* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: ***16.04.2021***
Date of Decision: ***25.05.2021***

+ **W.P.(C) 6239/2020 & CM 22293/2020**
+ **W.P.(C) 6240/2020 & CM 22295/2020**

J P MORGAN INDIA PRIVATE LIMITED ..... Petitioner

Through Mr.Siddharth Agarwal, Sr. Adv. with Mrs.Pallavi Shroff, Mr.Nishant Joshi, Ms.Sowjhanya Shankaran, Mr.Kunal Singh, Ms.Nimrah Alvi, Ms.Nitika Khaitan, Advs.

versus

SPECIAL DIRECTOR, DIRECTORATE OF ENFORCEMENT AND ANR ..... Respondents

Through Mr.Sanjay Jain, ASG with Mr.Amit Mahajan, CGSC with Ms.Mallika Hiremath, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed by the petitioner challenging the Show Cause Notice(s) dated 29.01.2020 and the consequent Order(s) dated 05.06.2020 and the Communication(s) dated 03.09.2020 of the respondent no. 1, proceeding with the inquiry against the petitioner under the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereinafter referred to as the 'Adjudication Rules') on the alleged violation of Section 6(6) of the Foreign Exchange

Management Act, 1999 (hereinafter referred to as the 'FEMA') read with Regulation 3 of the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2000 (hereinafter referred to as the 'Place of Business Regulations').

2. As the Show Cause Notice(s) and the Impugned Order(s)/Communication(s) are based on the same grounds for proceeding against the petitioner and the challenge thereto is common in both the petitions, the petitions are being adjudicated by way of this common judgment and order.

3. The petitioner herein is a private limited company incorporated under the Indian Companies Act, 1956. It is a subsidiary of JP Morgan India Securities Holding Limited, Mauritius ('JPMISHL').

4. The genesis of the inquiry launched by the respondents originates from the judgment and order dated 23.07.2019 passed by the Supreme Court in W.P.(C) No. 940 of 2017, titled ***Bikram Chatterji & Ors.* v. *Union of India & Ors.***, finding various fraudulent transactions of Amrapali Group of Companies.

5. In the said judgment and order, various acts of fraud and statutory violations were alleged to have been committed by the JP Morgan Group of Companies. The Supreme Court *inter alia* observed as under:

> *"87. The transactions of Amrapali Zodiac Developers Pvt. Ltd. with J.P. Morgan were clearly in order to avoid the provisions of the Companies Act. It is apparent that Mr. Anil Mittal, Statutory*

Auditor, did not report his interest and disclosed about his relatives and junior employee as Director and shareholders. Mr. Chandan Kumar was a junior employee and Mr. Atul Mittal was his relative. Thus, it is apparent that Rudraksha Infracity Pvt. Ltd. was created for money laundering as aforesaid two Directors and shareholders had no income, Rudraksha Infracity Pvt. Ltd. was incorporated to receive funds from Mannat Buildcraft which was also created by Mr. Chander Wadhwa, CFO through his close associates. After receiving money from Mannat Buildcraft Pvt. Ltd., the same was transferred to J.P. Morgan Investments for purchasing equity shares of Amrapali Zodiac Pvt. Ltd. at an exorbitant price. There was no transaction before or after these transfers of monies in the aforesaid dummy companies. To suit the requirement of J.P. Morgan Investments, in entirety incorrect valuation report was prepared by M/s. Sudit K. Parikh & Co., Chartered Accountants. The methodology and procedures defined of computation of fair market value were not followed at the time of exit. J.P. Morgan was having full control on Amrapali Zodiac Developers and no action could have taken as per clause 10.4.3 without investors' approval. The profit cannot be recognised until the project is completed. Thus, there cannot be any distributable amount as profit for distribution to J.P. Morgan. It has also been found by the Forensic Auditors that J.P. Morgan was in the knowledge of the fact that Amrapali Zodiac Developers had

paid the money received to other companies of Amrapali group. Advances exceeded the limits specified in the shareholders' agreement, but J.P. Morgan did not ensure bringing back the money. It was accepted by Mr. Suraj Chhabria that it was in his knowledge and that of J.P. Morgan that the money has been diverted from shareholder's agreement and share subscription agreement. The valuation of the shares did not follow the correct methodology of discounted cash flow as detailed out by the forensic auditors. The valuation exercise was done backwardly in order to inflate the value of share to siphon out the money of home buyers through J.P. Morgan.

88. The FEMA rules prohibited the kind of transactions which were entered into with J.P. Morgan. Rule 4 of FEMA has been clearly violated. Master Circular No.8/2010-2011 of July 1, 2010, dealing with external commercial borrowings and trade credits clearly provides that external commercial borrowings are not permitted to be utilized for real estate business under the automatic route. The term real estate excludes the development of the integrated township. It was not a case of development of the integrated township. Even if it is taken to be a case of integrated township as submitted on behalf of J.P. Morgan, then also for approval route, hedging is required as pointed out by the Forensic Auditors in their report and borrowers had to submit their report about the signing of loan agreement with the lender for obtaining Loan Registration Number. In

case J.P. Morgan had invested in the form of ECB, following would have been the requirements: (i) obtaining Loan Registration Number from the RBI; (ii) file ECB-2 returns every month to the RBI, (iii) to pay tax on interest payment to J.P. Morgan; and (iv) to file income tax return. We are in agreement with the findings of the forensic auditors in this regard. It is clear that it was a methodology adopted by the group to siphon out the funds of the home buyers in violation of the FEMA rules and the notifications and by the creation of dubious companies for which appropriate action is warranted by the concerned authorities.

89. The report of Forensic Audit also indicates that the Company has received a sum of Rs.140 crores during the financial year 2012-13 from IPFFI Singapore PTE Limited under Foreign Direct Investment Scheme. As per FEMA Rules, this amount was to be invested in real estate construction projects only.

90. The IPFFI Singapore PTE Limited which was incorporated on 20.5.2011, entered into a Share Subscription Agreement with ASCPL on 23.8.2012 and paid a sum of Rs.140 crores to ASCPL in the following manner on 7.8.2012:

(a) INR 85 crores received in Axis Bank, Indirapuram Branch on 7.8.2012.

(b) INR 55 crores received in BOB Escrow Account on 7.8.2012.

Thus, a total sum of Rs.140 crores was received in Axis Bank. The amount was received in Axis Bank of INR 85 crores was transferred to Amrapali Centurian Park Pvt. Ltd. in three proportion. On 7.8.2012, Rs.5 crores were transferred. On 8.8.2012, an amount of Rs.50 crores was transferred and on 18.8.2012, Rs.30 crores were transferred. The ACPPL on receiving Rs.85 crores allotted equity shares worth INR 85 lakhs to ASCPL and balance INR 84.15 crores were treated as share premium account. There is no valuation report available as to how the share premium of INR 84.15 crores had been calculated. This transfer of fund by ASCPL to ACPPL is termed as absolutely violative of FDI Rules and agreement. With respect to Rs.55 crores routed from IPFFI Singapore in the Escrow Account of Bank of Baroda, Escrow Account was transferred from 8.8.2012 to 28.9.2012 in the account of Bank of Baroda and used for payment of term loan instalments of OBC and Bank of Maharashtra for repayment of their term loan instalment. This money was not meant for payment of term loan instalment as per FDI Rules. It was to be used in the construction.

91. The ASCPL did not use the money for the project which was received from IPFII Singapore but transferred Rs.85 crores to ACPPL and Rs.55 crores to repay bank loan instalments and repay the outstanding creditors provided for in the books and standing in the books. The said payments have rightly been held by Auditors to be in

contravention of the FDI norms and rules and for which the money was brought in India.

92. From 2013 to 2015, ASCPL has paid interest of Rs.58.81 crores @ 17 percent, which is a highly abnormal rate. A sum of Rs.14.41 crores was paid on 31.3.2013. Likewise, on 31.3.2014, Rs.22.20 crores were paid and on 31.3.2015, another amount of Rs.22.20 crores was paid. The violations were made with the knowledge of the IPFII Singapore and they were in connivance with the ASCPL."

6. The Supreme Court issued *inter alia* the following direction:

" *xxxxx*

(vi) In view of the finding recorded by the Forensic Auditors and fraud unearthed, indicating prima facie violation of the FEMA and other fraudulent activities, money laundering, we direct Enforcement Directorate and concerned authorities to investigate and fix liability on persons responsible for such violation and submit the progress report in the Court and let the police also submit the report of the investigation made by them so far."

7. Relying upon the above judgment and order of the Supreme Court and certain investigations carried out, the respondent no. 2 filed two complaints, being Complaint No(s). 01/2020 and 02/2020, both dated

08.01.2020, against various persons and companies, including the petitioner herein before the respondent no. 1. As far as the petitioner is concerned, the complaints *inter alia* allege as under:

> "***14.29*** *It is further revealed during investigation that no prior approval of RBI was obtained by M/s. JPMIPL & JPMIPM-II for establishing a place of business in India in the name of M/s. JPMIPL thus appears to have contravened the provisions of Regulation 3 of FEM (Establishment in India of a Branch office or a liaison office or a project office or any other place of business) Regulations, 2000.*
>
> *xxxxx*
>
> ***14.32*** *Investigation has revealed that the JPMIPL has been established by JP Morgan Securities Holding Pvt. Ltd. as WOS and is a group company of JP Morgan Chase USA. The salary of the persons entrusted with the businesses in India by JPMIPL is being paid by the USA based company. Thus JPMIPL is place of business in India of JP Morgan Securities Holding Pvt. Ltd. (foreign company).*
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> ***15. FEMA Contraventions:***
>
> *The following provisions of Foreign Exchange Management Act, 1999 and Regulations made there-under have been contravened by the Noticees:*

S.No.	*Description*	*Amount involved*	*FEMA contraventions*

1.	*xxx*	*xxx*	*xxx*
	7. Unauthorized place of business in India by the foreign investor group company without RBI permission *ROC records, (01.04.2010 to 31.03.2011) of JP Morgan India Pvt. Ltd. (JPMIPL) reveals inter-alia that JP Morgan Chase & Co., USA is the group holding company.* • *JPMIPL is 96.26% subsidiary of JP Morgan India Securities Holding Limited, Mauritius and part of the JP Morgan group. JP Morgan Chase & Co., USA is the ultimate holding company of all JP Morgan group entities.* • *JPMIPL is engaged in merchant banking, underwriting, stock broking trading cum*	*Rs.85 Crore*	*Contravention of Section 6(6) of FEMA read with the provisions of Regulation 3 of the FEM (Establishment in India of a Branch office or a Liaison office or a project office or any other place of Business) Regulations, 2000 JP Morgan India Securities Holding Limited, Mauritius & JPMIPL by establishing a place of business in India without prior approval of RBI.*

	clearing of equity and currency derivatives and providing financial and investment advisory services. • *JPMIPL is in transactions with 18 subsidiaries located outside India of the JP Morgan group.* • *JP Morgan, USA has deputed its employee Hrushikesh Kar in India on deputation, inter-alia to establish real estate business in India in the name and style of JPMIPL Hrushikesh Kar was receiving salary from JP Morgan, USA.* • *Thus JPIML is place of business in India of JP Morgan India Securities Holding Limited, Mauritius without prior approval of RBI.*		

16. Charges under FEMA:

> *xxxxx*
>
> *e) JPMIPL has contravened the provisions of FEMA and Regulation issued by RBI as mentioned in Para 15 at Sl No.7 of the complaint to the tune of Rs 85 Crore and thus has made itself liable to be proceeded against u/s 13 of FEMA.*"

8. It is important here to clarify that Complaint No. 01/2020 is *inter-alia* in relation to Rs. 85 crores invested by JP Morgan India Property Mauritius Company-II in M/s Amrapali Zodiac Developers Pvt. Ltd., whereas Complaint No. 02/2020 is *inter alia* in relation to investment of Rs. 140 crores approximately by IPFII-S Singapore PTE Ltd. in M/s Amrapali Silicon City Pvt. Ltd. The allegations against the petitioner are, however, common in both the complaints.

9. The respondent no. 1 took cognizance of the above complaints and issued the impugned notice(s) dated 29.01.2020 in terms of Rule 4(1) of the Adjudication Rules to the petitioner, *inter alia* calling upon the petitioner to show cause as to why an inquiry should not be held against it. The petitioner was also called for a personal hearing by the notice dated 14.02.2020.

10. The petitioner filed its reply dated 26.05.2020 to the Show Cause Notice(s). In the reply, the petitioner denied it being a project/branch/liaison office or place of business in India for JPMISHL and further stated that JPMISHL had received all requisite approvals in 1995 and 1996 as per the then applicable law, that is, the Foreign

Exchange Regulation Act, 1973, from the Reserve Bank of India for investment in the petitioner company. The petitioner further stated that violation of Regulation 3 of the Place of Business Regulations cannot be alleged against an Indian entity such as the petitioner. The petitioner avers that it had also obtained the required registrations from the Securities and Exchange Board of India ('SEBI').

11. The petitioner thereafter received the notice(s) dated 11.08.2020 informing the petitioner for personal hearing to be conducted on 20.08.2020 by the respondent no. 1. In the said notice, so far as it related to Complaint no. 02/2020 filed by the respondent no. 2, the respondent no. 1 admitted receiving the reply dated 26.05.2020 of the petitioner to the Show Cause Notice on 27.05.2020, however, insofar as Complaint no. 01/2020 is concerned, it was claimed by the notice that no reply to the Show Cause Notice was received by the respondent no. 1 from the petitioner. The respondents, however, now admit that this observation of the respondent no. 1 was a mistake as reply had been duly received and, in fact, considered by the respondent no. 1 before proceeding with the inquiry.

12. The petitioner duly appeared before the respondent no. 1 and claimed violation of Rule 4(3) of the Adjudication Rules by the respondent no. 1.

13. In answer to such objection, by the Impugned Communication(s) dated 03.09.2020, the petitioner was informed as under:

> "*Attention is invited towards your reply dated 26.05.2020 in response to the captioned show cause notice received in this office on 26.05.2020.*
>
> *In this regard I have been directed to inform you that pursuant to your reply, the Ld. Adjudicating Authority is of the opinion that further proceeding in the matter should be held in terms of sub-rule (3) of Rule 4 of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000.*
>
> *This is for your information please.*"

14. Along-with the counter affidavit filed to the present petitions, the respondents have also placed the File Noting(s) of 05.06.2020 which, according to the respondents, is the order/opinion of the respondent no. 1 in accordance with Rule 4(3) of the Adjudication Rules. The File Noting in Complaint No. 02/2020 reads as under:

> "*I have carefully perused the complaint before me. I've also gone through the judgment of Hon'ble SC dated 23/07/2019 in WP(C) No. 940/2017 (especially para 91, 92 etc.) which is also referred by the complainant in the complaint before me.*
>
> *I have taken the cognizance of the complaint no. 02/2020 dtd. 08/01/2020 and SCN was issued on 29/01/2020.*
>
> *After due consideration of allegation levelled in the said complaint, judgment of Hon'ble SC dtd. 23/7/19 and replies*

received from the noticees, I am of the view that further enquiry is necessary & should be held in terms of Rule 4(3) of FEMA (Adjudication) Rule, 2000.

Pl. issue notice to noticees and call for written submissions first considering the current pandemic situation."

15. Except a minor inconsequential change, similar is the File Noting with respect to Complaint No. 01/2020.

16. The learned senior counsel for the petitioner submits that there has been a violation of Rule 4(3) of the Adjudication Rules thereby vitiating the entire proceedings against the petitioner. He submits that Rule 4(3) of the Adjudication Rules requires a two-stage inquiry process. At the first stage, the Adjudicating Authority has to form an opinion, after considering the cause shown by the noticee, if any, as to whether the noticee is to be proceeded against in an inquiry. He submits that such opinion must necessarily be recorded in writing and, in case he seeks a copy of the same, provided to the noticee. The opinion must show application of mind to the objections raised by the noticee and give reasons for the opinion to proceed. Though such reasons need not be elaborate, they must be clear and explicit. They must show application of mind on the representation/objections advanced by the noticee. Such reasons cannot be later supplanted/supplemented by fresh reasons given in the affidavit. In this regard, he places reliance on the judgment(s) of the Supreme Court in ***Natwar Singh* v. *Director of Enforcement & Anr.***,

(2010) 13 SCC 255; ***Mohindhr Singh Gill & Anr.* v. *Chief Election Commissioner, New Delhi & Ors.***, (1978) 1 SCC 405; of the High Court of Bombay in ***Shashank Vyankatesh Manohar* v. *Union of India & Anr.***, 2014 (1) Mh.L.J. 838; as also on the Technical Circular No. 11/2014, dated 26.09.2014 issued by the Directorate of Enforcement, Government of India.

17. On the general principles of recording of reasons, he places reliance on the renowned judgments of the Supreme Court in ***S.N. Mukherjee* v. *Union of India***, (1990) 4 SCC 594; and ***Union of India* v. *Mohan Lal Capoor & Ors.***, (1973) 2 SCC 836. He also places reliance on the following judgments:

- ***Bhikhubhai Vithlabhai Patel & Ors.* v. *State of Gujarat & Anr.***, (2008) 4 SCC 144;
- ***Siemens Engineering & Manufacturing Co. of India Ltd.* v. *Union of India & Anr.***, (1976) 2 SCC 981;
- ***Nareshbhai Bhagubhai & Ors.* v. *Union of India & Ors.***, (2019) 15 SCC 1;
- ***G. Vallikumari* v. *Andhra Education Society & Ors.***, (2010) 2 SCC 497;

18. On the other hand, Mr. Sanjay Jain, the learned Additional Solicitor General, and Mr. Amit Mahajan, the learned Central Government Standing Counsel, have submitted that there was no

violation of Rule 4(3) of the Adjudication Rules in the present case. They submit that in the present case, the respondent no. 1 formed his opinion to proceed with the inquiry as required in Rule 4(3) of the Adjudication Rules. The same is duly recorded in form of an Office File Noting(s) dated 05.06.2020. They submit that the expression of the opinion as required in Rule 4(3) of the Adjudication Rules need not be in form of elaborate reasons and as an order; it is a mere formation of an opinion, and in fact, is not even appealable under Section 19 of the FEMA. They further submit that in the present case, the Supreme Court in its judgment and order dated 23.07.2019 has found various violations of the FEMA against the JP Morgan Group of Companies and its officers. The complaint filed by the respondent no. 2 before the respondent no. 1 also makes reference to number of statements recorded during the course of investigation which make out the violation of *inter alia* the Place of Business Regulations by the petitioner. The respondent no. 1 in his opinion/order dated 05.06.2020 has clearly recorded that he has perused the complaint, the judgment of the Supreme Court as also the reply filed by the petitioner to the Show Cause Notice and formed an opinion that further inquiry is necessary to be held. This shows due application of mind by the respondent no. 1. They submit that such opinion need not give elaborate reasons and, in any case, this Court shall not adopt hyper-technical approach to determine the validity of such order as this Court is not sitting as an Appellate Court to determine the validity of the same. In support of their submissions, they place reliance on the judgments in ***State of Maharashtra Thr. Central Bureau of Investigation* v. *Mahesh G. Jain***, (2013) 8 SCC 119; ***R. Sundararajan* v. *State***, (2006) 12 SCC

749; and ***Mansukhlal Vithaldas Chauhan* v. *State of Gujarat***, (1997) 7 SCC 622.

19. I have considered the submissions made by the learned counsels for the parties.

20. Section 13 of the FEMA prescribes the penalties that can be imposed on a person who contravenes any provision of the Act, or contravenes any Rule, Regulation, Notification, Direction or Order issued under the Act. Section 16 of the FEMA empowers the Central Government to appoint 'Adjudicating Authority' for the purpose of adjudication under Section 13 of the FEMA. An appeal against any order passed by the Adjudicating Authority lies before the Special Director (Appeals) under Section 17 or before the Appellate Tribunal under Section 19 of the FEMA.

21. In exercise of its powers under Section 46 of the FEMA, the Central Government has framed the Adjudication Rules. The present petitions raise issues on interpretation and effect of Rule 4 of the Adjudication Rules, which is reproduced herein below:

> "***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 the 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 the 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."

22. A reading of the above Rule would clearly show that the adjudication process contemplated under the rules is a two-stage process. In the first stage, the Adjudicating Authority, on receiving a complaint, issues a notice to the person against whom violation of the FEMA or the Rules/Regulations framed thereunder is alleged, to show cause as to why an inquiry be not held against him. Upon receiving such cause, the Adjudicating Authority is to then form an opinion as to whether an inquiry should be held against such noticee. In the second stage, if the Adjudicating Authority has formed an opinion of holding an inquiry against the noticee, the Adjudicating Authority has to fix a date for the appearance of the noticee, either personally or through his legal practitioner or a chartered accountant duly authorised by him, on which date the Adjudicating Authority has to explain to the noticee or his representative, as the case may be, the contravention alleged to have been

committed by such noticee. Thereafter, the noticee has to be given an opportunity to produce documents or evidence in support of his defence. The Adjudicating Authority upon consideration of the evidence so produced, shall then pass an order either exonerating the noticee or finding him guilty of having committed any contravention of the Act or of the Rules/Regulations/Instructions/Direction/Orders, etc. and impose such penalty as he thinks fit. It is only this order which can be challenged by the noticee under Section(s) 17 or 19 of the FEMA.

23. The effect of this two-stage process in Rule 4 of the Adjudication Rules came up for consideration before the Supreme Court in ***Natwar Singh*** (supra), wherein the Supreme Court held as under:

> "**22**. *That a bare reading of the relevant provisions of the Act and the Rules makes it abundantly clear that the manner, method and procedure of adjudication are completely structured by the statute and the Rules. The authority is bound to follow the prescribed procedure under the statute and the Rules and is not free and entitled to devise its own procedure for making inquiry while adjudicating under Section 13 of the Act since it is under legislative mandate to undertake adjudication and hold inquiry in the prescribed manner after giving the person alleged to have committed contravention against whom a complaint has been made, a reasonable opportunity of being heard for the purpose of imposing any penalty. The discretion of the authority is so well structured by the statute and the Rules.*

__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.

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__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.

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***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 and 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.*"

24. A reading of the above would highlight the distinction between the two stages of the adjudication process. The Supreme Court has *inter alia* that it is only where the Adjudicating Authority forms an opinion to proceed with the inquiry under Rule 4(3) of the Adjudication Rules, that the true and substantial inquiry into the allegations/contravention begins. The concept of principles of natural justice and fairness though are inbuilt in the Rules even at the first stage of the initiation of an inquiry, that is, before formation of the opinion by the Adjudicating Authority to proceed with the inquiry, are not of the same rigour as the second stage.

25. The scheme of Rule 4 of the Adjudication Rules has also been considered by the High Court of Bombay in ***Shashank Vyankatesh Manohar*** (supra), observing as under:

> "***10***. *It is true that ordinarily this Court would not entertain a Writ Petition against a show cause notice as the noticee would get an opportunity to submit his reply and of hearing before the adjudicating*

authority. However, the scheme of the Adjudication Rules in question is different from the other inquiries where an authority issues a show cause notice, the noticee submits his reply, the authority then hears the complainant and the noticee for taking a decision in the matter. Ordinarily, inquiries are not divided into different stages, unlike the inquiry for which procedure is laid down in Rule 4 of the Adjudication Rules. In ordinary inquiries, the inquiry officer is not required to form any opinion before conclusion of the inquiry. On the other hand, the scheme of Rule 4 of the Adjudication Rules is quite different and the same is required to be examined both for the purpose of considering the last alternative submission of the petitioner about breach of Rule 4 of the Adjudicating Rules and also for considering the aforesaid preliminary objection raised by the learned Additional Solicitor General about maintainability of the Writ Petition.

***11**. It is the case of the petitioner that Special Director is not following the mandate of the Adjudication Rules while adjudicating the show cause notices. In such a case, if the case of the petitioner is correct, it becomes the duty of this Court to ensure that the authorities comply with the statutory provision while adjudicating the show cause notices. It would be convenient to reproduce Rule 4 of the Adjudication Rules, which reads as under: —*

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***12**. On reading the above Rule, particularly sub-rules (1) and (3) thereof, it is clear that on the issue of show cause notice, a noticee is permitted to submit his reply to the same. In terms of the above Rule, the Adjudicating Authority has to consider the objections raised by the noticee and only if he forms an opinion that an inquiry should be continued further that the Adjudicating proceedings can be proceeded with, by issuing a notice for personal hearing. However, if the Adjudicating Authority is satisfied that the objections raised to the notice are valid, he may drop the show cause notice. The provision as found in Rule 4 of the Adjudication Rules is a unique provision. The Counsel for the parties were not able to point out any similar rules under which a two tier adjudication of a show cause notice is provided for in any other statute. Normally, once a show cause notice has been issued, the Adjudicating Authority deals with all the objections of the noticee, be it preliminary as well as any other defence, by passing one common order of adjudication. The fact that the legislature has provided in Rule 4 of the Adjudication Rules that on issue of notice, the noticee can object to the same and this objection has to be considered by the Adjudicating Authority for forming an opinion to proceed further with the show cause notice would require giving some meaning to it, otherwise it would be rendered otiose.*

***13**. According to the learned Additional Solicitor General, the objections which have been raised by the petitioner would*

be considered and reflected in the final adjudication order which the Adjudicating Authority would pass. It is this final order which is appealable to the Appellate Tribunal for Foreign Exchange. This submission on the part of the respondent would render the entire exercise provided in Rule 4(1) and (3) of Adjudication Rules, a dead provision. The submission of learned Additional Solicitor General was that the objective of receiving objections to the show cause notice and forming an opinion whether or not the inquiry should be conducted further, has been provided only for the purpose of ensuring that the authorities under the Act do not proceed against persons who are complete strangers to the alleged contravention under the Act. The above provision according to him can have no application where prima facie, the noticee is connected to the alleged contravention such as in the present case and, therefore, the authority has formed the opinion to proceed with the inquiry and, therefore, the impugned notice for personal hearing has been issued on 6 June, 2013.

***14**. This submission of the learned Additional Solicitor General would require one to read words into Rule 4 of the Adjudication Rules that the objections to the show cause notice would be considered, only if they are of particular type, such as, the noticee is a stranger to the proceedings and no other objection would be considered while deciding whether or not the adjudication must be proceeded with further. Even if one were to*

proceed on the basis of the submission of the learned Additional Solicitor General that only some type of cases would fall within the mischief of Rule 4 (1) and (3) of the Adjudication Rules, yet the fact that the Adjudicating Authority has applied his mind to the objection raised by the noticee would only be evident if the formation of his opinion is recorded at least on the file. This forming of opinion need not be a detailed consideration of all the submissions but must show application of mind to the objections raised by the noticee. In case the objections are such as would require detailed consideration, the authority concerned can dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order.

***15**. However, this formation of opinion by the Adjudicating Authority is not required to be preceded by a personal hearing but only consideration of the written objections of the noticee would meet the ends of natural justice. The personal hearing would be afforded to the noticee before the disposal of the show cause notice by a final order an appealable order. This formation of opinion must be on record of the Adjudicating Authority, in this case the Special Director, Directorate of Enforcement. Keeping this recording of reasons on the file would ensure that there has been a due application of mind to the objections raised by the noticee. This would be a necessary safeguard against forming arbitrary opinions. These*

recorded reasons must be furnished to the noticee, when asked for by the noticee at the time of granting a personal hearing to the noticee. This would give an opportunity to the noticee during the personal hearing to correct any erroneous view taken in forming the opinion to proceed further with the show cause notice. This would ensure that the opinion formed on the preliminary objections which would otherwise never be a subject-matter of discussion/debate before the Adjudicating Authority is also a part of the order to be passed by the Adjudicating Officer. In the absence of the above, the preliminary objections would be dealt with by the Adjudicating Authority possibly only in his mind while deciding to proceed further with the notice and the reasons would never be recorded to evidence consideration of the objections. This would result in great prejudice to the noticee for more than one reason. Firstly, the noticee would have no clue as to what were the considerations which weighed with the Adjudicating Authority to reject the preliminary objections. It is also very clear from the provisions of the Act and the Rules that an Appeal which is provided would not lie from an order recording an opinion of the Adjudicating Authority to proceed further with the adjudication of the notice, but the appeal would only be against the final order.

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***19**. The above view taken by us on the interpretation of Rule 4 of the Adjudication*

Rules finds supports from decision of the Apex Court rendered in Income Tax matters. Sections 147 and 148 of the Income Tax Act, 1961 provides for re-opening of completed assessment. In the above provision of the Income Tax Act, 1961, there is no provision as found in Rule 4 of the Adjudication Rules of inviting objections to the notice and thereafter, forming an opinion on these objections before proceeding further with the notice for re-opening an assessment. Even so, the Supreme Court in the matter of GKN Driveshafts in 259 ITR 19 has held that on receipt of notice under section 148 of the Income Tax Act, 1961, seeking to reopen a completed assessment, the party is entitled to seek from the Assessing Officer, the reasons recorded for re-opening the assessment. On receipt of the reasons recorded for re-opening the assessment, the party is entitled to place its objections to the reasons recorded for re-opening before the Assessing Officer. The Assessing Officer is then required to consider those objections and pass an order thereon before proceeding to reassess the assessee's income in respect of a completed assessment. Thus, the Supreme Court has provided for giving of reasons recorded while re-opening the assessment to the party and then dealing with the objections of the party.

In this case, it has been specifically provided in Rule 4 of the Adjudication Rules that the noticee under the Act is entitled to raise objections to the issuance of the notice and the Adjudicating

Authority is obliged to consider those objections and form an opinion whether or not to proceed further with the show cause notice. Formation of opinion itself would presuppose an application of mind to the facts and the objections of the party before it is decided to proceed further with the show cause notice. This opinion cannot be arbitrary, but must be supported by reasons, howsoever, minimal those reasons may be, to evidence application of mind to the objections raised by the noticee.

***20**. The nature of the adjudication proceedings, the nature of the alleged contraventions, the nature of alleged liability and the extent of penalty which may be imposed demonstrate why we are inclined to place the aforesaid interpretation on the provisions of Rule 4(3) of the Adjudication Rules in the context of the adjudication proceedings under section 13 read with section 42 of the Act.*

***21**. Thus, in view of the above discussion, we are of the view that Adjudicating Authority after issuing show cause notice and receiving objections to the notice from the noticee, is required to apply his mind to the objections by recording his reasons for forming an opinion on the file. This exercise need not be preceded by personal hearing and the order to be passed on the objections is not required to be detailed order, but it must disclose some link with the objections raised by the noticee and the opinion formed by the Adjudicating Authority. This recording of the opinion of*

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

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***38**. In view of the above discussion, though we do not disturb, at this stage, the impugned show cause notices dated 25 November, 2011 issued by the Special Director, Directorate of Enforcement, to the Petitioner, we set aside the communication dated 6 June, 2013 issued by respondent No. 2, calling the petitioner for a personal hearing. We direct the Special Director, Directorate of Enforcement first to form his opinion, after recording reasons, whether to proceed against the petitioner with regard to the impugned 11 show cause notices, in light*

> *of the observations made in this judgment. If the opinion so formed is adverse to the petitioner, such opinion along with the reasons so recorded shall be furnished so as to reach the petitioner at least 15 days prior to the date of personal hearing. This would meet the requirements of Rule 4(3) of the Adjudication Rules.*"

26. The High Court of Bombay has, while appreciating the uniqueness of the two-staged inquiry process in Rule 4 of the Adjudication Rules, observed that the formation of opinion under Rule 4(3) need not be a detailed consideration of all the submissions but must show application of mind to the objections raised by the noticee. It must give reasons for arriving at the opinion. In case the objections are such as would require detailed consideration, the authority concerned can dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order. However, the File Noting itself must show the due application of mind of the Adjudicating Authority to the cause shown by the noticee.

27. The Director of Enforcement, to ensure compliance with the judgment of the High Court of Bombay, issued Technical Circular No. 11/2014, which reads as under:

> "*The Hon'ble High Court Bombay in the matter of Shashank V. Manohar (W.P. No. 5305 of 2013) has interpreted the provisions of sub-rule (3) of Rule 4 of the Foreign Exchange Management*

(Adjudication Proceedings and Appeal) Rules, 2000 and directed that the Adjudicating Authority while holding an inquiry under FEMA shall form an opinion as to whether the Adjudicating Authority intends to proceed against the noticee(s) further. Such opinion is to be formed in writing stipulating the reasons thereof.

2. If the opinion formed under Rule 4(3) of the said Rules is adverse, such opinion along with the reasons so recorded shall be furnished to the noticee(s) at least 15 days prior to the date of personal hearing.

3. Since the SLP filed by Directorate before the Hon'ble Supreme Court challenging the said Order was dismissed on 04.07.2014, hence the Order of the Hon'ble High Court of Bombay has attained finality and liable to be complied with by all the Adjudicating Authorities appointed under section 16(1) of the Foreign Exchange Management Act, 1999 (42 of 1999).

4. The above is brought to the notice of all the Adjudicating Authorities.

5. This issues with the approval of the Director of Enforcement."

28. Therefore, the following principles regarding the inquiry procedure under Rule 4 of the Adjudication Rules emerge from the above judgments:

(a) Rule 4 contemplates a two-stage inquiry process;

(b) Principles of natural justice and fairness are embodied into both the stages, though the rigours of the same at the first stage are a bit lighter in form of no compulsion to grant personal hearing to the noticee, supply of documents not relied upon, etcetera;

(c) The opinion formed by the Adjudicating Authority under Rule 4(3) must be informed and must reflect due application of mind;

(d) The opinion formed must also reflect reasons for the same. Though detailed and elaborate reasons need not be given, the same must satisfy the test of reflecting due application of mind by the Adjudicating Authority.

29. The requirement of giving reasons, as observed by Lord Denning, M.R. in ***Breen* v. *Amalgamated Engg. Union***, (1971) 1 All ER 1148 (CA), is one of the fundamentals of good administration. In ***Alexander Machinery (Dudley) Ltd.* v. *Crabtree***, 1974 ICR 120 (NIRC), it was observed that "*failure to give reasons amounts to denial of justice.*" "*Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.*" Right to reasons is an indispensable part of a sound judicial system. Reasons substitute subjectivity by objectivity.

30. In ***S.N. Mukherjee*** (supra), the Supreme Court emphasized the requirement of giving reasons, in the following words:

> "***35.*** *The decisions of this Court referred to above indicate that with regard to the requirement to*

record reasons the approach of this Court is more in line with that of the American courts. An important consideration which has weighed with the court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Courts under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making. In this regard a distinction has been drawn between ordinary courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.

36. *Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness*

and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

31. The necessity of giving reasons was re-emphasized by the Supreme Court in ***Kranti Associates (P) Ltd. & Anr.*** **v.** ***Masood Ahmed Khan & Ors.***, (2010) 9 SCC 496, observing as under:

"***12.*** *The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognised a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment*

of this Court in A.K. Kraipak v. Union of India, [(1969) 2 SCC 262 : AIR 1970 SC 150].

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***47.** Summarising the above discussion, this Court holds:*

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional

governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the Judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor, [(1987) 100 Harvard Law Review 731-37]

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now

virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain, EHRR, at 562 para 29 [(1994) 19 EHRR 553] and Anya v. University of Oxford, [2001 EWCA Civ 405 (CA)], wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process"."

32. In ***Bhikhubhai Vithlabhai Patel*** (supra), the Supreme Court held that though the opinion of the authority may be to its subjective satisfaction, it should reflect application of mind with reference to the material available on record. It was observed as under:

"***22.*** *Any opinion of the Government to be formed is not subject to objective test. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming its opinion. But there must be material based on which alone the State Government could form its opinion that it has become necessary to make substantial modification in the draft development plan.*

23. *The power conferred by Section 17(1)(a)(ii) read with proviso is a conditional power. It is not an absolute power to be exercised in the discretion of the State Government. The condition is formation of opinion— subjective, no doubt— that it had become*

necessary to make substantial modifications in the draft development plan. This opinion may be formed on the basis of material sent along with the draft development plan or on the basis of relevant information that may be available with the State Government. The existence of relevant material is a precondition to the formation of opinion. The use of word "may" indicates not only a discretion but an obligation to consider that a necessity has arisen to make substantial modifications in the draft development plan. It also involves an obligation to consider which of the several steps specified in sub-clauses (i), (ii) and (iii) should be taken.

24. *The proviso opens with the words "where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary, ... ". These words are indicative of the satisfaction being subjective one but there must exist circumstances stated in the proviso which are conditions precedent for the formation of the opinion. Opinion to be formed by the State Government cannot be on imaginary grounds, wishful thinking, however laudable that may be. Such a course is impermissible in law. The formation of the opinion, though subjective, must be based on the material disclosing that a necessity had arisen to make substantial modifications in the draft development plan.*

25. *The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: "as considered necessary" is again of crucial importance. The term "consider" means to think over; it connotes that there should be active application of the mind. In other words the term "consider" postulates consideration of all the*

relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word "necessary" means indispensable, requisite, indispensably requisite, useful, incidental or conducive, essential, unavoidable, impossible to be otherwise, not to be avoided, inevitable. The word "necessary" must be construed in the connection in which it is used. (See Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005.)

26. *The formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose substantial modifications to the draft development plan.*"

33. The Adjudicating Authority, under the Scheme of the FEMA, performs a quasi-judicial function as opposed to a purely administrative function. The requirement of giving reasons therefore cannot be undermined and must be insisted upon from the Adjudicating Authority. The reasons to be given for its opinion under Rule 4(3) of the Adjudication Rules to proceed with the inquiry though need not be as elaborate as in a Court decision or let's say an order passed by the Adjudicating Authority under Rule 4(8) of the Adjudication Rules, but have to be adequate, proper and intelligible, sufficiently clear and explicit. They must reasonably deal with the substantial points raised in the matter and show that they were taken into consideration. However,

the extent and nature of reasons depend upon specific facts and circumstances of each case.

34. The Impugned Opinion/Order dated 05.06.2020, in my opinion, does not satisfy the test of giving reasons by the respondent no. 1 for the formation of opinion to proceed with the inquiry against the petitioner.

35. The Impugned Order records the material considered by the respondent no. 1, that is the Complaint, the judgment/order dated 23.07.2019 of the Supreme Court, and the replies to the Show Cause Notice(s), and then proceeds to give a conclusion that further enquiry is necessary and should be held. However, the Impugned Order does not give any reasons for forming the above opinion.

36. The reasons are the bridge between the material on record and the final decision. Therefore, after considering the judgment of the Supreme Court, the Complaint and the reply of the petitioner to show cause, that is the material on record, the Adjudicating Authority is to give reasons, howsoever brief, at least showing that he is alive to the contentions raised in the reply to the Show Cause Notice and why he is of the opinion that inquiry must still be held. In the present case, this bridge is missing.

37. However, having said the above, it is also to be seen as to whether the inquiry deserves to be set aside only for the above violation. In the present case, as noted herein above, the Supreme Court has passed a detailed judgment finding various acts of violation of the FEMA and the Rules/Regulations framed there-under *inter alia* against the JP Morgan group of companies, may not be specifically by name against the

petitioner. The present inquiry has been initiated on the direction of the Supreme Court in the said judgment. The allegations against the petitioner also cannot be said to be such that do not warrant any inquiry given the above factual background. The role of the petitioner and its employees and the capacity in which they acted in the transactions in question need a detailed inquiry as such allegations form part of a larger whole which is being inquired into.

38. In ***Maharashtra State Board of Secondary and Higher Secondary Education*** **v.** ***K.S. Gandhi & Ors.***, (1991) 2 SCC 716, the Supreme Court while reiterating the requirement of giving reasons, observed that "*the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order/decision on the rights of the person and attendant circumstances.*"

39. Following the above judgment, in ***Hanuman Prasad & Ors.*** **v.** ***Union of India & Anr***., (1996) 10 SCC 742, the Supreme Court held that even though the order may not contain the reasons, the record may indicate the same. In the facts of that case, it was observed that as the action of cancellation of the Select List was based on the preliminary report submitted by the CBI which indicated that malpractices have been committed in writing the examination, it cannot be said that the order of cancellation does not contain any reasons.

40. Applying the above principle and especially considering that at the stage of Rule 4(3) of the Adjudication Rules, the Adjudicating Authority was merely to form an opinion whether to proceed with the inquiry; and

as held by the Supreme Court in ***Natwar Singh*** (supra), it is only thereafter that the "real and substantial inquiry into allegations of contravention begins"; and that unlike the final order imposing penalty, "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 as held by the High Court of Bombay in ***Shashank Vyankatesh Manohar*** (supra) that "*in case the objections are such as would require detailed consideration, the authority concerned can dispose of the objections by stating that the same would require detailed consideration, which would be done at the disposal of the notice by the final order",* it is held that there was enough reason for the respondent no. 1 to form an opinion to proceed with the inquiry against the petitioner and no useful purpose would be served by quashing the impugned Opinion and insisting on the reasons to be first recorded. Exercise of powers under Article 226 being discretionary in nature, this court, in the peculiar facts of the present petitions, does not find it fit to exercise the same.

41. Therefore, in the peculiar facts of the present case, even though the Impugned Opinion of the Adjudicating Authority does not record any reasons for the same, the same is sustained. This shall, however, not be considered as an affirmation of this Court to the manner in which such opinion is to be recorded. It is also made clear that this Court has not expressed any opinion on the merit of the allegations made against the petitioner in the Show Cause Notice or the inquiry.

42. In view of the above discussion, the present petitions are dismissed with no order as to costs.

NAVIN CHAWLA, J

MAY 25, 2021
RN/P/US