

(2007) 07 DEL CK 0019
In the Delhi High Court
Case No : WP (C) No. 1970 of 2007

Kanwar Jagat Singh

APPELLANT

Vs

Directorate of Enforcement and Another

RESPONDENT

Date of Decision : 05-07-2007

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 5(2)
Constitution of India, 1950 — Article 14, 21
Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 — Rule 16, 3, 4, 4(1), 4(2)
Foreign Exchange Management Act, 1999 — Section 13, 16(1), 16(3), 5, 6

Citation : (2007) 142 DLT 49

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Arvind Nigam, for the Appellant; P.P. Malhotra, ASG, Rajeeve Mehra, Chetan Chawla, Gaurav Sharma and Puneet Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—These two writ petitions are being taken up together as the impugned orders both dated 01.03.2007 are identical. The circumstances are also the same. The petitioners are seeking the supply of copies of the documents which are in the possession of the respondents because, according to them, those documents help their case. The respondents submitted that the petitioners are not entitled to the documents and would not be relied upon by them in the adjudication proceedings under the Foreign Exchange Management Act, 1999 (hereinafter referred to as "the said Act"). The petitioners, however, contended that they are not only entitled to copies of documents on which the respondents rely upon, but also those documents which are in the possession of the respondents and which advance the case of the petitioners. This is the entire scope of the controversy in these writ petitions.

2. The petitioners have prayed for a writ of certiorari or any other appropriate writ, order or direction in the nature thereof, quashing the communications dated

01.03.2007 issued by the respondents. They also pray for the issuance of a writ of mandamus or any other appropriate writ, order or direction in the nature thereof directing the respondents to furnish all the material available with the Directorate of Enforcement pertaining to the allegations sought to be leveled against the petitioners and in respect of which the petitioners have been asked to show cause. The petitioners have also sought other related reliefs.

3. The impugned letter dated 01.03.2007 is in response to the preliminary / short replies dated 15.01.2007 to the show cause notices issued to the petitioners. By virtue of the replies dated 15.01.2007, the petitioners, through their advocate, had requested for supply of the entire documents available with the Directorate of Enforcement pertaining to the show cause notices, including the documents not relied upon. In the impugned letter dated 01.03.2007, it has been noted that the grounds forming the basis of the issuance of the show cause notices, including the nature of contravention and copies of all the relied upon documents under the said Act and the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereinafter referred to as "the said Rules") have already been supplied to the petitioners and receipt thereof has also been acknowledged. In this background, the said communication dated 01.03.2007 informed the petitioners that their request for supply of copies of documents which are not relied upon in the show cause notices could not be acceded to in the following terms:

The provisions of Foreign Exchange Management Act, 1999 and Rules made there under envisage supply of the grounds, nature of contravention and copies of relied upon documents only in order to enable the noticee to make effective representation. This requirement has been met. Further as the Statute requires the adjudicating authority to conduct proceedings as per the said Statute i.e., Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, the noticee is not entitled to ask the adjudicating authority to deviate from the said procedure laid down in the said Rules. In this case, the said procedure having been followed, your request for supply of copies of documents which are not relied upon in the subject show cause notice, cannot be acceded to and hence the same is hereby rejected.

4. The petitioners are aggrieved by the refusal on the part of the respondents to supply copies of documents sought by them. Earlier, by a letter dated 06.12.2006 issued on behalf of the adjudicating authority, the petitioners were informed that, as they had failed to reply to the show cause notices dated 02.09.2006, the adjudicating authority (Special Director of Enforcement) was of the opinion that the adjudication proceedings under Rule 4 of the said Rules should be held against the petitioners in accordance with the procedure laid down in the said Rules. Accordingly, a personal hearing was fixed for 28.12.2006 at 11.00 a.m.

5. Being aggrieved by the said communication dated 06.12.2006, the petitioners filed writ petitions before this Court being WP(C) Nos. 18896/2006 and

18901/2006. The same were disposed of by a learned single Judge of this Court by an order dated 18.12.2006. In the said order, the entire background of the issuance of the show cause notices and proceedings pursuant thereto were noted. It was recorded that the petitioners were served with the show cause notices dated 02.09.2006 and that by communications dated 13.09.2006, they demanded copies of documents which were in the possession of the respondents, including about 83 documents allegedly procured by Mr Virender Dayal from U.S.A. in connection with the present case. It was also noted that in the reply sent by the respondents, the respondents sent the documents relied upon in support of the show cause notices by communications dated 19.09.2006. There was some grievance made by the petitioners about some of the documents being in Arabic and the translation of the documents not being provided to the petitioners. The respondents by their letter dated 03.11.2006 categorically communicated to the counsel for the petitioners that the English translation of the documents form part of the documents already supplied to the petitioners vide communications dated 20.09.2006. The petitioners were also granted time to file replies to the show cause notices up to 27.11.2006. It was also communicated to the petitioners that inspection of the original documents as required by the petitioners may be taken in the Office of the Assistant Director on any working day with prior appointment on telephone before 08.11.2006. There was some confusion with regard to a typographical error in the show cause notices requiring the replies to be sent by a particular date. The respondents by a letter dated 24.11.2006 communicated to the petitioners that the date by which their show cause notices could be replied was 27.11.2006 and not the date earlier communicated. The learned single Judge observed in the said order dated 18.12.2006 that it could not be disputed in the facts and circumstances that the typographical error in the show cause notices was pointed out to the petitioners only on 24.11.2006 and that, if that be so, the petitioners could not be asked to file the replies to the show cause notices within three days. Such an action would amount to a denial of a reasonable hearing to the petitioners. The court, Therefore, held that, considering the totality of the facts and circumstances, the petitioners were entitled for more time to file their replies to the show cause notices. Accordingly, the writ petitions were disposed of with the direction to the respondents to allow the petitioners four weeks time to file their replies to the show cause notices and further hearing be held only after four weeks on an appropriate date to be fixed by the respondents.

6. In the order dated 18.12.2006, it is also noted that the learned Counsel for the petitioners insisted that he was entitled for documents which, though have not been relied upon by the respondents, are alleged to be in their possession. It was also noted that the learned Counsel submitted that, according to those documents, the innocence of the petitioners would be reflected and, Therefore, the petitioners were entitled to those documents. However, with regard to this submission, no finding was returned by the learned single Judge. While disposing of the petitions, it was observed that, regarding this claim, the learned Counsel

for the petitioners contended that he would raise his claim in his reply to the show cause notices and the same may be decided by the respondents in accordance with rules and regulations and law. Thus, it is clear that while further time was granted for filing the replies to the show cause notices, the issue of supply of the documents not relied upon by the respondents was left to be raised by the learned Counsel for the petitioners in their replies and to be decided by the respondents in accordance with law.

7. It is consequent to these proceedings that on 15.01.2007, the short replies, referred to above, were sent by the petitioners through their advocate. Paragraph 2 of the short replies sent on 15.01.2007 reads as under:

2. That the present preliminary / short reply is being filed without prejudice to the rights and contentions of my client that he is entitled to the entire documentation available with the Directorate of Enforcement with respect to the matter in question including the material admitted to be available with the Directorate of Enforcement and not supplied to my client on the premise that the same has not been relied upon by the Directorate of Enforcement while issuing the captioned Show Cause Notice.

By virtue of the said short replies dated 15.01.2007, it was also contended on behalf of the petitioners that it is possible that the documents available with the Directorate of Enforcement may completely exonerate the petitioners with regard to the allegations leveled against them and which is possibly the reason why the same are being withheld from them. It was also contended in the said letter that denial of the said relevant documents by the respondents was violative of the fundamental rights of the petitioners as enshrined in the Constitution of India which assure them equality and a free and fair trial. The said letter also had reference to the Justice R.S. Pathak Committee of Inquiry which had been set up by the Government of India pursuant to the publication of the "Volker Committee Report on Oil-For-Food Programme of the United Nations" in Iraq. It was contended that the said report does not indict the petitioners of any financial or other misdemeanour. It was also mentioned in the said replies dated 15.01.2007 that the report of the Pathak Committee of Inquiry in terms states that its findings or observations contained in the said report cannot be made the basis of proceedings, civil or criminal against a person involved in the inquiry. It was also contended that the report had been accepted by the Government of India as also the conclusion contained therein.

8. It is in response to these short replies of 15.01.2007 that the impugned communications dated 01.03.2007 have been issued by the respondents whereby the request for supply of even those documents which are not relied upon in the show cause notices has been rejected.

9. Mr Arvind Nigam, the learned Counsel appearing on behalf of the petitioners submitted that the rejection is contrary to law and is based on completely erroneous grounds. With reference to the communications dated 01.03.2007, Mr

Nigam submitted that, according to the understanding of the respondents, the provisions of the said Act and the said Rules envisage supply of grounds, nature of contravention and copies of relied upon documents only in order to enable the noticee to make an effective representation. Mr Nigam submitted that there is no bar to the supply of copies of documents which, though are not relied upon, are requested by a noticee. He submitted that the use of the word "only" is not correct as there is no such provision. He submitted that as per the Act and the Rules, there is no bar, but the respondents are reading the provisions in such a way as to constitute a bar.

10. Mr Nigam referred to the said Rules. Rule 4 provides the holding of an inquiry. Rule 4(1) stipulates that for the purposes of adjudicating u/s 13 of the said Act as to whether any person has committed any contravention as specified in that Section, the adjudicating authority shall, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (a period not less than 10 days from the date of service thereof) why an inquiry should not be held against him. Under Rule 4(2), it is provided that every notice issued under Sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him. Under Rule 4(3), it is provided that if after considering the cause, if any, shown by such person, the adjudicating authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him. According to Mr Nigam, that stage has not yet been reached in the present case inasmuch as the matter is still at the show cause stage. The petitioners have sought documents to make effective replies to the show cause notices so as to convince the adjudicating authority that the proceedings be dropped and that holding of an inquiry would not be necessary. It is only after the adjudicating authority is of the opinion that an inquiry should be held that the further steps under Sub-rules (4), (5), (6), etc., till the passing of the adjudication order, can be taken. Mr Nigam submitted that none of these rules prohibit the supply of documents which the petitioners are seeking. He submits that there is no restriction provided in the said Act or the Rules. In this context, he submitted that it is well- settled that what is not prohibited, is permitted. He placed reliance on an old decision of the Allahabad High Court in the case of Muhammad Sulaiman Khan and Ors. v. Muhammad Yar Khan and Anr. 1888 (11) (All) 267 wherein the court observed that "everything is permissible unless it is prohibited." This principle has been followed in AIR 1940 390 (Nagpur) The State Vs. Sohan Lal, and The Public Prosecutor, Andhra Pradesh v. Kallam Prakasa Reddy and Ors. 1973 (1) AWR 291.

11. Mr Nigam also submitted that the requirement of Articles 14 and 21 of the Constitution of India stipulates that there must be fairness in the proceedings and the procedure must be one which is established by law. He submitted that the said Act and the said Rules do not prohibit the supply of the documents sought for. Therefore, the only inference that can be drawn is that they are

permitted.

12. Mr Nigam also submitted that fairness demands that there must be disclosure of everything that may be to the benefit of the petitioners. He drew my attention to the Attorney General's Guidelines on Disclosure issued in the U.K. The opening paragraph of the Foreword of the said Guidelines on Disclosure reads as under:

Disclosure is one of the most important issues in the criminal justice system and the application of proper and fair disclosure is a vital component of a fair criminal justice system. The "golden rule" is that fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defense.

Under the heading, "General Principles", the same guidelines indicate that disclosure refers to providing the defense with copies of, or access to, any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed. Under the heading "Responsibilities with regard to Investigators and Disclosure officers, the said guidelines provide that the investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. A failure to take action leading to inadequate disclosure may result in a wrongful conviction. It may alternatively lead to a successful abuse of process argument, an acquittal against the weight of the evidence or the appellate courts may find that a conviction is unsafe and quash it. With regard to the responsibility of the prosecutor, the guidelines indicate that the prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice and in accordance with law. Prosecutors must also be alert to the need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met.

13. Referring to the above guidelines, Mr Nigam submitted that in the U.K., this development in law has taken place and as a result a fair trial would include within its ambit a fair disclosure. In Australia too, the Commonwealth Director of Public Prosecutions has issued a Statement on Prosecution Disclosure. Paragraph 4 of the said statement deals with disclosure of unused material. Paragraph 4.1 refers to the prosecution's obligation to disclose unused material which has been defined to mean all information relevant to the charge/s against the defendant which has been gathered in the course of the investigation and which the prosecution does not intend to rely on as part of its case, and either runs counter to the prosecution case or might reasonably be expected to assist the defendant in advancing a defense, including the material which is in the possession of a third party (i.e. a person or body other than the investigating agency or the prosecution). Of course, there are exceptions to the requirement to disclose unused material. The same being immunity from disclosure on public interest

grounds, the disclosure being precluded by statute or the disclosure being prevented because of a claim of a legal professional privilege. Mr Nigam submitted that none of these exceptional circumstances arise in the present case.

14. He submitted that disclosure of unused material is a facet of fairness. He referred to the decision in the case of *R v H and R v C* 2004 (1) All ER 1269. Referring to the said decision in *R v H* (supra), Mr Nigam submitted that the following observation with regard to a fair trial is noteworthy:

It is axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all.

In the very same decision itself, it is also noted that:

Fairness is a constantly evolving concept.

An interesting reference to a conviction of theft in the 1840s after a trial which lasted for 2 minutes and 53 seconds was made in the following words:

Hawkins J (The Reminiscences of Sir Henry Hawkins, Baron Brampton (1904) vol 1, p 34) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes and 53 seconds, including a terse jury direction: "Gentleman, I suppose you have no doubt" I have none." Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.

In the background of the evolution of the concept of fairness, Mr Nigam submitted that disclosure is now very much a facet of it. Once again Mr Nigam referred to the decision in *R v H* (supra) because, according to him, the interplay of disclosure and fairness cannot be better put than what has been said therein:

[14] Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defense. Bitter experience has shown that miscarriage of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

15. Mr Nigam submitted that this has been the advancement of law in the U.K. and the general tendency is towards greater disclosure inasmuch as disclosure is a facet of fairness. He submitted with reference to the decision of the Supreme Court in the case of *Dwarka Prasad Agarwal (D) by LRs. and Another Vs. B.D. Agarwal and Others*, that the very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. The Supreme Court held that under our Constitution as also the International Treaties and Conventions, the right to get a fair trial is a basic fundamental / human right. Any procedure which

comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India.

16. Mr Nigam then referred to the Supreme Court decision in the case of *Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others*, . The Supreme Court, inter alia, observed as under:

30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

xxxx xxxx xxxx xxxx xxxx

33. The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation - peculiar at times and related to the nature of crime, persons involved - directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

xxxx xxxx xxxx xxxx xxxx 36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and Page 1363 atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its

purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

Referring to the above passages from Zahira Habibullah Sheikh (supra), Mr Nigam submitted that the view of the Supreme Court with regard to fairness being an evolutionary process and the concept of a fair trial being an ongoing developmental process is quite similar to what the courts in the U.K. have also been observing. Mr Nigam referred to the Memorandum of Action Taken on the report of Justice R.S. Pathak Inquiry Authority issued on 07.08.2006 by the Ministry of Finance, Department of Revenue, Government of India. Referring to para 2(2) of the said Memorandum, he submitting that it was recorded therein that there is no material to show that Shri Natwar Singh derived any financial or personal benefits from the contracts. He submitted that the Justice R.S. Pathak Inquiry Authority was established u/s 5(2) of the Commissions of Inquiry Act, 1952. All the statements were recorded u/s 5 of the said Act which is different from Section 6 thereof. Since those statements were made u/s 5, there is no bar to their disclosure. In view of all the submissions made by Mr Nigam, as indicated above, he requested that the impugned letters dated 01.03.2007 be quashed and the respondents be directed to disclose even unused material, i.e., the material not relied upon by the respondents, but which could be of assistance to the petitioners.

17. Mr P. P. Malhotra, the learned ASG appearing for the respondents, submitted that the show cause notices which had been issued to the petitioners were with regard to violations of the provisions of the said Act. The procedure that had to be followed was to be as per the said Act and the Rules. u/s 13 of the said Act, penalties are prescribed for contravention of the provisions thereof. However, the penalties are to be imposed only after adjudication. u/s 16(1) of the said Act, the adjudicating authority is appointed for the purposes of adjudication u/s 13 thereof. Section 16(3) of the said Act provides that no adjudicating authority shall hold an inquiry under Sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

18. Mr Malhotra then referred to the said Rules which pertain, inter alia, to adjudication proceedings. Rule 3 speaks of appointment of an adjudicating authority. As already referred to above, Rule 4 pertains to holding of an inquiry. Mr Malhotra submitted that, first of all, under the procedure prescribed for

holding of an inquiry, a show cause notice has to be issued asking the noticee to show cause as to why the inquiry should not be held. The nature of contravention has to be specified in the show cause notice in terms of Rule 4(2) thereof. Under Rule 4(3), after considering the the cause shown, if the adjudicating authority is of the opinion that an inquiry should be held, he is required to fix a date for appearance. Mr Malhotra submitted that prior to the formulation of the opinion as to whether an inquiry should be held or not, there is no requirement of hearing. He further submitted that as provided in Rule 4(4) on the date fixed for personal appearance of the noticee, the adjudicating authority is required to explain to such person or his legal practitioner or chartered accountant, as the case may be, the contravention alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, directions or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which the contravention is alleged to have taken place. Thereafter under Rule 4(5), the adjudicating authority is required to give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and, if necessary, the hearing may be adjourned to future date and in taking such evidence the adjudicating authority shall not be bound to observe the provisions of the Indian Evidence Act, 1872. By virtue of Sub-rules (6) and (7) of Rule 4, the adjudicating authority is empowered to summon and enforce attendance of any person acquainted with the facts and circumstances of the case. Finally, by virtue of Rule 4(8), if, upon consideration of the evidence produced before the adjudicating authority, the adjudicating authority is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit, in accordance with the provisions of Section 13 of the said Act. Thereafter, the said order imposing a penalty is subject to appeal. Referring to all these provisions, Mr Malhotra submitted that the said Act and the Rules are a special law and special procedures have been provided therefore. The Act and the Rules together constitute a complete Code.

19. He submitted that reliance was placed on 22 documents and copies of each and every document relied upon have been disclosed and given to the petitioners and each allegation has been specified so that the petitioners are in a position to make an effective reply to the same. Mr Malhotra referred to the following para which appears in the show cause notices:

IN ISSUING this Show Cause Notice, reliance, inter alia, is placed on the documents mentioned in the Annexure to this Notice. The originals of the said documents shall be made available for inspection to the noticee or to their legal practitioners or chartered accountants, if they so desire, at the office of the under-signed during office hours after fixing prior appointment. Copies of the relied upon documents can be obtained from the Assistant Director on written request.

Referring to the above paragraph, he submitted that in the show cause notices

itself, it was specified that reliance was placed on the documents mentioned in the Annexure. There are 22 documents in the list of relied upon documents. The respondents had also made it clear that the originals of the said documents shall be made available for inspection to the noticee. As such, according to Mr Malhotra, all disclosures have been made and nothing has been withheld insofar as relied upon documents are concerned. Mr Malhotra submitted that Along with the complaint, the complainant (S.K. Panda), Special Director (Investigating Officer) had sought permission of the adjudicating authority to refer to and rely on the documents mentioned in the Annexure to the complaint. The copies of all those documents, according to Mr Malhotra, have been given to the petitioners.

20. With regard to the nature of the documents sought by the petitioners, Mr Malhotra referred to a series of letters written by or on behalf of the petitioners. First of all, he referred to the letter dated 20.09.2006 whereby the petitioners requested the respondents to furnish copies of all documents in their possession with regard to the show cause notices, including the documents allegedly procured by Shri Virender Dayal from USA so as to ascertain as to whether relevant documentation has been kept away from the defense or not. A reply to the said letter was sent on 17.10.2007 whereby copies of the relied upon documents mentioned in the Annexure to the show cause notices were forwarded and information was given that the originals of the documents could be inspected on 19.10.2006. Mr Malhotra referred to the letter dated 19.10.2006 issued on behalf of the petitioners where once again inspection of the documents was sought. According to Mr Malhotra, the petitioners want a roving inquiry and an inspection of the entire office. By a letter dated 03.11.2006, the respondents replied to the said letter of 19.10.2006. The letter dated 03.11.2006 was silent on the issuance of the other documents that were sought by the petitioners, but reiterated that copies of all the relied upon documents had already been supplied to the petitioners. There is a bout of correspondence on similar lines which went on between the parties. Finally, on 06.12.2006, the respondents informed the petitioner that:

As regards your request for providing copies of other documents allegedly in the possession of the Directorate including documents procured by Shri Virendra Dayal from USA, I am directed to reiterate that the charges mentioned in the Show Cause Notice are based on the documents detailed in the list of relied upon documents annexed to the said Show Cause Notice, copies of which have already been supplied to you. As such, your request for supply of copies of documents not being relied upon, cannot be acceded to.

21. Mr Malhotra submitted that the current position of the law in India is that all the material that is relied upon has to be disclosed, but not the other material which is not used against a person. He submits that what the petitioners are seeking to do is to embark upon a roving inquiry and look into all the documents that are available with the respondents so as to ascertain if any document is in their favor. He submits that this is not permissible because the petitioners are

not entitled to the documents which are not relied upon by the respondents. Moreover, the other documents may deal with other persons and the petitioner may not be entitled to examine that information. Mr Malhotra also submitted that the present proceedings cannot be compared with a criminal trial. This is merely an adjudication proceeding and not a criminal trial as no criminality attaches and only penalties are leviable. He submits that the allegations are specific. There is a reliance on specific documents and copies of those documents have been supplied. The petitioners have no right to any further document.

22. Mr Malhotra then referred to a number of decisions. First of all, he referred to the decision of the Supreme Court in the case of Radhakrishnan Prabhakaran Vs. The State of Tamil Nadu and Others, He submitted that this was a matter of preventive detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. In paragraph 8 of the said decision, the Supreme Court held as under:

8. We may make it clear that there is no legal requirement that copy of every document mentioned in the order shall invariably be supplied to the detenu. What is important is that copies of only such of those documents as have been relied on by the detaining authority for reaching the satisfaction that preventive detention of the detenu is necessary shall be supplied to him....

23. Mr Malhotra then referred to the Supreme Court decision in the case of Syndicate Bank and Others Vs. Venkatesh Gururao Kurati, . This was a case of departmental / domestic enquiry. In that case, the delinquent officer sought the supply of certain documents. The 12 documents, which form part of the charges and which were relied upon by the enquiry officer, had been supplied to him. Two documents had been produced during the inquiry for cross- examination of witnesses. The rest of the documents were not supplied to the delinquent officer stating that they had no relevance to the enquiry inasmuch as neither did they form part of the charges nor were they relied upon by the prosecution during the course of enquiry. In the context of the request for supply of such documents, the Supreme Court observed as under:

...Learned Counsel for the respondent vehemently urged that although the documents may not form part of the charges or be relied upon by the prosecution in the course of enquiry, denial of the same would prejudice the delinquent's case because denial of contemporary documents deprive the right of the delinquent to set up an effective defense. We are unable to countenance such submissions at all, that the documents which do not form part of the charges or are relied upon by the prosecution during the course of enquiry, non-supply of which would cause any prejudice to the delinquent officer.

24. Mr Malhotra then referred to the decision of the Supreme Court in the case of Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others, to indicate that the adjudication proceedings are independent of criminal liability. In another case of a departmental inquiry, the Supreme Court in the case of

Chandrama Tewari Vs. Union of India (UOI) (through General Manager, Eastern Railways), held that the non-supply of a document, though mentioned in the memo of charge, but neither relevant to the charge nor referred to nor relied upon by the authorities would not be violative of the principles of natural justice and would not vitiate the proceedings. The Supreme Court held that the obligation to supply copies of a document is confined only to material and relevant documents which may include the copy of statement of witnesses recorded during investigation or preliminary enquiry or the copy of any other document which may have been relied upon in support of the charges. The Supreme Court observed that if a document, even though mentioned in the memo of charges, had no bearing on the charges or if it was not relied upon by the enquiry officer to support the charge, or if such document or material was not necessary for cross-examination of witnesses during the enquiry, the delinquent officer could not insist upon the supply of copies of such documents, as the absence of a copy of such document would not prejudice the delinquent officer.

25. Mr Malhotra also referred to the decision of the Supreme Court in the case of Krishna Chandra Tandon Vs. The Union of India (UOI), which also pertains to a departmental enquiry. The said decision is also to the same effect that only the relied upon documents have to be disclosed and copies thereof have to be supplied to the delinquent officer. Mr Malhotra also referred to certain other decisions of the Supreme Court, but it would not be necessary to note them down. The point that Mr Malhotra made was that whether it be preventive detention or a case of a departmental enquiry, the established principle is the same that only those documents which are referred to or relied upon have to be disclosed to the affected person. The documents which are neither referred to nor relied upon are not required to be disclosed to such person. Mr Malhotra also submitted that there is a logic to this principle in that it prevents the request for irrelevant documents and consequent delay. All that is necessary to constitute fairness is that the documents which are relied upon should be supplied to the petitioners. It must be sufficient to enable the petitioners to make an effective reply. In the context of the present cases, Mr Malhotra submitted that the show cause notices were issued quite some time back and the replies have not yet been filed. The petitioners are postponing the filing of replies on some pretext or the other. According to Mr Malhotra, the petitioners are repeatedly rushing to court in an attempt to thwart the adjudication proceedings. The earlier writ petitions had also been disposed of by this Court by granting time to file the replies. Yet the replies have not been filed on the pretext that the documents have not been supplied. According to Mr Malhotra, the petitioners are not entitled to those documents and the non-supply thereof cannot be made a ground for the petitioners to not file their full and final replies to the show cause notices.

26. In rejoinder, Mr Nigam submitted that if the defense of the petitioners is available on the file, can the respondents withhold that information " He submitted that even in civil matters, the trial is concluded after the

interrogatories / discoveries. There is a complete disclosure and only proof is awaited. It is only thereafter that the legal consequences of a trial would follow. Similarly, in a criminal case, disclosure of documents with the charge-sheet is necessary in the case of cognizable offences. In non- cognizable offences, pre-summoning evidence is provided for. He also referred to the Bar Council of India Rules and in particular to Rule 16 which reads as under:

An advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent. The suppression of material capable of establishment the innocence of the accused shall be scrupulously avoided.

27. Mr Nigam then referred to the decision of the Supreme Court in the case of *Jamaat-E-Islami Hind Vs. Union of India (UOI)*, to submit that copies of relied upon documents have to be supplied "in the minimum" to comply with the natural justice principles. According to him, this indicates that the duty to supply copies of the documents does not end with supplying copies of the documents relied upon, but extends to even those documents which would be to the benefit of the person concerned. Mr Nigam also referred to the following decisions:

- i) *Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Satyen Bhowmick and Others*,
- ii) *State of Orissa Vs. Debendra Nath Padhi*,
- iii) *Alpesh Navinchandra Shah Vs. State of Maharashtra and Others*,

28. Having considered the arguments of the counsel for the parties in detail, I am of the view that Mr Nigam is right in saying that fairness is an evolving concept and what may have been regarded as fair a few decades ago may not now be regarded as such. I am also in agreement with Mr Nigam when he submits that the duty to disclose has been expanded in the U.K. as also in Australia. But that expansion of the duty to disclose on the part of the prosecution has been brought about by judicial pronouncements of the highest courts as well as statutory provisions and guidelines issued in those countries. There is no doubt that disclosure of all the material which goes to establish the innocence of an accused is the sine qua non of a fair trial. Because, after all, what is the purpose of a trial " It is to arrive at the truth. If the truth is known to the prosecution and yet it prosecutes an accused based on the material which is only a half-truth and seeks the conviction of a person who is otherwise innocent, it would be a travesty of justice. A move towards full disclosure would, Therefore, be very welcome in this country also. Unfortunately, the law, as it stands today, does not permit this Court to give a ruling in favor of the petitioners. Mr Malhotra, the learned Additional Solicitor General, has been able to demonstrate that the Supreme Court, both in preventive detention matters as well as in the cases of departmental enquiries, has not permitted the supply of those documents which are not relied upon. Mr Malhotra is also right in saying that when the Supreme Court has taken such a stand even in matters involving

personal liberty, the same cannot be deviated from in the present cases which are merely adjudicatory proceedings and are not even full-fledged criminal trials.

29. For the foregoing reasons, the petitioners are not entitled to the reliefs claimed.

The writ petitions are dismissed. No order as to costs.