[2024:RJ-JP:404-DB]

HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

D.B. Civil Writ Petition No. 14857/2022

1. M/s Harish Forex Services Pvt. Limited, Having Its Registered Address At 249 Johari Bazar, Jaipur- 302003 (Raj.). Through Its Managing Director Shri Harish Bhatija S/o Sh. Ram Chand Bhatija, Aged About 64 Years, R/o 7-Na-3, Behind Pnb Bank, Jawahar Nagar, Jaipur-302004 (Raj.)
2. Shri Harish Bhatija S/o Sh. Ram Chand Bhatija, Aged About 64 Years, Managing Director, M/s Harish Forex Services Private Limited Having Its Registered Address At 249 Johari Bazar, Jaipur- 302003 (Raj.).
3. Sunny Bhatija S/o Sh. Harish Bhatija, Aged About 34 Years, R/o 7-Na-3, Behind PNB Bank, Jawahar Nagar, Jaipur - 302004 (Raj.).
4. Fate Purane Noton Ki Dukaan, Through Its Partner, Sh. Sunny Bhatija S/o Sh. Harish Bhatija, Aged About 64 Years, R/o 7-Na-3, Behind PNB Bank, Jawahar Nagar, Jaipur- 302004 (Raj.).
5. Harish Enterprises, Through Its Proprietor Sh. Harish Bhatija S/o Sh. Ram Chand Bhatija, Aged About 64 Years, 7-Na-3, Behind Pnb Bank, Jawahar Nagar, Jaipur- 302004 (Raj.).
6. Shakuntala Bhatija W/o Sh. Harish Bhatija, Aged About 55 Years, R/o 7-Na-3, Behind PNB Bank, Jawahar Nagar, Jaipur- 302004 (Raj.).
7. Pooja Bhatija W/o Sh. Sunny Bhatija, Aged About 30 Years, R/o 7-Na-3, Behind PNB Bank, Jawahar Nagar, Jaipur- 302004 (Raj.).
8. Satvik Bhatija S/o Sh. Sunny Bhatija, Aged About 8 Years, R/o 7-Na-3, Behind PNB Bank, Jawahar Nagar, Jaipur- 302004 (Raj.).

----Petitioners

Versus

1. Assistant Director Of Enforcement, Adjudicating Authority, Directorate Of Enforcement, Zonal Office, Second Floor, Jeevan Nidhi-Ii, Lic Building, Bhawani Singh Road, Jaipur-302005 (Raj.).

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2. Assistant Director Of Enforcement, Complainant And Investigating Authority, Directorate Of Enforcement, Zonal Office, Second Floor, Jeevan Nidhi-Ii, Lic Building, Bhawani Singh Road, Jaipur- 302005 (Raj.).

----Respondents

For Petitioner(s)	:	Mr. Siddharth Ranka. Mr. Daksh Pareek.
For Respondent(s)	:	Mr. Anand Sharma.

HON'BLE MR. JUSTICE ARUN BHANSALI
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

Judgment

03/01/2024

1. This writ petition has been filed questioning the validity of seizure/confiscation made by the respondents and seeking a direction to return/release the money, currency illegally confiscated/seized.

2. It is *inter alia* indicated in the writ petition that on the basis of input received by the Directorate of Enforcement, a search was conducted by its officers on 14/3/2019 at the business as well as residential premises of petitioner nos. 2, 3, 6, 7 & 8. During the course of search documents were summoned including Books of Account, Bill Book, Hard Drive, Mobile Phones and all the documents pertaining to the business transactions of petitioners. The officers of Enforcement Directorate seized Indian Currency as well as Foreign Currency, which was stock-in-trade so far as the business of the petitioners is concerned. Several allegations have been made in the petition pertaining to the manner of holding the search and questioning its validity, however, during the course of submissions, counsel for the petitioners confined his submissions on the aspect of seizure of the Indian and Foreign currency by the

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authorities & subsequent failure to comply with the requirements of applicable provisions in releasing the said currency.

3. It was submitted that power of search and seizure conferred on the Directorate of Enforcement is under Section 37 of the Foreign Exchange Management Act, 1999 ('FEMA, 1999') which *inter alia* provides that the officers shall exercise powers which are conferred on Income Tax authorities under the Income Tax Act, 1961 ('the Act, 1961') and shall exercise such powers subject to such limitations laid down under the said Act. Under the Act, 1961 'search and seizure' provisions are contained under Section 132 of the Act, 1961 and application of seized or requisitioned assets is dealt with under Section 132B of the Act, 1961. It was submitted that besides the fact that under proviso to Section 132 (1)(c)(B) (iii) stock-in-trade of the business could not have been seized and that the authorities were required to release the asset within a period of 120 days.

4. It is submitted that the search was conducted on 14/3/2019, wherein, the currency was seized; representations dated 5/4/2019, 21/4/2019 & 19/8/2019 were made seeking release of the seized assets, which were not responded to and ultimately a show cause notice was issued on 16/10/2020, to which the petitioners responded on 19/3/2021 and in the meanwhile made further representations for release of currency on 4/11/2020 and 24/11/2020. However, neither the representations have been decided nor the proceedings pursuant to the show cause notice have been concluded. It was further submitted that in view of the express provisions of second proviso to Section 132B and Section 132 of the Act, 1961, the respondents cannot sit over the seized

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asset/currency and they are bound to release the same. The inaction of the respondents in this regard is apparent and, therefore, they be directed to release the currency.

5. Reliance was placed on the interim order passed by a coordinate bench of this Court in *Mangilal Agarwal Vs. Deputy Director of Income Tax (Investigation)-I) : D.B.Civil Writ Petition No. 3040/2023*.

6. Learned counsel for the respondents made submissions that by filing the present writ petition, the petitioners are seeking to question the validity of the show cause notice issued, for which purpose the petition is not maintainable.

7. Further submissions were made that the show cause notice has been issued to the petitioners to which reply has been filed and respondents are in the process of adjudicating the same and, therefore, the petition deserves dismissal. However, it was not denied that several representations made by the petitioners seeking release of the seized currency were made in the year 2019 and 2020, which have not been responded to / decided by the authorities.

8. We have considered the submissions made by leaned counsel for the parties and have perused the material available on record.

9. The fact of search conducted by the authorities of Directorate of Enforcement and consequent seizure of Indian currency/Foreign currency are not in dispute. It is also not in dispute that the petitioners *inter alia* are involved in the business of foreign exchange and exchange of torn notes with new.

10. The provisions of Section 37 of the FEMA, 1999 confers power of search and seizure on the officers of Enforcement

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Directorate and sub-section (3) provides that the power shall be exercised by the officers as per the provisions of the Act, 1961 subject to such limitation as laid down under the said Act.

11. The provisions of Section 132B of the Act, 1961 *inter alia* provides for application of seized and requisitioned assets which provides that the assets seized may be dealt with in the manner provided therein, whereby, the amount of any existing liability and the amount of liability determined on completion of the assessment may be recovered out of such assets, however, such power is, thereafter, governed by two provisos, which are relevant to the present controversy and read as under:

> "Provided that where the person concerned makes an application to the Assessing Officer within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained to the satisfaction of the Assessing Officer, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, to the person from whose custody the assets were seized:
>
> Provided further that such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed;"

12. A bare look at the first proviso would reveal that on an application made for release of the assets while indicating the source of acquisition of such assets, after adjusting the liability, remaining portion of the assets has to be released.

13. The second proviso indicates that such asset or any portion thereof shall be released within a period of 120 days from the date on which the last of the authorizations for search was executed.

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14. The proviso are not without reason inasmuch as the same have been incorporated only with a view that to ensure that determination of liability has to take place expeditiously and in case the same does not take place the assets have to be released.

15. In the present case, as noticed hereinbefore, the search took place on 14/3/2019 and despite repeated representations made in the year 2019 and 2020, neither the assets have been released nor the representations have been rejected indicating any reason. Further, even when a show cause notice was issued on 16/10/2020 and a response was filed on 19/3/2021, despite passage of over 02 years and 09 months, no determination has taken place.

16. So far as the source of acquisition is concerned, as required by the first proviso (supra), a specific submission has been made that the books of account have been seized along with currency and everything is recorded therein and, therefore, the source is very much reflected and available with the respondents.

17. So far as the plea raised by the learned counsel for the respondents pertaining to attempt to challenge the show cause notice is concerned, the adjudication/determination of the show cause notice is well within the powers of the respondents and none prevented them from determining the same expeditiously, however, the respondents have chosen not to make the determination and continue to sit over the various representations made for release of assets, which action cannot be countenanced.

18. The respondents despite release of the seized currency are free to make the determination of the show cause notice, qua which no relief has been claimed presently.

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19. In view of the above discussion, the action of the respondents in not releasing the seized assets of the petitioners is essentially in violation of Section 132B of the Act, 1961, which is applicable in terms of Section 37(3) of the FEMA, 1999 and, therefore, the inaction of the respondents in this regard cannot be sustained.

20. Consequently, the petition is partly allowed. The respondents are directed to pass appropriate orders for release of the seized assets pursuant to the search conducted on 14/3/2019 within a period of four weeks from today.

21. However, it goes without saying that release of the seized assets would remain subject to final outcome of the proceedings initiated by the respondents against the petitioners.

(ASHUTOSH KUMAR),J (ARUN BHANSALI),J

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