

(2008) 03 DEL CK 0153
In the Delhi High Court
Case No : LPA 1072 and 1077 of 2007

Kanwar Natwar Singh

APPELLANT

Vs

Director of Enforcement and Another

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 — Rule 3, 4, 4(3), 4(4)
Foreign Exchange Management Act, 1999 — Section 13, 13(1), 16(1)

Citation : (2008) 149 DLT 18

Hon'ble Judges : T.S. Thakur, J; Kailash Gambhir, J

Bench : Division Bench

Advocate : Arvind K. Nigam and Samrat K. Nigam, for the Appellant; P.P. Malhotra, ASG, Rajdipa Behura, Chetan Chawla and Gaurav Sharma, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—One of the primary questions that falls for consideration in these two appeals is whether the appellants are entitled to demand copies of even such of the documents as are not relied upon against them by the Directorate of Enforcement in connection with an Inquiry initiated under the provisions of Section 16(1) of Foreign Exchange Management Act, 1999 read with Rule 4 of the Foreign Exchange Management (Adjudication Proceedings & Appeal) Rules, 2000. The Adjudicating Authority's refusal to supply the said documents led to the filing of WPs(C) No. 1970/2007 and 1971/2007 by the appellant, which were heard and dismissed by a learned Single Judge of this Court, relying upon the decisions of the Supreme Court in Radhakrishnan Prabhakaran Vs. The State of Tamil Nadu and Others, , Syndicate Bank and Others Vs. Venkatesh Gururao Kurati, , Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others, , Chandrama Tewari Vs. Union of India (UOI) (through General Manager, Eastern Railways), and Krishna Chandra Tandon Vs. The Union of India (UOI), . The learned Single Judge was of the opinion that supply of only such of the

documents as were relied upon by the Directorate of Enforcement was necessary before the commencement of the enquiry proceedings. The appellants assail the correctness of that view in these appeals and pray for a direction to the respondent to supply copies of all such documents as are in possession of the Directorate of Enforcement regardless whether or not such documents are being relied upon by it before the Adjudicating Authority. The controversy arises in the following backdrop:

2. As a sequel to what came to be known as "Volkar Committee Report" on Oil-For-Food Programme of the United Nations in Iraq and the report submitted by the Pathak Committee of Inquiry, a complaint alleging violation of the provisions of Section 13 of Foreign Exchange Management Act was filed against the appellants before the Adjudicating Authority. The Authority in turn issued a show cause notice to the appellants and a few others, inter-alia, calling upon them to show cause why adjudication proceedings as contemplated u/s 16(1) of FEMA, 1999 read with Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 should not be held against them for the contraventions referred to in the notice and why penalty as provided u/s 13(1) of the said Act be not imposed upon them. On receipt of the show cause notice, the appellants demanded copies of the documents referred to and relied upon in the notices and also other documents relating to the proposed Inquiry. It is not in dispute that copies of all such documents as are relied upon by the Directorate of Enforcement were furnished to the appellant. Copies of other documents complete details whereof were not indicated by the appellant were, however, declined in terms of an order/communication dated 6th December, 2006 sent to the appellants by the Adjudicating Authority. By another order/communication of even date, the Adjudicating Authority decided to hold an Inquiry in terms of Section 16(1) of FEMA, 1999 read with Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000.

3. Aggrieved by the aforesaid orders and communications, the appellant Shri Natwar Singh filed writ petition No. 18901/2006 in this Court, which was disposed of by a Single Judge of this Court by order dated 18th December, 2006 with the direction that the petitioner shall have four weeks further time to file his reply to the show cause notice served upon him. As regards the prayer for supply of copies of the documents, the Court gave liberty to the petitioner to demand such copies but left the issue regarding the entitlement of the petitioner to such documents open.

4. In pursuance of the above directions, the petitioner-appellant filed a preliminary/short reply to the show cause notice but once again insisted that documents not otherwise relied upon by the Directorate of Enforcement be supplied to them before taking any further step in the adjudication proceedings. In response to the said reply and demand for additional documents, the Adjudicating Authority passed an order dated 1st March, 2007 rejecting the plea for supply of documents other than those relied upon by the Directorate of

Enforcement and fixed the date of hearing under sub-Rule (3) of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings & Appeal) Rules, 2000. These communications came under challenge in two different writ petitions filed by the appellants before the Single Judge. It was contended on behalf of the petitioner that he was entitled to copies of all documents in possession of the Directorate of Enforcement regardless whether or not the same were relied upon by the Directorate of Enforcement. The Single Judge, as noticed earlier, dismissed the writ petitions holding that the petitioner was not entitled to any documents over and above those that are relied upon by the Directorate of Enforcement. The present appeals assail the correctness of the said view, as already noticed above.

5. Appearing for the appellant, Mr. Nigam, made a two fold submission in support of the appeals. Firstly, it was contended that the rejection of the demand for additional documents was unjustified having regard to the fact that the petitioner was entitled to prove his innocence and demand closure of the proceedings on the basis of the documents that were available with the Directorate of Enforcement. Principles of fairness in action, argued Mr. Nigam, demand that any document, which was in possession of the public authority like Directorate of Enforcement, is made available to the appellants regardless of the fact whether or not the said document was relied upon by the Directorate of Enforcement. What is, according to the petitioner, important is that the document is relevant to the matters sought to be inquired into. If it is, the same ought to be disclosed in the proceedings.

6. Secondly, it was contended by Mr. Nigam that since the Court had granted four weeks further time to the petitioner-appellant to file his reply to the show cause notice, order dated 6th December, 2006 by which the Adjudicating Authority had decided to proceed with the Inquiry should be deemed to have been quashed, no matter the same had not been specifically quashed or set aside. That being so, the proceedings must be deemed to be pending at the stage from where the Adjudicating Authority has yet to decide whether it is a fit case for holding an Inquiry. He argued that although the Adjudicating Authority was duty bound to afford to the petitioner-appellant a personal hearing before initiating the inquiry because such a hearing would subserve the interest of justice and could be directed by this Court, particularly when there is no bar in the Rules governing the conduct of the inquiry forbidding the grant of such a hearing.

7. On behalf of the respondent it was argued by Mr. P.P. Malhotra, Additional Solicitor General of India that the prayer for additional documents was wholly misconceived and had been rightly rejected by the Adjudicating Authority. The petitioner was, argued the learned Counsel, entitled to copies of only such of the documents as were relied upon by the Directorate of Enforcement. He could not be permitted to make a roving inquiry and demand copies of all the documents in possession of the Directorate of Enforcement. He further argued that the order passed by this Court in the previous writ petition filed by the petitioner did not

quash order dated 6th December, 2006 and that grant of further time to file a reply to the show cause notice simply implied that the appellants had the liberty to place their version on record without disturbing the order by which the Adjudicating Authority had decided to proceed with the inquiry. Pursuant to the order passed by this Court, the appellants had sent a short reply on 15th January, 2007 in which the appellants asserted that the allegations made in the show cause notice were unfounded and that denial of additional documents though not relied upon by the Directorate of Enforcement violated their fundamental rights. The authority had after consideration rejected the plea for additional documents in terms of the impugned communication dated 1.3.2007 and adjourned the case for hearing to 19.3.2007 in terms of sub-Rule (3) of Rule 4 of the Foreign Exchange Management (Adjudication Proceedings & Appeal) Rules, 2000. On 19.3.2007, the date fixed, the appellants had appeared through their counsel to whom the charges leveled in the show cause notice were explained as is evident from the following portion of order dated 19.3.2007:

In view of above and in view of the procedure laid down under Rule 4(3) having met, the Advocate for petitioners were explained the charges leveled against them, contraventions alleged to have been committed by them indicating the relevant the provisions of Act, Rules, etc. as required under rule 4(4) of said Rules read with FEMA, 1999.

8. Mr. Malhotra, further drew our attention to the proceedings recorded on 9.4.2007 when a personal hearing was given to the learned Counsel for the appellants who stated that the short reply submitted on behalf of the appellants on 15.01.2007 could be treated as the effective reply. He was also asked to justify his request for cross-examination as contained in the short reply dated 15.01.2007. On two dates of hearing held thereafter on 19.07.2007 and 6.8.2007 also the appellants sought time to make submissions for supporting the request for cross-examination. The proceedings had Therefore progressed beyond the initial stage. It was contended that the only issue that was raised before the learned Single Judge was whether the appellants-petitioners were entitled to copies of the documents which were not relied upon in the show cause notice. The appellants could not, Therefore, enlarge the scope of the controversy in these appeals by raising issues that were never raised in the writ petitions nor pursued before the learned Single Judge. The Adjudicating Authority had in any event applied its mind to the material placed before it, and come to a prima facie conclusion that an inquiry u/s 13 of the FEMA was warranted. Having said so it had initiated an enquiry affording an opportunity to the appellants to present their version in defense. There was, Therefore, neither any failure of justice nor breach of any principle of natural justice to warrant interference by this Court.

9. We have given our careful consideration to the submissions made at the bar. Two precise questions arise for consideration. These are:

(i) Whether Rule 4 of FEMA (Adjudication Proceedings & Appeal) Rules, 2000 envisages disclosure and supply of documents not relied upon in the show cause

notice to the noticee at any stage before the Adjudicating Authority decides to hold an inquiry in terms of Section 13 of FEMA read with Rule 4 of the Rules mentioned above;

(ii) Was a personal hearing to the appellants-noticees necessary before the Adjudicating Authority took a decision in terms of Rule 4(3) to initiate an inquiry and have the said proceedings gone beyond the stage envisaged by Rule 4(3) of the Rules

10. We shall examine the questions ad Seriatim : Re Question No. 1:

11. The provisions of Rule 4 of the Rules mentioned above prescribe the procedure to be followed by the Adjudicating Authority while holding an inquiry u/s 13 of the FEMA. It reads:

4. Holding of inquiry -

(1) For the purpose of adjudication u/s 13 of the Act whether any person has committed any contravention as specified in that section of the Act, 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 (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him.

(3) After considering the cause, if any, shown by the 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.

(4) On the date fixed, the Adjudicating Authority shall explain to the person proceeded against or his legal practitioner or the chartered accountant, as the case may be, the contravention, alleged to have been committed by such person indicating the provisions of the act or the rules, regulations, notifications, direction or orders or any condition subject to which an authorization is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place.

(5) The Adjudicating Authority shall then 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 (1 of 1872).

(6) While holding an inquiry under this rule the Adjudicating Authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the Adjudicating Authority may be useful for or relevant

to the subject matter of the inquiry.

(7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Authority, the Adjudicating Authority may proceed with the adjudicating proceedings in the absence of such person after recording the reasons for doing so.

12. It is evident from a bare perusal of the above that while sub-Rule 1 of Rule 4 requires the Adjudicating Authority to issue a notice to any person believed to have committed any contravention of Section 13 of FEMA, sub-rule 2 of the said rule requires the show cause notice to indicate the nature of contravention alleged to have been committed. Sub-rule 3 of Rule 4 provides that if the adjudicating authority is of the opinion that an inquiry should be held, it 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. Sub-rule 4 of Rule 4 lays down the procedure to be followed by the Adjudicating Authority on the date fixed in sub-Rule 3 of Rule 4, while sub-rule 5 of Rule 4 entitles the noticee to lead evidence in defense. Failure, neglect or refusal to appear as required under sub-rule 3 empowers the Adjudicating Authority to proceed in the absence of such person after recording the reasons for doing so.

13. It is clear from the scheme of Rule 4 (supra) that there are three distinct stages through which an inquiry u/s 13 read with Rule 4 passes. The first stage is where the Adjudicating Authority issues a show cause notice specifying the nature of the contravention alleged against the noticee and determines after considering the reply, if any, whether an inquiry should be held. At the second stage, the Adjudicating Authority explains to the person concerned the contravention alleged to have been committed, indicating the provisions of the Act or of the Rules, Regulations, Notifications that are relevant in that connection and gives to the noticee an opportunity to adduce the evidence that he may like to rely upon in his defense. At the third stage of the proceedings, the authority examines the entire material available before it and decides whether the noticee has committed any contravention and imposes upon him a suitable penalty. The final order passed by the Adjudicating Authority is subject to appeal before the prescribed appellate authority.

14. It is evident that in sub-rule (1), (2) and (3) of Rule 4 which cover the first stage of the proceedings, furnishing of any documents or summoning of any record by the Adjudicating Authority is not specifically envisaged. Yet once the Adjudicating Authority takes a decision to issue a notice of show cause to any person for the purpose of adjudication u/s 13 of the Act the same must be accompanied by the relevant material based on which the Adjudicating Authority felt the necessity of initiating proceedings u/s 13 of the Act. Even otherwise, principles of fairness, equity and good conscience demand that the show cause notice is accompanied by the material on the basis whereof the Adjudicating Authority has issued the same. That is because unless the material forming the basis of the show cause notice is disclosed to the noticee, his right to submit an

effective reply to the notice would remain illusory. It is only when the material based on which the Adjudicating Authority has decided to issue a notice is disclosed that the noticee may be able to exercise his right effectively.

15. It is not in dispute that the entire material referred to in the show cause notice and relied upon by the Directorate of Enforcement has been furnished to the noticees in the present cases. The noticees, Therefore, knew the exact basis on which the Adjudicating Authority proposed to initiate an inquiry. They had an opportunity to explain their position qua the said material. The attempt made by the petitioner however was to seek disclosure of all the documents in possession of the Directorate of Enforcement regardless of whether or not the Directorate was placing any reliance upon the same. What is significant is that the Adjudicating Authority was at that stage taking only a prima facie view of the matter and was not either by the provisions of the Rule or by any other principle of fairness or considerations of equity, required to supply the material upon which the Enforcement Directorate did not place any reliance against the noticees. The insistence on the part of the appellants for disclosure of documents that were not being pressed into service against them was Therefore unsupported by any legal requirement under the rules or principles of natural justice as applicable to such inquiries. The Adjudicating Authority was in that view legally correct in declining the request for supply of documents not relied upon by the Directorate of Enforcement. So also was the learned single Judge correct in declining interference with the view taken by the Adjudicating Authority. Re Question No. 2:

16. It was argued on behalf of the appellants that no hearing was afforded to the appellants-noticees before the Adjudicating Authority decided to hold an inquiry. Such a hearing though not compulsory argued Mr. Nigam was not forbidden by provisions of Rule 4(3) supra and could have been given with a view to making the process just and fair.

17. Rule 4 in our opinion is a complete code in itself and ensures that the affected parties are given an opportunity to defend themselves not only after the inquiry starts but even before. The only difference is that while the rule recognizes only the right to file a reply to the show cause notice before an inquiry is ordered, the right to lead evidence in defense becomes available to the noticees after the inquiry is initiated. The difference in the rights exercisable by the noticees at the two stages arises out of the nature of the inquiry and its implications at each stage. At the preliminary stage of issuing a notice and filing a reply, the Adjudicating Authority as observed earlier, takes a prima facie view of the matter and simply decides whether or not it is a case fit for initiating an inquiry. A personal hearing whether with or without the assistance of a legal practitioner or other agent is at that stage neither necessary nor recognized. That is largely because the initiation of an inquiry does not in itself visits the noticees with any adverse consequence. Even so, the rule provides that before the Adjudicating Authority decides to initiate an inquiry, it would issue a notice to

the person concerned and consider his reply, if any filed. That procedure was admittedly followed inasmuch as the appellants were given a show cause notice, furnished the documents relied upon in the same and asked to file their reply. The procedure followed by the Adjudicating Authority Therefore did not suffer from any infirmity to call for our interference.

18. Equally untenable is the argument of the learned Counsel for the petitioner that the order passed by the adjudicating authority deciding to hold an inquiry must be deemed to have been quashed by implication and Therefore, the proceedings revert back to a stage where the authority had to consider afresh whether an inquiry was or was not to be conducted. The order passed by the learned Single Judge in W.P.(C) No. 18901/2006 neither finds fault with the decision of the adjudicating authority to initiate the inquiry nor interferes with the same. The mere fact that an additional opportunity was granted to the petitioners to file their reply did not necessarily mean that the opinion of the adjudicating authority that it was a fit case for holding an inquiry stood reversed by the Court. In any case, the order of the court could have but has not said so. That being the position, the proceedings have indeed crossed the initial stage as is evident even from a reading of the order passed by the adjudicating authority, especially order dated 19.3.2007 in which the adjudicating authority has complied with the requirements of Rule 4(3) & (4) of the Rules and explained the charges leveled against them, the contraventions alleged to have been committed by them and the provisions of the Act and Rules relevant to such contraventions. Our answer to the first part of the question No. 2 is accordingly in the negative while the answer to the second part of that question is in the affirmative.

19. In the result, these appeals fail and are hereby dismissed but in the circumstances without any order as to costs. The original record produced by Mr.Malhotra shall be returned to him. Parties to appear before the Adjudicating Authority on 24th April, 2008 for directions at 3:00 PM.