(2013) 01 DEL CK 0408

In the Delhi High Court

Case No : Writ Petition (C) 401 of 2013 and CM No. 802 of 2013

Shahid Balwa APPELLANT

Vs

The Directorate of Enforcement RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Citation : (2013) 6 AD 698 : (2013) 199 DLT 380

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Rakesh Tikku, with Mr. Vijay Aggarwal, Mr. Mudit Jain, Mr. Ashish Dhingra and Mr. Hemant Chauhan, for the Appellant; Vikas Garg, Special Counsel with Mr. Sanjiv Aggarwal, AD (PMLA), for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—The aforementioned writ petitions lay challenge to a common order dated 03.01.2013 passed by the Special Director, Directorate of Enforcement, New Delhi (in short DOE). The impugned order has resulted in, the request made by the petitioners by way of a common application dated 12.12.2012, for cross examination of persons whose names and details are set out in paragraph 4 of their application, being declined. The petitioners before me claim that this is resulted in breach of the principles of natural justice. It may be pertinent to note, at the very outset, that the proceedings before the Special Director, DOE have not concluded, as yet. It may also be relevant to record that, this is a second round of litigation before this court. In the first round, the petitioner had approached this court, by way of two separate writ petitions bearing nos. 6358/2012 and 6360/2012, seeking copies of final replies filed by other notices apart from the petitioners herein; who are arrayed as respondents in the complaint filed by DOE. The said writ petitions were disposed of by an order dated 05.10.2012, directing respondents to give replies, if any, filed by other noticees after the petitioners had filed their final reply. It is not disputed before me that the respondents have complied with the said direction and have supplied copies of replies of other noticees.

2. Before I deal with the contentions of the petitioners raised before me, I may briefly touch upon the circumstances which have led to the institution of the present petitions:-

2.1 On 01.07.2007, the Assistant Director, DOE filed a complaint u/s 16(3) of the Foreign Exchange Management Act, 1999 (in short FEMA) for alleged contravention of Section 6(3)(b) of the FEMA read with Regulation 5(1) and paragraph 2, 3 and 9(1)(A) and (B) of Schedule 1 of the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 (in short 2000 Regulations) as also the provisions of Press Note No. 3 (2007 series) issued by Ministry of Commerce and Industries, Department of Industrial Policy and Promotion (SIA), (FC Division), Government of India (in short GOI), by a company going by the name Etisalat D.B. Telecom Pvt. Ltd. (formerly known as Swan Telecom Pvt. Ltd.). (in short Etisalat)

2.2 In so far as the petitioners were concerned alongwith five (5) other noticees, they were charged with contravention of the provisions of Section 42 of the FEMA.

2.3 In the complaint, it was alleged that Etisalat and the petitioners who alongwith other five (5) noticees were Directors in the said company at the relevant point in time had contravened the provisions of FEMA, resulting in violation to the tune of several thousand crores. The amount referred to in the complaint adds upto, approximately, Rs. 7260 Crores. The complaint was accompanied by documents on which reliance is sought to be placed by the respondents, in the proceedings presently pending before the Special Director, DOE. The details of the documents on which reliance is sought to be placed, is set out in Annexure B, which accompanies the complaint. In all, there are sixteen (16) documents referred to in Annexure B, amongst which there are statements of three (3) persons made on various dates, the persons concerned are: Ahmed Shakir, Director Genex Exim Ventures Pvt. Ltd. (in short Genex) and Mr. Pratap Ghose, CFO of Etisalat, K. Vasudeva, Vice President (Finance), Etisalat. It may be pertinent to note it is these persons apart from the complainant i.e., one Rajeshwar Singh, Assistant Director, DOE, qua whom the petitioners made a request for cross-examination.

2.4 In nutshell, the allegation against the noticees is that, during the period 2008 to May, 2010, foreign direct investment was made in Etisalat (which was formerly known as Swan), camouflaged as a domestic investment, thereby contravening the extant rules and regulations which required that, a non resident, under the automatic route could not invest beyond 49% in the equity of a company. In this device, according to the respondents, Genex, amongst other entities/persons was, inter alia used, to route FDI, without requisite permission of the Secretariat of Industrial Approvals (in short SIA) and/or the Foreign Investment Promotion Board (in short FIPB) in Swan (now known as Etisalat).

2.5 In order to establish the allegations, apart from statements of employees of

Genex and Etisalat, several documents have been filed to establish the charge. These include, inter alia, subscription agreement dated 23.09.2008 to which amongst others Swan and petitioners are parties; Put and Call Option agreements arrived at between Etisalat International India Ltd. (EIIL) and Genex; letter dated 09.03.2011 issued by one of the Directors of Etislat Mauritius Ltd. (EML) to DOE alongwith relevant enclosures; amendment dated 04.12.2008 to the subscription agreement; assignment deed dated 29.10.2008 executed between EIIL and EML; deed of amendment dated 12.11.2008 between EIIL and EML, minutes of Board of Directors meeting dated 27.10.2008, 25.02.2009 and 09.09.2009; letter of FIPB dated 29.09.2010 issued to Etisalat; letters dated 01.09.2010 and 13.02.2010 issued by Etisalat to DOE alongwith relevant enclosures; letter dated 05.03.2011 of Registrar of Companies, Mumbai (ROC) to DOE alongwith relevant enclosures; letter dated 29.03.2011 of RBI, Mumbai to DOE; and the annual report 2008 of Emirates Telecommunications Corporation - Etisalat.

2.6 Qua the aforementioned complaint, a show cause notice (SCN) was issued on 08.07.2011. By virtue of the said show cause notice the noticees, which included the petitioners, were called upon to explain within thirty (30) days of the receipt of the said notice, as to why adjudication proceedings u/s 13 of the FEMA in the manner provided under Rule 4 of the Foreign Exchange Management (Adjudication, Proceedings and Appeal) Rule, 2000 (in short the Adjudication Rules), ought not to be held. The show cause notice further indicated that, in case a decision was reached that, adjudication proceedings were to be held then, the noticees would be required to appear either in person or through legal practitioner/chartered accountant duly authorized by them, to explain and provide such documents and evidence which may be useful or relevant to the subject matter of the proceedings in issue. The SCN adverted to the fact that DOE retained the right to issue a corrigendum or addendum on the basis of fresh evidence, if any, which they may receive in future.

2.7 In response to the aforementioned SCN, petitioners filed their preliminary reply dated 18.02.2012, after a gap of nearly seven (7) months. Pertinently, there is no averment to the effect that statements of persons supplied alongwith the complaint, could not be relied upon as they were not recorded in their presence. Furthermore, at this stage no request was made that the petitioners be granted an opportunity to cross-examine the persons whose statements had been supplied with the complaint.

2.8 After nearly three (3) months the petitioners through counsel filed three applications. These being: (i) application for non-joinder of parties and for joint adjudication; (ii). application under Article 20(3) of the Constitution of India for keeping the adjudication proceedings in abeyance; and (iii) lastly, an application for keeping the proceedings in abeyance. In this application, a prayer apparently also made for being provided necessary documents for proper adjudication.

2.9 The aforementioned was followed by a fourth (4th) application, which was filed on 17.08.2012, for inspection of records and, as to the orders, if any, which had been passed on the applications filed by the petitioners.

3. The aforementioned applications, apparently were followed by a request, made on, 06.09.2012, to the Special Director, DOE for a decision on the said applications.

3.1 According to the petitioner, the Special Director, DOE by an order dated 17.09.2012 dismissed the applications filed by the petitioners.

3.2 It is against the order dated 17.09.2012, that the petitioners had approached this court by way of two writ petitions (WP (C) Nos. 6358/2012 and 6360/2012) which were disposed of vide order dated 05.10.2012, with a direction that, after a final reply was filed by the petitioners, copies of replies of other noticees be furnished to them.

3.3 As indicated above, the petitioners admittedly were provided copies of replies of other noticees on 12.11.2012 after the petitioners had filed their final replies on 05.10.2012 and made, requisite request to the respondents.

3.4 Undoubtedly, even in the final reply dated 05.10.2012 filed by the petitioners, there is no assertion to the effect that respondents could not place reliance on the statement of persons referred to in Annexure B as they were not recorded in their presence. There was significantly, absence of assertion that the petitioner ought to be given an opportunity to cross-examine the said persons. What is instead adverted to, is that reliance was being placed by the respondents on the statement of Mr. Ahmed Shakir, the Director of Genex, who was an ''unpardoned accomplice in the matter''. As regards others, there is an eloquent absence of even such an assertion.

3.5 An application, however, seeking permission to cross-examine the persons whose statements had been supplied with the complaint and whose names appeared in Annexure B was filed after a gap of more than two (2) months on 12.12.2012.

3.6 It is this application, which was, dismissed by the impugned order dated 03.01.2013.

SUBMISSIONS OF COUNSELS

4. Mr. Tikku, learned senior counsel for the petitioner has assailed the impugned order on the following grounds:-

(i). in passing the impugned order the adjudicating Officer had completely compromised the petitioner''s right to cross-examine, which had resulted in breach of principles of natural justice;

(ii). the provisions of Section 16 (1) of the FEMA, which mandate a grant of reasonable opportunity of being heard before imposing a penalty, encapsulated within it, the right to cross-examine any person on whose statement reliance is sought to be placed by the complainant. Mr. Tikku submitted that the adjudicating authority had wrongly construed the provisions of Rule 4(5) of the Adjudication Rules by holding that since the provisions of the Indian Evidence Act, 1872 (in short the Evidence Act) were not applicable to the proceedings, the right to cross-examination also stood excluded;

(iii). The proceedings, which are conducted before the adjudicating authority, had the trappings of a court, and therefore, the noticee are necessarily conferred with the right to cross-examine all such persons on whose statement(s) the complainant would seek to place reliance. In this regard, a reference was made to the provisions of Sections 16(5) and 28 of the FEMA;

(iv). denial of the right to cross-examine would lead to serious consequences, in as much as, the right of appeal, provided u/s 19 of the FEMA to the appellate tribunal against the order of the adjudicating authority; was subject to the appellant making a pre-deposit of the penalty imposed. Mr. Tiku submitted that failure to deposit the penalty imposed, within the stipulated period of 90 days from the date on which notice for payment of such penalty was served, could result in civil imprisonment, u/s 14 of the FEMA.

4.1 In support of his submission that cross-examination was a vital right available to the petitioner; the denial of which would lead to the breach of principles of natural justice, reliance was placed on the following judgments: (a) Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra & Ors., Civil Appeal NO. 7728/2012 decided on 08.11.2012 by the Supreme Court; (b). Mehar Singh Vs. Appellate Board Foreign Exchange, Crl. A. 109/1975, decided on 18.09.1985; (c). Central Govt. Vs. Fr. Alfred James Fernandez, ; (d); Kanwar Natwar Singh Vs. Director of Enforcement and Another, ; (e). State of Kerala Vs. K.T. Shaduli Yusuff etc., ; (f). S.C. Girotra Vs. United Commercial Bank (UCO Bank) and Others, .

5. On the other hand, Mr. Garg, who appeared for the respondents largely relied upon the impugned order to defend the position of the respondents. It was also submitted by Mr. Garg that, objection of the kind now raised by the petitioner did not find mention either in the preliminary reply or in the final reply filed on behalf of the petitioners. Mr. Garg contended that FEMA and the rules and regulations framed thereunder, by themselves, provided a complete code and therefore, there was no inherent right of cross-examination, as contended by the petitioners. It was further submitted by Mr. Garg that under Rule 4(5) of the Adjudication Rules, the petitioners would have a further opportunity to submit documents and evidence, which may be relevant for the purposes of the proceedings conducted before the Adjudicating Authority.

5.1 It was Mr. Garg''s submission that Rule 4(5) of the Adjudication Rules quite clearly indicated that the Adjudicating Authority was not bound to observe the provisions of the Evidence Act.

5.2 In support of his contentions, Mr. Garg placed reliance on the judgment of the Supreme Court in the case of Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, , and A.K. Roy and Others Vs. Union of India (UOI) and Others, .

REASONS

6. Having heard the learned counsels for the parties and perused the documents placed on record, in my view, quite clearly the following emerges:-

(i). pursuant to the complaint file against the petitioners u/s 16(3) of the FEMA on 01.07.2011, a copy of the same alongwith the documents, and statement of persons, relied upon were furnished to them;

(ii). in respect of the complaint, a show cause notice was issued pursuant to which the petitioners filed a preliminary reply on 18.02.2012 nearly seven (7) months after the issuance of notice in the complaint. Notice in the complaint was issued on 08.07.2011 while the preliminary reply was filed on 18.02.2012;

(iii). On 25.05.2012, the petitioners filed three (3) applications on various grounds. These applications were dismissed by the Special Director, DOE vide order dated 17.09.2012. The said order was assailed by the petitioners by two separate writ petitions being: 6358/2012 and 6360/2012, which were dismissed on 05.10.2012, with a direction to the respondents to supply copies of the replies filed by the other noticees after final replies were filed by the petitioners;

(iv). final replies were filed, on the very same date by the petitioners, i.e., on 05.10.2012, in which, no objection was taken that the complainant/respondents could not rely upon the statements of persons which accompanied the complaint as they were not recorded in their presence. This was the same position which obtained even qua the preliminary reply.

6.1 The aforesaid undoubtedly leads to a conclusion that the petitioners are attempting to derail the adjudication of the proceedings by filing one application after the other at various stages of the adjudication. It is not the case of the petitioners before me that they were not furnished with the material which is relied upon or that they were not issued notice or, even that, they were not given an opportunity to file their defence. It is not the case of the petitioners that they are not being heard in the matter. Therefore, the argument raised in their application for grant of request for cross-examination, which according to them, has been erroneously rejected and would thus, constitute a breach of principles of natural justice, requires to be examined in the background of the aforementioned circumstances, the position which obtains in law, and the stage at which a writ court can be called upon to intervene in the matter.

6.2 There are plethora of judgments of the Supreme Court and the High Courts including the ones cited by the learned counsel for the petitioners before me, dealing with the issue of cross-examination. A summary of the law on the issue would indicate that it is not as if a party can demand, as of right, the right to cross-examine witnesses or persons who have made statements against such a party. The enforceability of such a right, if demanded, would depend upon the facts and circumstances of the case, the nature of enquiry, the provisions of the statute and the rules as also the regulations governing the enquiry, the conduct of the person seeking to enforce the right of cross-examination i.e., as to whether such a right was demanded in the very first instance or not, and the prejudice, if any, caused to such a party by being denied the right of cross-examination on assessment of the entire material, which is placed before the authority conducting the enquiry.

6.3 It would be trite to say that principles of natural justice, simply put, only mean fair play in action. The recognized principles enunciated by courts, in this behalf, are that, the party against whom action is taken should be noticed and heard. Hearing to the party should be granted by a disinterested and unbiased adjudicator. Bias itself has several refinements including the principle of likelihood of bias. Similarly, hearing in every case does not necessarily mean the right to demand oral hearing (see Union of India and another Vs. M/s. Jesus Sales Corporation,).

6.4 In this particular case, respondents have substantially adhered to the principles of natural justice, in as much as, material relied upon including the statements of persons whose cross-examination is sought, have been provided, notice has been issued, opportunities have been granted to the petitioners to file not only preliminary replies but also final replies. That apart, with the intervention of the court, replies of other noticees have also been supplied to the petitioners.

6.5 Therefore, the question which arises for consideration is: should the court interdict the proceedings before the adjudicating authority by directing the said authority to grant the petitioner''s request to cross-examine the persons whose statements have been supplied. I have in great detail referred to the documents supplied to the petitioners, which are essentially those, which are executed between the noticees including the petitioners, to demonstrate that there is yet no final evaluation or appreciation of the material, which is placed on record before the adjudicating authority, by the complainant. Whether the complainant is able to establish the allegations made against the petitioners and other noticees based on the material supplied or not and, to the extent the statements become necessary to support or explain the remaining material on record, can become known, only after a final order is passed by the adjudicating authority. It cannot but be contended by the petitioners that prejudice, if any, caused can be assessed only after the adjudicating authority has finally appraised the material placed on record.

6.6 I may only add here that neither the provisions of FEMA i.e., Section 16 which requires a reasonable opportunity to be given to the party against whom a complaint is instituted or the Adjudication Rules, in particular Rule 4 (5), oblige the adjudicating authority to grant as of right the opportunity to the noticees to cross-examine the persons who may have given statements explaining a transaction. The provisions of Section 16 of the FEMA and Rule 4 of the Adjudication Rules do not explicitly advert to this aspect, therefore, much would depend on the discretion of the adjudicating authority as he progresses with the enquiry. This discretion, however, would have to be exercised keeping in mind the material at hand and the stage of enquiry. It is, therefore, provided in Rule 4(5) of the Adjudication Rules, that the adjudicating authority is not bound by the provisions of the Evidence Act.

6.7 As contended by Mr. Garg, before me, even at this stage, the petitioners would be at liberty to file documents or evidence in consonance with the provisions of Rule 4(5) of the Adjudication Rules to the extent they are relevant to the enquiry at hand. Therefore, the contention of the learned counsel for the petitioners that the denial of cross-examination would axiomatically lead to the conclusion that a breach of principles of natural justice has occurred, cannot be accepted. The appellate or a superior court (i.e., a writ court) should have the benefit of the final order to come to a conclusion that denial of cross-examination was prejudicial to the interest of the party seeking cross-examination.

7. To put the matter in perspective, I may refer to the following cases in which the Supreme Court has held that denial of cross-examination did not result in breach of the principles of natural justice. The first in the line of cases is the judgment of the Supreme Court in the case of Kanungo and Company Vs. Collector of Customs and Others, . In this case, the appellant before the Supreme Court, was charged with the offence of having smuggled wrist watches into the country without having a valid import license. In this process, a part of the consignment of wrist watches was confiscated. In the Supreme Court the appellant raised an issue that the burden of proving unlawful import had not been discharged by the Customs authority and that the impugned order had been passed based on the enquiries made by the Custom authorities with some persons, who had not been produced for cross-examination. While repelling this contention, the Supreme Court made the following observations:-

..11. The learned counsel for the appellant contended that the burden on the Customs Authorities has not been discharged. He urged that there was no evidence that the watches had not been brought into India lawfully. He urged, secondly, that the impugned order wrongly placed the burden on the appellant, thirdly, that the impugned order was made in contravention of natural justice; and fourthly, that there was no evidence that watches had been imported in contravention of law.

12. We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our opinion, the

principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly, we hold that there is no force in the third contention of the appellant....

(emhpasis supplied)

7.1 Also see Balumal Jamnadas Batra Vs. State of Maharashtra, and Collector of Customs, Madras and Others Vs. D. Bhoormall, ; which referred to M/s. Kanungo and Company Vs. Collector of Customs and Others.

7.2 The second judgment of the Supreme Court on the point, is the judgment in the case K.L. Tripathi Vs. State Bank of India and Others, . Briefly, in this case, the appellant had approached the Supreme Court against an order of dismissal passed by the State Bank of India, which had been affirmed by the High Court. The order of dismissal was passed after an investigation was carried out, which inter alia involved recording of statements of persons involved in the impugned transaction. The appellant was charged with having indulged in financial irregularity. One of the main arguments, advanced on behalf of the appellant, was that, the material relied upon against him had been gathered in his absence, which included statement of witnesses, which were neither recorded in his presence nor, was he allowed to cross-examine the witnesses. The Supreme Court, while repelling this contention made on behalf of the appellant, made the following observations in paragraphs 29 to 34, which shed great clarity on the issue raised in the matter before me.

... 29. We are of the opinion that Mr. Garg is right that the rules of natural justice as we have set out hereinbefore implied an opportunity to the delinquent officer to give evidence in respect of the charges or to deny the charges against him. Secondly, he submitted that even if the rules had no statutory force and even if the party had bound himself by the contract, as he had accepted the Staff Rule, there cannot be any contract with a Statutory Corporation which is violated of the principles of natural justice in matters of domestic enquiry involving termination of service of an employee. We are in agreement with the basic submission of Mr. Garg in this respect, but we find that the relevant rules which we have set out hereinbefore have been complied with even if the rules are read that requirements of natural justice were implied in the said rules or even if such basic principles of natural justice were implied, there has been no violation of the principles of natural justice in respect of the order passed in this case. In respect of an order involving adverse or penal consequences against an officer or an employee of Statutory Corporations like the State Bank of India, there must be an investigation into the charges consistent with the requirements of the situation in accordance with the principles of natural justice as far as these were applicable to a particular situation. So whether a particular principle of natural justice has been violated or not has to be judged in the background of the nature of charges, the nature of the investigation conducted in the background of any statutory or relevant rules governing such enquiries. Here the infraction of the natural justice complained of was that he was not given an opportunity to rebut the materials gathered in his absence. As has been observed in "On Justice" by J.R. Lucas, the principles of natural justice basically, if we may say so, emanate from the actual phrase "audi alteram partem" which was first formulated by St. Augustine (De Duabus Animabus, XIV, 22, J.P. Migne, PL. 42, 110).

30. In dealing with particular situation we must formulate the actual principles to be applied in a particular situation. Hence it may be illustrated as J.R. Lucas-"On Justice" (page 86) has done it, thus:

Hence when we are judging deeds, and may find that a man did wrong, there is a requirement of logic that we should allow the putative agent to correct misinterpretations or disavow the intention imputed to him or otherwise disown the action. God needed to ask Adam ''Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat ?'' because it was essential that Adam should not be blamed or punished unless, he had done exactly that deed. If the serpent had planted the evidence, or if he had beguiled Adam into eating it under the misapprehension that it came from another, non-forbidden tree, then Adam had not sinned and should not have been expelled from Eden. Only if the accused admits the charge, or, faced with the accusation, cannot explain his behaviour convincingly in any other way, are we logically entitled to conclude that he did indeed do it.

31. Wade ''in his Administrative Law'', 5th Edition at pages 472-475 has observed that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter, the application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.

32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross-examination must inevitable form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-

examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement.

33. The party who does not want to controvert the veracity of the evidence from or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. Where there is no dispute as to the facts, or the weight to be attached on disputed facts but only an explanation of the acts, absence of opportunity to cross-examination does not create any prejudice in such cases.

34. The principles of natural justice will, therefore, depend upon the facts and circumstances of each particular case. We have set out hereinbefore the actual facts and circumstances of the case. The appellant was associated with the preliminary investigation that was conducted against him. He does not deny or dispute that. Information and materials undoubtedly were gathered not in his presence but whatever information was there and gathered namely, the versions of the persons, the particular entries which required examination were shown to him. He was conveyed the informations given and his explanation was asked for. He participated in that investigation. He gave his explanation but he did not dispute any of the facts nor did he ask for any opportunity to call any evidence to rebut these facts. He did ask for a personal hearing, as we have mentioned hereinbefore and he was given such opportunity or personal hearing His explanations were duly recorded. He does not allege that his version has been improperly recorded nor did he question the veracity of the witnesses or the entries or the letters or documents shown to him upon which the charges were framed and upon which he was found guilty. Indeed it may be mentioned that he was really consulted at every stage of preliminary investigation upon which the charges were based and upon which proposed action against him has been taken, In that view of the matter, we are of the opinion, that it cannot be said that in conducting the enquiry or framing of the charges or arriving at the decision, the authorities concerned have acted in violation of the principles of natural justice merely because the evidence was not recorded in his presence or that the materials, the gist of which was communicated to him, were not gathered in his presence. As we have set out hereinbefore, indeed he had accepted the factual basis of the allegations. We have set out hereinbefore in extenso the portions where he had actually admitted the factual basis of these allegations against him, where he has not questioned the veracity of the witness of the facts or credibility of the witnesses or credibility of the entries on records. Indeed he has given explanation namely, he was over-worked, he had consulted his superiors and sought their guidance, his conduct has not actually, according to him caused any financial risk or damage to the Bank concerned. therefore, in our opinion, in the manner in which the investigation was carried out as a result of which action has been taken against him cannot be condemned as bad being

in violation of the principles of natural justice. Had he, however, denied any of the facts or had questioned the credibility of the persons who had given information against him, then different considerations would have applied and in those circumstances, refusal to give an opportunity to cross-examine the persons giving information against him or to lead evidence on his own part to rebut the facts would have been necessary and denial of such opportunity would have been fatal. But such is not the case here as we have mentioned hereinbefore....

(emphasis supplied)

7.3 Similarly, another three judge bench judgment of the Supreme Court, in the case of Union of India and Another Vs. Delhi High Court Bar Association and Others, , while dealing with a challenge to the constitutional validity of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (in short the RDB Act), was called upon to inter alia consider as to whether it was incumbent upon the Debt Recovery Tribunal, under Rule 12(vi) read with Rule 12(vii) of the Rules framed under the RDB Act, to summon a deponent of an affidavit, in a recovery proceeding, for cross-examination. The Supreme Court while repelling such a contention, made the following observations:-

...22. At the outset, we find that the Rule 12 is not happily worded. The reason for establishing banking tribunals being to expedite the disposal of the claims by the banks, Parliament thought it proper only to require the principles of natural justice to be the guiding factor for the Tribunals in deciding the applications, as is evident from Section 22 of the Act. While the Tribunal has, no doubt, been given the power of summoning and enforcing the attendance of any witness and examining him on oath, but the Act does not contain any provision which makes it mandatory for the witness to be examined, if such a witness could be produced. Rule 12(6) has to be read harmoniously with the other provisions of the Act and the Rules. As we have already noticed, Rule 12(7) gives the Tribunal the power to act upon the affidavit of the applicant where the defendant denies his liability to pay the claims. Rule 12(6), if paraphrased, would read as follows:

1. The Tribunal may, at any time for sufficient reason order that any particular fact or facts may be proved by affidavit.. on such conditions as the Tribunal thinks reasonable;

2. The Tribunal may at any time for sufficient reason order... that the affidavit of any witness may be read at the hearing, on such conditions as the Tribunal thinks reasonable.

23. In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same. The proviso to Rule 12(6) would certainly apply only where the Tribunal chooses to issue a direction, on its own, for any particular fact to be proved by affidavit or the affidavit of a witness being read at the hearing. The said proviso refers to the desire of an applicant or defendant for the production

of a witness for cross-examination. In the setting in which the said proviso occurs, it would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise. It is at that time, if it appears to the Tribunal, that such a witness can be produced and it is necessary to do so and there is no desire to prolong the case that it shall require the witness to be present for cross-examination and in the event of his not appearing, then the affidavit shall not be taken into evidence. When the High Courts and the Supreme Court in exercise of their jurisdiction under Article 226 and Article 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before it ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the Bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case, would not be sufficient...

(emphasis supplied)

7.4 In the case of Hira Nath Mishra and Others Vs. The Principal, Rajendra Medical College, Ranchi and Another, , the Supreme Court was dealing with the case where the appellants before it were expelled from the respondent-medical college, on the grounds of having indulged in lewd acts in a girls hostel. One of the contentions raised was that the Enquiry Committee which had recommended expulsion had done so based on statements of witnesses collected in the absence of the accused i.e., the appellants. The Supreme Court repelled the contention that the manner in which the Enquiry Committee had proceeded resulted in breach of principles of natural justice. The relevant observations in this regard are contained in paragraph 12:-

12......There was no question about the incident. The only question was of identity. The names had been specifically mentioned in the complaint and, not to leave anything to chance, the Committee obtained photographs of the four delinquents and mixed them up with 20 other photographs of students. The girls by and large identified these four students from the photographs. On the other hand, if as the appellants say, they were in their own Hostel at the time it would not have been difficult for them to produce necessary evidence apart from saying that they were innocent and they had not gone to the girls Hostel at all late at night. There was no evidence in that behalf. The Committee on a careful consideration of the material before them came to the conclusion that the three appellants and Upendra had taken part in the night raid on the girls Hostel. The report was confidentially sent to the Principal. The very reasons for which the girls were not examined in the presence of the appellants, prevailed on the authorities not to give a copy of the report to them. It would have been unwise to do so. Taking all the circumstances into account it is not possible to say that rules of natural justice had not been followed. In Board of Education v. Rice 1911 AC 179 Lord Loreburn laid down that in disposing of a question, which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. He did not think that the Board was bound to treat such a question as though it were a trial. The Board need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. More recently in Russell v. Duke of Norfolk 1949 1 All ER 109 at 118 Tucker, L.J. observed: "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." More recently in Byrne v. Kinematograph Renters Society Ltd. 1968 2 All ER 579 Harman, J. observed "what, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more....

(emphasis supplied)

7.5 Similarly in the case of Gurbachan Singh Vs. The State of Bombay and Another, , the Supreme Court repelled the contention of the petitioner before it, in a petition filed under Article 32 of the Constitution of India, wherein an order of externment passed qua him, u/s 27(1) of the City of Bombay Police Act, was assailed.

8. One could continue to refer to several judgments. The net result of all such judgments, is that, much would depend on the nature of enquiry, the provisions of the Act, the conduct of the party claiming the right to cross-examine and the prejudice caused to him. The prejudice in fact is required to have a tenor of a "real prejudice" not just a technical infringement of principles of natural justice.

9. As indicated by me, hereinabove, that such stage has not been reached and therefore, one would be slow to interdict the proceedings before the Adjudicating Authority, on the ground raised presently before me. In this regard, I may refer to a judgment of the Supreme Court in the case of State Bank of India Vs. Allied Chemical Laboratories and Another , wherein the High Court under Article 226 of the Constitution of India had interfered with the final decree passed by the Debt Recovery Tribunal (DRT) in favour of the appellant bank (SBI) under the RDB Act,

on the grounds of violation of principles of natural justice, in as much as the respondents/debtors had been denied the right to cross-examine the witnesses, whose affidavits had been entertained by the DRT. The Supreme Court strenuously differed with the approach adopted by the High Court as, in its opinion the appropriate remedy to which the respondents/debtors ought to have taken recourse to, was by way of an appeal. The relevant observations of the Supreme Court in this regard being apposite are extracted hereinbelow:-

6...We have heard counsel for the parties. We fail to understand how the High Court could have exercised its jurisdiction under Articles 226 and 227 of the Constitution to set aside a decree/final order passed by the DRT on 9.04.2003, in a collateral proceeding wherein the decree/final order was challenged indirectly on the ground that the application of the Respondent for cross-examining the deponent had earlier been wrongly rejected. We have no hesitation in holding that when the DRT did not accede to the request of the Respondent to cross-examine the deponent, it could have, in the appeal preferred by it, assailed the decree/final order on that ground and the appellate authority would have passed appropriate orders. The mere fact that the Respondent had not been given an opportunity to cross-examine the deponent did not enable the Respondent to by-pass the provision for appeal and approach the High Court directly by a writ petition under Articles 226 and 227 of the Constitution of India, challenging the decree/final order on the ground that the order earlier passed, refusing to permit the cross-examination of the deponent, was erroneous....

(emphasis supplied)

10. I may only indicate that each of the judgments relied upon by the petitioners, while acknowledging the right of the parties concerned in those cases to cross-examine the witnesses have taken into account the factum of prejudice caused, the conduct of the aggrieved party, the provisions of the statute and the rules under which the right is demanded and the nature of the enquiry. The principles therefore are not in issue. It is the application of the principles enunciated which is important.

11. This is clearly established if one were to closely examine the ratio of the cases cited by the petitioner. In State of Kerala vs. K.T. Shaudli Grocery Dealers case the Supreme Court was dealing with a situation where the sales tax officer had rejected the return of the respondent-assessee, since the sales appearing in the books of account of certain third parties were not accounted for in the books of account of the respondent-assessee. The sales tax officer had thus taken recourse to best judgment assessment under the provisions of Section 17(3) of the Kerala General Sales Tax Act, 1963. In other words, in order to establish the veracity of information appearing in the respondent-assessee''s book, he had necessarily to demolish the information appearing in the books of third party. The Supreme Court thus, while analyzing the rule of audi alteram partem made the following crucial observations:

... It is, therefore, not possible to say that in every case the rule of audi alteram partem requires that a particular specified procedure is to be followed. It may be that in a given case the rule of audi alteram parem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on facts and circumstances of each case.

(emphasis supplied)

12. In Alfred James Fernandes case proceedings were taken out against the respondent under the Foreign Exchange Regulation Act, 1973. The Supreme Court was dealing with an order passed in appeal by the Foreign Exchange Regulation Appellate Board, i.e., the Appellate Order. The Supreme Court noticed that the adjudicating authority in coming to the conclusion that a penalty ought to be imposed on the respondent, had not supplied the copies of the statements of the persons who had been summoned u/s 40 of FERA by the department, though opportunity had been given to peruse the document. The judgment is clearly distinguishable. It was firstly a final order, and secondly, in the given facts the court came to the conclusion that denial of opportunity to cross-examine the persons had created prejudice. In the present case, no such stage has been reached, and noticeably statement of persons had not been supplied to the petitioners.

13. In the case of Ayaaubkhan Noorkhan Pathan the Supreme Court was dealing with an appeal wherein the judgment of the Bombay High Court was challenged which had ordered a re-examination by the Scrutiny Committee of a caste certificate issued in favour of the appellant based on a challenge to it by a person who was found to be a complete stranger to the proceedings. As a matter of fact, the Supreme Court labeled him as a meddlesome inter lopper. The Supreme Court in the said judgment carefully examined the law on the subject and observed that once a caste certificate is issued after due verification by the vigilance cell, a presumption is raised with regard to its veracity, therefore, strong material evidence would be required to rebut such presumption. The respondent before the Supreme Court, who chose to challenge the caste certificate on the ground that he was raising a public cause, according to the judgment, ought to have acted with responsibility by bringing relevant material before the Scrutiny Committee. It is in this context that the court held that, a mere averment made in the petition impugning the veracity of a caste certificate is not enough, onus would lie on the person who raises an allegation to establish that the act had not been regularly performed. The Supreme Court in this context noticed, while examining the caste certificate issued by the Tehsildar in favour of the appellant that, the Scrutiny Committee had recorded statement of persons behind the persons back in whose favour the caste certificate had been issued, i.e., the appellant, without giving an opportunity to the appellant to cross-

examine the said persons. It is in this contextual background, that the Supreme Court remanded the matter to the Scrutiny Committee to cure the defect by giving due opportunity to the appellant for cross-examination.

13.1 As is clear there was a final order passed by the Scrutiny Committee, which discernibly pointed to a palpable prejudice caused to the appellant before the Supreme Court. The facts obtaining in the said case are clearly distinguishable when compared to the circumstances obtaining in the present case.

14. A similar situation obtains in S.C. Ghirotra''s case where a final order of dismissal was passed qua the appellant employee based on materials available with the respondent-bank. The Supreme Court reversed the judgment of the Division Bench of the High Court on the ground that no opportunity was given to cross-examine the makers of such reports and certificates which formed the evidence to prove the charge of dismissal.

15. Lastly, in Natwar Singh case the Supreme Court was dealing with the situation wherein the appellant before it had assailed the order of the adjudicating authority on the ground that he had not been provided with all the documents which were in the possession of the adjudicating authority. In other words, the appellant demanded that he be furnished copies of all documents in possession of department in addition to those on which reliance had been placed by the department, while issuing him a show cause notice as to why inquiry should not be held against him. The Supreme Court, while dealing with this contention made the following crucial observations:

...48. On a fair reading of the statute and the Rules suggests that there is no duty of disclosure of all the documents in possession of the Adjudicating Authority before forming an opinion that an inquiry is required to be held into the alleged contraventions by a noticee. Even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read. Any other interpretation may result in defeat of the very object of the Act. Concept of fairness is not a one way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework.

49. Hegde, J. speaking for the Supreme Court propounded: "In other words, they (principles of natural justice) do not supplant the law of the land but supplement it" [see A.K. Kraipak and Others Vs. Union of India (UOI) and Others,]. Its essence is good conscience in a given situation; nothing more but nothing less [see Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ...

(emphasis supplied)

16. At this stage, it cannot be stated that mere denial of the request for cross-

examination has led to breach of principles of natural justice and thus, warranting an intercession by this court under Article 226 of the Constitution of India. For the aforesaid reasons, the writ petition is dismissed.

