IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2024

CORAM

**THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM**

W.P.Nos.13268 & 13276 of 2020
and
W.M.P.Nos.16394, 16396, 16401 & 16402 of 2020

Auro Logistics Limited,
Rep. by its Authorised Signatory. ... Petitioner in W.P.No.13268 of 2020

R.Swarup Reddy ... Petitioner in W.P.No.13276 of 2020

**Vs.**

1. The Assistant Director (SRO),
Directorate of Enforcement,
Southern Regional Office,
Shasthri Bhavan,
IIIrd Block, IIIrd Floor,
No.26, Haddows Road,
Chennai- 600 006.

2. The Special Director,
Directorate of Enforcement,
Southern Regional Office,
Shasthri Bhavan,
IIIrd Block, IIIrd Floor,
No.26, Haddows Road,
Chennai- 600 006.

3. The Additional Director,
Directorate of Enforcement,

Southern Regional Office,
Shasthri Bhavan,
IIIrd Block, IIIrd Floor,
No.26, Haddows Road,
Chennai- 600 006. ... Respondents in both the writ petitions

**Common Prayer :-** Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorari, calling for the record of the 1st Respondent in the notice dated 9-9-2020 in reference No.T-4/10/HYZO/SRO /2018 and quash the same.

For petitioners
in both the Writ Petitions : Mr.Jayant Mehta,
Senior Advocate

For Respondents
in both the Writ Petitions : Mr.A.Kumaraguru,
Senior Standing Counsel,
for Central Government

**COMMON ORDER**

The personal hearing notice, dated 09.09.2020, issued by the Assistant Director (SRO), directing the petitioner to appear before the adjudicating authority, i.e., the Additional Director, Directorate of Enforcement, is sought to be quashed in the present writ petitions.

2. The writ petitioners are Auro Logistics Ltd. and R.Swarup Reddy, CEO, and the Show Cause Notice was originally issued by the Special Director (adjudicating authority) to the writ petitioner company vide proceeding dated 23.2.2018 on the ground that a complaint bearing No.T-

3/13-HZO/2009 dated 29.1.2018, under Sub Section 3 of Section 16 of the Foreign Exchange Management Act 1999, has been filed before the competent authority. With reference to the alleged violations committed under FEMA Act, the Show Cause Notice was issued by the Special Director (Adjudicating Authority) vide proceeding dated 23.2.2018.

3. In response to the said Show Cause Notice, the petitioners admittedly submitted reply on 11.03.2020 and 04.05.2020.

4. Thereafter, the Additional Directorate of Enforcement has taken up inquiry proceedings in view of the subsequent notification issued by the Government of India on 27.09.2018. By virtue of the notification issued, the Additional Director became the adjudicating authority under the provisions of the FEMA Act and therefore, the impugned notice was issued fixing personal hearing, enabling the petitioner to appear and defend their case by availing opportunities to be provided under the provisions of the Act and Rules.

5. The learned Senior Counsel Mr.Jayant Mehta, appearing on behalf of the writ petitioners would contend that the Show Cause Notice is

untenable in view of the specific provisions under the FEMA Act and the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000. When the Act intended specific performance of the Authority, such authority alone is empowered to perform such duties as contemplated under the Act and Rules and in the present case, the adjudicating authority was originally the Special Director and the impugned Personal Hearing Notice had been issued stating that the Additional Director became the adjudicating authority pursuant to the notification dated 27.09.2018 and therefore, the impugned Show Cause Notice is liable to be set aside.

6. The learned Senior Counsel Mr.Mehta would further contend that the Special Director (adjudicating authority) is the higher authority to the Additional Director (adjudicating authority) and once the Show Cause Notice has been issued by the Special Director in his capacity as an adjudicating authority, the said proceedings cannot be further transferred to the lower authority and such an adjudication is impermissible under the provisions of the FEMA Rules and thus, the impugned notice is to be set aside.

7. Mr. Jayant Mehta would further contend that mere enhancement of pecuniary jurisdiction by way of notification dated 27.09.2018 would not

have any retrospective application so as to obstruct the proceedings already instituted by the Special Director (adjudicating authority) under the FEMA Act. For all these reasons, the impugned Personal Hearing Notice is to be set aside for want of jurisdiction.

8. The learned Senior Central Government Standing Counsel, Mr.Kumaraguru would oppose the contention by stating that the notification was issued in exercise of the powers conferred under Section 16 of the FEMA Act and the pecuniary jurisdictions of the authorities underwent changes periodically and by exercising the powers the Personal Hearing Notice was issued, which cannot be construed as violations of the provisions of the Rules. No doubt, the original Show Cause Notice was issued by the Special Director, who was the adjudicating authority at the time of institution of the proceedings. Subsequently, the Ministry of Finance, issued notification dated 27.09.2018 and therefore, the Additional Director of Enforcement became the adjudicating authority. Thus, all further proceedings have to be continued by the adjudicating authority in view of the subsequent notification dated 27.09.2018.

9. The learned Senior Counsel Mr.Jayant Mehta would rely on the judgement of the Hon'ble Supreme Court in the case of ***Tata Chemical***

***Ltd. vs. Commissioner of Customs (2015)11 SCC 628***, so as to establish that *"there can be estoppal against the law. If the law requires that something to be done in a prescribed manner, and if not done in that manner, it has no existence in the eyes of law"* and further contended that he have no quarrel on the proposition since the question raised would be the authority competent who has to conduct further inquiry under the provisions of the FEMA Act.

10. The case of ***Cannon India Vs. Commissioners of Customs, (2021) 18 SCC 563***, is relied upon, wherein the Hon'ble Supreme Court held as follows:

> *"11. There are only two articles "a (or an)" and "the". "A (or an)" is known as the indefinite article because it does not specifically refer to a particular g person or thing. On the other hand, "the" is called the definite article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word "any".*

11. The Bombay high Court in the case of ***Shashank Vyankatesh Manohar Vs. Union of India (2014) 1 Mh.L.J. 838*** while considering the

rules held as follows.

*"11. It is the case of the petitioner that Special Director is not following the mandate of the Adjudication Rules while adjudicating the show cause notices. In such a case, if the case of the petitioner is correct, it becomes the duty of this Court to ensure that the authorities comply with the statutory provision while adjudicating the show cause notices. It would be convenient to reproduce Rule 4 of the Adjudication Rules, which reads as under:--*

*"4: **<u>Holding of inquiry:-</u>***

*(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) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him.*

*(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 duly*

*authorized 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 of rules, regulations, notifications, direction or orders or any condition subject to which an authorization is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place.*

*(5) The Adjudicating Authority shall, then, give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to a future date and in taking such evidence the Adjudicating Authority shall not be bound to observe the provisions of the Indian Evidence Act, 1872.*

*(6) While upholding an inquiry under this rule the Adjudicating Authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the Adjudicating Authority may be useful for or relevant to the subject-matter of the inquiry.*

*(7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Authority, the Adjudicating Authority may proceed with the adjudication proceedings in the absence of such person after recording the reasons for doing so.*

*(8) If, upon consideration of the evidence produced before the Adjudicating Authority, the Adjudicating Authority is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit, in accordance with the provisions of Section 13 of the Act.*

*(9) Every order made under sub-rule (8) of Rule 4 shall specify the provisions of the Act or of the rules, regulations, notifications, direction or orders or any condition subject to which an authorization is issued by the Reserve Bank of India in respect of which contravention has taken place and shall contain reasons for such decisions.*

*(10) to (12)......."*

*12. On reading the above Rule, particularly sub-rules (1) and (3) thereof, it is clear that on the issue of show cause notice, a noticee is permitted to submit his reply to the same. In terms of the above Rule, the Adjudicating Authority has to consider the objections raised by the noticee and only if he forms an opinion that an inquiry should be continued further that the Adjudicating proceedings can be proceeded with, by issuing a notice for personal hearing. However, if the Adjudicating Authority is satisfied that the objections raised to the notice are valid, he may drop the show cause notice. The provision as found in Rule 4 of the Adjudication Rules is a unique provision. The Counsel for the parties were not able to point out any similar rules under which a two tier* *adjudication of a show cause notice is provided for in any other statute. Normally, once a show cause notice has been issued, the Adjudicating Authority deals with all the objections of the noticee, be it preliminary as well as any other defence, by passing one common order of adjudication. The fact that the legislature has provided in Rule 4 of the Adjudication Rules that on issue of notice, the noticee can object to the same and this objection has to be considered by the Adjudicating Authority for forming an opinion to proceed further with the show cause notice would require giving some meaning to it, otherwise it would be rendered otiose."*

12. The learned Senior Counsel, relying upon the above judgements reiterated that the authority originally issued the Show Cause Notice alone would be competent to continue the inquiry proceedings and no other authority other than the Special Director is empowered to continue the inquiry in the present case. The notification issued by the Government of India in the year 2018 cannot be applied retrospectively. Thus, the Personal Hearing Notice impugned in the writ proceeding is to be set aside.

13. Mr.A.Kumaraguru, learned Central Government Standing Counsel would oppose the above submission by stating that the judgements

relied on would have no application in view of the fact that the notification was issued fixing pecuniary jurisdiction for the authorities and such notifications are issued periodically, considering the work load, administrative exigencies and other factors and no doubt, the notification will be implemented prospectively from the date of issuance of notification. In the present case, the case was transferred from Special Director to Additional Director after publication of the notification on 27.09.2018 and thus, the grounds raised regarding the retrospective application has no relevance in the present case.

14. Considering the arguments as advanced between respective learned Senior Counsel and learned Central Government Standing Counsel, let us first consider Section 2(b) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, which defines "Adjudicating Authorities" means "*an officer appointed by the Central Government under Sub Section (1) of Section 16 of the Act*". Section 16 of the Act provides appointment of the Adjudicating Authority. Sub Section 1 stipulates that "*for the purpose of adjudication under Section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as*

*the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under Section 13, against whom a complaint has been made under Sub Section (3) a reasonable opportunity of being heard for the purpose of imposing any penalty*".

15. Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, would contemplate the procedures to be followed by the adjudicating authority for conducting an adjudication.

16. In the present case, the point of jurisdiction has been raised. Section 2 (b) of the FEMA Act also defines "Adjudicating Authority" means an officer appointed by the Central Government under subsection (1) of Section 16 of the Act. That being so, the Court has to find out, who is the adjudicating authority under the Act in the present case for the purpose of conducting an adjudication.

17. No doubt, the final Show Cause Notice was issued by the Special Director on 23.02.2018. In response to the Show Cause Notice, dated 23.02.2018, the petitioners submitted two reply letters dated 11.03.2020 and 04.05.2020. In between the Government of India revised the pecuniary jurisdiction of the adjudicating authorities vide notification

dated 27.09.2018. The said notification was issued in exercise of the powers conferred by Section 16 of the Foreign Exchange Management Act, 1999, in supersession of the earlier notifications. The said notification reads as under:

> *"S.O. 4990(E).-In exercise of the powers conferred by Section 16 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (ii) vide the number S.O.2564 (E), dated the 30th September, 2014, except as respects things done or omitted to be done before such supersession, the Central Government hereby appoints the following officers of the Directorate of Enforcement specified in Column (2) of the Table below as adjudicating authorities to hold an inquiry for the purpose of adjudication under section 13 of the said Act, involving an amount or value as specified in column (3) of the said Table.*

| ***Sl.No.*** | ***Designation of Officers*** | ***Monetary limit*** |
|---|---|---|
| *(1)* | *(2)* | *(3)* |
| *(1)* | *Director of Enforcement* | *Cases involving amount exceeding rupees twenty five crore* |
| *(2)* | *Principal Special Director of Enforcement* | *Cases involving amount exceeding rupees twenty five crore* |

| ***Sl.No.*** | ***Designation of Officers*** | ***Monetary limit*** |
|---|---|---|
| *3)* | *Special Director of Enforcement* | *Cases involving amount exceeding rupees twenty five crore* |
| *(4)* | *Additional Director of Enforcement* | *Cases involving amount upto rupees twenty five crore but not less than ten crore* |
| *(5)* | *Joint Director of Enforcement* | *Cases involving amount upto rupees ten crore but not less than five crore* |
| *(6)* | *Deputy Director of Enforcement* | *Cases involving amount upto rupees five crore but not less than two crore* |
| *(7)* | *Assistant Director of Enforcement* | *Cases involving amount not exceeding rupees two crore."* |

18. Enhancement of the pecuniary jurisdiction for the purpose of appointing an adjudicating authority cannot be said to be illegal or contrary to the provisions of the Act since the power of appointment of an adjudicating authority is conferred on the Central Government under Section 16 (1) of the FEMA Act. The Central Government is empowered to publish in the official gazette and appoint as many officers of the Central Government as it may think fit as the adjudicating authority for holding an inquiry. Enhancement of pecuniary jurisdiction is inevitable for public institutions. Even in judiciary, pecuniary jurisdictions are enhanced periodically considering the volume of cases pending before various

Courts. Once such pecuniary jurisdiction underwent changes, the consequential action would be to transfer those cases to the appropriate Court holding pecuniary jurisdiction to deal with the case, irrespective of the fact whether it is a superior Court or Subordinate Court. Therefore, appointment of an adjudicating authority of a lower rank would not disentitle the said authority from conducting an adjudication under the FEMA Act and rules. Once the power to appoint an adjudicating authority is conferred on the Central Government and the Central Government, in exercise of power, issued a notification, no doubt the said notification is to be effected with prospective effect. While giving prospective effect, the cases which all are pending before the other authorities must be transferred to the appropriate authority with prospective effect for the purpose of continuance of further adjudication in the manner known to law. In the present case, such a transfer was effected from the file of the Special Director to the Additional Director of Enforcement.

19. The present case has been transferred from Special Director to the Additional Director in view of the enhancement of pecuniary jurisdiction by the Ministry of Finance, Department of Revenue, vide notification dated 27.09.2018. Thus, this Court do not find any

jurisdictional error or otherwise in the matter of continuation of further proceedings under the FEMA Act, by the Additional Director of Enforcement who is empowered to deal with the cases involving amount up to Rupees Twenty Five Crores, but not less than Rupees Ten Crores. In the case of the petitioner, the allegation is for a sum of Rs.11.27 Crores (Rupees Eleven Crores Twenty Sevel Lakhs) and therefore, the transfer of the case from the Special Director to the Additional Director of Enforcement is well within the provisions of the FEMA Act and the grounds raised by the petitioner fails.

20. No writ against a Show Cause Notice is entertainable. A writ against a Show Cause Notice can be entertained only if the notice has been issued by an incompetent authority having no jurisdiction or allegations of malafides are raised. In the present case, the learned Senior Counsel made an attempt to establish that there is a jurisdictional error which would disentitle the Additional Director (adjudicating authority) to continue the adjudication. This Court is of the opinion that the ground raised is untenable and respondents have transferred the case to the Additional Director of Enforcement in view of the notification issued by the Government of India in exercise of the powers under Section 16(1) of the

FEMA Act and thus, this Court has come to an irresistible conclusion that the petitioners are not entitled to the relief as such sought for in the present writ petitions.

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

05.01.2024

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

To

1. The Assistant Director (SRO),
Directorate of Enforcement,
Southern Regional Office,
Shasthri Bhavan,
IIIrd Block, IIIrd Floor,
No.26, Haddows Road,
Chennai- 600 006.

2. The Special Director,
Directorate of Enforcement,
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3. The Additional Director,
Directorate of Enforcement,
Southern Regional Office,
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**S.M.SUBRAMANIAM. J.,**

(sha)

W.P.Nos.13268 & 13276 of 2020

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