

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2017

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THE HON'BLE MR.JUSTICE B.RAJENDRAN

Writ Petition Nos. 1748 to 1751 of 2017

and

Writ Miscellaneous Petition Nos. 1735 to 1738 of 2017

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India Cements Limited
Coromandel Tower
No.93, Santhome High Road
Karpagam Avenue
R.A. Puram, Chennai - 600 028
rep. by its Authorised Signatory .. Petitioner in WP 1748/17

N. Srinivasan
Managing Director
India Cements Limited
Coromandel Tower
No.93, Santhome High Road
Karpagam Avenue
R.A. Puram, Chennai - 600 028 ... Petitioner in WP 1749/17

T.S. Raghupathy
Executive President
India Cements Limited
Coromandel Tower
No.93, Santhome High Road
Karpagam Avenue
R.A. Puram, Chennai - 600 028 .. Petitioner in WP 1750/17

R. Hariharasubramanian
Vice-President (Finance and Taxation)
India Cements Limited
Coromandel Tower
No.93, Santhome High Road
Karpagam Avenue
R.A. Puram, Chennai - 600 028 .. Petitioner in WP 1751/17

Versus

1. Union of India
represented by its Secretary
Department of Revenue
Ministry of Finance, New Delhi
2. The Deputy Director
Directorate of Enforcement
4th Floor, Kaiser-I-Hind
Currimbhoy Road
Ballard Estate, Mumbai - 400 001

.. Respondents in all
the Writ Petitions

WP No. 1748 of 2017:- Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of the second respondent dated 04.11.2016 bearing Ref.F.No.T-4/11-B//DD/VMS)/2015/3101 and quash the same.

WP No. 1749 of 2017:- Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of the second respondent dated 04.11.2016 bearing Ref.F.No.T-4/11-B//DD/VMS)/2015/3100 and quash the same.

WP No. 1750 of 2017:- Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of the second respondent dated 04.11.2016 bearing Ref.F.No.T-4/11-B//DD/VMS)/2015/3099 and quash the same.

WP No. 1751 of 2017:- Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari to call for the records of the second respondent dated 04.11.2016 bearing Ref.F.No.T-4/11-B//DD/VMS)/2015/3098 and quash the same.

For Petitioners :Mr. P.S. Raman, Senior Advocate
for Mr. P.R. Raman
in all the Writ Petitions

For Respondents :Mr. M. Dhandapani
in all the Writ Petitions

COMMON ORDER

In all these writ petitions, the petitioners have challenged a communication dated 04.11.2016 of the second respondent, in and by which the second respondent called upon the petitioners to be present on 24.11.2016 for an enquiry before the office of the Directorate of Enforcement in connection with the adjudication proceedings under Section 13 of the Foreign Exchange Management Act, 1999 read with Rule 9 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000.

2. In all these cases, the communication dated 04.11.2016 sent by the second respondent is under challenge and the contents of the said communication are identical. The respondents in all these writ petitions are one and the same. The counsel for both sides have advanced common arguments in all these writ petitions, besides common question arise for determination of this Court. Therefore, all the writ petitions are taken up for hearing together and are disposed of by this common order.

3. The petitioner in WP No. 1748 of 2017 is a company engaged in the business of manufacturing cement and allied activities. The petitioner in WP Nos. 1749 to 1751 of 2017 are holding the executive post in the above said company at various level. According to the petitioners, in the year 2007, the Board of Control for Cricket in India (BCCI) proposed a private league of 20-20 format of cricket called Indian Premier League (IPL) and for this purpose they have floated a tender inviting city based Franchise. The petitioner company participated in the said tender and became successful in bagging a franchise/team called as Chennai Super Kings (CSK). According to the petitioners, the format of the game involves each franchise playing a game against each of the other franchise, one at its designated home stadium and the other at the home stadium of the opponent team. The petitioner company was also successful in bagging a franchise for the IPL format of cricket game in the year 2009. During the year 2009, BCCI has scheduled the games to be conducted outside India and the venue for the 2009 matches were shifted from India to South Africa. For the purpose of conducting the IPL matches in South Africa, BCCI has also agreed to support the franchisees with respect to additional expenses to be incurred by them while participating in the cricket game outside India at South Africa. The petitioner also stated to have entered into an agreement to that effect with BCCI and BCCI also made all arrangements for conducting the IPL matches in the year 2009 in association with Cricket South Africa (CSA). Eventually, according to the petitioner company, they have incurred additional expenses for undertaking the trip to South Africa.

4. In this context, alleging infraction of the provisions of Foreign Exchange Management Act (FEMA), the directorate of Enforcement has given a complaint on 23.02.2015 against the petitioners herein and appointed the second respondent as the adjudicating authority under Section 16 of FEMA for having allegedly contravened the provisions of the Act. A show cause notice dated 27.02.2015 was issued by the second respondent to the petitioner company and their officers calling upon them to show cause as to why they cannot be made vicaciously liable for the infractions committed by the company. On receipt of such show cause notice, the petitioners have sent a detailed reply dated 19.06.2015. On receipt of the reply sent by the petitioners, the impugned communication dated 04.11.2016 has been sent to the petitioners calling upon them to appear for a personal enquiry on 04.11.2016.

5. Mr. P.S. Raman, learned Senior counsel appearing for the petitioners would contend that the impugned communication dated 04.11.2016 is per se arbitrary and in violation of principles of natural justice. According to the learned Senior counsel for the petitioner, the second respondent has already sent a show cause notice to the petitioners on 27.02.2015 for which a reply dated 19.06.2015 was also sent by the petitioners. It is not known as to whether the reply sent by the petitioners on 19.06.2015 to the show cause notice dated

27.02.2015 has been considered by the second respondent or not. Whether the reply dated 19.06.2015 of the petitioners was satisfactory, accepted or entertained is also not known and the petitioners were made to grope in the dark. Even in the impugned communication, the second respondent has not indicated as to whether the explanation submitted by the petitioners on 19.06.2015 has been accepted or not. The impugned communication dated 04.11.2016 is bereft of any material particulars and it is vague. There was no reasons assigned by the second respondent while issuing the impugned communications dated 04.11.2016 or it is not known as to what prompted the second respondent to issue the impugned communications dated 04.11.2016. The impugned communications dated 04.11.2016 have been issued only to comply with an empty formality and they are legally not sustainable. A perusal of the impugned communications would reveal that the second respondent has not assigned any reasons for issuing them. The basis on which the second respondent has issued the impugned communications has not been revealed. Whether the second respondent has accepted the reply dated 19.06.2015 sent by the petitioners or not is not known to the petitioners. In such circumstances, the learned Senior counsel for the petitioners would contend that the impugned communications dated 04.11.2016 sent by the second respondent without assigning the reasons or the basis on which they were sent would deprive the petitioners the opportunity to know the manner in which they will be proceeded with if they appear before the respondents on the date fixed for personal hearing. Unless reasons are indicated in the impugned communications, the petitioners will not be in a position to know whether the explanations submitted by them have been considered by the second respondent or not and whether the second respondent has applied his mind before issuing the impugned communications. Thus, according to the learned Senior counsel for the petitioners, the impugned communications are contrary to the well established principles of natural justice and he prayed for allowing the writ petitions.

6. Even though the respondents have not filed any counter affidavit, the learned counsel for the respondents would only contend that the petitioners were only called upon to attend a personal hearing on a date fixed by the second respondent. The second respondent has not finally adjudicated the complaint against the petitioners. In order to clarify certain aspects, the communications dated 04.11.2016 have been sent. It is well settled proposition of law that as against a show cause notice, a writ petition is not maintainable. The communication dated 04.11.2016 is only a notice calling upon the petitioners to appear for an enquiry and therefore, the writ petitions filed by the petitioners is pre-mature. The learned counsel for the respondents therefore prayed for dismissal of the writ petitions.

7. I heard the learned Senior counsel for the petitioners and the learned counsel for the respondents. I had carefully examined the records made available, including the communications dated 04.11.2016 which are challenged in these

writ petitions. The first and foremost submission of the learned Senior counsel for the petitioners is that earlier, the second respondent issued a show cause notice on 27.02.2015 for which the petitioners have sent their reply on 19.06.2015. In the reply dated 19.06.2015, the petitioners have specifically contended that they have not contravened any of the provisions of the FEMA and therefore, they have prayed for dropping all further actions in the complaint registered against them. In the last line of the reply dated 19.06.2015, the petitioners have specifically stated that they may be given an opportunity of personal hearing. In other words, in the reply dated 19.06.2015, a specific request was made for affording a personal hearing before any order is passed against the petitioners. Therefore, it is evident that only on the basis of the request made by the petitioners, the communications dated 04.11.2016 have been sent to them fixing a date for personal hearing.

8. The learned Senior counsel appearing for the petitioners would vehemently contend that there is no reason assigned in the communication dated 04.11.2016 by the second respondent. It has to be noted that already, a show cause notice dated 27.02.2015 was sent by the second respondent to the petitioners. In the said show cause notice, certain violations allegedly committed by the petitioners have been indicated. For the said show cause notice, a detailed reply dated 19.06.2015 have been sent by the petitioners. It is in pursuance of the said reply and/or in continuation of the proceedings which formed part of the show cause notices dated 27.02.2015, the present communications dated 04.11.2016 have been sent by the second respondent. It is needless to mention that during the course of personal hearing, the second respondent may or may not drop the proceedings against the petitioners or after hearing the petitioners, the second respondent may take up further proceedings in a manner known to law. In any event, it is evidently clear that the communications dated 04.11.2016, which are impugned in these writ petitions, have been sent by the second respondent as a sequel to the show cause notice dated 27.02.2015 already issued to the petitioners.

9. It is the vehement contention of the learned Senior counsel for the petitioners that the reasons are the heart-beat for any conclusion and in the absence of assigning any reason, the petitioners are not in a position to know as to whether the second respondent has applied his mind to the explanation already given by them or the explanation given by the petitioners have been considered by the second respondent. According to the learned Senior counsel for the petitioners, the petitioners are groping in the dark without knowing the fact as to whether the second respondent has arrived at a subjective satisfaction to proceed against them or to drop the proceedings against them. The learned Senior counsel for the petitioners would therefore contend that the communications dated 04.11.2016 are not only in violation of the principles of natural justice but without any reasons and it is a cryptic

order. I am unable to accept such submission of the learned Senior counsel for the petitioners. What is challenged in these writ petitions is only a communication dated 04.11.2016 calling upon the petitioners to appear for a personal hearing, as sought for by them in their reply dated 14.06.2015. Further, for issuing a notice of this nature calling upon the petitioners to appear for a personal hearing, the second respondent need not verbatim reproduce the allegations which formed part of the show cause notice or the reply given by the petitioners. In fact, a perusal of the communication dated 04.11.2016 of the second respondent would reveal that the second respondent has considered the explanation of the petitioners and specifically used the word "an indepth examination and an inquiry should be held in this case" meaning thereby apart from the explanations offered by the petitioners, the second respondent want to examine further with respect to the allegations made against the petitioners and for such purpose, the communications dated 04.11.2016 has been issued.

10. it is well settled that the reasons are the heart beat for any conclusion arrived at by an instrumentalities of the State. In the present case, reasons have been clearly spelt out by the second respondent by stating as follows:-

"I have considered the complaint along with its relied upon documents, the Show cause notice and the replies to SCN referred to above. On the basis of the same, I am of the opinion that the allegations made in the complaint and the defense reply, need in depth examination and an inquiry should be held in this case....."

11. This has clearly exposed the application of mind on the part of the second respondent who wanted to examine in detail the allegations levelled against the petitioners in the light of the reply given by them. For such examination, the second respondent has issued the communications dated 04.11.2016. The communications dated 04.11.2016 is not a final adjudication order requiring the second respondent to deal with each and every one of the allegations and counter-allegations raised in this regard. When the second respondent wanted to have an indepth examination of the case, by arriving at a subjective satisfaction to have a personal hearing, the second respondent is wholly justified in issuing the communications dated 04.11.2016 calling upon the petitioners to appear for an enquiry. It is needless to mention that by the communications dated 04.11.2016, the second respondent has not finally adjudicated the case against the petitioners or an adverse order has been passed against them and the adjudication is in the preliminary stage.

12. The learned counsel for the respondents relied on the order dated 25.08.2014 passed by this Court in WP No. 20592 of 2014 (Ramakrishna Settu vs. The Special Director, Directorate of Enforcement, Southern Region, Sastri Bhyavan, Chennai - 600 006) wherein this Court had an occasion to consider the manner in which an enquiry has to be conducted and the several stages

encompassed in such administrative or quasi-judicial enquiry. Useful reference can be made to para Nos. 9 to 11 of the order, which is usefully extracted hereunder:-

"9. A careful look at the provisions of sub-rules (1) to (12) of Rule 4 would show that the enquiry by the respondent, comprises of five stages, which are as follows:-

"1. The issue of show cause notice of a duration of not less than ten days, calling upon the person to show cause as to why an enquiry should not be held, for any contravention.

2. The issue of a notice fixing the date for the appearance of the person, if after considering the cause shown by the person to the show cause notice, the adjudicating authority is of the opinion that an enquiry should be held.

3. The explanation of the adjudicating authority in person, either to the noticee or to his authorised representative, the contravention committed by the noticee with reference to the provisions of the Act or the Rules or the Regulations.

4. Giving an opportunity to the noticee to produce such documents or evidence and the summoning and enforcing of the attendance of any person.

5. Passing of the orders.

10. Therefore, the scheme of Section 4 actually provides opportunities at the every stage to the noticee. The forming of an opinion at the stage of show cause notice and receipt of reply, as provided under sub-rule (3) or Rule 4, is almost akin to the forming of an opinion by a disciplinary authority to hold or not an enquiry, upon receipt of a reply to a charge memo in a disciplinary proceeding. Therefore, I do not think that there is any scope for expanding Rule 4 (3) to mean that the forming of the opinion as required in Rule 4 (3) has to be reflected by an order in writing containing reasons. The interpretation given by the Division Bench of the Bombay High Court in its expression 'opinion' appears to be very elastic.

13. Therefore, as held by this Court in the decision referred to above, there are several stages of an inquiry and one such stage is affording an opportunity to the noticee to certain aspects inter alia giving an opportunity to the noticee to put forth their defence. In such view of the matter, the communications dated 04.11.2016, which are impugned in these writ petitions, can be construed to be the one issued by the second respondent in compliance with the principles of natural justice while conducting an enquiry against the petitioners and it does not call for any interference by this Court.

14. In yet another order dated 09.12.2014 passed by this Court in WP No. 18857 of 2010 (KIBS Hoisery Mills Pvt Ltd., vs. The Special Director, Directorate of Enforcement Foreign

Exchange Management Act) relied on by the learned counsel for the respondents, it has been held in para-18 as follows:-

"18. On a bare reading of the show cause notice, it is seen that a complaint was made under Section 16 (3) of FEMA for contravention of the provisions of FEMA. The adjudicating authority on a perusal of the complaint and after considering the cause assigned by the complainant in the said complaint, stated that it appears that there is contravention in the said complaint against the petitioners of the provisions of Section 3 (c) read with Section 42 (1) of FEMA, as mentioned in the complaint. Therefore, the petitioner was required to submit reply to the show cause notice in writing within thirty days from the date of notice as to why adjudicating proceedings as contemplated under Section 13 of FEMA should not be held against them for contravention of the provisions of Section 3 (c) of FEMA as mentioned in the complaint, which was enclosed along with the show cause notice. The attention of the petitioners was invited to Rule 4 of the Rules. Further, the petitioners were directed to appear either in person or through their legal practitioners/Chartered Accountants duly authorised by them to explain and produce such documents as may be useful or relevant to the subject matter of enquiry. There is nothing to indicate that the adjudicating authority has straight away proceeded to the stage contemplated under sub rule (4) of Rule 4. The show cause notice does not indicate any such conclusion nor it may be stated that the respondent has violated the procedure under Rule 4 of the Rules. In fact, the attention of the petitioners has been drawn to Rule 4 of the Rules. Therefore, the plea raised by the petitioner that the show cause notice is vitiated for having not following the procedure under Rule 4 of the Rules, deserves to be rejected."

15. The learned Senior counsel for the petitioners would mainly contend that after the show cause notice dated 27.02.2015 issued by the second respondent, the petitioners have sent a detailed reply dated 19.06.2015 repudiating the allegations made therein. Thereafter, the impugned communication dated 04.11.2016 has been sent to the petitioners calling upon them to appear for a personal enquiry without assigning any reasons for issuing the same. It is true that reasons are the heart beat for any conclusion, however, reasons for issuing the communication calling upon the petitioners to appear for an enquiry need not be elaborate. In the present case, the respondent has clearly indicated that even though a reply was sent by the petitioners on 19.06.2015, yet, certain aspects required to be investigated in-depth and therefore the communications dated 04.11.2016 was issued.

16. The learned Senior counsel for the petitioner relied on the Division Bench decision of the Bombay High Court passed on 07.08.2013 in WP No. 5305 of 2013 (Shashank Vyankatesh Manohar vs. Union of India through Ministry of Finance, New Delhi and another) wherein in para No.15 and 21, it was held as follows:-

"15. However, this formation of opinion by the adjudicating authority is not required to be preceded by a personal hearing but only consideration of the written objections of the noticee would meet the ends of natural justice. The personal hearing would be afforded to the noticee before the disposal of the show cause notice by a final order - an appealable order. This formation of opinion must be on record of the Adjudicating Authority, in this case the Special Director, Directorate of Enforcement. Keeping this recording of reasons on the file would ensure that there has been a due application of mind to the objections raised by the noticee. This would be a necessary safeguard against forming arbitrary opinions. These recorded reasons must be furnished to the noticee, when asked for by the noticee at the time of granting a personal hearing to the noticee. This would give an opportunity to the noticee during the personal hearing to correct any erroneous view taken in forming the opinion to proceed further with the show cause notice. This would ensure that the opinion formed on the preliminary objections which would otherwise never be a subject matter of discussion/debate before the Adjudicating Authority is also a part of the order to be passed by the Adjudicating Authority. In the absence of the above, the preliminary objections would be dealt with by the Adjudicating Authority possibly only in his mind while deciding to proceed further with the notice and the reasons would never be recorded to evidence consideration of the objections. This would result in great prejudice to the noticee for more than one reason. Firstly, the noticee would have no clue as to what were the considerations which weighed with the Adjudicating Authority to reject the preliminary objections. It is also very clear from the provisions of the Act and the Rules that an Appeal which is provided would not lie from an order recording an opinion of the Adjudicating Authority to proceed further with the adjudication of the notice, but the appeal would only be against the final order.

21. Thus, in view of the above discussion, we are of the view that Adjudicating Authority, after issuing show cause notice and receiving objections to the notice from the noticee is required to apply his mind to the objections by recording his reasons for forming an opinion on the file. This exercise need not be preceded by personal hearing and the

order to be passed on the objections is not required to be detailed order, but it must disclose some link with the objections raised by the noticee and the opinion formed by the Adjudicating Authority. The recording of the opinion of the Adjudicating Authority would be given to the noticee when the proceedings are dropped in the form of an order. However, in cases where the opinion is formed to proceed further with the show cause notice, then a notice for personal hearing is required to be given to the party in terms of Rule 4 of the Adjudication Rules. However, if on receipt of the notice for personal hearing, the recorded reasons are sought for by the noticee, the same should be given. However, this recording of reasons is not an appealable order but it would be give the noticee a chance during adjudication proceedings to meet the reasons which led the Adjudicating Authority to form an opinion that he must proceed further with the inquiry against noticee. This would only result in fair procedure which would be in consonance not only with Rule 4 of the Adjudication Rules but with principles of natural justice."

17. The above decision of the Division Bench of the Bombay High Court clearly indicates that before arriving at a conclusion by the adjudicating authority, notice should be given, opportunity should be afforded to the noticee before proceeding further. Precisely, the impugned communications are in compliance with the directives of the Division Bench of the Bombay High Court, relied on by the learned Senior Counsel for the petitioners. The communications which are impugned in these writ petitions are not in contravention with the decision of the Bombay High Court. Therefore, the decision rendered by the Division Bench of the Bombay High Court do not lend support to the case of the petitioners. Rather, the respondent has given sufficient and cogent reasons for issuing the communications dated 04.11.2016 which are impugned in these writ petitions.

18. In the present case, as mentioned above, reasons have been clearly disclosed by the second respondent in the communications dated 04.11.2016 by specifically indicating that the case requires an indepth examination, meaning thereby, the objections raised by the petitioners as against the allegations levelled against them are required to be considered further and for such consideration, the petitioner must appear in person to putforth their case. Therefore, the reliance placed by the learned Senior counsel for the petitioners on the Division Bench decision of the Bombay High Court will not lend support to his case.

19. For all the above reasons, I hold that the communications dated 04.11.2016, which are impugned in these writ petitions, are intended for carrying out an indepth

examination by the second respondent as against the allegations raised against the petitioners. Such communications, in my considered opinion, are also in compliance of the principles of natural justice. By the communications dated 04.11.2016, the second respondent has not determined the case against the petitioners or passed an order adverse to their interest. Therefore, I am of the view that the writ petitions are only liable to be dismissed and the petitioners are not entitled for any relief in these writ petitions.

20. At this stage, the learned Senior counsel for the petitioners brought to the notice of this Court that by the communications dated 04.11.2016, the petitioners were called upon to appear for an enquiry on 24.11.2016 and by efflux of time, the date fixed by the second respondent for hearing the petitioners has lapsed. Having regard to the above submissions, the second respondent is hereby directed to issue a fresh notice to the petitioners indicating the date, time and venue for the personal hearing to be given to the petitioners and if any such notice is received, the petitioners are at liberty to appear before the second respondent either in person or through an authorised representative to putforth their defence.

21. In the light of what is stated above, all the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To

1. Union of India
represented by its Secretary
Department of Revenue
Ministry of Finance, New Delhi

2. The Deputy Director
Directorate of Enforcement
4th Floor, Kaiser-I-Hind
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