

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2803 OF 2015

Lalit Kumar Modi	}	
aged 52 years, son of Mr. K.	}	
K. Modi, resident of 117,	}	
Sloane Street, London,	}	
through his constituted	}	
attorney Mr. Mehmood M.	}	
Abdi, son of late Mohammad	}	
N. Abdi residing at A-901,	}	
Meera Tower, Near Mega	}	
Mall, Oshiwara, Andheri (W),	}	
Mumbai - 400 053	}	Petitioner
versus		
1. Special Director,	}	
Directorate of Enforcement	}	
(Western Region),	}	
Government of India,	}	
Ministry of Finance,	}	
Department of Revenue,	}	
ground floor, Kaiser-I-Hind	}	
Building, Currimbhoy Road,	}	
Ballard Estate,	}	
Mumbai - 400 001	}	
	}	
2. Assistant Director,	}	
Directorate of Enforcement	}	
(Western Region),	}	
Government of India,	}	
Ministry of Finance,	}	
Department of Revenue,	}	
ground floor, Kaiser-I-Hind	}	
Building, Currimbhoy Road,	}	
Ballard Estate,	}	
Mumbai - 400 001	}	Respondents

Mr. Aspi Chinoy-Senior Advocate with Mr. Gaurav Goyal and Ms. Naveli Reshmwalla i/b. M/s. Wadia Ghandy and Co. for the petitioner.

Mr. Anil Singh-Additional Solicitor General with Mr. Avinash Rana-Senior Advocate, Mr. Pradeep S. Jetly, Mr. Parag Vyas and Ms. Geetika Gandhi for respondent nos. 1 and 2.

**CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATE :- JANUARY 30, 2018

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

2. By this petition under Article 226 of the Constitution of India, the petitioner claims the following reliefs:-

“(a) issue a Writ of certiorari or any other appropriate writ/order or direction in the nature of certiorari quashing the decision contained in the letter dated 10th of July 2015 to the extent the Respondent No. 1 has refused the request of the Petitioner to cross examine the witnesses whose statements were recorded under Section 37 of FEMA and whose statements have been relied upon in the complaint;

(b) issue a writ of Mandamus and/or any other appropriate writ order or direction in the nature of Mandamus directing the Respondent No. 1 to issue summons to Mr. N. Srinivasan, Mr. Prasanna Kannan, Mr. Sundar Raman, Mr. Chirayu Amin, Mr. Shashank Manohar, Mr. Ratnakar Shetty, Ravi Shankar Shastri, Mr. M. P. Pandove and Mr. Peter Griffith (“the said witnesses”) and permit the advocates for the Petitioner to cross examine them;

(c) issue a Writ of Mandamus and/or any other appropriate Writ/order or direction in the nature of Mandamus directing the Respondent No. 1 and 2 to supply a copy of the reply filed by the other eight Co-Noticees including the BCCI in response to the eleven Show cause Notices issued against the Petitioner and others;

(d) issue a writ of Mandamus and/or any other appropriate Writ/order or direction in the nature of Mandamus directing the Respondent No. 1 to hold the proceedings with respect to all the eight Noticees in the eleven Show Cause Notices and the proceedings with respect to the State Bank of Travancore (Authorized Dealer) and a party in the complaint at the same time and venue.”

3. The petitioner before us is presently residing in London. He says that he was one of the Vice Presidents of the Board of Control of Cricket in India (hereinafter referred to as “the BCCI”). This board organised a tournament styled as Indian Premier League (hereinafter referred to as “the IPL”) and the petitioner was appointed as a Chairman of the governing council of this IPL, which is the sub-committee of the BCCI. However, he continued as the Vice President of the BCCI and Chairman of this IPL till 26th April, 2010.

4. The respondents before us are the authorities under the Foreign Exchange Management Act, 1999 (hereinafter referred to as “the FEMA”). The first respondent entertained a complaint by the second respondent dated 16th November, 2012. Based on this complaint, the first respondent has issued 11 show cause notices to the petitioner and seven other persons, including the BCCI. The allegations in the show cause notices are with reference to the organisation of this tournament styled as IPL. However, the petitioner says that the BCCI is a society registered

under the Tamil Nadu Societies Registration Act, 1978 and the Rules framed thereunder. It has a Working Committee and other committees like Finance Committee, Legal Committee and Marketing committee etc. Such committees assist and aid the BCCI in its smooth functioning. The complaint proceeds to allege that office bearers of the BCCI are President, Secretary, Joint Secretary, Treasurer and they are responsible for its affairs. The petitioner narrates as to how the Working Committee met on 13th September, 2007 and it decided to manage the IPL, for which, a sub-committee was formed. In the Annual General Meeting of 28th September, 2007, it was resolved that one Mr. N. Srinivasan, the then Honorary Secretary would open and operate a new bank account in the name of the BCCI-IPL. The petitioner claims that all financial transactions and in relation to BCCI-IPL were the responsibility of Mr. N. Srinivasan. Then, there is a reference made to a Special General Meeting of the BCCI dated 16th December, 2007.

5. The show cause notices are based on a complaint and that complaint alleges that the provisions of section 3(b) of the FEMA have been contravened by the petitioner by making a payment of US\$ 4,98,62,799.42 equivalent to Rs.243,45,35,781/- to Cricket South Africa (CSA) a person residing outside India, without

permission of the Reserve Bank of India (RBI) and that is inter alia apparent from an agreement dated 30th March, 2009 executed between the BCCI and Cricket South Africa. The show cause notices rely upon the complaint of the second respondent to this petition, the gist of which reads as under:-

“10. The Complainant, therefore, submits:-

I that the notices no 1 to 10 appear to have violated the provisions of FEMA, 1999 as mentioned above, and are liable to penalties under Section 13(1) of FEMA 1999.

II It is, therefore, prayed that this complaint may be taken on record and the noticees no 1 to 6 be dealt with in accordance with law.

III It is further prayed that directions be issued to BCCI to repatriate to India, the amount of ZAR 931567 which has accrued to BCCI as receivable against pouring rights.

IV That the Complainant seeks permission of the adjudicating authority to refer to and to rely, inter alia, on the documents mentioned in the “Annexure-II” to this complaint.

Dated at Mumbai, this 16th day of November, 2011.”

6. A copy of the show cause notice issued to the petitioner and others reads as under:-

“DIRECTORATE OF ENFORCEMENT
Ministry of Finance, Department of Revenue,
Janmabhoomi Chambers, Walchand Hirachand Marg,
Mumbai 400 038

022-22614011 / 22631535 - 022-22631541

SCN NO.T-4/16-B/SDE/R/2011(SCN-III) NO.T-3/44-B/2010/Part(BCCI-II)

SHOW CAUSE NOTICE

1 The Board of Control for Cricket in India
Cricket Centre, Wankhede Stadium,
'D' Road, Churchgate, Mumbai - 400 020

- 2 Shri Lalit Kumar Modi,
Nirlon House, 3rd Floor,
Dr. Annie Beasant Road,
Worli, Mumbai - 400 018
- 3 Shri Shasank Manohar,
The then, Hon. President, BCCI,
Cricket Centre, Wankhede Stadium,
'D' Road, Churchgate, Mumbai - 400 020
- 4 Shri N Srinivasan,
The then, Hon. Secretary, BCCI,
Cricket Centre, Wankhede Stadium,
'D' Road, Churchgate, Mumbai - 400 020
- 5 Shri M.P. Pandove,
Hon. Treasurer, BCCI,
Cricket Centre, Wankhede Stadium,
'D' Road, Churchgate, Mumbai - 400 020
- 6 Shri Ratnakar Shetty,
Chief Executive Officer, BCCI,
Cricket Centre, Wankhede Stadium,
'D' Road, Churchgate, Mumbai - 400 020
- 7 Shri Prasanna Kannan,
Manager, business and commercial services, IPL,
No.3, 6th Street, M.G.R. Salai, Palavakkam,
Chennai - 600 041
- 8 Shri Sunder Raman,
COO, IPL, Cricket Centre, Wankhede Stadium,
'D' Road, Churchgate, Mumbai - 400 020.

.....Notices

WHEREAS a complaint under sub-section (3) of Section 18 of the Foreign Exchange Management Act, 1999 (for short FEMA) has been filed before me against you, for contravention of the provisions of Foreign Exchange Management Act (as specified in the enclosed complaint)

On perusal of the said complaint and after considering the cause shown by the complainant in his complaint bearing No.T-3/44-B/210/ASD(DKS)/Part(BCCI-II) dated 17th November, 2011, there appears to be contravention of the following provisions of FEMA, 1999 as specified in the said complaint.

(i) Noticee No.1 appears to have contravened the provisions of Sec. 4 of FEMA, 1999 by transferring outside India foreign exchange totaling US \$ 4,98,62,799.42 (equivalent to Rs.243,45,30,781/-) to CSA, South Africa without the permission of RBI as appears inter alia from the agreement dated 30-03-2009 executed between the Board of Control for Cricket in India and Cricket South Africa and the statements of Shri N. Srinivasan, Shri Shasank Manohar, Shri Prasanna Kannan, Shri M.P. Pandove and Shri Sunder Raman, referred to in the Complaint and the narration of para 4 specially sub-para 4.1, 4.2, 4.5, 4.7, 4.10, 4.11, 4.12, 4.14, 4.16, 4.22, 4.33 and 4.34 of the Complaint.

(ii) Noticee Nos.2 to 5 appear to have contravened the above provisions of FEMA in terms of section 42(1) of FEMA, 1999.

(iii) Noticee Nos.6 to 8 appear to have contravened the above provisions of FEMA in terms of section 42(1) of FEMA, 1999.

You are therefore required to show cause in writing within 30 days of the receipt of this notice, as to why adjudication proceedings as contemplated under Section 16 of the Foreign Exchange Management Act, 1999 should not be held against you for the aforesaid contraventions.

Your attention in this connection is drawn to Rule (4) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000;

In view of the above, you are required to appear either in person or through Legal Practitioner/Chartered Accountant duly authorized by you to explain and produce such documents or evidence, as may be useful for or relevant to the subject matter of enquiry.

In case you fail, neglect or refuse to appear before me on the appointed date, the adjudication proceedings will be initiated against you ex-parte. Reliance has been inter alia placed on the documents listed in Annexure to the complaint.

Given under my hand and seal on this 25th day of NOVEMBER, 2011.

(RAJENDRA)
SPECIAL DIRECTOR

Encl: Copies of complaint dated 17/11/2011
and documents relied upon.”

7. All the show cause notices contain almost identical allegations. Thus, the petitioner before us is the noticee number two. The complaint is fairly detailed and by virtue of the serious allegations therein, the show cause notices were issued to the petitioner. The petitioner says that these show cause notices are accompanied by a copy of this complaint and the complainant, in turn, specifically states that he seeks permission of the adjudicating authority to refer to and rely, inter alia, on the documents mentioned in Annexure - II to the complaint. Annexure - I are the details of the remittances made to Cricket South Africa by the BCCI towards expenses of IPL-II. Annexure - II are several documents and we are concerned in this case with the following documents:-

- i) Statement dated 08.07.2010 of Shri N. Srinivasan, Hon. Secretary of the BCCI.
- ii) Statements dated 17.06.2010, 02.12.2010 and 09.08.2011 Shri Sunder Raman, Chief Operating Officer of IPL.
- iii) Statements dated 26.04.2011 and 28.04.2011 of Shri Prasanna Kannan, Manager of BCCI-IPL.
- iv) Statement dated 29.07.2011 of Shri Chirayu Amin, presently Member, IPL Governing Council the then Chairman, Indian Premier League.
- v) Statement dated 10.08.2011 of Shri Shashank Manohar, the then Hon. President, BCCI.
- vi) Statements dated 04.08.2011 and 19.08.2011 of Shri M.P. Pandove, Honorary Treasurer of BCCI.

vii) Statement dated 28.06.2010 if Shri Ratnakar Shetty, Chief Administrative Officer of BCCI.

viii) Statements dated 10.12.2010 and 03.02.2011 of Shri A.K. Nazeer Khan, Chief Manager of the State Bank of Travancore, Jaipur Branch under which transaction details, copies of A2 Forms and BCCI's request letters regarding remittances to be made to Cricket South Africa, have been submitted.

8. The show cause notice itself alleges that the Special Director-respondent no. 1, under whose hand and seal this notice has been issued, relies on, inter alia, the documents listed in the annexure to the complaint.

9. Thus, the show cause notice dated 25th November, 2011, based on the complaint of the Assistant Director dated 16th November, 2011, came to be served on the petitioner. The petitioner addressed a letter, copy of which is at Exhibit-'B' to the petition referring to this show cause notice. By this letter dated 10th January, 2012, the petitioner sought a clarification from the first respondent as to which documents were relied upon for the purpose of issuance of the show cause notices apart from the documents at Annexure - II. The complainant also requested to provide copies of all such documents. Under that letter, the petitioner also sought extension to file a reply to the show cause notices. Since no reply was received, the petitioner followed up his request by a letter dated 23rd January, 2012. These letters are addressed on behalf of the petitioner by his advocate and they

sought information and inspection as well of supply of complete set of documents relied upon in the show cause notices. Exhibit – 'C' to this petition is a copy of this letter of 23rd January, 2012.

10. The petitioner states that once again there was no response to these letters. The petitioner's advocate, therefore, addressed a letter dated 3rd May, 2012 reiterating that the petitioner intends to file a detailed reply to the allegations in the show cause notices and in view of his prior application/letter, a date be fixed by the first respondent for hearing of the application is the request contained in the letter dated 23rd January, 2012.

11. Thereafter, in order to effectively present his case and file a detailed and comprehensive reply to the show cause notices, on 7th May, 2012, the petitioner's advocate requested the first respondent to provide a copy of the reply filed by the BCCI to the show cause notices. Exhibit-'E' is a copy of this letter. The petitioner alleges that none of these letters were responded and respondent no. 1 did not intimate either the petitioner or his advocate about any order passed in respect of these applications. The petitioner, therefore, without prejudice to his right to file a detailed reply and reserving it after supply of all the documents sought by him, forwarded his preliminary reply under the advocate's letter dated 3rd September, 2012. In this reply, the

petitioner stated that the adjudication proceedings initiated by respondent no. 1 are quasi judicial in nature. The principles of natural justice require that the petitioner be furnished with all the details pertaining to the allegations in the show cause notices. Therefore, this preliminary reply asserted the petitioner's right to object to the manner in which the proceedings were being conducted and which are not in compliance with the principles of natural justice. A copy of this letter is at Exhibit-'F'.

12. A reply was given to this letter at Exhibit-'G' to the petition, in which, the authority, namely, the first respondent stated that the petitioner was served with the show cause notices. After considering the cause shown by him, the first respondent is of the opinion that the adjudication proceedings, as contemplated by section 13 of the FEMA should be held against him in accordance with the procedure laid down in Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2013 and a personal hearing has been fixed on 19th June, 2013 in the office of the Directorate. The petitioner is given an opportunity to appear either personally or through legal practitioner/Constituted Attorney at this personal hearing and in case he fails to appear, the adjudicating authority will proceed with the case in his absence and pass adjudication order on the

basis of the material and evidence available to him. The petitioner, through his advocate, on 19th June, 2013, stated that the notice is not adequate. The advocate is out of station and it will not be possible to get ready by the given date and time. Further, these notices of personal hearing do not refer to a personal meeting of one Gaurav Gopal when he met Shri. D. K. Sinha to collect the documents in respect of the other show cause notices. This meeting was held on 11th June, 2013, on which date, it was not informed that these show cause notices would be adjudicated so soon and a notice has already been issued in that behalf. Thus, the time was not adequate. The petitioner states that in these circumstances, the petitioner was constrained to move this court and a writ petition was filed being Writ Petition No. 1703 of 2013. That writ petition was disposed of by this court and in terms of the order passed by this court, it was directed that the petitioner be furnished with the documents.

13. The petitioner then addressed another letter dated 22nd July, 2014 and prayed for supply of the documents, withdrawal of the notices themselves and alternatively and without prejudice, proceed with the adjudication only after furnishing the documents and allowing the petitioner to file a detailed reply.

14. On 12th November, 2014 (Exhibit-'L'), the petitioner was informed that the Special Director has decided to furnish the documents mentioned in para 3 of the letter dated 22nd July, 2014 and requested the petitioner to collect these documents on 19th November, 2014, on which date, it was informed that the documents were not ready. The advocates were asked to contact again on 24th November, 2014. It was only on 11th December, 2014 that part of the documents were supplied by the Assistant Director to the advocate of the petitioner under their letter dated 11th December, 2014. The balance documents were agreed to be provided on 15th December, 2014. The documents were not ready. It is only on 11th February, 2015 that a letter was addressed by the Assistant Director to the advocate of the petitioner and the remaining documents were provided.

15. The petitioner then relies upon a notice issued by the Special Director dated 15th April, 2015, copy of which is at Exhibit-'O' to the petition. There was a correspondence with the authority and letters dated 29th April, 2015, 15th May, 2015, recording the appearance of the petitioner on that dates being Exhibits-'S' and 'T' to the petition, were addressed.

16. The petitioner, at the personal hearing as also by his written communications, requested respondent no. 1 to grant his

plea of cross examining the persons whose statements have been relied upon by the Assistant Director-second respondent in his complaint as also by the Special Director-first respondent in the show cause notice. The request was as follows:-

“3. That the aforesaid persons who were office bearers, administrators and officials of BCCI were examined by the complainant and their statements were recorded under Section 37 of FEMA, 1999. In the statements of office bearers, administrators and officials of BCCI have not only stated incorrect facts in respect of the subject matter of Show Cause Notice but an attempt has been made in their statements to shift the burden on our client. The falsity of those statements has been exposed in the reply filed by our client. Our client was issued three Show Cause Notices by Shri N. Srinivasan and Shri Shashank Manohar during the course of BCCI disciplinary proceedings. Those notices were result of internal political wranglings within the BCCI as Shri N. Srinivasan and Shri Shashank Manohar tried to oust our client from the BCCI. Our client had also exposed the deep and pervasive conflict of interest of Shri N. Srinivasan in the BCCI as he was wearing two hats of administrator as well as franchisee in the BCCI. Due to this, Shri N. Srinivasan had deep grudge against our client and all his actions were malicious and vengeful. These office bearers were having tremendous influence within BCCI. For example Shri Prasanna Kannan while being employed in India Cements Ltd. (a company owned by Shri N. Srinivasan) was also employed in BCCI as CFO of IPL and was directly reporting to Shri N. Srinivasan, Shri Sundar Raman was close associate of Shri N. Srinivasan and was considered as his alter ego. Similarly, other BCCI witnesses were under influence of Shri Shashank Manohar and Shri N. Srinivasan who were the two most important office bearers of BCCI. The statements of the BCCI witnesses before the ED are false in material particulars. Our client craves leave to rely on his reply to show the falsity of the stand of these BCCI witnesses. These witnesses have further tried, out of malice, to portray our client in a negative light and have tried to shift the allegations in the complaint on him whereas our client was not in any manner, ever involved in any monetary transactions concerning the BCCI or the IPL. He had no cheque signing power. He was not mandated with any authority to exercise control over BCCI accounts, either

operationally or in respect of withdrawals or authorized to make any payments. Thus, he had no role to play in any of alleged contraventions under FEMA. The only persons who were authorized to do the same were the BCCI Treasurer, the BCCI Secretary and the BCCI President. All FEMA related compliances were being taken care of by the Treasurer's and Secretary's office. The bank accounts were also being opened / operated by Treasurer and Secretary. In these circumstances, it is expedient and in the interest of justice to summon these persons so that they can be cross examined and the true facts can emerge out of their evidence.”

17. The petitioner's additional reply and application referred to these documents, but the filing of the additional reply was without prejudice to the request for cross examination. The cross examination was sought because it was pointed out by the petitioner that these statements are being relied upon to bring home the charge or to prove the allegations in the show cause notices. If these are indeed relied upon, then, principles of natural justice require that before these statements are relied upon and read in evidence, the makers thereof/the deponents should be available for cross examination by the petitioner. The petitioner was informed, in response to this written request and which was also reiterated orally by the impugned letter/order, that such a request as made cannot be granted.

18. The impugned communication reads as under:-

“F.No.T-4/16-B/SDE/RAJ/2011(SCNs I to XI)/1582
Dated: 10th Juy, 2015

To

Shri Lalit Kumar Modi,
Nirlon House, 3rd Floor,
Dr. Annie Beasant Road,
Worli, Mumbai – 400018

Sub: Adjudication proceedings u/s 13 of FEMA 1999
– in respect of SCN No.T-16-/SDE/RAJ/ 2011
(SCNs I to XI) dt.25.11.2011-Reg.

This has reference to the written submissions filed by M/s. Wadia Ghandy & Co., in their letter dated 15.05.2015, wherein they have sought cross examination of various witnesses viz. S/Shri N. Srinivasan, Prasanna Kannan, Sundar Raman, Chirayu Amin, Shashank Manohar, Ratnakar Shetty, Ravishankar Shastri, M.P. Pandove, Peter Griffiths and also the Investigating Officer, who is the Complainant in the SCN. While raising the said demand for cross-examination, it was submitted by the said Advocate that the statements given u/s 37 of FEMA 1999 by the various BCCI officials were all false in material particulars and at variance with that of the same tendered by them before the BCCI Disciplinary Committee with regard to the role played by their client in the entire IPL proceedings.

2 In this connection, the undersigned has examined the Complaint as well as the documents relied upon in the subject SCN which disclose that the statements of the aforesaid BCCI officials were recorded under oath administered u/s 36 of FEMA and it contain true facts, which were given voluntarily by the concerned persons. Moreover, none of the statements of the aforesaid BCCI officials stated to have been given before the BCCI were available before the ED authorities nor are they forming part of the relied upon documents in the impugned SCN.

3 Considering the above position, the request made by the Advocates seeking cross examination of the above officials of BCCI does not hold any justification and hence the same cannot be acceded to. However, after due examination of the facts brought on record, the undersigned has agreed for the cross-examination in respect of Shri D.K. Sinha, the Complainant in the subject SCN. Accordingly, summons are issued to Shri D.K. Sinha for his appearance on **30.07.2015 at 14:00 Hrs.** being the next date of personal hearing fixed in the matter.

Sd/-

[SAJJAD WASI NAQVI]
SPECIAL DIRECTOR
(Adjudicating Authority)”

19. It is this communication which is assailed in the writ petition on several grounds.

20. Before we note the contentions of Mr. Chinoy learned senior counsel appearing for the petitioner, we would dispose of the preliminary objections raised to the maintainability of this writ petition.

21. The first objection that has been raised and based on the affidavits filed in reply is that the petition is not maintainable. The present petitioner has been served a non-bailable warrant by the Special Court set up under the Prevention of Money Laundering Act, 2002. That Special Court at Mumbai has issued this non-bailable warrant on 6th August, 2015 in a PML case being investigated by this office, namely, the Directorate of Enforcement, Ministry of Finance, Government of India. Pursuant to issuance of this non-bailable warrant, attempts were made to trace out the petitioner, but the petitioner was not traceable. A red-corner notice is sought to be issued and that process is underway. Placing reliance upon a decision of the Hon'ble Supreme Court in the case of *Subhash Dave vs. Union of India*¹

¹ Writ Petition (Cri.) No. 137 of 2011

along with other matters, rendered on 16th July, 2013, it is urged that persons, who have evaded the process of law, shall not be heard by this court. It is contended by the learned Additional Solicitor General Mr. Singh that so long as the petitioner does not submit himself to the process of law, entertaining the present petition would be allowing the process of law to be abused by the petitioner. The present petition be dismissed on this ground alone.

22. In reply to this objection raised by the learned Additional Solicitor General, Mr. Chinoy would submit that the case referred in this affidavit in reply dated 16th March, 2016 and the non-bailable warrant do not concern the issue raised in the present petition at all. In the present petition, the show cause notices issued by the Directorate of Enforcement, exercising powers under the FEMA, are the subject matter and particularly when the said show cause notices are being adjudicated, has the petitioner a right to cross examine the persons whose statements are being relied upon to support the allegations in the show cause notices. Further, inviting our attention to the FEMA, particularly sections 13, 14 and 16 of the said Act, it is urged that sub-section (4) of section 16 in clearest terms says that a person to whom the show cause notice is addressed may appear either in person or

take assistance of the legal practitioner or a Constituted Attorney of his choice for presenting his case before the adjudicating authority. On instructions, Mr. Chinoy says that the petitioner, who is presently based in London, has duly appointed and instructed a legal practitioner of his choice to appear before the adjudicating authority. Even when the cross examination, if permitted, is conducted or held, the petitioner will not insist on his presence, but would cross examine the persons, whose statements are relied upon, through his duly appointed and instructed advocate/counsel. The petitioner would make no grievance if the proceedings are conducted in this manner and he will not insist that at every hearing before the adjudicating authority, he must be allowed to remain present. Thus, he will not make any grievance even if the proceedings go on in his absence.

23. After hearing both sides on this point, particularly in the light of the statements made by Mr. Chinoy and the controversy in this petition raising a distinct issue unconnected with the Prevention of Money Laundering Act, 2002 , we are of the opinion that the present petition cannot be dismissed on this preliminary objection. All the more when the adjudicating authority can conclude the adjudication in the absence of the petitioner and in

the light of his statement being accepted as an undertaking given to this court that the petitioner will not make any grievance, if the adjudication proceeds in his absence.

24. Then, the learned Additional Solicitor General relies upon an additional affidavit which is filed raising another preliminary objection. He would submit that this writ petition under Article 226 of the Constitution of India is not maintainable. Inviting our attention to sections 19 and 35 of the FEMA, it is urged that by virtue of sub-section (1) of section 19, the impugned communication, which can be termed as an order, is appealable. An appeal lies against this communication/order to the appellate tribunal. Since the wording of sub-section (1) of section 19 of the FEMA is “any person aggrieved by an order made by an adjudicating authority”, which would take in its import even the impugned communication/order. It is an order passed during the course of adjudication proceedings and is not purely procedural. It can be challenged before the appellate tribunal.

25. We heard both counsel on this point, but having invited their attention to the possible legal consequences of construing the words “any person aggrieved by an order made by an adjudicating authority”, on which reliance is placed by the learned Additional Solicitor General liberally, advisedly, this

preliminary objection was given up. In the larger interest of justice, we keep this wider question open for being decided in an appropriate case. Presently, we proceed on the footing that the order of the present nature and impugned in the present petition is not appealable and that aspect is not clear and discernible from the legal provisions relied upon. In any event, existence of an alternate remedy is not an absolute bar for entertaining a petition under Article 226 of the Constitution of India. It is merely a rule of caution and prudence rather than a legal bar. In these circumstances, even the second preliminary objection is overruled.

26. Now we come to the contentions of Mr. Chinoy insofar as the issue at hand. Mr. Chinoy would contend and by placing reliance on the wording of the impugned communication that the same adversely affects the rights of the petitioner. Mr. Chinoy invited our attention to the FEMA, particularly the Chapter empowering imposition of penalty and holding of adjudication and contends that the consequences of an adjudication order are indeed grave and serious. The penalties are imposed and in contravention of the statutory provisions and which could be twice the sum which is stated to have been remitted/withdrawn in contravention of the provisions of law. Thus, the monetary liability could be huge,

according to Mr. Chinoy. In the scheme of the Act and conferring in the authorities thereunder such drastic powers, Mr. Chinoy would submit that the legislature has framed also the rules. The Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 and particularly Rule 4 enables holding of an inquiry. Mr. Chinoy would submit that these are statutory rules. In the preamble to these rules, it is stated that in exercise of the powers conferred by section 46 read with sub-section (1) of section 16, sub-section (3) of section 17 and sub-section (2) of section 19 of the FEMA, the Central Government hereby makes the following rules for holding inquiry for the purpose of imposing penalty and appeals under Chapter V of the said Act. Mr. Chinoy relies on the language of these rules and particularly sub-rules (5) and (6) of Rule 4 to submit that implicit in the same and the entire scheme of the law is the right to cross-examine the persons whose statements are being relied upon by the adjudicating authority. Mr. Chinoy submits that the affidavits filed on record do not dispute that these statements are indeed relied upon by the adjudicating authority while issuing the show cause notices and would be, therefore, further relied upon to render any adverse opinion or finding. If that is how the authority is proceeding, then, even if it is not bound to observe the provisions of the Indian Evidence Act, 1872, it is bound to observe the

principles of natural justice. The principles of natural justice inhere in them a right to cross-examine the witness or a maker of a document. Thus, if the persons making the statements are not examined and their contents are not proved by examining them or their affidavits endorsing the same are not filed followed their cross-examination by the person against whom the statements are being used, then, the principles of natural justice would be violated. Mr. Chinoy submits that the allegations against the petitioner are serious and grave and as a penalty is being imposed, it is incumbent upon the adjudicating authority to afford the petitioner an opportunity to cross examine the persons whose statements are relied on to prove the allegations against him. The impugned order proceeds to deny this right, according to Mr. Chinoy, on untenable grounds. Mr. Chinoy assailed the finding in first paragraph of the impugned order/communication. The statements may be recorded in terms of section 37 of the FEMA, but they could be proved to be false in material particulars. However, the finding is that the documents relied upon in the subject show cause notices include these statements of the officials recorded under oath administered under section 37 of the FEMA and they contain true facts, which were given voluntarily by the concerned persons. Moreover, none of the statements of the aforesaid BCCI officials, stated to have been

given before the BCCI, were available before the Enforcement Directorate authorities. Mr. Chinoy criticised both these observations to submit that a conclusive opinion has now been rendered by the adjudicating authority that he would proceed to rely upon these statements, as according to him, they contain true facts. Precisely, for this reason, Mr. Chinoy would submit that the cross-examination becomes crucial and vital. It is only on a cross-examination of these witnesses that the petitioner can bring out the truth. The adjudicating authority, at this stage, cannot conclude that these statements contain true facts. It is in these circumstances, Mr. Chinoy would submit that in the teeth of the show cause notices, the specific statements made therein, now, as an afterthought, the adjudicating authority cannot say that these statements are not being relied upon. There is no assertion of this nature in the affidavit in reply. Rather, the assertion is otherwise and these statements would be utilised to bring home the charge and to prove the allegations. In these circumstances, Mr. Chinoy would submit that it would be a travesty of justice if the petitioner's request is turned down by sustaining the impugned order.

27. Mr. Chinoy has brought to our notice a judgment of a Division Bench of the High Court of Delhi, New Delhi in the case of

*Shahid Balwa vs. The Directorate of Enforcement*² decided on 29th May, 2013. Mr. Chinoy heavily relies upon paras 6, 9, 10, 16 and the summing up in para 27. Mr. Chinoy would submit that the legal position is also summarised in para 29 of this judgment. This judgment applies with full force to the facts and circumstances of the present case.

28. On the other hand, Additional Solicitor General Mr. Singh would submit that it cannot be argued as an absolute proposition of law that the right to cross-examine is a part and parcel of the principles of natural justice. He would submit that such a right cannot be claimed in absolute terms. It would depend upon the nature of the lis, the allegations, the gravity of the charge and the surrounding circumstances. It is not as if denial of such a right by itself causes prejudice. If this right is a part and parcel of the principles of natural justice, then, denial of the same alone is of no assistance, but the resultant and prejudice must be established and proved. Therefore, it is not as if the adjudicating authority is obliged to grant the request of the petitioner.

29. Mr. Singh would submit that interfering with the proceedings at this stage would mean that even an order made during the course of the same vitally affects the rights of the party like the petitioner. The order itself cannot be termed as

² L. P. A. No. 2310/2013 and CM No. 2310/2013

conclusive. It would mean that the petitioner has made a request, which request is presently not granted. The adjudication would proceed in accordance with law. In the event the final order results in imposition of penalty, then, while challenging such an order in appeal before the appellate tribunal, the petitioner can very well press the ground of denial of the right to cross examine, which is allegedly part and parcel of the principles of natural justice. The appellate tribunal will deal with it on facts and in law. Thus, there is a complete remedy available to the petitioner and we should not, therefore, entertain this petition or decide a wider question as is raised, particularly on the ambit and scope of sub-rules (5) and (6) of Rule 4 of the Rules in question. He would, therefore, submit that we should not grant the request made by the petitioner. More so, when no prejudice is caused to the petitioner.

30. Mr. Singh would rely upon a judgment of the Hon'ble Supreme Court in the case of *Telestar Travels Pvt. Ltd. vs. Special Director of Enforcement*³. He would also rely upon a Division Bench judgment of this court, to which one of us (S. C. Dharmadhikari, J.) was a party in the case of *Patel Engineering Ltd. vs. Union of India*⁴.

³ 2013 (289) ELT 3

⁴ 2014 (307) ELT 862

31. Mr. Singh, to support his argument that this is but a procedural order and should not be interfered with unless it is ex-facie illegal and perverse, relies upon a Full Bench Judgment of the High Court of Madhya Pradesh at Jabalpur in the case of *Kowa Shipping Ltd. and Ors. vs. Debt Recovery Tribunal and Ors.*⁵ For the above reasons, he would submit that the petition be dismissed.

32. For properly appreciating the rival contentions, we may have to refer to the FEMA. This is an Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. This is a successor legislation to the Foreign Exchange Regulation Act, 1973, which law the FEMA repeals. The statement of objects and reasons leading to this enactment says that significant developments have taken place since 1993 such as substantial increase in foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian investment abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets.

⁵ AIR 2004 MP 1

33. Once this law has come into force and is being invoked, then, the various Chapters thereof, commencing with Chapter – I, which contains the definitions of some vital terms and words, denote that the focal point is regulation and management of foreign exchange. Section 3 permits dealing in foreign exchange and opens with the words save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permissions of the Reserve Bank of India (RBI), no person shall deal in or transfer any foreign exchange or foreign security to any person not being an authorised person; and make any payment to or for the credit of any person resident outside India in any manner and finally receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner. This section is followed by several provisions and which would enable the RBI as also the Central Government to manage the foreign exchange and also regulate the transactions in relation thereto. By section 8, realisation and repatriation of foreign exchange is permissible, provided it is in such manner as may be specified by the RBI. The RBI thus is made the custodian of the foreign exchange and its regulation and management is under the control of the said bank. Chapter III is titled as “Authorised Person”. The RBI may, on an application made to it in this behalf, authorise any person to be

known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. The RBI has powers to issue directions to the authorised persons. Then, the power of the RBI to inspect authorised person is to be found in section 12. Chapter IV is titled as “Contravention and Penalties”. Therein appears section 13 and the same reads as under:-

13. Penalties. — (1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

(1-A) If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property.

(1-B) If the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

(1-C) If any person is found to have acquired any foreign exchange, foreign security or immovable property,

situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

(1-D) No Court shall take cognizance of an offence under sub-section (1C) of section 13 except as on complaint in writing by an officer not below the rank of Assistant Director referred to in sub-section (1B).

(2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation.— For the purposes of this sub-section, “property” in respect of which contravention has taken place, shall include —

(a) deposits in a bank, where the said property is converted into such deposits;

(b) Indian currency, where the said property is converted into that currency; and

(c) any other property which has resulted out of the conversion of that property.

34. By section 14, enforcement of the orders of the adjudicating authority is possible and by section 14-A, power to recover arrears of penalty is provided. The power to compound contravention by section 15 is conferred in the RBI. Then follows adjudication and appeal and that provision is in Chapter V. Section 16 falling thereunder reads as under:-

“16. Appointment of Adjudicating Authority.— (1) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit.

(2) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.

(3) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

(4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority.

(5) Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and

(a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);

(b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.”

35. A bare perusal of section 16 would enable us to hold that there is an adjudication for imposition of penalty and contemplated by law. For that adjudication, the Central Government is empowered to appoint as many officers as it may think fit, as the adjudicating authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) of section 16, a reasonable opportunity of being heard for the purpose of imposing any penalty. Proviso to sub-section (1) of section 16 confers in the adjudicating authority a power, if it is of the opinion that said person is likely to evade in any manner the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. Then, the respective jurisdiction of the adjudicating authority has also to be specified in the order to be published by the Central Government in the Official Gazette. Sub-section (3) says that no adjudicating authority shall hold an

inquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government. Pertinently, such an application was forwarded by the second respondent before us, based on which, respondent no. 1 issued the subject show cause notices. Then, sub-section (4) enables appearance, as we have noted above, either in person or with the assistance of a legal practitioner or Constituted Attorney for presenting the case before the adjudicating authority. The power of the adjudicating authority enumerated in sub-section (5) of section 16 is clear and that makes the proceedings before it to be judicial proceedings and the adjudicating authority shall be deemed to be a civil court for the purpose of section 345 and 346 of the Code of Criminal Procedure, 1973. Then, by sub-section (6), a time frame is stipulated so as to dispose of the complaints.

36. It is because sub-section (1) of section 16 employs the word “prescribed” that we have the rules and those rules enable adjudication proceedings to be conducted in a orderly manner. Rule 4 is titled as “Holding of inquiry”. That rule reads as under:-

"4. Holding of inquiry.—(1) For the purpose of adjudicating under section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, the Adjudicating Authority shall, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him.

(3) After considering the cause, if any, shown by such person, the Adjudicating Authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him.

(4) On the date fixed, the Adjudicating Authority shall explain to the person proceeded against or his legal practitioner or the chartered accountant, as the case may be, the contravention, alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, direction or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place.

(5) The Adjudicating Authority shall, then, given an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to future date and in taking such evidence the Adjudicating Authority shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (1 of 1872).

(6) While holding an inquiry under this rule the Adjudicating Authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the Adjudicating Authority may be useful for or relevant to the subject matter of the inquiry.

(7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Authority, the Adjudicating Authority may proceed with the adjudication proceedings in the absence of such person after recording the reasons for doing so.

(8) If, upon consideration of the evidence produced before the Adjudicating Authority, the Adjudicating Authority is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit, in accordance with the provisions of section 13 of the Act.

(9) Every order made under sub-rule (8) of rule 4 shall specify the provisions of the Act or of the rules, regulations, notifications, direction or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention has taken place and shall contain reasons for such decisions.

(10) Every order made under sub-rule (8) shall be dated and signed by the Adjudicating Authority.

(11) A copy of the order made under sub-rule (8) of rule 4 shall be supplied free of charge to the person against whom the order is made and all other copies of proceedings shall be supplied to him on payment of copying fee @ Rs. 2 per page.

(12) The copying fee referred to in sub-rule (11) shall be paid in cash or in the form of demand draft in favour of the Adjudicating Authority.”

37. A bare perusal of this rule would indicate that if any person has committed any contravention as specified in section 13, the adjudicating authority shall issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him. The notice shall indicate the nature of contravention alleged to have been committed by him. After considering the cause, if any, shown by such person, the adjudicating authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him. Then follows sub-rule (4), where the obligation of the

adjudicating authority to explain the person proceeded against or his legal practitioner or the chartered accountant the contravention alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, direction or orders or any condition subject to which an authorisation is issued by the RBI in respect of which contravention is alleged to have taken place. While holding an inquiry under Rule 4, the adjudicating authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating authority may be useful for or relevant to the subject matter of the inquiry. If any person fails, neglects or refuses to appear as required by sub-rule (3) before the adjudicating authority, the adjudicating authority may proceed with the adjudication proceedings in the absence of such person after recording the reasons for the same. If, upon consideration of the evidence produced before the adjudicating authority, the adjudicating authority is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit, in accordance with the provisions of section 13 of the FEMA.

38. The word “evidence” is of great significance. It means that material which has withstand cross-examination by the person against whom it is sought to be used. In the case of *M/s. Bareilly Electricity Supply Co. Ltd. vs. The Workmen and Others*⁶, the Hon'ble Supreme Court has laid down the principle in the following words:-

13. In *Bengal Kagazkal Mazdoor Union v. Titaghur Paper Mills Co. Ltd.*, 1964-3 SCR 38, Wanchoo J, (as he then was) observed at page 45:

"It is now well settled that the balance-sheet cannot be taken as proof of a claim to what portion of reserves has actually been used as working capital and that the utilisation of a portion of the reserves as working capital has to be proved by the employer by evidence on affidavit or otherwise after giving opportunity to the workmen to contest the correctness of such evidence by cross- examination (See *Patlad Turkey Red Dye Works Ltd. vs. Dyes and Chemicals Workers' Union*)"

14. An attempt is however made by the learned Advocate for the Appellant to persuade us that as the Evidence Act does not strictly apply the calling for of the several documents particularly after the employees were given inspection and the reference to these by the witness Ghosh in his evidence should be taken as proof thereof. The observations of Venkatram Aiyar J, in *Union of India v. Varma*, 1958-2 LAB LJ 259 at PP 263-64=(AIR 1957 SC 882) to which our attention was invited do not justify the submission that in labour matters where issues are seriously contested and have to be established and proved the requirements relating to proof can be dispensed with. The case referred to above was dealing with an enquiry into the misconduct of the Public Servant in which he complained he was not permitted to cross-examine. It however turned out that he was allowed to put questions and that the evidence was recorded in his presence. No doubt the procedure prescribed in the Evidence Act by first requiring his chief-examination and then to allow the delinquent to exercise his right to cross-examine him was

not followed, but that ,the Enquiry Officer, took upon himself to cross-examine the witnesses from the very start. It was contended that this method would violate the well recognised rules of procedure. In these circumstances it was observed at page 264:

"Now it is no doubt true that the evidence of the Respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by Tribunal even though they may be judicial in character. The law requires that such Tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a Court of Law".

But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure-under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the evidence Act are not strictly applicable except in so far as [Section 11](#) of the Industrial Disputes Act 1947 and the rules prescribed therein permit it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who

have executed them, if they are alive and can be produced.”

39. In the facts and circumstances before us, we have found, from a perusal of the show cause notices and the complaint, based on which they have been issued, that the adjudicating authority expressly relies upon these statements, which have been referred to in Annexure II and given by the persons whose names have been enlisted in the show cause notices. It is undisputed before us that these statements have been recorded by the authority so empowered under the FEMA. These statements have been recorded in connection with the violations and breaches of the FEMA and its rules. They have been recorded in connection with and have direct nexus to the IPL, which was conducted in South Africa. The persons connected with the affairs of the BCCI and others, who have given these statements, are referred to with names in the annexure. This is not a merely referred material. These statements are proposed to be expressly relied upon. If they are relied upon, then, it is incumbent upon the first respondent to allow the petitioner to cross-examine these persons during the course of the adjudication.

40. We are not in agreement with Mr. Singh, who says and in the passing that these statements are of those persons who are also served with show cause notices and rather they are co-

noticees. The petitioner cannot be permitted to cross-examine the co-noticees is his submission. We do not find any merit in the same. We must proceed with the communication, which is impugned in the petition and read it as it is. It is not possible to add or subtract anything from this communication. Once this communication is read as a whole, we do not find that the request for cross-examination is denied because these persons, whose statements have been relied upon, are also proceeded against for violation and breaches of the FEMA. This is the material which the adjudicating authority proposes to rely upon while adjudicating the subject show cause notices, namely, those issued to the petitioner. Once this aspect becomes clear, then, merely because the petitioner, in his pleadings, refers to certain other show cause notices or the persons to whom they addressed, would not mean that his request is as understood now by the respondents or Mr. Singh. Quite otherwise, the petitioner wants to cross-examine these persons because the statements made by these persons are being used against him. Once things are as simple and as plain as they are, then, we do not countenance the submissions of Mr. Singh.

41. The submission is an afterthought. Mr. Singh relies upon the judgment in the case of *Telestar Travels* (supra). True it is that it says that the right emphasised in this petition cannot be

claimed is not absolute. Telestar was a case of adjudication under the FERA. It was based on the proceedings, which were initiated to pass an adjudication order. The argument was that right of cross-examination available under the Evidence Act, 1872 ought to be read into FERA. The Hon'ble Supreme Court repelled it with reference to section 79 of the FERA and held that in a given situation, cross-examination may be permitted to test veracity of the deposition sought to be used against the party against whom action is proposed to be taken. Far from assisting the learned Additional Solicitor General, the observations in the paras relied upon would denote that though the right cannot be claimed and is not conferred in absolute terms, still, if it is claimed, it can be granted in a given situation. The Hon'ble Supreme Court found from the facts before it in that case that it is not that because such a right is denied that the order of the adjudicating authority should be quashed and set aside on that ground alone. However, para 18, which is relied upon, contains certain salutary principles and we reproduce it for ready reference:-

“18. There is, in our opinion, no merit even in that submission of the learned counsel. It is evident from Rule 3 of the Adjudication Rules framed under Section 79 of the FERA that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross examination may not be permitted to test the veracity of a deposition sought to be issued against a party whom action is proposed to be taken. It is only when a deposition goes through the fire of cross examination that a Court or Statutory Authority

may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case. For instance, a similar plea raised in *Surjeet Singh Chhabra v. Union of India and Ors.* (1997) 1 SCC 508 = 1997 (89) E.L.T. 646 (S.C.) before this Court did not cut much ice, as the Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed:

“3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a kara. In the situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of the case the failure to give him the opportunity to cross-examine the witnesses is not violative of the principles of natural justice. It is contended that the petitioner had retracted within six day from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So, there is no need to call panch witnesses for examination and cross-examination by the petitioner.”

42. Equally, the Hon'ble Supreme Court was shown its earlier decision in the case of *Kanungo and Co.* (supra), and it dealt with the argument based on that decision and held eventually that the Hon'ble Supreme Court in that case laid down certain principles. The principle is that natural justice does not require that in matters like the Sea Customs Act and Import and Export (Control) Act, 1947 and the adjudication thereunder, The persons who have given information should be examined in the presence of the person proceeded against or should be allowed to be cross-examined by them on the statements made before the customs authorities. However, once para 18 of the judgment in the case of *Telestar* (supra) recognises that an opportunity to cross-examine can be afforded and that request granted to test the veracity of deposition sought to be used against a party like the petitioner, then, there is little doubt that *Kanungo and Co.* is distinguishable on facts. More so, when the respondents do not object to the petitioner cross-examining the complainant on whose version the show cause notices are issued. Before us, the petitioner is charged with violations of the Act and the Rules. Before us, the petitioner is proceeded against because a complaint of the second respondent was brought before the first respondent. Based on the allegations therein and materials referred, which included the statements of persons recorded by the authorities under the

FEMA that the petitioner is called upon to show cause as to why penalty should not be imposed in terms of section 13 on him. It is such a proceeding, which the petitioner is facing. The material which the show cause notices relies upon is what the petitioner seeks to controvert. This material includes the statements of persons and which are used and expressly relied upon. It is not as if the respondents have stated that the allegations in the show cause notices are not based on these statements or these statements would not be used to bring home the charge. Had that been the position, we would not have been required to deliver this lengthy judgment. The position is quite otherwise and as has been asserted in the affidavit filed in reply and oral arguments of the learned Additional Solicitor General.

43. In the light of the above, we do not think by relying upon the judgment in the case of *Telestar* (supra) this request can be denied. Similarly, in the case of *Patel Engineering* (supra), a final order of the adjudicating authority, which was upheld right up to the CESTAT, came to be challenged. The argument was that this order, as upheld by the CESTAT, violates the principles of natural justice. The Division Bench, from para 7 onwards noted the facts and the legal principles. Applying them, it found that the dispute was raised with regard to the other materials and

contents of some certificates relied upon. There was suspicion that the inspection of the consignments carried out was before the containers were opened. There was a contradiction in the Chartered Engineer's certificate and the contents of the bills of entry. That is how the Chartered Engineer was summoned and he admitted that he issued the certificate without inspecting the machines. He gave conflicting opinion. Later on, the officers, such as in the rank of Vice President of the assessee, suppliers were summoned and their statements were recorded and show cause notices were issued and adjudicated. The dispute raised was with regard to other material and contents of these certificates relied upon. Hence, it was decided by the Department to form an expert panel. That also included the representatives of the assessee. The opinion of the expert panel, after examination, was taken on record. After conclusion of this, show cause notice was issued and impugned order was passed. The assessee was not permitted to cross examine the panel members. In the absence of any prejudice, this court held that the tribunal was not obliged to grant the request made before it and belatedly. Once there was a final adjudication order and that was assailed on several grounds, including that the right to cross-examine was denied, then, in the peculiar facts and circumstances and when there was no prejudice established and proved, this court held

that such an argument is purely an afterthought. The denial of that request and made by the assessee caused no prejudice. Thus, the decision was rendered purely in the backdrop of the facts and circumstances of the case.

44. It is common ground that even after such a view was taken in some what identical circumstances and on the principles which have been found in *Telestar* (supra), a Division Bench of this court in the case of *Nirmal Seeds Private Limited vs. The Union of India and Anr.*⁷, decided on 27th February, 2017, granted the request made during the course of adjudication to cross examine certain persons, whose statements were relied upon when the Revenue issued a show cause notice to the assessee. Writ Petition No. 1643 of 2017 was allowed on 17th February, 2017 applying these very principles.

45. We are, therefore, of the view that Mr. Chinoy's reliance on the judgment rendered by the High Court of Delhi, New Delhi in the case of *Shahid Balwa* (supra) and by the Division Bench of this court in the case of *Nirmal Seeds* (supra) is well placed. In para 14 of that decision, this court held as under:-

“14. We do not think that such an approach, apart from being unhealthy and non-conducive to fair and impartial adjudication subserves the cause of justice. The cross-examination of these persons is not a proper method to

believe their expertise and it is sought apparently for inconveniencing and making them uncomfortable for giving a version to help the investigation in the matter and for delaying the adjudication proceedings is one of the reasons assigned in the impugned communication. We are shocked and surprised that a Commissioner of Central Excise, Customs and Service Tax, Nashik-I Commissionerate, Nashik holds such a view. We do not see how a personal embarrassment is caused merely because witnesses are sought to be cross-examined on an advisory. There is nothing by which the proceedings partake the character of sully his image and harming his reputation. It is in the course of the proceedings and to falsify his version that answers are elicited. Depending upon the response to the questions the assessee can modulate and modify his stand and arguments. We do not see what inconvenience and lack of comfort is noticed by the adjudicating authority and why he is keen to protect these persons has not been explained to us at all. If the very purpose of the cross-examination is to elicit the truth and the adjudication proceedings are nothing but an attempt to vindicate the truth, then, the adjudicating body or authority should not adopt such a position and stand. It is this communication and a lengthy one running into two pages which enables us to interfere in writ jurisdiction with the same. It would be a complete mockery of rule of law and there would be no guarantee of justice if such high level officials and adjudicating authorities hold such a view with regard to compliance with the principles of natural justice. While it is true that they are not codified or embodied in a statute, yet they are fundamental to the rule of law and administration of justice. Courts and Quasi-Judicial bodies heavily rely on these principles which are salutary in nature. Therefore, when the principle and to be followed is that justice should not only be done but seen to be done that enables us to interfere in this matter in writ jurisdiction."

46. As a result of the above discussion, the writ petition succeeds. Rule is made absolute in the following terms:-

- (i) The impugned order dated 10th July, 2015 and the contents of the communication are quashed and set aside.
- (ii) We direct respondent no. 1 to issue summons to the persons whose statements have been recorded and permit

the advocates for the petitioner to cross-examine them. However, we are of the firm view that neither the petitioner nor the respondents can delay the proceedings any further.

(iii) We are indeed surprised that the show cause notice issued way back on 25th November, 2011 remains unadjudicated till date. We do not see how even the respondents agreed to the postponement of the proceedings before this court and in a petition filed on 21st August, 2015. Since this petition was pending for more than two years, the adjudication has been delayed further. Hence, to ensure that the adjudication proceedings come to an end expeditiously, we direct that the petitioner will appear before the adjudicating authority on 14th February, 2018 at 10.30 a.m. and the adjudicating authority shall issue summonses in the requisite forms to the persons whose statements have been recorded and are being relied upon to appear before it for cross-examination and such cross examination shall be held on or before 2nd March, 2018.

(iv) The cross-examination shall be conducted and concluded in two or three sittings and positively by 13th March, 2018.

(v) After the cross-examination is conducted and further opportunities, as envisaged by the rules, are provided, we direct that the adjudication proceedings shall be concluded as expeditiously as possible and in any event by 31st May, 2018. No extension shall be granted in any circumstances.

(vi) We clarify that we have not expressed any opinion on the rival contentions as far as the merits of the allegations in the show cause notices. We also clarify that each of them are kept open for being raised at an appropriate stage before appropriate forum.

47. Before parting, we must indicate that it is because of the acts and deeds of the BCCI in relation to a tournament styled as IPL that all these proceedings had to be initiated and now conducted in accordance with the FEMA. If IPL has led to serious breaches and violations of the FEMA, then, it is high time the

organisers realise that after 10 years of holding such tournaments what we have achieved can be termed as a gain or advantage or benefit for they are outweighed completely by the resultant illegalities and breaches of law, which are projected in several courts consuming a lot of precious judicial time. If the IPL has resulted in all of us being acquainted and familiar with phrases such as "Betting", "fixing of matches", then, the RBI and the Central Government should at least now consider whether holding such tournaments serves the interest of a budding cricketer, the sport, the game itself. There is a auction and buying and selling of young cricket players by business houses and chubs. Apart from huge money involved, the tournament has brought with it crimes and casualties in the form of ban on clubs and players allegedly involved in wrong doing and breaching of rules and regulations. Now the worrying trend is that such events are being organised even by those in-charge of other sports/games such as Football, Hockey and Badminton. Therefore, it is for the Central Government and the administrators to take a call on all this. We say nothing more.

(SMT. BHARATI H. DANGRE, J.)

(S.C.DHARMADHIKARI, J.)