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

% Judgment delivered on: 16.10.2023

+ W.P.(CRL) 2206/2020, CRL.M.A. 18111/2020 & CRL.M.A. 24612/2022

M/S SHILPI MODES (THROUGH ARVIND AGARWAL)
..... Petitioner

versus

DIRECTORATE OF ENFORCEMENT
& ORS Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. A. M. Dar, Sr. Advocate with
Mr. Apoorv Agarwal, Mr. Praveen Kumar,
Mr. Gaurav Singh and Mr. Anant Vikram
Singh, Advocates

Versus

For the Respondent : Mr. P. V. Yogeswaran, Senior Standing
Counsel

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

[The proceeding has been conducted through Hybrid mode]

1. By way of the present petition under Article 226 and 227 of the Constitution of India, 1950 the petitioner seeks issuance of writ of Mandamus or Certiorari or any other writ or direction or an order



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thereby quashing the impugned proceedings initiated under Section 56 of Foreign Exchange Regulation Act, 1973 (For Short 'FERA') by the Enforcement Directorate dated 04.04.2002.

2. Mr. A. M. Dar, learned senior counsel appears for the petitioner and on these grounds of violation of principles of natural justice submits that the entire proceedings were vitiated. Dilating on the aforesaid argument of violations of principles of natural justice and as to how the Supreme Court has interpreted the same in respect of the civil consequence entailing from the decisions of the administrative authority, relies upon the judgments of the Supreme Court in ***State Bank of India and Others Vs. Rajesh Agarwal and Others*** reported in (2023) 6 SCC 1 as also the judgment in ***Oil and Natural Gas Corporation Limited Vs. Western Geco International*** (2014) 9 SCC 263 to buttress his aforesaid arguments.

3. In respect of the judgment in the case of ***State Bank of India (Supra)***, Mr. Dar learned senior counsel draws attention of this Court to para 33, 34 and 35 to submit that the Supreme Court has held that if there is power to decide and determine conferred upon an authority to the prejudice of a person, it is incumbent upon the said authority to act judicially which is implicit in the very nature of the proceedings itself.

4. In that, according to learned senior counsel, the petitioner before this Court was never afforded any opportunity to present his case before the Adjudicating Authority. To the same effect, learned senior counsel invites attention of this Court to the judgment of Supreme Court in ***ONGC*** (Supra), particularly to para 26, 28 and 29 of the judgment to



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submit that *vide* the aforesaid case, the Supreme Court had laid down that the principles of natural justice fall within the fundamental policy of the Indian law though the background of the case was in respect of a case under The Arbitration & Conciliation Act, 1996.

5. According to learned senior counsel, the Adjudicating Authority has to apply its mind to the facts as obtaining in a given case, provided the party effected by it has been given a chance to put across its case and in absence whereof, the Supreme Court has held that it would amount to violation of principles of natural justice and the very order can be set aside.

6. On that basis, learned Senior Counsel submits that as a matter of law, the violation of principles of natural justice can and do entail setting aside of any order passed by the administrative authority, including one under the FERA.

7. That apart, on facts, learned senior counsel submits that the service of notice as stipulated under proviso to Section 61 (2) of the Act is a necessary concomitant prior to the Adjudicating Authority coming to any conclusion for or against the petitioner. According to learned senior counsel, though such show cause notice or opportunity notice was issued but the same was never received by the petitioner.

8. Learned Senior Counsel by referring to page 55 of the petition, which are the orders passed by the learned ACMM dated 05.08.2002 and 25.11.2002, submits that it is apparent that despite the learned ACMM noticing that the petitioner was not available at the address upon which such summons were sought to be served and that the petitioner



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had left it two and half years back, inexplicably directed further proceedings under Section 82 Cr.P.C., 1973 to be carried out.

9. Learned Senior Counsel submits that what followed thereafter was a consequence of the aforesaid incorrect observations on facts and the legal proceedings. Similar contention is raised by learned senior counsel in respect of the order dated 13.07.2004 at page 56 whereby erroneously the statement of process server was recorded on the ostensible assumption that the petitioner was indeed served by affixation, and upon such non-appearance, was declared as a proclaimed offender. In that context, learned Senior Counsel draws attention of this Court to page 66 of the present petition to submit that the petitioner while submitting its synopsis for the case of recovery by the Central Bank of India, *vide* the letter dated 01.09.2000 at page 72 of the present petition, had categorically informed the Central Bank of India about its fresh address at Gurugram. Learned Senior Counsel subsequently also invites attention of this Court to the letter dated 28.02.2001 issued by the Central Bank of India to the petitioner at the very same address at Gurugram.

10. On the aforesaid issue, learned Senior Counsel submits that having regard to the fact that the Central Bank of India had clear knowledge of the shifting of the petitioner to the address at Gurugram, the subsequent proceedings before the learned ACMM on the basis that they have been served at the previous address would render the proceedings itself void.

11. According to learned Senior Counsel, the result would be



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quashing of the entire proceedings.

12. That coupled with the judgment of the Supreme Court laid on the law aforesaid, learned Senior Counsel submits that the present petition should be allowed and the *ex parte* proceedings which were initiated by the Enforcement Directorate dated 04.04.2022 including the subsequent complaint be quashed and set aside.

13. *Per contra*, Mr. Yogeshwaran, learned senior standing counsel for the respondent submits that the proceedings under Section 56 of FERA and Section 18(2) and (3) are distinct proceedings and as such even if it is taken that the Adjudicating Authority has heard the petitioner or not, the proceedings under Section 56 FERA cannot be deemed to be violative of any law. In fact, Mr. Yogeshwaran submits that *vide* the order dated 16.04.2004, the FERA Authority has passed its order recording non satisfaction. This order was further appealed by the petitioner in this Court. This Court had *vide* the order dated 03.08.2023 dismissed the challenge to the order dated 16.04.2004 by permitting the petitioner to file an appeal thereagainst, in accordance with the provisions of section 52 of the FERA and consequently disposed of writ petition.

14. Mr. Yogeshwaran brings attention of this Court to the order dated 04.04.2002 placed at page 15 of the present petition to submit that independent of the civil consequences, the learned ACMM had taken cognizance of the offences alleged against the petitioner by the ED in its complaint as laid before the said learned ACMM. As such, according to learned counsel the proceedings were initiated in accordance with law



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and cannot be challenged.

15. In order to buttress his arguments, Mr. Yogeshwaran, learned senior standing counsel relies upon the judgment delivered by three learned Judges of the Supreme Court in the case of ***Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others*** reported in (2005) 4 SCC 530 whereby a challenge was laid to the *vires* of certain provisions of FERA including Section 56 which was rejected by the Supreme Court. In particular, Mr. Yogeshwaran, learned senior standing counsel draws attention on the paragraphs 18, 20, 22 and 24 to buttress the aforesaid submissions. On the aforesaid basis Mr. Yogeshwaran, learned senior standing counsel for the ED submits that the present petition ought to be dismissed *in limine*, particularly keeping in view the fact that the petitioner was permitted to file an appeal in accordance with Section 52 of the FERA.

Analysis & Conclusion

16. This Court has heard the arguments of Mr. Dar, learned Senior Counsel appearing for the petitioner as also Mr. Yogeshwaran, learned senior standing counsel for the respondent and perused the documents on record with the assistance of learned counsel. This Court has also considered the judgments placed on record by the learned counsel.

17. Brief facts, which are germane to the dispute and culled out from the order dated 12.01.2022 granting anticipatory bail to the petitioner (accused in Bail Appl. No. 2130/2020) which are as under:-

“Brief background as per the complaint u/s 56 FERA Act filed by ED before trial court on 04.04.2002 are that an information is received by the ED from RBI that accused



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firm had exported the goods and failed to realize the certain export bills pursuant to which inquiries were made from his bankers i.e. Central Bank of India. Central Bank of India vide various letters reported to the ED that 35 GRs pertaining to year 1992-93 valued US Dollar 1049426 are export outstanding which the accused had not realized till such time. Thereafter the accused was called upon to explain whether any such permission was granted to accused from RBI for realization for export proceeds, and he was served with memorandum and also with opportunity notice dated 25.01.2001 thereby accused was asked to place on record such permission for extension of realization however accused failed to furnish any such permission hence the complaint is filed.”

The issue revolves primarily around the dispute as to whether the notices under proviso to Clause (ii) of sub section (2) of Section 61 FERA affording an opportunity to show cause was served upon the petitioner or not. It is not disputed by the Enforcement Directorate that the petitioner had, *vide* the letter dated 01.09.2000 conveyed/ communicated the fresh address to the Central Bank of India for future correspondences in regard to the allegation of evasion of reconciliation of accounts by the Central Bank of India.

18. The penultimate paragraph of the letter dated 01.09.2000, annexed at page 72 of the paperbook disclosing the fresh address was recorded as under:-

Our address for correspondence and communication is:
M/S. Shilpi Modes
M-4/17A, DLF City II
Gurgaon.
Tel:91-6364669, 6364699
Email: aggarwalarvind@mantraonlinc.com



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For further discussion and early settlement of the matter in a hundred percent transparent matter, we are always at your disposal.

Thanking you

Yours truly, For Shilpi Modes

D. Arvind Aggarwal

(Proprietor)

19. It is also not disputed that the Central Bank of India *vide* letter dated 28.02.2001 had addressed certain issues to the petitioner at the very same fresh address of the petitioner at Gurugram. It is relevant to note that the proceedings undertaken by the ED under the FERA was undertaken only subsequent to such correspondence at the instance of the Central Bank of India. The Central Bank of India was under an obligation to inform the ED about the correct and proper address of the petitioner on which the responsible officer of the petitioner would have been served with necessary notices / summons by the learned ACMM. It is appears that the same was not done.

20. This Court premises the aforesaid conclusion on the document placed on record, particularly the order dated 12.01.2022 granting anticipatory bail under Section 438 Cr.P.C., 1973 to the authorized officer of the petitioner in Bail Appl. No. 2130/2020 whereby it was categorically noted by the learned Special Judge NDPS on the submissions made by the learned SPP for the ED therein, that the Central Bank of India had not communicated the said address to the ED. It also further observed that even after receiving the non-service report, the ED did not try to obtain fresh address from the Central Bank of India or from the RBI. In this context, it would be apposite to extract the



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relevant portion of the said order, which is as under:-

“The Central Bank of India had not communicated the said address to ED. Furthermore, on receiving the non service report, the ED also not tried to obtain the fresh address from Central Bank of India or RBI. Ld. SPP for ED submits that fresh address should be submitted to the ED however it is clear from the record that accused were not aware of the proceedings before ED, therefore there appears no occasion for accused to furnish the fresh address to ED. The accused came into the knowledge about present proceedings on receiving demand notice at Gurugram in 2020, thereafter filed the present application for anticipatory bail. The PO proceedings by the trial court was conducted on the addresses, on which the accused was not found during investigation by ED.

It is also pertinent to notice that accused do not appear to have changed the address because of the proceedings with the bank as the accused has already communicated his fresh address to the bank vide letter dated 01.09.2000 well prior to the proceedings before ED.”

21. It is clear from the aforesaid that the ED did not have the fresh and correct address of the petitioner which was not disclosed by the Central Bank of India despite being fully aware of the same. Having regard to the aforesaid undisputed admission being part of judicial record, propels this Court to conclude that the notice under proviso to Clause (ii) of sub section (2) of Section 61 FERA was never served upon the petitioner.

22. It would be also be apposite at this stage to extract the provisions of Section 61 which are as under :-



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“Section 61 of FERA reads as under:—

“61. Cognizance of offences:

(1) *** **

(2) No court shall take cognizance—

(i) *** **

*** **

(ii) of any offence punishable under section 56 or section 57, except upon complaint in writing made by—

(a) the Director of Enforcement; or

(b) any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government; or

(c) any officer of the Reserve Bank authorised by the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.”

23. The plain reading of the proviso would indicate that no complaint can be filed unless the person accused of such offence has been given an opportunity of showing that he has such requisite permission. It is clear that from the facts of this case and also not disputed by Mr. Yogeshwaran that there is no such show cause notice which was issued and served on the fresh address of the petitioner at Gurugram. That apart, it is pertinent to note that though the notice issued under proviso to Clause (ii) of sub section (2) of Section 61 FERA was not served upon the petitioner, the demand notice dated 28.08.2020 was served upon the correct address. There is no explanation as to how and from where the ED obtained this correct address of the petitioner while issuing the demand notice.



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24. So far as the judgment of Supreme Court relied upon by the ED in the case of ***Standard Chartered Bank (Supra)*** is concerned, the same is clearly distinguishable, in that, case of the Supreme Court was called upon to consider as to whether the certain provisions of FERA, 1973 including Section 56 are *ultra vires* the Constitution, which was negated by the Supreme Court.

25. This Court has perused the paragraphs relied upon by Mr. Yogeshwaran learned senior standing counsel for ED and is unable to appreciate the reliance placed thereon *qua* the facts of the present case.

26. So far as the judgments of Supreme Court in the ***State Bank of India (Supra)*** and ***Oil and Natural Gas Corporation Limited (Supra)*** relied upon by Mr. Dar, learned Senior Counsel are concerned, they laid down the law in respect of what is trite by now that rule of *Audi Alteram Partem* is fundamental to the policy of Indian law and as such any order by any quasi-judicial authority or any administrative authority entailing drastic civil consequences cannot be sustained except after affording an opportunity to the person who would have to face such civil consequences. There is no doubt in the mind of this Court that there has been clear violation of principles of natural justice in the present case.

27. A similar issue has been subject matter of a case decided by the learned Single Judge of this Court on 05.04.2018 in CrI. Rev. P. 642/2017 titled ***United India Airways Ltd. & Anr. Vs. Chief Enforcement Officer, Enforcement Directorate*** reported in (2018) SCC OnLine Del 8233.

28. It would be apposite to extract the relevant portion of the said



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judgment which are as under:-

“7. The requirement of proviso to Clause (ii) of sub Section (2) of Section 61 is that an opportunity of showing that the accused had the requisite permission, is a mandatory requirement.

8. A Coordinate Bench of this Court in Sanjay Malviya v. R.K. Rawal CEO Enforcement Directorate : (2015) 149 DRJ 231 has held that there is a statutory bar imposed under Section 61 of FERA on a magistrate on taking cognizance unless it is shown that the opportunity of showing availability of permission has been granted to the accused.

9. It is well settled that where law mandates something to be done in a particular way, it has to be done in that way or not at all.

10. Before initiation of proceedings under Section 56 of the FERA, an opportunity must be granted to the accused. Before taking the cognizance of the offence Magistrate is under statutory duty to satisfy himself that an opportunity has been given to the accused before filing the complaint. Magistrate will issue process only on being satisfied that a case has been made out for such issue.

14. It is also an admitted position that the notice dated 24.05.2002 was addressed to the petitioners at “A-34, Connaught Place, New Delhi”. This is apparent from the notice itself. The witness of the Respondent-Prosecution PW3 - Om Prakash from the office of the Asstt. Enforcement Directorate has deposed that he had affixed the notice at A-34, Connaught Place. In his cross-examination, he has deposed that the premises A-34, Connaught Place was locked and the office of the petitioners was not found in existence at A-34, Connaught Place and some other office was functioning. It is also an



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admitted position that the office of the petitioners was not at “A-34, Connaught Place” but at “E-34, Connaught Place” which is a distinct and different property. Clearly, the Opportunity Notice was neither sent to the correct address nor served on the petitioner.

15.....

16. The subject complaint was filed on 29.05.2002. Since petitioners were never granted an opportunity, as mandated by Section 61(2) of FERA, there is clearly a breach of the mandate of law. Since the requirements of Section 61(2) of FERA have not been complied with, reliance placed by the respondent on the statement recorded at the time when proceedings under Section 40 of FERA were being undertaken and reliance on the same in the impugned order as sufficient compliance of Section 61(2) of FERA, is clearly misplaced.

17. Since respondents have failed to comply with the mandatory requirement of Section 61(2) of FERA, the Trial Court clearly erred in taking cognizance.

18. In view of the above, the impugned order on charge dated 11.07.2017 cannot be sustained and is liable to be set aside. The impugned order dated 11.07.2017 is, accordingly, quashed. The present petition is allowed. There shall be no order as to cost.”

29. At the end, learned Single Judge had concluded that since the respondent therein had failed to comply with the mandatory requirement of Section 61(2) of FERA, the Trial Court in that case clearly had erred in taking cognizance and on that basis, quashed and set aside the impugned order on charge.

30. This Court respectfully concurs with the observations and the



ratio laid down in the case *United India Airways Ltd. & Anr. (Supra)*.

31. Another argument of Mr. Yogeshwaran in respect of proceedings being separate and not intertwined in respect of violation under Section 18(2) and (3) and Section 56 of the FERA is concerned, this Court is of the considered opinion that the substratum of violation of under Section 18(2) for becoming an offence under Section 56 has to be tested first by issuing show cause notice/opportunity notice so as to permit the petitioner to explain as to whether it got the requisite permission in accordance with law or not.

32. Since the show cause notice or opportunity notice was never served upon the petitioner, the consequent proceedings initiated under Section 56 FERA cannot be continued. It is for violation of Section 18(2) and Section 18(3) of the FERA that would entail action under Section 56 FERA, but the intervening threshold of issuance of show cause notice/opportunity notice and hearing the notice before passing the decision upon such mandatory application of principles of natural justice alone that the action under Section 56 could, at all, have been initiated. As such the submission of Mr. Yogeshwaran on that count are found to be untenable.

33. In view of the aforesaid observations, the present writ petition is allowed and as a consequence thereof, a writ of certiorari is issued quashing the *ex parte* proceedings issued by the ED dated 04.04.2022 including the complaint filed against the petitioner and all the consequential proceedings emanating therefrom.

34. The petition is allowed and disposed of in the above terms.



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35. Pending applications also stand disposed of.

TUSHAR RAO GEDELA, J .

OCTOBER 16, 2023/ms