

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **W.P.(CRL) 109/2004**

Decided on 09.09.2010

IN THE MATTER OF :

THE BANK OF NOVA SCOTIA Petitioner
Through: Mr. Ajay Monga, Advocate

versus

UOI & ANR. Respondents
Through: Mr.A.K. Panda, Sr. Advocate with
Mr. Jatin Singh, Advocate

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

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| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

HIMA KOHLI, J. (Oral)

1. The present petition is filed by the petitioner praying *inter alia* for issuance of a writ of certiorari for quashing and setting aside the order dated 13.12.2004 passed by the respondent No.2/Adjudicating Officer and for dropping of the proceedings against the petitioner. The second relief sought by the petitioner is for quashing of the proceedings initiated against it pursuant to the memorandum dated 31.05.2002, issued by the respondents, pending before respondent No.2.

2. The dates and events, which are relevant to decide the present petition are as follows. On 26.05.2002, a notice was issued to the petitioner/bank by the Enforcement Directorate regarding investigation under the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as

'the FERA') read with Section 49(3) and 49(4) of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'the FEMA'), which was received by the petitioner/bank on 28.05.2002. In the said notice, respondent No.2 sought information in respect of certain expatriate employees from the petitioner/bank. On 30.05.2002, the petitioner/bank filed a reply on merits to the aforesaid notice and furnished the necessary information. On the same date, the Chief Enforcement Officer of the Directorate required the petitioner/bank to provide him with the details of the salaries paid abroad to expatriate employees, if any, by 31.05.2002, which was replied to by the petitioner/bank stating *inter alia* that the information had already been furnished under the letter dated 30.05.2002.

3. On 04.06.2002, a memorandum dated 31.05.2002 was issued by Mr. K.R. Bhargava in his capacity as Adjudicating Officer of the Directorate, intimating the petitioner/bank and one Mr. Ashok Khanna, of the violation under Sections 8(1) & 9(1)(C) of the FERA, and calling upon them to show cause within 30 days of receipt of the said memorandum, as to why adjudication proceedings should not be held against them. As per the petitioner/bank, the said memorandum was received by the bank branch on 04.06.2002. On 13.06.2002, the petitioner/bank wrote to the Directorate that they had not received Annexure-A, enclosed with the memorandum. Further, the petitioner/bank sought time to inspect the original documents, as mentioned in Annexure-B to the memorandum. The petitioner/bank also informed the Directorate that Mr. Ashok Khanna had expired.

4. On 01.10.2003, a copy of Annexure-A to the memorandum dated 31.05.2002 was duly handed over to the counsel for the

petitioner/bank. However, the file could not be made available for inspection and the matter was adjourned for the purposes of inspection of the file for 13.10.2003. Ultimately on 23.12.2003, the Adjudicating Officer passed an order stating *inter alia* that since the original documents had not been inspected by the counsel for the petitioner/bank as desired, the matter be adjourned *sine die*. On 02.01.2004, counsel for the petitioner/bank received a letter dated 31.12.2003 from the Enforcement Directorate, directing the petitioner/bank to appear for personal hearing on 13.01.2004. Pertinently, the aforesaid letter dated 31.12.2003 (Annexure-J) commenced by stating as follows:-

"This is to inform you that **after considering the cause shown by you in/as you have failed to reply to the above mentioned memorandum,** the Special Director of Enforcement is of the opinion that Adjudication proceedings as contemplated in Section 51 of the FERA, 1973 should be held against you in accordance with the procedure laid down in Rules of the Adjudication Proceedings and Appeal Rules, 1974, and has accordingly fixed this case for personal hearing before him on 13.1.04 at 10.30 A.M. Hrs. in the office of this Directorate at above mentioned address."

5. It is contended by the petitioner/bank that immediately on receipt of the aforesaid letter, its counsel carried out an inspection of the file of the Department on 06.01.2004, i.e., one week prior to the date of hearing communicated by the respondent and to his surprise, found on record, a typed copy of an order in the instant case, imposing fine/penalty on the petitioner/bank and the original letter dated 08.05.2003, which was allegedly sent to the counsel for the petitioner/bank.

6. On 13.01.2004, proceedings were held before the Adjudicating Officer, extract of which is enclosed as Annexure-L to the present petition. In the said proceedings, the objection of the counsel for the petitioner/bank was recorded to the effect that the show cause notice did not constitute dispatch on the same date. It was admitted by the Department that the letter dated 08/09.05.2003 was not dispatched to the petitioner/bank. The objection taken by the counsel for the petitioner as to the maintainability of the proceedings in the light of the provisions of Section 49(3) of the FEMA was turned down by the Adjudicating Officer by holding that the notice issued to the petitioner/bank was in accordance with the requirements of Section 49(3). Lastly, the objection taken by the counsel for the petitioner/bank to the effect that there was already a draft order placed on the record, when there was no hearing granted by the department at all, was dealt with by the Adjudicating Officer by simply noting that the said draft was not a "relied upon document" or "any official communication", and was a "mere piece of paper". Hence, the request of the counsel for the petitioner/bank for a copy of the said document/inspection was turned down.

7. Counsel for the respondents submits that the issues arising in the present petition were summarized in the order dated 09.01.2006, which is reproduced hereinbelow:-

"The main controversy in this case is whether the notice dated 31.5.2002 issued by Mr.H.R.Bhargava, Special Director, Enforcement Directorate was issued by him in the capacity of an adjudicating authority in exercise of its powers in terms of Section 51 and Rule 3 of the Adjudication Proceedings and Appeal Rules 1974 or was merely a show cause notice issued by him simply as an officer of the Enforcement Directorate. There is also a dispute about the dispatch of the said notice on the said

date. Mr. A.K. Panda, learned senior advocate representing the respondent seeks time to clarify the above aspects by filing an additional counter affidavit of the concerned officer. Let the same be done within 4 weeks with copy to the counsel for the petitioner. Rejoinder, if any, may be filed within 2 weeks thereafter.

List on 26.4.2006.

Copy of the order be given dasti to counsel for the parties."

8. He submits that pursuant to the aforesaid order, an additional affidavit was filed by the Department on 16.02.2006, wherein it was averred that the memorandum dated 31.05.2002 was issued by Mr.K.R.Bhargava, Special Director, Enforcement Directorate in his capacity as an Adjudicating Officer in exercise of his powers in terms of Section 51 of the FERA and Rule 3 of the Adjudication Proceedings and Appeals Rules, 1974. A copy of the relevant notification dated 16.04.1999 issued under Section 50 of the FERA by the Central Government, appointing Shri K.R. Bhargava, Special Director, Directorate of Enforcement as an adjudicating authority is enclosed with the aforesaid affidavit. In the light of the photocopy of the gazette published by the Government, placed on the record by the respondents, the point in controversy with regard to the capacity of Mr. K.R. Bhargava to act as adjudicating authority is set at rest in favour of the respondent.

9. Insofar as the issue of dispatch of the aforesaid memorandum dated 31.05.2002 is concerned, it was stated in the aforesaid affidavit dated 16.02.2006, that the same was dispatched to the petitioner/bank on the very same day, i.e., on 31.05.2002. Counsel for the respondents has also produced the original records, which reflects that the same was dispatched to the petitioner/bank by courier on 31.05.2002 and was duly received by

the petitioner/bank against an endorsement dated 03.06.2002.

10. Counsel for the petitioner/bank seeks to place reliance on Rule 10 of the Adjudication Proceedings and Appeals Rules, 1974, to state that the service of the notice on the petitioner was to be effected either by delivering or tendering the notice or order to the petitioner/bank in person or through its duly authorized agent or by sending notice or order to the addressee by registered post with acknowledgement due at the address of his place of residence or his last known place of residence or the place of work and if the notice could not be served in either of the aforesaid manners, by affixation at the last place of residence or work. He submits that the dispatch of notice by courier is, therefore, not in accordance with terms of the aforesaid Rules and cannot be considered as a recognized mode for effecting service on the petitioner/bank. He further states that this position was duly brought to the notice of the Adjudicating Officer, who turned down the said submission in the proceedings dated 13.01.2004, without giving any reason therefor.

11. Counsel for the petitioner/bank further submits that without prejudice to the aforesaid submission, on an assumption that the notice dated 31.05.2002 having been dispatched on even date by courier, was proper service, the same could not be acted upon in view of the provisions of Section 49(3) of the FEMA. His last submission is that the notice dated 31.12.2003 issued by the respondent, calling upon the petitioner/bank to present itself before the Special Director of Enforcement for a personal hearing on 13.01.2004, is liable to be quashed as the proceedings had been adjourned *sine die* one week prior thereto, i.e., on 23.12.2003, and no

opportunity to show cause was afforded to his client, nor was any order passed, reviving the proceedings.

12. As regards the grievance of the petitioner with regard to issuance of letter dated 31.12.2003 by the Department is concerned, it is an admitted position that on 23.12.2003, the Adjudicating Officer had adjourned the matter *sine die* since the Department had not given inspection of the original documents mentioned in Annexure-B to the memorandum dated 31.05.2002, to the petitioner/bank, inspite of repeated request to the said effect made by it. As a result, the petitioner/bank was not in a position to file its reply to the notice to show cause dated 31.05.2002. However, a perusal of the file shows that despite the aforesaid position, the petitioner/bank had filed a detailed reply to the notice to show cause Annexure-K (colly) running into 38 pages.

13. Rule 3(3) of the Adjudication Proceedings and Appeal Rules, 1974 requires the Adjudicating Officer to consider the cause, if any, shown to the addressee and only thereafter, if he is of the opinion that the adjudication proceedings should be held that the officer is required to issue a notice fixing a date of appearance of the addressee, personally or through counsel. In the present case, the aforesaid notice dated 31.12.2003 was premature as on the said date, no reply could have been filed by the petitioner/bank in the absence of inspection of the records and further, the proceedings had been adjourned *sine die* on 23.12.2003, by the Adjudicating Officer himself. In view of the aforesaid circumstances, the aforesaid notice is vitiated and has to be set aside. If the notice itself is set aside, then the consequent proceedings, recorded on a subsequent date, i.e., on 13.01.2004

have also to go as the said proceedings were a step in furtherance to the notice to show cause, which could not have been taken place in the absence of the Adjudicating Officer having arrived at any conclusion, one way or the other as to whether he was satisfied with the cause shown by the petitioner/bank before proceeding further with the adjudication. As a result, both, the notice to show cause dated 31.05.2002 and the proceedings held on 13.01.2004 are quashed and set aside.

14. This Court is also inclined to agree with the submission of the learned counsel for the petitioner that it is rather curious that there exists a draft order, on the record of the Department, as produced by the counsel for the respondent and examined by this Court. There is no explanation, much less plausible explanation offered by the other side as to how a draft order came on the file of the respondent on 06.01.2004, the date on which the counsel for the petitioner/bank carried out an inspection of the file of the Department, when by then only a notice to show cause had been issued to the petitioner/bank and a hearing had to take place on 13.01.2004, the date mentioned in the notice. It appears from the above that the respondents were only performing a formality of granting a hearing to the petitioner, when in fact, the fate of the case was a foregone conclusion. The apprehension of the petitioner/bank of getting a genuine opportunity of setting forth its case and being granted an unbiased hearing was therefore not misplaced.

15. Counsel for the respondents has opposed the petition on the ground of its maintainability and submits that this Court ought not to entertain the present petition as it questions the legality of a show cause

notice, which is impermissible. Pertinently, in the present case, on the very first date of hearing, i.e., on 30.01.2004, the petitioner was directed to continue to cooperate with the respondent to facilitate the progress of the proceedings before the Adjudication Officer. The aforesaid order dated 30.01.2004 was reiterated on 04.12.2007. However, on enquiry, counsel for the petitioner submits that the respondent never called upon the petitioner/bank for further adjudication of the proceedings. In these circumstances, it does not lie in the mouth of the respondent to allege that the adjudication proceedings got delayed on account of the pendency of the present petition. If despite the orders passed by the Court on 30.1.2004 and 4.12.2007, the Department did not proceed further with the adjudicatory process, it has none else to blame but, itself.

16. In any case, the fact of the matter is that it is six years down the line and the case is still at the stage of notice to show cause. However, now that it is stated that the earlier Adjudicating Officer has changed, the apprehension of the petitioner of not getting an unbiased hearing stands allayed. In these circumstances, without wasting any further time, the present petition is disposed of with the following directions:-

- (i) The Adjudicating Officer of the respondent shall apply his mind afresh to the reply filed by the petitioner/bank to the notice to show cause, in accordance with Rule 3(3) of Adjudication Proceedings and Appeal Rules, 1974.
- (ii) After perusal of the reply, if the Adjudicating Officer is of the opinion that adjudication proceedings should be held, he shall issue a fresh notice to the petitioner/bank, fixing a date for its appearance, either

directly or through its counsel.

- (iii) In case, such a notice for holding the adjudication proceedings is issued by the Adjudicating Officer, the petitioner shall be entitled to raise all the legal pleas as taken by it in the reply to notice to show cause and the same shall be considered and decided by the Adjudicating Officer in accordance with law.

17. In the event, the petitioner/bank is aggrieved by the orders that may be passed by the respondents, it shall be entitled to seek its remedies, as may be available to it in law. Given the facts and circumstances of the present case, there shall be no orders as to costs.

SEPTEMBER 09, 2010
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(HIMA KOHLI)
JUDGE