(1976) 09 MAD CK 0027

In the Madras High Court

Case No : W.A. No. 237 of 1976, against Judgment of Ra

The Enforcement Officer, Enforcement Directorate, Madras — APPELLANT

Vs

S.O. Arjunan Chettiar and Others — RESPONDENT

Date of Decision : 21-09-1976

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 40, 46

Citation : AIR 1977 Mad 279 : (1977) ILR (Mad) 227 : (1977) 90 LW 232 : (1977) 1 MLJ 497

Hon'ble Judges : Kailasam, C.J;Balasubrahmanyan, J

Bench : Division Bench

Judgement

Kailasam, C.J.—This appeal is preferred by the Enforcement Officer, Enforcement Directorate, Madras, Against the judgment of

Ramanujam, J. in W. P. 6771 of 1975 dated 16-7-1976 directing him (Enforcement Officer) to return the documents seized from the first

respondent herein.

2. On 13-9-1974, the residential premises of the first respondent was searched. Three fixed deposit receipts of the first respondent were

recovered. One was in the name of one Vaidyalingam Chettiar. A statement was recorded from the first respondent. On 1-11-1974, the Deputy

Controller of Reserve Bank was asked to block the operation of the fixed deposit receipts. The Deputy Controller by him order dated 5-11-1974,

blocked the operation of the fixed deposit receipts. On 19-5-1975, the first respondent was directed under S. 40 of the Foreign Exchange

Regulation Act, 1973, to appear before the officer on 25-5-1975. The matter was adjourned to 16-6-1975. Fresh summons was issued on 31-5-

1975. In the meantime, the first respondent filed W. P. 4259 of 1975, questioning the validity of the summons. On 19-6-1975 this Court issued a

rule Nisi and directed stay of operation of the summons. The first respondent also filed W. P. 4287 and 5090 of 1974, questioning the blocking of

the fixed deposit receipts. These writ petitions were allowed only in respect of two fixed deposit receipts as the remittances were found to be from

authorised channels. On 29-10-1975, the first respondent filed W. P. 6771 of 1975, praying for the return of the documents seized from him on

the ground that one year had elapsed from 13-9-1974. On 12-12-1975, W. P. 4259 of 1975 questioning the legality of issuing summons was

taken up and was dismissed holding that the first respondent was bound to appear in obedience to the summons. On 15-7-1976, W. P. 6771 of

1975 was allowed as one year had elapsed from 13-9-1974, and this writ appeal is preferred against that order.

3. On behalf of the Enforcement Officer, the appellant, it was submitted that the learned Judge was in error in directing the return of the documents

as the Enforcement. Directorate has not only the power but also a duty to retain the documents when proceedings are taken for adjudication.

Section 19-A empowers the Enforcement Officer to search any person. Section 19-G provides that where in pursuance of an order under Sub-s.

(2) of S. 19, any document is furnished or seized and the Director of Enforcement or any other officer of Enforcement has reason to believe that

the said document would be necessary to retain the document in his custody, he may so retain the said document for a period not exceeding one

year; and the officer can keep the document for more than one year if he, before the expiry of the said period commenced any proceedings under

S. 23, in which case, he will be entitled to retain the document until the disposal of those proceedings. Section 23 prescribes the procedure for

levying penalty. If any person contravenes any of the provisions mentioned in S. 23, he shall be liable to such penalty not exceeding three times the

value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be

adjudged by the Director of Enforcement in the manner provided for. He is also liable to be prosecuted in a criminal Court. Under S. 23(1-B), the

power of confiscation is also conferred. Section 41 of the new Act, namely. Act 46 of 1973, corresponds to S. 19-G with an added explanation, which is not necessary for the purpose of this case. According to that section, the authority can retain the document for a period of one year; but

he may retain it for an extended period if before the expiry of the said period of one year, he commences proceedings under S. 51 of the new Act.

Section 51 confers power on the authority to adjudicate against any person who has committed a contravention of any of the provisions of the Act.

Section 63 deals with the power of Court and the adjudicating officer to direct confiscation.

4. The facts of the case as admitted are that the documents were recovered on 13-9-1975. On 31-3-1976, a notice was issued by the authorities

asking the first respondent to show cause as to why adjudication should not be started. Admittedly, this is beyond one year from the date of

seizure and it is also equally clear that no action was taken to commence proceedings, which would enable the retention for a longer period before

the expiry of the one year''s period. In the circumstances, therefore, under the wording of S. 41, the Enforcement Officer is not entitled to keep the

documents beyond 13-9-1975. An attempt was made on behalf of the Enforcement Directorate, to submit that during the period 19-6-1975 and

12-12-1975, there was an order of stay of operation and that the said period should be excluded. Even if that period is excluded, the notice that

was given subsequently was not within one year. Therefore, on the plain wording of the section, the Enforcement Directorate has no authority to

withhold the documents.

5. The Advocate General appearing for the appellant submitted that while under the provisions of S. 41, the Enforcement Directorate can no

longer keep the documents, yet, the courts will not issue a writ of Mandamus as under the other provisions of the Act, the Enforcement authority

has a duty to keep the documents when once the adjudication proceedings commenced. In other words, the contention of the Advocate General is

that even if more than an year has elapsed and under S. 41 he could not retain the documents, when once he commenced proceedings for

adjudication, he is entitled to retain the documents and as such, a writ of mandamus will not be issued. In support of his contention, he relied on the

decision of the Supreme Court in State, by Nilratan Sircar, Enforcement Officer Vs. Lakshmi Narain Ram Niwas, . The case was under Foreign

Exchange Regulation Act, and under the Act, the authorities had a right to keep the documents for a period of four months from the date of

seizure, under S. 23 they could keep the documents for a period of four months, and if proceedings are commenced within that period for an

extended time. In that case, the search warrant was issued on 6-5-1959 by the Chief Presidency Magistrate, Calcutta. On 28-5-1959, the

Enforcement Officer applied to the Chief Presidency Magistrate for permission for retention of the seized documents for a period of two months.

The chief Presidency Magistrate granted the permission. Again, on applications made by the Enforcement Officer, time was extended by the Chief

Presidency Magistrate on 28th July and 28th September, 1959. On 5-10-1959, the respondent therein applied to the Chief Presidency Magistrate

for an order of return of the said documents as the statutory period of four months during which the Director of Enforcement could keep the

documents had expired, and no proceedings had been commenced against him under S. 23 of the Act. On 20-10-1959, the Chief Presidency

Magistrate ordered the return of the seized files to the respondent therein. He, however, modified this order the same day permitting the

Enforcement Officer to retain the documents till 28-11-1959. The matter was heard on 26-10-1959 and on that day, the matter was adjourned for

decision to 10-11-1959. In his application presented on 10-11-1959, the Enforcement Officer stated that the Director of Enforcement had started

adjudication proceedings against the respondent for alleged violation of S. 4(1) of the Act and had issued notice to him to show cause and that in

connection with the adjudication proceedings seized files items Nos. 2 and 7 of the seizure memo would be required. On 10-11-1959, the Chief

Presidency Magistrate ordered the return of all the documents except those mentioned as items. 2 and 7 of the search list. The respondent therein

went up in revision against this order for the continued retention of the two documents and the High Court allowed the revision and ordered the

return of those documents also to the respondent. Against that order, the appeal to the Supreme Court was preferred. The Supreme Court, in

para. 19 of that decision, after referring to Sections 19-A and 23 of the Act, came to the conclusion that as the proceedings were not commenced

before the expiry of the period of four months during which period they could keep the documents, the director could not have on his own retained those documents after the expiry of the fourth month. In that case, the documents were retained after obtaining the permission of the Chief

Presidency Magistrate from the time of their seizure under the impression that the magistrate could legally order the retention of the documents. In

dealing with the question whether in the circumstances, the documents should be returned or not, the Supreme Court observed as follows-

Proceedings under S. 23 did start prior to the order for the return of the documents. Considering the real intention of S. 19-A to be that the

Director of Enforcement can retain the documents seized till the final disposal of proceedings under S. 23 of the Act, the Magistrate''s order, even

if he had not the authority to pass orders for the retention of the documents by the Director of Enforcement, till the final disposal of the proceeding

under S. 28, was an order giving effect to the spirit behind the provisions of Section 19-A. The order of the High Court directing the return of the

documents to the respondent therefore appears to us to be unjustified in the special circumstances of the case.

This passage is relied on by both the learned counsel for the appellant and the first respondent, in support of their contentions. According to Mr.

Abdul Kareem, the learned counsel for the first respondent, the court refrained from directing the return of the documents due to special

circumstances, namely, that the Enforcement Officer was over-careful in getting orders from the Magistrate for the retention of the documents and

as his behaviour was exemplary. On the other hand, the contention of the learned Advocate General is that the special circumstance referred to is

the starting of the further proceedings prior to the order of return of the documents. On a careful reading of the passage, we feel that the special

circumstance referred to by the Supreme Court is the commencement of the proceedings before the order of retention of the documents.

6. In this matter, it is the common case that proceedings were commenced on 31-3-1976. The question is, even though the Enforcement

Directorate is not entitled to keep the documents, according to S. 41, should they be directed to return them in view of the fact that they had

commenced proceedings. According to the Supreme Court, no order directing the return of the documents should be issued. We feel that in view

of the fact that the Enforcement Directorate has in law a right to retain the documents pending adjudication proceedings return of the documents should not be ordered. It may be seen that when an Enforcement Officer commences proceedings in connection with the offence, he is entitled to

require any person to produce or deliver any document relevant to the enquiry. Though under S. 19-G he can retain the documents only for the

period specified therein, when once he commences adjudication proceedings, under S. 23-D he is empowered to hold an enquiry and impose the

penalty specified under the provisions of S. 23 and while holding such enquiry, under S. 23-D(2), he has the power to summon and enforce the

attendance of any person to give evidence or to produce a document or any other thing, which, in the opinion of the Director of Enforcement, may

be useful for, or relevant to, the subject-matter of the enquiry. Under this section, after the Officer commences proceedings for adjudication, he is

entitled to summon and retain the documents. Therefore, though he is bound to return the documents under S. 19-G, he is entitled to summon the

same documents and those document should be produced by the person as such. The proceedings may end with the confiscation of the

documents. The position, therefore, is that while u/s 19-G, he has no right to retain the documents after the specified period, when once the enquiry

is commenced, he is entitled to summon, receive and retain the documents. In such a situation, even though the adjudication proceedings had

started after the period specified in S. 19-G, it will not be property for the court to direct the return of the documents, for, in law, he would be

entitled to have the documents for adjudication purposes. It would be for the purpose of technically obeying the requirements of Section 19-G if a

direction were to be made for the return of the documents when the officer could exercise his powers to summon them. If a direction to return the

documents is to be issued, it is only for the purpose of making the Enforcement Officers to obey the provisions of the Act. This question had arisen

before the Supreme Court of the United States where the desirability of strict enforcement of fourth amendment and the question whether the

evidence procured during any illegal search is to be admitted or not were considered reportedly. Recently, the Supreme Court in a decision Stone

Warden v. Power delivered on 6-7-1976, went back on its earlier view and held that the basis of exclusion of evidence to deter the policemen

deflects the truth finding process and often frees the guilty and is not in conformity with the concept of justice. Taking all the circumstances into account, we do not think that a writ of mandamus should issue when the officers have got a right to retain the documents under the other provisions

of the Act.

7. The law in England regarding the issue of a writ of mandamus is stated in Halsbury''s Laws of England, 3rd Edn., Vol. II, in para 199 page 106

thus-

A mandamus will not go when it appears that it would be futile in its result. Accordingly, the court will not, by Mandamus, order something which

is impossible of performance, by reason of the circumstance that the doing of the act would involve a contravention of law............ A Mandamus

will not be granted if the party complained of has powers which would enable him to make order inoperative;..........No mandamus will issue in

order to effect what amounts to an evasion of a statute, or a breach of trust.

We will now refer to a few decisions cited by the learned counsel for the first respondent. Reliance is placed upon the decision of the Supreme

Court in Assistant Collector of Customs Vs. Charan Das Malhotra, . The court held that the Collector cannot extend the period of retention of the

articles beyond the period permitted under the provisions of the Act. The court also held that before the time could be extended, notice should be

given to the party concerned. The court further held that the power of extending the period is quasi-judicial in nature and an opportunity of being

heard should have been (given) to the respondent therein before orders for extension were made. This decision does not advance the case of the

first respondent.

8. He then relied on the decision Supdt. of Taxes, Dhubri and Others Vs. Onkarmal Nathmal Trust and Others, . In that decision, the Supreme

Court held that the contention on behalf of the State that it became impossible for the State to issue notice under S. 7(2) of the new Act within two

years of the expiry of the period of return is unsound on principles and facts. This decision also does not help us to decide the question arising in

this case.

9. In the decision in Commissioner of Income Tax, Uttar Pradesh and Others Vs. Jawahar Lal Rastogi, , in considering S. 132(2) of the Income

Tax Act, the court observed that the premises of the assessee were searched on 21-9-1964 and 22-9-1964, and the documents were retained till

May 1966, i. e., for a period of 19 months and that there was no order of the authorities recording reasons for retaining the documents seized after

the expiry of 180 days, nor was there any approval of the Commissioner for retaining such documents. In the circumstances, the court held that the

retention of the documents without complying with the requirements of the stature after the expiry of the period of 180 days would be plainly

contrary to law. The question that has arisen in this cases as to whether the Enforcement Directorate could retain the documents pending

adjudication proceedings did not arise there.

10. The learned counsel placed strong reliance upon the decision of this court in P.T.C. Thangiah Nadar and Co. Vs. The Assistant Collector of

Central Excise, . In that case, the articles were seized on 3-9-1974. Under the provisions of the Act, the notice of confiscation ought to have been

given within six months i.e. before 3-3-1975. The show cause notice was actually given on 1-4-1975 i. e., after the expiry of six months. The

Government sought to rely upon the fact that a notice was given directing to show cause as to why the time should not be extended. It was held

that that notice did not have the effect of extending the time and that the only notice that extended the time was dated 1-4-1975 which is beyond

six months from the date of seizure and it would attract the prohibition under S. 110(2). The goods were ordered to be returned. In that case, the

question whether the proceedings were commenced or not and if commenced what would be the effect was not considered at all.

11. Lastly, the learned counsel relied upon the decision in The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others

etc., . He placed reliance on the passage at page 468 where the court held that the proviso to sub-s. (3) has fixed the period for which the officer

seizing accounts can keep them, namely, 30 days at a time and if he wants to keep them for more than thirty days he has to take the permission of

the next higher officer. The question whether after the expiry of the period if there were proceedings pending did not arise there.

12. On a consideration of the authorities before us, we hold that the decision of the Supreme Court in State, by Nilratan Sircar, Enforcement

Officer Vs. Lakshmi Narain Ram Niwas, is applicable to the facts of the case and that it will have to be held that in the circumstances of the case, the court should not direct the return of the documents by the issue of a mandamus.

13. In the result, the appeal is allowed and the order of the single Judge is set aside. There will be no order as to costs.

14. Appeal allowed.

