**(1999) 02 MAD CK 0042**

**In the Madras High Court**

**Case No :** W. P. No. 568 and 816 of 1998

B. S. Gandhi APPELLANT

Vs

Union of India (UOI) RESPONDENT

**Date of Decision :** 25-02-1999

**Acts Referred:**
Foreign Exchange Regulation Act, 1973 — Section 19G, 33(2), 34, 36, 37

**Citation :** (1999) CriLJ 2820

**Hon'ble Judges :** K. Govindarajan, J

**Bench :** Single Bench

**Advocate :** M.M. Abdul Razack and Ajmeer Ali, for the Appellant; M.T. Arunan, A.C.G.S.C, for the Respondent

**Final Decision :** Dismissed

## Judgement

K. Govindarajan, J.—The petitioner has filed the above writ petition seeking to issue a writ of Mandamus, directing the respondent to

forthwith return to the petitioner US $12,500/- along with interest yielded so far and documents of five sheets from the possession of the petitioner

on 17-3-1993.

2. It is the case of the petitioner that on 17-3-93 the officers of the respondent searched the office and residential premises of the petitioner and as

a result of that US $12,500/- and documents were seized from the petitioner. Relying on Section 41 of the Foreign Exchange Regulation Act,

1973 (hereinafter called the Act''), the petitioner has come forward with the above writ petition on the basis that the proceedings as contemplated

under Sections 51 or 56 have not been initiated within six months of seizure and so the respondent cannot retain the documents without returning

the same.

3. The respondent filed a counter stating that proceedings under the Act have been initiated against the petitioner on 14-9-1993 by the Special

Director of Enforcement, Government of India, New Delhi. In the said proceedings, he was asked to show cause as to why adjudication

proceedings as contemplated in Section 51 of the Act 1973 should not be held against him for contravention of Section 8(1) and as to why the

foreign exchange of US $12,500/- seized from his office premises on 17-3-93 being the amount involved in Section 8(1) contravention should not

be confiscated to the Central Government in terms of Section 63 of the Act. On the basis of the said facts, it is alleged in the counter that since the

adjudication proceedings u/s 51 of the Act commenced within six months from the date of seizure, the question of returning the same until the

adjudication proceedings are over will not arise.

4. The learned counsel appearing for the petitioner on the basis of the above said admitted facts has submitted that the contention of the

respondent that the proceedings u/s 51 of the Act had been taken within six months from the date of seizure cannot be accepted, as the said show

cause notice did not reach the petitioner within six months, and so, according to the learned counsel, it has to be construed that no proceedings

have been initiated, and the respondent should be directed to return the documents. The learned counsel, has, relied on the decision in Mool

Chand Vs. Union of India (UOI) and Others, wherein the learned Judges of the Rajasthan High Court while dealing with the scope of Sections 41

and 51 of the Act have held as follows:--

In the case of Prem Nath Khanna Vs. Collector of Central Excise and Others, a similar view was taken while considering the terms ''giving''. It will,

therefore, be clear and we are of the opinion that though no limitation for initiation of adjudication proceedings u/s 51 of the Act is prescribed, but

a reasonable opportunity to the person can only be said to have been afforded after the notice to show cause is served on that person and not by

merely despatch of notice to show cause. u/s 41 of the Act a power is vested in any officer of the Enforcement Directorate if he has reason to

believe that the document seized in pursuance of an order made under Sub-section (2) of Section 33 or of the provisions of Section 34 or Section

36 or Section 37 of a requisition or summons u/s 39 or Section 40 would be

 

evidence of the contravention of any of the provisions of the Act, to

retain it for a period not exceeding one year. The document within the meaning of Section 41 as per the explanation to Section 33 of the Act

includes Indian currency also. The retention of the documents beyond a period of one year is also permissible, if before the expiry of period of one

year as aforesaid any proceedings (i) u/s 51 of the Act have been commenced, until the disposal of those proceedings, including the proceedings, if

any, before the appellate Board or the High Court, or (ii) u/s 56 of the Act have been commenced before a Court and documents have been filed

in the Court. Under the Explanation to Section 41 in computing the period of one year during which a document may be retained, the period of

injunction or order of any Court is to be excluded. We are not presently concerned with Explanation to Section 41 of the Act and the retention of

the Indian currency seized as aforesaid is sought to be justified on the ground that adjudication proceedings u/s 51 of the Act as well as

proceedings u/s 56 of the Act have commenced and are pending. There is no dispute that so far as the proceedings of Section 56 of the Act are

concerned, they were commenced much after the expiry of period of one year, but dispute is in respect of the provisions of Section 51 of the Act.

As already stated earlier the search as aforesaid took place on September 17, 1985 and even as per the case of the non-petitioners a show cause

notice u/s 51 of the Act was issued on September 15, 1986 or September 17, 1986, i.e. within one year of the seizure of the Indian currency. It is

contended by Mr. Rathore, learned counsel for the petitioner that though the notice bears the date September 15, 1986 but it was actually

despatched on September 1986. It has also been stated in para 3 of the writ petition that the notice in fact was received by the petitioner on

September 25, 1986. This fact has not been specifically denied and whatever stated is that it is the date of notice which is relevant and not the

service on the petitioner. We have already said earlier that the term ''giving'' means the service of the notice and not its despatch. Therefore, it can

be said that the notice was given when it was served on the petitioner, i.e., on September 25, 1986. Therefore, the adjudication proceedings

cannot be said to have commenced in this case within one year of the seizure of the currency notes (documents). Therefore, the currency notes could not be retained beyond a period of one year, because neither the proceedings u/s 51 of the Act, nor u/s 56 of the Act had commenced

before the expiry of the period of one year.

The learned Judges proceed on the basis that ""commencement"" should be construed as notice under Sections 51 or 56 of the Act and should be

served within one year of seizure so as to enable the authorities to defend that the proceedings were commenced; otherwise the adjudication

proceedings cannot be said to have been commenced within one year of the seizure of the ''currency notes (documents). Even in the above said

decision, the learned Judges though laid down law, factually found that proceedings have already been commenced and the authorities can summon

documents, pending proceedings and so found that documents need not be returned for certain period.

5. In the present case, though the show cause notice was despatched within six months, according to the petitioner, it reached the petitioner after

the expiry of the said period of six months. On that basis and on the basis of the abovesaid decision, the learned counsel for the petitioner has tried

to sustain the prayer sought for in the writ petition.

6. The enforcement authorities of the respondent are empowered to search premises by virtue of Section 37 of the Act. The power of seizure of

documents is conferred on the authorities u/s 38 of the Act. Regarding the documents so seized, the other relevant provision is Section 41 of the

Act which reads as follows:--

Custody of documents, etc., Where in pursuance of an order made under Sub-section (2) of Section 33 or of the provisions of Section 34 or

Section 36 or Section 37 or of a requisition summons u/s 39 or Section 40, any '' document is furnished or seized and any officer of Enforcement

has reason to believe that the said document should be evidence of the contravention of any of the provisions of this Act or of any rule, direction or

order made thereunder and that it would be necessary to retain the document in his custody, he may so retain the said document for a period not

exceeding six months or if, before the expiry of the said period of six months, any proceedings:--

(i) u/s 51 have been commenced, until the disposal of these proceedings, including the proceedings, if any before the Appellate Board and the High

 

Court, or

(ii) u/s 56 have been commenced before a Court, until document has been filed in the Court;

Provided that the aforesaid period of six months may, for reasons to be recorded in writing be extended by the Director of Enforcement for a

further period not exceeding six months.

Explanation:-- In computing the period during which a document (hereinafter in this Explanation referred to as the said document) may be retained

under this Section, in any case where by reason of an injunction or order of any Court (whether such injunction or order is in relation to the said

document or is in relation to any other document reference to which would be necessary for examining or using the said document):--

(a) the said document could not be examined fully for the purpose of determining whether it would be evidence of the contravention of any of the

provisions of this Act or of any rule, direction or order made thereunder; or

(b) the said document could not be used for commencing any proceedings u/s 51 or Section 56, or

(c) the proceedings u/s 51 or Section 56 could not be commenced, the time of the continuance of the injunction or order, the day on which i t was

issued or made and the day on which it was withdrawn, shall be excluded.

From the abovesaid provision, it is clear that the Enforcement authorities are empowered to retain the document seized u/s 38 of the Act for a

period of six months time as stated in Sub-section (1) and (ii) of the Section 41 of the Act. The said period can be extended for reasons to be

recorded in writing, by the Director of Enforcement for a further period not exceeding six months. So, if any proceedings u/s 51 have been

commenced, the respondent-authorities are entitled to retain the documents in question until the disposal of those proceedings, including, if any,

before the Appellate Authority and the High Court. It is relevant to mention here that u/s 51 of the Act to commence the proceedings, there is no

limitation. For the purpose of retaining the documents, the authorities have to commence the proceedings within six months. Otherwise, they have

to return the same. So, the relevant point to be considered to retain the documents by the authorities is whether the adjudication proceedings have

been initiated u/s 51 of the Act.

 

7. u/s 53 of the Act, the adjudicating officer and the appellate Board have power of a civil Court, to summon relevant documents. While

considering the said power of the adjudicating officer, the Division Bench of this Court in, The Enforcement Officer, Enforcement Directorate,

Madras Vs. S.O. Arjunan Chettiar and Others, , has held that mandamus cannot be issued when the officers have got right to summon the

documents after initiating proceedings though the proceedings are started after the prescribed period, u/s 41 of the Act, and observed as follows:--

The position therefore, is that while u/s 19-G, it will not be proper for the Court to direct the return of the documents, for in law, he would be

entitled to have the documents for adjudication purposes. It would be for the purpose of technically obeying the requirements of Section 19-G, if a

direction were to be made for the return of the documents when the officer could exercise his powers to summon them. If a direction to return the

documents is to be issued, it is only for the purpose of making the Enforcement. Officers obey the provisions of the Act. This question had arisen

before the Supreme Court of the United States where the desirability of strict enforcement of Fourth Amendment and the question whether the

evidence procured during any illegal search is to be admitted or not were considered repeatedly. Recently the Supreme Court in a decision,

Assistant Collector of Customs Vs. Charan Das Malhotra, , delivered on 6th July, 1976, went back on its earlier view and held that the basis of

exclusion of evidence to deter the policemen deflects the truth-finding process, and often frees the guilty and is not in conformity with the concept

of justice. Taking all the circumstances into account, we do not think that a writ of mandamus should issue when the officers have got a right to

retain the documents under the other provisions of the Act.

8. In view of the above and in view of the admitted fact that the adjudication proceedings have already been commenced, the writ of mandamus as

sought for cannot be granted. Accordingly, this writ petition is dismissed. No costs. Consequently, W.M.P. No. 816 of 1998 is closed.

 