
(2013) 08 MAD CK 0140
In the Madras High Court
Case No : Writ Petition No. 18096 of 2013

Ramakrishna Setty

APPELLANT

Vs

Special Director, Directorate of Enforcement, Adjudicating
Authority, Southern Region

RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Citation : (2013) 4 LW 939 : (2013) 6 MLJ 388

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : R. Rajarathinam, for the Appellant; Dhandapani, S.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—This writ petition is directed against the order dated 6 June 2013 whereby and whereunder, the Directorate of

Enforcement rejected the request of the petitioner for cross examination of the officers and other persons mentioned in the show cause notice, and

directed the petitioner to furnish substantive reply within a period of thirty days.

The facts

The Directorate of Enforcement, Chennai, initiated adjudication proceedings against the petitioner on the basis of a complaint preferred by the

Assistant Director, Directorate of Enforcement, Bangalore. The complaint was preferred u/s 16(3) of the Foreign Exchange Management Act,

(hereinafter referred to as FEMA). The Special Director, pursuant to the said complaint, issued a notice to the petitioner dated 14 February 2011

to show cause as to why adjudication proceedings should not be held against him on account of the contravention of provisions of FEMA. The

petitioner submitted reply on 27.12.2012, with a request to cross examine certain witnesses and to permit him to file an additional reply. The

request made for cross examination was considered by the first respondent and vide order dated 6 June 2013, the prayer was rejected. The said

order is under challenge in this writ petition.

2. The Assistant Director, Enforcement Department, filed a counter affidavit wherein it was contended that strict provisions of the Indian Evidence

Act are not applicable to a proceeding before the adjudicating authority constituted under FEMA. The Director contended that there is no question

of cross examination of persons whose names were shown in the complaint in view of the scheme of the Act.

Submissions

3. The learned counsel for the petitioner contended that the adjudicating authority placed reliance on the statement recorded from various persons

and as such, adequate opportunity should have been given to the petitioner to cross examine the witnesses. According to the learned counsel,

though the Adjudicating Authority was not bound by the provisions of the Indian Evidence Act, he should follow the principles of natural justice.

Since the adjudicating authority placed reliance on the statement of certain witnesses recorded by the authority, necessarily, the petitioner should

have been given an opportunity to cross examine all such witnesses.

4. The learned counsel, by placing reliance on the judgment of this Court in V. Bhaskaran vs. The Special Director, Enforcement Directorate,

FEMA (dated 24.6.2005 in W.P. Nos. 18918 of 2000 etc. batch), contended that a learned Judge of this Court has already held that in case the

Adjudicating Authority intend to rely on the statement of any witness, such a witness shall be produced for cross examination at the instance of the

accused. The learned counsel contended that the first respondent proposed to rely on the statement recorded by the authority and as such, the

petitioner should have been given an opportunity to cross examine the witnesses.

5. The learned Senior Central Government Standing Counsel for the Directorate of Enforcement contended that there is no requirement to cross

examine persons referred to in the complaint and the show cause notice. The learned counsel contended that the proceedings before the

Adjudicating Officer cannot be construed to be a criminal proceedings in the true

sense of its term. The learned counsel by placing reliance on the judgment of Supreme Court in *Telestar Travels Pvt. Ltd. and Others Vs. Special Director of Enforcement*, , contended that the issue raised by the petitioner is no more *res integra* in view of the legal principle laid down by the Supreme Court that principles of natural justice do not require that in matters involving FEMA, persons who are said to have given information should be cross examined in the presence of the accused or subjected to cross examination. The learned Senior Central Government Standing Counsel placed reliance on a similar judgment of the Delhi High Court in *Shahid Balwa v. Directorate of Enforcement*, (dated 24.1.2013) in W.P.(C). No. 401/2013 and contended that similar contention was negatived by the Delhi High Court.

Analysis

6. The Assistant Director, Directorate of Enforcement, preferred a complaint before the special Director, Directorate of Enforcement u/s 16(3) of the FEMA against the petitioner. The complaint refers to the information gathered by the complainant and the names of certain persons involved in the subject matter. The complaint was taken on file by the first respondent resulting in issuance of show cause notice to the petitioner on 14.2.2011. The petitioner, on receipt of show cause notice, submitted a reply denying the entire allegations made against him. The petitioner wanted the Special Director to permit him to cross examine the mahazar witness, officers who were present at the time of the alleged seizure, officers who have recorded the alleged statement and the persons named in the show cause notice. The petitioner also wanted to file an additional reply, meaning thereby, he reserved the right to file additional reply after the cross examination. The Adjudicating Authority was of the opinion that in view of sub-rule (5) of Rule 4 of the Adjudication Proceedings and Appeal Rules 2000, the Authorized Officer was not bound to follow the provisions of Indian Evidence Act. The application submitted by the petitioner for cross examination was accordingly rejected.

7. The adjudication proceedings are governed by Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereinafter referred to as Rules). Rule 4 relates to holding of enquiry and the related proceedings. Rule 5 gives a right to the aggrieved to file an

appeal before the Special Director, Appeals.

8. The petitioner wanted the adjudicating authority to permit him to cross examine the witnesses referred to in the complaint preferred by the

second respondent. The petitioner placed reliance on an earlier order passed by this Court dated 24.6.2005 in W.P. No. 18918 of 2000 etc.

batch. In the said decision, the learned Judge held that once the enquiry commences and if the adjudicating authority ultimately proposes to rely in

his final order the statement of a witness and would ultimately render a finding by placing reliance on the evidence of such witness, against the

accused, the enquiry authority cannot be permitted to rely on such evidence or statement unless he has been produced for cross examination. The

relevant observation reads thus:

73.....(iii) As regards the right of cross examination, the accused cannot seek to cross-examine the witnesses even before they furnish their reply to

the show cause notice. But when once the adjudication proceeding commences, it is for the adjudicating authority to decide whether he intends to

rely on the statement of any witness. If he decides to place reliance on the statement of any witness, then such a witness shall be produced for

cross examination if demanded by the accused. No reliance can be placed on the statement of any witness not produced in the adjudication

proceedings without the accused being afforded with an opportunity for cross examination.

9. The question regarding cross examination of witness cited in the complaint before the adjudicating authority came up for consideration before

the Supreme Court in Surjeet Singh Chhabra Vs. Union of India and others, . The Supreme Court observed that cross examination of the witness

would not make any material difference.

3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted

it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA.

When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an

opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute

concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But

in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to

cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the

confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no

force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So

there is no need to call panch witnesses for examination and cross-examination by the petitioner.

10. In *Kanungo and Company Vs. Collector of Customs and Others*, , the issue before the Supreme Court was whether the adjudicating officer

had breached the principles of natural justice by denying the opportunity to cross examine the persons from whom enquiries have been made by

the authority. The Supreme Court while rejecting the said argument, held as follows:

"12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In

the show-cause notice issued on 21.8.1961, all the material on which the Customs Authorities have relied was set out and it was then for the

appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been

made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the principles of natural justice do not

require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to

be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third

contention of the appellant.

11. The Supreme Court in *Telestar Travels Pvt. Ltd. and Others v. Special Director of Enforcement* (supra), by placing reliance on *Surjeet Singh*

Chhabra v. Union of India (supra) and *Kanungo and Co. v. Collector of Customs* (supra) held that the disclosure of the documents to the accused

and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. The issue in the said case was also regarding the right to cross examine the witness.

12. In *Shahid Balwa v. the Directorate of Enforcement* W.P.(C) No. 402 of 2013 the Delhi High Court considered the very same issue regarding

the right to cross examine the person who has given a statement before the authorities. The learned Judge by placing reliance on various judgments

of the Supreme Court, held that denial of opportunity of cross examination would not operate as breach of principles of natural justice warranting

interference by the Court.

13. The Foreign Exchange Management Act is a special statute enacted for promoting the orderly development and maintenance of foreign

exchange market in India. The Act contains detailed provisions with regard to machinery for contravention of the provisions of the Act, the

enforcement of the orders passed by the adjudicating authority and the manner in which the proceedings should be conducted by the adjudicating

authority. The Act is a self contained code dealing with all the aspects of the matter. While interpreting a provision of a special statute like FEMA,

the nature of proceedings should also be taken into account by the Court.

14. The complainant produced certain materials before the adjudicating authority to initiate adjudication proceedings. The adjudicating authority

has in turn provided all such materials to the petitioner to submit his explanation. It is for the petitioner to submit his explanation with regard to the

circumstances pointed out against him. The attempt of the petitioner appears to be to collect materials after cross examining the witnesses and to

file an additional reply to escape from the clutches of law. The petitioner has denied the allegations in a vague manner. The intention of the

petitioner is very clear. He is not prepared to disclose his defence and he wanted to make out a case after cross examination. The materials now

produced by the second respondent before the first respondent does not require cross examination of the persons who have given statement. It is

for the petitioner to produce primary materials and to show that there were no valid materials before the first respondent to render a finding against

him. In case the first respondent rejects such contention, the petitioner is having a right of appeal u/s 17 of the FEMA Act. Therefore, it cannot be

said that denial of cross examination would amount to violation of the principles of natural justice. In the result, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.