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

Reserved on : 06.05.2013

Decided on : 29.05.2013

+ **LPA No.79/2013 & CM No.2310/2013**

SHAHID BALWA

..... Appellant

Through: Mr. Rakesh Tikku, Sr. Adv. along with
Mr. Vijay Aggarwal and Mr. Mudit
Jain, Advs.

VERSUS

THE DIRECTORATE OF ENFORCEMENT

..... Respondent

Through: Mr. Vikas Garg along with Ms. Divya
Jyoti Singh, Advs. and Mr. Sandeep
Aggarwal, EO/ED.

AND

+ **LPA No.80/2013 & CM No.2332/2013**

VINOD GOENKA

..... Appellant

Through: Mr. Aman Lekhi, Sr. Adv. along with
Mr. Vijay Aggarwal and Mr. Mudit
Jain, Advs.

VERSUS

THE DIRECTORATE OF ENFORCEMENT

..... Respondent

Through: Mr. Vikas Garg along with Ms. Divya
Jyoti Singh, Advs. and Mr. Sandeep
Aggarwal, EO/ED.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. By the present appeal, the appellants seek to impugn the order dated 24.01.2013 passed by the learned Single Judge dismissing the writ petitions

of the appellants. The present order will dispose of LPA 79/2013 and LPA 80/2013 which are based on common facts. For convenience the facts of LPA 79/2013 are stated here.

2. The brief facts giving rise to the said petitions is that a complaint dated 01.07.2011 was filed under Section 16 (3) of the Foreign Exchange Management Act, 1999(hereinafter referred to as 'FEMA') for alleged contravention of Section 6(3)(b) of FEMA read with Regulation 5(1) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 and Para 2, 3 and 9(1) (A) & (B) of Schedule 1 of the said Regulation read with Press Note no. 3 (2007 series) issued by Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (SIA) (FC Division) by M/s Etisalat DB Telecom Pvt. (formerly, M/s Swan Telecom Pvt. Ltd.).

3. According to the complaint, it is alleged that M/s Swan Telecom Pvt. Ltd , (M/s Etisalat DB Telecom Pvt. Ltd.) contravened the condition of clause (vi), (vii) and (xxi) of Para-B of Press Note No. 3(2007 series) as aforesaid and thereby contravened the provisions of para 2 of Schedule 1 of Regulation (5) (1) of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000 read with section 6(3)(b) of FEMA, 1999 in issuing shares to M/s Etisalat Mauritius under automatic route facility to the tune of Rs.3228.44 Crores.

4. It was further stated in the complaint that M/s Swan Telecom Pvt. Ltd. (M/s Etisalat DB Telecom Pvt. Ltd) chose to issue 5.27% equity shows to M/s Genex Exim Ventures Pvt. Ltd and 44.73% equity to M/s Etisalat Mauritius without any FIPB approval and thus contravened the provisions of Para 3 of Schedule I of Regulation (5)(1) of the Foreign Exchange

Management (Transfer or Issue of Security by a Person Resident outside India) Regulations 2000 read with section 6(3) (b) of FEMA, 1999 for the amount of Rs.380 crores plus Rs.3228.44 crores approx., by issuing shares to M/s Genex Exim and M/s Etisalat Mauritius.

5. It is further stated that M/s Swan Telecom Pvt. Ltd issued shares to M/s Etisalat Mauritius and indulged in over-valuation of its three shares issued to said Etisalat Mauritius so as to remain within the stipulated threshold of 49% equity prescribed for the automatic route. Hence the said M/s Swan Telecom Pvt. Ltd violated the provisions of para 3 of the Schedule 1 of Regulation (5) (1) of the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations 2000 read with sections 6(3) (b) of FEA, 99 for the amount of Rs.316.22 crores because the facility of automatic route was already exhausted by the said M/s Swan Telecom Pvt. Ltd in issuing shares to Foreign Investors without FIPB approval.

6. Pursuant to receipt of the said complaint dated 01.07.2011 a show cause notice dated 08.07.2011 was issued against the said M/s Etisalat Mauritius and its Directors including the appellant herein.

7. The appellant thereafter filed a preliminary reply dated 18.02.2012 to the aforesaid show cause notice and reserved the right of filing a detailed reply after receiving the documents as prayed for. On 25.05.2012, the appellants filed three applications i.e. (a) application for non-joinder of parties and for joint adjudication; (b) application under Article 20(3) of the Constitution of India for keeping the adjudication proceedings before the Court in abeyance and; (c) application for keeping in abeyance the proceedings under Rule 4(3) FEMA Rules wherein the appellants have

prayed for providing necessary documents for proper adjudication of the matter. On 17.09.2012, the Adjudicating Authority dismissed the said applications filed by the appellants. Aggrieved by the said order the appellants preferred writ petitions being CWP 6360/2012 against the said order. This Court vide its order dated 05.10.2012 directed that the reply by the other noticees may be supplied to the appellants on the filing of final reply of the appellant. The appellant finally filed his reply dated 05.10.2012 before the Adjudicating Authority.

8. On 12.12.2012 the appellants filed another application seeking permission to cross-examine certain persons for effective disposal of the matter. The cross-examination was requested of Sh. Rajeshwar Singh, Assistant Director of Enforcement, Sh. Ahmed Shakir, Director of M/s/ Genex Exim Venture Pvt. Ltd., Sh. Pratap Ghosa, CFO of M/s Etisalat DB Telecom Pvt. Ltd. and Sh. K. Vasudeva, Vice President Finance of M/s Etisalat DB Telecom Pvt. Ltd. Vide order dated 03.01.2013 the Adjudicating Authority rejected the applications of the appellants. Thereafter the appellants filed the said writ petition. The learned Single Judge dismissed the said writ petitions vide order dated 24.01.2013. Hence the present appeal has been filed.

9. The learned Single Judge dismissed the writ petition. The impugned order held that the stage for leading cross examination had not been reached and that further one would be slow to interdict proceedings before the adjudicating authority on the grounds raised in the writ petition. The learned Single Judge also observed that the appellants were attempting to derail the adjudication proceedings by filing one application or the other at various stages of the adjudication. Hence the writ petition was dismissed.

10. It is the contention of the learned senior counsel appearing for the appellant that the complaint that has been filed by the respondent relies upon the statements of the three persons namely Mr. Ahmad Shakir, Mr. Pratap Ghose and Mr. K. Vasudeva, in Annexure 'B' which gives the list of documents relied upon by the complainant. The said Annexure 'B' gives a list of 16 documents including various agreement letters and the statements of said three persons. It is claimed that cross examination is an integral part and parcel of principle of natural justice and that on a fair reading of the provisions of FEMA Act and Rules, it is permissible to cross-examine the aforesaid persons and the same would be an indefensible right. Reliance is placed on Section 16(1) of FEMA that provides that for the purposes of adjudication under Section 13, the Central Government may appoint such officers of the Central Government as it may think fit as Adjudicating Authority for holding an enquiry in the manner prescribed after giving the persons alleged to have committed contravention, a reasonable opportunity of being heard for the purpose of imposing a penalty. Reliance is also placed on Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeals) Rules, 2000. It is stated that right of cross examination in the present case would have to be read into the aforesaid statutory provisions. It is pointed out that the respondents are relying on the said statements of the three persons and the appellant is entitled to test the veracity of the statements on the touchstone of cross examination. It is also contended that in the present proceedings unless opportunity for cross-examination is granted to the appellant, grave and irreparable loss/injury would be caused to them inasmuch as under Section 13 of FEMA a penalty upto 3 times the sum involved in the contravention can be imposed. The alleged

contravention in the present case amounts to a total sum of Rs.7200 Crores. It is claimed that under Section 14, if a person fails to make full payment of the penalty imposed upon him under Section 13, he is liable for civil imprisonment as stated under Section 14 of the said Act.

11. Learned senior counsel appearing for the appellant further submits that under the Foreign Exchange Regulations Act 1973, the enquiry was conducted in exercise of power under “The Adjudication Proceeding and Appeal Rules 1974”. He states that the procedure as prescribed for adjudication of the proceedings in Rule 3 of the said Rules is almost identical as Rule 4 of the Foreign Exchange Management Rules 2000, (adjudication proceedings and Appeal) Rules 2000 (hereinafter called the ‘Rules of 2000’)] and the present proceedings are being conducted under the said Rules of 2000.

12. He relies upon the judgment of Division Bench of the Kerala High Court in the case of ***Central Govt. represented by Directorate, Enforcement Directorate, Foreign Exchange Regulation Act, New Delhi vs. Fr. Alfred James Fernandez, AIR 1987 Kerala 179*** and the judgment of the Single Bench of this Court in the case of ***Mehar Singh v. Appellate Board Foreign Exchange*** 1986(10) DRJ 19 to argue that under the Adjudication Proceedings and Appeal Rules, 1974” these judgments have held that the Rules in question under FERA provide for a personal hearing which includes the right to examine and cross examine the witnesses. He has also relied upon ***Gurmeet Kaur Dhillon –vs- Tribunal for Foreign Exchange & Anr., 2007 CRL.L.J.3294*** whereby the Single Judge of Punjab and Haryana High Court relied upon the judgment of Kerala High Court and held as follows:-

“In spite of that, the authorities took no steps to permit the appellants to cross-examine the persons said to have been examined under Section 40 of the FERA and, therefore, in view of the law laid down by the Kerala High Court in the case of Central Govt. represented by the Director, Enforcement Directorate, Foreign Exchange Regulation Act, New Delhi v. Alfred James Fernandes (supra), said evidence cannot be taken into account.”

13. It is argued that as the Provisions of the Rules under FERA are identical to the Foreign Exchange Management Rules 2000, the appellants in view of the said judgments is entitled to cross examine the said witnesses and the impugned orders have wrongly denied them the said opportunity.

14. He further relies on the following judgments to submit that in the given facts, he would have a right to cross-examine.

- (i) ***State of Kerala vs. K.T. Shaduli Grocery Dealer Etc (1977) 2 SCC 777;***
- (ii) ***Khem Chand, vs. Union of India and others AIR 1958 SC 300;***
- (iii) ***Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra, AIR 2013 SC 58;***

It is also submitted by the learned senior counsel for the appellant that the judgments relied upon in the impugned order by the learned Single Judge also support such contention of the appellant that cross-examination should have been allowed. He refers to the following judgments

- (iv) ***K.L.Tripathi –vs- State Bank of India, (1984) 1 SCC 43;***
- (v) ***Union of India –vs- Delhi High Court Bar Association, (2002) 4 SCC 275;***
- (vi) ***Hira Nath Mishra –vs- Principal, Rajender Medical College, Ranchi (1973) 1 SCC 805;***

15. On the other hand, learned counsel appearing for respondents states that there is no procedure prescribed under the Rules of 2000 for permitting the appellant to cross examine the witnesses which they have sought for. The learned counsel relies upon ***Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement and Another*** 2010 (4) SCC 772 where the Hon'ble Supreme Court held that FEMA is a complete Code in itself and Chapter V of FEMA read with the Rules provides a complete network of provisions adequately structuring rights and remedies available to a person who is aggrieved by adjudication under FEMA. He also relies upon ***Kanungo & Co. v. Collector of Customs*** (1973) 2 SCC 438, where the Hon'ble Supreme Court held that principles of natural justice do not require that in the matter like this, the person who has 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. Relying on the said judgment, he submits that the appellant has no right to cross-examine. In the written synopsis, the learned counsel for the respondent also relies upon the judgments cited by the learned Single Judge of this Court in his order dated 24.01.2013 which are reproduced as under:-

- (i) M/s. Kanungo and Company vs. Collector of Customs and others, (73) 2 SCC 438;
- (ii) Balumal Jamnadas Batra vs. State of Maharashtra (1975) 4 SCC 645;
- (iii) Collector of Customs, Madras & Ors, vs. D.Bhoormall (1974) 2 SCC 544;
- (iv) *K.L.Tripathi –vs- State Bank of India and ors*, (1984) 1 SCC 43;
- (v) *Union of India & Anr. –vs- Delhi High Court Bar Association & Ors.*, (2002) 4 SCC 275;
- (vi) *Hira Nath Mishra and others –vs- The Principal, Rajendra*

Medical College, Ranchi and Others (1973) 1 SCC 805;
(vii) *Gurcharan Singh –vs- State of Bombay and anr., AIR 1952 SCR 737;*
(viii) *State Bank of India vs. Allied Chemical Laboratories and Anr. (2006) 9 SCC 252; and*
(ix) *State of Kerala vs. K.T.Shaudli Grocery Dealers;*

16. The legal position regarding the right to cross examination has been well settled by a catena of judgments of Hon'ble Supreme Court. In ***State of Kerala vs. K.T. Shaduli Grocery Dealer Etc (1977) 2 SCC 777***, the facts of the case related to the assessment of the assessee for sales tax for three assessment years where the return filed by him on the basis of his books of accounts appeared to the sales tax officer to be incorrect and incomplete since certain sales appearing in the books of account of one Haji Usmankutty were not accounted for in the books of accounts maintained by the assessee. The assessee applied to the sales tax officer for an opportunity to cross examine Mr. Haji Usmankutty. The Hon'ble Supreme Court in para 5, held as follows:-

“The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to Cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the

Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Haji Usmankutty and other wholesale dealers were not shown in the books of account of the assessee. The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Haji Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Haji Usmankutty and other whole- sale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Haji Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Haji Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete, the assessee was entitled to have Haji Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the efficacious methods of establishing truth and exposing falsehood.”

17. Reference next may be had to the case of *Khem Chand, vs. Union of India and others AIR 1958 SC 300*. This matter related to the appellant therein who was appointed as Sub-Inspector in the Co-operative Societies Department and posted as Sub-Inspector in the Milk Scheme. A charge sheet was issued upon him formulating several charges. An Enquiry Officer was appointed. The only issue that survived to be decided was as to whether the appellant was given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. In para 19, the Hon’ble Court held as follows:-

“(19) To summarise: the reasonable opportunity envisaged by the provision under consideration includes:

(a)****

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence, and finally”

18. The latest judgment of the Hon’ble Supreme Court in this regard is in the case of *Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra*, AIR 2013 SC 58. The said case pertains to a Caste Certificate issued to the appellant. On the basis of his being a member of the Scheduled Tribe, the appellant was appointed as a Senior Clerk in the Municipal Corporation of Aurangabad. The Scrutiny Committee to whom the matter was referred to revoked the Caste Certificate. It was the submission of the appellant before the Hon’ble Supreme Court that he was denied the opportunity to cross-examine witnesses which resulted in grave miscarriage of justice. The Hon’ble Supreme Court after noting the various previous judgments rendered on this issue recorded as follows:-

“28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.”

29. ***

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.”

20. In view of the above judgement of the Hon’ble Supreme Court especially in the latest judgment of *Ayaaubkhan Noorkhan Pathan(supra)* it would clearly follow that cross-examination of witnesses has been held to be an integral part and parcel of the principles of natural justice. Refusal to grant permission to cross-examine witnesses would normally be an exception.

21. Learned counsel for the respondent has relied on various judgments to try and submit that there is no inherent right for cross-examination. The first judgment relied upon by him is *Gurcharan Singh –vs- State of Bombay, AIR 1952 SC 221*. Relevant paragraph 7 is reproduced as under:-

“The only point which Mr.Umrigar attempts to make in regard to the reasonableness of this procedure is that the suspected person is not allowed to cross-examine the witnesses who deposed against him and on whose evidence the proceedings were stated. In our opinion, this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein. This object would be

wholly defeated if a right in confront to cross-examine these witnesses was given to the suspect.”

22. The said judgment pertains to an order of externment passed against the petitioner under the City of Bombay Police Act. The action of externment was done to protect the general public against the dangerous and bad characters, and in view of the purpose of the statute, the Court disallowed cross-examination.

23. Learned counsel also relied upon the judgement in the case of ***Union of India –vs- Delhi High Court Bar Association, (2002) 4 SCC***

275. This matter pertains to right of cross-examination before the Debt Recovery Tribunal wherein in paragraph 23 it was held as under:-

“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 them 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.”

24. The matter pertained to right to cross-examine before the Debt Recovery Tribunals. The Hon’ble Supreme Court noted that the reason for establishing Banking Tribunals was to expedite the disposal of the claims by the banks. The Hon’ble Court, however, recognised that in certain cases right to cross-examine the witness would be allowed.

25. The next judgment relied upon by the learned counsel for the respondent is the judgment in the case of *Hira Nath Mishra –vs- Principal, Rajender Medical College, Ranchi (1973) 1 SCC 805*. This matter pertained to the veracity of enquiry committee constituted on account of the complaint received from some girl students regarding certain acts by the male students. In paragraph 13 the Hon’ble Court has held as follows:-

“Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witness who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However, unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies.”

The Hon’ble Court disallowed cross-examination keeping in view the need to protect the girls who had given their statements.

26. Reliance was also placed on the case of *K.L.Tripathi –vs- State Bank of India, (1984) 1 SCC 43*. This matter pertained to a departmental enquiry leading to dismissal of the employee. The Hon’ble

Supreme Court in paragraph 32 held as follows:-

“The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of 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.”

27. The right to cross-examination was denied on the facts of the case. Further the appellant in that case never asked for cross-examination and he admitted the facts but only an explanation of the acts was given.

28. Learned counsel for the respondent has also heavily relied upon the judgment of *M/s. Kanungo & Company vs. Collector of customs and others, (1973) 2 SCC 438*. That matter pertained to a firm carrying on business as a dealer or importer and repairer of watches. The Customs in the course of search seized certain amount of watches. On the argument of breach of principles of natural justice on account of denial of the right of cross-examination, the Hon’ble Supreme Court in para 12 noted as follows:-

“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 Custom 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 Authority. Accordingly, we hold that there is no force in the third contention of the appellant.”

The aforesaid judgment was rendered on the facts of the said case.

29. The legal position that would follow is that normally 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 normally right to cross-examination would be inevitable. If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied. No doubt, it is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given. Everything depends on the subject matter. In the application of the concept of fair play there has to be flexibility. The application of the principles of natural justice depends on the facts and circumstances of each case.

30. Now, coming to the facts of this case. In the complaint that has been filed, the statements of three witnesses have been extensively relied upon. Regarding Shri Pratap Ghosh, CFO of M/s. Etisalar DB Telecom Pvt. Ltd. his statement is relied upon in paragraph 10.2 of the complaint which para reads as follows:-

“10.2. Shri Pratap Ghosh, CFO of M/s. Etisalat DB Telecom Pvt.Ltd. in his statement dated 08.04.2011 under the provisions of FEMA, 1999 inter-alia stated that he had joined this company in August, 2009 and before tht he was working in Etisalat Group head office as Director (financial consolidation and reporting) based in Abu Dhabi, that so far three investments from abroad has been received by the company totaling Rs.3543 crores approximately during the period since December, 2008 to May, 2010; that these FDI were received by the company as pr agreement(s) dated 23.09.2008; tht it is a fact that shares to M/s. Genex Exim, Chennai were allotted in December, 2008 pursuant to the agreement(s) dated 23.09.2008; that on 17.12.2008 company had issued shares to M/s.Etisalat Mauritius, M/s.Genex Exim and M/s.Tiger Trustees, that shares were allotted to M/s.Etisalat Mauitius as decided by M/s.Etisalat UAE, that as per share subscription agreement dated 23.09.2008 (under clause 2.2) after the issuance of such shares and completion of all actions; M/s. Etisalat Mauritius would be allotted 50% +10 equity shares of the company subject to FIPB approval; that there appears a delay in reporting to RBI after issue of the shares in the FORM FCGPR submitted by the company on 13.04.2009; that the total of share holding in the company held by M/s. Etisalat Mauritius and M/s. Delphi Investments Mauritius was already 49% which was the maximum limit allowed for non-resident entities under automatic route.”

31. Regarding the next witness Shri Ahmad Shakir, Promotor/Director of M/s. Genex Exim Ventures Pvt. Ltd., the complaint in paragraph 11.3 relies upon the said statement to prove that the purchase of shares by Genex Exim Ventures Pvt. Ltd. was in fact a foreign investment disguised as domestic investment.

11.3 of the complaint reads as under:-

“11.3 It is thus clear that purchase of shares by Genex Exim Ventures Pvt. Ltd. From the overseas funds received under well conceived design was foreign investment disguised as domestic investment. It is also substantiated by the statement of Shri Ahmad Shakir, Promoter/Director of M/s. Genex Exim Ventures Pvt. Ltd. He in his

statement dated 07.04.2011 under FEMA stated that he had already tendered full facts regarding investment in Swan & agreement with Etisalat etc. in his statements dated 02.02.11, 17.03.11 and 07.04.11 under PMLA.”

Similarly, in paragraphs 8.2 and 8.3 of the complaint again the complaint relies upon the statement of the said Shri Ahmad Shakir.

32. Further alongwith the complaint is annexure B with the heading “List of relied upon documents to complaint” at Sl.No.9 of the said annexure is the statement dated 2.2.2011, 17.3.2011 and 7.4.2011 of Shri Ahmad Shakir, at serial No.10 is the statement dated 08.04.2011 of Mr.Pratap Ghose and at serial No.11 is the statement dated 06.04.2011 of Mr.K.Vasudeva.

33. In the application that was filed by the appellants for seeking permission to cross-examine, it is stated that there is a need to cross-examine Shri Ahmad Shakir, Shri Pratap Ghose and Shri K.Vasudeva to controvert their statements and to establish their (appellants) innocence as the charges have been denied by the said appellant. A fourth person who is sought to be cross-examined is Shri Rajeshwar Singh, Assistant Director i.e. the complainant as according to the appellant it intends to cross-examine the said person with intent to controvert the veracity of the complaint regarding contraventions of various provisions of FEMA and it is further stated that the statements made by the said complainant in the complaint are inherently false.

34. Keeping in view the facts of the present case and the nature of allegations being raised against the appellant the judgments of the Supreme Court in the case of *K.T.Shaduli (supra)*, *Khem Chand vs. UOI (supra)* and *Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra(supra)* would in

our view apply to the facts of this case. The respondent has failed to place on record any fact to show that prejudice would be caused to it if the appellant is permitted to cross-examine the said witness. In fact a query was posed to the learned counsel for the respondent about whether any prejudice would be caused to the respondent if the cross-examination is allowed. The learned counsel could not specify any prejudice. In our view the present appeal should be allowed to the extent that the appellants should be entitled to cross-examine the three witnesses whose statements have been relied upon by the respondent in the complaint. The respondent in the complaint have heavily relied upon the statement of Shri Ahmad Sakir, Shri Pratap Ghose and Shri K.Vasudeva. It would be in the fitness of things that to test the veracity of their statements which is relied upon by the respondent the appellants are allowed to cross-examine them.

35. However, other than the three witnesses no grounds are made out to cross-examine any other person. The request of the appellant to cross-examine Shri Rajeswhar Singh, Assistant Director, the complainant is a request without merits. The said complainant has filed the complaint based on material gathered by the respondent. No purpose would be served by putting him to cross-examination as is sought by the appellants.

36. Though we have allowed the appellant to cross-examine the witnesses, we are conscious of the fact that the appellant may be intent on delaying the proceedings. We cannot help noting that the appellant has been filing one application or the other at various stages of adjudication as noted by the learned Single Judge. Keeping in view the nature of the matter, we direct that the appellant be permitted to cross-examine the three witnesses, namely, Shri Ahmad Shakir, Shri Pratap Ghose and Shri K. Vasudeva. The

learned adjudicating authority shall fix an appropriate date for cross-examination of the said three witnesses. The said dates should be fixed within one month from today and steps for presence of the witnesses be taken. The cross-examination may be done on a day to day basis and may be concluded by the learned adjudicating authority preferably within a period of 10 working days from commencement. These directions are being made so that no unnecessary delay takes place in completion of the cross-examination of the said witnesses. Needless to add that the cross-examination would be confined to questions as permissible in law.

37. With the above directions, the above appeal is disposed of.

JAYANT NATH, J.

CHIEF JUSTICE

May 29 2013

rb/nt/raj