
(1988) 04 BOM CK 0024
In the Bombay High Court

Det Norske

APPELLANT

Vs

Reserve Bank of India

RESPONDENT

Date of Decision : 22-04-1988

Acts Referred:

Constitution of India, 1950 — Article 14
Foreign Exchange Regulation Act, 1973 — Section 29

Citation : (1991) 72 CompCas 470 : (1988) 18 ECC 276

Hon'ble Judges : Sujata V. Manohar, J

Bench : Single Bench

Advocate : Aspi Chinoy, G.E. Vahanvaty, D.D. Madon, H.D. Petit and M.V. Rane, for the Appellant; I.M. Chagla and Anup Shah, for the Respondent

Judgement

Mrs. Sujata Manohar, J.—The petitioners are an international ship classification society and verification/certification authority founded in Norway in 1864. The petitioners have over 120 year's expertise in the field of classification of ships, safety of men and machinery and onshore.

2. They are a non - profit foundation and their entire income is used for research relating to shipping as well as industries both marine and land based. The petitioners have 236 sub - stations. They have two sub - stations in India, one at Bombay and one at Calcutta. The benefit and development from Norway is made available to their centres in India by the petitioners. The petitioners employ in India only one foreign national as against 18 Indians.

3. In 1972, the petitioners established a separate branch in Bombay for classification and certification of ships. The branch was established pursuant to an authorisation issued by the Director - General Of Shipping Bombay. By a letter dated 26th July 1972, the Reserve Bank of India granted permission to the petitioners to carry on such business for five years.

4. As from January 1, 1974, the foreign Exchange Regulation Act, 1973, came into operation. u/s 29 of this Act, inter alia, a person who is not a citizen of India

or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company cannot carry on any activity of a trading, commercial or industrial nature without the permission of Reserve Bank Of india, nor can it open or establish a branch or office in India for this purpose. The petitioners, therefore made an application on March 30, 1974, to the Reserve Bank of India (the respondent) for permission u/s 29(2)(a) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the FERA"), to continue to carry on the activities of classification/certification of ships. This permission was granted on January 31, 1976, subject to the condition that technical personnel would be predominantly Indian and that no other activities would be predominantly Indian and that no other activities would be undertaken without the prior permission of the Reserve Bank of India.

5. On March 11, 1977, the petitioners applied to the Reserve Bank of India for permission u/s 29(1)(a) of the FERA for undertaking control and inspection of land - based installations, machinery and plant as well as inspection of machinery and engineering products intended for export. In their application, the petitioners pointed out that research and development information will be provided by their head office laboratories without any payment. They also pointed out that the petitioners had a world - wide reputation and their work in India would help to promote export of Indian goods. By their letter dated March 26, 1979, the Reserve Bank of India granted permission to the petitioners to undertake inspection of non - marine industrial machinery or equipment at their establishment at Bombay for a period up to December 31, 1979.

6. On December 14, 1979, the petitioners applied for extension of permission beyond December 31, 1979, and also asked for permission to open other locations in India for their activities. In March, 1980, this permission was granted extending the period of such permission up to December 31, 1981. The Reserve Bank of India also granted ex post facto permission to the petitioners for opening a branch at Calcutta.

7. Before the expiry of this permission, the petitioners once again asked for extension of permission and the same has been granted. In this manner the petitioners have been granted five extensions. The last extension was granted upto 31st December, 1986. The extension seem to have been granted routinely. Usually some months after the expiry of previous permission although a application for extension was made in each case before the permission expired. The petitioners in their last application for extension did not even set out the period for which they wanted the permission to be extended. This last application is dated December 17, 1985. It was made before expiry of previous permission on December 31, 1985. After the lapse of nine months, on August 28, 1986, The Reserve Bank granted this permission but only up to December 31, 1986, and stated that no further extension of such permission would be granted beyond December 31, 1986.

8. The petitioners made representation to the Deputy Secretary, Ministry of

Finance in December, 1986, after receipt of this letter. They also forwarded a representation dated December 12, 1986, to the Reserve Bank Of India requesting that they be given a reasonable opportunity for showing that the permission should be granted to them. They also requested that the grounds for refusing extension should be communicated to them. The petitioners also enclosed detailed particulars of various contracts which they had already entered into as also of the proposed contracts under negotiation. The petitioners had seven pending contracts. Most of these contracts were either with the Government of India or with public sector undertakings. For example one of the contracts related to inspection of machinery/components for the Director, Research and Development Establishment Engineers, Ministry Of Defence. Another contract was with Vikram Sarabhai Space Centre. A third contract was with the National Fertilizers Ltd. and so on. Of these only two contracts were with private parties for certification and inspection of goods for export. There were also eight contracts which were under negotiation. Once again most of these were with the Government Of India agencies or public sector undertakings. Only two contracts were being negotiated with private parties.

9. The respondents have, however, refused to extend permission beyond the end of December, 1986. The present petition is, therefore, filed on December 16, 1986, challenging this refusal for extension by the respondents.

10. The petitioners contend that before refusing any extension of permission to them, it was incumbent upon the respondents to give a hearing to the petitioners. Thereafter the petitioners should have passed a reasoned order on that application. By not giving such a hearing or any opportunity to make a representation to the petitioners and by passing an order without giving reasons, the respondents have arrived at a decision in gross violation of the principles of natural justice and, hence, the petitioners contend that the decision must be set aside.

11. The relevant parts of section 29 of the Foreign Exchange Regulation Act, 1973, are as follows :

" 29. (1)... 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) carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained u/s 28 ;...

(2)(a) Where any person or company (including its branch) referred to in sub - section (1) carries on any activity referred to in clause (a) of that sub - section at

the commencement of this Act....

then such person or company (including its branch) may make an application to the Reserve Bank within a period of six months from such commencement...for permission to continue to carry on such activity...

(c) Where any application has been made under clause (a), the Reserve Bank may, after making such inquiry as it may deem fit, either allow the application subject to such conditions, if any as the Reserve Bank may think fit to impose or reject the application :

Provided that no application shall be rejected under this clause unless the parties who may, be affected by such rejection have been given a reasonable opportunity for making a representation in the matter...

(4)(a) Where at the commencement of this Act any person or company (including its branch) referred to in sub - section (1) holds any shares in India ... then, such person or company (including its branch) shall not be entitled to continue to hold such shares unless before the expiry of a period of six months from such commencement... Such person or company (including its branch) has made an application to the Reserve Bank...for permission to continue to hold such shares.

(b) Where an application has been made under clause (a), the Reserve Bank may, after making inquiry as it may deem fit, either allow the application subject to such conditions, if any, as the Reserve Bank may think fit to impose or reject an application :

Provided that no application shall be rejected under this clause unless the parties who may be affected by such rejection have been given reasonable opportunity for making a representation in the matter."

12. It is submitted by the respondent that before rejecting an application u/s 29(2)(a) for permission to continue to carry on the activities specified, it is necessary to give to the applicant an opportunity to make a representation. The section so provides. In the same manner, under sub - section 4 (a) also a reasonable opportunity for making a representation is to be given to the applicant before rejecting his application. Sub - section 1 (a) of section 29 however, does not so provide. There is, therefore by implication, an exclusion by the Act of an opportunity for making a representation being given to an applicant under sub - section 1 (a) of section 29. It is, therefore, submitted by Mr. Chabla. on behalf of the respondents, that looking to the language of section 29(1)(a) , it must be held that the status excluded by necessary implication the application of the principles of natural justice to an application u/s 29(1)(a).

13. Mr. Chagla drew my attention to the observations of the Supreme Court in the case of R.S. Dass Ors. Vs. Union of India (UOI) and Others, and in particular to paragraph 22 which states that the application of audi alteram partem is not warranted in all eventualities or to cure all ills. Its application can be excluded in

the Interest of administration , efficiency and expedition. Some times legislation itself excludes the application of the rule. Now, it is difficult to conceive exhaustively of all eventualities and circumstances for the application or exclusion of the rule. In the language or content of sub - section (1) (a), however, there is nothing which excludes the rule expressly or by implication. It is submitted that such exclusion is by necessary implication because other parts of the section expressly provide for representation. I do not agree with this line of reasoning. Such an inference in the case of application of principles of natural justice should not be readily drawn. These principles are vital to the rule of law. They inject a sense of fair play and prevent arbitrariness in decision making. These principles cannot be readily discarded unless there is compelling necessity to exclude them.

14. In the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , a similar argument was negated by the Supreme Court in the Following Terms :

" We have been told that wherever Parliament has intended a hearing it has said so in the Act and the Rules and inferentially where it has not specified it is otiose. There is no such sequitur. The silence of a statute has no exclusive effect except where it flows from necessary implication."

15. In the case of S.L. Kapoor Vs. Jagmohan and Others, , also the Supreme Court stated " It is not always a necessary inference that if opportunity is expressly provided in one provision and not so provided in another provision, it is to be considered as excluded from that other provision. It may be a weighty consideration to be taken into account but the weightier consideration is whether the administrative action entails civil consequences."

16. As far back as in 1978, in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , the Supreme Court, while discussing the principle of audi alteram partem, observed (page 629) :

" The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law " lifeless, absurd, stultifying, self - defeating or plainly contrary to the common sense of the situation"... the audi alteram partem rule would , by the experimental test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time, it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case."

17. In a current decision of the Supreme Court in the case of Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, , The Supreme Court has said that there is nothing in the regulation before it which excluded the

operation of the principles of natural justice which required that a member be heard by the council when it proceeds to render its finding. The Supreme Court said (p. 276 of 61 comp cas) :

" The principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary. "

18. There is no clear mandate to the contrary in the present case to jettison the principles of natural justice. There are no other circumstances to justify its exclusion. The administrative processes would not have been overburdened had the petitioners be given an opportunity of making a representation or of being heard. In giving a hearing to the petitioners , the administration would not have suffered in the slightest degree. In fact under the FERA, it has happily taken over far more trifling tasks of scrutinizing even numerous small applications. None of the eventualities contemplated by the Supreme Court for excluding the audi alteram partem rule exist.

19. Looking to the long period of time over which the permission had been granted and extended, there was nothing urgent in the situation which demanded a prompt decision without any hearing. In fact, I have not been pointed out any exceptional circumstances which would justify not spending a little time in considering the representations of the petitioners before deciding to grant or reject the application for extension. The present case does not appear to be of a kind which warrants any departure from the principles of natural justice.

20. My attention was invited to a decision of the Delhi High Court in Writ Petition No. 1191 of 1987, in the case of Himalayan Art Gallery v. Union of India, decided on May 26, 1987. In that case, a money changer's licence which was granted u/s 7 of the FERA was revoked without giving any notice to the petitioners to show cause against the revocation. In that case, it was submitted by the respondents that several irregularities had come to light. The petitioners had violated the conditions of the licence and the licence was being used to camouflage illegal transactions in foreign exchange. In these circumstances, the Delhi High Court refused to intervene. In the course of its judgement, the Delhi High Court made a distinction between two clauses of sub - section (3) of section 7 of the Act. Clause (i) of section 7(3) permits revocation if it is in the public interest to do so. Clause (ii) of section 7(3) deals with revocation if money changer has not complied with the conditions subject to which the authorisation was granted. In the latter clause, i.e., clause (ii) of section 7(3), there is a provision that a reasonable opportunity should be given to the money changer to make a representation before the licence is revoked. From this, the Delhi High Court concluded that when a licence is to be revoked in public interest such prior hearing is not required. On the facts of the case, it was clear that an immediate revocation of the money changer's licence was required in public interest. The facts of the present case are quite different. The material wording of section 29 is also quite different from the wording of section 7. The ratio of the Delhi High Court judgement cannot, therefore, be extended to the present case. In any

event, there is no compelling necessity in the circumstances of this case which would warrant the suspension of the principles of natural justice.

21. It is next submitted that even though the principles of natural justice may be applied to refusal of permission u/s 29, sub - section(1), the principles should not be applied in the present case because the petitioner is an alien and not an Indian Company. An alien has no right to carry on business in India. He does so only when permitted. The petitioners, it is submitted, have no legal right to carry on any business. They cannot, therefore, file the present writ petition challenging the refusal of permission, u/s 29, sub - section (1). The submission must be rejected. The principles of natural justice do not recognise any national frontiers. They are of universal application. A State which claims to be governed by the rule of law must ensure that the authority of the State is not used in an arbitrary manner, be it against a citizen or an alien. Such misuse or arbitrary use of authority would be a total negation of the rule of law. The principles of natural justice provides a safeguards to prevent misuse or arbitrary use of State authority. They apply as much as to aliens as to citizens. Every person who is required to deal with the State is entitled legitimately to expect that his case would be dealt with fairly and in consonance with the principles of natural justice.

22. In the case of Union of India and Another Vs. Tulsiram Patel and Others, , the Supreme Court considered, inter alia, the provisions of article 14 of the Constitution (p. 1457) and held that article 14 contains a guarantee of equality before the law to all persons and protection to them against discrimination by any law. It is, in fact , a protection against arbitrariness and discrimination by the State. Arbitrariness can take many forms and shapes. Whenever a person or class of persons is treated unfairly it would amount to an arbitrary act or discrimination forbidden by article 14. The Supreme Court said that the principles of natural justice have come to be recognised as being a part of the guarantee contained in article 14 because of its new dynamic interpretation of the concept of equality which is the subject - matter of that article. Where discrimination is the result of State action, it is a violation of article 14. Therefore, the violation of the principles of natural justice by a State action is violation of article 14. The protection of article 14 extends to all persons - citizens or aliens.

23. My attention was drawn to a decision of the Court of Appeal in England in the case of Schmidt v. Secretary of State for Home Affairs [1969] 1 All ER 904; [1969] 2 Ch 149; [1969] 2 WLR 337. In this case, the plaintiffs who were aliens had been given leave to enter the United Kingdom. Their claim that their applications should have been considered on merits and accordance with the principles of natural justice was rejected on the ground that aliens have no right to enter into the United Kingdom. Their application for subsequent extension of stay was rejected. Their claim that their applications should have been considered on merits and in accordance with the principles of natural justice was rejected on the ground that aliens have no right to enter into the United Kingdom and there was no duty to give them a hearing. What is more relevant, the court

held that the defendant had properly and fairly exercised his power for the public good and as much as no intervention was called for. From this judgement, one cannot conclude that an alien has no claim to natural justice. If the judgement says soon, I respectfully disagree.

24. In a case before the Privy Council in *Attorney - General of Hong Kong v. Ng Yuen Shiu* [1983] 1 All ER 346 an illegal immigrant who had stayed in Hong Kong and had become a partner in a business was held entitled to invoke the principles of natural justice. His request that he should be given a hearing before his application for being permitted to stay was rejected was upheld. The Privy Council said that in the circumstances of the case he had a legitimate expectation of being accorded such a hearing before the order of removal was passed against him.

25. A person who invokes the principles of natural justice need not necessarily have any legal right. If he has a legitimate expectation which is being denied to him, he is entitled to invoke the principles of natural justice and claim that before his legitimate expectations are denied to him he should be permitted to make a representation or be heard.

26. In *Administrative Law*, fifth edition, by H.W.R. Wade, at page 464, under the Chapter "The Right to Fair Hearing", it is stated "In many cases, legal rights are affected, as where property is taken by compulsory purchase or someone is dismissed from a public office. But in other cases, the person affected may have no more than an interest, a liberty or an expectation...The holder of a licence who applies for its renewal is likewise entitled to be fairly heard before renewal can be refused....In none of these situations is there is legal right, but they ,au involve what the courts sometimes call "legitimate expectation."

27. The House of Lords in the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 2 All ER 935 held in the circumstances of the case that civil servants had legitimate expectations of being consulted before the Minister took action. Since this was not done the action of the Minister was open to judicial review. In India, this position in law is further strengthened because of the interpretation of article 14 by the Supreme Court.

28. In the present case right from the year 1977, the petitioners were permitted to carry on the control and inspection of land based installations, machinery and plant, as also inspection of machinery and engineering products intended for export. Although such permission was of a limited duration it was throughout renewed without any difficulty. In fact the renewal was usually given some months after the previous permission had expired and was made effective from the date of such expiry till some further period. From this course of conduct, the petitioners were entitled, legitimately, to expect that the permission which was granted to them would be renewed and in any case, would not be withheld hearing them.

29. It is submitted on behalf of the respondents by Mr. Chagla that looking to the

Objects and Reasons of the Foreign Exchange Regulation Act, 1973, the Act is for conservation of the foreign exchange resources of the country and its proper utilisation in the interests of economic development of the country. u/s 76 of the FERA also the Reserve Bank, while granting any permission under the Act, is required to have regard to the following :

- (i) Conservation of the foreign exchange resources of the country;
- (ii) that all the foreign exchange accruing to the country is properly accounted for;
- (iii) that foreign exchange resources of the country are utilised as best to subserve the common good; and
- (iv) Such other relevant factors as the circumstances of the case may require.

30. He submitted that in view of these provisions it must be assumed that the decision in the present case was based on these statutory considerations. Without any relevant material it is difficult to make such an assumption. In fact, it is the contention of the petitioners that had these very same guiding principles been applied the permission would not have been refused. In any case the contend that granting permission would not in manner violate or affect these objectives of the Act. Had the petitioners been given an opportunity to make a representation all these factors would have been clarified.

31. In their affidavit - in - reply the respondents have for the first time sought to make out a case for denial of permission. It is stated in paragraph 16 that although the petitioners have not applied for remittance of their earnings to Norway or anywhere else, the petitioners have credited various amounts in their head office account maintained in the books of account of the Bombay branch office. It is alleged that some liabilities of the head office of the petitioners in India are met out of the money lying to the credit of the head office in Bombay. It is alleged that, as a result, some foreign exchange which would have come to India is lost. No particulars of these allegations are given, nor it is the extent of foreign exchange loss specified. The petitioners have denied these allegations. In fact if information was required from the petitioners in this regard, or if imposition of any conditions was under comtemplation, there was all the more reason why the petitioners should have been called for a hearing.

32. By not granting a hearing and denying permission, the respondents seriously disrupted the important work which the petitioners have contracted to carry out for various Government agencies, Departments and public sector undertakings. It is also alleged by the respondents that some technical know - how is now available with Indian agencies. The petitioners are challenging this submission also. It is surprising that despite the availability of Indian technical know - how, the respondents themselves and their various departments and agencies have entered into contracts with the petitioners and are even now negotiation for further contracts with them instead of availing of Indian know - how as alleged

by them. In case, this was also matter on which the petitioners should have been heard before the orders were passed. There was no supreme urgency which prevented the application of the rule of audi alteram partem in the present case.

33. My attention was also drawn to the case of Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , where, inter alia, the provisions of sections 29(1) the Foreign Exchange Regulation Act come up for consideration. The decision, however, is not directly relevant because it dealt with a set of facts issues which have no bearing on the present case. The author case which was cited was of Apeejay (P) Ltd. Vs. Union of India (UOI) and Others, , where the court relied upon section 29(2)(c) of the Foreign exchange Regulation Act. In that case, the Reserve Bank of India did not itself exercise its powers u/s 29(2). It referred the parties to the Central Government for approval. The Supreme Court in the circumstances of that case held that the decision of the Central Government must be supported by reasons and opportunity must be given to make a representation. Neither of these cases is of any direct assistance.

34. The petition, therefore, succeeds and the rule is made absolute in terms of prayer (a). The respondents are directed to give to the petitioners a proper hearing before deciding about their application for extension of permission. The petitioners should make a fresh representation before the respondents within four weeks from today. The respondents to give a hearing to the petitioners within four weeks thereafter and to pass an order giving reasons within four weeks thereafter.

35. Under an order dated March 28, 1988, in this petition, the petitioners have been permitted to carry out the activity of inspection of non - marine industrial machinery and equipment under the contract dated March 31, 1986, with John Galt International. The petitioners will be entitled to carry on the work under the said contract until the final decision of the respondents is given u/s 29 of the foreign Exchange Regulation Act, 1973, and for a period of two weeks thereafter.

36. In the circumstances of the case there will be no order as to costs.