

HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
SRINAGAR

Reserved on: 04.04.2023
Pronounced on:13 .04.2023

OWP No.2064/2018

MUSHTAQ AHMAD DAR & ORS. ...PETITIONER(S)

Through: Mr. M. A. Qayoom, Advocate.

Vs.

ENFORCEMENT DIRECTORATE & ORS.RESPONDENT(S)

Through: Mr. T. M. Shamsi, DSGI.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioners have challenged communication bearing No.T-4/04/SRZO/2017-759 dated 10.08.2018, issued by respondent No.2, whereby the said respondent has, after considering the cause shown by the petitioners, opined that adjudication proceedings as contemplated under Section 13(1) of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'FEMA') should be held against the petitioners.

2) It appears that a show cause notice dated 26th October, 2017, was issued by respondent No.2 to the petitioners wherein it was stated that a complaint under Section 16(3) of FEMA has been filed against them by Assistant Director, Srinagar Zonal Office, Directorate of Enforcement, in connection with contravention of FEMA and the Rules and Regulations framed thereunder. The petitioners were further informed

that in the complaint contravention of Sections 3(c), 4, 6(3)(g) and Section 3(a) of FEMA has been alleged against them. As per the complaint, prima facie, contravention of the provisions of FEMA, Rules and Regulations framed thereunder was committed by the petitioners and they were asked to show cause in writing within 30 days from the date of receipt of notice as to why adjudication proceedings as contemplated in Section 13(1) of FEMA should not be held against them and as to why the seized foreign currency of 1,00,000/ US Dollars should not be confiscated to the Central Government in terms of Section 13(2) of FEMA. The petitioners were also informed by way of the aforesaid show cause notice that in case it is decided to hold enquiry proceedings in terms of Section 13 of FEMA, they would be required to either appear in person or through Legal Practitioner/Chartered Accountant to explain and produce such documents or evidences, as may be useful for or relevant to the subject matter of the enquiry and in case of their failure, the adjudication proceedings would proceed against them *ex parte*. In the show cause notice, it was further indicated that reliance was placed upon the documents listed in Annexure-B to the complaint and that original of the said relied upon documents would be made available for inspection of the petitioners or their authorized representative in the office of respondent No.1.

3) Reply to the show cause notice was filed by the petitioners wherein they raised preliminary objections with regard to maintainability of the proceedings, primarily, on the ground that during the pendency of

the criminal trial against the petitioners emanating from FIR No.14/2002 of Police Station, Kud, Udhampur, for offences under Section 3/6 POTA, the show cause notice deserves to be recalled. It was further contended that the criminal trial and the complaint filed by respondent No.1 are technically intertwined and that the result of one is bound to affect and prejudice the rights of the accused in the other case and on this basis, it was contended that the show cause notice deserves to be recalled. The petitioners also filed their reply on merits of the complaint and submitted that the documents relied upon forming Annexure-B to the complaint are unreadable, blurred and not legible. It was submitted that the petitioners should be, either themselves or through their authorized representative, allowed to prepare the copies of these documents from the office of respondents or they should be provided a fresh set of legible documents so that they can supplement their reply.

4) It appears that vide impugned communication dated 10.08.2018, the Adjudicating Authority has, after considering the aforesaid reply of the petitioners, framed an opinion that adjudication proceedings under Section 13(1) of FEMA should be held against the petitioners.

5) The petitioners have challenged the aforesaid communication, primarily, on the ground that the Adjudicating Authority, without taking note of the request of the petitioners that they should be allowed to inspect the documents relied upon in the complaint as the same are not legible, issued the impugned communication/notice. It has been submitted that it was incumbent upon the respondents to provide legible

copies of the documents relied upon in the complaint or to allow the petitioners to have inspection of the documents in their office but without doing so, the Adjudicating Authority has, in a mechanical manner, issued the impugned communication/notice.

6) The respondents have contested the writ petition on the ground that the writ petition is not maintainable because the impugned communication is appealable before the Court of Special Director (Appeals), in terms of provisions of FEMA and without exhausting the said remedy, the petitioners could not have invoked the writ jurisdiction of this Court.

7) On merits, it has been submitted by the respondents that as per the prosecution case in FIR No.14/2002 for offences under Section 3/6 POTA registered with P/S Kud Udhampur, foreign currency of US Dollars 1.00 lac was seized from petitioners No.1 and 2. According to the respondents, the said petitioners disclosed that the seized foreign currency was acquired by them from Nepal from one Altaf Qadri, leader of All Parties Hurriyat Conference and was meant to be handed over to petitioner No.3. Thus, according to the respondents, there were cogent grounds for proceeding against the petitioners. The respondents have given details regarding the case registered against the petitioners and seizure of foreign currency.

8) Regarding supply of legible copies of relied upon documents, the respondents have submitted that the petitioners never approached their office with such a request. It has been further submitted that the criminal
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proceedings are entirely different from the adjudication proceedings under FEMA and, as such, merely because criminal proceedings are going on against the petitioners, the impugned notice cannot be recalled.

9) I have heard learned counsel for the parties and perused the record of the case.

10) At the very outset, the preliminary objection with regard to maintainability of the writ petition, as has been raised by the respondents, is required to be addressed. It has been contended by Mr. Shamsi, learned DSGI, appearing for the respondents that the impugned communication/notice is appealable under the provisions of FEMA and, as such, the writ petition is not maintainable.

11) On the other hand, learned counsel appearing for the petitioners has submitted that a notice under Rule 4(3) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereinafter referred to as the Rules of 2000) is not appealable.

12) Section 17 of FEMA provides that Special Director (Appeals) shall be appointed by the Central Government to hear the appeals against the orders of the Adjudicating Authorities. Thus, it is an order passed by an Adjudicating Authority which is appealable before Special Director (Appeals) in terms of Section 17 of FEMA. In the instant case, the Adjudicating Authority has not proceeded to pass any order against the petitioner as yet but it has, after considering the cause shown by the petitioners to the notice issued to them under Rule 13(1) of the Rules of

2000, framed an opinion that enquiry should be held against the petitioners and in this regard, a notice for fixing the date for their appearance has been issued to them. No order as such has been passed by the Adjudicating Authority against the petitioners. As per Rule 4(8) of the Rules of 2000, the Adjudicating Authority has power to pass an order in writing and impose such penalty as it thinks fit in accordance with the provisions of Section 13 of FEMA, if upon consideration of the evidence it is satisfied that the person has committed the contravention. It is this order passed by the Adjudicating Authority in terms of Rule 4(8) of the Rules of 2000 imposing penalty in terms of Section 13 of FEMA, which is appealable before Special Director (Appeals).

13) Every proceeding initiated by the Adjudicating Authority prior to passing of an order under Rule 4(8) of the Rules of 2000 is not appealable before Special Director (Appeals). Therefore, the contention of learned counsel for the respondents that the impugned notice issued by the respondents to the petitioners is appealable in nature, is without any merit. The writ petition is, therefore, held to be maintainable and the preliminary objection raised by the respondents about its maintainability is rejected.

14) That takes us to the merits of the case. It has been vehemently contended by Mr. Qayoom, learned counsel appearing for the petitioners, that once the petitioners had made it known to the respondents that some of the documents relied upon by the respondents for issuing show cause notice to the petitioners were not legible, it was the duty of the

respondents to provide legible copies of those documents to the petitioners or else allow them inspection of the record and without undertaking such an exercise, the respondent No.2 could not have framed an opinion to proceed against the petitioners. It has been submitted that in the impugned notice, the respondent No.2 has not even made a passing reference to the request of the petitioners which they had made specifically in their reply to the show cause notice.

15) The question that falls for determination in this case is as to whether the supply of documents relied upon by an Adjudicating Authority in framing an opinion to proceed against the noticee is a mandatory requirement. In this regard, we need to have a look at the relevant provisions of FEMA and the Rules of 2000.

16) Section 13 of FEMA provides for penalties and it reads as under:

Penalties. (1) *If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.*

(1-A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

(1-B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

(1-C) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1-D) No court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation.--For the purposes of this sub-section, "property" in respect of which contravention has taken place, shall include--

- (a) deposits in a bank, where the said property is converted into such deposits;*
- (b) Indian currency, where the said property is converted into that currency; and*
- (c) any other property which has resulted out of the conversion of that property.*

17) A perusal of the aforesaid provision reveals that for determining as to whether a person has contravened any provision of FEMA, the Adjudicating Authority has to adjudge the matter.

18) Section 16 of FEMA provides for appointment of Adjudicating Authority and it also prescribes the procedure for holding adjudicating proceedings. It reads as under:

(1) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit.

(2) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.

(3) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

(4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority.

(5) Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and—

- (a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);*
- (b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.*

(6) Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.

19) From a perusal of the aforesaid provision, it is clear that for the purpose of adjudication under Section 13 of FEMA, the Adjudicating Authority has to hold an enquiry after giving the person alleged to have committed contravention under Section 13 a reasonable opportunity of being heard. The Adjudicating Authority has to hold an enquiry upon a complaint in writing made by any the authorized officer and the person, against whom allegations of contravention are made, has a right to appear in person or to have legal assistance before the Adjudicating Authority. As per the said provision, the powers of civil court have been vested to an Adjudicating Authority.

20) In exercise of powers under Section 46 read with Sections 16(1), 17(3) and 19(1) of FEMA, the Central Government has made the Rules of 2000. Rule 4 of the said Rules is relevant to the context and the same is reproduced as under:

4. Holding of inquiry.-- (1) *For the purpose of adjudicating under section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, the Adjudicating Authority shall, 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 an inquiry should not be held against him.*

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

(3) After considering the cause, if any, shown by such person, the Adjudicating Authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him.

(4) On the date fixed, the Adjudicating Authority shall explain to the person proceeded against or his legal practitioner or the chartered accountant, as the case may be, the contravention, alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, directions or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place.

(5) The Adjudicating Authority shall, then, given an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to a future date and in taking such evidence the Adjudicating Authority shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (1 of 1872).

(6) While holding an inquiry under this rule the Adjudicating Authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the Adjudicating Authority may be useful for or relevant to the subject matter of the inquiry.

(7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Authority, the Adjudicating Authority may proceed with the adjudication proceedings in the absence of such person after recording the reasons for doing so.

(8) If, upon consideration of the evidence produced before the Adjudicating Authority, the Adjudicating Authority is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit, in accordance with the provisions of section 13 of the Act.

(9) Every order made under sub-rule (8) of the rule 4 shall specify the provisions of the Act or of the rules, regulations, notifications, directions or orders or any condition subject to which an authorisation is issued by

the Reserve Bank of India in respect of which contravention has taken place and shall contain reasons for such decisions.

(10) Every order made under sub-rule (8) shall be dated and signed by the Adjudicating Authority.

(11) A copy of the order made under sub-rule (8) of rule 4 shall be supplied free of charge to the person against whom the order is made and all other copies of proceedings shall be supplied to him on payment of copying fee @ Rs. 2 per page.

(12) The copying fee referred to in sub-rule (11) shall be paid in cash or in the form of demand draft in favour of the Adjudicating Authority.

21) From a perusal of the aforesaid Rule, it appears that while holding an enquiry, the Adjudicating Authority has to initially issue a notice to the concerned person asking him to show cause as to why an enquiry should not be held against him. As per sub-rule (3) of Rule 4, if, after considering the cause, the Adjudicating Authority is of the opinion that the enquiry should be held, a notice fixing the date for appearance of the person concerned has to be issued. Sub-rule (8) of Rule 4 provides that if, upon consideration of the evidence produced before the Adjudicating Authority, it is satisfied that the person has committed the contravention, the Adjudicating Authority would impose such penalty as it thinks fit in accordance with the provisions of Section 13 of FEMA.

22) The Supreme Court in the case of **Natwar Singh vs. Director of Enforcement and another**, (2010) 13 SCC 255, after considering the aforesaid provisions of law, went on to determine the question, whether, in the absence of any mandate in the Rules regarding supply of copies of the documents along with the show cause notice, the Adjudicating Authority is required to furnish the list of documents and copies thereof,

upon which reliance has been placed by it to issue the notice of show cause to a person against whom a complaint has been made by the authorized officer. While deciding this question, the Supreme Court has, after noticing the law on the subject, held as under:

31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.

23) From the analysis of the aforesaid law on the subject, it is clear that though the provisions of FEMA and the Rules made thereunder do not mandate the Adjudicating Authority to provide copies of the documents relied upon by it in issuing the show cause notice to the concerned person, yet the Adjudicating Authority has to provide these documents to the person concerned so as to enable him to file a proper reply to the show cause notice.

24) Coming to the facts of the instant case, it has been clearly indicated by the petitioners in their reply to the show cause notice dated 26th October, 2017, that the relied upon documents forming Annexure-B are unreadable, blurred and not legible and a request has been made to provide legible copies of these documents or to allow the petitioners to prepare copies of these documents from the office of respondents.

25) The record produced by the respondents does not suggest that the after filing of their reply to the show cause notice, the petitioners have either been provided legible copies of the documents or they have been allowed inspection of the record. The record contains the receipts of documents executed by the petitioners, according to which all the documents were furnished to them along with the show cause notice. These receipts have been executed by the petitioners prior to the filing of their reply to the show cause notice. There is no document in the record evidencing the receipt of documents by the petitioners after they had filed reply to the show cause notice. There is no receipt of documents in the record after filing of the reply to the show cause notice to the petitioners in which they had claimed that some of the documents are not legible.

26) There is, however, yet another aspect of the matter. A perusal of the record would show that in the show cause notice dated 26th October, 2017, it is indicated that the Adjudicating Authority has placed reliance upon the complaint filed by the Authorized Officer and the documents listed in Annexure-B to the said complaint. The record shows that

Annexure-B to the complaint gives the details about the relied upon documents. The same is reproduced as under:

1. Copy of charge sheet dated 19.09.2022 filed in FIR No.14/2002 dated 24.03.2001 registered with P.S Kud Udampur.
2. Copy of attachment order dated 06.07.2002 of the Divisional Commissioner of Jammu, Designated Authority under POTA.
3. Copy of confessional statement of Mushtaq Ahmad Dar and his wife in Urdu, recorded under POTA (Not legible as partly destroyed in flood of 2014)
4. Copy of statement of Mushtaq Ahmad Dar and his wife in Urdu, recorded by the then CJM, Srinagar (Not legible as partly destroyed in flood of 2014)
5. Copy of order dated 05.04.2004 passed by the Hon'ble High Court, Srinagar, in WP No.561A/51/2003.
6. Statement dated 05.07.2012 of Mushtaq Ahmad Dar recorded under FEMA.
7. Statement dated 14.12.2016 of Mushtaq Ahmad Dar recorded under FEMA with authorization letter of his wife Smt. Shameema Mushtaq.

27) From a perusal of the aforesaid details of the relied upon documents, it is clear that the documents mentioned at serial No.3 and 4, available with the respondents, are not legible as the same have been partly damaged in the floods of 2014. The record, which contains these documents, goes on to confirm this fact. Therefore, even the respondents are not in possession of legible copies of the aforesaid documents, as such, there was no occasion or possibility for the respondents to provide legible copies of these documents to the petitioners when they were not themselves in possession of the legible record. Though the respondents were obliged to provide legible copies of the documents relied upon by them but when they themselves were not in possession of the legible

copies of the documents mentioned above, it was impossible for them to provide the same to the petitioners. The rules of natural justice do not operate in vacuum. Therefore, when the respondents themselves incapable of furnishing legible copies of certain documents, it cannot be stated that by non-furnishing of these documents to the petitioners, the principles of natural stand violated.

28) Even otherwise, a perusal of the reply to the show cause notice filed by the petitioners clearly indicates that they have effectively replied each and every allegation made in the show cause notice and they have also responded to the allegations relating to confessional statements of petitioners No.1 and 2 and their statements recorded before the Chief Judicial Magistrate, Srinagar, which are stated to be not legible. Therefore, no prejudice has been caused to the petitioners by non-supply of legible copies of these two documents which, in any case, are not available with the respondents themselves.

29) In **Natwar Singh's** case (supra), the Supreme Court has observed that even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read in a manner to impose a duty of disclosure of all documents in possession of Adjudicating Authority before forming an opinion that an enquiry is required to be held into the alleged contravention committed by a noticee. It has been further observed that the concept of fairness is not a one-way street and that the principles of natural justice are not intended to operate as roadblocks to obstruct statutory enquiries.

30) In the present case, if the respondents are insisted upon to provide legible copies of those documents which are not even in their possession, it will amount to stretching the principles of natural justice too far, particularly at a stage when only the adjudication proceedings have been initiated and the parties are yet to produce their respective evidences/material before the Adjudicating Authority, whereafter the matter is required to be considered finally by the said Authority.

31) In the peculiar facts and circumstances of the case, as indicated hereinabove, I do not find that non-furnishing of legible copies of the documents by the respondents to the petitioner has infringed the principles of fairness. Thus, the impugned communication issued by the Adjudicating Authority does not call for any interference from this Court.

32) For what has been discussed hereinbefore, the petition is dismissed. Since the Adjudicating Authority has not proceeded in the matter after the issuance of impugned notice, the said Authority is directed to proceed further in the matter in accordance with the law expeditiously.

33) The record be returned to learned counsel for the respondents.

(Sanjay Dhar)
Judge

Srinagar,
13.04.2023
"Bhat Altaf, PS"

Whether the order is reportable: Yes