

(2002) 01 MAD CK 0073

In the Madras High Court

Case No : Writ Petition No. 3158 of 1996

S. Raghu

APPELLANT

Vs

Special Director, Enforcement Directorate, New Delhi and
Additional Director, Enforcement Directorate, Madras

RESPONDENT

Date of Decision : 18-01-2002

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 2, 33, 34, 35, 36

Citation : (2003) CriLJ 3601

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : K.A. Jabber, for the Appellant; K. Kumar, ACGSC, for the Respondent

Final Decision : Allowed

Judgement

A. Kulasekaran, J.—The petitioner has filed the above writ petition for a writ of mandamus to direct the respondents to return the documents seized by the respondents on 14-03-1995.

2. The case of the petitioner is that he is an exporter of ready made garments, besides he is doing business of indenting agent of various garment exporter of South India and due to his efforts, number of exporters in India got export orders from foreign buyers thereby he has made contribution of earning foreign exchange to the country. The enforcement officers, Madras has searched his business premises on 14-03-1995 and seized under Mahazar documents, foreign currencies and his passport under the provisions of Foreign Exchange Regulation Act, 1973, hereinafter referred to as the Act. US dollars and Sterlings seized from the petitioners have nothing to do with the foreign exchange violation which are nothing but the balance amount of foreign exchange released to the petitioner before he made his visit to foreign countries. It is alleged by the petitioner that the documents seized from his office premises are not incriminating. The enforcement officers have forcibly taken him to their office and obtained involuntarily false statements from the petitioner by using threat,

force and intimidation. The petitioner was also arrested under Sec. 35 of the Act and later released on bail by Economic Offences Court II, Egmore, Chennai. The authorities have not commenced the adjudication proceedings within the period of six months from the date of seizure of the documents and the petitioner has sent a letter dated 20-09-1995 to the 1st respondent requesting him to return the seized documents, foreign currencies and his passport and the copy of the said letter was also sent to the 2nd respondent. The 1st respondent has issued a show cause notice under T-4/41/-95 (SCN I to IV) dated 12-10-1995 and T/4/42/M/95 (SCN I) dated 16-10-95 as to why adjudication proceedings under Sec. 51 of the Act should not be held against him and the foreign currencies seized from him should not be confiscated to the Government under the provisions of the Act. With reference to the petitioner's representation dated 20-09-1995, the first respondent sent a reply letter dated 09-11-1995 informing that the show cause notice has already been issued as such returning the foreign currencies is to be decided by the adjudicating authority at the time of adjudication. The petitioner has also caused a notice dated 12-01-1995 through his counsel requesting the 2nd respondent to return the passport but the 2nd respondent did not comply with the same, hence this writ petition.

3. The learned counsel appearing for the petitioner has argued that retention of the documents, foreign currencies and passport of the petitioner by the respondents and their attempt to confiscate it in the adjudication proceedings is illegal and against law. The enforcement office seized the said document on 14-03-1995, show cause notices were issued on 12-10-1995 and 16-10-1995 as such it has to be deemed that no proceedings either under Sec. 51 or 56 of the Act has been commenced before the expiry of the 6 months period as prescribed under Sec. 41 of the Act. Learned counsel for the petitioner further argued that the word document means and includes Indian Currency, Foreign Exchange and books of accounts as defined in Sec. 33, 34, 36 to 41, combined reading of Sec. 2(h) and 33 (Explanation) would show Foreign currency also a document. The counsel for the petitioner further pointed out the further period of six months as mentioned under Sec. 41 was not extended by the respondents and no such order extending such period of six months was received by the petitioner. Learned counsel for the petitioner emphasized that since proceedings were not commenced within a period of six months from the date of seizure of the foreign currency seized from the petitioner are liable to be returned. After the expiry of six months the documents are deemed to have been returned to the petitioner as such the respondents are not legally entitled to make use of the document.

4. The learned counsel appearing for the respondents filed his written submissions and advanced his arguments based on the same. The learned counsel for the respondents brought to the notice of this Court Sections 33 - Powers to Call for information, Sec. 34 - power to search suspected persons and to seize the documents, Sec. 36 - Power to stop and search conveyance, Sec. 37 -Power to search premises, Sec. 39 - Power to examine persons and Sec. 40 - Power to persons to give evidence and produce documents. The learned counsel

also argued that on the basis of reliable information, the premises of M/s. Obitex and M/s. International Services at No.1/1, South Mada Street, Srinagar Colony, Saidapet, Chennai -15 were searched by the offices of the enforcement directorate on 14-03-1995 which resulted in seizure of foreign currencies and incriminating documents. The seized documents indicate over-invoicing and under-invoicing of exports and also unauthorized collection of foreign exchange and payments. The learned counsel further argued that the petitioner in his statement under Sec. 40 of the Act has stated that he was acting as an indenting agent of M/s. IBO Tex and its sister concern in Netherland and also proprietor of M/s. Obitex, Madras, that Obitex has been indulging in over-invoicing and under-invoicing of exports to M/s. Ibotex and their sister concerns in Netherlands. On the basis of seized documents, follow-up action were initiated against M/s. Fashion India by searching its office and residential premises under Sec. 37 of the Act on 14-03-1995 and 15-03-1995. One Gokulaganapathy has stated that he was a partner in M/s. Fashion India and that firm is indulging in over-invoicing and under-invoicing of exports for meeting the floor price fixed by the Government of India. In his statement, the said Gokulaganapathy stated that exports proceeds to the tune of Rs. 1,01,80,870/- was pending realization by M/s. Fashion India beyond the period prescribed. On the basis of documents seized from the premises of M/s. Fashion India it was learnt that they owed huge sum of foreign exchange to M/s. IBO Tex. One Govindarajan, partner of Fashion India was at large and evading courts of justice and he was not available to participate in the proceedings initiated against the petitioner and thus in the proceedings the documents seized could not be utilized on account of the non-availability of the said Govindarajan. Thereafter, the said Govindarajan appeared before them and gave a statement under Sec. 40 of the Act only on 13-07-1995 before the Enforcement Officer. Since the said Govindarajan was not participating in the proceedings till 13-07-1995, the show cause notice was issued on 12-10-1995 and on 16-10-1995, therefore, in this case is well within the right with respect to retain the documents within the time frame.

5. The learned counsel for the petitioner relied on the following decisions in support of his case.

i) In 1977 2 MLJ 5 (S.O. Arjunan Chettiar Vs. The Enforcement Officer and others) it has been held thus:-

"Special leave petition is dismissed but we must express our disapproval of the action of the Department in retaining the documents beyond the period of one year specified in Section 41 of the Foreign Exchange Regulation Act, 1973. When the statutory provision requires that the documents seized from a person should not be retained for a period exceeding one year unless before the expiration of the said period, adjudication proceedings are commenced under Sec. 51, the department must obey the law and return the documents unless in the meantime it has commenced adjudication proceedings under Sec. 51. If it is found by the department that the period of one year, which is specified in Sec.41 is not

adequate, it would be for the legislation to amend the section in order to provide for extension of time, but so long as the section stands as it is, it must be complied with by the Department."

ii) In Directorate of Enforcement Vs. Deepak Mahajan and another, it has been held in Para Nos. 32 and 33 as follows:-

"32. True, normally Courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for Courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane. In case of this kind, the question is not what the words in the relevant provision mean but whether there are certain grounds for inferring that the legislature intended to exclude jurisdiction of the Courts from authorizing the detention of an arrestee whose arrest was effected on the ground that there is no reason to believe that the said person has been guilty of an offence punishable under the provisions of FERA or the customs Act which kind of offences seriously create a dent on the economy of the nation and lead to hazardous consequences. Authorising, a few of which we have referred to above, show that in given circumstances, it is permissible for Courts to have functional approaches and look into the legislative intention and sometimes may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

33. In the light of the above exposition of the principle of law, we have no reason to believe and in fact do not believe that the provisions of the FERA and Customs Act were passed for any other purpose rather than their ostensible purposes, the vital of which being the economic development of the country and augmentation of revenue."

iii) In 1998 Criminal Law Journal (Madras) - 2388 (K.M.A. Abdul Kabeer Vs. Special Director, Enforcement Directorate, New Delhi and another) wherein in Para 31 and 33 it has been held thus:-

"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 18-08-1992. 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.

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 us as per the earlier section. This would be against the interest of public policy and interest 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."

6. The learned counsel appearing for the respondents relied on the following decision in support of his contentions.

i) In AIR 1998 SCW 235 (Directorate of Enforcement Vs. Ashok Kumar Jain) it has been held in Para 9 and 10 as follows:-

"9. Learned Additional Solicitor General invited our attention to Section 41 of the FERA which provides that the document seized can be retained only for a period of six months unless the Directorate extends the said period for a further period which shall not exceed six months. It is submitted that the directorate has already extended the period of six months and even that extended period would expire on 04-01-1998. According to the learned Additional Solicitor General interrogation of the respondent would become completely futile if the Directorate is disabled to use the seized documents for questioning the persons concerned because respondent is not availing himself for effective interrogations during the

said statutory limited time schedule in spite of extension of the period permitted by FERA.

10. It was submitted by both the senior counsel appearing for the respondent that respondent would not ask for return of the seized documents on the expiry of the said time schedule. But such a concession from the respondent may not help the Directorate because of the statutory limitation contained in Section 41 of FERA. Since the period fixed for return of the seized documents would have expired for no lapse on the part of the officials of the Directorate, we are of the considered opinion that public interest should not suffer by non-utilization of the seized documents for interrogating the respondent. We therefore extend the said period for a further period of six months commencing from 04-01-1998. We make it clear that the Directorate shall abide by this extended time and no further extension shall be made by them except with the leave of this Court."

7. Now we look into the relevant provisions of Foreign Exchange Regulations Act, 1973:-

Section 2(h) - "Foreign Exchange" means foreign currency and includes -

(i) all deposits, credits and balances payable in any foreign currency, and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency.

(ii) Any instrument payable, at the option of the drawer or holder thereof or any other party thereto, either in Indian currency or in foreign currency or partly in one and partly in the other;

i) "foreign security" means any security created or issued elsewhere than in Indian, and any security the principal of or interest on which is payable in any foreign currency or elsewhere than in India

Section 33 - Power to call for information -

1.

2.

Explanation:- For the purposes of this Section, Sec. 34 and Secs. 36 to 41 (both inclusive) document includes Indian Currency, Foreign Currency and books of accounts.

Section 41 :- where in pursuance of an order made under sub-section (2) of Sec. 33 or the provision of Sec. 34 or Sec. 36 or Sec. 37 or of a requisition or summons under Sec. 39 or Sec. 40, any document is furnished or seized and any officer of Enforcement has reason to believe that the said document would be evidence of the contravention of any of the provisions of this Act or of any rule, direction or order made thereunder, and that it would be necessary to retain the document in his custody, he may so return the said document for not exceeding (six months) or if before the expiry of the said period of (six months) any

proceedings;-

Section 51:- Power to adjudicate :-

For the purpose of adjudging under Sec. 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

8. A combined reading of Sec.2(h) and the explanation to Sec.33 of the Act makes it clear that "documents" means and includes foreign currency for the purpose of Sec.41 of the Act.

9. Sec.41 of the Act prescribes a time limit of six months for the retention of the documents by the Department provided within the said period of six months the action under Sec.51 or under Sec.56 of the Act commenced, the authorities have powers to retain the documents beyond the period of 6 months till the disposal of the proceedings.

10. In this case, the show cause notices dated 12.10.95 and 16.10.95 were issued by the respondent beyond the period of 6 months from the date of seizure under Sec.51 of the Act. Admittedly no proceedings under Sec.56 was commenced against the petitioner. The petitioner has not obtained any order of injunction restraining the respondents from initiating any action either under Sec.51 or under Sec.56 of the Act. It is true under Sec.41 of the Act, for reasons to be recorded in writing, be extended by the Director of Enforcement for a further period not exceeding six months. In this case admittedly the respondents have not obtained further period of 6 months and no such order-extending period of 6 months was also sent to the petitioner. Even in the written arguments nowhere it is stated that the respondents have obtained extension for a further period of six months. The judgments relied on by the petitioner show that when the statutory provisions require that the documents seized from a person should not be retained for a period exceeding one year unless before the extension of the said period adjudication proceedings were commenced under Sec.51 of the Act, the Department should obey the Law and return the documents.

11. The documents inclusive of Passport were seized from the petitioner on 4.3.95. The petitioner has sent a letter-dated 20.9.95 to the first respondent to return the seized documents and forwarded copy of the same to the 2nd respondent. After receipt of the said letter dated 20.9.95 the respondents have issued show cause notice dated 12.10.95 and 16.10.95, however not given any reply to the letter dated 20.9.95 before the issuance of the said two show cause notices. By letter-dated 9.11.95, the respondent has informed the petitioner that as the show cause notices have been issued the return of documents is not

possible. As rightly pointed out by the learned counsel for the petitioner, nothing was mentioned about the passport of the petitioner in both the show cause notices. Learned counsel for the respondents argued that the documents were not utilized due to the lapse on the part of one Govindarajan who appeared belatedly on 13.7.95. Even in the reply dated 9.11.95, the respondents did not whisper anything about the alleged belated appearance of the said Govindarajan before them, indeed he appeared and gave statement in a period of four months from the date of seizure of documents from the petitioner. Further it is clear that the seized documents were not utilized due to the lapses not on the part of the petitioner. Hence I have no hesitation to come to the conclusion that the retention of the seized documents under mahazar-dated 14.3.95, beyond the period of six months is illegal. Hence the writ petition deserves to be allowed.

12. In the result, the writ petition is allowed as prayed for. No costs. Consequently connected WMP is closed.