

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/07/2004

CORAM

THE HONOURABLE MR. JUSTICE N.KANNADASAN

WRIT PETITION No.19332 of 1997

A.Abdul Samath .. Petitioner

-Vs-

Union of India  
represented by its Enforcement  
Directorate (South Zone),  
Shastri Bhavan, 3rd Floor,  
3rd Block, No.26, Haddows Road,  
Chennai-600 006. .. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for the issue of a Writ of Mandamus, directing the respondent to forthwith return to the petitioner US Dollar 1,92,493/-; Saudi Riyals 5,44,000/-; Qatar Riyals 12,000/-; UAE Dirhams 70,500/- and Singapore Dollars 11/- along with interest, the currencies being seized from the petitioner's residence on 15th July 1993.

For Petitioner : Mr.Ajmeer Ali  
For Respondent : Mr.K.Kumar,  
S.C.G.S.C.

:O R D E R

It is contended on behalf of the petitioner that the Officers of the respondent Department have conducted a search at the residence of the petitioner which resulted in seizure of (a) US Dollar 1,92,493/-; (b) Saudi Riyals 5,44,000/-; (c) Qatar Riyals 12,000/-; (d) UAE Dirhams 70,500/- and (e) Singapore Dollars 11/-. By a show cause notice dated 29.12.1993, the Special Director, Enforcement Directorate, New Delhi required the petitioner to show cause in writing as to why the adjudication proceedings as contemplated under Section 51 of the Foreign Exchange Regulation Act, 1973 (hereinafter called as the ' Act') should not be held against him for the alleged contravention of Section 8 (1) of the Act and as to why the above foreign currencies should not be confiscated under Section 63 of the Act. It is further contended that as per Section 41 of the Act, if no proceedings are initiated within a period of six months, the document should be returned. It is further contended that the proceedings said to have been initiated under Section 51 of the Act, have not commenced within the period of six months. The learned counsel for the

petitioner further contended that the notice issued by the Special Director cannot be termed as proceedings initiated under Section 51 of the Act. According to the learned counsel, any notice issued under Rule 3 (4) of the Adjudication Proceedings and Appeal Rules, 1974 (hereinafter called as 'Rules') alone should be construed as the actual commencement of the enquiry proceedings under Section 51 of the Act and what was served upon the petitioner is only a notice for initiation of enquiry proceedings under Rule 3(3) of the Rules. Accordingly, the learned counsel contended that the notice served upon him cannot be termed as the actual commencement of the proceedings. The learned counsel further contended that even the said notice was served only on 15.4.1994, viz., which is beyond the period of six months and as such, the petitioner is entitled to the relief as stated in the petition. The learned counsel for the petitioner placed reliance upon the decisions of the Supreme Court and other High Courts in support of his contention.

2. Per contra, the learned Senior Counsel for Central Government contended that the commencement of the adjudication proceedings is actually from the date of issuance of show cause notice vide proceedings dated 29.12.1993 issued by the Special Director and not the date of service of the notice. The learned counsel further contended that the respondent Department has made every effort to serve upon the petitioner initially by registered post which was later on returned undelivered, and thereafter, the service was effected through Police Department, since the petitioner was working as an Inspector of Police. The learned counsel further contended that the reliance placed upon by the counsel for the petitioner about the reference in the objections submitted in the connected proceedings pending before the Additional Chief Metropolitan Magistrate Court in C.C.No.1164 of 1994 with regard to the actual date of service of the said proceedings as 15.4.1994 is only a reply to the contentions raised by the petitioner therein, and that would not mean that the Department has not made any attempt to serve the show cause notice dated 29.12.1993 immediately thereafter. The learned counsel further contended that the petitioner was adopting delaying tactics to avoid the service of show cause notice, and as such, he cannot take any advantage for the alleged delay in the service of notice. The learned counsel also relied upon the various decisions of this Court wherein the law has been clearly settled to the effect that the date of show cause notice should be construed as the commencement of proceedings under Section 51 of the Act.

3. I have considered the rival contentions of the parties.

4. For the purpose of deciding the matter, Section 41 is extracted here-under:

"41. Custody of documents, etc. - Where in pursuance of an order made under sub-section (2) of Sec.33 or the provisions 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 retain the said document for a period not exceeding (six months) or if, before

the expiry of the said period of (six months) any proceedings--  
(i) under Sec.51 have been commenced, until the disposal of those proceedings, including the proceedings, if any, before the Appellate Board and the High Court, or

(ii) under Sec.56 have been commenced before a court, until the document has been filed in the Court:

(Provided that the aforesaid period of six months may, for reasons to be recorded in writing, be extended by the Director of Enforcement for a further period not exceeding six months) (Emphasis supplied by the Court)

5. A bare reading of the above provision clearly discloses about the commencement of the proceedings only. The said provision does not speak about the actual date of service for the purpose of calculation of the cut-off period viz., six months. In the instant case, it is not disputed that the show cause notice for adjudication proceedings is dated 29.12.1993, and an attempt was made to serve the said notice. In fact, when a specific question was put to the learned counsel for the petitioner as to whether he denies the attempt initiated on the part of the Department to serve the said notice by registered post, he has fairly conceded that the same cannot be denied, but however, submitted that though factually the petitioner was not made available at his residence on the date of service, the same could not be served. According to the learned counsel for the petitioner, the notice could not be served upon the petitioner due to the fact that he was not available at the particular point of time and as such, further attempt should have been made by the Department to serve the notice within the time stipulated.

6. That apart, the petitioner has carefully avoided to make any reference in the affidavit filed in support of the writ petition about the actual date of service viz., 15.4.1994 and the mode of the said service. In the absence of any specific pleadings, the respondent is not expected to furnish the correct details about the mode of service. However, a specific stand is taken by the respondent in the counteraffidavit to the effect that the notice was returned undelivered, and later on, the service was effected through Police Department. A further submission is also made in the counter-affidavit that the petitioner has deliberately avoided the service of show cause notice. Even though the writ petition was filed in the year 1997, the petitioner has not chosen to make a reference about the actual date of service of show cause notice the mode of service and other particulars, though the contention is urged before me that the notice was served only on 15 .4.1994. This amounts to deliberate suppression of the material facts on the part of the petitioner which alone is sufficient ground for the dismissal of the writ petition.

7. As regards the submission with regard to the commencement of proceedings is concerned, the contention of the learned counsel for the petitioner to the effect that the notice issued under Rule 3(3) of the Adjudication Proceedings and Appeal Rules, 1974 cannot be construed as the commencement of proceedings of the enquiry under Section 51 of the FERA of 1973 and only a notice under Rule 3(4) of the said Rules can be construed as the commencement of the proceedings cannot be accepted. To appreciate the

above contention, it is relevant to extract the relevant Rule of Adjudication Proceedings and Appeal Rules, 1974, which is extracted here-under:-

"The Adjudication Proceedings And Appeal Rules, 1974

Rule 3. Adjudication Proceedings.-(1) In holding an inquiry under Sec.51 for the purpose of adjudging under Sec.50 whether any person has committed contravention as specified in Sec.50, the adjudicating 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 service thereof), why adjudication proceedings should not be held against him.

(2) Every notice under sub rule (1) to any person shall indicate the nature of offence alleged to have been committed by him.

(3) If after considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that adjudication proceedings should be held, he shall issue a notice fixing a date for appearance of that person either personally or through his lawyer or other authorised representative.

(4) On the date fixed, the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence alleged to have been committed by such person indicating the provisions of the Act or of the rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place."

8. A perusal of the above Rules discloses that the notice under Rule 3(3) is to be construed as the commencement of the proceedings, in view of the fact that the said notice shall be issued provided if the adjudicating Officer is of the opinion that the said proceedings should be initiated, he shall issue the notice. Further, a Division Bench of this Court in its judgment in W.A.No.851 of 1994 etc. bench dated 10.3.1994 (THEIR LORDSHIPS K.A.SWAMI, CHIEF JUSTICE AND RAJU, J.) has held as follows:-

"The plea based on the irregular service of the notice under challenge upon the petitioner in W.P.No.3487 of 1994 also proceeds upon a surmise and misapprehension. Rule 10 of the Adjudication Proceedings and Appeal Rules, 1974 provides for more than one manner of service of which one is by delivering or tendering the notice or order to that person concerned or his duly authorised agent. This obviously governs the cases of service directly by the department by adopting personal service methods. The other mode of service contemplated under clause (b) of rule 10 is by sending the notice or order to the person concerned by registered post with acknowledgment due to the address of his place of residence or his last known place of residence or the place where he carries on, or last carried on, business or personally works, or last worked for gain. In this case, it is not in dispute and as a matter of fact, it was admitted that the impugned proceedings were issued for service through registered post with acknowledgment due and if during delivery by the postal authorities while effecting service of the same, the wife of the

petitioner received the envelope with its contents sent through registered post and acknowledged the same, the Officers of the department could not be accused of having not observed the rule."

9. Further the very same Division Bench in a common judgment in W.

A.No.791/95 dated 31.8.1995 has held as follows:-

"In our view, a proceeding under Section 41 of the Act can be held to have commenced on issuance of the show cause notice. It is not necessary that such show cause notice should be served, within a period of one year (at the relevant point of time the period contemplated under the Act was one year)"

10. Similarly, a Division Bench of this Court in an yet another decision in Dy. Director, Enforcement Directorate, Madras vs. Naina Maricair (AIR 1990 MADRAS 22) was clearly of the opinion that the commencement of the adjudication proceedings should be construed when the show cause notice is issued and not when a notice of hearing is fixed.

11. The learned single Judge of this Court in WP No.16377 of 1997 dated 28.4.2004 has taken the view that the issuance of show cause notice is to be construed as the commencement of the proceedings and that date of service is immaterial. In the above decision, the learned Judge has also made a distinction about the service of notice as referred to under Section 110(2) of the Customs Act and the service of notice under Section 41 of FERA, 1973.

12. The decisions referred to above clearly proceeds to the effect that the date of issuance of show cause notice should be construed as the commencement of proceedings under Section 51 of the Act and to calculate the time limit, service of notice need not be taken into account.

13. The learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court in Bachhittar Singh vs. The State of Punjab (1962 3 SCR 713) and contended that the date of service alone should be reckoned. The above decision of the Supreme Court is with reference to the service of order of dismissal in the matter relating to disciplinary proceedings. The Apex Court have observed therein to the effect that a mere writing on the file by the concerned Minister cannot be construed as an order, since it has to be culminated finally as an order by the Secretary to the Government. Accordingly, the Apex Court held that the date on which the mere writing was made on the file cannot be construed as the date of order and proceeded that the order should be communicated to the concerned individual. Hence, the said decision has no application to the facts of the case.

14. Similarly, the learned counsel has relied upon the decision of the Supreme Court in Chaganlal Gainmull vs. Collector of Central Excise (1991 SCC (Cri) 149) as well as the decision of a Division Bench of Allahabad in Overseas Paints Linkers vs. Union of India (2001 (127 ) E.L.T.42 (All.)) which decisions were rendered with regard to Section 110(2) of the Customs Act 1962. As pointed out already, there is a vast different between Section 110(2) of the Customs Act 1962 and Section 41 of the FERA, 1973. Hence, the above decisions also have no application to the facts of the present case.

15. The learned counsel has also relied upon the decision of the Rajasthan High Court in Mool Chand vs. Union of India (1990 (48) E.L.T.374 (Raj.)). Even though the learned counsel has placed reliance upon the above judgment, in view of the fact that the law is settled by the two Division Bench of this Court, the above decision has no relevance.

16. In the light of the above settled legal principles, the date on which the show cause notice was issued viz., 29.12.1993 has to be construed as the commencement of adjudication proceedings and the same is within the meaning of Section 51 of the Act and as such, the petitioner cannot take advantage of the benefit of Section 41 of the Act.

17. For the reasons stated above, the petitioner is not entitled to the relief as prayed for and accordingly, the writ petition is dismissed. However, there will be no order as to costs. Before parting with the matter, this Court appreciates the able assistance rendered by Mr.K.Kumar, Senior Counsel for Central Government.

Index : Yes.

Internet : Yes.

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To

The Enforcement Directorate (South Zone),  
Union of India  
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Chennai-600 006.

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