IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **29.04.2024**

CORAM :
THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P. No.11917 of 2024
and
W.M.P.Nos.13016, 13017, 13019 & 13044 of 2024

The Hongkong and Shanghai Banking Corporation Limited (HSBC),
No.7, M.G.Road,
Bengaluru – 560 001,
represented by its Authorised signatory. ... 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 is filed under Article 226 of Constitution of India, for issuance of writ of Certiorarified Mandamus, to call for the original records pertaining to impugned notice dated 04.04.2024 with ref No.F.No.T-4/SRO/SDE/BGZO/09/2023 issued by the Respondent which are connected with proceedings emanating from Show Cause Notice bearing F.No.T-f/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 (3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 and quash the impugned notice dated 04.04.2024 with ref.No.F.No.T-4/SRO/SDE/BGZO/09/2023 issued by the respondent and consequently direct the respondent to communicate the reasons which it formed an opinion to proceed with inquiry against the petitioner in terms of Rule 4(3) of the Foreign Exchange Management (Adjudication proceedings and Appeal) Rules, 2000.

For Petitioner	: Mr.Harish Narasappa, Senior Counsel for Mr.T.K.Bhaskar
For Respondent	: ARL.Sundaresan Additional Solicitor General of India Assisted by Mr.Rajnish Pathiyil Senior Panel Counsel for ED

O R D E R

The lis on hand has been instituted challenging the adjudication proceedings dated 04.04.2024 under FEMA 1999 in show cause notice dated 09.06.2023. In short, fixation of personal hearing is under challenge in the present writ proceedings.

2. The petitioner is a scheduled commercial bank and carries out the banking business in India as per the license granted by the Reserve Bank of India in terms of Reserve Bank of India Act, 1934.

3. A Show cause notice has been issued by the Directorate of Enforcement, Southern Regional Office at Chennai on 09.06.2023.

4. Mr.Harish Narasappa, learned Senior Counsel appearing on behalf of the petitioner would submit that the petitioner/Bank responded to the show cause notice. Thereafter, a personal hearing note was issued on 06.10.2022. The personal hearing was conducted on 22.12.2023 and on that day, Mr.Harish Narasappa, learned Senior Counsel appeared on behalf of the noticee no.5 and advanced arguments that a copy of the reasoned opinion formed under Rule 4 (3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000 (hereinafter referred to as "Act") has not been provided. Since, the impugned personal hearing notice was issued on 04.04.2024, without providing reasoned opinion formed under Rule 4 (3) of the said Rules, the writ petition came to be instituted.

5. Learned Senior Counsel for the petitioner would further submit that it is mandatory on the part of the respondent to furnish the reasoned opinion recorded for the purpose of proceeding with the case. Thus, fixing date for personal hearing without furnishing the reasoned opinion is in violation of the Rules and the Judgment of the Bombay High Court and the consequential circular issued by the Directorate of Enforcement on 26.09.2024, implementing the Judgment of the Bombay High Court as affirmed by the Hon'ble Supreme Court of India. Further, it is submitted that the learned single judge of High Court of Madras also followed the Bombay High Court judgment with reference to Rule 4 (3) as state above.

6. Mr.ARL.Sundaresan, learned Additional Solicitor General of India appearing on behalf of the respondent would oppose by stating that plain reading of the Rule would explicitly reveal that it is not mandatory on the part of the Enforcement Directorate to furnish the copy of the reasoned opinion recorded in the file. It is only for the purpose of forming an opinion by the competent Authority for proceeding further. Therefore, it is not mandatory under the Rules to serve copy of the recorded reasoned opinion to the persons against whom actions are initiated. The Bombay High Court

Judgment has been considered by the Division Bench of the Madras High Court, in the case of ***India Cements Vs. Union of India & Ors.*** reported in ***MANU/TN/2509/2018.*** Learned Additional Solicitor General of India would refer the following paragraphs:

> *"6. The learned Single Judge who heard the writ petition along with other cases, after elaborate discussions of the rival contentions with reference to the provisions of the Rules, concluded that such a requirement of communication of the reasons which forms the basis of the opinion are not mandatory. The learned Single Judge also took note of proceedings dated 04.11.2016, wherein, he had, after considering the explanation offered by the petitioners concluded that the contents of the complaint and the reply necessitate an in-depth examination and that an enquiry should be held in this case. The learned Single Judge was of the opinion that this would satisfy the requirements of Rule 4(3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. On the above conclusion, the learned Single Judge dismissed the writ petition. Aggrieved, the petitioner in W.P.No.1748 of 2017 has come forward with this appeal.*
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> ....
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> *11. The learned Senior Counsel would also point out that the judgment of the Bombay High Court in Shashank Vyankatesh Manohar V. Union of India and onother cited supra was followed by another Division Bench of the Bombay High Court in Lalit Kumar*

Modi v. Special Director, Directorate of Enforcement referred to supra. By relying upon the observations of the Bombay High Court in the above two judgments, the learned Senior Counsel would contend that a duty is cast upon the adjudicating authority to record its reasons for arriving at an opinion to proceed with the enquiry and communicate such reasons to the noticee to enable the noticee to put forth his defence. In the absence of strict compliance of the provisions of sub-Rule 3 of Rule 4, the Authority cannot proceed with the enquiry. The learned Senior Counsel would further submit that the learned Single Judge erred in not following the ratio of the decisions of the Division Benches of the Bombay High Court.

12. Mr.P.R.Raman,learned Senior Counsel would also point out that the Special Leave Petition filed by the Union of India challenging the judgment in Shashank Vyankatesh Manohar v. Union of India and another referred to supra was rejected by the Hon'ble Supreme Court on 04.07.2014. A downloaded record of the proceedings of the Hon'ble Supreme Court has also been produced before us.

....

23. This Court had in fact disagreed with the interpretation of the Division Bench of the Bombay High Court in Shashank Vyankatesh Manohar v. Union of India and another cited supra. Mr.P.R.Raman, learned Senior Counsel appearing for the appellant would draw our attention to the judgment of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. v. Income-Tax Officer and others reported in MANU/SC/1053/2002 : (259) ITR 19,wherein, the *provisions of Section 148 of the Income Tax Act were considered and the Hon'ble Supreme Court held that while reopening an assessment under Sections 147 and 148 of the Income Tax Act, the Assessee whose assessment is sought to be reopened is entitled to seek from the Assessing Officer, the reasons recorded for reopening the assessment."*

7. The Division Bench of the Madras High Court confirmed the order of the learned Single Judge in the case of ***Ramakrishna Setty Vs. The Special Director, Directorate of Enforcement, Chennai*** dated 25.08.2014 in W.P.No.20592 of 2014. The Division Bench judgment of the Madras High Court considered the ratio laid down by the Bombay High Court Judgment. When the Bombay High Court judgment has been considered by the Division Bench by this Court, the Technical circular dated 26.09.2014, issued in implementation of the Bombay High Court judgment cannot be relied upon. The circular was issued in the year 2014 and the Division Bench of the Madras High Court considered the issues with reference to the Rules and delivered judgment on 05.06.2018. Thus, the later judgment would prevail.

8. Considering the arguments as advanced between the learned Senior Counsel appearing on behalf of the petitioner and the learned

Additional Solicitor of India appearing on behalf of the respondent, let us look into the spirit of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000. The Rule 4 reads as under:

*"**4. Holding of inquiry-***

(1) 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.

(2).....

(3) 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.

(4) 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, alleged to have been committed by such person indicating the provisions of the Act or rules, regulations, notifications, direction 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.

....”

9. Rule 4(3) unambiguously stipulates 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 the date of appearance of that person either personally or through his legal practitioner or Chartered Accountant duly authorised by him.

10. Plain reading of the Rule reveals that there is no express provision or intention to communicate such reasons to the person against whom the proceedings are initiated by the Enforcement Directorate. Only through judicial interpretation by the Bombay High Court, the scope of the Rule has been expanded for the purpose of communicating the reasoned opinion to the person against whom proceedings are initiated.

11. Incorporating additional clause or expanding the provision undoubtedly would cause prejudice to the interest of the Department for further investigation or process. It is an initial stage after show cause notice,

where competent Authority has to form an opinion under Rule 4 (3) for the purpose of proceeding with the enquiry or to drop all further proceedings by exonerating the persons. Therefore, it would be sufficient, if the reasons are recorded in the file as stipulated under the Rules. It is the decision taken by the competent Authority to proceed further. The Rule to form opinion is intended to ensure that the Authority has applied his/her mind on the issues. Thereafter, opportunity will be given to the parties as per Rules.

12. That apart, furnishing of reasons may hamper the further proceedings and pertinently, 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 alleged to have been committed by such persons indicating provisions of the Act or of Rules, regulations, notifications, directions, 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 been taken place.

13. Rule 4(5) to 4(12) contemplate procedures to be followed for the

purpose of holding of enquiry. Therefore, it is self regulated mechanism provided under the Rules and interference by the High Court by exercising powers of judicial review by expanding the scope of the Rules by incorporating additional condition become unnecessary. The procedures contemplated under the Rules are in consonance with the Rules of natural justice.

14. The scope of the Rules are to be read as it is and judicial expansion of Rule is ordinarily impermissible. Rules contemplate procedures and such procedures are to be adopted as stipulated in the Rules. In the present case, Rule 4(3) unambiguously stipulates that after considering the cause, if any, shown by such person in response to the show cause notice, the Adjudicating Authority is of the opinion that an inquiry should be held, he shall issue a notice fixing the date of appearance of that person. Therefore, the Rule contemplates for forming an opinion by the competent Authority to his satisfaction, which is to be recorded in writing in the file. It is a check and balance contemplated on the competent Authority to proceed with the case and such a check provided under the Rules cannot be expanded for the purpose of furnishing the reason to the person against whom the proceedings

are initiated.

15. Act and Rules contemplate check and balance to ensure that a person subjected to the proceedings get fair opportunity. However, expanding scope of the Rule under the guise of fair opportunity would defeat the purpose of the Rule and the procedures contemplated therein. Therefore, judicial expansion of scope of the Rule, if causes prejudice to the interest of the proceedings, the same need not be adopted. The plain reading of the Rule would indicate that the Adjudicating Authority has to form an opinion for the purpose of issuing a show cause notice by fixing the date for appearance of the person either personally or through his legal practitioner or a Chartered Accountant. Such a plain procedure contemplated cannot be further interpreted for the purpose of providing a scope for the person to seek the reasons formed by the Authorities. The Division Bench of the Madras High Court, in the case of ***India Cements vs. Union of India*** considered the Bombay High Court Judgment as confirmed by the Hon'ble Supreme Court of India in the S.L.P., at the admission stage and the principles laid down by the learned Single Judge in the case of ***Ramakrishna Setty.*** *De horse* the

decisions, reading of the Rules would indicate that furnishing the reasons to the persons is not mandated nor expressly stated. Therefore, entertaining a writ petition during the intermittent stage would hamper the proceedings.

16. Therefore, this Court is not inclined to encourage such writ petitions filed. Contrarily, the petitioner have to defend their case by availing the opportunities to be provided by the respondent in consonance with the procedures as contemplated under the Rules.

17. A writ against a show cause notice or a personal hearing notice is normally not entertainable under Article 226 of Constitution of India, unless such notices are issued by an incompetent authority having no jurisdiction or tainted with the allegations of malafide. In the present case, the learned Senior Counsel raised a ground that Rule 4(3) has not been complied with. However, Rule 4(3) does not contemplate any such procedure and the Rule stipulates that the Adjudicating Authority has to form an opinion before issuing a notice fixing the date of appearance of the person. That being the scope of the Rule, further expansion is impermissible and the petitioner is at liberty to participate in the proceedings by availing the opportunities to be

provided in the manner contemplated under the Act and Rules.

18. With this observations, the writ petition stands **dismissed** at the admission stage itself. No costs. Consequently, connected miscellaneous petitions are clos

29.04.2024

Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No
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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.

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W.P. No.11917 of 2024

29.04.2024