
(2010) 07 MAD CK 0007

In the Madras High Court

Case No : Writ Petition No. 15059 of 2010

G.K. Muralikrishna, Managing Director, Helios and Matheson
Information Technology Ltd.

APPELLANT

Vs

The Special Director and The Dupty Director, Directorate of
Enforcement

RESPONDENT

Date of Decision : 13-07-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Foreign Exchange Management Act, 1999 — Section 6(2), 6(3)

Citation : (2010) 07 MAD CK 0007

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : T.S. Sridharan, for Pais Lobo and Alvares, for the Appellant; M. Ravindran, Addl. Solicitor General of India for M. Dhandapani, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

V. Dhanapalan, J.—Heard Mr. T.S. Sridharan Learned Counsel appearing for both the writ Petitioner and Mr. M. Ravindran, learned

Additional Solicitor General of India appearing for Mr. M. Dhandapani, learned Additional Government Pleader who takes notice for the

Respondents. What is challenged in these writ petitions is a show cause notice dated 21.01.2010 issued by the adjudicating authority namely the

1st Respondent herein.

2. Petitioner in W.P. No. 15059 of 2010 is the Managing Director of the Company by name M/s. Helios and Matheson Information Technology

Ltd., a Public Limited Company, hereinafter referred to as "H & M.I.T.L.", and the Petitioner in W.P. No: 15060 of 2010 is the former Chairman

of the said Company. It is Petitioners' case that the contravention alleged to have been committed by the Petitioner in furnishing the bank guarantee

to a non resident was on the ground of applicability of Section 6 (3) (1) (J) of the Foreign Exchange Management Act, hereinafter referred to as

FEMA, is not sustainable in law and the issue of guarantee by a resident in India to a non-resident is permissible u/s 6(2) of the said Act and the

regulations made thereunder. The company H & M.I.T.L., in order to expand its business activities agreed to purchase 100% shares of vMoksha

entities and on 11.05.2005 entered into a share purchase agreement, subscription agreement and Escrow agreement with vMoksha Technologies

Ltd., Mauritius and 7 others. As per the terms of their share purchase agreement a like amount will be retransferred to the Petitioner company

which in turn will issue its redeemable preference shares in favour of vMoksha, Mauritius which will be redeemed 18 months from the date of the

issue. For the above share purchase agreement M/s. Price Waterhouse Coopers Pvt. Ltd. acted as advisers to the transaction. vMoksha

deposited the original share certificate and the share transfer form duly signed with the Escrow agents as per the terms of the agreement. The terms

of the share purchase agreement provides that the Petitioner shall apply and secure the approval from the Foreign Investment Promotion Board for

the said investment in non-convertible preference shares in the Company by a non resident. The Government of India, in its proceedings dated

20.06.2005 granted approval for the aforesaid collaboration agreement subject to the condition that the consideration for the investment will be

paid out of the inward remittance of foreign exchange through normal banking channels and to follow the procedure prescribed by the Government

of India in Press Note No: 9 of 99 under which foreign companies will have to bring the requisite funds from abroad and not leverage the same

from the funds from the domestic market.

3. While that being so, vMoksha, Mauritius, in order to remit US \$ 13.5 million equivalent to Rs. 58,37,75,195/- being the consideration for the

allotment of preference shares of the Petitioner, availed credit facilities from the State Bank of Mauritius at Mauritius. In order to comply with the

terms of the share purchase agreement, Petitioners gave a letter of lien and guarantee by both Mr. G.K. Miyalikirishna and Mr. V. Ramachandran

in favour of Chennai Branch of State Bank of Mauritius. The entire sum of Rs. 58,37,75,185/- was remitted to the account of the Petitioner

company at the Chennai Branch of State Bank of Mauritius on 29.06.2005 and it was credited to the account of H & M.I.T.L. and then

retransmitted to the account of vMoksha, Mauritius, towards the consideration for the purchase of three subsidiaries of vMoksha and thereby the

Petitioners have fulfilled the terms and conditions of the contract and in that situation vMoksha committed breach of contract and on such account

dispute arose between Rajeev Shawney and Pawan Kumar, the C.E.O. of the said company. Petitioner, therefore, initiated arbitration proceedings

to resolve the disputes that arose between H & T.I.M.L. and vMoksha and the same is still pending.

4. During the pendency of the above proceedings, a complaint was made by Rajeev Sawhney against the Petitioner. On that basis, the Reserve

Bank of India found that except the complaint pertaining to the alleged contravention of the provisions of FEMA, the other complaints were not

sustainable. Based on the above complaint, the second Respondent ought to have summoned the Petitioners to produce the relevant records.

Without doing so, the officials of the second Respondent, on 12.03.2008, who came to serve the summons, raided the Corporate Office at

Nungambakkam and the Branch Office at T. Nagar simultaneously and seized certain documents relating to the contract referred to above. On

27.11.2008, Petitioners made a representation stating that the letter of lien and guarantee for the retransmission of the amount which would be

credited to its account at Chennai have already been done and again on 15.12.2008 by way of another representation, a clarification was made.

Then it was brought to the notice of the Respondents that the Provisions of Section 6 (2) of FEMA is alone applicable.

5. While that being so, the Respondents, without considering the representations made by the Petitioners, proceeded further based on the

complaint made by Rajeev Sawhney and called upon the Petitioners to explain the charges framed vide its letter dated 21.01.2010. Through

various representations, Petitioners sought for certain documents including those documents seized by the Respondents from Petitioner's office.

But, by a letter dated 18.05.2010, the 1st Respondent refused to provide any document as requested by the Petitioners for the return of

documents seized by them. Subsequently, the 1st Respondent, by its letter dated 10.06.2010, received by the Petitioners on 15.06.2010, required

the Petitioners to submit explanation and also fixed the date of enquiry at New Delhi either on 12.07.2010 or on 14.07.2010 or on 16.07.2010.

Though the Petitioners have offered their explanation by letter dated 01.07.2010, since the Respondents are determined to go ahead with the

enquiry without considering the representations / explanations of the Petitioners, are before this Court in these writ petitions challenging the show

cause notice.

6. The Learned Counsel for the Petitioners would vehemently contend that when there is no prima facie case established before the Respondents in

respect of the alleged contravention of the provisions of the FEMA Act and when the Petitioners have established that the guarantee was executed

only at Chennai, the action of the Respondents in proceeding further with the matter is unsustainable. Learned Counsel appearing for the

Petitioners, by pointing out the provisions contained in Section 6 (2) Clause 3 (2) (d) of FEMA Act, would submit that the action of the Petitioners

in executing a guarantee by a person resident in India in favour of a person resident outside India is well within the permissible Capital Account

Transaction prescribed by the Reserve Bank of India and hence, the provisions of Section 6 (3) (j) of FEMA is not applicable to the Petitioners

and that, the show cause notice issued is in contravention of the said provisions of the Act. Learned Counsel for the Petitioners would also add that

the Respondents have not responded to the request of the Petitioners to return the documents seized by them from H & M.I.T.L. Office or

furnished xerox copies inspite of several requests made. According to the Learned Counsel, by this act of the Respondents which compelled the

Petitioners to submit their explanation only with the available records, the Respondents have violated the principles of natural justice and hence, this

Court has to interfere with the impugned proceedings though it is only a show cause notice.

7. Mr. M. Ravindran, learned Additional Solicitor General, appearing for the Respondents would, at the outset, raise the question of maintainability

of the writ petitions filed challenging the show cause notice issued. He would submit that the Petitioners having offered their detailed explanation on

01.07.2010 cannot invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

8. I have heard the Learned Counsel on either side at length and perused the materials available on record. It is the case of the Petitioners that the

Respondents have issued the impugned show cause notice in contravention of the Provisions of Section 6 (2) of the FEMA Act and that the

Respondents have violated the principles of natural justice by refusing to either furnish or return the documents seized by them from the office of H

& T.I.M.L., thereby much prejudice had been caused to the Petitioners by compelling them to offer their explanation only based on the available

records. On the other hand, according to the learned Additional Solicitor General, the Petitioners have already offered their explanation on

01.07.2010 and only by way of providing an opportunity of personal hearing, Petitioners have been called upon to appear before the Respondents

vide its letter dated 10.06.2010 and therefore, it cannot be said that the Respondents have violated the principles of natural justice.

9. In this regard, it would be relevant to refer to the decision rendered by the Hon"ble Supreme Court in the case of The Special Director and

Another Vs. Mohd. Ghulam Ghouse and Another, wherein the Supreme Court held that,

5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning the legality of the

show cause notices 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 show cause notice was totally nonest 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 and as a matter of routine and the writ

Petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show

cause notice 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.

In view of the ratio laid down by the Hon"ble Supreme Court in the decision cited supra, it is clear that this Court under Article 226 of the

Constitution of India cannot interfere with the impugned show cause notice. Though the Learned Counsel for the Petitioner very strongly contends

that the Respondents have violated the principles of natural justice, nothing has been brought on record to substantiate his claim. At this juncture,

Learned Counsel appearing for the Petitioner would submit that the Petitioners have submitted their detailed representation to the Respondents

based on the documents available with them and as the Respondents have refused either to return the documents seized by them from the office of

H. & T.I.M.L. or to furnish the documents sought for by the Petitioners, the Petitioners are not in a position to state anything further in the matter.

He would make a plea that if the objection of the Petitioners that Section 6 (3) (j) of FEMA is not applicable and only the provisions of Section 6

(2) of FEMA will alone apply is considered by the Respondents, then the grievance of the Petitioners would stand redressed.

10. Considering the facts and circumstances of the case, while declining to interfere with the show cause notice impugned in these writ petitions, as

the Petitioners have limited the extent of their prayer in the writ petitions, without advertng into the merits and demerits of the contentions raised on

either side, the Respondents are hereby directed to consider Petitioners' objection as to the applicability of Section 6 (3) (j) of Foreign Exchange

Management Act and pass appropriate orders within a period of four weeks from the date of receipt of a copy of this order. Both the writ

petitions stand disposed of accordingly. Connected miscellaneous petitions are closed. There shall be no orders as to the costs.