

S. Mohan Vs. Union of India and Others

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Court : Chennai

Decided On : Mar-31-1993

Reported in : 1994CriLJ343

Judge : K.S. Bakthavatsalam, J.

Appeal No. : W.P. No. 5435 of 1993

Appellant : S. Mohan

Respondent : Union of India and Others

Advocate for Pet/Ap. : C.T. Selvamani, Adv.

Judgement :

ORDER

1. The petitioner herein challenges Rules 3 of the Adjudication Proceedings and Appeal Rules, 1974 framed by the first respondent herein under S. 79 of the Foreign Exchange Regulation Act, 1973 as illegal, arbitrary, ultra vires and void.

2. The petitioner herein is a practising Chartered Accountant in Madras since 1978. A search was made at the petitioner's office and residence and on the same day another search was made at Hotel Savera by the officers of the respondents and the petitioner alleges that he has nothing to do with the same. It is stated in the affidavit that later the petitioner was summoned by the officers of the third respondent for enquiry and on 10-12-1991 the petitioner attended the enquiry.

Subsequently, the second respondent issued a memorandum against 11 persons including the petitioner as accused charging of offences under the Provisions of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA') and the petitioner was charged under Ss. 8(1) and 64(2) of FERA, 1973. The petitioner was called upon to show cause as to why adjudication proceedings under S. 50 of the FERA should not be instituted against him. 25 documents were relied upon by the respondents Department. It is also stated that those documents were available for inspection at the office of the third respondent at Madras. It seems the petitioner on 5-2-1992 wrote to the second respondent stating that he has not committed any offence, that he had acted only in the professional capacity as Chartered Accountant. It seems the petitioner requested the second respondent to furnish copies of some documents and by letter dated 4-3-1992, the petitioner was replied that the petitioner can make inspection of the documents in the office of the third respondent at Madras. It seems that the petitioner wrote a letter on 19-3-1992 stating that inspection of documents would be insufficient and that authenticate copies of the same were very essential for him to defend his case and a copy of the said letter was marked to the second respondent. The petitioner alleges that with the available records he sent a reply on 30-4-1992 stating that he has not violated any provision of FERA and that he is neither a necessary nor a proper party to the adjudication proceedings. However, by order dated 25-6-1992 the second respondent has stated that the second respondent is of the opinion that adjudication proceedings as contemplated u/S. 51 of the FERA would be held and the hearing was fixed on 14-8-1992 at 11 a.m. The petitioner seems to have objected to the notice of the second respondent and requested for the hearing to be conducted at Madras. This letter is dated 27-7-1992. However, by another notice dated 25-8-1992, the second respondent fixed the second hearing at Delhi on 25-9-1992. It seems representations were made by the accused persons stating that they are unable to attend the enquiry at New Delhi and requesting that the enquiry be held at Madras. The reasons they have stated for such request are that the alleged offence has been committed at Madras, that almost all the accused reside at Madras, that all documents relied upon were admittedly kept at the office of the third respondent at Madras, that all the officers who investigated the case are at Madras and that all witnesses mentioned in the memorandum are

all permanent residents of Madras. It is also stated that however, the second respondent sent a notice dated 7-10-1992 stating that the enquiry will be held at New Delhi at 4-00 p.m. on 2-11-1992 and that hearing cannot be fixed at Madras. It seems some of the accused persons challenged the said notice in W.P. Nos. 14923, 16941 and 16942 of 1992 and they have been admitted and interim stay was also granted therein by Srinivasan, J. by orders dated 16-10-1992 and 29-10-1992. Subsequently, it seems the respondents have filed counter affidavits in the said writ petitions. Subsequently, a notice was issued on 21-1-1993 holding the enquiry at 4-00 p.m. on 8-3-1993 and when it was brought to the notice of the respondents that 8-3-1993 is a holiday on account of 'holi' festival, the second respondent by notice dated 2-3-1993 fixed the hearing on 23-3-1993 at 4-00 p.m. at New Delhi. At this stage, the writ petitioner came up before this Court with this writ petition.

3. The petitioner mainly alleges in the affidavit that Rule 3 of the adjudication proceedings and Appeal Rules 1974 does not prescribe a manner and the procedure by which an accused person is given a reasonable opportunity for making his representation in this matter and as such it is violated of Art. 14 of the Constitution of India. It is also alleged in the affidavit that the adjudication proceedings should be conducted within the jurisdiction of the High Courts where the right of appeal is given under S. 54 of FERA. It is also stated that when all the witnesses reside at Madras, and the entire investigation were conducted at Madras and when an appeal against the order of the Foreign Exchange Regulation Appellant Board lies exclusively within the jurisdiction of this Court, Rule 3 of FERA is invalid since it does not provide reasonable opportunity as contemplated u/S. 54 of the FERA. Various decisions of the apex Court as well as by this Court are relied upon in the affidavit to show that Rule 3 of the Adjudication Proceedings and Appeal Rules 1974 are not in consonance of S. 51 of the FERA and as such it has got to be struck down. It is also stated that Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 gives unfettered powers to the adjudicating officer and that there is no procedure at all, and as such it should be quashed.

4. After hearing the learned counsel for the petitioner and on going through the affidavit and the materials placed before me, I see no merit at all in this writ petition. It is not necessary for me to go into merits in this writ petition as the adjudication proceedings is on and that it is not open to the petitioner to canvass the merits of the adjudication proceedings in this writ petition. Section 51 of the FERA speaks of the powers to adjudicate and it is in the following terms :

'..... For the purpose of adjudging under S. 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

The Rules for the Adjudication Proceedings and Appeal Rules, 1974 are prescribed for the purpose of adjudication. The reasonable opportunity of making a representation as found in the Rules and Act is to issue a show-cause notice upon the person concerned and it should be of a reasonable opportunity. The Supreme Court in *Indru Ramchand Bharvani v. Union of India* : 1992(59)ELT201(SC) pointed out that a fair hearing has two justiciable elements, the first one is that an opportunity of hearing must be given and the second one is that the opportunity must be reasonable. No doubt, the proceedings under the Tribunal are quasi-judicial in nature. Under Sub-rule (3) of Rule 3 of the Adjudication proceedings and Appeal Rules, 1974, a notice fixing a date for the appearance of that person should be given and a lawyer or an authorised representative can appear on behalf of him. That is all. By any stretch of imagination, I do not think that sub-rule (3) of Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 can be said as invalid. It has been clearly held by a judgment of the Bombay High Court in *Joaquim Mascarenhas Fiuza v. Jaire Rebello* : 1986(3)BomCR236 that the statute, i.e. the Act is not basically a penal statute. The Act is designed to safeguard and conserve foreign exchange which is essential to the economic life of a developing country. To regulate, to conserve and improve the foreign exchange resources of

the country, the Foreign Exchange Regulation Act, 1973 was enacted. See LIC of India v. Escorts Ltd., : 1986(8)ECC189 . The FERA is enacted in the interests of the national economy and it should be construed so as to make it workable. It should however, receive a fair construction, without doing any violence to the language employed by the Legislature. See Union of India v. Shreeram Durga Prasad, : [1969]2SCR727 . Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974, which is framed in exercise of the powers conferred by S. 79 of the Foreign Exchange Regulation Act, 1973 and in supersession of the Adjudication Proceedings and Appeal Rules, 1957 speaks of adjudication proceedings and sub-rules (1) to (4) of Rule 3 are as follows :

'..... (1) In holding an enquiry under Section 51 for the purpose of adjudging under Section 50 whether any person has committed contravention as specified in Section 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 such 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 the appearance of the person either personally or through his lawyer or 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

A reading of Rule 3 mentioned above, in my view, clearly shows that sufficient opportunity is given to the accused, like that of the petitioner herein, just because the hearing is fixed at New Delhi, it cannot be said that it is unreasonable. That too

for a practicing Chartered Accountant, like the petitioner herein. In fact, the accused need not appear in person and they can represent through a lawyer or a legal authorised representative. As such there is no substance in the contention that just because the hearing is fixed at New Delhi the Rule has to be held as invalid. All the Authorities and precedents stated in the affidavit and relied upon before me by the learned counsel during the course of agreement, are on certain principle with regard to application of principle of natural justice and giving a fair opportunity to the petitioner before any adverse order is passed. I do not see any case which has gone to the extent of saying that if the place of hearing is fixed in a particular place, by issuing a notice, it can be challenged as violative of Article 14 of the Constitution of India. Since the Legislature has got the competency and the Parliament has got the power to enact FERA and the Act provides to frame Rules thereunder, Rules cannot be said to be invalid on any ground. The reasons stated in the affidavit and reiterated by the learned counsel for the petitioner are without substance to attack the vires of the Rules impugned before me. I do not think there is any statutory provision to confer power on the Adjudication Officer to hold an enquiry in a particular place. On a perusal of the Circular issued by the respondents Department it is seen that a ceiling has been fixed and according to that, for the purpose of Adjudication Proceedings the Special Director has given the power to adjudicate without limit and the Assistant Director to a limit of Rs. One lakh. Therefore, I do not find any force in the contention of the learned counsel for the petitioner on this aspect.

5. The Supreme Court has an occasion to consider the question as to what is a 'fair hearing'. In Indru Ramchand Bharvani v. Union of India. : 1992(59)ELT201(SC) the Supreme Court has held as follows :

'..... The first is that an opportunity of hearing must be given and the second is that the opportunity must be reasonable

In Kannugo and Co. v. Collector of Customs, Calcutta, : 1983(13)ELT1486(SC) it was held that the principles of natural justice do not require that the persons who have given information should be examined in presence of the person concerned. It was a case under the Customs Act. But in Collector of Central Excise v.

Banwarilal Purohit, (1979) ETJ 613 the Supreme Court has held that it is the duty of the quasi-judicial authority to inform the person charged before him of the charges with full details, the evidence in support of the charges and to give him an opportunity to meet those charges. So in my view, just because the hearing is fixed at New Delhi, it cannot be said that no reasonable opportunity is given to the petitioner and as such the Rule is invalid. Further, as I have already said that the Rule which is challenged before this Court is only a Rule of Procedure. In Owners & Parties Interested in M.N. 'Vali Pero' v. Fernando Lopez, : AIR 1989 SC2206 held as follows :

'..... Rules of procedure are not by themselves an end but the means to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and are not hurdles to obstruct the pathway to justice. Construction of a rule of procedure which promotes justice and prevents its miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged, acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice. The reason is obvious. Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, where is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case. In our view, this appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provisions. Otherwise, rule of procedure will become the mistress instead of remaining the handmaid of justice, contrary to the role attributed to it in our legal system

As such, I do not find any substance in the contentions of the learned counsel for the petitioner. The writ petition has got to be dismissed in limine and as such, this writ petition shall stand dismissed.

6. Petition dismissed.