

(1991) 05 DEL CK 0019

In the Delhi High Court

Case No : Civil Writ Appeal No. 1802 of 1989

Carrasco Investments Ltd. and Others

APPELLANT

Vs

Special Director, Enforcement Directorate and Others

RESPONDENT

Date of Decision : 14-05-1991

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 29(1)

Citation : (1994) 79 CompCas 631 : (1991) 44 DLT 615 : (1994) 46 ECC 234

Hon'ble Judges : Dalveer Bhandari, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : T.R. Andhiyarujina, P.G. Gokhale, U.A. Rana, U.M. Rana, P.N. Kapadia, M.M. Sareen, B.P. Aggarwal and Kamaljit Arora, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) By this writ petition, the petitioners who number seven seek an order of direction quashing a show cause notice issued to them under the Foreign Exchange Regulation Act, 1973 (for short "the Act") and for a further direction prohibiting the respondents from proceeding with that notice in any manner. This show cause notice is dated October 16, 1985 and was issued by the Special Director, the first respondent u/s 51 of the Act. There are three respondents. The second respondents is the Enforcement Officer in the Enforcement Directorate under the Act, and the third respondent Union of India through the Secretary, Ministry of Finance.

(2) The facts which have been set out in the show cause notice for proceeding under the. Act have not been disputed by the petitioners for the purpose of this petition. These facts may briefly be set out.

1.M/s. Shaw Wallace & Co. Ltd. (Shaw Wallace) is a public limited company registered under the laws of this country in India. 38.7% of the shares of Shaw Wallace are held by R.G. shaw & Co. Ltd., and its three subsidiaries (1) Shaw Darby & Co. Ltd., (2) Shaw Scott & Co. Ltd., and (3) Thames Rice Milling Co. Ltd.

(collectively hereinafter referred to as R.G. Shaw Companies). All these four companies are registered under the laws of the United Kingdom and have their registered offices in Bromley, Kent, U.K. M/s. Carrasco Investments Limited (Carrasco) is a company, incorporated in Hong Kong. Another company M/s. Sime Darby East Ltd. is also incorporated in Hong Kong (Sime Darby Hong Kong)and yet another company M/s. Sime Darby Berhad in Kuala Lumpur, Malaysia (Sime Darby Kuala Lumpur). Under an agreement dated January 21, 1985 between the Carrasco and Sime Darby Hong Kong and Sime Darby Kuala Lumpur, Carrasco purchased shares of R.G. Shaw Companies on payment of Us \$26, 140, 290.08 to Sime Darby Hong Kong. Para F of the recitals to this agreement stated "It is acknowledged by the parties hereto that the intention of the purchaser in purchasing the Ordinary Shares is to acquire indirect control of 38.7% of the issued ordinary share capital of Shaw Wallace." 2. An ordinary share of Shaw Wallace is of the value of Rs. 10.00 . The total consideration for purchase of Shaw Wallace shares was expressed in Indian rupees amounting to Rs. 332,682,026, the rate of Us dollar being 7,8 Us dollars equal to 100 rupees. The parties were to keep the terms of the agreement secret. 3. The schedule to the agreement recorded that R.O. Shaw Companies were the registered holders of the Shaw Wallace shares totalling 2,323,986 which were free from all charges, liens, encumbrances, equities and claims whatsoever and further that R.O. Shaw Companies had not at any time since July 1, 1972 participated in any trade or business or performed any function other than the holding for investment purposes of the Shaw Wallace shares. 4. Statement of Mr. M.R. Chhabria, a Director of Carrasco, and petitioner No. 6 before us, was recorded by the Deputy Director, Enforcement Directorate, on 23rd July, 1984 under the Act. He said that earlier total consideration of Us \$ 23 5 million was based on a value of Rs. 124.00 per share and though that agreement for purchase of shares was to be completed by December 21, 1984, certain circumstances intervened whereby he gave a higher bid for the purchase of the shares. He stipulated that he would pay Rs. 50 lakhs more than any other highest bidder subject, however, that maximum purchase price of each share would be Rs. 145.00 and further that whole of the payment would be made in cash within 24 hours of the intimation of his offer having been accepted. Ultimately, the agreement for purchase of shares was concluded on January 21, 1985.

(3) On the basis of these averments, the Special Director prima facie reached the following conclusions :

(1)that sale consideration was negotiated and determined on the basis of the value of the shares of Shaw Wallace; (2) That Carrasco acquired 38.7% of the undertaking of Shaw Wallace; and (3) that Carrasco acquired 2,323,986 ordinary shares of Shaw Wallace.

(4) He was, Therefore, of the view that there had been violation of the provisions of Sections 29(1) and 47 of the Act. He also noted that u/s 68(1) of the Act the company and every person who, at the time the contravention was committed,

was in charge of, and was responsible to the company for the conduct of the business of the company, would be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly, and as such, according to the Special Director, Mr. M.R. Chhabria (Dubai), Mr. K.R. Chhabria (London), Horace W. Longlois (Singapore), Mr. Ahmed Sobri (Kuala Lumpur) and H.A. Tajuddin (Kuala Lumpur) were the Directors of Carrasco, Hong Kong, and were in charge of and responsible to that company for the conduct of its business during the relevant period. The Special Director also prima facie reached the conclusion that by acquiring the shares of Shaw Wallace without the permission of Reserve Bank of India (R.B.I.), Carrasco and its Directors M.R. Chhabria, K.R. Chhabria, Horace W. Longlois, Ahmed Sobri and H.A. Tajuddin contravened the provisions of Section 29(1) of the Act and thereby rendered themselves liable to be proceeded against u/s 50 of the Act. Similarly, it appeared to him that by entering into the aforesaid agreement dated January 21, 1985 without the permission of the R B.I., Carrasco and its Directors M.R. Chhabria, K.R. Chhabria, Horace W. Longlois. Ahmed Sobri, H.A. Tajuddin, Sime Darby Hong Kong and Sime Darby Kuala Lumpur, contravene the provisions of Section 47(1) of the Act, and similarly rendered themselves liable to be proceeded against u/s 50 of the Act. The Special Director, Therefore, called upon all these persons to show cause as to why (1) adjudication proceedings u/s 51 of the Act be not held against them and (2) as to why 2,323,986 shares of Shaw Wallace held in the name of R.G. Shaw Companies be not confiscated to the Central Government in terms of Section 63 of the Act. There are 11 persons to whom this show cause notice is addressed, these being Carrasco, R.G. Shaw Companies numbering four, M.R. Chhabria, K.R. Chhabria, Horace W. Longlois, Ahmed Sobri, Sime Darby Hong Kong and Sime Darby Kuala Lumpur.

(5) On these very facts an opportunity notice was also issued by the Special Director, Enforcement Directorate, for contravention of the provisions of Sections 19(1)(b), 29(1) and 47 of the Act and calling upon the persons concerned to state in terms of sub-Section (2) of Section 61 of the Act as to whether they had the permission of the R.B.I, in regard to respective actions taken by them and if so to produce the same failing which action will be taken against them as provided u/s 56 of the Act. There are seven persons to whom this opportunity notice was addressed and these being Carrasco,. M.R. Chhabria, KR. Chhabria Horace W. Longlois, Ahmed Sobri, Sime Darby Hong Kong and Sime Darby Kuala Lumpur. It appears a certain prosecution was also filed u/s 56 of the Act read with Section 120B Indian Penal Code in the Special Court for Economic Offences, Bangalore, against Chhabrias, one Mr. Vijay Mallya and M/s. United Breweries for contravention of the provisions of the Act. From the record, however, it is not clear if that prosecution had anything to do with the contraventions alleged in the present petition. However, that prosecution was withdrawn on April 29, 1987 and the accused discharged on an application filed by the Enforcement Directorate u/ s 321 of the Code of Criminal Procedure. The opportunity notice dated October 16, 1985 was also withdrawn. Both the actions in withdrawing the prosecution

and also the opportunity notice were done on the request made by Carrasco under the signature of K.R. Chhabria, Director, by its letter dated January 21, 1987. This letter is addressed to Mr. Bhurelal, the then Director, Enforcement Directorate. It was stated in this letter that there was no contravention of any provisions of the Act but with a view to avoid controversy and litigation a request was made that the lapse, if any, might be condoned and in these premises an apology was tendered for such lapse, if any. The matter was considered at the highest level in the Government of India. Both Mr. M.R. Chhabria and Mr. K.R. Chhabria met the Director of Enforcement tendering an apology and requesting to adjudicate the case expeditiously and amnesty from prosecution. The Revenue Secretary recorded on February 13, 1987 the following note :-

"I have already submitted my proposal regarding United Breweries Ltd., Bangalore and Shri Vijay Mallya, Chairman & Md of the Company. We have the following cases against Carrasco Investments Ltd., Hong Kong, and Chhabria Brothers :- (i) Adjudication case against carrasco Investments, S/Shri M.R. Chhabria, K.R. chhabria and others; (ii) Prosecution for abetment in the case against Shri Vijay Mallya; and (iii) Opportunity notice for prosecution of the offences involved in adjudication (Item No.1 above).

(6) The abetment case against Chhabria Brothers is not very strong. It was filed to give support to our major case against M/s. United Breweries and Shri Vijay Mallya. In their application, Chhabria Brothers have no objection to the continuation and early disposal of adjudication against Carrasco Investments and themselves. The proposal Therefore boils down to the question of dropping of the abetment case and non-launching of the prosecution for which opportunity notice has been given. I have discussed with the Law Officer and I feel. that the balance of advantage lies in agreeing to the situation. There is legal authority to do so u/s 60 of the Foreign Exchange Regulation Act, 1973. Mos (BD) may kindly approve. sd/- V.C. Pande, Revenue Secretary 13.2.1987 Mos (BD) This note was approved by the Minister of State (Banking Division) on the same day. He wrote as under :-

" AS proposed .But I do not understand the idea of filing a not very strong case to support another case. Sd/13.2.1987."

(7) On the next day approval was also sought from the Finance Minister for withdrawal of prosecution for abetment against the Chhabria brothers and non-launching of the prosecution for which opportunity notice had been given in view of the apology of the concerned persons.. It was specifically mentioned that adjudication case would continue. Then on 21.2.1987 the Prime Minister in his capacity as Finance Minister granted the approval. In pursuance to this it would appear that both the prosecution in Bangalore Court-and the opportunity notice were withdrawn.

(8) Coming back to the show cause notice in question, quite an amount of correspondence ensued between the petitioners and the Special Director. The

petitioners said that the show cause notice was issued without jurisdiction and they gave detailed reasons in support of their stand. They also sought certain records to be summoned from the R.B.I., as well as Company Law Board to contend that there has not been any contravention of the provisions of the Act and to show that bonus shares in respect of shares held by R.G. Shaw Companies were allowed to be issued by the R.B.I. by its letter dated March 14, 1988 and further that R.B.I., even permitted the remittance of dividends on these shares and also that petitioners 6 and 7 were appointed Directors at the Annual General Meeting of the Shaw Wallace and Central Government had accorded its approval u/s 269(1) of the Companies Act. Special Director refused to summon any record. The petitioners appeared before him under protest and raised all their objections to the issuance of the show cause notice and the continuance of the adjudication proceedings there under. Last time the hearing before the Special Director was fixed for November 21, 1986. The petitioners wrote a letter seeking adjournment on the ground that an adjourned Extraordinary General Meeting of Shaw Wallace was to be held at Calcutta on 19th, 20th and 21st November, 1986 as directed by the Supreme Court and certain report was to be submitted by the Chairman appointed for the meeting. It was said that the date was not convenient to the petitioners and the hearing might be adjourned to some other date in the second week of January next. The petitioners were informed by a telex message that the hearing has been adjourned sine die. We saw the nothings on the relevant files of the department. Special Director had accepted the request to adjourn the hearing though the telex said it was adjourned sine die. After this date the petitioners received a notice dated March 2, 1989 fixing the date of hearing before the Special Director as March 29, 1989 respecting the show cause notice in question. This it appears was the immediate cause for the petitioners to file this writ petition challenging the show cause notice as well as the adjudication proceedings being held by respondent No. 1.

(9) The petitioners have raised four propositions :-

1. On a demurer i.e. without disputing any of the facts stated in the Show Cause Notice dated October 16, 1985, the respondents do not have any jurisdiction to enquire into the purchase of shares of R.G. Shaw Companies by Carrasco u/s 29(1)(b) of the Act. That being so, Section 47 of the Act was inapplicable. 2. The adjudication proceedings having been dropped and/or abandoned after January 21, 1987, the respondents could not revive the same. 3. Revival of the adjudication proceedings after over two years is not a bonafide exercise of statutory powers and is unreasonable, unfair and oppressive. 4. In any case the adjudication proceedings should be prohibited from continuing until the respondent produce vital documents and/ or issue summons to the Company Law Board and to the R.B.I. "to produce these documents.

(10) Before we refer to the points raised in reply by the respondents and discuss the matter further, relevant provisions of Sections 29(1)(b) and 47(1) may be stated:

"29.Restrictions on establishment of place of business in India- (1) Without prejudice to the provisions of Section 28 and Section 47 and not with standing anything contained in any other provision of this Act or the provisions of the Companies Act, 1956 (1 of 1956), a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent or any branch of such company, shall not, except with the general or special permission of the Reserve Bank,- (a) (b) acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such company."

"47.Contracts in evasion of the Act- (1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order there under."

(11) Through the show cause notice refers to contravention of Section 29(1), there is no dispute between the parties that the contravention is respecting clause (b) of sub-Section (1) of Section 29 of the Act.

(12) Respondents have questioned the jurisdiction of the Court in this petition and said the adjudication proceedings were neither withdrawn nor dropped at any stage. They denied that the show cause notice and adjudication proceedings were without jurisdiction or that there was any delay making the proceedings stale and illegal. They said the petitioners never requested for withdrawal of adjudication proceedings and what they prayed by their letter dated January 21, 1987 was that a lenient view be taken. They said that the Special Director had jurisdiction to deal with the matter and bids order was appealable under the Act to the Foreign Exchange Appellate Board (Section 52) and on a question of law a further reference could be made to the High Court(Section 54). They said High Court was not a proper forum to decide the controversy as the issue raised was a mixed question of law and fact and it should be left best to the Adjudication Authority constituted under the Act. They also denied that the show cause notice was issued without jurisdiction. They then said that the allegation of the petitioners that certain documents be made available to them before the adjudication proceedings were commenced and concluded was without any basis and was untenable in law. With reference to some documents it was stated that the relevant file dealt with many a important and secret matters and was not in any way relevant to the issues raised and "it was neither necessary nor proper to make that file available for inspection. Respecting other documents it was stated that these must be in possession of the company Shaw Wallace on which the petitioners, particularly petitioners 6 and 7, admittedly had absolute control since December, 5, 1986. In the alternative, it was submitted by the respondents that request of the petitioners to have the documents summoned from the various

departments of the Government and the R.B.J. and instead of producing these documents from their own custody appeared to be purely malafide and belated tactics on the part of the petitioners particularly when these documents were not within the direct control and possession of the Enforcement Directorate. Lastly, it was said that all the statements relied upon and relevant to the pending adjudication proceedings had been supplied to the petitioners and the Enforcement Directorate did not rely upon any other statement or document and, Therefore, there was no question of supplying the same to the petitioners. Sections 29(1) and 47 of the Act of which contravention was complained have been set out in the show cause notice by the Special Director. During the course of arguments it was submitted that on the basis of the facts mentioned in the show cause notice there was contravention of Section 19(3) as well and the provisions of Section 47(1) read with Section 19(5) were, Therefore, also attracted. Section 19(5) is as follows :

"19(5).Notwithstanding anything in any other law, no transfer of any share of a company registered in India made by a person resident outside India or by a national of a foreign State to another person whether resident in India or outside India shall be valid unless such transfer is confirmed by the Reserve Bank on an application made to it in this behalf by the transferor or the transferee."

(13) The argument was that even though Section 19(5) has been specifically mentioned in the show cause notice that fact in itself would not come in the way of the first respondent holding that the petitioners did not contravene that provision. To support this argument reliance was sought to be placed on Chapter XVII (Sections 211 to 224) of the Code of Criminal Procedure dealing with framing of charges in criminal trial. We do not think any such parallel can be drawn. Proceedings before the Special Director are quasi judicial in nature. The show cause notice has to show which provision of the Act or of any rule, direction or order made there under has been contravened. The person to whom the notice is given is to be heard on this. The notice must specify on the basis of the facts which provision of the Act has been contravened. The person to whom notice is given has to be put on notice. Various provisions in the Act operate in different fields though there may be overlapping. But that does not mean that if the authorities contend that there is contravention of Section 29(1)(b) and it is found that it is not so to hold the notice guilty for contravention of Section 19(5) of the Act as was suggested before us. We must limit show cause notice to the fact and contravention of the provision of mentioned therein. Any reference to the provision of the Code of Criminal Procedure dealing with criminal trial, to our mind, is inappropriate. Adjudication proceedings are governed by the Adjudication Proceedings and Appeal Rules, 1974, framed under the Act, and not by the Code. We must also notice that in the opportunity notice contravention of the provision of Section 19(1)(b) is specifically mentioned but that is not so in the present show cause notice. We reject the argument that if the facts mentioned in the show cause notice constitute also contravention of Section 19(5) and that Section is not mentioned that would not be material or that the

notice can still be held guilty of Section 19(5).

(14) u/s 71 of the Act where any person is proceeded against for contravention of any of the provisions of the Act or of any rule, direction or order made there under which prohibits him from doing any act without permission, the burden of proving that he had the requisite permission shall be on him. Since restriction has been imposed u/s 29(1)(b) of the Act unless there is general or special permission of the R.B.I. the person had to prove that he had such general or special permission if the facts constituted contravention of Section 29(1)(b). The person could also show that the R.B.I. in this very case or in a similar case had taken a view that provisions of Section 29(1)(b) were not attracted and that the Company Law Board also acted on that premise. This would be quite material and relevant piece of evidence in answer to the show cause notice. The petitioners were, Therefore, quite well within their rights to request the Special Director to summon the relevant record from the Company Law Board as well as from the R.B.I. to show cause notice was not valid and there had not been any contravention. Special Director had power to summon the record or even the person to give evidence under Sections 40 and 53 of the Act. As noted above, proceedings before the Special Director are not in the nature of a trial under the Code of Criminal Procedure where the accused enters into his defense after the prosecution closes its case. Here the burden was on the petitioners and in our opinion the Special Director grossly erred in not summoning the records as requested by the petitioners thus pausing serious prejudice to the petitioners in the defense of their case. The Special Director failed to exercise jurisdiction visited in him by law. The argument that petitioners were possessed of records of Shaw Wallace is not of any consequence and is no substitute for the official records of the department of the Government or other authority.

(15) The petitioners did not press the proposition that the adjudication proceedings had been dropped and/or abandoned after January 21, 1987 after having examined the relevant files of the Enforcement Directorate in Court and the relevant nothings which have been reproduced above. Then the argument that in any case after the proceedings were adjourned sine die on November 20, 1986, and the notice dated 2.3.1989 given after a lapse of over two years which sought to revive the adjudication proceedings would show that it was not bona-fide exercise of statutory powers and that it was unfair, unreasonable and oppressive, was pressed. Petitioners submitted that there was total inaction and silence on the part of the Special Director all this period and there was no Explanation as to what was the reason for sudden revival of the proceedings. The counter-affidavit filed by the respondents does not show the reasons for delay. We Therefore, had per force to see the records of the department. Mr. Sareen, learned counsel for the respondents, submitted that it was on account of huge pendency of cases in the Enforcement Directorate that there had been delay but said that the delay was not fatal. From the record it appears to us that on account of letter dated January 21, 1987 of the petitioners the matter was being dealt with in the administrative Ministry which resulted in withdrawal of

prosecution in April 19 87 and of the opportunity notice. Since the petitioners themselves had said that the R, 1. had taken a view that there was no contravention of Section 29(1)(b) of the Act, a letter was also addressed by the Special Director to the Controller. Exchange Control Department of the R.B.I. on March 19, 1987. A reply to this was received which is dated May 27, 1987. The R.B.I, advised that in the past in dealing with similar cases it had taken a view that acquisition of shares of a company incorporated abroad which had bulk shares of an Indian company, by any other company incorporated outside India would not attract the provisions of Section 26(4) of the Act. Referring to the case of South India Viscose Limited it said that the question whether or not the provisions of Section 26(4) were attracted was pending before the Madras High Court and that all depended upon the interpretation that might be given by the judiciary. In the circumstances, the R.B.I. advised the Enforcement Directorate to approach the Ministry of Law to ascertain the correct legal position. Section 26(4) is as follows :-

"26(4)Notwithstanding anything contained in any other law, no transfer of any interest in any business in India made by a person resident outside India to any person also resident outside India shall be valid unless such transfer is confirmed by the Reserve Bank on an application made to it in this behalf by the transferor or the transferee."

(16) The Enforcement Directorate did not, however, seek the opinion of the Ministry of Law and it was recorded on August 4, 1987 that it was not advisable to refer the matter to the Ministry of Law because of the pendency of the adjudication proceedings. By that time it appears the judgment of the Madras High Court had not come. That is, however, a different matter. The fact, Therefore, remains that up to August 1987 the adjudication proceedings file was being dealt with in the Enforcement Directorate. It appears to us that petitioners were quite well aware of the pendency of the adjudication proceedings inasmuch as they had been writing to the Adjudicating Authority for commencement and conclusion of the proceedings. One such letter is dated March 10, 1987. On May 4, 1987, R G. Shaw Companies wrote a letter to the Special Director that proceedings might be completed in the spirit of letter of apology tendered by them and accepted by the Government of India. They further said that they had already advanced their argument in the matter and did not wish to say anything further and that if further hearing was felt necessary it might be filed in May itself. They also wrote that they were prepared to waive the notice for personal hearing and requested that order of adjudication might be passed in the light of submissions already advanced. We also find that during this period as many as three Special Directors changed. In fact in one of the letters the petitioners themselves wrote that since the new Special Director had taken over they would like to address argument again before him. At no point of time any indication was given to the petitioners that the adjudication proceedings were going to be dropped. In fact it was made clear to them that though the prosecution would be withdrawn and opportunity notice not acted upon, adjudication proceedings

would go on. The petitioners had the impression, however, that a lenient view would be taken in the matter. That, however, does not mean that restart of the proceedings now is in any way malafide or is unfair, unreasonable as alleged or otherwise. Principles of estoppel are not applicable. A statutory authority is bound to act in accordance with the provisions of the law Constituting that authority. This is settled position in law.

(17) The petitioners want us to draw an inference from certain facts that the Special Director decided to drop or abandon the adjudication proceedings. These facts being (1) withdrawal of prosecution (2) withdrawal of opportunity notice, (3) issue of bonus shares of Shaw Wallace to R.G. Shaw Companies by the R.B.I. respecting the shares in question, (4) R.B.I. permitting remittances abroad of dividends on these very shares, (5) permission by the R.B.I. to Shaw Wallace to defray the living expenses of the 6th petitioner M.R. Chhabria, a non-resident Indian, in India. (6) appointment of M.R. Chhabria and K.R. Chhabria, petitioners 6 and 7, as Directors of Shaw Wallace in the Annual General Meeting with the vote of Government financial institutions which controlled 25.32% of the shares, and subsequently appointment of the 7th petitioner as Chairman of that company and also its Managing Director, the approval having been granted by the Central Government u/s 269(1) of the Companies Act, 1956, and (7) R B I having taken a similar view in other cases particularly with reference to Section 26(4) of the Act. We, however, do not think that all these circumstances either individually or cumulatively would make us to draw any such inference of dropping or abandoning the adjudication proceedings in face of the specific orders that adjudication proceedings would go on and the petitioners themselves requesting the Adjudicating Authority to take lenient view in the adjudication proceedings. Delay itself cannot be fatal. There is no conduct on the part of the Special Director, the Adjudicating Authority. from which it could be inferred even remotely that adjudication proceedings were abandoned or even dropped. There has to be a specific order for doing the same. If reference is made to the Adjudication Proceedings and Appeal Rules, 1974, mentioned above, it would be seen that there are three steps in the adjudication proceedings:-

(1)The adjudicating officer in the first instance is to issue a notice to a person accused of having committed contravention of the provisions of the Act requiring him to show cause as to why adjudication proceedings should not be held against him. This notice is to indicate the nature of the offence alleged to have been committed by such person ; (2) After considering the cause, if any, shown by such person, the adjudicating officer is still of the opinion that the adjudication proceedings should be held then he is to issue notice fixing a date for the appearance of that person either personally or through his authorised representative. On this date the adjudicating officer is to explain to the person proceeded against or his authorised representative the offence alleged to have been committed by him indicating to him the provisions of the Act or of the rules, directions or orders made there under in respect of which contravention is alleged to have taken place. The person concerned is to be given an opportunity

to produce such documents or evidence as he may consider relevant to the enquiry. The hearing can, of course, be adjourned from time to time ; (3) After consideration of the whole record before the adjudicating officer, if he is satisfied that the person has committed the contravention, he is to pass an order in writing imposing such penalty as he may think fit. This would also mean that in case the adjudicating officer finds that no contravention has been committed he will still nevertheless pass an order in writing.

(18) u/s 52(4) of the Act, the Foreign Exchange Regulation Appellate Board may for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer u/s 50 read with Section 41 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit. This would also show that the Adjudicating Authority is to pass an order in writing. Further in face of the provisions of appeal and. the power of the Appellate Board it is difficult to comprehend that an adjudicating officer can just drop or abandon the proceedings without recording anything. We do not find that delay in issuing the notice dated March 2, 1989, for personal hearing on March 29, 1989, was fatal on account of the delay. There is nothing to suggest on the basis of the record that the issue of this notice was not bona- fide or the adjudicating authority in issuing this notice abused its power or in excess of it. There is nothing unfairness in the exercise of powers by the adjudicating officer. It does, however, appear rather queer to us that on the basis of the apology on the one hand the Central Government withdrew the opportunity notice but at the same time the adjudication proceedings were allowed to continue. That itself, however, will not make the proceedings void. No representation either in writing or even by conduct was made by the adjudicating authority to the petitioners that the proceedings would be dropped. In fact, as noted above, the adjudicating authority had to pass an order in writing either levying the penalty or withdrawing the notice after having thought fit to hold the adjudication proceedings. The petitioners cannot have any grievance on this score. We find in this case that the adjudicating authority, a public authority, has acted within the scope of the powers conferred upon him.

(19) It will be better here to analyze the provisions of Section 29(1)(b) of the Act: . Except with the general or special permission of the R.B.I.,

(A)a person resident outside India (whether a citizen of India or not), or (b) a person who is not a citizen of India but is resident in India, or (c) a company (other than a banking company) which is not incorporated under any law in force in India or in which the nonresident interest is more than forty per cent, shall not (1) acquire the whole or any part of any undertaking in India of any person or company on any trade, commerce or industry, or (2) purchase the shares in India of any such company.

(20) The R.B.I. has prescribed forms for submitting application for getting permission u/s 29(1)(b) of the Act. Separate forms have been prescribed. Form

Fnc 2 has been prescribed u/s 29(1)(b) for permission for acquiring the whole or any part of undertaking in India. Form Fnc 3 has similarly been prescribed for purchase of shares in India of any such company carrying on trade, commerce or industry. If reference is made to Item 4 in both these forms, the particulars required are-

form fnc 2: 5. Description of the undertaking including the items of its assets, etc. proposed to be acquired and place where the undertaking is located. Form Fnc 3: 4. Particulars of the company whose shares are proposed to be purchased. (a) Name, address and place of its incorporation (b) Nature of its business or manufacturing activity.

(21) The undertaking of a company is not the same thing as "shares" of that company. This is even quite apparent from the different forms prescribed by the R.B.I.. Even though a shareholder acquires a right to participate in the profits of the company but the shareholder acquires no interest in the assets of company. The Supreme Court in *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, , observed that a shareholder had got no right in the property of the company and that it was true that the shareholders had the sole determining voice in administering the affairs of the company and were entitled, as provided in the Articles of Association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively did not amount to more than a right to participate in the profits of the company. Whatever rights of the shareholder, these have been spelled out by the Supreme Court in the case *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, , but these we need not refer to. It is well settled that company is a juristic person and is distinct from shareholders and it is the company which owns the property and not the shareholders. When in the show cause notice in one of the recitals it is mentioned that Carrasco acquired 38.7% of the undertaking of Shaw Wallace it only meant Carrasco acquired 38.7% of the shares of Shaw Wallace. In fact this is made clear in the sub sequent paragraph where it is said that by acquiring the shares of Shaw Wallace the notices rendered themselves liable to be proceeded against u/s 50 of the Act. There is nothing as 38.7% of the undertaking of a company. An undertaking of a company is a different thing than the shares of the company. In *Carew and Company Ltd. Vs. Union of India (UOI)*, , the Supreme Court did consider the question of undertaking vis-a-vis the shares of a company though the matter came to be examined in the context of definition of "undertaking" as given in Clause (v) of Section 2 of the Monopolies and Restrictive Trade Practices Act, 1969. The Court held that by getting 100% shares in a company, another company did not acquire the undertaking of that company, and that beyond obtaining control and the right of management of the company, the purchase of 100% shares had not the effect of an acquisition of the undertaking owned by it. It must also be noticed that the impugned agreement dated January 21, 1985, does not refer to the purchase of shares in India of Shaw Wallace, but only to acquire indirect control of 38.7% of the issued

ordinary share capital of Shaw Wallace by purchasing the ordinary shares of R G. Shaw Companies. The words "the purchase of shares in India" are quite significant. Even if assuming that the agreement of January 21, 1985, is for purchase of shares, but it can certainly not be said that purchase of said shares took place in India of the Shaw Wallace. Mr. Andhyarujina said that if the interpretation put by the respondents was right then there would every day be contravention when in a stock exchange in a foreign country shares of a company registered there are sold and which foreign company has shareholding in an Indian company. Mr. Andhyarujina appears to be quite right in his submission. This aspect of the matter has been completely missed in the show cause notice. Further there is no purchase of shares of Shaw Wallace by Carrasco and the purchase is of the shares of R.G Shaw Companies, all of England, and the agreement dated January 21, 1985 was also entered into in a foreign country though with the ostensible purpose of controlling the shareholding of Shaw Wallace to the extent of 38.7%. This would, however, not mean that there has been purchase of shares of Shaw Wallace in India in contravention of Section 29(1)(b) of the Act which provision in our opinion is not applicable in the present case. Reference was made to a decision of the Supreme Court in Electronics Corporation of India Limited Vs. Commissioner of Income Tax and Another, , to contend that requirement of purchase of shares in India is an important condition, otherwise Section 29(1)(b) of the Act might suffer from extra-territorial application for want of a necessary nexus. It is not disputed before us that R.G. Shaw Companies validly held the share of Shaw Wallace, an Indian company. In somewhat similar circumstances in a case pertaining to South India Viscose Company Limited (R. Venkataswamy Naidu v. The Director, Enforcement Directorate and others) pending in the High Court of Judicature at Madras, the Enforcement Directorate took the stand that no non-resident interest in the business of the South India Viscose had been transferred and that Sapina, a foreign company, was still holding those shares and that changes in the ownership of Sapina, was an internal matter of that company. It was stated that Section 26(4) of the Act did not apply. No reasons have been given to us to show as to why a different stand is now being taken by the Enforcement Directorate before us. The R.B.I. also filed an affidavit in the proceedings in Madras and said that it was not correct to say that shareholding itself gave an interest in the business in India and that it was not correct to say that the transfer or take over of Sapiia by another foreign company outside India was in fact and in law a transfer of interest in business in India u/s 26(4) of the Act. This is also what R.B.I, said in its letter dated May 27, 1987, to the Special Director. In spite of this letter and the stand of the Enforcement Directorate therein in Madras, the Special Director still did not feel necessary to take the opinion of the Ministry of Law. It would have been more appropriate to do that in the circumstances of the case, though in our opinion Section 29(1)(b) do not bring any other interpretation than what suggested by the petitioners. The heading of Section 26 of the Act shows that it deals with certain provisions as to companies. Sub-Section (4) has already been set out. Sub-Sections (3) and (5) may also be

noted:-

"26(3).Except with the general or special permission of the Reserve Bank, no person resident in India shall, in respect of any business outside India, in which the non-resident interest is forty-nine per cent or less, do any act, whereby the non-resident interest in that business becomes more than forty-nine per cent."

"26(5).Except with the general or special permission of the Reserve Bank, no person resident in India shall transfer any interest in any business in India, or create any interest in such business, to or in favor of a person or company referred to In sub-Section (1) of Section 29"

(22) Thus, it would be seen that no generator special permission of the R.B.I. was required u/s 29(1)(b) of the Act in the present case. There has, thus, been no contravention of this provision.

(23) With reference to sub-Sections (3), (4) and (5) of Section 26, it would be noticed that here the words used are "any interest in any business in India". This terminology has to be different than the words "shares" and undertaking" used in other provisions in the Act.

(24) Before the madras High Court in South India Viscose Company case the main contention was that the take over of the Sapina of Luxembourg was an indirect method of obtaining transfer of shares of the Indian public company by resident Indian and it was in violation of the provisions of the Act. The stand of the Enforcement Directorate, as noted above, was that there had not been any transfer of shares held by Sapina. The Court also noted that no application had been made by any transferee or transferor for registration of such alleged transfer of shares, and that, Therefore, it had to be presumed that no transfer had taken place. Again, as noted above, the R.B.I, had taken the stand that there had not been any violation- of Section 26(4) of the Act. The Court, Therefore, observed that as far as the Director of Enforcement and R.B.I. were concerned, there was no transfer of shares and there was no violation of Section 26(4) off the act The Court also noticed that not a single document relating to alleged transfer of shares had been produced and the registers of the South India Viscose Company did not show that there had been any application by the transferor or the transferee for registration of shares on transfer. As a matter of fact, after the learned Single Judge had dismissed the writ petition as wholly misconceived ,the matter was considered by the Appellate Bench where the argument of transfer of shares had been given up. The only argument raised was that there was transfer of interest. In the circumstances of the case this argument did not find favor with the Appellate Bench as well.

(25) One of the questions before the Company Law Board on certain complaint under Sections 250 and 409 of the Companies Act, 1956, respecting Shaw Wallace which arose out of the acquisition of the shares of R.G. Shaw Companies by Carrasco was if the provisions of sub-Section (3) of Section 250 of that Act become applicable. The Board observed that for invoking this sub- Section three

links were necessary : (1) there must be a transfer of shares, (2) the transfer of share should be likely to result in change in the . composition of the Board of Directors, and (3) such change should be prejudicial to the public interest. The Board held that transfer of shares was sine qua non for setting the machinery of sub-Section (3) in motion. After discussing the merit of the case in depth the Board concluded that there was no transfer of shares of Shaw Wallace.

(26) The order of the Company Law Board dated October 31, 1985 was challenged in the Calcutta High Court u/s 250(6) of the Companies Act, 1956, and by invoking the inherent jurisdiction of the Court under Rules 6 and 9 of the Company Court Rules, 1959. The petitioners there contended that the sole purpose of the agreement dated January 21, 1985 was to obtain and/or secure an indirect control over 38.7% shares of Shaw Wallace and that the purchase by Carrasco of the shares of R.G. Shaw Companies in fact amounted to transfer of 38.7% shares of Shaw Wallace which nominally stood in the name of R.G. Shaw Companies and this attracted the mischief of Section 29(1)(b) read with Section 2(4) and Section 29(1)(b) of the Act. The Court noted that the Company Law Board .after relying upon the report of the Inspector filed before it, was of the vie without there had been no change in the shareholding of Shaw Wallace and that R.G. Shaw Companies were the registered shareholders of the 38.7% equity shares of the Shaw Wallace for more than twenty years and they continued to hold the same with the approval of the R.B.I and that they had neither transferred the shares nor had they entered into any contract for such transfer, and further that even the dividends including those for the year ending June 30, 1984, had been remitted to them after securing the permission of the R.B.I, which as in January 1985. In the circumstances of the case, the Company Law Board also did not consider it necessary to lift the corporate veil for ascertaining the real owner as the shares stood and continued to remain in the name of R.C. Shaw Companies. In the proceedings before the High Court an application bad also been made for impleading the Enforcement Directorate and others as parties, but the Court did not think it necessary to do so an submissions made by the Enforcement Directorate that various investigations were in progress by it. After examining the various pleas in the matter the Court was of the opinion that no case had been made out to justify the application of the principles of lifting the corporate veil to ascertain the true and real ownership of the shares at such sale transaction. The Court refused to interfere with the order of the Company Law Board and dismissed the application by order dated November 14,1986.

(27) Mr. Sareen said that in any case contravention of Section 47(1) would be there. There is no basis for such a submission. If Section 29(1)(b) itself is not applicable, no question of any evasion or avoidance of this provision arises. Mr. Andhyarujina is right in his submission that Section 47(1) cannot be read independently of some prohibition under the Act the, i.e. it multi latch on to something. We do not think in the facts of this case any argument is needed to hold that Section 47(1) is inapplicable. The Section ex-facie has no application. It was rightly pointed out that R.G. Shaw Companies were not created merely to

acquire the shares of Shaw Wallace but this companies bad existed and held shares in Shaw Wallace for over forty years and it is an admitted case that the shares held by R.G. Shaw Companies in Shaw Wallace were with the permission of the R.B.I.

(28) We also find that show cause notice has been wrongly Issued to petitioners 6 and 7. They were not Directors of Carrasco at the time when alleged contravention of the provisions of the Act were stated to have taken place. Section 68 of the Act, Therefore, becomes inapplicable so far as petitioners 6 and 7 are concerned.

(29) We do not find it permissible of even necessary to tear the corporate veil of R.G. Shaw Companies to hold that that in acquiring the shares of R.G. Shaw Companies, Carrasco in fact acquired the shares of Shaw Wallace. We are supported in this view by a decision of the Supreme Court in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, . That was also a case where Court considered the provisions of Section 29(1) of the Act though here the shares of Indian Company had also been purchased by companies registered abroad, and said :

" GENERALLY and broadly speaking, we may say that the corporate veil may be lifted where a statue itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

(30) The Court then held that in the case before it, it did not think that lifting the veil was necessary or permissible beyond the essential requirement of the Act and some scheme, and that where the Act required the corporate veil to be lifted it said so. The Supreme Court in this case also observed that the provisions of the Act did not appear to stipulate that the purchase of shares Without the permission of the Reserve Bank would be void and that permission could be granted even ex post facto.

(31) The show cause notice in the present case appears to have been sent merely on the basis of the agreement dated January 21, 1985 and the statement of Mr. M. R. Chhabria and without more. It there was any other investigation we would not know but some investigation certainly ought so have taken place before issuing such a notice and we wished we were apprised of that. It is correct that burden of proof is placed on the person proceeded against under the Act to show if he had the requisite permission or not but a case like the present one does not absolve the authority to investigate the matter before hand and in any case to come to a prima facie view that permission was in fact necessary and for

that purpose it was appropriate to seek the opinion of the Reserve Bank. This was so particularly when an altogether different stand had - been taken by the Enforcement Directorate in the Madras case and also the stand taken by the R B 1. The Enforcement Directorate and the R.B.I, act in a complimentary fashion to enforce the provisions of the Act. In fact as we read various provisions of the Ace, the Enforcement Directorate enforces compliance with the provisions of the Act rules, regulations and directions issued by the Central Government and the R.B.I. It was, Therefore, all the more necessary to find out from the R.B.I, if any permission was required in the present case. In the Life Insurance Corporation of India Vs. Escorts Ltd. and Others, the Supreme Court had to say as under :-

" THERE is no provision of the Act which enables an individual or authority functioning outside the Act to determine for his own or its own purpose whether the Reserve Bank was right or wrong in granting permission u/s 29(1) of the Act. As we said earlier, under the scheme of the Act, it is the R.B.I, that is constituted and entrusted with the task of regulating and conserving foreign exchange. If one may use such an expression, it is the custodian- general of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the R.B.I, and the R.B.I. alone that has to decide whether permission may or may not be granted u/s 29(1) of the Act. The Act makes its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally."

(32) Lastly coming to the argument of the respondents that the adjudication proceedings should be allowed to proceed in accordance with law with the right of the petitioners to file appeal in case of adverse orders, we have only to say this point must have been considered at the time of admission of the writ petition. It is too late in the day to take notice of such an argument when we find that the show cause notice was issued without jurisdiction and the provisions of either Section 29(1)(b) or Section 47(1) of the Act were not applicable. That it is a fit case where this Court should exercise its jurisdiction, reference may be made to three decisions of the Supreme Court in (1) East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, . We would say no more on this point.

(33) Accordingly, this writ petition succeeds. The show cause notice dated October 16, 1985, and all proceedings subsequent thereto are quashed and respondents 1 and 3 are restrained from proceeding there under. Rule is made absolute. There will be, however, no order as to costs.