

KA. Manshoor Vs Assistant Director, Enforcement Directorate, Government of India

Court: Madras High Court

Date of Decision: Nov. 24, 2009

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 30

Constitution of India, 1950 â€” Article 14

Customs Act, 1962 â€” Section 108

Evidence Act, 1872 â€” Section 24

Foreign Exchange Management Act, 1999 â€” Section 13

Foreign Exchange Regulation Act, 1973 â€” Section 19(2)

Income Tax Act, 1961 â€” Section 131

Citation: (2010) 258 ELT 491 : (2010) 97 SCL 167

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: B. Kumar, SC for S. Ramachandran, for the Appellant; M. Dhandapani, Spl. G.P, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

Heard Mr. B. Kumar, learned Senior Counsel leading Mr. S. Ramachandran for the petitioner and Mr. M. Dhandapani,

learned special counsel appearing for the Enforcement Directorate.

2. The short question that arises for consideration is whether the summons issued by the respondent u/s 37 of the Foreign Exchange Management

Act, 1999 (for short "FEMA") should be interdicted by this Court on the ground that there was no application of mind and the documents sought

for would amount to a roving enquiry by the Directorate.

3. The petitioner has come forward to challenge the summons issued by the respondent, dated 29.12.2008 issued u/s 37 of the FEMA read with

Section 131 of the Income Tax Act, 1961. The summon issued reads as follows:

WHEREAS your attendance is required in connection with the proceedings under the Foreign Exchange Management Act, 1999, in your case,

you are hereby required to personally attend before me at the above address, on the 23rd day of January 2009 at 11.00 A.M. to give evidence

and to provide documents specified under the Schedule and not to depart until you receive my permission to do so.

SCHEDULE

1. Your passport;
2. Your bank pass book with up to date entries;
3. Details of your immovable properties with documents.

Without prejudice to the provisions of any other law for the time being in force, if you intentionally omit to attend and give evidence or produce the

books of account or documents, a penalty, which shall not be less than Five Hundred Rupees, but which may extend to Ten Thousand Rupees

may be imposed upon you u/s 272A(1) of the Income Tax Act, 1961.

4. The learned Senior Counsel attacked the issuance of the summons on the ground that the Enforcement Directorate, which has the power to

issue summons u/s 37, can do so, only if it is satisfied that the purpose has relevance to the issue in which the summons was issued. Therefore,

when the summons is issued, the person against whom the summons is issued is entitled to know the full details of the nature of proceedings in the

Court. There must be an inbuilt safeguard into the provisions so that the right to privacy and the right not to have his affairs discussed openly are

also preserved. If the inbuilt safeguards are not provided, the procedure will become unconstitutional and violative of Article 21 of the Constitution.

Since the impugned summons was issued without disclosing any purpose or nature of enquiry that has been taken against the petitioner, it is

contrary to the Act.

5. Pending notice on the writ petition, this Court granted an interim stay, which was continued from time to time. On notice from this Court, the

respondents have filed a counter affidavit, dated 17.11.2009 justifying the issuance of the summons. It was stated that the power given to the

Enforcement Directorate u/s 37 is the same as that of an Income Tax Officer under the Income Tax Act in terms of Section 131. Such power is

available to deal with the discovery of materials in contravention of foreign exchange violations. It was also stated that there is no necessity to

disclose the particulars even at the time of summons, which will enable a person to manipulate or conceal the required particulars. The summoning

authority need not disclose the nature of the enquiry/ investigation to the person so summoned. The issuance of summons will no way affect the

rights of the person, as it is only for the preliminary investigation and for production of documents before the authority for further investigation. It

was also stated that the petitioner was well aware that the summons was issued to him with regard to the enquiry, which was initiated on the basis

of a case registered by the Director General of Central Excise (Intelligence), Chennai and the summons issued is for a preliminary enquiry and for

submission of documents mentioned in the schedule to the summons.

6. Before dealing with the contentions raised by the learned Counsel, it is necessary to refer to the Statement of Objects and Reasons for the

introduction of FEMA, and it reads as follows:

The Foreign Exchange Regulation Act, 1973 was reviewed in 1993 and several amendments were enacted as part of the on-going process of

economic liberalisation relating to foreign investments and foreign trade for closer interaction with the world economy. At that stage, the Central

Government decided that a further review of the Foreign Exchange Regulation Act would be undertaken in the light of subsequent developments

and experience in relation to foreign trade and investment. It was subsequently felt that a better course would be to repeal the existing Foreign

Exchange Regulation Act and enact a new legislation. Reserve Bank of India was accordingly asked to undertake fresh exercise and suggest a new

legislation. A Task Force constituted for this purpose, submitted its report in 1994 recommending substantial changes in the existing Act.

Significant developments have taken place since 1993 such as substantial increase in our foreign exchange reserves, growth in foreign trade,

rationalisation of tariffs, current account convertibility, liberalisation of Indian Investments abroad, increased access to external commercial

borrowings by Indian corporates and participation of foreign institutional investors in our stock markets.

Keeping in view the changed environment, the Central Government has decided to introduce the Foreign Exchange Management Bill and repeal

the Foreign Exchange Regulation Act, 1973. The provisions of the Bill aim at consolidating and amending the law relating to Foreign Exchange with

the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange markets

in India.

7. Therefore, there is a complete departure was made from the earlier enactment, namely, Foreign Exchange Regulation Act, 1973 (for short,

FERA), which was repealed by Section 49 of FEMA. The concept of an offence being committed has been dispensed with. The present

procedure under the Act is for imposition of a penalty contravention of the provisions of the Act. Any contravention of FEMA is determined by an

adjudicating authority. There is a further appeal to the Special Director, failing which, there is further appeal to an Appellate Tribunal for Foreign

Exchange. The Act also provides for compounding of contraventions u/s 15 of FEMA. Therefore, the entire face of the Act has completely been

overhauled and the concept of the offence has been removed and replaced only by penalty with a two-tier appellate system. Therefore, at this

stage, it is unthinkable to question the summons issued by the Enforcement Directorate u/s 37 of the FEMA.

8. Section 37 of FEMA reads as follows:

37. Power of search, seizure, etc. - (1) the Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant

Director, shall take up for investigation the contravention referred to in Section 13.

(2) Without prejudice to the provisions of Sub-section (1), the Central Government may also, by notification, authorise any officer or class of

officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India

to investigate any contravention referred to in Section 13.

(3) The officers referred to in Sub-section (1) shall exercise the like powers which are conferred on Income Tax authorities under the Income Tax

Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act.

9. Since Section 37(3) of FEMA applies the provisions of Section 131 of the Income Tax Act, it is necessary to extract that provision, which

reads as follows:

131. Power regarding discovery, production of evidence, etc.-

(1) The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals) and Chief Commissioner or

Commissioner shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of

1908) when trying a suit in respect of the following matters, namely:

(a) discovery and inspection

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.

(1A). If the Director General or Director or Joint Director or Assistant Director or Deputy Director or the authorised officer referred to in Sub-

section (1) of Section 132 before he takes action under Clauses (i) to (v) of that Sub-section, has reason to suspect that any income has been

concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any enquiry or

investigation relating thereto, it shall be competent for him to exercise the powers conferred under Sub-section (1) on the Income Tax authorities

referred to in that Sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any

other Income Tax authority.

(2) (omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1.4.1989).

(3) Subject to any rules made in this behalf, any authority referred to in Sub-section (1) (or Sub-section (1A) may impound and retain in its

custody for such period as it thinks fit any books of account or other documents produced before it in any proceeding under this Act:

Provided that an Assessing Officer or an Assistant Director or Deputy Director shall not-

(a) Impound any books of account or other documents without recording his reasons for so doing, or

(b) Retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of

the Chief Commissioner or Director General or Commissioner or Director therefore, as the case may be.

10. The Act has deliberately chosen not to apply the concept of summons used either under the CPC or under the Code of Criminal Procedure,

but has chosen to apply analogous provisions found in the Income Tax Act. Therefore, while interpreting the scope and width of Section 37 of

FEMA, one cannot apply the concept of summons as available to a Civil Court under the Code of Civil Procedure, only because the power of a

Civil Court was conferred on the authorities.

11. The word ""summons"" is defined in K.J. Aiyar's Judicial Dictionary (10th Ed. 1988) to mean as ""a call of authority to appear before a

Judicial Officer"". In the Oxford Dictionary of Law (2003) published by the Oxford University Press, it is defined as follows:

A court order to an individual to appear in court at a specified place and time. The term is used in criminal cases for appearance at a Magistrate's

Court. Before the introduction of the Civil Procedure Rules in 1999, it was used in civil cases for hearing in the county court and applications to a

Judge sitting in chambers about procedural matters prior to the court hearing. Such orders are now made by application notice.

12. Mr. B. Kumar, learned Senior Counsel referred to the case of The Barium Chemicals Ltd. and Another Vs. Sh. A.J. Rana and Others, . The

said judgment arose in the context of interpreting Section 19(2) of the Foreign Exchange Regulation Act, 1947. u/s 19(2), it is stated that where

the Central Government or the Reserve Bank considers it necessary or expedient to obtain and examine any information, book or other document

in the possession of any person or which in the opinion of the Central Government or the Reserve Bank, it is possible for such person to obtain and

furnish, the Central Government, or, as the case may be, the Reserve Bank may, by order in writing, require any such person (whose name shall be

specified in the order), to furnish or to obtain and furnish, to the Central Government or the Reserve Bank or any person specified in the order with

such information, book or other document.

13. While interpreting Section 19(2) of FERA, in paragraph 14 of Barium Chemicals Case (cited supra), it was observed as follows:

14. The words "considers it necessary" postulate that the authority concerned has thought over the matter deliberately and with care and it has

been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word "consider" is "to view attentively, to

survey, examine, inspect (arch), to look attentively, to contemplate mentally, to think over, meditate on, give heed to, take note of, to think

deliberately, bethink oneself, to reflect" (vide shorter Oxford Dictionary). According to Words and Phrases - Permanent Edition Vol. 8-A "to

consider" means to think with care. It is also mentioned that to "consider" is to fix the mind upon with a view to careful examination; to ponder;

study; meditate upon, think or reflect with care. It is, therefore, manifest that careful thinking or due application of the mind regarding the necessity

to obtain and examine the documents in question is sine qua non for the making of the order. If the impugned order were to show that there has

been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the

essential requisite to the making of the order would be held to be non-existent.

14. Therefore, placing reliance upon the said passage, it is stated that Section 131(1A) of the Income Tax Act is also an analogous provision and,

therefore, the summons before its issuance must be based on reasons and calling for all the documents relating to an immovable property owned by

the petitioner is nothing but a fishing expedition. In the Barium Chemicals case (cited supra) in paragraph 19, the Supreme Court had also

observed as follows:

19. The fact that an omnibus order was made in respect of all documents relating to the appellants, which were in the custody of the Registrar

under the order of this Court, including some of the documents which have not even remotest bearing on the matter covered by the Act, goes to

show that there was no due application of the mind by the authority concerned. As mentioned earlier, an essential condition precedent to the

making of an order u/s 19(2) is that the authority concerned should have considered it necessary to obtain and examine for the purpose of the Act

the specified information, book or other document. The element of due care and attention which is an essential ingredient of the phrase "considers

it necessary" is lacking in this case. As such, the impugned order should be held to be not in conformity with Sub-section (2) of Section 19 of the

Act.

15. It is in this context, the learned Senior Counsel submitted that the summons has been issued not in conformity with the FEMA and there is no

basis for calling for such information. It is also submitted that the Calcutta High Court vide its judgment in New Central Jute Mills Co. Ltd. Vs.

Dwijendralal Brahmachari and Others, dealt with the scope of Section 131 of the Income Tax Act. Applying the Barium Chemicals case while

interpreting the said section, it was observed as follows:

It is true that the language of the two sections is different but under both the sections it is necessary to apply the mind to determine the question of

relevancy of the documents. u/s 131 of the Income Tax Act, 1961, the officers mentioned therein have no larger power than a civil court trying a

suit, under the Code of Civil Procedure, and the powers to direct production, discovery and inspection of documents are controlled by Section 30

of the CPC and Order 11 of the Code. But the civil court cannot direct production of any document unless it considers that the said documents are

relevant. In this case it is difficult to accept the position that the Income Tax Officer considered the said documents to be relevant for two reasons.

Firstly, admittedly, the Income Tax Officer did not have and could not have any knowledge about the contents of the documents. Secondly, the

omnibus nature of the order passed also indicated non-application of the mind. Counsel for the petitioner in this connection drew my attention to a

decision of T.K. Basu, J. in the case of Dwarkadas Shah Brother Private Ltd. v. Income Tax Officer, "F" Ward, Companies District, III (Matter

No. 60 of 1967, decided on 01.12.1969). The facts of that case were slightly different because there a third party was directed to produce the

documents. In such cases, unless the documents are identified, there might be difficulty in complying with the order. Here, in view of the fact that

the documents had been seized before the issue of the summons, it may be considered from one point of view that the documents have been

identified. But, it appears for the reasons mentioned hereinbefore that the documents had been directed to be produced without consideration of

the relevancy of the documents. Therefore, in view of the judgment of the Supreme Court in the case of The Barium Chemicals Ltd. and Another

Vs. Sh. A.J. Rana and Others, , in this case I must accept the petitioner's contention that there has been no application of mind by the Income Tax

Officer and, as such, the impugned summons was beyond the power u/s 131 of the Income Tax Act, 1961.

16. The said judgment came to be confirmed by a Division Bench of the Calcutta High Court in Dwijendra Lal Brahmachari and Others Vs. New

Central Jute Mills Co. Ltd. and Another, . At page Nos. 573 and 574, it was observed as follows:

From a perusal of Section 131 of the Income Tax Act, we are of the opinion, that the power of the Income Tax Officer under that section is co-

extensive with that of a court trying a suit u/s 30 of the Civil Procedure Code, read with Rules 12, 14 and 15 of Order 11 of the Code. Section

131 empowers the officers mentioned in the section to act for the purpose of the Act, but that cannot be the only limitation set out u/s 131 imposed

upon the powers of the officers mentioned in the said section to act in the terms of the said section. All statutory bodies must act for the purposes

of the statute even though the term ""for the purposes of the Act"" be not expressly stated. Secondly, it appears to us that the statutory power

cannot be exercised without application of mind as urged by Mr. R.C. Deb appearing on behalf of the respondent. If such powers are granted then

such powers would be so naked that the section itself would become ultra vires. Application of mind must be in regard to the question of relevancy

of the documents to the lis involved in the matter before the Income Tax Officer. A civil court cannot order discovery, production or inspection of

documents until it is of the opinion that such documents are relevant for the purpose of the issues involved in the suit pending before it. Similarly, it

seems to us that the officers mentioned in Section 131 of the Income Tax Act have been vested with powers to make the orders as mentioned

therein provided they are satisfied that the orders made would be relevant for the purpose of deciding the case pending before them. If we hold

otherwise, we would be holding that Section 131 (1) has conferred naked and arbitrary powers upon such officers which would make the section

itself liable to be struck down.

It appears from the terms requiring the production of the books, documents, etc. as contained in the above-quoted notice u/s 131 (1)(c) that the

Income Tax Officer concerned had no idea as to what those documents were and as such there was no occasion for him to apply his mind to the

question as to whether the same were relevant or necessary for the purpose of assessment or re-assessment of the income of the respondent

company for any particular year. It seems to us that it has been admitted that, as the documents were lying in sealed boxes, the officer concerned

could not and, in fact, did not apply his mind to those documents. In the premises, it appears that the Income Tax Officer did not apply his mind to

the question of relevancy of documents in determining any issue required to be determined by him. The wide ambit of the language requiring the

production of the documents itself goes to show that the officer concerned did not apply his mind at all to the nature of the documents or the

purpose for which he required the production of the said documents.

17. Once again another Division Bench of the Calcutta High Court in *Income Tax Officer and Others Vs. James Joseph O'Gorman*, referred to

Dwijendralal Brahmachari's case (cited supra) and in page 458, it was observed as follows:

Under the circumstances, it appears that the issuance of such notice by the Income Tax Officer was without jurisdiction. It has been averred in

paragraph 10 of the writ petition that in respect of proceedings which were pending similar notices were issued by the Income Tax Officer and

those had been duly complied with. Under the circumstances, as very rightly observed by the learned court below, the Income Tax Officer was not

entitled to exercise such power as a mere cloak for the purpose of making a fishing investigation and a roving enquiry in order to take proceedings

u/s 147 of the Act.

18. But this line of reasoning did not find acceptance by this Court. A Division Bench of this Court in *V. Datchinamurthy and Another Vs. Asst.*

Director of Inspection, (Intelligence), I.T. Dept. and Another, set out the purpose of the power conferred on an Income Tax Officer under

Sections 131 and 132 of the Income Tax Act. In page 356, *V. Sethuraman, J.* speaking for the Bench, had observed as follows:

It is thus manifest that there is great latitude allowed to the ITO in the collection of materials and he does not act as a court at that stage. There are

no two parties before him, and the procedure in the adversary system of proceedings cannot be applied to him. However, the ITO, before he uses

the materials so collected, is bound to give the necessary opportunity to the assessee to test the evidence, to adduce any evidence in rebuttal and

to explain the facts that appear against him. Thus, it is clear that the ITO cannot be asked to put on, or be thrust with, the garb of a court, even at

the stage of collection of evidence. There can be no reasonable apprehension of the ITO not utilising the favourable materials appearing in such

evidence. The Supreme Court has examined this aspect in *Suraj Mall Mohta and Co. Vs. A.V. Visvanatha Sastri and Another*, at page 13 and

pointed out the rights available to the assessee under the I.T. Act as contrasted with the rights available under the Taxation on Income

(Investigation Commission) Act, 1947 (Act No. XXX of 1947). It was pointed out that while in the proceedings under Act No. XXX of 1947, the

assessee would be entitled only to get copies of that portion of the materials, which were brought on record and which were going to be used

against him, the portion of the material which was in his favour and which had not been brought on record may not be available to him. In contrast,

it was observed that there was fullest right of inspection under ordinary law and the CPC available to an assessee in order to meet the case made

against him. We cannot assume that the ITO is not likely to act in accordance with law and give directions to him. Therefore, the apprehension of

the Federation at this stage appears to be absolutely misconceived.

19. Mr. M. Dhandapani, learned special counsel for Enforcement Directorate submitted that the provisions of FEMA cannot be compared with

the provisions of other enactments. Here the question of application of Article 20(3) or Article 21 of the Constitution does not arise. A person who

is summoned to appear before the Enforcement Directorate is not an accused in a criminal case. The Supreme Court in *Poolpandi Vs.*

Superintendent, Central Excise and others etc. etc., in dealing with the analogous provision of the Customs Act, held that the purpose of Customs

Act or similar statute will be completely frustrated, if whims of the person in possession of useful information for the Department are allowed to

prevail. The relevant provisions of the Constitution have to be construed in the spirit in which they were made and the benefits there under should

not be expanded to favour the exploiters engaged in tax evasion at the cost of public exchequer and, therefore, such persons do not have the

protection of Article 20(3) of the Constitution.

20. He also referred to the judgment of this Court in *T.T.V. Dinakaran Vs. Enforcement Officer, Enforcement Directorate*, for the purpose of

stating that under the earlier enactment, viz., FERA, 1973, the attempt to challenge the summons served u/s 40 was repelled by this Court. In

paragraph 11, it was stated as follows:

Para 11. . ""...Moreover, if the summons is taken into consideration it is stated therein that the petitioner's attendance is necessary to give evidence

and/or to produce documents in an investigation being made by the respondent under the FERA Act. So far as the documents mentioned are

concerned, it is mentioned the petitioner's passport, petitioner's account books relating to his accounts in India and abroad and his property

details. If we take into consideration the required documents mentioned in the schedule, the enquiry relates only to the petitioner in respect of his

involvement in some transaction under the FERA Act. If the investigation relates to any other person, then the authorities would have mentioned the

documents relating to the concerned third parties or the transaction between the petitioner and those third parties. Hence, I am of the view that the

non-mentioning of the (nature) of investigation and the purpose of the requirement of documents do not vitiate the summons in any manner.

21. Further, the attack on the ground of non-application of mind and also summoning of documents having nexus with the investigation, were also

repelled by this Court in paragraphs 12 and 13 and it reads as follows:

Para 12. ""So far as the second point is concerned, the learned Senior Counsel for the petitioner contends that the summons has been issued

without application of mind, because it does not specify as to whether the appearance of the petitioner is necessary to give evidence or to produce

the documents specified in the schedule or for both because "and/or" has been left without striking out the unnecessary words. It is specifically

stated in the summons that the Enforcement Officer considered the attendance of the petitioner necessary. When once these words are specified in

the summons, that is an indication for the application of the mind of the authority issuing summons that he has satisfied that the attendance of the

petitioner is necessary for the purpose mentioned in the summons. The non-striking of the words either "and" or "or" (does) not go to show that

the respondent has not applied his mind before ever the summons were issued. Whenever the attendance is required to give evidence and to

produce documents, it is clear that the concerned person is required for both the purposes. Some times on production of the documents the

authority may satisfy without recording any evidence that the petitioner's involvement is not there, then the petitioner may be free. In case if on the

verification of the records he found that the petitioner's involvement is there, in that case, naturally his statement has to be recorded. At this stage, it

may not be possible for the concerned authorities to issue summons for a restricted purpose. It is known that the summons are being issued only to

hold the preliminary enquiry and hence it would be too premature for the petitioner to contend that the authority should apply his mind for what

purpose the petitioner's attendance is required and indicate the same in the summons. Hence, this contention is also rejected.

Para 13. ""So far as the third point is concerned that the documents and the investigation must have nexus with each other, as already mentioned

while considering the first point, that the documents mentioned are only concerned with the petitioner i.e. his passport, his bank account passbooks

relating to his accounts in India and abroad and his property details. The documents "are" all "not" related to third parties but related to the

petitioner himself. While so, the investigation may be in respect of the petitioner himself or in respect of third person who had some connection with

the petitioner. When there is suspicion with regard to the involvement of the petitioner in any of the transactions which are prohibited under the

FERA Act, it is open to the authorities to summon him for enquiry. Since the documents are pertaining to him, it cannot be said that the

investigation has no nexus with the documents called for from the petitioner. When an investigation is commenced, it is not possible for the

authorities to come to the conclusion with regard to the involvement or the non-involvement of any person until the enquiry is completed. During the

enquiry if the authorities get any information with regard to the involvement of any other individual, those individuals can also be summoned by the

concerned officer in order to complete the enquiry. When Section 40(4) of the FERA Act specifically mentions that the proceedings taken by the

authorities are judicial proceedings, it is not open to the petitioner to challenge the summons issued under the said proceedings as ab initio void.

The petitioner cannot claim any right under Article 21 of the Constitution of India and Section 24 of the Evidence Act, as he is not an accused.

22. The learned special counsel has also referred to another judgment of this Court in *Kishore J. Chawla Vs. Union of India (UOI)*, wherein this

Court has held that when a person is examined u/s 108 of the Customs Act, 1962, he does not have a right to have the assistance of a lawyer. This

was on the premise that the proceedings under the enactment cannot be compared with the principles evolved in criminal cases. Therefore, it was

stated that the attempt by the petitioner to stall answering the summons issued by the Department is completely misconceived. The learned Special

counsel for the Enforcement Directorate also produced the original file relating to the summons for the perusal of this Court. This Court perused the

file. On perusal, it cannot be said that there was material for the issuance of the summons.

23. It must be noted that out of three documents, the first two documents, viz., the passport and the bank passbook (with upto date entries) will

have relevance to the issue on hand. Therefore, the petitioner cannot feel shy of producing these documents. However, the learned Senior Counsel

Mr. B. Kumar alternatively submitted that the production of all the immovable property documents is totally misconceived. The power u/s 37 of

the FEMA cannot be stretched to the level of disturbing every private citizens to part with all the information in the absence of relevance for the

same.

24. In this context, it is necessary to refer to Section 13(2) of the FEMA. The explanation to Section 13(2) defines "property" and Section 13(2)

(c) deals with a property which has resulted out of the conversion of that property. Under the said Sub-section, the adjudicating authority,

adjudging the contravention under Sub-section (1) to Section 13, if he thinks fit then in addition to any penalty, which he may impose for such

contravention, direct the property in respect of which the contravention has taken place to be confiscated to the Central Government. Therefore,

the petitioner cannot contend that he has no obligation to inform the authorities about the nature of properties possessed by him.

25. The Supreme Court in C. Sampath Kumar Vs. Enforcement Officer, Enforcement Directorate, Madras, , while deciding the case in respect of

Section 40 of the FERA, held that when a person is summoned and examined u/s 40, it cannot be presumed that a statement will be obtained

under pressure or duress. In fact it was held in that case that such a statement obtained does not infringe the constitutional guarantee of protection

against self-incrimination under Article 20(3) of the Constitution. Therefore, the concept of applying the theory of self-incrimination even at the

stage of investigation in case of violation of FEMA cannot be raised to the level of an investigation of a criminal offence protected by Articles 20(3)

and 21 of the Constitution.

26. If it is seen in this context, then the attack made against the summons issued by the Department cannot be countenanced by this Court. The

petitioner in essence seeks for a writ of prohibition against the department for having issued the summons by the exercise of the powers vested on

them u/s 37 read with Section 131 of the Income Tax Act. In Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others,

which arose out of the FERA violation, the Supreme Court spelt out the parameters in entertaining a writ petition against initiation of adjudication

proceedings. Para 25 of the said decision may be usefully extracted below:

25. The prayer for the issue of a writ of prohibition restraining the authorities under the Act from proceeding with the adjudication and the

prosecution is essentially based on the constitutional challenge to the relevant provisions of the Act on the ground that they violate Articles 14 and

21 of the Constitution. Once we have held, as the High Court did, that the provisions are constitutional, the basis on which the writ of prohibition is

sought for by the appellants disappears. It is settled by the decisions of this Court that a writ of prohibition will issue to prevent a tribunal or

authority from proceeding further when the authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of

natural justice; or proceeds to act under a law which is itself ultra vires or unconstitutional. Since the basis of the claim for the relief is found not to

exist, the High Court rightly refused the prayer for the issue of a writ of prohibition restraining the authorities from continuing the proceedings

pursuant to the notices issued. As indicated by this Court in State of Uttar Pradesh Vs. Brahm Datt Sharma and Another, when a show-cause

notice is issued under statutory provision calling upon the person concerned to show cause, ordinarily that person must place his case before the

authority concerned by showing cause and the courts should be reluctant to interfere with the notice at this stage unless the notice is shown to have

been issued palpably without any authority of law. On the facts of this case, it cannot be said that these notices are palpably without authority of

law. In that situation, the appellants cannot successfully challenge the refusal by the High Court of the writ of prohibition prayed for by them.

27. Therefore, the attempt by the petitioner to stall the summons issued by the respondent has to be necessarily rejected. Accordingly, the writ

petition will stand dismissed. However, there will be no order as to costs. Consequently, the connected miscellaneous petition is also dismissed.