

(2010) 03 MAD CK 0176

In the Madras High Court

Case No : Writ Petition No's. 23110 and 23558 of 2009 and M.P. No. 1 of 2009

P. Giribabu

APPELLANT

Vs

Deputy Director of Enforcement

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Advocates Act, 1961 — Section 30
Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2, Order 18 Rule 2, 135(2)
Constitution of India, 1950 — Article 20(3), 21
Customs Act, 1962 — Section 108
Foreign Exchange Management Act, 1999 — Section 13, 37, 37(1), 37(3)
Income Tax Act, 1961 — Section 131, 131(1), 131(B), 293
Oaths Act, 1969 — Section 3, 4, 5, 6(2), 7
Sea Customs Act, 1878 — Section 171A, 171A(4)

Citation : (2010) 254 ELT 636 : (2010) 326 ITR 575 : (2010) 99 SCL 268

Hon'ble Judges : K. Venkataraman, J

Bench : Single Bench

Advocate : B. Kumar, for the Appellant; M. Dhandapani, for the Respondent

Final Decision : Dismissed

Judgement

K. Venkataraman, J.—These writ petitions have been filed for mandamus directing the respondent to permit the petitioner to be accompanied by an advocate of his choice when he appears before the respondent in pursuant of the summons issued to them u/s 37 of the Foreign Exchange Management Act, 1999 (FEMA) and recording of statement, though the advocate will be present beyond the hearing distance, if need be.

2. The averments made in the affidavit filed in support of the writ petition in W.P. No. 23110 of 2009, in nutshell is set out hereunder:

(i) The petitioner is a businessman and has a jewellery shop under the name of Sri Vasavi Gold & Bullion (P.) Ltd., at N.S.C. Bose Road, Chennai. He is assessed to Sales tax and Income Tax. All of a sudden, the officers of the respondent conducted a search in his shop on 23-10-2009. They did not recover any

document or any other incriminating material. However, they forcibly took him to the office of the Enforcement Directorate at Sastri Bhavan. What happened at that place was described by him in his communication to the respondent sent by RPAD on 25-10-2009. The advocate of the petitioner was not permitted to meet him. Though, the petitioner requested the respondent to permit him to appear with a lawyer of his choice, a reply dated 27-10-2009 was sent by the respondent, rejecting his request.

(ii) Section 37(3) of the Foreign Exchange Management Act, 1999 (FEMA) provides that the officers under FEMA shall exercise powers like the powers conferred on the Income Tax authorities under the Income Tax Act, 1961, subject to the limitations contained therein. Section 131 of the Income Tax Act provides that the officers thereon shall have the powers vested in a Court under the Code of Civil Procedure, 1908 for the purpose of enforcing attendance of any person for examining him on oath. CPC in turn requires to be noted to understand the width of power of examination of the persons. Order 10 Rule 2 of CPC provides for oral examination of the party or his pleader to elucidate the issues involved in a suit. Order 16 of the code provides for examination of witnesses and issuance of summons thereof. Order 18 provides for recording of evidence and Rule 2 of Order 18 provides for cross examination and attendance of witnesses.

(iii) Since the same procedure is to be adopted u/s 37 of FEMA also, the persons summoned have to be examined on oath. Section 7 of the Oaths Act, 1969 provides that what is recorded after administration of Oath is evidence. Income Tax Act provides that examination by an officer is deemed to be a judicial proceedings and hence a person is entitled to be represented by an advocate of his choice.

(iv) FEMA is not a penal enactment but it is only a civil proceedings. Hence, the right to be represented by an advocate flows as the cross examination of the petitioner is justified as if before a Court of law. The respondent has no jurisdiction of power to deny the presence of an advocate. The right of a fair procedure is part of the requirement of Article 21 of the Constitution of India. It is being denied by the respondent by his refusal to allow the presence of an advocate.

(v) Thus, making these averments, the petitioner has come up with the said writ petition.

3. The averments made in the affidavit filed in support of the writ petition in W.P.No. 23558 of 2009, in nutshell is set out hereunder:

(i) The petitioner is doing business as real estate dealers and builders. The officers of the respondent functioning under FEMA conducted a search on the business premises on the night of 6-10-2009. Large amount of Indian cash was recovered. It was Rs. 1.31 Crores. The money actually belonged to a partnership firm "Messrs Venkatesh Property" in which the petitioner is a partner. It was kept in the office for the purposes of investment in real estate. The seizure is

therefore not justified in the first place. The statement recorded from the petitioner is contrary to the above facts and was out of coercion and ill treatment. The officers forcibly took the petitioner to their office at Sastri Bhavan and detained him there continuously and no outside help was provided to him during the entire period.

(ii) At the instance of his relatives, an advocate came to the office of the respondents and wanted to meet the petitioner as he was entitled to, but he was not permitted. Since, he was ill-treated, a letter dated 25-10-2009 was addressed to the respondents requesting him to permit to appear before him with an advocate of his choice, if further summons are issued to him. By communication dated 4-11-2009, the respondent replied that such permission cannot be accorded. He was summoned to appear on 17-11-2009. A grave prejudice will be caused to him, if he is not permitted to be accompanied by an Advocate to be present at the time of interrogation.

(iii) Thus, the contentions raised in this writ petition are similar to the contentions raised in the other writ petition which was extracted above.

4. Counter affidavit was filed on behalf of the respondent in W.P. No. 23110 of 2009 wherein the following facts have been set out:

(i) The respondent issued summons u/s 37 of FEMA read with Section 131 of the IT Act, 1961 to the petitioner vide this Office letter dated 29-7-2009. After receipt of the above summon, the petitioner appeared before the Assistant Director of Enforcement Directorate at 2.00 P.M on 23-10-2009 and on the same day he gave a statement giving preliminary details. When further questioned about his involvement in the case, the petitioner refused to answer the question. After that the Assistant Director issued summons dated 27-10-2009 and 4-11-2009. The above two summons were not responded by the petitioner but the petitioner counsel sent telegrams dated 23-10-2009 and 24-10-2009. The request made by the petitioner to permit him to be accompanied by an advocate of his choice at the time of interrogation was denied.

(ii) The allegation that the officers of the Enforcement Directorate, Chennai conducted a search on the petitioner's establishment on 23-10-2009 is not true. The officers of the Enforcement Directorate visited the petitioner premises on 23-10-2009 and summons u/s 37 of FEMA and Section 131 of the Income Tax Act was issued by the Assistant Director of Enforcement, Chennai for the appearance of the petitioner on 23-10-2009. In response, the petitioner appeared on his own before the said officer.

(iii) There is no provision under FEMA, 1999 and Income Tax Act, 1961 to permit the petitioner to appear with a lawyer of his choice, as the petitioner is called for giving evidence under summons. A Division Bench of this Court in the judgment in V. Datchinamurthy and Another Vs. Asst. Director of Inspection, (Intelligence), I.T. Dept. and Another, , has gone into the depth of this issue whether a lawyer can be present during examination of the witness appearing on summons and

held that the witness has no right to take his counsel along with him, at the time when the statement is recorded.

(iv) The authorized officers of FEMA are empowered to investigate any contravention of the provisions of FEMA, 1999, summon any person and record any statement from them in order to unearth the truth or otherwise. The purpose of issuing summons to the person concerned is to make enquiry and record the statements under the provisions of FEMA. On further investigation, if there appears to be a contravention, the department is at liberty to initiate adjudication proceedings by issuing a show-cause notice as required under the FEMA and relevant rules thereunder. During the adjudication proceedings the petitioner is entitled to have the assistance of an Advocate or a Chartered Accountant of his own choice to defend him. The petitioner in his voluntary statement given earlier has given intricate details and the investigation is still at the initial stage. The petitioner has been summoned for further enquiry in this regard and for completion of the investigation.

5. Counter affidavit was filed on behalf of the respondent in W.P. No. 23558 of 2009 wherein the following facts have been set out:

(i) Specific intelligence was gathered by the officers of the enforcement that the petitioner has been receiving huge sums of money and making payments locally on a large scale under instructions of persons residing in Dubai and Malaysia and also transfer foreign exchange unauthorizedly abroad. He has received huge amount of Rs. 1.31 Crores and he was about to deliver the same to persons who would come from Mumbai to Chennai. Therefore the officers of the Enforcement Department kept surveillance on the activities of the petitioner. Based on the above specific intelligence and surveillance made, the business premises and the residential premises were searched by the officers of the respondent department. During the course of search, the officers have found a box containing Rs. 1.30 Crores in the denomination of 1,000 and 500 rupee notes in the cabin of the petitioner. The officers also found additional amount of Rs. 1,31,000 in addition to incriminating documents, records etc., when the officers were interrogating, two persons entered the premises of the petitioner to receive the said amount.

(ii) The contention of the petitioner that the amount of Rs. 1.31 Crores seized by the Department actually belonged to a partnership firm in which the petitioner is a partner and the same was kept for the purpose of investment in real estate are totally false and incorrect. The petitioner in response to the summons dated 6-10-2009 and 7-10-2009 appeared before the Assistant Director and gave a voluntary statement on oath admitting, inter alia that he is the Managing Director of "M/s. Venkateswara Homes P. Ltd." and Proprietor of "M/s. Sambhav Investments". He has also confessed that he has been receiving and making payments in India as per the instructions of the persons in Dubai and Malaysia for commission.

(iii) The respondent after analyzing the entire documents and the statement of

the petitioner decided to continue further investigation and hence the petitioner's appearance was necessitated and therefore the petitioner was issued with summons dated 20-10-2009 and 4-11-2009 for his appearance on 26-10-2009 and 17-11-2009.

(iv) The other contentions raised are similar to the Counter Affidavit in W.P. No. 23110 of 2009.

6. I have heard Mr. B. Kumar, the learned Senior Counsel appearing for the petitioners and Mr. M. Dhandapani, the learned Special Counsel appearing for the respondent.

7.1 The first and foremost submission made by the learned Senior Counsel appearing for the petitioners is that Section 37(1) of FEMA contemplates power to search, by the Director of Enforcement and other officers of Enforcement.

Section 37(3) contemplates that the officers referred to under Sub-section (1) shall exercise like powers which are conferred on the Income Tax authorities under the Income Tax Act, 1961.

Section 131 of the Income Tax Act contemplates that the officers concerned shall for the purpose of that Act, shall have the powers as are vested in a Court under Civil Procedure Code, 1908, when trying a suit in respect of the matters enumerated thereunder. One such power enumerated u/s 131(b) namely, "Enforcing attendance of any person including an officer of a banking institution and examining him on oath". Thus, according to the learned Senior Counsel appearing for the petitioners, the officer who records the statement u/s 37 of FEMA is a Civil Court and hence the Advocates can appear before the authorities under FEMA.

7.2 On the other hand, it was contended by the learned Special Counsel appearing for the Enforcement Department that for collecting material and gathering facts, statement was obtained from the petitioners. Thus the officials of the respondent was collecting materials to investigate the matter further at this stage. Thereafter, if the officials of the respondent are not satisfied with the statement of the petitioners, before adjudication, show-cause notice will be caused to the petitioners. Even at the preliminary stage, the petitioner cannot request for assistance of an Advocate.

7.3 Before adverting to the said contentions raised by the learned Senior Counsel appearing for the petitioners and the learned Special Counsel appearing for the Enforcement Department, it would be more appropriate to reproduce Section 37 of FEMA as well as Section 131(1) of the Income Tax Act.

Section 37 of FEMA

37. Power of search, seizure, etc.--(1) The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in Section 13.

(2) Without prejudice to the provisions of Sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an under Secretary to the Government of India to investigate any contravention referred to in Section 13.

(3) The officers referred to in Sub-section (1) shall exercise the like powers which are conferred on Income Tax authorities under the Income Tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under the Act.

Section 131(1) of the Income Tax Act

Power regarding discovery, production of evidence, etc.

131(1) The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals) and Chief Commissioner or Commissioner shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) issuing commissions,

7.4 Section 37(3) of FEMA, no doubt contemplates that the officer who are entrusted with the power to search shall exercise like powers which are conferred on the Income Tax Authorities under the Income Tax Act, 1961 and shall exercise such powers subject to limitations laid down under the Act. Section 131 of the Income Tax Act confers the same power for the authorities as are vested in a Court under Civil Procedural Code.

7.5 It has been asserted in the Counter Affidavit, that the purpose of issuing summons to the petitioners are to make an enquiry and record the statements. On further investigation, if there appears to be a contravention, the department would be at the liberty to initiate Adjudication proceedings as required under FEMA and relevant rules therein. During the adjudication proceedings, the petitioner is entitled to have an Advocate or Chartered Accountant of his choice to defend him. It has been further stated in the Counter Affidavit that the investigation is still at the initial stage and the petitioners have been summoned for further enquiry in that regard and for completion of the investigation.

7.6 The question that arises for consideration is whether at the stage of preliminary investigation, can the petitioners seek the assistance of a lawyer.

7.7 When collecting materials to take further action, the officers of FEMA does

not act as a Court. Whether, the petitioners will be treated as accused of contravention of the provisions of FEMA or whether they would be treated as witness would be decided after preliminary enquiry or investigation by the authorities concerned. Even at the initial stage itself, before the adjudicating authorities comes to a conclusion to proceed further or not, there need be no assistance to the petitioners either by an Advocate or by a Chartered Accountant. The said view was taken by the Division Bench of this Court in V. Datchinamurthy's case (supra). The observations made by the Division Bench is usefully extracted hereunder:

The question thus to be considered is whether the scope of the enquiry under the I.T. Act is the same as it was before the civil court in passing the decree. The civil court adjudicated, though in a summary way, on the claim of the depositors in the present case, based on the promissory notes executed in their favour. The ITO in making investigation in the case of the Federation was seeking to find out the person to whom the money belongs. In other words, he wanted to find out whether there was any income earned by the Federation, which took its shape as deposits in the names of these persons, who had obtained decrees. As the scope of the enquiry under the I.T. Act is wholly different from that before a civil court, it is not possible to accept the submission that the ITO in making the enquiries was acting in any manner contrary to the findings of the civil court. Any action taken by the ITO is not likely to set at naught these decrees if they otherwise remained unchallenged in accordance with the provisions of the CPC in the appropriate forum. As the scope of the enquiries by the civil court and by the ITO are different, the principle of this decision cannot be applied to the facts herein.

We agree with this statement of principle by the learned judge. We hold that a witness has no right to take his counsel along at the time when his statement is recorded.

It is thus manifest that there is great latitude allowed to the ITO in the collection of materials and he does not act as a court at that stage. There are no two parties before him, and the procedure in the adversary system of proceedings cannot be applied to him. However, the ITO, before he uses the materials so collected, is bound to give the necessary opportunity to the assessee to test the evidence, to adduce any evidence in rebuttal and to explain the facts that appear against him. Thus, it is clear that the ITO cannot be asked to put on, or be thrust with, the garb of a court, even at the stage of collection of evidence.

The ITO is a Tribunal of a kind. He is duly appointed under the I.T. Act to discharge the powers and functions which are well-defined by the statute. His principle job is to make an assessment of the income and levy Income Tax on the basis of his determination. For the purpose of discharging these functions, he is invested with the power to gather information, material evidence, and the like. A specific power is conferred on him to summon witnesses, enforce their attendance, issue commissions and the like. In this respect, his powers are coequal with those of courts of law under the Civil Procedure Code. He is held to

be a Tribunal within the meaning of Section 135(2) of the Code of Civil Procedure, and witnesses who have to appear before him are protected from arrest. He is also a court for purposes of the Criminal Procedure Code. In these circumstances, the ITO, in his own sphere, is a Tribunal of plenary jurisdiction subject to no other control and limitations save those which are enacted in the Income Tax code. It stands to reason, therefore, that the investigations and inquiries launched by him are not subject to the jurisdiction of ordinary courts. Indeed, there is a specific provision in the IT. Act which forbids courts of law from interfering with the ITO's jurisdiction to assess: vide Section 293.

7.8 Thus, considering the overall aspects of the judgment cited above, I am of the considered view that the petitioners have no right to take their counsels along with them at the time when their statement is recorded by the respondent or his officials.

8.1 Secondly, it was contended by the learned Senior Counsel appearing for the petitioners that Section 3 of the Oaths Act, 1969 enables administration of Oath. However, the respondent has not administered the oath as required under the said Act. Before advertng to the said contention, Section 3 of the Act is usefully reproduced hereunder:

3. Power to administer oaths.--(1) The following Courts and persons shall have power to administer, by themselves or, subject to the provisions of Sub-section (2) of Section 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties imposed or in exercise of the powers conferred upon them by law, namely:

(a) all Courts and persons having by law or consent of parties authority to receive evidence;

(b) the commanding officer of any military, naval, or air force station or ship occupied by the Armed Forces of the Union, provided that the oath or affirmation is administered within the limits of the station.

(2) Without prejudice to the powers conferred by Sub-section (1) or by or under any other law for the time being in force, any Court, Judge, Magistrate or person may administer oaths and affirmations for the purpose of affidavits, if empowered in this behalf--

(a) by the High Court, in respect of affidavits for the purpose of judicial proceedings; or

(b) by the State Government, in respect of other affidavits.

8.2 In this connection, the learned Special Counsel appearing for the Enforcement Directorate relied on the decision reported in Hira H. Advani Etc. Vs. State of Maharashtra, One of the question that came in for consideration before the Hon''ble Apex Court in the said decision was about the admissibility of the statements made to the officer u/s 171A of the Sea Customs Act. Paras 33, 34,

35 of the judgment is usefully extracted hereunder:

33. In our view if the Legislature intended that the inquiry u/s 171A was to be considered a judicial proceeding not within the narrow limits therein specified but generally, it could have used suitable words to express its intention. Although, this Court gave a wider meaning to the expression "judicial proceeding" in Lalji Haridas Vs. State of Maharashtra and Another, there is nothing in that judgment to warrant a still wider interpretation of that definition.

34. Mr. Jethmalani referred to the provisions in the Indian Oaths Act (X of 1873) and on the basis of his argument that the statements u/s 171A(4) were made on oath contended that the proceeding became a judicial proceeding in the wider sense of the word. In our view the Oaths Act has no application here. The preamble to the Act shows that it was an Act to consolidate the law relating to judicial oaths, affirmations and declarations and was enacted because the Legislature thought it "expedient to consolidate the law relating to judicial oaths, affirmations and declarations and to repeal the law relating to official oaths, affirmations and declarations". Section 4 of the Act provided that

The following Courts and persons are authorised to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law;

(a) all Courts and persons having by law or consent of parties authority to receive evidence.

The relevant portion of the Section 5 runs--

Oaths or affirmations shall be made by the following persons:

(a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any Court or person having by law or consent or parties authority to examine such persons and to receive evidence.

35. Counsel argued that a Customs Officer was a person who had authority by law to receive evidence within the meaning of Section 4 of the Oaths Act and anybody who could be lawfully examined before such a person would be a witness within the meaning of Section 5 and as such it would be necessary to administer oath to them. In our view, the argument proceeds on a complete misconception of the provisions of the Act. The preamble to the Act shows that the oaths referred to are only judicial oaths and Section 7 shows that all such oaths had to be administered according to such forms as the High Court might prescribe. The Customs Officers have nothing to do with such forms and nothing has been shown to us that any such formality was ever complied with. Neither do the records show that any oath was administered to any person making a statement u/s 171A. In Maqbool Hussain Vs. The State of Bombay, this Court stated expressly that the Customs Officers were not authorised to administer

oath and the position according to us is not altered by the insertion of Section 171A in 1955.

8.3 Considering the above judgment complied with the fact that: the respondent is investigating the matter which is at the preliminary stage, I am of the considered view that the question of administering oath does not arise for consideration at all.

9.1 The next contention of the learned Senior Counsel appearing for the petitioner is that the Advocates right flows from the Advocates Act, 1961. Section 30 of the Act contemplates the rights of advocates to practice. While so, denying permission to the petitioners to have an advocate of their choice at the time of taking statement from the petitioner is untenable. Before advertng to the said contention of the learned Senior Counsel appearing for the petitioner, it would be desirable to extract Section 30 of the Advocates Act, 1961.

30. Rights of advocates to practise.--Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends-

(i) in all Courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

9.2 The reading of the above provision makes it clear that the Advocate is entitled to practice all Courts including Supreme Court, before the Tribunal or person legally authorised to take evidence or before any other authority or person. No doubt the said provision stipulates that the advocates is entitled to practice, including before the persons legally authorised to take evidence. Further, the respondent is not taking any evidence from the petitioners and hence the reliance placed on the Advocates Act, 1961 may not be of any relevance to the matter in issue in these writ petitions. But however, the Advocates Act, 1961 only speaks about the rights of the Advocates to practice in any Court or authorities and it does not speaks about the rights of the parties to engage a counsel before the Supreme Court or any other forum.

9.3 In this connection, the learned Senior Counsel appearing for the petitioners relied on the decision in Smt. Jaswant Kaur and Another Vs. The State of Haryana and Another, . The question that arose before the High Court of Punjab and Haryana was with regard to the constitutional validity of Section 20A of the Haryana Ceiling on Land Holdings Act which bars the appearance of any Legal practitioner before any officer or authority other than the Financial Commissioner. It was held by the Division Bench that Section 20A is repugnant to Section 30 of the Advocates Act and therefore invalid. It has been held therein that the said Act is a complicated piece of legislation and it would indeed be difficult for lay persons to understand some of its provisions without expert legal

assistance. Under those circumstances, it has been held by the Division Bench that the need of legal assistance to enable those persons to understand the provisions of the Act shall not be deprived.

9.4 The other judgment that was cited by the learned Senior Counsel appearing for the petitioners in H.S. Srinivasa Raghavachar Vs. State of Karnataka and Others, . The prohibitions of the legal practitioners from appearing before the land Tribunals under the Karnataka Land Reforms Act came in for consideration before the Hon''ble Apex Court and the Hon''ble Apex Court has held the said provision as unconstitutional.

9.5 The said judgments may not be of any use to the petitioners, since in the given case on hand, it is only at the stage of preliminary investigation.

10.1 The learned Special Counsel appearing for the respondent relied on the decision in Poolpandi Vs. Superintendent, Central Excise and others etc. etc., of the said judgment usefully extracted hereunder:

11. We do not find any force in the arguments of Mr. Salve and Mr. Lalit that if a person is called away from his own house and questioned in the atmosphere of the customs office without the assistance of his lawyer or his friends his constitutional right under Article 21 is violated. The argument proceeds thus: if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering questions it amounts to mental torture. We are unable to agree. It is true that large majority of persons connected with illegal trade and evasion of taxes and duties are in a position to afford luxuries on lavish scale of which an honest ordinary citizen of this country cannot dream of and they are surrounded by persons similarly involved either directly or indirectly in such pursuits. But that cannot be a ground for holding that he has a constitutional right to claim similar luxuries and company of his choice. Mr. Salve was fair enough not to pursue his argument with reference to the comfort part, but continued to maintain that the appellant is entitled to the company of his choice during the questioning. The purpose of the enquiry under the customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be disassociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer. Applying the "just, fair and reasonable test" we hold that there is no merit in the stand of appellant before us.

10.2 Thus, in the case on hand, for collecting materials and to gather facts,

statements were obtained from the petitioners. Thus, collecting material to investigate cannot be construed as an evidence taken by the respondent from the petitioners, which requires the assistance by an advocate.

11. Yet another decision relied on by the learned Special Counsel appearing for the respondent is reported in Deputy Director of Enforcement Vs. A.M. Ceaser, . Para 12 of the said judgment is usefully extracted hereunder:

12. With regard to the observation of the Lower Appellate Court for the handicap faced by the accused in the absence of an Advocate, the Supreme Court in Poolpandi Vs. Superintendent, Central Excise and others etc. etc., has considered that when a person was summoned to appear before the officers under FERA, he cannot be treated as an accused and under such circumstances, he is not entitled to the presence of his lawyer when he was examined by the officers. Therefore, refusal to allow the presence of lawyer in such cases, would not be violative of protection under Article 20(3) of the Constitution. When the Apex Court itself has held so clearly that a person, who was summoned to appear before the Enforcement Directorate for interrogation, is not entitled to seek the presence of the Advocate, the Lower Appellate Court cannot make use of this as a circumstances in favour of the accused to arrive at the conclusion that his statement could not be voluntary.

12. Yet another decision relied on by the learned Special Counsel appearing for the respondent in Kishore J. Chawla Vs. Union of India (UOI), . This Court in the said judgment has held that person examined u/s 108 of Customs Act, 1962 is not having a right to have his lawyer at the time of interrogation or near to him in the premises.

13. Yet another judgment relied on by the learned Special Counsel appearing for the Enforcement Directorate, is an unreported judgment made in W.P. No. 2429 of 2009, dated 24-11-2009. The question that came for consideration before this Court was whether the summons issued by the respondent therein u/s 37 of the FEMA should be interdicted by this Court on the ground that there was no application of mind and the documents sought for would amount to a roving enquiry by the Directorate. Para 10 of the said judgment is usefully extracted hereunder:

10. The Act has deliberately chosen not to apply the concept of summons used either under the CPC or under the Code of Criminal Procedure, but has chosen to apply analogous provisions found in the Income Tax Act. Therefore, while interpreting the scope and width of Section 37 of FEMA, one cannot apply the concept of summons as available to a Civil Court under the Code of Civil Procedure, only because the power of a Civil Court was conferred on the authorities.

14. Yet another judgment relied on by the learned Special Counsel appearing for the Enforcement Directorate, is the judgment made in CrI.O.P. (MD) No. 7646 of 2007, dated 11-1-2008. Para 11 of the said judgment is usefully extracted

hereunder:

11. The perusal of the eleven conditions would clearly demonstrate that all those eleven conditions are relating to arrestees/detenues. At this juncture, the learned Counsel for the respondent would convincingly put forth his arguments that under pretext of examining/interrogating the respondent R. Sundar Raj, he cannot be kept even during night time or for days together, simply labelling him as a mere witness.

15. Thus, the decisions relied on by the learned Special Counsel appearing for the respondent will amply prove that the request made by the petitioners to have an assistance of an Advocate at the stage of initial and preliminary investigation by the officials of the respondent does not sound well.

16. Thus, summing up the entire discussions made above, I am of the considered opinion that the relief sought for by the petitioners seeking permission to be accompanied by an advocate of his choice when he appears before the respondent in pursuant of the summons issued u/s 37 of the Foreign Exchange Management Act, 1999 (FEMA) and recording of statement in the presence of an advocate who will be present beyond the hearing distance does not require any consideration.

17. In fine, both the writ petitions are dismissed. Consequently, connected miscellaneous petitions are closed. However, no order as to costs.