

10.05.2023.
Court No.13
Item No. 18
pk

W.P.A. No. 10962 of 2023

**Shri Sanjay Jhunjhunwala
Versus
Office of the Special Director, Eastern Region, ED
and others**

Mr. Jishnu Saha, Sr. Adv.
Mr. Sudip Deb,
Mr. M. Mukherjee,
Mr. Ishaan Saha,
Mr. Ramendu Agarwal
Ms. Bidisha Gupta

...For the petitioner.

Mr. Arijit Chakrabarti,
Mr. Deepak Sharma

... For the E. D.

Mr. Asok Kumar Chakraborti, ASG.
Mr. Sukumar Bhattacharyya

... For the Union of India

1. Let the Union of India be added as party respondent in the instant proceeding. The learned advocate on record for the petitioner shall amend the cause title in course of the day.
2. The subject matter of challenge in the instant writ petition is an order dated 11.04.2023 whereby the Enforcement Directorate (ED) formed an opinion to commence an adjudication of violation of Section 13 of the Foreign Exchange Management Act, 1999 against the writ petitioner. Such opinion was formed in terms of sub-Rule (3) of rule 4 of the of the Foreign Exchange Management (Adjudication and Appeal) Rules of 2000 (2000 Rules).

3. Prior thereto the petitioner was issued a show cause notice on 18.11.2022 in terms of the sub-rule 1 of Rule 4 of the aforesaid Rules of 2000. The petitioner sent a detailed reply thereto on 20.01.2023.
4. The impugned order dated 11.04.2023 forming an opinion in terms of sub rule (3) of Rule 4 of the aforesaid Rules of 2000 was passed after consideration of reply.
5. Mr. Jishnu Saha, Ld. Senior Advocate, contends that the impugned opinion of E.D. is bad in law as it does not deal with any of the facts or issues indicated by the petitioner in his reply to the show cause.
6. Mr. Saha has relied upon several decisions of the Supreme Court of India and one of Bombay High Court, in challenging the opinion to initiate the inquiry/adjudication.
7. The first decision relied upon is **Swadeshi Cotton Mills Vs. Union of India** reported in **(1981) 1 SC 664** at paragraphs 59 to 61. The observations of the Hon'ble Supreme Court were in the context of a prima facie opinion formed under Section 18AA(1)(a) of the Industries (Development and Regulation) Act, 1951. The consequence of such opinion was immediate take over the management of a company, in that case a textile mill by the Central Government. Serious prejudice to the

company was a clear consequence of formation of the opinion unlike the facts of the instant case. Actual and real prejudice would be caused only after an adjudication following the detailed procedure under sub-rules 4 to 7 of Rule 4 of the said 2000 Rules.

8. Hence the observation of the Hon'ble Supreme Court at paragraph 59 and 60 on the requirement of the opinion to be found on detailed and evidently sound reasoning must be understood only in the factual matrix of the said case. The said decision cannot be applied in the instant case.

9. The second decision relied upon by Mr. Saha is that **63 Moon Technologies Limited Vs. Union of India** reported in **(2019) 18 SCC 401**. The said case dealt with power of the Central Government under Section 396 of the Companies Act, 1956. Under the said Sections the Central Government is required to form an opinion of compulsory amalgamation of one company with another.

10. The formation of such opinion ipso facto leads to such amalgamation. It is in that context that the Hon'ble Supreme Court had required detailed and sufficient reasoning before and in formation of such opinion.

11. The third decision relied upon by Mr. Saha is that of a Division Bench of the Bombay High Court in **Shashank Vyankatesh Manohar Vs. Union of**

India reported in 2014(1) Mh. L.J. 838. In the case the Bombay High Court has clearly held in paragraph 14 that detailed reasons need not be given in the process of formation of an opinion under Rule 4(3) of the 2000 Rules.

12. The last decision relied upon by Mr. Saha is

Bhikhubhai Vithlabhai Patel and others Vs. State of Gujarat and another reported in **(2008) 4 SCC 144**. The said decision was rendered under the provisions of the Gujarat Town Planning and Urban Development Act of 1976. In the said case the State Government had formed an opinion to interfere with a draft development plan, proposed by the appellant therein. Such interference would have completely altered and/or substantially modified the plan submitted by the appellant to the State, thereby causing severe prejudice and financial implications to the appellant. The dicta at paragraph 26 of the said decision requiring an intense application of mind and recordings of detailed reasons and consideration of objections and hearing the appellant cannot be applied to a proceeding under Rule 4(3) of the 2000 Rules.

13. It is now well settled that any decision of the Supreme Court must be viewed in the light of the facts and circumstances of each case and the judgements are not to be read as statutes.

14. Counsel for the ED has relied upon two decisions of the Supreme Court of India in the case of **Special Director and another Vs. Mohd. Ghulam Ghouse and another** reported in **(2004) 3 SCC 440** on the proposition that any grievance against the proceeding under Rule 4 must be raised only before the tribunal under Rule 5. It follows therefore that an order under Rule 4(3) is not justiciable. The order under sub-Rule 8 and 9 of Rule 4 are justiciable under Rule 5.
15. The law on the subject has already been settled by the Hon'ble Supreme Court in the case of **Natwar Singh v. Director of Enforcement** reported in (2010) 13 SCC 255. At paragraphs 23, 26, 29, 31 and 34 it was laid down as follows:-

“23. The Rules do not provide and empower the adjudicating authority to straightaway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the adjudicating authority shall issue a notice to such person requiring him to show cause as to why an *inquiry* should not be held against him. It is clear from a bare reading of the rule that show-cause notice to be so issued is not for the purposes of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the adjudicating authority is required to form an opinion as to whether an inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins.

26 Even in the application of the doctrine of fair play there must be real flexibility. There must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. Can the courts supplement the statutory procedures with requirements over and above

those specified? In order to ensure a fair hearing, courts can insist and require additional steps as long as such steps would not frustrate the apparent purpose of the legislation.

29. It is thus clear that the extent of applicability of the principles of natural justice depends upon the nature of inquiry, the consequences that may visit a person after such inquiry from out of the decision pursuant to such inquiry.

31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.

34. As noticed, a reasonable opportunity of being heard is to be provided by the adjudicating authority in the manner prescribed for the purpose of imposing any penalty as provided for in the Act and not at the stage where the adjudicating authority is required merely to decide as to whether an inquiry at all be held into the matter. Imposing of penalty after the adjudication is fraught with grave and serious consequences and therefore, the requirement of providing a reasonable opportunity of being heard before imposition of any such penalty is to be met. In contradistinction, the opinion formed by the adjudicating authority whether an inquiry should be held into the allegations made in the complaint are not fraught with such grave consequences and therefore the minimum requirement of a show-cause notice and consideration of cause shown would meet the ends of justice. A proper hearing always include, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.”

16. The next stage of the proceeding is an adjudication by the adjudicating authority. Such process involves a further opportunity to the petitioner and/or his legal practitioner or Chartered Accountant to produce documents, summoning of witnesses and recording evidence. It is thereafter that in terms of sub rules 9 and 10 of Rule 4 that

the adjudicating authority may find as to whether there is contravention of Section 13 of the FEMA, 1999. Rule 5 specifies the appeal to this Special Director Appeals/Tribunal.

17. Admittedly therefore a mere formation of an opinion under sub-rule (3) cannot lead to any civil consequences on a person is therefore not justiciable. The argument of Mr. Saha that the formation of opinion dated 11.04.2023 is itself bad in law, therefore, cannot be sustained.
18. The opinion referred to in the rules in question of Rules 2000 is at best a preliminary inquiry to launch quasi judicial adjudicatory process. There is no prejudice contemplated under the Rules or the Act in formation of such opinion. Prejudice if at all may arise and give a cause of action to the petition, an order is passed by the adjudicating authority under Rule 8 and 9 of the procedure adopted in arriving at the same. An opinion to launch adjudication by itself may not be prejudicial. There is remedy of appeal against the order under sub-Rule 8 and 9 of Rule 4 before the Tribunal under Rule 5.
19. The petitioner would have sufficient opportunity to dislodge the opinion and the enquiry by the adjudicating authority itself in the next stage. The writ petition is wholly pre-mature. It would not be

inappropriate to say that it is in gross abuse of process.

20. The writ petition is, therefore, dismissed with costs assessed at Rs.14,000/- payable by the petitioner to the E. D.

21. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)