IN THE COURT OF SH. DHARMENDER RANA,
ADDL. SESSIONS JUDGE-02, NEW DELHI DISTRICT

In CC No. 22/2017

Case no. 32/2017

Deputy Director (HIU)
The Directorate of Enforcement, Delhi
Government of India
10-A, Jamnagar House, Akbar Road,
New Delhi-110011. … Applicant/Petitioner

Versus

1. **Nitin Jayantilal Sandesara,**
S/o Late Jayantilal Chunnilal Sandesara
R/o 39, Nutan Laxmi Society, JVPD Scheme,
N.S. Road 9, Vile Parle (W), Mumbai.

2. **Sh. Chetan Jayantilal Sandesara**
S/o Late Jayantilal Chunnilal Sandesara
R/o 39, Nutan Laxmi Society, JVPD Scheme,
N.S. Road 9, Vile Parle (W), Mumbai.

3. **Smt. Dipti Chetan Jayantilal Sandesara**
W/o Chetan Jayantilal Sandesara
R/o 39, Nutan Laxmi Society, JVPD Scheme,
N.S. Road 9, Vile Parle (W), Mumbai.

4. **Sh. Hiteshkumar Narendrabhai Patel**
S/o Sh. Narendrabhai Patel,
R/o 58-A Punit Nagar, Vadodara,
Gujarat. … Accused/Respondents

Misc. Application filed on	:	26.10.2018
Arguments on application concluded	:	26.09.2020
Date fixed for pronouncement of Order	:	28.09.2020
Date of pronouncement of Order	:	28.09.2020

O R D E R

1. By way of the instant order, I propose to dispose of an application moved on behalf of the Directorate of Enforcement (hereinafter referred to as Petitioner)

moved under Section 4 read with Section 10 and Section 12 of The Fugitive Economic Offenders Act, 2018 for declaration of the accused **(I)** Nitin Jayantilal Sandesara, **(II)** Chetan Jayantilal Sandesara **(III)** Dipti Chetan Jayantilal Sandesra and **(IV)** Hiteshkumar Narendrabhai Patel (hereinafter referred to as Respondents) as fugitive economic offenders and for confiscation of their properties.

2. Briefly stated: The Central Bureau of Investigation registered FIR No.RCBDI/2017/E/007, dated 25 October 2017, under Section 13 (2) r/w 13 (1) (d) of the Prevention of Corruption Act, 1988 and 120-B r/w 420, 468, 471 and 469 IPC (scheduled offences under PMLA) against various accused persons including, the Respondents. Eventually, Petitioner recorded a case bearing No. ECIR/HQ/17/2017 against the Respondents to investigate the offences under The Prevention of Money Laundering Act (PMLA). Thereafter, CBI registered another FIR Dated 30. 08. 2017 RC08(A)/2017/AC III under Section 13 (2) r/w 13 (1) (d) of the Prevention of Corruption Act, 1988 and 120 B IPC, based upon which the Petitioner recorded ECIR bearing No. ECIR/HQRS/15/2017. Consequently, the Petitioner filed a supplementary complaint on 23.10.2018 against the Respondents before this court. This Court accordingly took cognizance and issued Non-Bailable Warrants (NBWs) against the Respondents on 25.10.2018. The Petitioner now, through one of its Deputy Director; Sh. Prem Malik (Applicant), has filed the instant Application under consideration, dated 26.10.2018 under Section 4 read with Section 10 and Section 12 of the Fugitive Economic Offenders Act, 2018 (hereinafter referred to as "FEOA") for declaration of the Respondents as 'Fugitive Economic Offenders' and for confiscation of their properties.

3. Consequently, vide order dated 12.11.2018, the notice of the said application was directed to be served upon the Respondents, by the Learned Predecessor, whereupon the Respondents entered their presence through their counsel.

4. I have heard the rival submissions and carefully perused the record.

5. At the very outset, the Petitioner submits that for the time being they want to confine their prayer only to the extent that the Respondents be declared fugitive economic offenders.

6. Ld. Additional Solicitor General Sh. S.V. Raju has submitted that vide order dated 22.01.2018 and 19.05.2018, open ended NBWs have been issued by this court against the Respondents, who are facing trial for commission of the scheduled offence under the provisions of The Prevention of Money Laundering Act (hereinafter referred to as PMLA). It is submitted that the offence of money laundering committed in the instant case is in excess of Rupees 100 Crores. It is submitted that the Respondents have fled from the country and are evading the process of law to face criminal prosecution. It is further argued that the Respondents have chosen deliberately not to return back to the country and to face trial. It is submitted that the Respondents are shifting their base from one country to another to escape the clutches of law. It is pointed out that summons under Section 50 of the PMLA act were issued against Respondent No. 1 on 31.08.2017, 05.09.2017, 09.09.2017, 12.09.2017, 15.09.2017, 21.09.2017, 27.09.2017, 09.10.2017, 23.10.2017, 31.10.2017, 20.11.2017 and 04.12.2017. Similarly, summons under Section 50 of the PMLA act were issued against Respondent No. 2 on 31.08 2017, 05.09.2017, 07.09.2017, 12.09.2017, 15.09.2017, 21.09.2017, 27.09.2017, 09.10.2017, 23.10.2017, 31.10.2017, 20.11.2017 and 04.12.2017. Summons against respondent No. 3 were issued under Section 50 of the PMLA act on 11.10.2017, 31.10.2017, 20.11.2017 and 04.12.2017. Summons under Section 50 of the PMLA act were issued against Respondent No. 4 on 09.09.2017, 27.09.2017, 09.10.2017, 23.10.2017, 27.10.2017, 31.10.2017, 20.11.2017 and 04.12.2017. However, the Respondents failed to join investigation before the investigating officer showing their total non-cooperation in the investigation. It is submitted that even the open-ended NBWs issued against the Respondents have remained unexecuted till date and the Respondents are absconding. It is submitted that based upon the intelligence reports, provisional arrest requests in respect of the Respondent No. 1 & 3 were sent to United Arab Emirates but the same has also failed to yield any results. It is submitted that based upon the intelligence inputs the Respondents are presumably in Nigeria, U.K., U.S.A or U.A.E. and

they are deliberately avoiding the instant proceedings of the court. It is submitted that it is established on record that the Respondents are involved in offence of money laundering, wherein the proceeds of crime is somewhere around Rupees 8100 Crores. It is submitted that in the case at hand, all the statutory conditions stands satisfied and the Respondents deserve to be declared 'fugitive economic offenders'.

7. The Respondents, through their counsel, have sought the dismissal of the instant application on the following five grounds:
   (i) Lack of authority of the applicant to move the instant application.
   (ii) The NBWs issued against the Respondents are no longer in force.
   (iii) The proceedings cannot be segregated for the purpose of declaring the Respondents as fugitive economic offenders and confiscation of their properties.
   (iv) The instant application has not been moved in the prescribed form and manner and thus deserves to be dismissed.
   (v) The application is hit by provisions of Article 20 of the Constitution of India.

8. The detailed contentions of the Ld. Counsel for the Respondents; Senior Advocate Sh. Vikram Choudhury, shall be dealt with later during the course of the instant order.

9. Before we deal with the rival contentions, it would be appropriate to reproduce the relevant provisions of FEOA.

10. Section 2 (f) of FEOA defines fugitive economic offender as under :–

> 2. Definitions
>
> (1) In this Act, unless the context otherwise requires, –
>
> (f)" fugitive economic offender" means any individual against whom a warrant for arrest in relation to a scheduled offence has been issued by any court in India, who –
>
> (i) has left India so as to avoid criminal prosecution; or

(ii) being abroad, refuses to return to India to face criminal prosecution;

11. Section 4 of FEOA provides for application for declaration of fugitive economic offender and procedures therefor. The relevant Section reads as under:

> "**4. Application for declaration of fugitive economic offender and procedure therefore**. —(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this Section, has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that any individual is a fugitive economic offender, he may file an application in such form and manner as may be prescribed in the Special Court that such individual may be declared as a fugitive economic offender.
> (2) The application referred to in sub-Section (1) shall contain—
> (a) reasons for the belief that an individual is a fugitive economic offender;
> (b) any information available as to the whereabouts of the fugitive economic offender;
> (c) a list of properties or the value of such properties believed to be the proceeds of crime, including any such property outside India for which confiscation is sought;
> (d) a list of properties or benami properties owned by the individual in India or abroad for which confiscation is sought; and
> (e) a list of persons who may have an interest in any of the properties listed under clauses (c) and (d).
> (3) The Authorities appointed for the purposes of the Prevention of Money-laundering Act, 2002 (15 of 2003) shall be the Authorities for the purposes of this Act."

12. Perusal of the statutory definition as provided under Section 2(f) of the FEOA would reveal that for an individual to be declared 'fugitive economic offender' the following conditions must be satisfied :-

(a) A warrant for arrest must have been issued against that individual by any court in India

(b) The warrant must be in relation to a scheduled offence

(c) The individual has left India so as to avoid criminal prosecution; or being abroad, refuses to return to India to face criminal prosecution.

13. Evidently, vide orders dated 22.01.2018 and 19.05.2018 open-ended NBWs have been issued against the Respondents, by this court, in relation to the scheduled offence. Further, in the connected PMLA proceedings, this Court once again issued Non-Bailable Warrants (NBWs) against the Respondents on 25.10.2018 The conduct of the Respondents, unambiguously, establishes on record that they have left India to avoid criminal prosecution and they are deliberately avoiding to return back to India to face the instant prosecution. Thus, I have no hesitation to observe that the Respondents deserve to be declared fugitive economic offenders.

Now I would prefer to deal with the detailed contentions of the Learned Counsel for the Respondents under the various above-mentioned heads.

(i) Lack of authority of the applicant to move the instant application.

14. It is submitted by the Ld. Counsel for the Respondents that as per Section 4 (1) of the FEOA, only Director or any other officer not below the rank of Deputy Director, duly authorised by Director for the purpose of Section 4, can move an application under Section 4 of FEOA. It is forcefully argued that applicant Prem Malik in the instant case is neither Director nor a Deputy Director duly authorised by Director. It is submitted that the applicant is neither authorised by the director nor the applicant has claimed to have been authorised by the director in this regard.

15. It is submitted that it is well settled that when a statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited. (Ld. Counsel has placed reliance upon the judgment of the Hon'ble Supreme Court in *"Hussein Ghadially @ M.H.G.A. Shaikh and others State of*

Gujarat 2014 (8) SCC 425" and *'Nazir Ahmad vs. King Emperor (1936) 44 LW 583'*.

16. Ld. Counsel for the Respondents has further argued that since the FEOA does not provide for any retrospective power of authorisation to the Director, the purported ex post facto authorisation is non-est and a nullity in the eyes of law.

17. It is further submitted that as per provisions of Section 23 (5) of The General Clauses Act, 1897, it was mandatory for the Petitioner to publish the authorisation of the applicant in the official Gazette. It is forcefully argued by the Ld. Counsel for the Respondents that for want of a valid authority in favour of the applicant herein, the entire proceedings stands vitiated and application under consideration deserves to be dismissed.

18. On the contrary, it is argued by the Petitioner that there is no requirement under the FEOA to satisfy a noticee that the Applicant is authorized by the Director. It is submitted that an authorization dated 02.05.2018, Vide F. No. LD/Fugitive Ordinance/Rules/51/2018 was already existing in favour of the applicant and he was duly authorised to institute the instant proceedings against the Respondents. It is submitted that by virtue of the deeming provision of Section 26 of the FEOA, there was a valid authorization in existence at the time of filing of the application on 26.10.2018 in favour of the applicant Prem Malik. It is further submitted that in any event, out of abundant caution, the Director, ED by way of an authorization letter dated 15.01.2019 has authorized all officers of the rank of Deputy Director and above for the purposes of, inter alia, Section 4(1) of the FEO Act with effect from 21.04.2018. It is further submitted that statutory presumption under Section 114 (e) of The Indian Evidence Act, 1872 to the effect that all official acts have been regularly performed operates in favour of the Petitioner.

19. In rebuttal, Ld. Counsel for the Respondents has vehemently argued that the purported authority vide authorization letter dated 15.01.2019 in the favour of applicant Prem Malik is non-est in the eyes of law for want of publication in the official Gazette. It is further argued that any ex post facto approval therefore,

cannot validate any such non-est action. It is argued that once the very threshold was breached, the question of validity of any consequential proceeding would pale into insignificance. It is argued that the entire proceedings are therefore, null and void ab initio hit by maxims "Debile fundamentum fallit onus", meaning thereby that when the foundation falls, everything falls; and “Sublato fundamento cadit opus”; meaning thereby, in case a foundation is removed, the superstructure falls. Ld. Counsel for the Respondents has placed reliance upon “*State of Punjab vs. Devinder Pal Singh Bhullar (2011) 14 SCC 770*”, “*Hukam Chand vs. Union of India & Ors. 1972 (2) SCC 601”*, “*State of Haryana vs. Bhajan Lal, 1992 Supp (1) SCC 335*”.

With reference to the authorization dated 02.05.2018, it is argued that the same is not in accordance with Manual of Office Procedure (Ministry of Personnel). It is further submitted that the plea regarding a valid authority letter is specious on the face of it as the purported Authorisation letter dated 15.01.2019 does not even remotely refer to the earlier purported Authorisation letter dated 02.05.2018. The two authority letters are also questioned as to how both Authorisation letters carry the same File Numbers.

20. I have carefully perused the record and considered the rival submissions. Perusal of authority letter dated 02.05.2018 (F. No. LD/Fugitive Ordinance/Rules/51/2018) reveals that Sh. Karnail Singh; the then Director of Enforcement Directorate, has duly authorised all the officers of the Directorate of Enforcement, above the rank of Deputy Director, for the purpose of Section 4 (1) of FEOA. Therefore, in light of the authority letter dated 02.05.2018 applicant Prem Malik, who admittedly is a Deputy Director, was duly authorised to institute the instant application. Even if the Manual of Office Procedure (Ministry of Personnel) was not strictly followed in issuance of the said authority letter, the issue is a mere procedural irregularity and is not sufficient to negate the authority vested in the applicant Prem Malik to move the instant application. Similarly, the non mention of the authorisation letter dated dated 02.05.2018 in the subsequent Authorisation letter dated 15.01.2019 or the fact that both the authorisation letters carry the same file number are trivial issues which hardly

have a bearing upon the authority of the applicant to institute the present application.

Further, with respect to the contention regarding non-publication of the said authority letter in the official Gazette, I concur with the Learned Counsel for the Petitioner that there is no such requirement under the provisions of FEOA. In my considered opinion, Section 23 of the General Clauses Act is applicable where prior publication in the official Gazette is a condition precedent for making rules or bye laws. In the case at hand the requirement of law would be served by a mere office notification and there is no statutory requirement of any prior publication in the official Gazette. Therefore, I have no hesitation in observing that applicant Prem Malik was duly authorised to institute the present application. The contentions of the Learned Counsel for the Respondents in this regard are absolutely meritless and deserve to be discarded.

21. Now I move on to the second ground of objections raised by the learned counsel for the Respondents.

(ii) The NBWs issued against the Respondents are no longer in force.

22. Learned Counsel for the Respondents has drawn my attention towards the order passed by Hon'ble Supreme Court in Writ Petition (Crl) No. 172 of 2019 and 147 of 2019, dated 02.07.2019, wherein Hon'ble Supreme Court has observed as follows:

> *"Issue Notice,*
> *No coercive steps shall be taken against the Petitioners in all the Writ Petitions in the meanwhile.*
> *Tag with W.P(Crl) No. 333 of 2018"*

23. It is forcefully argued by the Learned Counsel for the Respondents that the effect of 'no coercive action' would automatically render the warrants issued by this Court in relation to PMLA proceedings to be inoperative & non-est. Since Section 2(1)(f) defines "fugitive economic offender" & mandates the pre-requisite of the issuance of a warrant for arrest before any proceedings under the FEOA could be initiated, the proceedings under the FEOA therefore, have

been rendered absolutely untenable. It is also pointed out that an application of the Respondents in terms of Sec.70(2) Cr.P.C. for cancellation of warrants of arrest issued under PMLA is already pending in the connected PMLA case. It is submitted that if the warrants cease to exist, the proceedings under FEOA have to automatically fail. Learned Counsel for the Respondents has placed reliance upon the judgement of Hon'ble Rajasthan High Court in the matter of '**Punit vs. State & Anr. 2017 SCC OnLine Raj 4061'**, wherein, it has been observed as under as under:-

> "12. Therefore, no coercive steps shall automatically mean that a person cannot be arrested until the petition is finally dismissed on merits."

24. On the contrary, Learned Counsel for the Petitioner has forcefully argued that an interim order directing *'no coercive steps'* cannot be construed to mean cancellation of 'NBW'. Learned Counsel for the Petitioner has further submitted that, as a sequel to the order of the Hon'ble Supreme Court dated 02.07.2019, the Petitioner had filed an application before the Hon'ble Supreme Court on 20.02.2020 (being IA No. 33455/2020) for modification/revocation of the earlier order dated 02.07.2019 passed in W.P(Crl) Nos 172 of 2019 and 147 of 2019 pointing out suppression of material facts by the writ Petitioners/noticees. It is submitted that pursuant to the application of the Petitioner Hon'ble Supreme Court vide order dated 03.03.2020 was pleased to clarify as under:

> *"Heard.*
> ***It is made clear that the interim order dated 02.07.2019 passed by this Court in Writ petition (Crl.) No. 172/2019, is not intended to stay the proceedings pending before the Additional Sessions Judge-02 (FTC), NDD/PHC/New Delhi.***
> *List the instant application on 16.04.2020."* (emphasis supplied)

25. It is submitted that the Hon'ble Supreme Court has passed only an interim order of no-coercive action and has neither cancelled the NBWs nor stayed proceedings under the PMLA, including the non-bailable warrants of arrest issued earlier. It is contended that the order of the Hon'ble Supreme Court

dated 02.07.2019 cannot be interpreted to have retroactive application, so as to cancel the non-bailable warrants issued against the noticees dated 22.01.2018 and 19.05.2018. It is argued that, the non-bailable warrants of arrest issued during the course of proceedings under the PMLA still exists and other conditions as stipulated u/s 2(1)(f) of the FEO Act i.e. the accused persons had refused to return to India to face criminal prosecution and the amount involved is more than Rs. 100 Crores are also fulfilled at this point of time. Learned Counsel for the Petitioner has further relied upon Section 70(2) of the Code of Criminal Procedure 1973 to contend that every warrant issued by a court of competent jurisdiction shall remain in force until it is cancelled by the Court which issued it or until it is executed. It is submitted that the NBWs issued by this court have neither been cancelled/recalled not the same have been executed therefore, the NBWs continues to remain in force. Learned Counsel for the Petitioner has placed reliance upon the judgement of Hon'ble Patna High Court in the matter of *Indar Mandal and Ors. Vs The State of Bihar 1966 SCC online Pat. 46: AIR 1967 Pat.141* to contend that a warrant of arrest shall continue to remain in force unless cancelled or executed.

26. In the case at hand, vide Order Dated 19.05.2018, open-ended non-bailable warrants were issued against accused Hiteshkumar Narendrabhai Patel and Dipti Chetan Jayantilal Sandesara. Similarly, vide Order Dated 22.01.2018, open-ended non-bailable warrants were issued against Nitin Jayantilal Sandesara and Chetan Jayantilal Sandesara. Further, vide Order dated 25.10.2018, this court while taking cognizance upon the supplementary complaint filed by the Petitioner against the Respondents, specifically directed that instead of issuing summons, NBWs be issued against the Respondents. Admittedly, the NBWs issued against the Respondents were neither executed nor they were ever cancelled by this court. I cannot but disagree with the Learned Counsel for the Respondents that as a necessary corollary of the order of the Hon'ble Supreme Court in Writ Petition (Crl) No. 172 of 2019 and 147 of 2019, dated 02.07.2019, NBWs were non-est and no longer remained in force. In my humble opinion, the execution of NBWs was merely eclipsed by the order of the Hon'ble Supreme Court dated 02.07.2019 but the NBWs continued to remain very much in existence. I concur with the Learned Counsel for the

Petitioner that as per the provisions of Section 70 (2) of Cr.P.C., a warrant for arrest continues to remain in force unless the same is executed or cancelled by the court issuing it. Reliance is placed upon the judgement of Hon'ble Patna High Court in the matter of **Indar Mandal and Ors. Vs The State of Bihar 1966 SCC online Pat. 46: AIR 1967 Pat.141(Supra).** The judgement relied upon by the Counsel for the Respondents i.e. Punit vs. State & Anr. 2017 SCC OnLine Raj 4061' is a pronouncement on the fact that 'no coercive steps' shall mean that a person cannot be arrested but it's not an authority on the point that directions of the Superior Court to take no coercive steps shall automatically lead to cancellation of NBWs. Further, mere pendency of an application for cancellation of NBWs would also not automatically lead to the cancellation of the NBWs. Unless the court, while disposing of the application for cancellation of NBWs, specifically directs the recall/cancellation of NBWs, the same remains in force. Therefore, the contention of the Learned Counsel that the NBWs issued against the Respondents is non-est is meritless and deserves to be rejected.

27. Now I move on to the next contention of the learned Counsel for the respondent.

(iii) The proceedings cannot be segregated for the purpose of declaring the Respondents as fugitive economic offenders and confiscation of their properties.

28. The Learned Counsel for the Respondents has submitted that upon receipt of the response of the Respondents, the Petitioner realised the shortcomings of the application under consideration and has now mischievously opted to confine its prayer only with respect to the relief of declaration. It is forcefully argued that the relief of declaration and confiscation under Section 4 of FEOA are inextricably linked and it is not legally permissible to bisect one unified process into two incomplete halves. It is submitted that upon declaring any person as fugitive economic offender under Section 4 of FEOA confiscation of his properties is an inevitable consequence. It is submitted that upon such declaration the court has no other option but to order the confiscation of the

properties of the fugitive economic offender. It is vehemently argued that the procedure adopted by the Petitioner by abandoning the relief of confiscation of the properties is not in consonance with the provisions of FEOA.

29. On the contrary, Learned Additional Solicitor General has submitted that Section 4 of FEOA envisages that the process of Declaration and Confiscation, though interdependent, are not inextricably intertwined. It is submitted that the statutory provision permits the court to proceed ahead with the declaration proceedings first and thereafter it may, in its discretion, choose to proceed with the confiscation proceedings or may even opt to drop the confiscation proceedings. It is submitted that as per Section 12 Clause 1 of the FEOA , after hearing the application under Section 4, if the Special Court is satisfied that an individual is a fugitive economic offender, it may, by an order, declare the individual as a fugitive economic offender for reasons to be recorded in writing. Further, as per Section 12 Clause 2, on a declaration under sub-Section (1), the Special Court may order that any of the properties mentioned in the subsequent clauses stand confiscated to the Central Government.

30. In my humble understanding of the subject, the contention of the learned counsel for the Respondents is meritless and deserves to be discarded. The use of word ‘may’ in clause 2 of Section 12 of The FEOA vests the court with a discretionary power with respect to the issue of confiscation of the properties of the fugitive economic offender. In my considered opinion, the proceedings with respect to confiscation ensues upon an observation by the court that an individual has been declared fugitive economic offender. Further, the Petitioner is the master of his application and the Petitioner has an absolute liberty to choose the relief claimed and abandon the reliefs in which he is not interested. The Respondents cannot foist their will upon the Petitioner in the matter of making choices. I am supported in my opinion by the judgement of the Hon’ble Bombay High Court in the matter of **Mehul Choksi vs The State Of Maharashtra (Criminal Application No. 1414 of 2019 D.O.D. 18 November, 2019)** wherein challenge to the decision of the Special Court to split the hearing and decision of the application (preferred by the Enforcement Directorate) in two parts, i.e. to hear the application first on the issue whether the applicant

can be declared as a fugitive economic offender and pass orders thereon, and thereafter, based on the outcome of the first order, proceed with the hearing on the issue whether the properties involved can be subjected to confiscation to the Central Government, was rejected. Thus, I do not find any merit in the contentions of the Respondents and the same is also dismissed.

31. Now I move on to the next objection of the Learned Counsel for the Respondents.

(iv) The instant application has not been moved in the prescribed form and manner and thus deserves to be dismissed.

32. It is forcefully argued by the Learned Counsel for the Respondents that as per Section 4 (1) of FEOA, before an individual can be declared fugitive economic offender, the application is mandatorily required to be moved in the prescribed form and manner. It is submitted that in the case at hand, there is complete violation of Section 4(2)(e) of the FEOA read with Rule 3(1)(viii) of the Fugitive Economic Offenders (Application for declaration of Fugitive Economic Offenders) Rules, 2018. It is pointed out that as per Section 4(2)(e) of the FEOA, application for declaration of fugitive economic offender shall essentially contain a list of persons who may have an interest in any of the properties sought to be confiscated. Similarly, Rule 3(1)(viii) of the Fugitive Economic Offenders (Application for declaration of Fugitive Economic Offenders) Rules, 2018 provides that a list of persons, who may have an interest in any of the properties listed under clauses (v) and (vi) of that rule, must accompany the application moved under Section 4 of the FEOA. Learned Counsel for the respondent has contended that it is obligatory on part of the Applicant to mandatorily submit a list of persons who may have an interest in the properties that are sought to be confiscated. Learned Counsel for the respondent has drawn my attention to sub-Section (1) of Section 10 of the FEOA wherein it is provided that where an application under Section 4 has been duly filed, the Special Court shall issue notice to an individual who is alleged to be a fugitive economic offender. Learned Counsel for the respondent has further drawn my

attention to Sub-Section (2) of Section 10 whereby notice referred to in sub-Section (1) is also required to be issued to any other person who has any interest in the property mentioned in the application under sub-Section (2) of Section 4. It is submitted that along with the Application, the Applicant has filed list of properties sought to be confiscated as Annexure A and the Provisional Attachment Order issued under PMLA as Annexure F. However, it is forcefully contended that, in stark violation of Section 4(2)(e) of the FEOA read with Rule 3(1)(viii) of the Fugitive Economic Offenders (Application for declaration of Fugitive Economic Offenders) Rules, 2018,in the array of parties, none of the owners of the properties have been arraigned as noticees. It is further contended that, it is an undisputed fact that the properties are equitably mortgaged and requisite charge has been created by the banks/financial institutions therefore, banks/financial institutions equally have an interest in the properties sought to be confiscated. It is forcefully argued that since no mandatory statutory notice Sub-Section (2) of Section 10 has been issued to said persons/entities etc having an interest in the property sought to be confiscated, therefore, the instant proceedings are bad in the eyes of law and the present proceedings cannot continue as such.

33. On the contrary, Learned Additional Solicitor General has informed that the requisite list of persons interested in the property sought to be confiscated has already been filed by the Petitioner and as far as the non-issuance of notice is concerned, it is forcefully argued, the same is not the mandatory requirement of the law at this stage. It is submitted that that the presence of the so-called 'interested persons' shall only be required at the stage when the court begins with the proceedings for confiscation of the properties. It is submitted that their presence at this stage is not going to serve any practical purpose and issuance of notice to them at this stage is not only a redundant exercise but shall also lead to unnecessary complications of issues. It is pointed out that at this stage, as per provisions of Section 10 (1) of FEOA, only the presence of individual sought to be declared as fugitive economic offender is the mandatory requirement of the law. It is submitted that at this stage notice to the Respondents under sub-Section (1) of Section 10 of the FEOA is sufficient compliance of law. It is further submitted that it is for the Respondents to divulge

the particulars of all such 'interested persons' to the Petitioner so that notice under sub-Section (2) of Section 10 of the FEOA can be issued to them at appropriate stage. It is further submitted that mere non-issuance of notice to the said interested persons is a mere irregularity and is not fatal to the cause of the Petitioner. It is submitted that the stage at which such persons are required to be heard is yet to arrive therefore, their absence is not going to cause any adverse impact upon the rights of these persons.

34. The argument of the Learned Counsel for the Respondents can be divided into following sub components. (i) The non-filing of the list of persons having any interest in the property sought to be confiscated along with the application under consideration.(ii) Non-issuance of notice to the above said interested persons. Let us deal with the contention one by one. Perusal of the record reveals that on 12.11.2018, in compliance of the mandate of law, more particularly, in terms of the Fugitive Economic Offenders (Application for Declaration of Fugitive Economic Offenders) Rules, 2018, Petitioner has submitted the requisite information in terms of Rule 3 in a sealed envelope. The seal was duly broken before the court and upon being satisfied the Learned predecessor of this court opted to issue notice of the application under consideration to the Respondents. During the course of arguments, the said sealed envelope was once again produce before this court by the Ahelmad and the same was duly opened. Perusal of the same reveals that the applicant has duly furnished a list of persons, who may have an interest in any of the properties sought to be confiscated. The sufficiency or insufficiency of the same can be decided at an appropriate stage. Thus ,the first contention of the Learned Counsel for the Respondents is factually incorrect and deserves to be discarded. Now I move on to the second leg of the argument i.e. the non-issuance of notice to the interested persons is fatal to the cause of the Petitioner. At the first blush, the contention of the Learned Counsel for the Respondent seems to bear force. I cannot but disagree with the Learned Additional Solicitor General for the Petitioner that issuance of notice to the said 'interested persons 'is not mandatory. As per Section 10 (2) of FEOA, it is mandatory for the court to issue notice of the application under Section 4 to any other person who has any interest in the property sought to be confiscated. However, I cannot travel any

further with the Learned Counsel for the Respondents that the application at hand deserves to be dismissed for non-issuance of notice to the said interested persons because of the following reasons: –

(A) Sub-Section (2) of Section 10 of the FEOA merely makes it mandatory for the court to issue notice to the above said 'interested persons' however, it does not provides that notice under Sub-Section (1) and Sub-Section (2) of Section 10 of the FEOA are required to be issued simultaneously and at the same stage. Notice to the person sought to be declared fugitive economic offender is required to be issued under Clause 1 of Section 10 whereas notice to the interested persons is required to be issued under Clause 2 of Section 10. The Section in fact impliedly permits the court to decide at what time the notice under Clause 2 is required to be issued. Had the legislature intended that both the notices are required to be issued simultaneously, nothing prevented it from clubbing the requirement of issuing notice under the same Clause. Perusal of Section 12 of the FEOA reveals that it is only upon a declaration that an individual is Economic Fugitive Offender, under Clause 1 of Section 12, confiscation proceedings shall commence under Clause 2 of Section 12. Considering the scheme of the act, I concur with the Learned Additional Solicitor General that the presence of the said 'interested persons' before the commencement of confiscation proceedings shall be a superfluous and ornamental exercise.

(B) *Actus Curiae Neminem Gravabit* i.e. An Act of the Court shall prejudice no one. Perusal of the record reveals that the Petitioner cannot be blamed for non-issuance of the notice to the said 'interested persons' as it has substantially complied with the statutory obligation by furnishing the list of the persons, who may have an interest in the property sought to be confiscated, before the court on 12.11.2018. Thereafter, it was upon the court to decide as to when and how the notices are required to be issued under Section 10 of the FEOA. Perusal of the order dated 12.11.2018 reveals that the learned predecessor of this court has opted to issue notice of the application under consideration only to the Respondents. And rightly so, the learned predecessor has opted not to mix the two streams of a tributary and distributary at a premature junction. In any case the Petitioner is not to be blamed for the course of action adopted by the court.

(C) The non-issuance of notice is a mere procedural irregularity which can be cured at any stage. The notice to the said 'interested persons' could have been issued by this court even at this stage. However, this court is refraining from issuing the notice at this stage, before conclusion of the declaration proceedings, because it is not going to serve any practical purpose and would unnecessarily lead to further delay of an already delayed disposal of the application under consideration.

35. A division bench of the Hon'ble Delhi High Court answering a reference in the matter of **Remfry And Sons vs Commissioner Of Income Tax Viii: (2005) 195 CTR Del 66, 118 (2005) DLT 720, 2005 276 ITR 1 Delhi** has observed as under :-

> "3. The controversy in the present reference revolves around a fine distinction between the expressions 'illegality', 'irregularity', 'procedural irregularity', and whether it is curable or should prove fatal to the case of the assessed?
> ……
> ……
> ……
> ……
> ……
> 22. The expression illegal has been defined as being contrary to law and is normally applicable to everything which is an offence or which is prohibited by law. This word has an extensive meaning including anything and everything which is prohibited by law which constitutes an offence and which furnishes the basis for a civil suit. Giving it a wider meaning, the expression has been equated as unlawful (Reference can be made to judgment in AIR 1930 Patna 593), but it may still not be void. This expression is discernibly distinguishable from the expression irregularity and irregularity is defined as a want of adherence to some prescribed rule or mode of proceedings and primarily consists of omitting to do what is necessary for due and orderly conduct of the proceedings. The word illegality on the other hand is properly predictable of radical defects only and signifies what is contrary to the principle of law, as defined from the mere rule of procedure. It denotes a complete defect in jurisdiction or proceedings. For instance, denial of principles of natural justice would render the proceedings illegal while the memorandum of appeal not being signed by the prescribed person under rules would be an irregularity . Irregularity is an expression of lesser effect as an act which is improper or inefficient by reason, or departure from the prescribed. It primarily connotes the neglect of order or method and may not be according to regulations (Reference can be made to 'The Law Lexicon' by P. Ramanatha Aiyar, 1997 Edition).
> 23. In the case of Martin Burn Ltd. v. Calcutta Corporation, , the Supreme Court held that irregularity covers any case, thing that has not been done in the manner laid down by the statute, and thus, this word does not cover a case of procedural irregularity only. One of the basic distinction between the two expressions is the resultant effect of its being curable or uncurable.

> Normally, the illegality which goes to the very root of the matter or jurisdiction could hardly fall in the class of those cases, but an irregularity which is merely procedural and it has even been substantially complied with, than to bring such a case within the class of cases where irregularity is curable, would be a fair and just interpretation of the relevant rule.
> 24. From the above discussion of law, particularly, keeping in view the facts and circumstances of the present case, we have no hesitation in answering the questions referred to, by stating that the irregularity committed by the assessed was curable and could be rectified on the date of its filing and even subsequent thereto, as appeal admittedly was filed within the period of limitation.
> 25. From the above discussion of law, particularly, keeping in view the facts and circumstances of the present case, we have no hesitation in answering the questions referred to, by stating that the irregularity committed by the assessed was curable and could be rectified on the date of its filing and even subsequent thereto, as appeal admittedly was filed within the period of limitation."

36. In the case at hand also mere non-issuance of notice is at best merely a procedure irregularity which would not go to the root of the matter. In view of the above discussion, I am of the opinion that even this leg of argument lacks any merit and deserves to be discarded.

37. Now I move on to the next argument of the Learned Counsel of the Respondents.

(v) The application is hit by provisions of Article 20 of the Constitution of India.

38. It is submitted by the learned Counsel for the Respondents that the President of India promulgated the Fugitive Economic Offenders Ordinance, 2018 on 21.04.2018 whereas, the Respondents have already left the country around September 2017. It is forcefully argued that instant proceedings are unconstitutional being hit by Article 20 of the Constitution of India. It is argued that the instant proceedings may lead to forfeiture of property, which is in fact inflicting penalty greater than what could have been imposed on the date of the commission of offence i.e. September 2017. It is submitted that such a course of action is impermissible in law being violative of Article 20(1) of the Constitution of India. Learned counsel for the Respondents has played heavy reliance upon the observation of the Hon'ble Apex Court in the matter of **Kedar**

Nath Bajoria v. The State of West Bengal AIR 1953 SC 404, wherein it was held by the Hon'ble Supreme Court that a fine imposed under the West Bengal Criminal Law Amendment Act was in violation of Article 20(1) of the Constitution:-

> "As regards the fine of Rs. 50,000, inflicted on the first appellant, Mr. Chatterjee objected that it could not stand to the extent of Rs. 47,550 found to have been received by the first appellant by the commission of the offence, as it is in contravention of article 20 of the Constitution which provides, inter alia, that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offences for which the first appellant has been convicted were all committed in 1947, whereas the Act which authorised the imposition of the additional punishment by way of fine equivalent to the amount of money or value of other property found to have been procured by the offender by means of the offence came into force in June, 1949. Mr. Chatterjee urged that article 20 on its true construction prohibits the imposition of such fine even in cases where the prosecution was pending at the commencement of the Constitution. This question, which turns on the proper construction of the article, was recently considered and decided in Rao Shiv Bahadur Singh and Another v. The State of Vindhya Pradesh, and according to that decision the sentence of fine to the extent of Rs. 47,550 will be set aside in any event."

39. On the contrary, Learned Additional Solicitor General has argued that the provisions of the FEOA neither defines any offence nor prescribes any punishment. It is submitted that FEOA is not a penal statute and its sole objective is to provide for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India. It is thus argued that Article 20 of the Constitution of India is not at all applicable in the case at hand. Learned Additional Solicitor General has placed reliance upon **Jawala Ram and Ors. vs. State of Pepsu AIR 1962 SC 1246**. (2). **State of West Bengal vs. S.K. Ghosh AIR 1963 SC 255** (3). **Shiv Dutt Rai Fateh Chand and Ors. vs Union of India & Ors. (1983) 3 SCC 529** (4). **Biswanath Bhattacharya vs. Union of India & Ors. (2014) 4 SCC 392**.

40. Upon perusal of the scheme of the act, its object and reasons and its various provisions, I have no hesitation in holding that the instant proceedings are not hit by Article 20 of the Constitution of India. Article 20(1) of the Constitution reads as under:-

> "20. Protection in respect of conviction for offences- (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence…."

41. The bar against ex-post facto laws would only operate in case if the impugned statute seeks to impose conviction for an offence or inflicting of a higher penalty, by way of retrospective operation of law. In the matter of **Biswanath Bhattacharya vs. Union of India & Ors. (2014) 4 SCC 392** the forfeiture of property under the provisions of Smugglers and Foreign Exchange Manipulators (Forefeiture of Property) Act, 1976 was challenged on the grounds of being violative of Article 20 of the Constitution of India. Rejecting the challenge Hon'ble Apex Court has observed here as under: –

> "41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.
> 42. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. To understand the substance of such examination, we can profitably extract from an article published in the Journal of Financial Crime, 2004 by Anthony Kennedy.
>
> > "..It has been suggested that a logical interpretation of Art. 1 of the First Protocol of the European Convention on Human Rights is:
> >
> > 'Everyone is entitled to own whatever property they have (lawfully) acquired ….'
> >
> > hence implying that they do not have a right under Art. 1 to own property which has been unlawfully acquired. This point was argued in the Irish High Court in Gilligan v The Criminal Assets Bureau, namely that where a defendant is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in Welch v United Kingdom : 'in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol.' This principle has also been explored in US jurisprudence. In United States v. Vanhorn a defendant

> convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In United States v Dusenbery the court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the government's decision to destroy the property without recourse to formal forfeiture proceedings. The UK government has impliedly adopted this perspective, stating that: '…. It is important to bear in mind the purpose of civil recovery, namely to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct."
>
> 43. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: United States of America, Italy, Ireland, South Africa, UK, Australia and certain provinces of Canada.
>
> 44. Anthony Kennedy conceptualised the civil forfeiture regime in the following words:- "Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the 'trophies' of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that 'half a loaf is better than no bread'."
>
> 45. For all the above-mentioned reasons, we are of the opinion that the Act is not violative of Article 20 of the Constitution.."

42. The case of **Kedar Nath Bajoria v. The State of West Bengal**(*Supra*) would not help the cause of the Respondents as in that case the appellants therein were convicted for the offence under Section 120 – B, Section 420 IPC and Section 5 of The Prevention of Corruption Act. In the present proceedings, the Respondents are neither sought to be convicted for any offence nor any penalty/punishment is sought to be inflicted upon them. The sole objective of the proceedings is to persuade the Respondents to come and face trial in the pending criminal proceedings against them. The Respondents, if they at all have any faith in the majesty of Rule of Law must come and face trial instead of attempting to thwart the proceedings against them by resorting to ruse and

stratagems. Therefore, I have no hesitation in observing that the instant proceedings are not violative of Article 20 of the Constitution of India.

43. In the end, Learned Counsel for the Respondents has attempted to attack the Petitioner on the ground of its conduct. It is submitted that the mischievous conduct of the Petitioner is borne out from the fact that it has been consistently adopting mutually contradictory stand. It is pointed out that initially, with respect to the authority of the applicant to file the instant application, the Petitioner claimed that the applicant Prem Malik, being a Deputy Director, does not require authorisation. Subsequently, the Petitioner claimed that the applicant is duly authorised vide letter dated 15.01.2019 and thereafter it once again took a U-turn claiming that the applicant was already duly authorised vide letter dated 02.05.2018. It is further pointed out that throughout the course of arguments, the Petitioner has been consistently contending that there is no requirement of furnishing the list of persons who are interested in the property sought to be confiscated whereas on the last date of hearing they have mischievously come up with a plea that such a list has already been furnished to the court on 12.11.2018 itself. It is submitted that the very conduct of the Petitioner disentitles them from claiming the relief prayed.

44. Suffice it would be to state, that the vacillating stand of the Petitioner is not prejudicial to their interest as long as they are on the right side of the Law.

45. As a cumulative effect of the aforesaid discussion, I have no hesitation in observing that this court is satisfied that the Petitioner has successfully pleaded and proved that the Respondents herein are fugitive economic offenders. In view of the same it is hereby declared that accused **(I)** Nitin Jayantilal Sandesara, **(II)** Chetan Jayantilal Sandesara **(III)** Dipti Chetan Jayantilal Sandesra and **(IV)** Hiteshkumar Narendrabhai Patel are fugitive economic offenders. The application accordingly stands partially disposed of. The Petitioner may reapproach the court for initiation of confiscation proceedings, after applying for issuance of notice under Section 10 (2) of FEO Act.

Announced in open court on
28th September, 2020.

(Dharmender Rana)

ASJ-02/NDD/PHC/ND.