

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of reserving judgment :15.01.2009

Pronounced on: 27.04.2009

+ W.P. (C) 6198/2003

NARENDER SINGH & OTHERS

..... Petitioners

Through: Mr.Ashok Desai, Sr. Advocate with Mr. Rajesh
Batra and Mr. Jintender Anand, Advocates.

versus

ENFORCEMENT DIRECTORATE & ANR.

..... Respondents

Through: Mr. P.P. Malhotra, ASG with Mr. N.Matta and
Mr. Pratap Singh Parmar, Advocates.

CORAM:

Mr. Justice S. Ravindra Bhat

1. Whether the Reporters of local papers
may be allowed to see the judgment? YES
2. To be referred to Reporter or not? YES
3. Whether the judgment should be
reported in the Digest? YES

Mr. Justice S. Ravindra Bhat

1. By these proceedings under Article 226 of the Constitution of India, the petitioners seek a quashing order, against the Show-cause Notice/Memorandum for adjudication, dated 21.5.2002 issued under section 51 of Foreign Exchange Regulation Act, 1973 (FERA) issued by respondents.

2. The allegations in the impugned show-cause notice, in brief, proceed on the premise that Nestle World Trading Corporation (NWTC) acted so as to raise suspicion that coffee exported by Nestle India Ltd. (NIL), was subsequently resold by it (NWTC)

and that the petitioners herein being directors/in-charge of NIL, during the relevant period were responsible for the conduct of the said company. It was alleged, therefore, that they rendered themselves liable to be proceeded against and punished alongwith the Company for the contravention committed by the NIL, in terms of Section 68 of FERA, 1973.

3. The facts in brief, as stated by the petitioners, are that since 1992, NIL was exporting value added Nescafe instant coffee to Russia. From 1993, pursuant to the Indo-Russian Debt Repayment Scheme, NIL entered into some contracts for export of coffee to Russia payable in Rupee Debt Repayment Letters of Credit. For the entire export transactions during 1995 and 1996 the Russian buyers did not claim non-delivery of cargo shipped to them. All transactions were completed in terms and conditions of the Letters of Credit, which were submitted to the Indian Banks; these transactions were exclusively with the Russian Buyers against Rupee payment, which had been received through proper banking channels. It is stated that coffee was exported to Russia through the port of Helsinki, Finland for logistical reasons, to be taken by land and delivered to buyers at Moscow, Russia. The petitioners contend that all documents of export by NIL (including export permit from the Indian Coffee Board, Letters of Credit, Bill of Lading) record the final destination was Russia through Helsinki, Finland. In order to standardize the products sold by various companies, Nestle World Trade Corporation (NWTC), an independent company incorporated in Switzerland, acted as a facilitating organization to ensure standardized supply of the "Nestle" products to Russia.

4. The petitioners contend that the Directorate of Revenue Intelligence (DRI), on 19.11.96, searched NIL's premises and, again repeatedly, yet they did not find any instance of diversion of exported goods or under invoicing by it (NIL). Further, NIL and its officers fully co-operated with investigations initiated by the DRI and Enforcement Directorate. The petitioners submit that NIL shipped the coffee CIP Russia after arranging for and paying freight till Russia, and handed over documents of shipping/export in terms of conditions of LC opened by the Russian buyer. It is submitted that upon delivery of documents to Indian Bankers, duly authorized by the RBI, NIL had no control over the goods as the property in them passed to the buyers. The value of goods had been received in full through banking channels. Thus, it was submitted that the NIL has not committed any violation of any provision of FERA.

5. The petitioners prefer their petition on the following grounds, *inter alia*, that the impugned show cause notice is based on assumptions, without application of mind and is, in a way, a judgment without the support of any provisions of law or precedent to that effect. There was absolutely no material available with the concerned officer against them to justify issuance of the impugned show-cause notice nor has any evidence been placed on record to suggest that the petitioners were involved in day to day business of running of the company. No specific allegations were made against the petitioners in the impugned show-cause notice, it merely sought to proceed against the petitioners on the ground that the relevant time they were amongst the directors of the company. Further, it was submitted that an opportunity notice dated 22.5.2002 (under

Section 61 of FERA) sought to implicate them and others, by mechanical application of Section 68, FERA.

6. The relevant portions of the impugned show-cause notice are extracted below:

“16. AND WHEREAS it appears that S/Shri Narender Singh, D.E. Ardeshir, Lim King Fong, M.W.O. Garrett, Brij Mohan Khaitan, Jean Daniel Luethi, Stephan Issesmann, Ranjit Raj and R.K. Sharma were directors/incharge of M/s. Nestle India Ltd. during the relevant period and were responsible for the conduct of the said Company. It, therefore, appears that they have also rendered themselves liable to be proceeded against and punished accordingly alongwith the Company for the contravention committed by the Company for the contravention committed by the Company in terms of Section 68 of FERA, 1973.

17. AND WHEREAS from investigations it appears that NIL by transferring documents of the title to Goods and the property in the form of goods to NWTC got a right to receive payment in foreign exchange equivalent to Rs.1992568631 i.e. the amount as per respective invoice under relevant L/c as mentioned as per NIL letter dated 30-04-2002 but they failed to take any action to recover the said amount in foreign exchange from NWTC. By refraining from taking any action against NWTC from whom foreign exchange equivalent to Rs. 1992568631 was due which had the effect of securing that the foreign exchange so due was not received in India in aforesaid manner. M/s. NIL and its directors/officers incharge appear to have contravened section 16(1) of FERA 1973 read with section 68 of the said Act and thereby rendered themselves liable to be proceeded against under Section 50 of the FERA 1973.

18. AND WHEREAS from investigation, it also appears that export made by M/s. NIL under above mentioned L/cs as detailed in NIL letter dated 30.04.02 are not covered under Repayment of State Credit Scheme and that the said scheme was only misutilised for the purpose of exploit the benefits generated under Indo Russian repayment of state credit scheme for debt reduction. By exporting the goods to NWTC at Helsinki M/s. NIL and its directors/officers incharge have violated the condition of above mentioned scheme and thereby they have failed to comply with the directions contained in circular No.30 dated 28.9.93 issued by RBI under 73(3) of FERA 1973 and thereby rendered themselves liable to be proceeded against under section 50 of the FERA, 1973.

19. AND WHEREAS from investigations it appears that M/s. NIL actually exported the goods to NWTC in Finland. The investigations also confirmed that the said exported goods were further sold by NWTC to off shore companies located outside Russia and therefore the goods exported by NIL did not reach Russia as declared by them but actually exported to NWTC from where payment

against the exports is unrealized. And M/s. NIL and its directors/officers incharge therefore by not realizing outstanding export payment from NWTC. M/s. NIL appears to have contravened the provisions of Section 16(1) and Section 18(1), 18(2) read with Central Govt. notification No.F/67 Executive Committee/73/1&3 both dated 1-1-1974 and 18(3) of FERA, 1973 read with Rule 7, 8 and 9 of Foreign Exchange Rules – 1974 and thereby rendered themselves liable to be proceeded against under section 50 of the said Act (except for section 18(1)(a)).

20. *NOW THEREFORE, the said M/s. Nestle India and its directors/officer in charge are hereby required to show cause in writing (in duplicate) within 30 days of receipt of this memorandum as to why adjudication proceedings as contemplated under section 51 of the said Act should not be held against them for the aforesaid contraventions.*

21. *IN ISSUING this memorandum reliance is placed on documents as mentioned in Annexure to this memorandum inspection of which can be taken by him or his lawyer(s)/any other authorized representative(s) at the office of the Deputy Director, Enforcement Directorate, Gallery No.10-A, Jamnagar House, Akbar Road, New Delhi 110 011, after fixing prior appointment with him on any working day.*

22. *THEIR ATTENTION in this connection is also invited to the proviso to Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 read with sub section (3) & (4) of section 49 of FEMA, 1999. In case it is decided to hold adjudication proceedings, personal hearing of the case could be waived at his request. In case, they prefer the case to be disposed of on the basis of available evidence, they may intimate their preference in writing so that if adjudication proceedings are to be held, the case may be decided without requiring his personal attendance or the attendance of their lawyer or other authorized representative.”*

7. Sections 50 and 51 of FERA (which was repealed, and instead of which, the Foreign Exchange Management Act (“FEMA”) brought into force, stated as follows:

“50 PENALTY.

If any person contravenes any of the provisions of this Act other than Section 13, clause (a) of sub-section (1) of section 18, section 18A and clause (a) of sub-section (1) of section 19 or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director

of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).

Section 68 of the same Act read as follows:

“Section 68- Offences by companies.

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation : For the purposes of this section—

(i)“company” means any body corporate and includes a firm or other association of individuals; and

(ii)“director”, in relation to a firm, means a partner in the firm.” (emphasis supplied)

8. The petitioners argue that neither are the contents of the impugned memorandum, specific in particulars, nor do they particularize their role, if any, as directors of NIL which amount to contravention of provisions of FERA, that they have to answer. It is submitted that all the petitioners were non-executive directors; some not

even residing in India. In such case, when the respondents could have given show cause notices to them assigning or attributing specific actions of the company which could – if at all be attributed to each or any of them – the issuance of a general and vague notice, prejudices them and denies them fair opportunity. It is contended that the petitioners were forced to file general replies, denying the allegations; they were also constrained to seek documents, which run into several box files. The compulsion on the respondent to adhere to a fair procedure would imply that where it is in possession, or can indicate the role of each director, in regard to decisions taken by the company, with reference to dates, the nature of the company's decision and action, and the supportive material, it should do so, and not leave the party likely to be affected adversely, guessing about what he has to answer. Counsel submitted that this obligation has to be discharged, if the respondents are to go ahead with the proceeding, because it can possibly result in imposition of a penalty.

9. It was urged by Shri. Ashok Desai, learned senior counsel that the petitioners are not bound to respond, and even if they did respond (as they concededly did, in this case) they are not obliged to await the ruling of the adjudicatory authority. Having regard to the probable or likely drastic consequence, they can apply for an appropriate writ, or direction, in Article 226 proceedings, since the latter are more efficacious. He relies upon the ruling in *Anisminic Ltd., v. the Foreign Compensation Commissioner*, (1969 (1) ALL ER 208.) to say that lack of jurisdiction has been interpreted widely to mean the tribunal or authority (concerned) doing something contrary to principles of natural justice; that judgment was cited, and applied in *Union of India -vs- Tara Chand Gupta* AIR 1971 SC 1558. He also cited *East India Commercial Co -vs-*

Collector of Customs AIR 1962 SC 1893, particularly the following passage, to say that a writ in the nature of prohibition is available to an aggrieved person, who need not await the order pursuant to an illegal notice:

"It cannot be denied that the proceedings under the said sections are quasi-judicial in nature. Whether a statute provides for a notice or not, it is incumbent upon the respondent to issue notice to the appellants disclosing the circumstances under which proceedings are sought to be initiated against them. Any proceedings taken without such notice would be against the principles of natural justice. In the present case, in our view, the respondent rightly issued such a notice wherein specific acts constituting contraventions of the provisions of the Acts for which action was to be initiated were clearly mentioned. Assuming that a notice could be laconic, in the present case it was a speaking one clearly specifying the alleged act of contravention. If on a reading of the said notice, it is manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified sections was contravened, the respondent would have no jurisdiction to initiate proceedings pursuant to that notice. To state it differently, if on a true construction of the provisions of the said two sections the respondent has no jurisdiction to initiate proceedings or make an inquiry under the said sections in respect of certain acts alleged to have been done by the appellants, the respondent can certainly be prohibited from proceedings with the same."

Learned counsel further relied upon the judgment reported as *Whirlpool Corporation Vs. Registrar of Trade Marks*, 1998 (8) SCC 1 and submitted that the High Court in exercising its judicial powers is unconstrained by the circumstance that alternative statutory remedies may exist.

10. The petitioners contend that to say that the Director of a company is incharge of and responsible for conduct of business of the company, there should be something more than a stated reference to him in the show cause notice. They rely upon the three Judge ruling in *SMS Pharmaceuticals Limited Vs. Neta Bhalla*, AIR 2005 SC 3512 and the ruling in *Sabitha Ramamurthy Vs. RBS Channa Basavaradhya*, AIR 2006 SC 3086 and submitted that complaint or notices alleging that an individual, in his capacity as director, was in charge of or responsible for the affairs of the company, have to necessarily connect him with some specific role failing which the notice and consequently the entire proceedings are legally vulnerable to

challenge. It was lastly contended that the respondents consciously decided to initiate criminal proceedings only against three individuals i.e. M/s D E Ardeshir, Rajat Raj and R.K. Sharma. In the copy of the complaint, it was contended that Shri R.K. Sharma was the head of exports in the NIL and recorded submission in the course of proceedings; the petitioner's rely upon the following averments in the complaint filed before the Magistrate; in 2002

"S/shri De Ardeshir, Rajit Raj and R.K. Sharma were directors/incharge of M/s Nestle India Limited during the relevant period and were responsible for the conduct of day to day business of the Accused No.1 M/s Nestle India Limited thereby they having rendered themselves liable to proceedings against and punished accordingly along with the Accused No.1 M/s Nestle India Limited for the contravention committed by the Accused No.1 Nestle India Limited in terms of Section 68 of the FERA, 1973."

12. It is submitted that complaint proceedings were preceded by an opportunity notice issued to all persons including the petitioners; yet consciously criminal proceedings were initiated only against four excluding the petitioners. This, it is urged clearly points to the respondents' determination that the petitioners had no culpable role in the company's alleged wrong doing. In these circumstances, the respondents cannot be permitted to continue with the proceedings under Section 50 of the Act as is sought to be done.

13. The respondents, who did not file a return, argued that the present writ proceeding should be dismissed, since the petitioners should first submit themselves to the jurisdiction of the adjudicating officer, and then, if aggrieved by his order, seek an appellate remedy. They submit that a somewhat similar case, the ANZ Grindlays Bank had approached the Bombay High Court, challenging an identical notice, calling upon its officer to respond. Reliance was placed on the judgment of the Bombay High Court (*ANZ Grindlays Bank –vs- Director of Enforcement* 1999-(105)-Crl. LJ 2970 (Bom)); a copy of

the judgment was produced by the petitioners as Annexure P-2) in that case, particularly the notice issued:

"One of the notice at page 51 (Exh. A1) have been perused. The Directorate therein, after giving details of the contravention has stated :

"AND WHEREAS it appears that at the relevant time when the alleged contraventions had taken place, Mr. G. P. Pande, G. M. Investment Banking Division of ANZ Grindlays Bank, Bombay, was in charge of and was responsible to the Bank for the conduct of the business of the said Bank in whole of India and Mrs. Preetha Sundaram, Country Manager, Correspondent Banking Services, Shri Rajagopalan Ramkumar, Officer-in-charge, Remittance Section, Shri Paul Pereira, the then Customer Service Officer, Shri Sunil Ganpat Sawant, Officer Fund Transfer and Shri N. K. Jetly of ANZ Grindlays Bank, Connaught Place, New Delhi, were also responsible for the proper conduct of the business of the said ANZ Grindlays Bank at the relevant time when the aforesaid alleged contraventions had taken place."

The learned Counsel has pointed out, except Mr. G. P. Pandey in the notice others were not alleged to be incharge of the business. These other persons therefore cannot be prosecuted pursuant to the notice. They were merely referred to as the persons responsible for the proper conduct of the business..."

Counsel points out that the court negated the challenge, in the following terms:

"41. Obviously, Section 68 refers to incharge of and was responsible to. These words are synonymous and in a common parlance are mutually exchangeable. A person incharge of the business has always to be responsible is necessarily to be incharge of the business. Moreover, whether the person is incharge of the conduct of business can conveniently be gathered from his position in the Company. It can be seen that in the notice the position of each person in relation to the business of the Bank at the relevant time of contravention, has specifically been stipulated. At the close of the paragraph of the notice reproduced above, it is further alleged that they were responsible for the proper conduct of the business of the bank. We, therefore, do not feel any latent or patent defect in the notice.."

14. It was submitted that the appeal against the Bombay High Court judgment was preferred before the Supreme Court, which referred the question about a company's criminal liability, for determination to a larger bench of 5 judges. After determination of

the question, by the five judges, the appeal (of Standard Chartered Bank) was heard; in the judgment reported as *Standard Chartered Bank v. Directorate of Enforcement*, (2006) 4 SCC 278, it was held that:

“15. The other set of notices are in respect of the adjudication under Section 50 of FERA. Again, it is for the appellants to put forward their objections thereto before the authority concerned and it is for that authority to decide the relevant aspects while deciding to impose or not to impose any penalty on the appellants. The appellants have a right of appeal under Section 52 of FERA to the Appellate Board and a further right of appeal to the High Court under Section 54 of FERA. We see no justification for the issue of a writ of prohibition restraining the authority under FERA from proceeding further with the adjudication. It is for the appellants to put forward their defences, if any available, before the adjudicating authority and pursue it in accordance with law.”

The respondents contend that in these circumstances, the court should desist from exercising jurisdiction, and relegate the petitioner to its remedies, in case it is aggrieved by an adverse order.

15. It was next urged on behalf of the respondents, by Mr. P.P. Malhotra, learned Additional Solicitor General that the court should give effect to the statutory presumption, under Section 71 of FERA, since the burden of proving that the petitioners did not contravene any provision of law, was upon them.

16. The question which arises in this case, is whether the notices issued to the petitioners are vague and unspecific, in particulars, as not to answer to the description of a notice, and thus, would lead to an unfair procedure. A reading of the notice shows that the respondents, in the first few paragraphs, describe the transaction of exports, to Russia, then allege that Russian customs authorities took some action. It is later alleged that the consignments of coffee were sold elsewhere. The respondents thereafter

sought to implicate the petitioners, in terms of the allegations mentioned in a preceding part of this judgment.

17. There can be no two opinions that in quasi judicial proceedings (those under FERA, proposing to impose penalties undeniably being such) the authority empowered to issue or make orders that may impact anyone, or institution adversely, the procedure to be adopted has to be fair and reasonable. Fair procedure, non-arbitrariness and regularity of proceedings, (apart from following the dictates of law) are immutable and non-derogable standards which such authorities have to measure up to. That no one can be condemned unheard, is unalterably fixed to the “fairness” of such procedure. Unless such person is informed, in an adequate and reasonable manner, what are the facts which connect him, with the alleged illegality, he would be left groping as to what he should possibly answer to. This aspect gets complicated, if the action of a company is attributed to him, in his capacity as a director, and whether – (and if so, to what extent) he was responsible, in the decision making process, for the alleged wrongdoing. The necessity of this was emphasized in *East India Commercial Co* (supra). Recently, in *Aneeta Hadav v. Godfather Travels and Tours Pvt. Ltd.* 2008 (8) SCALE 25, the Supreme Court observed:

“22. In Sarav Investment and Financial Consultants Pvt. Ltd. and Anr. v. Llyods Register of Shipping Indian Office Staff Provident Fund and Anr. 2007 (12) SCALE 123, this Court opined that the director of the company is only vicariously liable for the acts of the company, and could be prosecuted only if the conditions precedent laid down in Section 141 of the Act are satisfied.

In K. Srikanth Singh v. North East Securities Ltd. and Anr. 2007 (9) SCALE 371, a Criminal complaint was filed for the dishonour of cheque. Appellant therein had been proceeded against for alleged commission of an offence under Section 138

of the Negotiable Instruments Act by the Trial Court. Before the High Court, quashing of proceedings under Section 482 of the Code of Criminal Procedure, 1973 was sought.

It was contended by the appellant that at the relevant point of time since he was not the Director of the Company, hence no cognizance could be taken as the same does not satisfy the requirements of Section 141. The High Court dismissed the petition holding the same as fact in respect thereof was required to be established before the Trial Court.

In an appeal to this Court, this Court while referring inter-alia to the decisions in S.M.S. Pharmaceuticals Ltd. (Supra) AIR 2005 SC 3512 and Sabitha Ramamurthy (supra) AIR 2006 SC 3086 held that for showing a vicarious liability of a Director of a Company, it was incumbent to plead that the accused was responsible to the Company for the conduct of the business of the Company in the complaint. The allegation in the complaint petition would not give rise to an inference that the Appellant was responsible for day-to-day affairs of the Company. A negotiation for obtaining financial assistance on behalf of the Company by its Directors itself was not an ingredient for the purpose of constituting an offence under Section 138. Thus, vicarious liability on the Director of the company part must be pleaded and proved and not inferred. [See also Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors. AIR 2008 SC 1683

In Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. AIR 1983 SC 67, the Respondent No. 1 was the manager and respondents No. 2 to 5 were directors of X company. Respondents were charged for offences under Sections 7 and 16 of the Prevention of Food Adulteration Act, 1954 and Section 482 of Criminal Procedure Code, 1973 as the Toffees manufactured by X company was found to be not conforming to the standards prescribed for toffees. On appeal, the High Court quashed the proceedings against respondents.

It was held by this Court that:

So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable.

However, as regards the Manager of the Company, the court held that since he could not fall in the same category as the Directors, and as he was directly incharge of the affairs of the company, he should be held to be liable."

18. The Supreme Court in *Tamil Nadu Electricity Board v. Rasipuram Textile (P) Ltd. and Ors.* (Criminal Appeal No. 1962 of 2008 (Arising out of S.L.P. (Crl) No. 3878/2004)

Decided On: 25.11.2008) observed that:

“15. In terms of Sub-section (1) of Section 49A (Indian Electricity Act, 1910, which provides for “Offence by Companies”), it is for the complainant to prove that the Director of the Company at the time when the theft was committed was in charge of and/or was responsible for the conduct of its business. Only in the event such an averment is made and sufficient and cogent evidence is brought on record to prove the said allegations, the proviso appended to Section 49A would be attracted; meaning thereby only in the event it is proved that a Director or a Group of Directors of the Company were in charge of and/or were responsible for the conduct of the business of the company, the burden would shift on the accused to establish the ingredients contained in the proviso appended to Section 49A of the Act. 16. Learned Additional Sessions Judge as well as the High Court, in our opinion, therefore, were right in holding that in the absence of any averment made in the complaint petition as also in the absence of any evidence brought on record by the complainant to satisfy the requirements of Section 49A of the Act, the respondents could not have been convicted.”

19. Earlier, in *Food Corpn. of India v. State of Punjab*, (2001) 1 SCC 291, commenting on this aspect, it was held by the Supreme Court, that:

“Notice to the affected person mandated in the section is not an empty formality; it is meant for a purpose. A vague and unspecific notice will not provide reasonable opportunity to the noticee to file objection meeting the reasons/grounds on which the amendment of the assessment list is proposed to be made. Such a notice cannot be taken to be complying with the statutory requirement.”

13. We find that in the show cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchise holder (sic franchiser). On a perusal of the show cause notice the stand of the respondents clearly gets established.”

20. In *Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Ltd. and Ors.* (2007) 5 SCC 388, the Supreme Court, speaking in a similar vein, said that:

“14. There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted.”

21. The relevant paragraphs of the impugned show-cause notice, merely go on to say that as the petitioners herein are directors/in-charge of NIL, therefore they were liable for the contravention of law by NIL in the export of coffee to Russia. There undoubtedly are no specific allegation against them, which pinpoints their role in the alleged offence. A show-cause notice is not a mere empty formality, but a necessity, so that the person is informed of allegations against him to provide a proper, timely and reasonable opportunity to explain and present his case. Thus, the petitioners can arguably say that the show cause notice does not contain the essential foundational facts by which the company NIL’s decision could be attributed to them, as directors or that they point to how they were in charge of, or responsible for the affairs of the said company.

22. The above conclusion, however, is not dispositive of this case. The respondents rely upon the decision in *Standard Chartered* (supra) where, apart from stating, that the

noticees could reply and later appeal, if affected by adverse orders, the Court had observed, earlier:

“11. It is argued that the issue of a notice under Section 61 is not a mere formality and that it is a real right given to a person accused of an offence to establish that the proceedings are being initiated without jurisdiction or wholly in violation of the provisions of FERA. Article 20(3) of the Constitution is referred to and it is submitted that many rights including the right against self-incrimination is available to a person accused of an offence. Section 61(2) of FERA makes it clear that no court can take cognizance of an offence except upon a complaint by the officer referred to therein. The proviso to Section 61(2) of the Act provides that no complaint regarding the offences referred to in that section shall be made unless an opportunity is given to the person concerned to show that he had the requisite permission where the offence charged is an act which requires permission under the Act. We think that if the notice sets out the alleged contravention, (an act which could have been done with permission) and calls upon the person accused of the offence whether he had the requisite permission for the transaction, that will satisfy the requirement of the section.

12. Learned counsel relied on East India Commercial Co. Ltd. v. Collector of Customs to emphasise that the notice is not a mere formality and should contain the relevant materials based on which the prosecution was being initiated. The following passage was relied on: (SCR pp. 361-62)

“Assuming that a notice could be laconic, in the present case it was a speaking one clearly specifying the alleged act of contravention. If on a reading of the said notice, it is manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified sections was contravened, the respondent would have no jurisdiction to initiate proceedings pursuant to that notice. To state it differently, if on a true construction of the provisions of the said two sections the respondent has no jurisdiction to initiate proceedings or make an inquiry under the said sections in respect of certain acts alleged to have been done by the appellants, the respondent can certainly be prohibited from proceeding with the same.”

13. On a reading of the notices issued under Section 61 of the Act, we are of the view that they are in terms of that section and there is no reason to interfere with them in these writ petitions and that it would be appropriate to leave the appellants to their available defences in the prosecutions that have been initiated. Suffice it to say that it is not possible to issue the writ of prohibition as sought for by the appellants on the ground that these notices do not satisfy the jurisdictional requirement under Section 61 of the Act.

14. At this stage, we cannot ignore the argument on behalf of the respondents that if the appellants are not able to show any permission, complaints have to be filed before the Magistrate concerned and that the Magistrate will issue process only on being satisfied that a case has been made

out for such issue and that the attempt of the appellants to block the prosecution should not be countenanced. The object of the present notice, submitted the counsel, is limited and the arguments attempted on behalf of the appellants can be raised before the criminal court when the occasion arises. We find merit in this submission. Obviously, it is open to the appellants to put forward all their defences to the prosecution at the appropriate stage.

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*Once we have held, as the High Court did, that the provisions are constitutional, the basis on which the writ of prohibition is sought for by the appellants disappears. It is settled by the decisions of this Court that a writ of prohibition will issue to prevent a tribunal or authority from proceeding further when the authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of natural justice; or proceeds to act under a law which is itself ultra vires or unconstitutional. Since the basis of the claim for the relief is found not to exist, the High Court rightly refused the prayer for the issue of a writ of prohibition restraining the authorities from continuing the proceedings pursuant to the notices issued. As indicated by this Court in *State of U.P. v. Brahm Datt Sharma* when a show-cause notice is issued under statutory provision calling upon the person concerned to show cause, ordinarily that person must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. On the facts of this case, it cannot be said that these notices are palpably without authority of law. In that situation, the appellants cannot successfully challenge the refusal by the High Court of the writ of prohibition prayed for by them."*

23. The above discussion would show that even though the petitioners have a substantially arguable case, yet, the Supreme Court, in *Standard Chartered* stated that in such cases, where individuals or concerns are issued show cause notices, the courts should not interfere, and that the authorities should be left to proceed with the matter, in the following terms:

"...We see no justification for the issue of a writ of prohibition restraining the authority under FERA from proceeding further with the adjudication. It is for the appellants to put forward their defences, if any available, before the adjudicating authority and pursue it in accordance with law."

The Supreme Court had indicated the same approach, in another case, involving a challenge to proceedings, under FERA, i.e *Special Director v. Mohd. Ghulam Ghouse*, (2004) 3 SCC 440:

“This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court.”

23. Absent the observations in *Standard Chartered Bank*, and *Mohd. Ghulam Ghouse* (supra), this court could have adjudicated on the validity of the notice. However, those two clear decisions, are binding on this court, about the correct approach to be adopted; they say that the party aggrieved should reply to the show cause notice, and if aggrieved by the order, seek remedies through appeal. In view of these observations, the challenge is insusceptible of scrutiny, under Article 226 of the Constitution of India.

24. The writ petition has to, for the above reasons, fail; it is accordingly dismissed without any order as to costs.

APRIL 27, 2009

(S.RAVINDRA BHAT)
JUDGE