

(1997) 10 BOM CK 0016

In the Bombay High Court

Case No : Criminal Writ Petition No. 306 of 1996

Satyanarayan and another

APPELLANT

Vs

The Chief Enforcement Officer, Enforcement Directorate,
Bombay and others

RESPONDENT

Date of Decision : 10-10-1997

Acts Referred:

Advocates Act, 1961 — Section 30, 40
Civil Procedure Code, 1908 (CPC) — Order 5 Rule 1, 132
Constitution of India, 1950 — Article 20(3), 21, 22(1), 226
Foreign Exchange Regulation Act, 1973 — Section 40(3)

Citation : (1998) 5 BomCR 658 : (1998) 1 MhLj 548

Hon'ble Judges : L. Manoharan, J;G.D. Patil, J

Bench : Division Bench

**Advocate : S.A. Bobde, M.V. Samarth and Miss Basuri Datta, for the Appellant;
V.V. Naik "A" P.C., M.G. and V.V.. Bhangde, for the Respondent**

Judgement

L. Manoharan, J.—The petitioners seek for the issuance of a direction to the respondents to permit them to be accompanied by a lawyer whenever they are summoned for interrogation; to allow petitioner No. 1 to represent the other members of his family; permit an advocate of their choice to remain present during investigation, interrogation or examination and direct the respondents to interrogate the petitioners only during office hours, that too after giving them reasonable notice of at least 48 hours. The petitioners alleged that one Shri Vinod Goel, a non-resident Indian, made gifts of amounts mentioned in para 4 of the petition in their favour and they learnt that Directorate of Enforcement has started enquiry into the said payments made by Shri Vinod Goel to other persons. Therefore, the petitioners reasonably apprehend that similar proceedings would be initiated against them.

2. Pending this petition, the petitioners moved for interim direction and this Court on 11-2-1997 passed an order stating that it is open for the petitioners to make appropriate application before the authority seeking permission for the

presence or company of an Advocate of their choice at the time of interrogation. Pursuant to the said direction, they moved the appropriate authority by Annexure-I application which was disposed of by the authority by the order Annexure-II. Later the writ petition came to be amended by which the petitioners incorporated fresh allegations and also prayer clause (iii-a) seeking to quash and set aside the order at Annexure-II. The petitioners had also moved Crim. Appln. No. 132/97 for appropriate orders.

3. On behalf of respondents, reply was filed to the aforesaid application and additional reply to the amended writ petition. The learned Counsel for the respondents sought permission to treat the reply to the application for appropriate orders as reply to the writ petition. Learned Counsel, Shri Bobde, for the petitioners maintained that as per section 40(3) of the Foreign Exchange Regulation Act, 1973 (for short the Act), a person who is summoned by the authority is entitled to have the presence of lawyer at the time of his interrogation. According to the learned Counsel the very wording of the section would show that when a prayer is made by the person who is summoned under the said provision for permitting the assistance of a lawyer or any authorised agent of his choice, at the time of his interrogation, that has to be considered and, according to the learned Counsel, since section 40(3) of the Act, confers a discretion on the authority, a duty is cast upon to him to exercise the said discretion adhering to the principles of natural justice. It is also the case of the learned Counsel that any ambiguity or doubt as to the meaning of the provision in the said section has to be resolved in favour of the citizen.

4. On the other hand, learned Counsel Shri Bhangde, on behalf of respondents, maintained that a person who is summoned u/s 40 of the Act, being only a suspect or a person having information on the subject, has no such right as maintained by the petitioners and the learned Counsel urged that principles of natural justice are not applicable in such situation. It would be open for the authority on questioning the summoned person to summon such other persons whom the authority may consider necessary to question for the purpose of the investigation; and the same in no way would give a right to the person summoned to insist that in his place somebody else must be questioned. At any rate, according to the learned Counsel, a lawyer cannot be held to be an authorised agent within the meaning of section 40 of the Act. Para 9 of the petition contains the case of the petitioner wherein petitioner states :

"....However, section 40(3) of the Act provides that the person so summoned may attend either in person or by authorised agent before the authorised officer. The petitioners submit that the provision u/s 40 of the F.E.R. Act, is in conformity with the guarantee as enshrined under Article 21 of the Constitution of India. That no citizen can be deprived of his life and personal liberty except according to procedure established by law. That section 40 of the F.E.R. Act, provides that a person ought to be examined by the officer of the Directorate could appear personally or through an authorised agent. In this view of the matter the

petitioner submits that the petitioners may be permitted to be accompanied by a lawyer or a person of their choice when they are being examined or interrogated."

In the context of the rival contentions, it becomes necessary to read section 40 of the Act which reads :

40. Power to summon persons to give evidence and produce documents -

(1) Any gazetted officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce document during the course of any investigation or proceeding under this Act.

(2) A summons to produce documents may be for the production of certain specified documents or for the production of all documents of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised agents, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required:

Provided that the exemption u/s 132 of the Code of Civil Procedure; 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and 228 of the Indian Penal Code (45 of 1860)."

The emphasis in sub-section (3) of section 40 of the Act is inescapable which is to the effect that the choice whether the person summoned should attend in person or by an authorised agent vests with the officer. A literal interpretation of this section thus admits of no doubt that it is for the officer to satisfy consistent with the object of summoning the said person whether the person summoned should attend in person or through authorised agent.

In this context, it is worthy to note the provisions in Order V, Rule 1, sub-rule (2) of Civil Procedure Code, which reads :

"A defendant to whom a summons has been issued under sub-rule (1) may appear in person, or by a pleader duly instructed and able to answer all material questions relating to the suit, or by a pleader accompanied by some person able to answer all such questions."

This gives an indication that wherever the statute wants to confer an authority on the person summoned to appear through an authorised agent or lawyer the statute specifically provides for the same. But the arguments of the learned Counsel, Shri Bobde, is that whenever statute vests discretion with an authority, the discretion has to be exercised consistent with the principles of natural justice. According to the learned Counsel inasmuch as the said sub-section vests a discretion with the authority, that automatically creates a right in the person so

summoned to have a request made by him in that behalf considered by the said authority. When such is the position the said consideration in exercise of the discretion, according to the learned Counsel, has to be adhering to the principles of natural justice, particularly the principles of audi alteram partem. But on the other hand, learned Counsel, Shri Bhangde, for the respondents, maintained that this aspect is concluded by the decision of Supreme Court in the case of Poolpandi Vs. Superintendent, Central Excise and others etc. etc., . Shri Bobde, learned Counsel, maintained that Annexure-II order since does not assign any acceptable reason for rejecting the prayer for presence of a lawyer at the time of interrogation, the said order is infirm and the reasons in support of the said order cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. The learned Counsel made reliance on the decision in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and urged that the order Annexure-II only states that the prayer for assistance of the lawyer cannot be entertained on account of the decision in Poolpandi Vs. Superintendent, Central Excise and others etc. etc., , referred early. The point urged by the learned Counsel is, what was considered in the said decision was only the right of such person under Arts. 20(3) and 21 of the Constitution. It was urged by the learned Counsel that only the ratio and the principles underlying is binding and the same cannot be extended. Reliance was placed by the learned Counsel on the decision in the case of Prakash Amichand Shah Vs. State of Gujarat and Others, . The thrust of the argument of the learned Counsel, Shri Bobde, was that in Poolpandi Vs. Superintendent, Central Excise and others etc. etc., referred early, the aspect as is now urged by the petitioners as per section 40 of the Act, was not considered. Learned Counsel, maintained that rules of natural justice apply even to administrative actions which entails civil consequences.

5. Before going into the question whether Poolpandi's case is complete answer to the present prayer by the petitioners, it will be worthy to see, with due regard to the scheme and object of the Act, whether the principles of natural justice has to be observed when the authority acts u/s 40(3) of the Act.

6. There are two requirements of natural justice (a) no man shall be judge in his own cause, and (b) no man shall be condemned unheard. But the said requirement may be dispensed with either by express words of statute or by necessary implication. True, such exclusion of natural justice by implication must be clear and it should spring from the provisions of the Act. In the decision in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , referred early, at page 291 of it is observed :

"Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential 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

demandsTrue it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excludedThe audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications.

" Shri Bobde pointed out that, in the said decision the Court expressed to the effect that fair opportunity of being heard immediately on impounding the passport, in the circumstance, could satisfy the mandate of natural justice. The learned Counsel then relied on the decision in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, to maintain that even where statute expected immediate action the Court held that hearing at pre-decisional stage must be given. Therefore, according to the learned Counsel, natural justice cannot be excluded merely because immediate action is necessary. Alternatively it was maintained by him, even if at the stage of issuing summons the person so summoned is not entitled to be heard; when he makes a request for the presence of his lawyer at interrogation and/or to be represented by an authorised agent on his appearance in response to the summons, the authority has to consider the same consistent with the principles of natural justice,

7. As noted, the main thrust of the argument of learned Counsel, Shri Bhangde, is on the basis of the decision in *Poolpandi Vs. Superintendent, Central Excise and others etc. etc.*, . It will be seen that the said decision was rendered in an appeal against the decision in *K.T. Advani, New Delhi Vs. The State, New Delhi*, also. In *Advani's* case, the High Court on interpretation of section 30 of Advocate's Act and section 40 of this Act and Arts. 20(3) and 22(1) of the Constitution, among other things, held that a person so summoned is entitled to have the presence of a lawyer when he is questioned during investigation under the provisions of the Act. Before the Supreme Court various arguments were advanced in support of the said claim which included a contention to the effect that since there is possibility of the person under interrogation being prosecuted he is entitled to have assistance of a lawyer by virtue of Article 20(3) of the Constitution. Arguments were also advanced under Article 21 of the Constitution in support of the said claim. Reliance is seen to have been made on the decision in *Nandini Satpathy Vs. P.L. Dani and Another*, . But the Supreme Court repelled the said arguments. What is important in this connection is, the Supreme Court in the said decision held that protection against self incrimination belong to a person who is accused of an offence and that a person called (or questioned during investigation by authorities under the provisions of Customs Act or F.E.R. Act being not an accused, refusal to allow the presence of a lawyer is not violative of Article 20(3) of the Constitution. In this context the observation by the Apex, Court while dealing with the argument in support of the claim for the presence of lawyer at interrogation relying on the minority judgment in 1957 (352) U.S. 330 is relevant and instructive. In para 10 at page 1799 *Poolpandi Vs. Superintendent, Central Excise and others etc. etc.*, it is observed :

"The learned Judge, accordingly expressed his dissent observing that to compel a person to answer questions at a secret interrogation where he is denied legal assistance and where he is subject to the uncontrolled and invisible exercise of power by Govt. officials, would be unconstitutional. We do not share the apprehension as expressed above in the minority judgment in connection with enquiry and investigation under the Customs Act and other similar statutes of our country. There is no question of whisking away the persons concerned in the cases before us for secret interrogation, and there is no reason for us to impute the motive of preparing the ground work of false cases for securing conviction of innocent persons, to the officers of the State duly engaged in performing their duty of prevention and detection of economic crimes and recovering misappropriated money justly belonging to the public."

In para 11, Their Lordships clearly held that a person who is summoned does not have such right as is now claimed by the petitioners. Their Lordships held :

"Mr. Salve was fair enough not to pursue his argument with reference to the comfort part, but continued to maintain that the appellant is entitled to the company of his choice during the questioning. The purpose of the enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the person in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-co-operative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour others engaged in tax evasion as the cost of the exchequer. Applying the "just, fair and reasonable test" we hold that there is no merit in stand of appellant before us."

A reading of this judgment does not admit of the scope for a claim that the Supreme Court there did not specifically refer to section 40 in the body of the discussion, it is still open to maintain that section 40 sub-section (3) particularly has to be interpreted to mean !hat the authority is obliged to exercise the discretion u/s 40(3) consistent with the principles of natural justice. As indicated, the endeavour of the learned Counsel, Shri. Bobde, is to read into section 40(3) the principles of natural justice. The question to be posed in this connection is whether on account of necessity the principles of natural justice themselves stand excluded. What the learned Counsel strived to maintain was, the principle of audi alteram partem has to be observed while exercising the power of authority u/s 40(3) of the Act. The discretion u/s 40(3) carries with it an obligation to exercise the discretion adhering to the principles of natural justice. If the principles of natural justice stand excluded atleast by implication, then one cannot insist that the said discretion has to be exercised consistent with the

principles of natural justice. Therefore, it becomes necessary to consider whether in the context of section 40(3) of the Act, the principles of natural justice stand excluded.

8. As to the ratio laid down in Poolpandi's case, referred early, the main thrust of the argument of Shri Bobde, as indicated, is that section 40(3) of the Act, in the aforesaid perspective was not considered and discussed in the said decision. In appreciating the said argument, it is worthy to note that the principles laid down in the decision in Kesho Ram and Co. and Others etc. Vs. Union of India (UOI) and Others, wherein the Supreme Court held while interpreting Article 141 of the Constitution that once a point is finally decided by the Court it becomes binding and cannot be reopened on the ground that some points have not been raised or considered by the Court. And as to interpretation of statutes, the Supreme Court held that an interpretation which would advance the object and purpose of the Act should, be adopted. In Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, , while interpreting Article 141 of the Constitution, it is held by Supreme Court that the decision of Supreme Court is binding on the High Courts and the same cannot be ignored on the ground that relevant provision was not brought to the notice of the Supreme Court. Not only that, the decision in Poolpandi Vs. Superintendent, Central Excise and others etc. etc., was rendered against an appeal from K.T. Advani, New Delhi Vs. The State, New Delhi, the question arose under F.E.R. Act was noticed by the Supreme Court, and the appeal against the aforesaid decision of the High Court was allowed against that part of the judgment of the High Court which dealt with the right of the respondents to have their lawyer during interrogation. Then it is idle, in such circumstance, to contend that still it is open u/s 40(3) of the Act for a summoned person to claim the presence of a lawyer at the time of his questioning.

9. Of course, interpretation of statute is to discover the intention of the legislature. When the concerned provision admits of no doubt or ambiguity, the literal meaning of the provision giving effect to words employed therein has to prevail, for the intention of the legislature is what it states in the statute. But the meaning to be given to a provision should be with due regard to the context in which the provision appear, for the words would capture depth and content of their meaning from the context in which they are used. And when one speaks of context the same takes into its fold the object of the legislation revealed through the preamble and scheme of the said statute. The very object and scope of the statute is such that such claim for the presence of lawyer at the time of questioning or to have a person of his choice to represent him, cannot be entertained and the principles of natural justice has to be held to be excluded by necessity. In the decision in Union of India and another Vs. W.N. Chadha, the aspect as to the applicability and exclusion of audi attire partem rule was considered. The Court held that the rule of audi alteram partem is a rule of justice and its application will exclude where the rule itself would lead to injustice and that, the said rule cannot be applied to defeat the ends of justice or to make

the law lifeless, absurd, stultifying and self-defeating or plainly contrary to the common sense of the situation". This decision notes that there are exceptional circumstances and situations where the application of the rule of audi alteram partem is not attracted. The same view is expressed in the decision in State Bank of Patiala and others Vs. S.K. Sharma, . In para 32 of the judgment, among other things, it is held :

"There may be situations where the interest of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

Therefore, when a question is posed as to whether the principles of natural justice has to be applied in a given situation, the Court has to balance the interest of the public/ State with that of a person who is summoned. In Poolpandi's case, this aspect was considered by the Supreme Court and the Supreme Court put the object of the statute at higher pedestal than the principles of natural justice, for the scheme, the purpose and object of the Act are for unearthing misappropriated money which ultimately should belong to the people of this country. When the object of the Act is so understood, it is inescapable that a person cannot insist that the authority acting u/s 40 of the Act is obliged to observe audi alteram partem. It is exclusively for the investigating authorities to decide in a given situation whether the particular person himself must answer the questions.

10. The learned Counsel, Shri Bobde, attempted to maintain that there are situations where another has to represent the person summoned like a person suffering from legal disability. Such person must be able to be represented by an authorised agent of his choice. This need not be always correct, illustratively one can envisage a situation where a minor witnessing a particular occurrence which attracts the provisions of F.E.R.A.; merely because such a witness suffers from legal disability, in an investigation, such witness cannot be allowed to be represented by an authorised agent. Merely because of minority one cannot become an incompetent witness. It is not open to a person summoned for interrogation to insist that he must be represented by another. If he is conferred with such a right that would amount to his directing as to how the investigation should proceed. This certainly does not belong to the person summoned. It should be noted that the person so summoned is not one "accused of an offence." The very purpose of summoning and questioning is to decide upon as to who is the real person to be proceeded against.

11. The petitioners in paragraph 5 of the petition maintained that one Shri Vinod Goel, a Canadian citizen, made gifts to the petitioners and that it has no other significance. But in para 1 of the reply to the application of the petitioners for appropriate orders, the 1st respondent states that enquiries under the provisions of F.E.R.A. relating to N.R.I. Vinod Goel were initiated in 1994 and that during the course of investigation it was revealed that one Sanjeev Goel, a

person resident in India (staying in Mumbai) was holding mandate to operate the N.R.E. accounts in India on behalf of Shri Vinod Goel. "Their modus operandi was to purchase/acquire the foreign currency from the black market in India and deposit the same into the N.R.E. A/cs in the name of Shri Vinod Goel. Out of these N.R.E. A/cs, several cheques were issued as so called gifts to various persons resident in India at a premium over and above the amount of cheque issued."

When the object and purpose of the Act is understood, as already noticed, the issue of summons to persons who admittedly had received amounts which they claimed to be gifts, so as to discern whether any offence under F.E.R.A. was committed or there is any violation of the provisions of law in the said transaction, it would be necessary for a genuine and effective investigation that the concerned authority is clothed with the necessary power to summon and question persons whom they consider to be either suspects or persons who are in possession of valuable information as regards the subject. In such a process, the object of the Act, as indicated, is to expose and contain the exploitation and subversion of the economy of the country. There, the principles of audi alteram partem cannot come to the assistance of such persons who are so summoned.

12. Shri Bobde, learned Counsel, brought to our notice the decision of this Court in W.R No. 1280/94 which, according to the learned Counsel, arose under F.E.R. Act and by the said decision, this Court has allowed the prayer of the petitioners to be accompanied by a responsible person. Therefore, according to the learned Counsel, even we defer with the said view in the said decision, we have to refer the matter to a larger Bench as the said decision is by Division Bench of this Court. The learned Counsel relied on the decision in Rajesh Kumar Verma Vs. State of Madhya Pradesh and others, in support of his submission. A reading of the decision in W.R No. 1280/94 does not reveal that any principle of law is discussed or laid down. It is evidently a decision on the facts of that case. Therefore, the point urged by the learned Counsel cannot be accepted.

13. Shri Bhangde, learned Counsel, maintained that the claim of the petitioner for presence of a lawyer or company of a person of their choice is not sustainable u/s 40 of the Act, unless there is a right in them for the said facility. Such a claim even on the plea of discrimination cannot be sustained unless they show they have a right to enforce. In support of his contention, the learned Counsel made reliance on the decision in State of Haryana and Others Vs. Ram Kumar Mann, . Yet endeavour was made to maintain that even if the person summoned is of right cannot insist presence of a lawyer, he still can make a request for the same, and when made the same has to be considered. Reference was made to the decision in Johny D'couth Vs. State of Tamil Nadu, in support of the claim for presence of a lawyer drawing parallel to the observation in para 5 of the judgment to the effect that though the provision of the Act disentitles a detenu from claiming as of right to be represented by a lawyer, it does not disentitle him from making a request for the service of a lawyer. The first and foremost thing to

be noted in appreciating the same is, that was a case of a detenu who was detained under the provisions of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The right of a detenu under the relevant provisions of the statute as well as Constitution cannot be equated with a claim of a person who is simply summoned for questioning. The said decision cannot come to the assistance of persons like the petitioners, particularly in the contest of the declaration of law by Supreme Court in Poolpandi Vs. Superintendent, Central Excise and others etc. etc., . The effect of the said decision certainly would not enable one to maintain, a lawyer is an authorised agent.

14. It is pertinent in this connection to note that as regards the prayer of the petitioners that the 1st petitioner must be allowed to represent other petitioners, by Annexure-IV the authority has informed that the said request will be considered when appropriate authorisation, as stated in Annexure-II, are produced. As regards the prayer that there must be atleast 48 hours notice, a perusal of Annexure-III summons would show that the said summons has granted more than 48 hours. By the amendment the petitioners have sought to maintain that petitioner No. 1 is entitled to retract from the statement recorded on 20-1-1997 on the grounds mentone in para 10 of the amended petition. The respondents have produced the copy of the summons which allegedly was served on the 1st petitioner before he was questioned. In answer to the same, the respondents have filed a further affidavit on 27-8-97 denying the allegations. In the context of the prayers in the petition, we do not consider that in this petition, we should go into the merits of the rival contentions in relation to the aforesaid statement recorded by the authority. In that view, Crim, Appin. No. 132/97 is dismissed. In view of the above, discussion in this judgment, the petitioners are not entitled to the prayers in the petition and the petition is liable to be dismissed. In the result, the writ petition is dismissed. Rule discharged. No costs.

15. Petition dismissed.