
(2008) 12 DEL CK 0034

In the Delhi High Court

Case No : Writ Petition (Civil) No. 9519 of 2007

Aditya Khanna

APPELLANT

Vs

The Regional Passport Officer/Passport Authority

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 104, 91
Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 — Rule 4
Foreign Exchange Management Act, 1999 — Section 37(3)
Income Tax Act, 1961 — Section 131
Industries (Development and Regulation) Act, 1951 — Section 18AA
Passports Act, 1967 — Section 10, 10(3), 10(3)(1), 10(5), 10(9)
Passports Rules, 1980 — Rule 10

Citation : (2009) 156 DLT 172 : (2009) 3 ILR Delhi 391 : (2009) 3 ILR Delhi 335

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Uday Lalit and Atul Nanda, for the Appellant; P.P. Malhotra and Sanjay Katyal, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—This writ petition has been filed by Aditya Khanna assailing the action of the respondents in revoking his passport bearing No. F 4812183 without issuance of a notice to show cause and grant of an opportunity to represent against the proposed action. The action is assailed also on the ground of malafide and that no order has been communicated to him till date.

2. Certain public allegations into the administration and management of the United Nation Oil for Food Programme in Iraq were made. As a result, the United Nations Security Council appointed an independent high level inquiry headed by Mr. Paul Volcker, a former chairman of the United States Federal Reserve to look into the administration and management of the programme in Iraq. On 27th October, 2005 the Volcker Committee submitted its fifth and final substantive

report setting out the manner in which Iraq had manipulated the programme to dispense contracts on the basis of political preference and to derive illicit payments from companies that obtained oil and humanitarian aid contracts. It appears that the Volcker Committee report contained a reference to transactions involving one Shri Andleeb Sehgal and his company Masefield AG, Switzerland. The report was accompanied with a set of eight comprehensive tables identifying contractors under the programme and actors of significance to the programme transactions (including non-contractual beneficiaries of Iraqi oil allocations) and parties that financed the oil transactions.

The Government of India was concerned with allegations set out in table 3 and 5 of the report which contained details of payments made in contract Nos. M/09/54 and M/10/57 and the beneficiaries thereof referred to an Indian political party and a senior member thereof.

3. Mr. P.P. Malhotra, learned Additional Solicitor General contends that these allegations were treated by the government as being of extremely serious concern and consequently, by a notification dated 11th November, 2005 of the Ministry of Finance, Department of Revenue, of the Government of India, it was resolved to set up a single member inquiry under the provisions of the Commissions of Inquiry Act, 1952 whereby Justice R.S. Pathak, former Chief Justice of India and former Judge of the International Court of Justice was appointed as the authority to go into the root of the matter.

4. In addition, investigations were initiated by the Directorate of Enforcement-respondent No. 3 herein in November, 2005 into allegations of violations of the provisions of the Foreign Exchange Management Act, 1999 (FEMA for short) arising out of these transactions. The learned Additional Solicitor General has submitted that the investigations which were being conducted by the respondents were of an extremely serious nature and the charges which were being examined involved only matters of public importance.

5. The respondent No. 3 Directorate of Enforcement has submitted before this Court that during the course of investigations, there was sufficient material indicating the involvement of the petitioner in the financial transactions arising out of the said two oil contracts and therefore it became necessary to examine the petitioner vis-a-vis his role in the allocation of oil by the Iraqi authorities to M/s Hamdaan Exports/Sh. Andaleeb Sehgal under the two contracts; payment of surcharge to an Iraqi designated account and sharing of commission earned out of execution of the above between the petitioner and other beneficiaries.

For this reason, summons were issued u/s 37(3) of FEMA read with Section 131 of the Income Tax Act, requiring the petitioner to appear before the directorate on 25th November, 2005 and to produce his passport as well as the details of his bank account in India and abroad.

6. As the petitioner failed to appear and also did not produce the required document or their copies or information, on 29th November, 2005, an alert for

his appearance was issued. The respondents submit that summons failed to persuade the petitioner to appear on 19th , 20th December, 2005 and 21st February, 2006. For the first time, the petitioner's advocate, Sh. B.N. Goswami, submitted a letter dated 20th February, 2006 requesting that the petitioner be allowed to appear on 27th/28th February, 2006. According to Mr. Malhotra, learned ASG, in view of this non-cooperation by the petitioner and in order to ensure and seek presence of the petitioner, the respondent No. 3 is stated to have made a request to the Ministry of Home Affairs on 27th February, 2006 that in case the petitioner comes to India, information of his arrival be immediately given to the respondent No. 3 before he leaves the airport. A "Look Out Circular" was issued against the petitioner on 27th February, 2006.

7. The further submission is that despite appearance on 28th February , 2006 before the directorate of the respondent No. 3, the petitioner failed to submit his passport for verification of his travel particulars and status and also failed to come clean with facts available with him; gave vague replies and there was sufficient apprehension that he would flee the country jeopardising the investigation. For this reason, a request was made by the Directorate of Enforcement on 28th February, 2006 to the Ministry of External Affairs (MEA) to revoke/impound the passport of the petitioner in public interest. The passport of the petitioner was revoked by the Ministry of External Affairs on 3rd March, 2006.

8. As a result of this communication, it appears that on the 3rd March, 2006, the regional passport officer addressed a circular bearing reference No. RPO/DEL/REV/151/06 to all passport issuing and checkpost authorities in India and abroad; the Director, Intelligence Bureau" Ministry of Home Affairs, New Delhi; the Deputy Commissioner of Police, Special Branch, CID, New Delhi and the Ministry of External Affairs (P.V.I.), Patiala House, New Delhi informing authorities that it had been decided to revoke the petitioner's passport u/s 10(3) (c) of the Passport Act setting out particulars of the petitioner and his passport in this communication. So far as the decision to revoke the passport was concerned, reference was made to a file No. : Y/007052/05.

9. It is an admitted position that no copy of these communications or orders with regard to the petitioner were sent or even informed to him.

10. The petitioner is stated to have appeared before the directorate of enforcement on the 1st, 2nd, 3rd and 6th March, 2006 when his further statements were recorded. However, the respondents submit that his conduct was of a non-cooperative nature; he failed to comply with directions to furnish the requisite information and documents necessary for the purposes of the investigation. This resulted in delays making it necessary to verify the answers given by the petitioner as well as his passport details.

11. On the other hand, Mr. Uday Lalit learned senior counsel submits that the petitioner fully co-operated with the enquiry and that ignorant of these official communications or orders, the petitioner bonafide went to the United Kingdom

on 19th March, 2006 openly flying out from the Indira Gandhi International Airport through normal required channels. The petitioner remained uninformed of the orders with regard to revocation of his passport even when he returned to India on 24th April, 2006. On his return his passport was seized at the airport itself. The seizure memo dated 24th April, 2006 issued by the Indian Immigration Controller at the airport shows that the passenger alongwith the passport was handed over to the enforcement directorate officials for further action.

12. The petitioner relies on a letter dated 19th December, 2005 addressed by him to Shri S.K. Panda, Special Director & the Assistant Director of the Enforcement Directorate giving reasons why he could not visit India till mid-January. My attention is drawn to the enclosures to this letter which include a notarized photocopy of his passport duly enclosed by the Indian High Commission and details of the countries visited by him along with the dates of the visit and duration of his stay.

13. The petitioner relies on a yet another letter dated 11th January, 2006 which was issued by his counsel Shri B.N. Goswami, Advocate to the Director of the Directorate of Enforcement stating that from a news report on the NDTV, it had been learnt that the team led by the enforcement directorate was in London, UK where the petitioner was located. The petitioner's counsel had informed the enforcement directorate that no one had contacted Aditya Khanna in London on behalf of the enforcement agency and had given his contact phone numbers and address in London. Information was sought on behalf of the petitioner as to the contact number of the enforcement directorate team in London so that the petitioner could contact them for a meeting.

14. The respondents do not dispute receipt of the letter. The same has however not been placed on record nor is there any explanation of the same by the respondents.

15. Mr. Uday Lalit, learned senior counsel has painstakingly pointed out that the petitioner has appeared before the respondent on the several dates for which he had received notice and that his bona fide is manifested from the letters dated 11th January, 2006 and 27/28th February, 2006 addressed on his behalf by his counsel to the officials of the Directorate of Enforcement volunteering appearance and expressing an intention to join the investigation even in London. It was pointed out that the petitioner had extensive business interests in the United Kingdom and in case of any doubt, the investigating agency could have examined every issue threadbare in London itself.

It is urged that admittedly the petitioner attended the office of the Directorate of Enforcement on 28th of February, 2006 as well as the 1st, 2nd, 3rd and 6th March, 2006. The enforcement directorate has recorded the petitioner's statement again on 25th, 26th and 28th April, 2006 as well as on 18th May, 2006. It is only because of the petitioner's willing participation in the inquiry, the respondents were able to crystallize the matter during the investigation and upon

completion thereof, issued a show cause notice dated 2nd September, 2006 under the provisions of Foreign Exchange Management Act (FEMA hereafter).

The show cause notice contains a reference to all the statements of the petitioner. This notice has been issued to eight other noticees apart from the petitioner.

16. The petitioner has placed his reply dated 1st December, 2006 to this notice. It is contended that after a consideration of the same, the respondents have taken a decision dated 6th December, 2006 that adjudication proceedings as contemplated under Rule 4 of the Foreign Exchange Management (Adjudication Proceedings) Rules, 2000 should be held against the petitioner which are admittedly pending.

17. Mr. Lalit, learned senior counsel has urged at great length that in the notice dated 2nd September, 2006 the role attributed to other persons named was much more serious than the role attributed to the petitioner. The submission is that the respondent has not even suspended, let alone impounded or revoked the passport of any other person implicated by the Volcker Commission or the Pathak Commission or to whom the notice to show cause has been issued.

It is also pointed out by learned senior counsel, that under the Foreign Exchange Management Act, 1999, only a penalty in fiscal terms subject to a maximum thereof has been fixed as three times of the amount of the violation is prescribed.

18. In order to establish his bonafide and cooperation with the respondents, it is submitted that only after investigations stood completed and the respondents had referred the matter to adjudication, on the 29th December, 2006 the petitioner made a request for return of his passport to the Directorate of Enforcement.

19. A reply dated 3rd January, 2007 was given by Sh. S.K. Panda, the Special Director of the Directorate of Enforcement to this application informing the petitioner that his passport stood taken over by the Central Bureau of Investigation, CGO Complex, New Delhi vide a seizure memo dated 18th December, 2006 in the case No. RC AC-2-2005 A 0002 and that the petitioner may contact the Central Bureau of Investigation for its return.

A grievance is vehemently made by the petitioner that even at this stage, he was not informed about the request for revocation made in the Director's letter dated 28th February, 2006 or the order dated 3rd March, 2006 passed thereon.

20. The petitioner states that though he was not a party to the proceedings before the CBI, he made an application before the Special Judge, CBI, Patiala House, New Delhi in FIR No. RC. AC/2/2005 A/0002 dated 6th June, 2005 seeking return of his passport as he has urgent need to travel abroad for two weeks to attend to his business which was suffering on account of the petitioner being unable to travel for eight months as his passport had been seized. Personal details and contact numbers were stated and an undertaking was given in this

application that in case he is required urgently, even during such two weeks period, he would return in person upon 72 hours notice and present himself before the respondent.

21. The reply filed by the CBI opposing the application still did not disclose to either the court or the petitioner that his passport stood revoked.

22. It is only with a subsequent affidavit dated 5th February, 2007, that copy of a letter dated 23rd January, 2007 issued by Sh. S.K. Panda, Special Director of the Directorate of Enforcement to Shri D.C. Jain, DIG of the CBI was enclosed wherein it was stated that the passport issued to the petitioner stood revoked. The CBI had also enclosed a copy of the letter of request dated 28th February, 2006 addressed by the Enforcement Directorate; the circular dated 3rd of March, 2006 and the letter dated 23rd of January, 2007 from the Enforcement Directorate to the CBI.

The petitioner submits that for the first time he learnt that the respondents had revoked his passport from a copy of the letter filed before the court with the second affidavit filed by the CBI.

23. The present writ petition has been filed thereafter assailing the revocation of the petitioner's passport. The primary ground of challenge of the petitioner is that the impugned action is in violation of the principles of natural justice; the action is mala fide and arbitrary and amounts to infringement of petitioner's right under Articles 19 & 21 of the Constitution.

It has been urged at great length that the petitioner was not served with the notice to show cause nor granted an opportunity of hearing. In this regard, reliance has been placed on the pronouncements of the Apex Court reported at Baldev Singh and Others Vs. State of Himachal Pradesh and Others, , State of Haryana Vs. Ram Kishan and Others, and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another,

24. I have heard learned senior counsel at length. On examination of the statutory scheme, I find that Sub-section 10(3) of the Passport Act, 1967 enables the passport authority if it deems it necessary to impound, revoke the passport in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public. Sub-section (e) and (f) also empowers the passport authority to make such order if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India or if it is brought to the notice of the passport authority that a warrant or summons for the appearance, or a warrant for the arrest, of the holder of the passport or travel document has been issued by a court under any law for the time being in force or if an order prohibiting the departure from India of the holder of the passport or other travel document has been made by any such court and the passport authority is satisfied that a warrant or summons has been so issued or an order has been so made.

25. The expressions "impound" and "revoke" are not defined under the Passport Act, 1967. Learned senior counsels on both sides have placed reliance on the meaning given to these two expressions in several dictionaries which deserve to be noticed.

The Black's Law Dictionary (6th edition) defines these expressions as follows

Impound. To seize and take into the custody of the law or of a court.

Revocation: The withdrawal or recall of some power, authority, or thing granted, or a destroying or making void of some will, deed, or offer that had been valid until revoked.

In Stroud's Judicial Dictionary, they are given the following meaning :

Impound:

1. To "impound or otherwise secure"
2. A document is impounded when it is ordered by a court to be kept in the custody of its officer.

REVOCATION :

(1) " " Revocation " is the calling back of a thing granted" (Cowel: Jacob)

Wharton's Law Lexicon has also given a similar meaning which reads thus :

Impound: to place a suspected document in the custody of law, when it is produced at a trial.

Revocation : the undoing of a thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void. It may be either general, or all acts and things done before, or special to revoke a particular thing.

Jowitt's Dictionary Of English Law defines these expressions thus :

Impound : to place a suspected document in the custody of law, when it is produced at a trial. As to custody of documents impounded by the Court.

Revocation : {Lat.REvocare, to recall}, the undoing of a thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void. It may be either general, or all acts and things done before, or special to revoke a particular thing.

These expressions in the Passport Act, 1967 would therefore derive the meaning from the above.

26. It is evident that as a result of impounding, the passport does not cease to exist. Only its possession and custody changes hand and it is placed in the hands of the authorities stipulated under the statute. So far as revocation is concerned, its effect is as if the document had not been granted or issued and it is rendered

nonest.

Nature of Right

27. In the instant case, the petitioner has contended that his main place of business is in the United Kingdom and that as a result of the passport having been revoked, the petitioner has been prevented for a period of over two years from travelling abroad as well as carrying on his business. The first question which therefore arises is what would be the nature of the right of a person as the petitioner to travel abroad. This issue is certainly not *res integra*. The Constitution Bench in the judgment reported at *Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others, Satwant Singh Sahni v. D. Ramarathnam, Asstt. Passport Officer and Ors.* answered this question and held by majority that the expression personal liberty "in Article 21 of the Constitution of India includes the right to travel abroad. Consequently, no person can be deprived of such a right except according to a procedure established by law.

It is noteworthy that the Passport Act, 1967 was enacted by the parliament in order to comply with this decision to prescribe a procedure whereby a citizen maybe granted a passport in terms of the statutory provisions and, if granted, be revoked or impounded by such a procedure.

28. The right to travel abroad being a fundamental right and part of the personal liberty of the citizen has been reiterated in several later pronouncements of the Supreme Court as well including those reported at *People's Union for civil Liberties (PUCL) and Others Vs. Union of India (UOI) and Another, P. Rathinam/ Nagbhusan Patnaik Vs. Union of India and another, Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, Maneka Gandhi v. UOI (para 3); Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., J.P. Unnikrishnan v. State of Andhra Pradesh*

29. Before the Apex Court in the pronouncement reported at *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, a challenge had been laid to an order impounding the petitioner's passport. In para 45 (at page 322 of SCC), the Apex Court also pointed out that refusal or impounding a passport interferes with a basic human right recognised in Article 13 of the Universal Declaration of Human Rights.

30. The Passport Act, 1967 empowers the authorities named therein to curtail such rights. The issue raised in this case is as to whether compliance with the principles of natural justice would be an essential element of the procedure established under the Passport Act, 1967 for revocation of the passport.

31. In *Maneka Gandhi's* case, the court also held that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. A procedure which curtails or takes away the personal liberty guaranteed under Article 21 has to be construed and considered in the context, primarily, of the

purpose which the act is intended to achieve and situations involving urgency, which those who are charged with the duty of administering the act, may be called upon to deal with.

A second pertinent issue which such a procedure has to comply with is that even the fullest compliance with the requirements of Article 21 would not suffice inasmuch as, the law which prescribes a fair and reasonable procedure for curtailing or taking away rights guaranteed by Article 21, has still to meet the challenge under other provisions of the constitution as under Article 14 and 19. Therefore law which prescribes a procedure for depriving the person of personal liberty under Article 21 may also breach or take away fundamental rights under Article 19 or other fundamental rights and would be required to satisfy those considerations as well.

32. In para 81A at page 644 of the AIR report, the Apex Court clearly held that the right to go abroad is not a guaranteed right under any clause of Article 19(1) and that Section 10(3)(c) which authorises imposition of restrictions on the right to go abroad by impounding of a passport cannot be held to be void as offending Article 19(1)(a) or (g) as its direct and inevitable impact is on the right to go abroad and not on the right of free speech and expression or the right to carry on trade, business, profession or calling. It was explained that this however does not mean that an order u/s 10(3)(1) of the Passport Act, 1967 may not violate Article 19(1)(a) or (g). This is for the reason that though the statutory provision which empowered the authority to take action is constitutionally valid, action taken under it may offend a fundamental right. The Apex Court pointed out instances of a pilot with an international flying licence or an evangelist who had made it a mission of his life to preach his faith to people all over the world and for that purpose set up institutions in different countries. Other instances cited were of those of a musician wanting to go abroad to sing, a dancer to dance, a visiting professor to teach and a scholar to participate in a conference or seminar. If in these cases, the passport was denied or impounded, it would then directly interfere with the right to carry on profession or restrict freedom of speech and expression so as to contravene Article 19(1)(a) or 19(1)(g).

In such a case, refusal or impounding of the passport would be invalid unless it is justified under Article 19(2) or Article 19(6) as the case may be.

33. The Apex Court observed that the first three categories/circumstances prescribed u/s 10(3)(c) of the Passport Act which permit a passport authority to pass orders in this behalf are for the interests of sovereignty and integrity of India; security of India; friendly relations of India with any foreign country or in the interest of the general public. These reasons are the same as those prescribed under Article 19(a). The expression "interests of general public" is a wide expression covering within its sweep all kinds of interests of the general public including interest of sovereignty and integrity of India, security of India and friendly relations of India with foreign countries. An order made u/s 10(3)(c) which confirms with the terms of these provisions would be in the interest of the

general public, and even if it restricts the freedom to carry on a profession, it would be protected by Article 19(6).

However, if an order made u/s 10(3)(c) restricts freedom of speech and expression, it would not be enough that it is made in the interest of the general public. It would satisfy the requirement of Article 19(2) if it is made in the interest of sovereignty and integrity of India or in the interests of the security of India or in the interests of friendly relations of India with any foreign country. It was observed that if the order made u/s 10(3)(c) restricts freedom of speech and expression, it must be made not in the interests of the general public in a wider sense, but in the interests of public order, decency or morality, apart from the other three categories noticed above. If the order cannot be shown to have been made in the interest of public order, decency or morality, it would not only contravene Article 19(1)(a), but would also be outside the authority conferred by Section 10(3)(c).

The order passed in the instant case and the submissions of the respondents have to be tested on these principles.

Applicability of principles of natural justice

34. The primary ground of challenge to the respondents action rests on the assertion that the same is void & illegal on grounds of violation of principles of natural justice, by the respondents. In *Maneka Gandhi v. UOI* (supra) the Supreme Court defined natural justice as "a facet of fair play" and defined it as "quintessence of the process of justice, inspired and guided by fair play in action"; while in, another situation it can be described as a "distillate of due process of law".

It is trite that natural justice constitutes the following three ingredients which are required to be adhered to in any action having civil consequences to the person effected.

(i) "Nemo debet esse judex propria causa", that is that no one would be a Judge in his own case

(ii) "audi alteram partem" i.e. no decision shall be given against a party without affording him a reasonable hearing.

(iii) Application of mind and scrutiny of the record; passing of a speaking order which reflects application of mind to the contentions on points of submission raised before the authority i.e. Quasi Judicial enquiry must be held in good faith, within bias and not arbitrarily or unreasonably.

35. In a recent judgment dated 20th October, 2008 of the Apex Court in Civil Appeal Nos. 1438, 1439, 1442, 1443 and 1444/2004 entitled *Nagarjuna Construction Co. Ltd. v. Govt. of Andhra Pradesh and Ors.*, the Apex Court succinctly summed up the essence of natural justice when it observed thus:

33. Natural justice is another name for commonsense justice. Rules of natural

justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

34. The expression "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

35. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate interrogate and adjudicate". In the celebrated case of *Cooper v. Wandsworth Board of Works* 1963 (143) ER 414, the principle was thus stated :

Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou has thou not eaten of the tree whereof I commanded thee that thou should not eat."

Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

Thus, natural justice as understood in its common parlance stands for fundamental equality and fairness which has to be adopted in any action and its soul is fair play in action.

36. The historic decision of the Apex Court in *A.K. Kraipak and Others Vs. Union*

of India (UOI) and Others, held that the purpose of the rules of natural justice is to secure justice, put negatively, to prevent miscarriage of justice. They, therefore, supplement and not supplant the law.

37. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, it was held that even an administrative order which involves civil consequences must be made consistent with the rules of natural justice.

38. It is well settled that the principles of natural justice apply to domestic administrative tribunals as well as authorities who are discharging quasi judicial functions. Natural justice is called in aid of legal justice. In that event, it relieves legal justice from unnecessary technicality and logical prevarication and also supplies the omission of a formulated law (Ref : Tapashgan Chooudhary in "Penumbra of natural justice" ; *Ram Niwas Bansal Vs. State Bank of Patiala and another*,

39. It is equally well settled that there are no rigid rules as to when the principles of natural justice are to apply, nor any absolute proposition as to their scope and extent, can be laid down.

The Apex Court analysed the requirement of flexibility in the application of principles of natural justice in *The State of Maharashtra and Another Vs. The Jalgaon Municipal Council and Others*, and observed thus:

32. The caution of associating rules of natural justice with the flavour of flexibilities would not permit the Courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are: (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate exceptions, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, (v) express legislation. There is also a situation, which Prof. Wade & Forsyth terms as "dubious doctrine" that right to a fair hearing may stand excluded where the Court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exceptional into play. (Administrative Law, *ibid*, at pp. 543-544).

40. Fairness in administrative action has been enunciated as an absolute rule without exception. This would be more so when a finality is attached to the action which is taken or the punishment imposed. Higher would be the degree then to which the requirement to do substantial justice is required. From the principles laid down by the Supreme Court of India, it is apparent that the

principles of natural justice would be required to be read into every proceeding wherein rights of a person are affected.

41. So far as exercise of power u/s 10(3) of the Passport Act, 1967 is concerned, in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, the court had considered the entire law on the subject and (in para 62 of the AIR page 628) clearly held that the power conferred on the passport authority to impound a passport is a quasi judicial power and the rules of natural justice would in the circumstances be applicable in the exercise of the power of impounding a passport because it seriously interfered with the constitutional rights of the holder and entails civil consequences.

42. On the other hand Mr. P.P. Malhotra, learned ASG has urged that after the pronouncement of the Apex Court in *Maneka Gandhi (supra)*, the legislature has effected a statutory amendment to the Passports Act, 1967 and despite the judicial pronouncement has not provided for a hearing before passing an order for revocation of the passport. Mr. Malhotra, learned ASG contends that in view thereof, the principles of natural justice cannot be read into the statutory provisions, so far as passing of an order for revocation of the passport is concerned.

43. Such a submission that principles of natural justice cannot be read into the statutory provisions if not expressly statutorily prescribed has been considered by the Apex Court in a host of binding judicial precedents which would guide adjudication on this issue, which is the main plank of the respondents' arguments.

I find that in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, the court was called upon to consider exclusion of a hearing in Section 18AA of Industries (Development & Regulation) Act, 1951 by necessary implication in the statutory provision. In this behalf the court had observed thus:

Section 18-AA, does not expressly in unmistakable and unequivocal terms exclude the application of the audi alteram partem rule at the pre-decisional stage. The phrase "that immediate action is necessary" in Section 18-AA(a) does not exclude absolutely, by inevitable implication, the application of this cardinal canon of fair play in all cases where Section 18-AA(1)(a) may be invoked. Section 18-F has also not the effect of excluding the rules of natural justice relating to prior hearing.

...In short, this rule of fairplay must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The Court must take every effort to salvage this cardinal rule to the maximum extent possible, with situational modification. But the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

44. In *Baldev Singh and Others Vs. State of Himachal Pradesh and Others*, the

Apex Court had occasion to consider the proposition that natural justice required an opportunity of being heard before the administrative decision to constitute the notified area was taken. So far as exclusion of the applicability of the principles is concerned, the Apex Court placed reliance on its earlier decision reported at *State of Orissa Vs. Sridhar Kumar Mallik and Others*, where the validity of the action taken u/s 417-A of the Orissa Municipal Act in Constituting a notified area was explained and held thus:

It is a fact that the Orissa Act provides in clear terms a right of hearing whereas Section 256 of the Himachal Act makes no such provision but the settled position in law is that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, the rules of natural justice would apply. xxxx We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way.

45. Again, in a judgment reported at (1988) 3 SCC 416 entitled *State of Haryana v. Ram Kishan*, the Apex Court had held thus:

8. Considered in this light, the Section must be interpreted to imply that the person who may be affected by such a decision should be afforded an opportunity to prove that the proposed step would not advance the interest of mines and mineral development. Not to do so will be violative of the principles of natural justice. Since there is no suggestion in the Section to deny the right of the affected persons to be heard, the provisions have to be interpreted as implying to preserve such a right. Reference may be made to the observations of this Court in *Baldev Singh and Ors. v. State of Himachal Pradesh and Ors.*, that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, such rules would apply.

46. In *Dr Rash Lal Yadav Vs. State of Bihar and Others*, it was held that in the absence of contrary indication in the statute, procedural fairness is an implied mandatory requirement to protect arbitrary action where statute confers wide power coupled with wide discretion on the authority. In this behalf, in para 6 of the judgment, the apex court held thus :

Drastic substantive laws can be suffered only if they are fairly and reasonably applied. In order to ensure fair and reasonable application of such laws, Courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can

be said to be procedurally fair. Rules of natural justice are, therefore, devised for ensuring fairness and promoting satisfactory decision-making. Where the statute is silent and a contrary intention cannot be implied the requirement of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Natural justice has thus secured a foothold to supplement enacted law by operating as an implied mandatory requirement thereby protecting it from the vice of arbitrariness. Courts presume this requirement in all its width as implied unless the enactment supplies indications to the contrary as in the present case.....

xxx

What emerges from the above discussion is that unless the law expressly or by necessary implication excludes the application of the rule of natural justice, Courts will read the said requirement in enactments that are silent and insist on its application even in cases of administrative action having civil consequences.

47. The following observations of the Full Bench of the Punjab & Haryana High Court in the pronouncement reported at 1972 74 PLR 127 (FB) Hamek Singh and Anr. v. State of Punjab and Ors. also throw valuable light on the issue:

...that even if the statute and the rules framed thereunder are silent on the point, it appears to us to be necessary for satisfying the principles of natural justice, without which it is impossible to maintain the rule of law, to give an adequate opportunity to a transferee to safeguard his interest in proceedings which can possibly culminate in a decision prejudicially affecting him and his property rights.

48. The doctrine of "useless formality" urged as an exception to the compliance of the principles of natural justice has also been considered. The principle that in addition to breach of natural justice, de facto prejudice must also be proved has been developed in several cases. (Ref: (2000) 7 SCC 527 K.L. Tripathi Vs. State Bank of India and Others, Rajendra Singh Vs. State of Madhya Pradesh and others,

49. Exclusion of the audi alteram partem rule has been held permissible only where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot also be applied to defeat the ends of justice or to make the law "lifeless" absurd, stultifying and self defeating or plainly contrary to the common sense of the situation "and this rule may be jettisoned only in very exceptional circumstances where compulsive necessity so demands. (Ref: Union of India and another Vs. W.N. Chadha,

50. The House of Lords in Wiseman v. Borneman (1967) 3 All ER 1045 had submitted that the inquiry which an authority must always raise is that fairness in action demands that an opportunity to be heard should be given to the person affected.

51. In Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New

Delhi and Others, the Apex Court had placed natural justice on the highest pedestal when it observed that:

Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendry days of Adam and of Kautilya's Arthashastra - the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these depths for the present except to indicate that the roots of natural justice and its foliage are noble and not newfangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experimental test, importing the right to be heard will paralyse the process, law will exclude it. It had been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and-death aspects of the supreme command by the then British Prime Minister to the distress of all our friends and to the delight of all our foes" - too historic to be lost on Jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.

52. The rule therefore is that application of the principles of natural justice can be excluded only by specific statutory expression of the negative intention of the legislature or the statutory scheme reflects such an exclusion. Application of the principles of natural justice including the audi alteram partem maxim do not stand excluded by inevitable or irresistible implication. These principles can be excluded also in absolutely exceptional circumstances when compulsive necessity so demands or immediate action is imperative. The requirement of hearing has been held to be indispensable at the initial stage and is extended to the appellate stage so as to ensure proper application of the principles of natural justice. So far as observance of natural justice is concerned, in Mohinder Singh Gill's case (supra), the Apex Court observed that inasmuch as this principle is so integral to good governance, the onus is on him who urges exclusion to make out why. Violation of the principles of natural justice by any action is recognised as a violation of the rights of the citizen under Article 14 of the Constitution of India.

53. By virtue of the amendment of 2002, there is no change to Sub-section (3)

of Section 10 of the Passport Act, 1967. The statute which was being considered by the Apex Court in Maneka Gandhi's case (supra), did not provide for an emergency situation where immediate steps were required to be taken with regard to the passport of an individual. Because of absence of a power to take emergency actions under the Passport Act, 1967 in an emergency situation, the authorities were taking recourse to "look out circulars" which had no sanctity in law.

54. This statutory vacuum was provided for by the incorporation of Section 10-A into the Passport Act, 1967 which was inserted as Section 2 of the Act No. 17 of 2002 w.e.f. 23rd October, 2001 empowering the Central Government or a designated officer to immediately suspend the passport or travel document of a person against whom an order is likely to be passed under Clause (c) of Sub-section 3 of Section 10. The same requires to be considered in extenso and reads thus :

10A. Suspension of passports or travel documents in certain cases

(1) Without prejudice to the generality of the provisions contained in Section 10, if the Central Government or any designated officer is satisfied that the passport or travel document is likely to be impounded or caused to be impounded or revoked under clause (c) of Sub-section (3) of Section 10 and it is necessary in the public interest so to do, it or he may,--

(a) by order, suspend, with immediate effect, any passport or travel document;

(b) pass such other appropriate order which may have the effect of rendering any passport or travel document invalid, for a period not exceeding four weeks:

Provided that the Central Government or the designated officer may, if it or he considers appropriate, extend, by order and for reasons to be recorded in writing, the said period of four weeks till the proceedings relating to variation, impounding or revocation of passport or travel document u/s 10 are concluded:

Provided further that every holder of the passport or travel document, in respect of whom an order under clause (a) or clause (b) of this Sub-section had been passed, shall be given an opportunity of being heard within a period of not later than eight weeks reckoned from the date of passing of such order and thereupon the Central Government may, if necessary, by order in writing, modify or revoke the order passed under this Sub-section.

(2) The designated officer shall immediately communicate the orders passed under Sub-section (1), to the concerned authority at an airport or any other point of embarkation or immigration, and to the passport authority.

(3) Every authority referred to in Sub-section (2) shall, immediately on receipt of the order passed under Sub-section (1), give effect to such order.

55. By statutory prescription, the power to suspend the passport pending further proceedings for revocation or impounding thereof was conferred on the

authorities in statutory recognition of the requirement for immediate action that is to say the exceptional circumstance or impulsive necessity which may render imperative action necessary if the designated officer is satisfied that the passport is likely to be impounded or revoked u/s 10(3)(c) and it is necessary to do so in public interest.

56. It is well settled that where an action under a statute entails civil consequences, then even if an opportunity of being heard may not be explicitly set out in the applicable legal provisions, the adherence to the principles of natural justice has to be read into such a statute. For this reason the legislature has enacted Sub-section 1(a) and (b) of Section 10A empowering the designated authority to suspend any passport or travel document or pass any order rendering any passport invalid.

57. The two provisos to Sub-section 1 of Section 10-A, however, specifically mandate that every holder of the passport in respect of whom an order of suspension of the passport has been passed u/s 10-A or Clause b of Sub-section 1 of Section 10, shall be given an opportunity of being heard, within a period of not later than eight weeks reckoned from the date of passing of such an order. Upon such hearing, the Central Government is empowered, if necessary, by an order in writing to modify or revoke the order under this section.

58. It is noteworthy that an important safeguard has been statutorily provided. The duration of the order of suspension is statutorily restricted to a period not exceeding four weeks. In case of extension being required, the proviso to Sub-section 10-A enables the Central Government or the designated officer to extend by an order, for reasons to be recorded in writing, the period till proceedings relating to the variation, impounding or revocation of passport u/s 10, are concluded.

59. The legislature has therefore prescribed the only eventuality when the respondents can proceed to take action without prior adherence to principles of natural justice. In view of the principles laid down by the Apex Court and in a catena of judgments of various High Courts, the contention that merely because the legislature had not prescribed requirement of a hearing prior to the passing of an order u/s 10(3), the same stands excluded is therefore contrary to the well settled principles of law and is hereby rejected. As a consequence it is held that the respondents were bound to comply with the principles of natural justice before passing the impugned order.

Order rendered invalid on grounds of failure to state reasons

60. The petitioner has further contended that if the communication dated 3rd March, 2006 was in the nature of an order u/s 10(3)(c), then the same does not indicate as to the details and particular of the authority who had "decided" the matter. No communication of this order u/s 10(9) of the Passport Act, 1967 has been effected. According to the statutory provisions, the order must disclose clearly the reasons for the revocation of the passport which it does not.

61. It has been argued at length that the non-communication of the order, ground and reasons thereof, impacts the petitioner's right to file an appeal u/s 11 of the Act and that there was no public interest in passing the order for revocation of the petitioner's passport.

62. The petitioner has also assailed the order dated 3rd March, 2006 for the reason that the same suffers from non-application of mind. In this behalf, reference is made to the contents of the communication dated 28th February, 2006 which reflect a pre-discussion between the Directorate of Enforcement who issued the letter and the Foreign Secretary. The submission is that in case the reason and decision is of the Directorate of Enforcement, the same tantamounts to abdication of the powers of the respondent No. 3 to this authority and hence the same is not sustainable. Mr. Uday Lalit, learned senior counsel appearing for the petitioner has contended that the order dated 3rd March, 2006 is rendered completely illegal for failure to effect bare statutory compliance.

63. The respondents however submits that the CBI furnished the reasons for the order of revocation to the petitioner when it filed a reply on 3rd January, 2007 to the petitioner's application seeking release of the passport. In any case, it is urged that the Ministry of External Affairs has given the reasons for its order in the counter affidavit in these proceedings and the petitioner cannot contend that he is not aware of the reasons for the order of revocation.

64. Placing reliance on the pronouncement of the Apex Court in *Union of India (UOI) and Others Vs. Smt. Charanjit Kaur*, it has been further urged that so long as reasons existed on the file, the court cannot go into the same.

65. Coming to the submissions of the learned Additional Solicitor General to the effect that the reasons exist in the files or the attempt to support the order by reasons in the counter affidavits of other respondents is concerned, the legal principles are well settled. In the judgment reported as back as on *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, the *Commissioner of Police v. Gordhan Das Bhanji*, the Apex Court held that "public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself." It was further held, "Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with what exactness and precision they are expected to do or forbear from doing and exactly what authority is making the order."

66. So far as reliance on the reasons given in affidavits filed in court proceedings are concerned, in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, it was observed that when a statutory

functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise. Otherwise, an order bad in the beginning, may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

67. These principles have been reiterated in later pronouncements of the Apex Court reported at S.L. Kapoor Vs. Jagmohan and Others, State Bank of India and others Vs. D.C. Aggarwal and another,

68. It is noteworthy, that so far as the instant writ petition is concerned, this Court is required to examine an order for revocation of the petitioner's passport only. It needs no elaboration that an order has to be tested against material which was there before the authority when it passed the order. Material cannot be gathered after the passing of the order to support the same which is placed in the counter affidavits of other respondents.

69. Mr. Uday Lalit, learned senior counsel appearing for the petitioner has drawn my attention to this communication dated 28th February, 2006 from the Directorate of Enforcement addressed to the Joint Secretary (CPV), that is the Council for Passport and Visas of the Ministry of External Affairs, who has set out the reasons as to why the petitioner's passport should be impounded/revoked, it reads thus :

It may be mentioned that the passport of Shri Aditya Khanna is a vital document for the purposes of investigation by the Directorate. Moreover, if he travels abroad, his visits would delay investigation. Further, if he goes abroad, he may tamper with evidence which will jeopardise the investigation which is at a crucial stage.

The letter also records that this issue has already been discussed by the author of the communication with the Foreign Secretary. A copy of this communication is also marked to the Foreign Secretary.

70. It is noteworthy, that the letter dated 28th February, 2006 addressed by the Directorate of Enforcement to the Foreign Secretary enclosed the aforementioned communication and a request that the passport of the petitioner be immediately revoked/cancelled for the three reasons which were delay in investigation; tampering with evidence; and jeopardising investigation if the petitioner travelled abroad.

71. The stand of the respondents to the effect that the reasons existed on the file is also not borne out from the record. The file of the Ministry of External Affairs commences from a noting dated 2nd March, 2006 referring to a letter dated 28th February, 2006 received from the Directorate of Enforcement requesting for impounding/revocation of the passport of the petitioner. It was noted that as the passport was not in the custody of the Enforcement Directorate and neither was it produced by the petitioner as per the summon of the Directorate, the RPO

Delhi be instructed to revoke his passport under the Passport Act. On this noting, the SO(PV-I) recorded that in view of the importance of the case, the passport may be revoked "W/O issuing SCN in the public interest on 2nd March, 2006". This noting was endorsed by the Under Secretary who directed the "RPO" to send the revocation order by 11 a.m. on the same day. The passport was revoked by the RPO, New Delhi on 3rd March, 2006. The noting of the RPO is obviously not available on the record of the Ministry of External Affairs.

72. The averments made by the Central Bureau of Investigation with regard to revelations during the course of investigation are not the material which was there before the competent authority when it passed the impugned order.

73. As a result of the above, the submission on behalf of the respondents that the reasons exist on the file is found to be contrary to the respondents record. The contention that the grounds on which the order is based are to be found in the affidavits of the other respondents and hence validate the order is contrary to law.

74. The other limb of the submission is based on failure to furnish copy of the order or the reasons to the petitioner. Sub-section 5 of Section 10 mandates that the authority impounding or revoking the passport or travel document shall record in writing a brief statement of the reasons for making such an order. The statutory provisions require the passport authority to furnish to the holder of the passport, or travel document on demand, a copy of the same unless in any case, the passport authority is of the opinion that it will not be in the interest of the sovereignty and integrity of India, the security of India, friendly relation of India with any foreign country or be in the interest of general public to furnish such a copy.

Mr. Malhotra, learned ASG has submitted that for the reason that there was no demand by the petitioner for the order, the action of the respondent cannot be faulted.

75. There is no prescribed format for such a demand. Every representation of the petitioner makes a complaint in this behalf. Despite the filing of the writ petition and a prolonged grievance having been addressed by the petitioner with regard to non-supply of the order, the respondents have opted not to supply the order or the reasons to the petitioner.

76. It has been submitted by the passport authority which passed the order of revocation in its reply to the petition, that since the revocation was in public interest, there was no need to communicate the order.

77. A statutory appeal is provided u/s 11 of the order passed u/s 10. Such a statutory right can be meaningfully utilized only if reasons and grounds of the order are available to a party. Even otherwise, the authority has to apply its mind and record its satisfaction with regard to the existence of the statutory grounds prescribed for revocation of the passport and also has to show that mind was

applied to the request for issuance of the copy of the order and that the same was being denied only in the exceptional circumstances provided in Sub-section 5 of Section 10.

78. It is important to note, that Sub-section 9 of Section 10 requires the holder of a passport which has been revoked, to surrender the same, if the same has not already been impounded, to the authority by whom it has been revoked.

No person can comply with the mandate of Section 10(9) unless a copy of the order is furnished to him. A copy of order is thus statutorily required to be served on a person whose passport is revoked. Only the reasons thereof may be withheld only if the circumstances set out in Sub-section (5) of Section 10 are satisfied.

In the given circumstances noticed hereinabove, there is no record of the satisfaction of the conditions of Sub-section (5) of Section 10 by any competent authority. The inevitable consequence is that the petitioner has been unjustifiably denied the copy of the order.

Availability of an alternate remedy

79. It has been urged at great length, that the present writ petition deserves to be dismissed on the ground that the petitioner has available to him an alternative remedy by way of a statutory appeal u/s 11 of the Passports Act, 1967. The submission is that such an appeal provides an adequate mechanism to address all issues raised by the petitioner.

80. The petitioner has pointed out that in the instant case, the issue was taken at the level of or in any case at the instance of the Joint Secretary and the Foreign Secretary of the Ministry of External Affairs as is manifested from the letter dated 28th February, 2006 and order dated 3rd of March, 2006.

The appeal has been provided u/s 11 and Rule 10(c) of the Passports Rules 1980 whereunder the Chief Passport Officer, who is subordinate to both these authorities, is the Appellate Authority. There is substance in the argument that he would reasonably not be in a position to apply independent mind if an appeal against their order(s) was placed before him.

81. The principles with regard to this objection were authoritatively laid down by the Apex Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, The Apex Court had laid down the applicable principles thus :

7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternate remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where

the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged. (Ref : Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. (1998) 8 SCC 11.

Having regard to the grounds on which the challenge has been laid by the petitioner before this Court and in the given facts, certainly, it cannot be held that the remedy of the statutory appeal would be an efficacious remedy to the petitioner and cannot be a bar to the present proceedings.

82. In this case, I find that the proviso to Sub-section 11 of the Passport Act, 1967 provides that no appeal under the Passport Act, 1967 would lie where the order in question has been passed by the Central Government itself. The order at the instance of the Secretary/Joint Secretary of the Ministry of External Affairs has been urged to be really an order of the Central Government. No appeal would lie in these circumstances. Judicial review in any event has to lie before the court by way of appropriate proceedings under Article 226 of the Constitution of India.

83. This objection must fail on yet another count. The respondents have refused to furnish the copy of order upon the petitioner. Absent such copy, certainly the petitioner cannot adopt such remedy, even if available.

84. So far as the argument that the order is beyond the pale of judicial scrutiny is concerned, this submission was squarely answered by the Apex Court in Maneka Gandhi's case (supra) wherein the court has held that an order of impounding a passport may be legally permissible. However the impact thereof being on fundamental rights of the citizen, the same has to withstand the test of judicial scrutiny especially where allegations of malafide, arbitrariness and illegality are made. In Para 86 at page 648 of the AIR, it was held that an order made by the Passport Authority impounding a passport is subject to judicial review on the ground that order is malafide, or that the reasons for making the order are extraneous or they have no relevance to the interests of the general public. The submission on behalf of the respondents that the order cannot be subjected to judicial scrutiny is therefore to be noted only for the purpose of rejection.

Offer of post-decisional hearing to validate action

85. Mr. P.P. Malhotra, learned ASG has urged at length that if the view of the respondents is that the revocation of the passport is necessary in public interest and exercise of discretion of the Government to do so cannot be subjected to judicial scrutiny. It is further submitted, that when a passport is not surrendered to the custody of law, then it has to be revoked and that the purpose of the whole exercise would have stood frustrated if hearing was to be given. It has further been submitted that the request of the Central Bureau of Investigation requesting continuation of the revocation is pending and a fresh order can be

passed. Placing reliance on the observations of the Apex Court in para 220 at page 401 of the SCC report of the judgment in *Maneka Gandhi (supra)*, it has been urged that bare suspicion is enough to take action in the instant case.

86. It is urged that in the facts and circumstances of the instant case, the passport authority had the absolute discretion to impound or cause to be impounded or revoke the petitioner's passport" u/s 10(3)(c). The respondents have urged that there is no challenge to the authority or the power of the respondents to make the order for revocation of the passport.

87. Mr. P.P. Malhotra, learned ASG has urged that a decision was taken by the respondents to treat the petitioner's representation dated 16th of August, 2007 as an appeal and to hear the petitioner and thereby, to give a post decisional hearing to the petitioner. Instead of participating in such hearing, the petitioner filed CM No. 1430/2008 in the instant writ petition and the proceedings contemplated by the respondent No. 2 were stayed by an interim order passed herein.

Placing reliance on the pronouncement in *Maneka Gandhi's* case, it is urged that the respondents have the option to give a post decisional hearing to the petitioner. The further submission is that the orders were passed in emergency circumstances and that the Supreme Court in the landmark pronouncement in *Maneka Gandhi's* case has held that post-decisional hearing satisfies compliance with both the legal requirements as well as principles of natural justice. The same having been offered, the action of the respondents in revoking the petitioner's passport cannot be invalidated only on the ground of denial of prior hearing. Reliance is also placed on *Ajit Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others*, in support of this submission.

88. The legislature has also specifically incorporated a provision for taking immediate action to suspend by way of Section 10(A) and in a case of grave urgency to, thereafter grant a post decisional hearing pending consideration of the orders for revocation or impounding, based on the emergency of the situation.

Such post decisional hearing has not been statutorily prescribed when a decision to impound or revoke the passport is envisaged.

89. In *Maneka Gandhi's* case (*supra*), the court was considering an order impounding a passport and it was held that compliance with the *audi alteram partem* rule was mandatory. It was only in the facts of the case that the post decisional hearing was accepted as permissible. Revocation of a passport has consequences which are more drastic than impounding of the passport. The principles laid down by the Apex Court so far as impounding are concerned, would certainly apply to revocation of the passport.

90. In *Institute of Chartered Accountants of India Vs. L.K. Ratna and Others*, it was laid down that a post-decisional hearing cannot be an effective substitute for

a pre-decisional hearing and if an opportunity of hearing is not given before a decision is taken at the initial stage, it would result in serious prejudice inasmuch as if such an opportunity is provided at the appellate stage, the person is deprived of his right to appeal.

91. In this regard, the Apex Court in pronouncement reported at K.I. Shephard and Others Vs. Union of India (UOI) and Others, held thus:

16. We may now point out that the learned single Judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could now represent and their cases could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.

92. This very issue had arisen before the Apex Court in H.L. Trehan and Others Vs. Union of India (UOI) and Others, The court in this behalf had observed thus:

12. It is, however, contended on behalf of CORIL that after the impugned circular was issued, an opportunity of hearing was given to the employees with regard to the alterations made in the conditions of their service by the impugned circular. In our opinion, the post-decisional opportunity of hearing does not subserve the rules of natural justice. The authority who embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity.

93. In Satish Nambiar Vs. Union of India (UOI), it was held that since the circumstances of the case are of such grave nature that, in the opinion of the authority, it is likely to jeopardize the security and sovereignty of the country, and affect adversely the relationship with other countries. For this reason, the revocation of the petitioner's registration card and permanent visa without granting him a pre-decisional hearing was upheld.

94. Where the legislative scheme of provisions of a statute suggests that the intent of the legislature is to take an emergent action, in that event and subject to fulfilment of ingredients of the provisions, an order could be passed without affording a pre-decisional hearing and an expeditious post-decisional hearing may amount to substantial compliance with the basic law. (Ref: International Cargo Services Vs. Union of India (UOI) and Commissioner of Customs (I and G),

95. In the instant case, the revocation has been effected in order to prevent the petitioner from travelling and from tampering with documents and hampering with the investigation as was noticed in the communication dated 28th February, 2006. It has not been contended that such purpose could not have been achieved by appropriate proceedings u/s 10-A pending the finalization or taking a decision u/s 10(1)(c) of the Act.

96. It has been specifically contended on behalf of the petitioner that he had returned specifically to India on April, 2006 for the purposes of meeting the officers of the Directorate of Enforcement and making further submission before them as may be required. It has been submitted on his behalf that he had specifically informed them about the details as well as the date of his arrival including the exact flight number and airlines. Such information is stated to have been given much in advance. There has been no denial to this submission.

97. So far as tendering of his passport is concerned, the petitioner has submitted that it could not be done physically for the reason that he did not have the passport physically with him as it had gone to the visa authority for the purposes of meeting certain visa requirements. It has been submitted that in order to further assist the investigation, the petitioner had forwarded a photocopy of all the pages of his passport duly endorsed by the Indian High Commission under the covering letter dated 19th December, 2005 to the Directorate of Enforcement. It has also been pointed out that apart from the petitioner's statement, the petitioner had sent details in a letter dated 4th April, 2006 with extensive enclosures including bank documents, bank prescription details of financial entries etc. This is manifested from the show cause notice filed by the Directorate of Enforcement manifesting the statement made on behalf of the petitioner.

98. The petitioner has contended that he is not an accused in any criminal proceedings. The allegations made in the Volcker inquiry report are pending adjudication and, therefore, are yet to be decided by process of law and adjudication. The petitioner has objected to the applicability of the Foreign Exchange Management Act, 1999 on the ground that u/s 8 of this statute, the same would apply only to a person resident in India whereas the petitioner is a non-resident Indian.

99. The petitioner has placed several communications including the letters dated 9th March, 2007, 10th April, 2007, 17th April, 2007, 11th July, 2007, 16th August, 2007 and an undated letter addressed to various authorities in the Ministry of External Affairs, ranging from the Joint Secretary, Secretary to the Ministry of State for External Affairs, requesting that the matter be looked into on urgent basis and that the order/circular revoking his passport be cancelled. The petitioner had pointed out that he was in the hospitality and restaurant business in the United Kingdom having international acclaim. On account of his absence for over 14 months, the petitioner's reputation has been irreparably damaged apart from the monetary loss he was suffering. It was specifically

pointed out that no proceedings of any kind were pending against the petitioner or his business in India.

100. I find that the petitioner had also undertaken to be available as and when required by the respondent to do so in respect of any question or clarifications. It may be noted that in the communications addressed in March, 2007, the petitioner had even requested that the order revoking his passport be cancelled or withdrawn or his passport be reinstated as a valid document. The petitioner had requested the respondent that the same could still be continued to be held by the CBI if deemed necessary even after its restoration as a valid document. These requests evoked no response at all.

101. The representations which were addressed by the petitioner had been made without the copy of the impugned order which is essential to raise a meaningful challenge. The petitioner had complained that he had not been given a copy of order therein.

102. The petitioner filed the present writ petition on 17th December, 2007 praying for issuance of an appropriate writ reversing/annulling/cancelling the order of revocation including the circular dated 3rd March, 2006 issued by the Regional Passport Office/Passport Authority/Ministry of External Affairs and a writ of mandamus directing the Central Bureau of Investigation to release the passport of the petitioner from its custody. Notice in this writ petition was issued by an order passed on 19th December, 2007. The respondents failed to file their reply within the period stipulated by the court. Instead, a communication dated 15th January, 2008 was addressed to the petitioner, received by him on 21st January, 2008, addressed by the Ministry of External Affairs, respondent No. 2 informing the petitioner that it was treating a representation dated 16th August, 2007 of the petitioner as an appeal under the provisions of Section 11 of the Passport Act, 1967. The petitioner was required to present himself for a personal hearing on 29th January, 2008 before the Joint Secretary, CPB, Ministry of External Affairs.

103. Contending that this action of the respondent was itself a mala fide action, to subvert the pending proceedings before this Court and a mala fide attempt to legitimize their illegal action, the petitioner filed application registered as CM No. 1430/2007 before this Court, praying for stay of the effect and operation of the notice dated 15th January, 2008.

104. This application came up for hearing on 29th January, 2008 when it was directed that till the next date of hearing, the appeal/proceedings contemplated by the respondent No. 2 in terms of its communication of 15th January, 2008 shall stand stayed. This order has continued to bind the parties till date.

105. The respondents have thus proposed to treat as an appeal, the representation of the petitioner, where he has complained against the revocation in violation of the audi alteram partem rule and made a grievance that he has not received a copy of the order. This representation was made on 6th August,

2006, six months after the revocation. The order to grant a hearing was made almost two years (twenty two months) after the revocation. The same is beyond the period permissible for the post-decisional hearing even u/s 10A(1b).

106. The allegations surfaced in the year 2005 and revocation of the passport has been effected only on 3rd March, 2006. The petitioner on the other hand has acceded to the jurisdiction of the respondents voluntarily when his counsel wrote the letters on 19th December, 2005 and 11th January, 2006 to the Directorate of Enforcement in the United Kingdom itself. The respondents have set out the several dates on which the petitioner has appeared before them.

107. The respondents do not make any allegation let alone place any material that the petitioner has tried to abscond or leave from the country after knowledge of the pendency of the proceedings before the Directorate of Enforcement. The case registered by the Central Bureau of Investigation implicated the petitioner's father also. Even this agency has stated that the noticees have appeared when required.

108. A reading of the judgment in para 62 of Maneka Gandhi's case shows that it was conceded by the learned Attorney General on behalf of the Union of India that the audi alteram partem rule is a highly effective rule devised by the courts to enable a statutory authority to arrive at a just decision and it is calculative to act as a healthy check on abuse or misuse of power and hence its reach should not be narrowed and its applicability circumscribed. The learned Attorney General had in fact urged a narrow contention based on the facts of the case and sought to place exercise of the power in the case within the exceptions to the applicability of the rule. In this behalf, para 62 of the AIR report deserves to be considered in extenso and reads thus:

62. Now, as already pointed out, the doctrine of natural justice consists principally of two rules, namely, *nemo debet esse iudex propriae causae* : no one shall be a judge in his own cause, and *audi alteram partem* : no decision shall be given against a party without affording him a reasonable hearing. We are concerned here with the second rule and hence we shall confine ourselves only to a discussion of that rule. The learned Attorney General, appearing on behalf of the Union of India, fairly conceded that the audi alteram partem rule is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it is calculated to act-as a healthy check on abuse or misuse of power and hence its reach should not be narrowed and its applicability circumscribed. He rightly did not plead for reconsideration of the historic advances made in the law as a result of the decisions of this Court and did not suggest that the Court should re-trace its steps. That would indeed have been a most startling argument coming from the Government of India and for the Court to accede to such an argument would have been so act of utter retrogression. But fortunately no such argument was advanced by the learned Attorney General. What he urged was a very limited contention, namely that having regard to the nature of the action involved in the impounding of a passport, the

audi alteram partem rule must be held to be excluded, because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded, he might immediately, on the strength of the passport, make good his exit from the country and the object of impounding the passport would be frustrated. xxx xxx

The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, and opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure "established" by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article.

109. From the above, the Supreme Court clearly held that it is only if the provisions of natural justice would be read into the provisions of Section 10 of the Passport Act, 1967 that the same would be a fair and just procedure and would not suffer from the vice of arbitrariness and unreasonableness. It is evident that it is only so far as the exercise of power to impound a passport in the given facts was concerned that the Apex court held that the applicability of the audi alteram partem rule before the making order was required to be excluded. Even in such eventuality it was clearly held that the reasons for the order are to be supplied at the earliest to enable the person concerned to make a representation and to plead for setting aside the action of impounding his passport. The provision of giving an immediate opportunity to the person concerned can or should be read by implication into the Passport Act, 1967 and only then would the procedure prescribed by the Act for impounding a passport be right, fair and just; that then it would not suffer from the vice of arbitrariness and unreasonableness and would be a procedure which was in conformity with the requirement of Article 21 of the Constitution.

110. In view of the issues raised before this Court, so far as the applicability and extent of the principles of audi alteram partem are concerned, in Maneka

Gandhi's case (supra), the Apex Court was clearly of the view that the principles of audi alteram would have application even where no positive words are used in the statute. The Supreme Court had observed thus:

Although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of audi alteram, which mandates that no one shall be condemned unheard is part of the rules of natural justice.

Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. The inquiry must, always be : does fairness in action demand that an opportunity to be heard should be given to the person affected ?

The law must now be taken to be well settled that even in an administrative proceedings, which involves civil consequences, the doctrine of natural justice must be held applicable.

111. In para 225 of Maneka Gandhi case (Supra), the court held as follows:

So also the right to be heard cannot be presumed when in the circumstances of the case, there is paramount need for secrecy or when a decision will have to be taken in emergency or when promptness of action is called for where delay would "defeat the very purpose or where it is expected that the person affected would take an obstructive attitude. To a limited extent it may be necessary to revoke or to impound a passport without notice if there is real apprehension that the holder of the passport may leave the country if he becomes aware of any intention on the part of the passport authority or the Government to revoke or impound the passport. But that by itself would not justify denial of an opportunity to the holder of the passport to state his case before a final order is passed. It cannot be disputed that the legislature has not by express provision excluded the right to be heard. When the passport authority takes action u/s 10(5) he is required to record in writing a brief statement of reasons and furnish a copy to the holder of the passport on demand unless he for sufficient reasons considers it not desirable to furnish a copy. An order thus passed is subject to an appeal where an appellate authority is required to give a reasonable opportunity to the holder of the passport to put forward his case. When an appeal has to be disposed of after given for a specified period, the revocation or impounding during the without hearing the aggrieved person. Further when a passport is given for a specified period the revocation or impounding during the period when the passport is valid can only be done for some valid reason. There is a difference between an authority revoking or modifying an order already passed in favour of a person and initially refusing to grant a license. In *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others*, the Supreme Court held that "it would not be proper to equate an order revoking or modifying a licence with a decision not to grant a licence". In *Schmidt v. Secretary of State, Home Affairs*

(1969) 2 Ch. 149, Lord Denning observed that "if his permit (alien) is revoked before the time limit expires he ought, I think, to be given an opportunity of making representation; for he would have a legitimate expectation of being allowed to stay for the permitted time. Lord Denning extended the application of the rule of *audi alteram partem* even in the case of a foreign alien who had no right to enter the country. When a permit was granted and was subsequently sought to be revoked, it has to be treated differently from that of refusing permission at the first instance. As in the present case the passport which has been granted is sought to be impounded the normal presumption is that the action will not be taken without giving an opportunity to the holder of the passport. Section 10(3) in enumerating the several grounds on which the passport authority may impound a passport has used the words like 'if the authority is satisfied', 'the authority deems it necessary to do so.' The Privy Council in *Duravappah v. Fernando* (1967) 2 A.C. 337 after referring to an earlier decision in *Sugathadasa v. Jayasinghe* (1958) 59 N.L.R. 457 disagreed with the decision holding "As a general rule that words such as 'where it appears to ... or 'if it appears to the satisfaction of ... or 'if the ... considers it expedient that' or 'if the ... is satisfied that' standing by themselves without other words or circumstances of disqualification, exclude a duty to act judicially." , The Privy Council in disagreeing with this approach observed that these various formulae are introductory of the matter to be considered and are given little guidance upon the question of *audi alteram partem*....

112. Mr. Atul Nanda, learned Counsel representing the petitioner has placed an observation of Justice P.N. Bhagwati in a foreword to a second edition of "Administrative Law" by Dr. I.P. Massey. On such reading of the pronouncement of the Apex Court, Justice Bhagwati has written thus:

...Sometimes an attempt is made by lawyers appearing on behalf of the government to contend that even where prior hearing is not given, the exercise of the power does not become bad and it can be cured by post-decisional hearing. But this is a gross misunderstanding of the decision of the Supreme Court in *Gill's case* and *Maneka Gandhi's case*, because it is clear law that if prior hearing is required to be given as part of the rule of natural justice, failure to give it would indubitably invalidate the exercise of the power and it cannot be saved by post-decisional hearing.

113. There is therefore substance in the contention of Mr. Uday Lalit, learned senior counsel for the petitioner that the Apex Court has not laid down as a proposition of law, that a post-decisional hearing if given, would satisfy the requirement of law. The statutory scheme as noticed above, prescribes to the contrary.

114. The action of revocation of a passport is final and much more drastic than an action of only impounding of the passport. There is nothing in the statute or its scheme which shows any intention to exclude applicability of the principles of natural justice or permit a post decisional hearing .

115. So far as urgency is concerned, in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, the court construed the expression "immediate action" which would guide adjudication in the instant case. The court held that:

(iv) "Immediacy" does not exclude a duty to act fairly, because, even an emergent situation can co-exist with the canons of natural justice. The only effect of urgency on the application of the principle of fair-hearing would be that the width, form and duration of the hearing would be tailored to the situation and reduced to the reasonable minimum so that it does not delay and defeat the purpose of the contemplated action.

(v) where the civil consequences of the administrative action - as in the instant case - are grave and its effect is highly prejudicial to the rights and interests of the person affected and there is nothing in the language and scheme of the statute which unequivocally excludes a fair pre-decisional hearing, and the post-decisional, hearing provided therein is not a real remedial hearing equitable to a full right of appeal, the Court should be loath to infer a legislative intent to exclude even a minimal fair hearing at the pre-decisional stage merely on ground of urgency.

116. The law and the principles laid down by the Apex Court, therefore, would bind adjudication in the instant case. Even in *Maneka Gandhi*, the Apex Court has unequivocally declared that as soon as the order impounding the passport is made, the reasons for impounding are required to be supplied and opportunity of hearing, remedial in aim is to be given. Certainly a post-decisional hearing after almost twenty two months of the passing of order revoking the passport without supplying copy of the reasons or order, even if permissible, which I have held is not, does not satisfy the requirements laid down by the Apex Court.

117. Now the legislature has envisaged an emergency situation and has empowered the authorities to suspend a passport in the case of an emergency subject to a post-decisional hearing within the prescribed time limit.

Nothing precluded or, prohibited the respondents from taking action to suspend the petitioner's passport, if the action was so emergent and comply with the legislative mandate. The issuance of the letter dated 15th January, 2008 almost two years after the passing of the order of revocation, is only an attempt to give a facade of legality to the orders which stood passed against the petitioner. In absence of statutory authority, certainly the offer of the post-decisional hearing in the instant case cannot validate the respondents' order or actions.

118. In this background, the respondents have failed to make such grave urgency which could justify passing of an order without adherence to the bare minimal of hearing mandated by the binding principles of natural justice. In the given facts there was no warrant or justification for passing of the order of revocation without grant of the same.

It therefore has to be held that there could be no exclusion from compliance with

the principles of natural justice in the instant case.

Challenge on grounds of mala fide

119. The petitioner rests his challenge on a strong plea that the action of the respondent against him is mala fide. It is urged that the respondent No. 2 has passed the impugned order on 3rd March, 2006 in unwarranted haste, without application of independent mind or adherence to the principles of natural justice based on the communication of the special director of the Directorate of Enforcement addressed communications to the Foreign Secretary or the Joint Secretary in the Ministry of External Affairs on 28th February, 2006,

So far as the gravity of the allegations against the petitioner were of a grave nature are concerned, it is urged that there is no exemption to the statutory compliance merely because the allegations are serious.

120. On the other hand, the respondent's contend that the petitioner is an agent dealing with and involved in illegal transactions of arms and the Central Bureau of Investigation has requested continuation of the revocation. Mr. Malhotra, learned ASG contends that prayer "b" in the writ petition seeks a mandamus to the Central Bureau of Investigation to release the passport and in view of the disclosures in the investigation, such an order ought not to be made.

121. The communication dated 3rd March, 2006 issued by the Regional Passport Officer does not disclose the reasons for the extreme step of revocation of the petitioner's passport. It is left to implication and presumption that the order has been issued on the same grounds as are stated in the communication dated 28th February, 2006 placed before this Court.

122. Apart from the petitioner, the respondents were investigating the roles of several people into the allegations including that of his father Shri Vipin Khanna and one Shri Andleeb Sehgal. A look out circular was issued against Shri Andleeb Saigal and his passport as well as that of Shri Vipin Khanna, father of the petitioner were seized. Both these persons had sought legal redressal against the action of the respondent in seizing their passports.

123. My attention has been drawn to proceedings in W.P.(C) No. 3005/2007 which is stated to have been filed by Shri Andaleeb Sehgal with regard to the Look Out Circular issued against him. On the statement made by Mr. P.P. Malhotra, learned Additional Solicitor General, on 5th of July, 2007, this writ petition was disposed of on the submission by Mr. Malhotra that on the completion of the three months period, the Look Out Circular would have outlived its utility and, therefore, would be withdrawn. Insofar as the passport is concerned, the same shall be returned to the court of ACMM, Delhi and would be subject to any orders that may be passed by that court. The order records that Mr. Malhotra makes these submissions on the basis of instructions received from Mr. S.K. Panda, Special Director, Directorate of Enforcement who was also present in the court.

124. The petitioner has also relied upon the proceedings before the Apex Court in IA No. 6 & 7 in W.P.(C) No. 386/2006 filed by the petitioner's father Shri Vipin Khanna against the Union of India and Anr. before the Apex Court. In the hearing held on the 24th of August, 2007 learned Addl. Solicitor General, appearing for the respondent C.B.I., submitted that the petitioner therein was a suspect and it is for the purpose of investigation the passport was withheld by the C.B.I. Despite such submission the Apex Court directed the C.B.I. to surrender the passport before the Special Court, C.B.I., Patiala House, New Delhi within five days from this date and on such surrender, the petitioner shall be at liberty to make an appropriate application before the court and the Court will decide the application in accordance with law.

From the above, it is apparent that the court did not permit CBI to retain the passport.

125. It is pointed out, that the passports of Shri Andaleeb Sehgal and Shri Vipin Khanna had been seized in London during the course of investigation by the Central Bureau of Investigation and it was for this reason that the special court has been directed to pass orders.

126. The petitioner has placed a copy of the letter being F No. TI/HQ/305/205 (Court), PT III/Vol.II dated 15th December, 2006 before this Court addressed by Mr. S.K. Pandey to Shri Jagat Singh and Shri Mohammad Asad Khan, two other persons whose roles were under investigation in same enquiries informing them that the "retention period of their passport has expired today; that as the passport is no more required by the Directorate, you are requested to collect the same from the Directorate after fixing date and time" at the telephone number which was stated in the letter. It has been urged that this letter was written to persons similarly placed as the petitioner on the very date when the retention period was expiring.

127. Mr. Uday Lalit, learned senior counsel has urged that the revocation of the petitioner's passport has been effected and enforced illegally which action would amount to the use of statutory powers for an unauthorised purpose, amounting to malice in law and malice in fact. Reliance is placed on the pronouncement of the Apex Court in Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, The Apex Court had authoritatively held that malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause. It was observed that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith.

128. It is trite that an action carried out a mala fide would stand vitiated and void and in this regard, in State of Punjab and Another Vs. Gurdial Singh and Others, the Apex Court has held that the action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by

extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion.

129. The petitioner has placed reliance on the pronouncement of the Apex Court in *Anirudhsinhji Jadeja and another Vs. State of Gujarat*, to contend that the instant case is a clear case of exercise of power on the basis of external discretion. It has been pointed out that the discretion is exercised under the direction or in compliance with a higher authority's instructions and consequently, it is a case of failure to exercise discretion altogether.

130. In answer to these arguments on behalf of the petitioner, the only assertion on behalf of the respondent was that the notification dated 11th May, 2005 appointing the inquiry commission noted that the matter was of public importance and therefore the impugned action was justified. Such an observation in this notification certainly, cannot satisfy the requirements of Section 10 of the Passport Act. The whole object, nature and content of the notification dated 11th May, 2005 and those of the order of revocation dated 3rd March, 2006 are different. The notification dated 11th May, 2005 notices that the matter was of public importance as allegations pertain to a high functionary and a political party. Section 10(3) mandates that the order has to be made in the interest of general public.

131. There is force in the submission of learned senior counsel for the petitioner that the order dated 3rd of March, 2006 must reflect independent application of mind by the person passing the order to stand on its own.

132. Mr. P.P. Malhotra, learned ASG has opposed these arguments of the petitioner on the sole ground that every secretary of the Government of India would not be opposed to the petitioner and that the officers in the Government were honest to discuss matter with each other which would not vitiate the decision making of one officer.

133. Mr. P.P. Malhotra, learned Additional Solicitor General has urged that despite the revocation of the passport and issuance of the LOC, the petitioner persisted with his non-cooperation and did not appear before the authorities on the 9th or 17th April, 2006. It is further urged at length that the petitioner was obstructing the investigation being conducted for the reason that he had submitted a written objection to the Attorney General of Jersey, Channel Island for their action of giving assistance to the investigation being conducted in India.

134. Reliance is placed on the counter affidavit filed by the Central Bureau of Investigation through Sh. Tanmaya Behera, its additional SP submitting that on 6th June, 2005 a regular case No. RC AC 2 2005 A 0002 was registered by the Central Bureau of Investigation on the basis of information/reference received from the Ministry of Defence vide letters dated 22nd April, 2005 and 30th April, 2005 against unknown public servants of the Ministry of Defence of the

Government of India; M/s Denel (Ptv.) Limited, South Africa; M/s Varas Associates, Isle of Man, United Kingdom and others under various provisions of the Prevention of Corruption Act, 1988 and the Indian Penal Code.

135. The position which emerges therefore is that the Directorate of Enforcement has handed over the passport of the petitioner to the Central Bureau of Investigation pursuant to a request made by it. The Central Bureau of investigation in its counter affidavit has given details of its investigation and in para 14 and 15 of its counter affidavit has stated that efforts are on to collect information/documents and time is being taken to receive responses to the letterogatories to different countries. The submission is that during the pendency of the investigation, the presence of Sh. Aditya Khanna is required in India to prvent unavoidable dealy in completion of the investigation of the case and from preventing him from tampering with the evidence located abroad. It is further submitted that if the passport is released/issued afresh to him, there is likelihood of his not returning to India and for this reason CBI has addressed a letter dated 19th December, 2007 to continue with the revocation order dated 3rd March, 2006.

136. The CBI is not holding the passport as a document seized during the course of any search/seizure or proceedings against the petitioner.

137. My attention is drawn to the pronouncement of this Court reported at Jamal Ajmal Saidi Vs. Union of India (UOI) and Others, The petitioner in this writ petition was a consultant for various multinational companies whose business required him to frequently travel abroad. Notice was issued to him pursuant to the media reports about the Volcker report. This petitioner had assailed the respondent's action in illegally retaining his passport without any formal order. The court reiterated the principle that every decision or action of the state, in relation to a citizen's rights must be traced to, or be relatable to legal provisions; they must bear a "legal pedigree" (Ref: State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, Bishan Das and Others Vs. The State of Punjab and Others, The respondents action was thus held to be violative of the law.

138. The petitioner has also placed reliance on the pronouncement of this Court reported at 80 (1999) DLT 19 Hazral Iman v. UOI in support of the submission that if orders are passed either on no evidence or evidence which is irrelevant or does not exist, the court would act in favour of the petitioner in exercise of its power of judicial review.

139. In Hassan Ali Khan Vs. The Regional Passport Officer, Passport Office, the court scrutinised the records of the respondent and observed that the record did not disclose that any decision to impound the passport was recorded in the file. It was observed that the respondent had dealt with the matter in a casual fashion and the record did not disclose any proceedings except the requests made by the police department to impound the passport of the petitioner and

held that the respondent could not have taken steps for impounding the passport without issuing notice to the petitioner and without affording him of an opportunity of submitting his explanation and hearing. The action could not have been taken on the basis of some information furnished by the police alone. The method and procedure adopted by the respondent was held to be illegal and arbitrary and action in declaring that the petitioner's passport was impounded was nonest in law.

140. In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, so far as exercise of power u/s 10 of the Passport Act was concerned, the court had observed that:

159. The orders u/s 10(3) must be based upon some material even if the material concerns in some cases of reasonable suspicion arising from certain credible assertions made by reliable individual. In an emergent situation, the impounding of a passport may become necessary without even giving an opportunity to be heard against such a step which could be reversed after an opportunity is given to the holder of the passport to show why the step was unnecessary.

160. It is well settled that even if there is no specific provision in a statute or rules made thereunder for showing cause action action proposed to be taken against an individual, which affects the right of that individual the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or demaging action.

161. An order impounding a passport must be made quasi-judicially. This was not done in the present case. It cannot be said that a good enough reason has been shown to exist for impounding the passport of the petitioner. The petitioner had no opportunity of showing that the ground for impounding it given in this Court either does not exist or has no bearing on public interest or that the public interest can be better served in some other manner. The order should be quashed and the respondent should be directed to give an opportunity to the petitioner to show cause against any proposed action on such grounds as may be available.

162. Even executive authorities when taking administrative action which involves any deprivation of or restriction on inherent fundamental rights of citizens must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice.

141. The allegations made against the petitioner in the affidavit filed by the Central Bureau of Investigation is that the Ministry of Defence had made payments to said M/s Denel of South Africa which paid agency commission to M/s Varas Associates. After credit to the account of M/s Varas, the entire funds

were transferred to accounts of certain companies, some of which are suspected to be in some way or the other linked with Aditya Khanna and Vipin Khanna, his father. The CBI has however stated that Sh. Vipin Khanna and Sh. Aditya Khanna have been summoned on 26th Oct, 2006, 25th January, 6th February, 13th February, 15th February, 19th February, 26th February, 2007 and 14th January, 2008 and have participated in the investigation. The contention is that their answers were evasive.

142. It has been submitted that one Sh. Vipin Khanna and his family member including his son Aditya Khanna - petitioner herein, emerged as prime suspects in the case and hence searches were conducted at various premises owned by them. It was required to ensure the presence of both Sh. Vipin Khanna and his son Sh. Aditya Khanna and a notice u/s 91 CrPC was issued to Sh. S.K. Panda, Spl. Director, Directorate of Enforcement for handing over the passport of Sh. Vipin Khanna and Sh. Aditya Khanna. The admitted position is that in response to such notices, the Enforcement Directorate handed over the passport of Sh. Aditya Khanna but withheld the passport of Sh. Vipin Khanna on the ground that he had moved the Supreme Court of India against the Enforcement Directorate for releasing the passport.

The CBI does not dispute that the Supreme Court of India has passed orders in favour of Sh. Vipin Khanna so far as his prayer for directions to release his passport are concerned. Nothing has been placed before this Court to persuade me to take a different view.

143. I find that there is not a single allegation in the affidavit filed by the Central Bureau of Investigation that they have required the appearance of the petitioner and he has not appeared before it.

144. In a case reported at Suresh Nanda Vs. C.B.I., the CBI had seized the appellant's passport in a search and seizure pursuant to an FIR registered by the police. The appellant was seeking release of his passport to travel abroad.

The court had held that the action of the respondent in retaining the passport of the petitioner was illegal. The observations of the court which throw valuable light and would guide the result of the above discussion deserve to be considered in extenso and read thus :

15. In our opinion, even the Court cannot impound a passport. Though, no doubt, Section 104 Cr.P.C. States that the Court may, if it thinks fit, impound any document or thing produced before it, in our opinion, this provision will only enable the Court to impound any document or thing other than a passport. This is because impounding a "passport" is provided for in Section 10(3) of the Passport Act. The Passport Act is a special law while the Cr.P.C. is a general law. It is well settled that the special law prevails over the general law vide G.P. Singh's Principles of Statutory Interpretation (9th Edition pg,133). This principle is expressed in the maxim "Generalia specialibus non derogant", Hence, impounding of a passport cannot be done by the Court u/s 104 Cr.P.C. Though it

can impound any other document or thing.

After so holding, the court directed the respondent to hand over the passport to the appellant within one week of the passing of the judgment.

145. There is no submission even that the petitioner is implicated or arraigned as an accused person in the criminal case by the Central Bureau of Investigation.

The allegations surfaced in the year 2005 in the affidavit filed as late as on 31st January, 2008 before the registration of the case in 2005, it is submitted that the petitioner's role is still only at the stage of investigation by the CBI.

146. Having held that compliance with principles of natural justice would be essential before passing of an order of revocation of the passport as in the instant case, the question then arises as to what would be the effect of such of an order passed in violation thereof. It has been repeatedly held that an order which infringes a fundamental freedom and is passed in violation of audi alteram partem rule is a nullity. When a court holds such order as invalid or sets aside such order, this would operate from nativity i.e. the impugned order was never valid. (Ref : Nawabkhan Abbaskhan Vs. The State of Gujarat, State of Orissa Vs. Dr. (Miss) Binapani Dei and Others,

147. The order revoking the passport of the petitioner in the instant case in violation of these principles, is thus null, void and nonest.

It is an admitted position that the competent authority has not considered the request of the Central Bureau of Investigation for making the order of revocation. The Directorate of Enforcement has merely handed over the petitioner's passport to the CBI pursuant to the notice dated 5th December, 2006 issued u/s 91 of the Code of Criminal Procedure.

148. The Central Bureau of Investigation has no authority to detain the passport in view of the principles laid down by the Apex Court in Suresh Nanda v. CBI (supra). Passports of persons whose conduct was also being enquired into on similar allegations have been directed to be released.

149. As a result of the foregoing discussion, the circular/order dated 3rd March, 2006 passed by the respondents is hereby set aside and quashed. The Central Bureau of Investigation/respondent No. 4 herein is directed to release the passport to the petitioner within three weeks from today.

150. It is made clear that this judgment shall not preclude the designated authority u/s 10 of the Passport Act, 1967 from making an appropriate order in accordance with law on a request made by any authority or pending with it.

The writ petition is allowed in the above terms.