

(2022) 05 CAL CK 0003
In the Calcutta High Court
Case No : MAT No. 478 Of 2022, CAN 1 Of 2022

Nillesch Parekh

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 02-05-2022

Acts Referred:

Foreign Exchange Management (Adjudication Proceedings And Appeal) Rules, 2000 — Rule 4, 4(1), 4(2), 4(3)
Foreign Exchange Management Act, 1999 — Section 13, 16(3)

Citation : (2022) 05 CAL CK 0003

Hon'ble Judges : Prakash Shrivastava, CJ;Rajarshi Bharadwaj, J

Bench : Division Bench

Advocate : Dr. Samir Chakraborty, Pranit Bag, Souradeep Banerjee, Amit Agarwalla, Aniruddha Agarwalla, Debashree Mukherjee, Rama Ghosh Dastidar, Arijit Chakrabarti

Final Decision : Disposed Of

Judgement

Prakash Shrivastava, CJ

1. This appeal is at the instance of the writ petitioner against the order of the learned Single Judge dated 14.03.2022 whereby WPA 2038 of 2021 has been disposed of with certain directions.

2. The appellant had approached the writ Court challenging the show cause notice dated 06.07.2020 issued by the Special Director, Eastern Region, Enforcement Directorate under Rule 4(3) of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (for short, 'Rules of 2000') in pursuance to the complaint received under Section 16(3) of the Foreign Exchange Management Act, 1999 (for short, 'FEMA').The main ground of challenge was that the impugned notice was issued without complying with the Rule 4(1) and Rule 4(2) of the Rules of 2000.

3. Learned Single Judge has held that the appellant was required to demonstrate

prejudice on account of infraction of the procedure and has accordingly disposed of the petition directing the adjudicating authority to submit the brief gist of its satisfaction of prima facie case against the petitioner along with copies of necessary documents and directing the petitioner to show cause to the notice dated 06.07.2020 as well as the gist and thereafter adjudicating authority is to undertake the procedure prescribed under Rule 4(3) of the Rules of 2000.

4. Submission of the learned Counsel for the appellant is that Rule 4(1) and 4(2) of the Rules of 2000 were required to be mandatorily followed. In support of his submission he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of Natwar Singh vs. Director of Enforcement and Another reported in (2010) 13 SCC 255 and Bombay High Court judgment in the matter of Shashank Vyankatesh Manohar vs. Union of India and Another reported in (2014) 1 Mah LJ 838 as also the circular issued by the Director of Enforcement. He has also submitted that a reliance on the judgment of the Hon'ble Supreme Court in the matter of State Bank of Patiala and Others vs. S. K. Sharma reported in AIR 1996 SC 1669 for attracting the principle of prejudice, is misplaced and is not applicable in the present case.

5. Learned Counsel for the respondent has supported the order of the learned Single Judge and has submitted that gist in pursuance to the direction of the learned Single Judge has been supplied, therefore, nothing further is required in the matter.

6. We have heard the learned Counsel for the parties and perused the records.

7. Rule 4 of the Rules of 2000 relates to holding of inquiry and sub-Rule (1) to (3) of Rule 4 which are relevant for the present controversy are as under:

"4. Holding of inquiry.—(1) For the purpose of adjudicating under section 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 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."

8. In terms of the aforesaid Rule, the adjudicating authority is required to give the notice under sub-rule (1) to the concerned person requiring him to show cause as to why inquiry should not be held against him indicating the nature of contravention alleged to have been committed by him. After considering the cause, if any shown, and on forming an opinion that an inquiry should be held,

the adjudicating authority is required to issue notice under sub-rule (3) fixing the date of appearance. In the present case, undisputedly no notice in terms of sub-rule (1) and (2) of Rule 4 has been given and straight away notice under sub-rule (3) of Rule 4 has been issued which was subject matter of the challenge in the writ petition.

9. The Hon'ble Supreme Court in the matter of Natwar Singh (supra) has considered the similar issue and has held that:

"22. That a bare reading of the relevant provisions of the Act and the Rules makes it abundantly clear that the manner, method and procedure of adjudication are completely structured by the statute and the Rules. The authority is bound to follow the prescribed procedure under the statute and the Rules and is not free and entitled to devise its own procedure for making inquiry while adjudicating under Section 13 of the Act since it is under legislative mandate to undertake adjudication and hold inquiry in the prescribed manner after giving the person alleged to have committed contravention against whom a complaint has been made, a reasonable opportunity of being heard for the purpose of imposing any penalty. The discretion of the authority is so well structured by the statute and the Rules.

23. The Rules do not provide and empower the adjudicating authority to straightaway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the adjudicating authority shall issue a notice to such person requiring him to show cause as to why an inquiry should not be held against him. It is clear from a bare reading of the rule that show-cause notice to be so issued is not for the purposes of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the adjudicating authority is required to form an opinion as to whether an inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins."

10. From the above judgment, it is clear that the notice in terms of sub-rule (1) and (2) is necessary and thereafter formation of opinion under sub-rule (3) is required before conducting inquiry in terms of other provisions of the Rule.

11. The Similar issue has been examined by the Division Bench of the Bombay High Court in the matter of Shashank Vyankatesh Manohar (supra) wherein the two tier adjudication of a show cause notice provided under Rule 4 has been taken note of and it has been held that:

"12. On reading the above Rule, particularly sub-rules (1) and (3) thereof, it is clear that on the issue of show cause notice, a noticee is permitted to submit his

reply to the same. In terms of the above Rule, the Adjudicating Authority has to consider the objections raised by the noticee and only if he forms an opinion that an inquiry should be continued further that the Adjudicating proceedings can be proceeded with, by issuing a notice for personal hearing. However, if the Adjudicating Authority is satisfied that the objections raised to the notice are valid, he may drop the show cause notice. The provision as found in Rule 4 of the Adjudication Rules is a unique provision. The Counsel for the parties were not able to point out any similar rules under which a two tier adjudication of a show cause notice is provided for in any other statute. Normally, once a show cause notice has been issued, the Adjudicating Authority deals with all the objections of the noticee, be it preliminary as well as any other defence, by passing one common order of adjudication. The fact that the legislature has provided in Rule 4 of the Adjudication Rules that on issue of notice, the noticee can object to the same and this objection has to be considered by the Adjudicating Authority for forming an opinion to proceed further with the show cause notice would require giving some meaning to it, otherwise it would be rendered otiose.

13. According to the learned Additional Solicitor General, the objections which have been raised by the petitioner would be considered and reflected in the final adjudication order which the Adjudicating Authority would pass. It is this final order which is appealable to the Appellate Tribunal for Foreign Exchange. This submission on the part of the respondent would render the entire exercise provided in Rule 4(1) and (3) of Adjudication Rules, a dead provision. The submission of learned Additional Solicitor General was that the objective of receiving objections to the show cause notice and forming an opinion whether or not the inquiry should be conducted further, has been provided only for the purpose of ensuring that the authorities under the Act do not proceed against persons who are complete strangers to the alleged contravention under the Act. The above provision according to him can have no application where prima facie, the noticee is connected to the alleged contravention such as in the present case and, therefore, the authority has formed the opinion to proceed with the inquiry and, therefore, the impugned notice for personal hearing has been issued on 6 June, 2013.

14. This submission of the learned Additional Solicitor General would require one to read words into Rule 4 of the Adjudication Rules that the objections to the show cause notice would be considered, only if they are of particular type, such as, the noticee is a stranger to the proceedings and no other objection would be considered while deciding whether or not the adjudication must be proceeded with further. Even if one were to proceed on the basis of the submission of the learned Additional Solicitor General that only some type of cases would fall within the mischief of Rule 4(1) and (3) of the Adjudication Rules, yet the fact that the Adjudicating Authority has applied his mind to the objection raised by the noticee would only be evident if the formation of his opinion is recorded at least on the file. This forming of opinion need not be a detailed consideration of all the submissions but must show application of mind to the objections raised by the

noticee. In case the objections are such as would require detailed consideration, the authority concerned can dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order.

15. However, this formation of opinion by the Adjudicating Authority is not required to be preceded by a personal hearing but only consideration of the written objections of the noticee would meet the ends of natural justice. The personal hearing would be afforded to the noticee before the disposal of the show cause notice by a final order an appealable order. This formation of opinion must be on record of the Adjudicating Authority, in this case the Special Director, Directorate of Enforcement. Keeping this recording of reasons on the file would ensure that there has been a due application of mind to the objections raised by the noticee. This would be a necessary safeguard against forming arbitrary opinions. These recorded reasons must be furnished to the noticee, when asked for by the noticee at the time of granting a personal hearing to the noticee. This would give an opportunity to the noticee during the personal hearing to correct any erroneous view taken in forming the opinion to proceed further with the show cause notice. This would ensure that the opinion formed on the preliminary objections which would otherwise never be a subject-matter of discussion/debate before the Adjudicating Authority is also a part of the order to be passed by the Adjudicating Officer. In the absence of the above, the preliminary objections would be dealt with by the Adjudicating Authority possibly only in his mind while deciding to proceed further with the notice and the reasons would never be recorded to evidence consideration of the objections. This would result in great prejudice to the noticee for more than one reason. Firstly, the noticee would have no clue as to what were the considerations which weighed with the Adjudicating Authority to reject the preliminary objections. It is also very clear from the provisions of the Act and the Rules that an Appeal which is provided would not lie from an order recording an opinion of the Adjudicating Authority to proceed further with the adjudication of the notice, but the appeal would only be against the final order.”

12. After considering the severe consequences of the proceedings under Section 13 of FEMA, Bombay High Court in the case of Shashank Vyankatesh Manohar (supra) has further held that:

“18. In view of such serious consequences which would be inflicted upon the noticee against whom the adjudication order may be passed under section 13 of the Act, the safeguards provided by sub-rules (1), (2) and (3) of Rule 4 of the Adjudication Rules must be rigorously applied by this Court, otherwise the noticee would be presented with dire penal consequences of being imprisoned for six months, apart from other liabilities and adverse consequences. Merely because the imprisonment would be in a civil prison and not in a criminal prison, would be no consolation to the person who was not responsible for contravention of FEMA.”

13. After the above judgment of the Bombay High Court the Director of Enforcement had also issued Technical Circular No. 11/2014 stating that the SLP against the judgment of the Bombay High Court was dismissed by order dated 04.07.2014, therefore, judgment in the case of Shashank Vyankatesh Manohar (supra) had attained finality and it was liable to be complied with all the adjudicating authorities under FEMA. The Hon'ble Supreme Court in the matter of State of Uttar Pradesh vs. Singhara Singh and Others reported in AIR 1964 SC 358 has noted that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

14. Thus, in terms of the aforesaid judicial pronouncement the Special Director, Enforcement Directorate was required to form an opinion after giving notice to the petitioner before issuing the impugned show cause notice dated 06.07.2020 which he has failed to do in the present case.

15. The application of principle of prejudice by the learned Single Judge based upon the judgment of the Hon'ble Supreme Court in the matter of State Bank of Patiala and Others (supra) cannot be upheld in view of the fact that in that judgment the principle was applied in the case of disciplinary inquiry under service dispute whereas in the present case Rule 4(1) and 4(2) is clear and required to be complied with in view of the judgment of the Hon'ble Supreme Court in the case of

16. Learned Advocate for the official respondent has submitted that a gist of satisfaction of prima facie case has been supplied but that is not enough compliance of provision because in terms of Rule 4(3) the adjudicating authority is required to form an opinion that an inquiry should be held, hence we find that the prayer made by the learned Counsel for the appellant to issue the same direction as contained in paragraph 38 of the judgment of the Bombay High Court in the case of Shashank Vyankatesh Manohar (supra) appears to be justified.

17. Hence, we dispose of the appeal without interfering in the show cause notice dated 06.07.2020 but by directing the Special Director, Eastern Region, Enforcement Directorate to form his opinion after recording reasons in terms of sub-rule (3) of Rule 4. If the opinion so formed is adverse to the appellant, such opinion along with the reasons so recorded shall be furnished so as to reach the appellant at least 15 days prior to the date of personal hearing as the same would meet the requirement of Rule 4(3).