

(1997) 09 MAD CK 0075

In the Madras High Court

Case No : W.A. No's. 522 of 1995, 794 of 1994 and M.P. No's. 7390/95 and 9573 of 1997

K.M.A. Abdul Kabeer

APPELLANT

Vs

Special Director, Enforcement Directorate, New Delhi and another

RESPONDENT

Date of Decision : 29-09-1997

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 13, 18, 19, 2, 22
General Clauses Act, 1897 — Section 6

Citation : (1998) CriLJ 2388

Hon'ble Judges : Karpagavinayagam, J;Ar Lakshmanan, J

Bench : Division Bench

Advocate : S.K.L. Ratan for K. A. Jabbar and K. M. Ismail, for the Appellant; V.T. Gopalan, Sr. Central Govt. for S. Udaya Kumar, Addl. Central Govt., for the Respondent

Judgement

A.R. Lakshmanan, J.—These two Writ Appeals have been filed against the common order dated 21-4-94 made in W.P. Nos. 1279 and

1280 of 1994 by a learned single Judge of this Court.

2. W.P. No. 1279/94 was filed by one K. M. A. Abdul Kabeer for a mandamus directing the respondents therein to return the seized currency of

Rs. 1,65,000/- to him and for other orders. W.P. No. 1280/94 was filed by the very same party for the following relief :

.....to call for the records pertaining to show cause memorandum dated 4-8-1993 and bearing reference No. T4/29-M/93-SON and to

quash the same by the issue of a Writ of Certiorary or other appropriate Writ Order or direction and grant the petitioner such other relief or reliefs

as this Hon'ble Court deems fit to grant in the circumstances of this case and

grant the petitioner costs of this petition and render justice.

3. The case of the Writ petitioner in W.P. No. 1279 of 1994 is that the officers of the Enforcement Directorate, in exercise of the powers

conferred under S. 34 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the FERA) came to the residential premises of the

writ petitioner, searched and seized Indian currency of Rs. 1,65,000/- which was kept in the wooden almirah in his bed room on 18-8-1992. It

was seized under a mahazar dated 18-8-1992. As required by the authorities, the petitioner gave a statement to their dictation stating that the

amount seized had been received from one Aboobacker of Ceylon and that between the period January 1985 to August 1992 he has received a

total sum of Rs. 4,55,00,000/- at the rate of Rs. 5 lakhs a month. His son-in-law was also compelled to give a statement in writing that he was

present when the petitioner gave his statement. The petitioner retracted the said statement in his letter dated 21-8-92. According to him, the money

seized by the officers was the money which he had received from one V. C. Kader residing at Angappan Naicken Street, Madras, in the course of

an usufructuary mortgage transaction. It is the contention of the petitioner that S. 41 (as amended) reduced the period for retaining custody of

documents from one year to six months, and that the said section as amended contains a proviso entitling the officer for reasons to be recorded in

writing to extend the period of six months by another six months. It is stated that the Spl. Director of Enforcement has not, in the instant matter

extended the period as provided in the proviso of S. 41. According to the petitioner, the period of six months provided in S. 41 expired on 17-2-

1993 as the seizure was on 18-8-92, and that the said period of 6 months was neither extended by the Special Director of Enforcement, the first

respondent in the writ petition nor any proceedings under S. 51 or under S. 56 of the Act had been commenced. It was further submitted that after

the expiry of the period of six months, notice to show cause dated 4-8-1993 was served on the petitioner on 24-8-1993. In this context, he

referred to the following relevant dates :

1. Date of seizure : 18-08-1992

2. Show cause notice : 04-08-1993

3. Date of receipt of show cause notice : 24-08-1993

4. Date of commencement of the Amended

Act reducing the period of custody

from one year to six months : 08-01-1993

According to the writ petitioner any provision providing for a period of limitation is retrospective in character and that therefore, his counsel

addressed a letter dated 21-12-1993 drawing the attention of the authorities to the provisions of the FERA (as amended) stating that the custody

of the document could not be retained by the respondents after the expiry of the period of six months and requested them to return the documents

seized. The petitioner received a reply dated 5-1-1994 from the Chief Enforcement Officer stating that the first respondent could not accede to the

request for the return of the documents since the amendment of S. 41 came into force only on 8-1-1993 and as such the period to retain the

documents prior to this date is one year. According to the petitioner, the department grievously erred in taking the stand that the amended section

has no application to the facts of this case, and that any provision fixing a period of limitation is a law relating to procedure and will have

retrospective effect. The said writ petition was resisted by the Department by filing a counter affidavit through their Assistant Director in the office

of the Deputy Director, Enforcement Directorate, Madras. According to the Department, the seizure of the currency was on 18-8-1992 namely

prior to the amendment to S. 41 which came into effect from 8-1-93 and that the amended provision would have no application the instant case

and that therefore, the authorities would be at liberty to retain the seized currency for a period of one year from the date of seizure since such right

vested with the respondents or the date of such seizure as the Act stood. Even prior to the expiry of one year from the date of seizure, the first

respondent Special Director had issued a show cause notice to the petitioner and in such circumstances, the respondents would be perfectly

justified in retaining the seized currency. It is further submitted that in the absence of a specific provision, any amendment cannot have a

retrospective effect and can be made only prospectively. In accordance with the provisions of law as prevailing at the time of seizure, the

respondents were entitled to retain the seized currency for the period of one year and that the unamended S. 41 of the Act would be applicable to

the facts of the instant case and therefore the contentions of the writ petitioner have no basis either on facts or in law.

4. In W.P. No. 1280/94, the subject matter of challenge was the memo No. T-4/29/M/93-SCN dated 4-8-93. It is contended that the show

cause notice issued by the Special Director who has no power or jurisdiction to issue the show-cause notice, is void ab initio and non est in law,

and that therefore, it cannot be considered to be a valid show cause notice in the eye of the law. Thus, no show cause notice is deemed to have

been issued to the writ petitioner within the period of one year from the date of seizure. Even assuming without admitting that the longer period of

one year is applicable to the facts of this case still the department cannot retain the Indian currency of Rs. 1,65,000/- in view of the fact that no

valid show cause notice was issued to the petitioner by any competent authority within the period of one year and therefore, the proceedings

prescribed under the Act cannot be said to have been commenced within the period of one year from the date of seizure.

5. The writ petition was resisted by the respondents/department. It is contended that the post of a Special Director of Enforcement is also one of

the classes of officers of Enforcement contemplated under S. 3 of the Act. The provisions of S. 3 of the Act and clause (e) in particular thereof are

wide enough to include any classes of officers of any rank whatsoever and the post of Special Director would be one among them. Acting in

exercise of powers, the Central Government has by G.O. No. 174/2/89-TC(E) appointed Shri S. S. Ranjhan (the officer who has issued the show

cause notice) as an officer of enforcement.

6. The notification in G. No. 174/2/89-TC(E) dated 22-9-1989 reads thus :

TO BE PUBLISHED IN GAZETTE OF INDIA PART II, SECTION B, SUB-SECTION (II)
F. No. 174/2/89-TC(E)

Government of India/Bharat Sarkar Ministry of Finance/Vit Mantralaya
Department of Economic Affairs/Arthik Akrya Vibhag.

New Delhi The 22nd September, 1989

NOTIFICATION

S.O. In exercise of the powers conferred by sub-section (1) of S. 4, r/w clause (e) of S. 3 of the Foreign Exchange Regulation Act, 1973 (46 of

1973), the Central Government hereby appoints Shri S. S. Ranjhan to be an

officer of Enforcement with the designation of Special Director of Enforcement, for the purpose of enforcing the provisions of the said Act, and in exercise of the powers conferred by S. 50 of the said Act hereby empowers him to adjudicate cases of contravention of any of the provisions thereof (other than S. 13, clause (a) of sub-section (1) of S. 18 and clause (a) of sub-section (1) of S. 19) or of any rule, direction or order made thereunder.

Sd.

XX XX K. G. Goel, Director.

F.No. 174/2/89-TC(E) To The Manager, Government of India Press Maya Puri, Ring Road, New Delhi.

7. Both the writ petitions were heard together by J. Kanakaraj, J., and were disposed of by a common order dated 21-4-1994. In his order, the

learned single Judge has first dealt with the power to retain the documents viz., the currency in accordance with S. 41 of FERA and as to whether

the respondents have lost the power and are bound to return the currency notes. After considering the rival submissions and also of the judgments

cited, the learned single Judge has observed as follows in paragraphs 9 and 10 :

The argument of the respondents is, that no question of limitation is involved to S. 41 of the FERA Act and the right to retain the document is a

substantial right and therefore, the same cannot be taken away by the amended provisions. There is a misconception in the argument because the

amended provision does not take away substantial right to retain the documents. On the other hand, the amended provision only says that instead

of a period of one year the authorities can retain documents only for a period of six months, subject of course, to the authorities initiating action

under sub-clauses (1) and (11) of S. 41 of the FERA Act. So far as the reduction of the period of limitation is concerned, on the basis of the

voluminous authorities cited above, I have no hesitation in holding that the shortening of the period of limitation is only procedural and therefore, the

amended provisions will alone apply subject to the proviso above quoted. In this case, it is not disputed that there was no order of the Director of

Enforcement extending the period of retention of the documents by the respondent.

It is thus clear that where in stated cases the department is faced with the

situation that the period of six months expires on the date of coming into force of the amended provisions namely on 8-1-1993, it is always open to the Director of Enforcement to come to the aid of the authority and extend the period up to a maximum limit of six months, after recording the reasons therefor. In my opinion, this safety valve in the amended S. 41 of the FERA Act provides the key to solve the disputed question between the parties. Even assuming on the particular facts of the case where even after the amendment of S. 41 of the FERA Act, the Department had a short period from 8-1-1993 to 17-2-1993 to initiate action and continue to have possession of the seized documents, and that it was not sufficient, it was open to the authorities to have sought for extensions of time by applying to the Director of Enforcement under the proviso above quoted. The learned single Judge also held that there is no scope for resorting to S. 6 of the General Clauses Act because this is not a case of repeal of a provision of law and the repeal not affecting any investigation or obligation arising out of an Act being proceeded with as if the repealing Act had not been passed, and that the shortening of the period of limitation and the retrospective or prospective application of the amendment will depend only upon the considerations already referred to and as decided by various courts, including the Apex Court. The learned single Judge also held that the prayer in W.P. No. 1279/94 has necessarily to be conceded based on the judgment of the Supreme Court of India in SLP (Civil) No. 3997 of 1976 reported in Arjuna Chettiar v. Enforcement Officer (1977) II MLJ (SC) 5. Consequently, a writ of mandamus was issued directing the respondents to return the seized currency to the tune of Rs. 1,65,000/- to the petitioner. In so far as W.P. No. 1280/94 is concerned, which is with reference to the show cause notice dated 4-8-1993, on the ground of no jurisdiction to issue the notice, the learned single Judge held that the Special Director has jurisdiction to issue the show cause notice and consequently, he dismissed the said writ petition. While dismissing the writ petition, the learned single Judge considered the arguments of Mr. S. K. L. Ratan with reference to S. 3, Section 4(1), GSR 61 dated 1-1-1974 etc., and also a passage of the text book written by R. Swaminathan and held that the passage relied on by the learned counsel for the petitioner does not conclusively prove that the delegation to special director is illegal or

contrary to the provisions of Ss. 3 and 4 of the Act. The learned single Judge also held that in the instant case, there was a specific notification dated 22-9-1989 published in the Gazette of India which specifically authorizes the Special Director to be an Officer of Enforcement for the purpose of enforcing the provisions of the Act and to exercise the power under S. 50 of the Act and that these notifications have been purported to be in the exercise of the power conferred by S. 4(1) r/w. Section 3(e) of the FERA Act. The learned single Judge was of the opinion that the argument of the petitioner is without any force because S. 4(1) categorically says that the Central Government may appoint any person as it thinks fit to be an officer of Enforcement and Mr. S. S. Ranjhan has been specifically appointed as an officer of Enforcement with the designation of Special Director of Enforcement and that therefore, there can be no dispute that the impugned show cause notice is valid. The learned single Judge also held that the doctrine of factum valet or the defect theory will apply to this case.

8. Aggrieved by the said order in W.P. No. 1279/94, W.A. No. 794 of 1994 has been filed and as against W.P. No. 1280/94, W.A. No. 522 of 1995 has been filed. W.A. No. 794/94 was admitted by this Court on 20-6-1994 and the Writ Appeal 522/95 was admitted on 9-6-95 and both the appeals were ordered to be posted together as agreed to by both the parties, for final hearing.

9. At the time of hearing, permission was sought to raise some additional grounds in writ appeal 522/95. On such permission being granted, the writ petitioner filed CMP No. 9573/97 with an affidavit stating that S. 51 provides that the adjudicating officer shall hold an enquiry in the prescribed manner, that the Adjudication Proceedings and Appeal Rules, 1974 sets out the procedure, that R. 3(1) of the said rules authorizes the Adjudicating Officer, in the first instance to issue notice to show cause why adjudication proceedings should be not held and upon considering the cause shown, the adjudication officer is to decide whether or not to hold adjudication proceedings. It is also stated that R. 3(3) provides that after considering the cause if any shown by such person, the adjudicating officer is of the opinion that adjudication should be held he shall issue notice fixing a date for appearance, and that as the procedure having been prescribed

by law, the same will have to be strictly followed, that in as much as the show cause notice issued not only requires the writ petitioner to show cause why adjudication proceedings should not be held but also requires the writ petitioner to show cause as to why the Indian currency should not be confiscated, the notice is in direct violation of R. 3(1) of the Adjudication Proceedings and Appeal Rules, 1974 and also clearly establishes the pre-determination in the mind of the Special Director who issued the notice. It is also stated that as the notice not being in strict compliance with the procedure prescribed, the same as a whole is illegal, and that as the ground sought to be urged of the invalidity of the show cause notice for not conforming to R. 3 of the Adjudication Proceedings and Appeal Rules, 1974, is a pure question of law not requiring any facts being set out and hence it is prayed that the writ petitioner may be permitted to raise the additional grounds viz.,

The show cause notice dated 4-8-1993 is illegal and void ab initio for not conforming to R. 3 of Adjudication Proceedings and Appeal Rules.

10. This petition was resisted by the respondents/department. It is contended that the show cause notice is fully in accordance with S. 51 r/w. R. 3

of the Adjudication Proceedings and Appeal Rules, 1974. It is submitted that the petitioner's writ petition cannot be maintained against the show

cause notice and it is for the petitioner to reply to the show cause notice raising whatever contentions available to him and interference at the show

cause notice stage would only scuttle and stifle the enquiry itself. It is further submitted that a conjoint reading of S. 51 and R. 3 of the

Adjudication Proceedings and Appeal Rules, clearly show that the show cause notice dated 4-8-1993 is legal, valid and was properly made and

that there is no question of any violation of R. 3, and that the proviso to R. 3 provides for a waiver of the personal hearing referred to in sub-rule

(1) and sub-rules (3), (4) and (5), that according to sub-rule (3) of R. 3, if the adjudicating officer is of the opinion that the adjudication

proceedings should be held, he shall issue a notice fixing a date of appearance of that person and sub-rules (4), (5) and (6) prescribed as what

should be done at such a hearing. If any person to whom notice under R. 3(1), is issued, waives his right of personal hearing and that then the

adjudicating officer could straightway proceed with the adjudication proceedings

if he is of the opinion that the proceedings should be held. It is stated that it was only in the light of this provision that the petitioner was asked to state in the show cause notice as to whether he prefers the case to be disposed of based on the available records by waiving his right of personal hearing. It is further stated that even otherwise, Rule 3 of the Adjudication Proceedings and Appeal Rules is made only to carry into effect S. 51 of the Act which does not contemplate any multiple stages of opportunities being given, and that what all S. 51 contemplates is that the person should be afforded reasonable opportunity for making representation in the matter, and that therefore, the various provisions of R. 3 will have to be construed in the light of object of S. 51. It is also stated that if only the petitioner has stated by filing his reply to the show cause notice that he would not waive his right of personal hearing, then if the respondent is of the opinion that adjudication proceedings should be held, he would certainly issue a notice fixing the date for appearing of that person either personally or through his lawyer or by an authorised representative, and that in as much as on reply at all had been given by the petitioner to the show cause notice excepting the lawyer's notice for the limited purpose stated above, the question of proceeding further with the show cause notice in the manner provided for under R. 3 does not arise particularly when the petitioner had rushed to this court with the above writ petition against the impugned show cause notice. Even assuming without admitting the case of the petitioner in the affidavit under counter that only after considering the cause if any shown by such person, the adjudication officer is of the opinion that the adjudication proceedings should be held, the question of showing cause to the confiscation would arise, there could be nothing wrong or illegal in asking the petitioner to show cause under R. 3(1) as to why the Indian Currency seized by them should not be confiscated. No prejudice will be caused to the petitioner particularly when the petitioner had not shown any cause at all. Therefore both the Writ Appeals and the above CMP were heard together and the arguments advanced by both the learned counsel appearing on either side were heard in this regard also.

11. Mr. V. T. Gopalan, learned Senior Central Government Standing Counsel appearing for the respondents/department has made the following

submissions :

a) the finding of the learned single Judge that the amendment to S. 41 of the FERA Act by which the maximum period for retention of seized

documents were reduced from one year to 6 months would have a retrospective effect is incorrect and that in this context, the learned single Judge

ought to have noticed that the seizure of the currency in the instant case was made on 18-8-92 much before the amendment to S. 41 was effected

and while so, the learned single Judge ought to have held that the amendment would take effect only prospectively and not retrospectively.

b) that considering the public interest involved, the writ petition ought to have been dismissed.

12. Mr. S. K. L. Ratan contended that the right to seize and the period for which the seized documents can be retained is determined by the

statute, and that the right to retain is subject to the period prescribed by the Act, the right to retain is only procedural. According to Mr. Ratan, the

contention that the amendment should be deemed to be prospective, is erroneous. The Parliament is aware that the amendment will have the

retrospective effect, sought to introduce the proviso to S. 41 enabling the Director to extend the period of six months. Consequent upon the

amendment, the period is reduced to six months and the Act does not contain any provision saving the repealed period of one year in respect of

seizures effected before the coming into force of the amendment. It is fallacious to contend that the repealed period which is not saved will apply

after the coming into force of the amendment. The Parliament in its wisdom brought about the amendment reducing the period for retaining the

documents. The law is supreme and will have to be scrupulously followed and applied and that the enactment of a statute and amendment thereto

is only in public interest. Therefore, he contends that the Writ Appeal 794/94 is bereft of merits and that the same may be dismissed with costs.

13. Mr. S. K. L. Ratan further submitted that S. 41 does not vest any power in the officer who holds the documents. He is in the position of a

bailee who is to hand over the document to the person from whom it is seized on the expiry of the period under S. 41 or to the adjudicating officer

if adjudicating proceedings are initiated before the expiry of the period and that he has no power to initiate any proceedings. According to Mr.

Ratan, the case law cited by the counsel for the appellant do not apply to the facts of the case and all the cases cited are cases in which there is a right to initiate proceedings or the remedy gets barred.

14. In so far as W.A. No. 522/95 is concerned. Mr. Ratan contended that the show cause notice issued by the Special Director is defective and is not in accordance with law. According to him, it would be seen from Rule 3(1) of the Adjudication Proceedings and Appeal and Rules as follows :

Adjudication proceedings :- (1) In holding an enquiry under S. 51 for the purpose of adjudging under S. 50 whether any person has committed contravention as specified in S. 50, the adjudication officer shall in the first instance, 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 the service thereof why adjudication proceedings should not be held against him.

That the rule contemplates the issue of a show cause notice calling upon the person who is alleged to have violated the provisions of the Act to

show cause why adjudication proceedings should not be held against him. It does not empower the adjudicating officer to ask the alleged offender

to show cause why the seized cash should not be confiscated. That would be prejudging the issue and it is not in conformity with R. 3(1). It is only

after the alleged offender makes his submission, that the adjudicating officer, if he is not satisfied with the explanation, then only can initiate action

against him. According to Mr. S. K. L. Ratan, the Act has created five classes of Officers of Enforcement, vests the power of appointment of

Officers of Enforcement in the Central Government. Sub-section (2) of S. 4 provides that the Central Government may authorise the Director,

Additional Director, Deputy Director and Assistant Director to appoint Officers of Enforcement below the rank of Assistant Director of

Enforcement. The Act contains restrictions set out in Ss. 8, 9, 13, 22, 24, 25, 28, 29 and 31. The Act under sections 34, 35, 36, 37, 38, 39, 40,

41 and 43 sets out the powers and duties of Officers of Enforcement. The Act provides that violations of provisions of the Act constitute offences,

prosecutions therefore and for cognizance of offences.

15. Mr. S. K. L. Ratan traces the history of the FERA as follows : The fore-runner of the Foreign Exchange Regulation Act, 1973 (Act 46 of

1973) was the Foreign Exchange Regulation Act, 1947 (Act 7 of 1947). This was first intended to be a temporary measure and was placed

permanently on the statute book by the amending Act 30 of 1957. Act 39 of 1957 introduced S. 2(bb) which reads as follows :

Director of Enforcement means the Director of Enforcement of Foreign Exchange Regulation appointed by the Central Government for the

purposes of enforcing the provisions of this Act. Before the amendment there was no adjudicatory process, only prosecution : The Act was further

amended by Act 65 of 1964 which came into force on 1-4-1965. The amended Act introduced the new S. 2A which defined for the first time the

term "Officers of Enforcement". Section 2A reads as follows :

2A. Officers of Enforcement : The Central Government may appoint a Director of Enforcement and as many Deputy Directors of Enforcement,

Assistant Directors of Enforcement and such other officers as it thinks fit to be officers of Enforcement for the purpose of enforcing the provisions

of this Act.

The section created the posts of Director of Enforcement, Deputy Directors of Enforcement, Assistant Directors of Enforcement and such other

officers for the purpose of enforcing the provisions of the Act. It would be thus seen that apart from a Director of Enforcement, Deputy Directors

of Enforcement, Assistant Directors of Enforcement there was another class described as such other class of officers as it thinks fit to be officers of

Enforcement for the purpose of enforcing the provisions of the Act. It is noteworthy that the description of Officers is in the descending order in the

hierarchy of officers thus lending credence to the submission that the new class must hold a rank below that of an Assistant Director. On the same

day i.e., the day on which Sec. 2A was introduced Government issued notification No. 1/65-FERA/F. No. 15/18/65-Cus. III dated 1st April,

1965 which reads as follows :

In exercise of the powers conferred by S. 2A of the Foreign Exchange Regulation Act, 1947 (VII of 1947), the Central Government appoints

with effect from the 1st day of April, 1965, the persons holding office immediately before the said date as Director of Enforcement, Deputy

Director of Enforcement, Assistant Directors of Enforcement, Chief Enforcement Officers, Enforcement Officers and Assistant Enforcement

Officers to be Officers of Enforcement with the same designation for the purpose of enforcing the provisions of the said Act.

16. Thus, it is contended that the statutory functions were according to the Director of Enforcement for the first time in 1957 and to the Deputy

Director, Assistant Directors and Enforcement Officers by Notification No. 1/65-FERA/F. No. 15/18/65-CUS.III dated 1st April, 1965. The

reference in the Notification is only to a Director of Enforcement. But plural is used when referring to Deputy Director, Assistant Directors, Chief

Enforcement Officers and Enforcement Officers. It is important to note that Enforcement Officers also fell under the category of Officers of

Enforcement. They are persons appointed to enforce the provisions of the Act. These officers were exercising functions even before the notification

was issued under the provisions of S. 2A of the Act. It is clear from the said notification that the term "Officers of Enforcement" included

Enforcement Officers. Even prior to the enactment of Act 46 of 1973 there existed Enforcement Officers who fell within the category of Officers of

Enforcement as would appear from the notification dated 1-4-1965 referred to above. When Act 7 of 1947 was repealed there existed Officers of

Enforcement who were discharging functions under the Act. These included not only the Director, Additional Director, Deputy Director, Assistant

Director but also Enforcement Officers. As soon as Act 46 of 1973 came into force on 1-1-1974, on the same day, Government issued G.S.R.

No. 60 dated 1-1-1974 which reads as follows :

G.S.R. 60 dated 1st January, 1974 :

In exercise of the powers conferred by sub-section (1) of S. 4 of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and in supersession of

the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 1/65-FERA/F. No. 15/18/6-CUS.III, dated

1st April, 1965 and notification of the Government of India in the Ministry of Finance (Department of Revenue and Insurance) No. 3/67/FERA/F.

No. 1.2.1967-Tech. Coord., dated the 7th October, 1967 the Central Government hereby appoints with effect from the 1st day of January, 1974

the persons holding office immediately before the said date under the Foreign Exchange Regulation Act, 1947 (7 of 1947) as Director of

Enforcement, Additional Directors of Enforcement, Deputy Directors of

Enforcement, Assistant Directors of Enforcement, Chief Enforcement

Officers, Enforcement Officers and Assistant Enforcement Officers to be Officers of Enforcement with the same designation for the purpose of

enforcing the provisions of the said Act.

17. It is further stated by Mr. S. K. L. Ratan that the notification directed the continuance in office of persons holding office immediately before the

new Act came into force as Director, Additional Director, Deputy Director, Assistant Director, Chief Enforcement Officer, Enforcement Officer

and Assistant Enforcement Officers with the same designation for the purpose of enforcing the provisions of the Act. It is seen from the said

notification that the term "Officers of Enforcement" included not only the Director, Additional Director, Assistant Director but also Chief

Enforcement Officers, Enforcement Officers and Assistant Enforcement Officers etc. Sections 3 and 4 read together will show that the Act

contemplates only five classes of Officers viz., those mentioned in S. 3(a) to (d) and (e) i.e., such class of Officers who shall be appointed for the

purposes of the Act. Under S. 4(1) power is given to appoint Officers under the Act. So S. 4(1) read with S. 3(e) entitles the Government to

appoint a class of Officers who fall under S. 3(e). If Government has appointed this class of Officers under S. 3(e) read with S. 4(1) it would

appear that the power to appoint a new class of Officers is exhausted.

18. Mr. S. K. L. Ratan then invited our attention to a Government notification appointing a class of Officers under S. 3(e) r/w. S. 4(1) which could

be seen from the judgment of the Supreme Court reported in *Pusphadevi M. Jatia v. M. L. Wadhawan* : 1987CriLJ1888 . The relevant portion of

the judgment cited by him is extracted below :

The validity of appointment of R. C. Singh to be an Officer of Enforcement under this Act cannot be questioned. The Directorate of Enforcement

have along with the counter affidavit placed on record establishment Order No. 87/92 dated November, 24, 1982 which shows that R. C. Singh

along with 22 others was appointed by the Director to be an Officer of Enforcement on an ad hoc basis against 30 per cent deputation quota. The

subsequent Establishment Order No. 84/86 dated January 13, 1986 relied upon by the petitioner shows that R. C. Singh along with 29 others was

appointed as an Officer of Enforcement on an officiating basis. It is not suggested

that these officers were not authorised by the Central Government to discharge the function and duties of an Officer of Enforcement. Under the scheme of the Foreign Exchange Regulation Act, the Director of Enforcement is primarily charged with the duty of administering the Act. Section 3 defines different classes of officers of Enforcement. The expression "Officers of Enforcement" as defined in section 3 embraces within itself not only (a) a Director, (b) Additional Director (c) Deputy Director and (d) Assistant Director but also (e) such other class of officers of Enforcement as may be appointed for the purposes of the Act. Obviously, R. C. Singh who was Assistant Enforcement Officer having been appointed as an Officer of Enforcement on an ad hoc basis in 1982 fell within the category such other class of officers covered by S. 3(e), sub-sec. (1) of S. 4 provides that the Central Government may appoint such persons, as it thinks fit, to be Officers of Enforcement. Sub-section (2) thereof provides for delegation of such power of appointment by the Central Government to a Director of Enforcement or an Additional Director of Enforcement etc., to appoint Officers of Enforcement below the rank of an Assistant Director of Enforcement. Sub-section (3) of Section 4 of FERA provides that subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under the Act. Undoubtedly R. C. Singh was discharging his duties and functions as a gazetted officer of Enforcement under S. 40(1) of the FERA when he recorded the statements in question. In our opinion the expression gazetted officer of Enforcement appearing in Sec. 40(1) must take its colour from the context in which it appears and it means any person appointed to be an Officer of Enforcement under S. 4 holding a gazetted post. There is no denying the fact that R. C. Singh answered that description.

19. Relying upon the above judgment, Mr. S. K. L. Ratan submitted that there was an order dated 21-11-1982 in which the said R. C. Singh along with 22 others were appointed as Officers of Enforcement. R. C. Singh whose right to search was questioned when he was an Assistant Officer of Enforcement who was appointed under the Exchange Notification dated 24-11-1982. Therefore, he contended that the Government had exercised the power to create the post of Chief Enforcement Officer,

Enforcement Officer, Assistant Enforcement Officer by the order dated 24-11-1982 i.e., long before the order appointing the Special Director was issued.

20. He would further submit as follows : Once it is clear that Government had exercised its power to appoint a class of officers to exercise functions under S. 3(e) read with S. 4(1) the power to make further appointments gets exhausted. The judgment of the Supreme Court clearly says these class of officers were appointed under S. 4(1). Such being the case there could be no further exercise of power under S. 3(e) read with S. 4(1). Therefore, the notification of Government F.No. 174/2/89-TC(E) dated 22nd September, 1989 appointing S. S. Renjhan to be an Officer of Enforcement with the designation of Special Director under S. 4(1) read with S. 3(e) cannot be exercised because that power has already been exercised. By this notification a new and sixth class of Officer of Enforcement is created. Reliance for exercising this power has been placed on S. 3(1)(e) read with S. 4(1). As already stated the power having already been exercised by notification referred to in Pusphadevi's case. The Enforcing Agencies including the Executive have throughout acted outside the statutory powers. There has been a failure to examine the implications of the various provisions of FERA and their impact on the administration of the Act.

21. Mr. V. T. Gopalan, in reply to the above argument, contended that the ground sought to be raised by Mr. S. K. L. Ratan is without any substance. According to him, the show cause notice dated 4-8-1993 is perfectly legal and is fully in accordance with the requirements of R. 3 of the adjudication proceedings and appeal Rules, 1974. The affidavit filed in support of the abovesaid petition for raising additional grounds proceeds on a total misconception of the provisions of R. 3. As regards the jurisdiction of the Special Director to issue the show cause notice in question, section 3(3) of the FERA clearly provides that ""such other clause of officers of the Enforcement as may be appointed for the purpose of this Act"" thus implying the officers, other than those specified in clauses (a) to (d). Therefore, the Central Government in exercise of the powers have appointed Shri Ranjan, Special Director to the Office of Enforcement for the purpose of the Act as can be seen from the notification (at page 43 in the typed set of papers filed) in W.A. No. 522/95.

22. On the above pleadings and submissions made by both parties, the following three questions arise for determination in these appeals :

1. Whether the show cause notice is defective in that it offends the provision of R. 3 of the Adjudication Proceedings and Appeal Rules ?

2. Whether the amendment to S. 41 of the FERA by the amending Act 29/93 reducing the period of limitation for retention of seized documents by the authorities, is retrospective ?

3. Whether the Special Director who has issued show cause notice is an officer of Enforcement with adjudicatory powers ?

23. We have carefully perused the entire pleadings and also the notifications, judgments and the documents relied on by both the parties including the common order impugned in these writ appeals.

24. Questions 1 & 2.

In this case, the following three dates are relevant :

18-08-1992 Date of seizure of Indian Currency of Rs. 1.65 lakhs.

08-01-1993 Date of amendment to Section 41 FERA

04-08-1993 Date of Show Cause Notice.

According to S. 41 as it stood as on 18-8-92, the officer of enforcement may retain the said documents seized (Indian Currency) in his custody for

a period of not exceeding one year or before the expiry of the said period of one year, any proceedings under S. 51 or under S. 56 have been

commenced until the disposal of those proceedings etc., Inasmuch as the Indian Currency had been seized on 18-08-92 long before the amended

S. 41 came into effect, the period of limitation of one year under old S. 41 started running and if the old section is held to apply to such a case, the

show cause notice issued on 4-8-93 in our opinion is well within statutory period of one year and as such on time. If one has to look at the

amended S. 41, it is seen that the outer period of one year is still retained but the powers to retain the documents which was originally for a period

of one year has been reduced to 6 months at the first instance, but under the proviso, for the reasons to be recorded in writing, the said period of

six months can be extended for a further period of not exceeding six months by the Director of Enforcement.

25. The learned single Judge in his impugned order, was pleased to take the view

that the shortening of the period of limitation is only procedural

and as such it would apply retrospectively to pending proceedings and when no order extending the period was passed under the above said

proviso to S. 41, the show cause notice issued was beyond time. With great respect, the view of the learned single Judge that shortening of the

period of limitation is procedural cannot be sustained. As regards the limitation period, it is neither always procedural, the question whether it is

substantive or procedural has to be looked into with reference to each enactment considered in the light of its object. The statement that

substantive law determine rights and procedural laws deals with remedy is not wholly valid.

26. In support of his contention, Mr. V. T. Gopalan cited the decision of the Supreme Court reported in AIR 1972 1935 (SC) wherein it was held

that in considering the question as to whether in the absence of any substantive power given under the Act itself enabling the Rule making authority

to prescribe the period of limitation by way of Rules, no rule of limitation can be prescribed. The Apex Court was pleased to hold that provisions

of limitation by way of Rules destroying the right of remedy itself would affect the substantive right and therefore cannot be left to the Rule making

authority. Our attention was drawn to paras 6 and 13 of the said judgment.

27. The decision reported in S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company, , can now be looked into in considering a converse

case, i.e., when under the shorter period of limitation prescribed under the old Act the right was barred, the question as to whether such a right

could be revived by prescription of a longer period of limitation, the Supreme Court was pleased to hold that the prescription of a longer period of

limitation by amendment cannot revive a right already barred under the old Act.

28. In the decision reported in New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult, which arose under the Motor Vehicles Act, in respect

of a shorter period of limitation prescribed on amendment as against a longer period, the Supreme Court held that such prescription cannot

extinguish vested right of action the period of limitation for which had already commenced under the old longer period of limitation. The Supreme

Court in the above case has observed that even though by and large the law of limitation has been held to be a procedural law, there are

exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there

are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy, nor can it suddenly

extinguish vested right of action by providing for a shorter period of limitation.

29. In the decision reported in Vinod Gurudas Raikar Vs. National Insurance Co. Ltd. and others, , the Supreme Court held that where the

accident took place when the old Motor Vehicles Act was in force, however, the claim petition was filed after the repeal of the old Act and the

new Act came into force, the case would be covered by the new Act and delay for a longer period than six months could not be condoned.

30. Further in judging the validity of the provision prescribing a period of limitation, the intention of the law makers as well as the object of such

prescription will also become relevant as held in the decision reported in Deputy Director, Enforcement Directorate, Madras and another Vs.

Naina Maricair, a Division Bench of our High Court held in para 9 as follows :

At the same time the Statute has taken care to see that this power of retention should not be abused by the officers by refraining from taking

action within a prescribed time and putting the matter into cold storage and thereby causing considerable hardship to the individuals affected.

Section 41 therefore, imposes a time limit as a safeguard against any such possible abuse.

31. We are of the view that it cannot be said that the amendment to Section 41 providing for a shorter period of six months instead of original

period of one year, at the same time retaining the outer limit of one year subject to a condition viz., that the Director of Enforcement for the reasons

to be recorded in writing extend by another six months would be merely a matter of procedure so as to have retrospective operation affecting even

proceedings which have commenced prior to the date of amendment and particularly in the absence of any provision providing for retrospective

operation. In this view of the matter, we are of the opinion that the impugned show cause notice is well within the period of one year u/s 41 as it

stood when the Indian currency was seized on 18-8-92. When the period of limitation also started running under the old Section 41, such period

of limitation cannot be intercepted or arrested or extinguished by providing a

shorter period of limitation by way of a subsequent amendment.

32. As already noticed, Section 41 of the Act was amended by Act 29/93 by which the maximum period for retention of seized documents was

reduced from one year to six months and excepting for the change in the period, the said section has not been otherwise amended. In the instant

case, the seizure of the currency was on 18-8-92 that is prior to the amendment of Section 41 which came into effect from 8-1-93. Whiles, the

amended provision would have no application to the instant case. Therefore, we are of the view that the department is at liberty to retain the seized

currency for the period of one year from the date of the seizure since such right vested with the officers. This apart, even prior to the expiry of one

year from the date of seizure, the first respondent had issued the show cause notice to the writ petitioner and in such circumstances, we are of the

view that the respondents would be perfectly justified in retaining the currency.

33. We are also unable to countenance the contention of Mr. S. K. L. Ratan that the amendment will have a retrospective effect. We are of the

view that in the absence of a specific provision, any amendment cannot have a retrospective effect and can be made only prospectively. In

accordance with the provisions of law, as prevailing at the time of seizure, the authorities were entitled to retain the seized currency for the period

of one year and should the show cause notice be issued within such period, it would be open to the respondents to continue to retain the currency

until completion of the proceedings. On a careful consideration of the provisions of Law, we are of the view that the provisions of the unamended

Section 41 of the Act would be applicable to the facts of the instant case and the contentions of the writ petitioner therefore have no basis either on

facts or in law. In this case the currency was seized from the writ petitioner before the amendment of Section 41 of the Act. In any event, the

retention of document is vital for investigation. While so, on the date of seizure, there was a right to retain the currency and investigate thereon for a

period of a year should thereafter on amendment alter such period. Such alteration could only be prospective since it would prejudice the

investigation which was being proceeded with as per the earlier section. This would be against the public policy and interest and cannot be

assumed to be the intention of the legislature in the absence of express terms in

the section. When the whole matter is pending before the adjudicating authority, it is always open to the writ petitioner to participate in the proceedings and raise all his contentions in such proceedings. In fact, the Act also provides for further appellate remedies on a question of law u/s 54. However, the petitioner has made an air-dash to this Court without exhausting the statutory remedies available under the Act.

34. Question No. 3 : As regards the jurisdiction of the Special Director, to issue show-cause notice in question, Mr. S. K. L. Ratan in his reply to the arguments of Mr. V. T. Gopalan submitted that the Division Bench of this Court did not decide the contention raised that the Special Director must be considered to be an Officer of Enforcement below the rank of an Assistant Director of Enforcement. According to him, in order to determine whether the Special Director is entitled to adjudicate, the questions that arise for consideration are :

- a) Section 3 of the Act having set out the classes of Officers of Enforcement under Clauses (a) to (e), the Central Government having appointed a class of officers designated "Enforcement Officer" under clause (e) whether the Central Government could create under clause (e) a further class of officer and designate him "Special Director";
- b) Is not the power of the Central Government to appoint such other class of Officers of Enforcement under clause (e) exhausted with the creation and making of appointments of officers of Enforcement with the designation "Enforcement Officer";
- c) Section 3 having declared that the classes of officers shall be as set out therein and as the said section does not contain any reference to the class of "Special Director" what is the rank of one appointed as Special Director" in the absence of statutory recognition for the said post;
- d) If the power of the Central Government to create a clause under clause (e) is exhausted with the making of appointments of "Enforcement Officers", then is the Special Director and Officer" of Enforcement falling within Section 3 of the Act;
- e) Sub-section (2) of Section 4 authorises the Central Government to authorise a Director, Additional Director, Deputy Director and Assistant Director to appoint officers of Enforcement below the rank of Assistant Director of Enforcement; Section 3 which sets out classes of officers of

Enforcement has after clause (d) relating to Assistant Directors of Enforcement, provided clause (e) for such other class of officers of Enforcement.

The Central Government's authorisation to Director, Additional Director, Deputy Director and Assistant Director, Deputy Director and Assistant

Director to appoint can only relate to that class of officers falling under clause (e);

f) A class of officer falling under clause (e) can be appointed either by the Central Government or pursuant to authorisation of Central Government

by the Director, Additional Director, Deputy Director, or Assistant Director;

g) An Assistant Director is also capable of appointing an officer of the Class falling under clause (e);

h) The appointment order of the Special Director makes express reference to the power of the Central Government u/s 4(1) read with Clause (e)

of Section 3; the Special Director's appointment being referable to clause (e) of Section 3 it follows that the rank of Special Director should be

below that of an Assistant Director of Enforcement;

i) The nomenclature or designation of a post cannot create rights, duties or privileges. It is the statute that can determine the rank, notwithstanding

the nomenclature or designation of the post;

j) Section 50 provides that adjudication being made by the Director of Enforcement or any other officer of Enforcement not below the rank of an

Assistant Director of Enforcement specially empowered in this behalf;

k) the power to adjudicate is a quasi judicial power vested by statute; the limitation to the power of the Central Government to specially empower

any other officer is restricted to an officer of Enforcement not below the rank of Assistant Director of Enforcement;

l) Apart from the Director, for any other person to be competent to adjudicate the pre qualifications are that he must be an officer of Enforcement

not below the rank of an Assistant Director and is specially empowered;

m) The Special Director's appointment order makes express reference to Section 4(1) read with clause (e) of Section 3 which could render the

Special Director below the rank of Assistant Director and hence incapable of being specially empowered to adjudicate; n) The Division Bench did

not consider the ranking classes of officers of Enforcement set out in Section 3, the effect of making appointment by reference to clause (e) of

Section 3, the rank of Special Director vis-a-vis the rank of Assistant Director of Enforcement;

o) The order of the Division Bench does not contain any reasons except placing reliance upon the notifications making the appointment;

p) The Division Bench was concerned two cases, one initiated by the Deputy Director and another initiated by the Special Director; the Deputy

Director is above the rank of Assistant Director and hence capable of being specially empowered to adjudicate; on the other hand, the Special

Director has no statutory recognition which fact has not been considered.

35. He also submitted that the Division Bench's judgment is per incuriam and would further contend that the contention raised specifically about

the rank of the Special Director as being below that of an Assistant Director of Enforcement has not been decided; and that the judgment of the

Division Bench is neither supported by reasons, nor rendered with consideration of the statutory provisions; and therefore, any declaration or

conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general

nature binding as a precedent. We are unable to countenance the said contentio.

36. As rightly pointed out by Mr. V. T. Gopalan, in the instant case, there was a specific notification dated 22-9-1989 published in the Gazette of

India which specifically authorises the Special Director to be an Officer of Enforcement for the purpose of enforcing the provisions of the Act and

to exercise the power u/s 50 of the Act. These notifications have been purported to be in the exercise of the power conferred by Section 4(1) read

with Section 3(e) of the FERA Act. Therefore, we are of the opinion that the argument of the learned counsel for the writ petitioner is without any

force because Section 4(1) categorically says that the Central Government may appoint any person as it thinks fit to be an officer of Enforcement.

Mr. S. S. Ranjhan has been specifically appointed as an Officer of Enforcement with the designation of Special Director of Enforcement.

Therefore, there can be no dispute that the impugned show cause notice is valid. Therefore, we are of the view that there is no substance in the

contention that the Special Director, the first respondent in the writ petition has no jurisdiction to issue the show cause notice in question.

37. That part of the impugned judgment upholding that the show-cause notice

issued by the Special Director could still be valid by applying the de facto doctrine, the order of the learned single Judge is quite unexceptional and the same does not call for any interference. The notification appointing Mr. Ranjhan as Special Director, Enforcement for the purpose of the Act as such has not been challenged. However, the show cause notice issued by Mr. Ranjhan has been challenged on the ground that he has no jurisdiction to issue the show cause notice. Such an attack regarding the jurisdiction of the Special Director can only said to be collateral and not direct. This position has been well settled in the decision reported in Gokaraju Rangaraju Vs. State of Andhra Pradesh, by the Supreme Court wherein it has been held as follows (at page 879 (of Cri LJ) :

The de facto doctrine is now well established that the acts of the Officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de jure.

38. For all the foregoing reasons, all the three questions are answered in the negative, i.e., in favour of the Department and against the writ petitioner.

39. In so far as the additional ground in W.A. No. 522/95 is concerned, we are of the view that the grounds raised are without any substance. The show-cause notice dated 4-8-1993 is perfectly legal and fully in accordance with the requirements of Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974. The notice under Rule 3 of the adjudication proceedings to show cause as to why the adjudication proceedings should not be held, has been construed as the notice commencing the adjudication proceedings. As contended by the learned counsel for the Department, Rule 3(3) is only a notice of hearing fixing date of appearance of the persons. The adjudication proceedings cannot be said to commence only by the issue of the hearing notice Rule 3(3). This position is well settled in the decision reported in Deputy Director, Enforcement Directorate, Madras and another Vs. Naina Maricair, . Therefore, the apprehension or assumption of the writ petitioner that any show cause notice issued with reference to confiscation could be only after the Authority decides to hold adjudication proceedings after examining the causes under Rule 3(1) is

uncalled for, since Rule 3(3) is only hearing notice of adjudication proceedings. At the stage of Rule 3(3) another show cause notice as to why

confiscation should not be made is not contemplated. It would therefore be legally necessary that show cause notice to show cause as to why

confiscation should not be made should also be given in the notice under Rule 3(1). The fact that the persons concerned above may waive his

personal hearing referred to in sub-sections (3), (4) and (5) will also assume relevance in this context. For example, in a case where no show cause

notice has been issued as to why confiscation should not be made and the person concerned also waives his right of personal hearing and if

confiscation is made as a consequence of adjudication proceedings holding the contravention proved then, the person concerned will be left with

no opportunity to show cause notice as to why confiscation should not be made in event. Again, the power of confiscation is not automatic on

proof of a contravention and the same also cannot be mechanically exercised since the language of Section 62 conferred a discretion in the

Authority concerned to confiscate or not to confiscate and it is needless to state that such discretion has to be judiciously exercised based upon

certain objective considerations. It will therefore be all the more necessary that a person should also be asked to show cause as to why

confiscation should not be made in the notice under Rule 3(1).

40. Mr. S. K. L. Ratan, in his concluding remarks, submitted that it is a cardinal rule of interpretation that where a Statute provides that a particular

thing should be done, it should be done in the manner prescribed by the Statute and not in any other way, and that it is a settled rule of

interpretation that where the Statute is penal in character it must be strictly construed and in favour of the citizen. There is no quarrel or dispute that

the adjudication proceedings under FERA is governed by the Adjudication proceedings and Appeal Rules, 1974 and Rule 3 governs adjudication

proceedings. Referring to Rule 3(1) Mr. S. K. L. Ratan submitted that the confiscation does not arise and therefore it can be done only after

recording a finding that there has been contravention and imposition of the penalty by the Adjudicating Officer, the Adjudicating Officer can then

invoke the provisions of Section 63 of the Act which provides that the Adjudicating Officer adjudging any contravention u/s 51 may if he thinks fit

and in addition to any sentence which he may impose directing that any currency, security or any other money or property in respect of which contravention has taken place shall be confiscated. It would therefore submitted that the confiscation is the last stage in the proceedings initiated by the adjudicating officer, and to summarise (1) he should issue a notice calling upon the alleged offender to show cause; (2) if he is satisfied with the explanation given in response to the show cause notice, he should drop the proceedings; (3) If not, he should issue a notice fixing the date for the inquiry; (4) the inquiry should be in accordance with the provisions of Section 51 which provides that the inquiry shall be done in the prescribed manner; (5) If he finds that there has been a contravention he can impose a penalty u/s 51; (6) If he wants to confiscate after adjudicating the contravention u/s 51 he can confiscate u/s 63.

41. In view of what is stated above, Mr. S. K. L. Ratan again reiterated that the show cause notice in this case which asked the respondent in the Writ Appeal to show cause as to why adjudication proceedings should not be taken against him and also show cause as to why the currency should not be confiscated it is clear that the show cause notice is against law and contravenes the provisions of FERA.

42. We have already dealt with the above argument of Mr. S. K. L. Ratan is extenso in the paragraphs supra with reference to the pleadings, judgments cited and the arguments advanced by the counsel appearing on either side. We have therefore, for the reasons stated above, reject the above contention of Mr. S. K. L. Ratan with reference to the additional grounds also.

43. Therefore, for all the foregoing reasons and discussions, Writ Appeal No. 522/95 filed by the writ petitioner is dismissed and the Writ Appeal No. 794/94 filed by the Special Director, Enforcement Directorate and another is allowed. C.M.P. No. 9573/97 also is dismissed, and consequently C.M.P. 7390/95 also is dismissed and in the circumstances of the case, the parties are directed to bear their own costs in these appeals.

43. Order accordingly.