai,
South Regional Office,
Government Of India,
Shastri Bhawan, III Floor, III Block, B Wing,
26 Haddows Road, Chennai-600 006.

S.M.SUBRAMANIAM. J.,

(sha)

W.P.No.374 of 2024

30.04.2024