IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.07.2024

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

AND

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

W.A.Nos.3520 to 3524 of 2023
and
C.M.P.Nos.28745, 28749, 28748, 28750, 28756 of 2023
& 2240 of 2024

1.M/s.Accord Distilleries & Breweries Pvt. Ltd.,
Represented by its Director
Shri J.Sundeep Aanand,
No.29, Tilak Street, T.Nagar,
Chennai – 600 017. ... Appellant
in WA.No.3520/2023

2.Smt. J.Sri Nisha ... Appellant
in WA.No.3521/2023

3.Shri. J.Sundeep Aanand ... Appellant
in WA.Nos.3522 &
3523/2023

4.Shri. S.Jagathrakshakan ... Appellant
WA.No.3524/2023

Vs.

1.The Special Director,
Adjudicating Authority,

Directorate of Enforcement,
Southern Region,
Shastri Bhavan, III Floor, III Block,
No.26, Haddows Road,
Chennai – 600 006.

2.The Assistant Director,
Authorised Officer,
Directorate of Enforcement,
Government of India,
Ministry of Finance,
Department of Revenue,
3rd, 4th & 5th Floor, Shastri Bhavan – C Block,
No.26, Haddows Road,
Chennai – 600 006. ... Respondents in 5 WAs

Prayer in WA.No.3520/2023: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order passed in W.P.No.21102 of 2023 dated 30.11.2023 on the file of High Court of Judicature at Madras.

Prayer in WA.No.3521/2023: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order passed in W.P.No.21105 of 2023 dated 30.11.2023 on the file of High Court of Judicature at Madras.

Prayer in WA.No.3522/2023: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order passed in W.P.No.21359 of 2023 dated 30.11.2023 on the file of High Court of Judicature at Madras.

Prayer in WA.No.3523/2023: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order passed in W.P.No.21100 of 2023 dated 30.11.2023 on the file of High Court of Judicature at Madras.

Prayer in WA.No.3524/2023: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order passed in W.P.No.21096 of 2023 dated

30.11.2023 on the file of High Court of Judicature at Madras.

For Appellant	:	Mr.R.Sivaraman and Mr.Veerabathran Prasanth M (In WA.No.3520/2023)
	:	Mr.M.R.Venkatesh For Mr.R.Sivaraman and Mr.Veerabathran Prasanth M (In WA.No.3521/2023)
	:	Mr.Sricharan Rangarajan Senior Counsel For Mr.R.Sivaraman and Mr.Veerabathran Prasanth M (In WA.No.3522/2023)
	:	Mr.Abudu Kumar Rajarathinam Senior Counsel For Mr.R.Sivaraman and Mr.Veerabathran Prasanth M (In WA.No.3523/2023)
	:	Mr.S.Manishankar Senior Counsel For Mr.R.Sivaraman and Mr.Veerabathran Prasanth M (In WA.No.3524/2023)
For Respondents	:	Mr.AR.L.Sundaresan ASGOI Assisted by Mr.Rajnish Pathiyil Special Public Prosecutor (In all WAs)

COMMON JUDGMENT

[Judgment was delivered by **S.M.SUBRAMANIAM, J.**]

The Letters Patent Appeal on hand has been instituted questioning the validity of the show cause notice dated 22.12.2021 and the corrigendum issued consequently in proceedings dated 13.03.2023 and the writ order dismissing the writ petition.

2. Since the show cause notice is under challenge, it is necessary for this Court to consider the grounds regarding entertainability of the writ petition at the first instance. Normally, High Court would not entertain a writ petition challenging show cause notice. On exceptional circumstances, show cause notice issued by an incompetent authority having no jurisdiction or tainted with the allegation of *mala fides* are entertained under Article 226 of the Constitution of India.

3. The noticees on receipt of such show cause notice, has to defend their case before the authority competent by availing the opportunities to be afforded under the provisions of Acts, Rules and procedures contemplated

therein. In the present case, the appellants raised grounds regarding the jurisdiction and therefore it becomes necessary for this Court to interpret the scope of the provisions of the Foreign Exchange Management Act, 1999 [hereinafter referred as "FEMA"].

4. Section 2(a) defines "Adjudicating Authority" means an officer authorised under Sub-Section (1) of Section 16.

5. Sub Section (1) to Section 16 contemplates **"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"**. Therefore, Section 16 confers power on the Adjudicating Authority to hold an inquiry in the manner prescribed after affording opportunity to the person against whom contravention under Section 13 are noticed.

6. Section 2 (cc) defines “Authorised Officer” means an officer of the Directorate of Enforcement authorised by the Central Government under section 37A.

7. Section 37A was inserted by Act 20 of 2015 with effect from 15.10.2019. In order to make Section 37A effective, consequential definition for “Authorised Officer” was inserted by Act 20 of 2015 with effect from 15.10.2019. In other words, it necessitated the legislators to incorporate the definition for “Authorised Officer” under Section 2(cc), in view of insertion of Section 37A under the Act. Thus, the Authorised Officer as defined under Section 2(cc) is with reference to Section 37A of FEMA.

8. Section 37A provides special provisions relating to assets held outside India in contravention to Section 4.

9. Section 4 denotes “Holding of foreign exchange, etc., no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India”.

If Section 4 is violated, then the special provision under Section 37A may be invoked by the Authorities. Section 37A(1) enumerates **"Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property"**.

10. The Scope of Special Provision under Section 37A expressly provides power to the authority to seize the property or value equivalent situated within India. Therefore, Section 4 contemplates no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. On receipt of any information, the Authorised Officer under Section 37A is empowered to seize the properties by recording reasons in writing by an order. Thus, Section 37A is all about passing an order by the Authorised Officer to seize the value equivalent to the properties situated within India of such foreign

exchange, foreign security or immovable property acquired in violation of Section 4 of FEMA.

11. Section 37A(2) contemplates that "The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure". Sub Section 3 provides "The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person". Sub Section 4 stipulates "The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under Sub-Section (1)".

12. The Scheme of Section 37A which is a special provision

unambiguously and in unequivocal terms speaks about an interim seizer to be made and the procedures to be followed for effecting such seizer value equivalent situated within India of such foreign exchange, foreign security or immovable property. ***The language employed in Section 37A(4) on its careful reading would indicate that the order of the competent authority confirming the seizer of equivalent assets shall continue till the disposal of adjudication proceedings***. The very language employed would indicate that the adjudication proceeding is distinct and not connected with the seizer proceedings initiated by the Authorised Officer under Section 37A of the Act. The seizer order passed under Section 37A by the Authorised Officer will remain valid till such time the adjudication process is completed, and the Adjudicating Authority dispose of the proceedings under Section 16 of the Act.

13. Sub Section (4) to Section 37A further proceeds by stating that after disposal of adjudication proceedings, Adjudicating Authority shall pass appropriate orders in the adjudication order with regard to the further actions as regard to the seizer made under Sub Section (1) to Section 37A of the Act. Therefore, the Adjudicating Authority is empowered to pass an order dealing

with the interim seizer order passed by the Authorised Officer under Section 37A of the Act.

14. The very spirit of the provisions would indicate that the special provision is enacted so as to ensure seizer value equivalent situated within India of such foreign exchange, foreign security or immovable property during the pendency of the adjudication proceedings. The interim seizer made under Section 37A is to be dealt with by the Adjudicating Authority, while disposing of the adjudication proceedings under FEMA.

15. In the context of the above constructive interpretation of Sections 4, 16 and 37A, it is made clear that action under Section 16(1) is independent and seizer under Section 37A with reference to Section 4 is an interim measure, which is to be dealt with by the Adjudicating Authority, while passing final orders.

16. That apart, the Act contemplates remedial mechanism to the aggrieved persons. An order passed by an Adjudicating Authority is appealable under Section 19 of FEMA. Second Appeal is provided under

Section 35 of the Act before the High Court. Therefore, entertaining a show cause notice in the absence of establishing jurisdictional error is not desirable.

17. In the present case, the show cause notice along with the corrigendum issued are under challenge in the writ proceedings and the Writ Court dismissed the writ petition with a finding that the appellants should participate in the process of adjudication to be conducted under the provisions of the Acts and Rules and thereafter exhaust the remedy as contemplated under the scheme of the enactment.

18. Mr.C.Manishankar, Mr.Abudu Kumar Rajarathinam, Mr.Sricharan Rangarajan, respective learned Senior Counsels and Mr.M.R.Venkatesh, learned counsel appearing on behalf of the appellants made their respective arguments mainly on the ground that an action was initiated under Section 37A of the Act and the order of seizer passed was rejected by the competent authority appointed by the Central Government under Sub Section (2) to Section 37A of the Act. Once the competent authority under Sub Section (2) has rejected the order of seizer passed by the Authorised Officer, there cannot be any further actions by the Adjudicating Authority. Therefore, the show

cause notice impugned and the consequential corrigendum are untenable and without jurisdiction.

19. In order to substantiate the said points, the respective learned Senior Counsels and the learned counsels would contend that Section 37A cannot be read in isolation, since the order of the Authorised Officer under Sub Section (1) to Section 37A has got implications in the adjudication proceedings. When the seizer order itself speaks about non-violation under FEMA, there is no scope for any further adjudication from the hands of the Adjudicating Authority. Therefore, the show cause notice is to be set aside.

20. The respondents / Directorate of Enforcement preferred an appeal before the Tribunal challenging the order passed by the Authorised Officer under Section 37A(1) of the Act and during the pendency of the said appeal, the Adjudicating Authority ought not to have proceeded with the adjudication, which is improper and running counter to the scheme of the Act as spelled out under Section 37A of the Act. The procedures contemplated under Section 37A would reveal that the competent authority shall dispose of the petition within 180 days and Sub Section (4) says that only if the

competent authority confirms the seizer of equivalent assets, shall continue till the disposal of the proceedings. In the present case, the order passed by the Authorised Officer was rejected and therefore, continuance of adjudication proceedings would not arise at all.

21. On behalf of the appellants, further it is contended that, when the competent authority under Section 37A of the Act rejected the order of the Authorised Officer, question of invoking Section 13 would not arise at all. Corrigendum issued is to circumvent the process adopted, which is not in accordance with the scheme of the Act. At the first instance, the respondents have invoked Section 13(2) of the Act and by issuing corrigendum they have replaced Section 13(1A) of the Act only for the purpose of penalising the appellants and such an idea mooted out cannot be sustained in view of the scope under the provisions of the Act.

22. Regarding the entertainability of the writ petition under Article 226 of the Constitution of India against show cause notice, the Hon'ble Supreme Court of India in the case of ***L.N.Phulkan and Ors v. Mahendra Mohan Choudhury and Ors.***[1]***,*** it was observed that:

1 AIR 1965 Assam and Nagaland 74

"20. In the above case it was clearly laid down that even if the powers and privileges claimed and the immunities conferred by Article 194(3) of the Constitution are repugnant to the fundamental right, they will not be void to the extent of the repugnancy. The contention raised in this case on behalf of the Petitioner was that he had a fundamental right under Article 19 of the Constitution and by issuing a notice calling upon him to show cause as to why he should not be dealt with for the breach of the privilege of the House his fundamental right has been affected. This was repelled. Even in the majority opinion of the Supreme Court it has been held that the observations in the case of AIR 1959 SC 395 were confined to the case of a fundamental right under Article 19 of the Constitution. ***Once it is found that the House has got a right to deal with its own contempt or breach of privilege, the notice issued by the Privileges Committee cannot be said to be without jurisdiction and thus the Petitioners will not be entitled to any writ of prohibition. In our opinion thus the Petitioners are not entitled to any relief at this stage of the***

proceedings both on the ground that the quashing of the notice will amount to the quashing of the proceedings of the House which the courts of the land are precluded from doing in view of the provisions of Articles 212 and 194(2) of the Constitution and also on the ground that the House having the power to take action for the breach of its privileges, it must be left to the House itself to determine whether there has in fact been any breach of its privileges and the court will not at this stage interfere with the exercise of such a power by the Privileges Committee. *In this view of the matter it is not necessary for us to go into the question whether the report or the Commissioner in the circumstances of the present case can or cannot be said to be a proceeding or a document of the House and further whether on the face of it the publication constitutes the contempt of the House or not.*

13. Regarding the question raised as to the right of the Petitioners to approach this Court under Article 226 of the Constitution it is sufficient to point out that if we had held that the

notice was without jurisdiction, obviously the Petitioners against whom the notice was issued, had every right to approach this Court under Article 226 of the Constitution for the quashing of the proceedings arising out of the said notice. *In the result, therefore, we reject these petitions. But in the circumstances the parties will bear their own costs.?"*

23. The Hon'ble Supreme Court of India in the case of ***Special Director and Another vs. Mohd. Ghulam Ghose and Another***[2]**,** held that:

"5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the SCNs stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the SCN was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking

2 (2004) 3 SCC 440

and as a matter of routine, and the writ petitioner should invariably be directed to respond to the SCN and take all stands highlighted in the writ petition. Whether the SCN was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, not granted."

24. In the case of ***Union of India and Another vs. Kunisetty Satyanarayana***[3]**,** the Hon'ble Supreme Court reasoned out as to why a Writ Petition is normally not entertained against a 'SCN'. The relevant portion of

3 (2006) 12 SCC 28

the Judgement is extracted below:

> *"**14**. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.*

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

25. In the case of ***Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement and Another***[4], the Hon'ble Supreme Court held that;

"***13.*** *FEMA is a complete code in itself. The long title of FEMA would indicate that the same is*

"An Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange

4 (2010) 4 SCC 772

market in India."

14. *The Act has seven chapters and 49 sections and out of which, Chapter V, which deals with adjudication and appeal, contains detailed provisions starting from Sections 16 to 35, thus spanning 20 sections. Rules styled as the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 have been framed in exercise of powers under Section 46 read with sub-section (1) of Section 16, sub-section (3) of Section 17 and sub-section (2) of Section 19 of FEMA.*

15. *It is thus clear that Chapter V of FEMA, read with the aforesaid Rules, provides a complete network of provisions adequately structuring the rights and remedies available to a person who is aggrieved by any adjudication under FEMA.*

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28. *.....*

29. *By referring to the aforesaid schemes under different statutes, this Court wants to underline that the right of appeal, being always a creature of a statute, its nature, ambit and width has to be determined from the statute itself. When the language of the statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same.*

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31. *.....*

32. *.....*

33. *.....*

34. *....*

35. *.....*

36. *......*

37. *.....*

38. *The learned counsel for the respondents relied on a judgment of this Court in Seth Chand*

Ratan v. Pandit Durga Prasad [(2003) 5 SCC 399] . The learned counsel relied on para 13 of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief."

26. In the context of the above interpretations of the provisions of FEMA and scope of the special provision under Section 37A, let us now look into the factual matrix in nutshell presented before us.

27. It is not in dispute between the parties that an order by the Authorised Officer under Section 37A of FEMA was issued on 03.02.2021. Thereafter, a complaint under Section 16(3) of FEMA was filed by the Authorised Officer on 01.12.2021. The impugned show cause notice was issued by the Adjudicating Authority / Special Director on 22.12.2021. Subsequently, the procedures contemplated under Rule 4(3) of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, were followed and the 1st respondent issued an inquiry notice on 19.07.2022. Opportunity for personal hearing was provided vide notice dated 11.10.2022. The Appellants admittedly participated in the adjudication proceedings. They have submitted their written statement of defence and appeared for personal hearing and availed of the opportunities provided by the Adjudicating Authority and defended their case through their lawyers. The corrigendum was issued by the 1st respondent on 13.03.2023 and even after issuing corrigendum further opportunity of personal hearing was provided at the request of the appellants on 10.04.2023.

28. Pertinently, the compounding application filed by the appellants were considered by the authority and it was returned. After providing

personal hearing at the request of the appellants on the impugned corrigendum proceedings dated 13.03.2023, notice for personal hearing for adjudication proceedings under FEMA was issued on 12.04.2023. The appellant filed reply to impugned corrigendum on 01.05.2023. A personal hearing was held on the same day. Thereafter, the 1st respondent asked the appellants to appear on 17.07.2023. At the final stage of adjudication proceedings, writ petition was instituted challenging the show cause notice and the consequential corrigendum on 12.07.2023.

29. Mr.AR.L.Sundaresan, learned Additional Solicitor General of India appearing on behalf of the respondents would contend that the writ petitions itself were instituted on the verge of the adjudication proceedings, which is not maintainable. The discretionary power under Article 226 of the Constitution of India need not be exercised in such nature of cases, where the Adjudicating Authority has completed the proceedings and about to pass final orders. The stage on which the writ petitions filed, raising certain grounds would be the consideration deliberated by the Writ Court for dismissing the writ petition. There is no other additional ground raised for the purpose of entertaining the present Intra-Court Appeal. Thus, the appeals are to be

rejected.

30. Learned Additional Solicitor General of India would submit that the Authorised Officer passed the seizer order and sent the same to the competent authority, who in turn rejected the order of the Authorised Officer. Appeal has been preferred by the respondents before the Tribunal, which is pending. However, pendency of the appeal against an order passed under Section 37A(1) is not a bar for the Adjudicating Authority to proceed with the adjudication under Section 16(1) of FEMA and therefore, the grounds raised by the appellants are untenable.

31. We concur with the learned Additional Solicitor General of India, in view of the fact that the special provision under Section 37A is all about an interim seizer value equivalent situated within in India of such foreign exchange, foreign security or immovable property. In the event of seizer during the pendency of the adjudication proceedings, the procedures to be followed by the authority are enumerated under Sub Section (6) of Section 37A of FEMA.

32. Therefore, the very purpose and object of inserting Section 37A is to seize value equivalent situated within India of such foreign exchange, foreign security or immovable property during pendency of the adjudication proceedings and such seizer proceedings initiated under Section 37A, undoubtedly cannot stand as a bar to proceed with the adjudication proceedings under Section 16 of the FEMA by the Adjudicating Authority. As noted under the definition, the functions of the Adjudication Authority, Authorised Officer and Competent Authority are distinguishable and each Authority is conferred with powers under the Act to carry out certain actions. Therefore, the contention on behalf of the appellants that the Authorised Officer is below the Competent Authority has no relevance as far as Section 37A of FEMA is concerned.

33. In fine, we could arrive at an irresistible conclusion that a writ against a show cause notice is not entertainable. The adjudication proceedings have completed and the final order is about to be passed by the Adjudicating Authority. Regarding an interim seizer under Section 37A is concerned, it may not have any implication in respect of the final order to be passed by the Adjudicating Authority and it would be appropriate on his part

to deal with the effect of seizer order passed by the Authorised Officer under Section 37A of FEMA, while passing final order under Section 16 of FEMA.

34. The above position has been amply made clear in Sub Section (4) to Section 37A of the Act, wherein, it is contemplated that the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further actions as regards to seizer made under Sub Section (1) to Section 37A and in this case, the Adjudicating Authority is directed to take note of said provision and take an appropriate decision with reference to the order passed by the Authorised Officer under Section 37A(1) of the FEMA.

35. In view of the facts and circumstances, the respondents shall proceed with all further actions and conclude the same as expeditiously as possible. Accordingly, the writ order impugned stands confirmed and the Writ Appeals are dismissed. No costs.

[S.M.S., J.] **[C.K., J.]**
23.07.2024

Jeni
Index : Yes
Speaking order

To

1.The Special Director,
Adjudicating Authority,
Directorate of Enforcement,
Southern Region,
Shastri Bhavan, III Floor, III Block,
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S.M.SUBRAMANIAM, J.
and
C.KUMARAPPAN, J.

Jeni

W.A.Nos.3520 to 3524 of 2023

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