*vai*

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

WRIT PETITION NO.1703 OF 2013

Lalit Kumar Modi
Son of Mr.K.K. Modi,
resident of 117, Salone Street,
London, through his Constituted
Attorney Mr.Mehmood M. Abdi,
son of Late Mohammad N. Abdi,
residing at A-901, Meera Towers,
Near Mega Mall, Oshiwara,
Andheri (West), Mumbai - 400 053. ...Petitioner

..Versus..

1) Special Director,
Directorate of Enforcement
Government of India, Ministry of
Finance, Department of Revenue,
101, Janambhoomi Chambers,
Walchand Hirachand Marg,
Mumbai - 400 001.

2) Assistant Director,
Directorate of Enforcement
Government of India, Ministry of
Finance, Department of Revenue,
101, Janambhoomi Chambers,
Walchand Hirachand Marg,
Mumbai - 400 001. ...Respondents

Mr.Aspi Chinoy, Senior Counsel with Mr.Swadeep Hora and Mr.Gaurav Gopal i/b Wadia Ghandy & Co. for the Petitioner.

Mr.Kevic Setalvad, Additional Solicitor General with Mr.Sumit Patni and Mr.Som Sinha i/b Mr.Dhiren Shah for the Respondents.



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**CORAM : S.J. VAZIFDAR &**
**B.P. COLABAWALLA, JJ.**
**DATE : 6TH FEBRUARY, 2014.**

**ORAL JUDGMENT (Per S.J. Vazifdar, J.) :-**

1. Rule. With the consent of the parties rule is made returnable forthwith and heard finally.

2. Respondent Nos.1 and 2 are the Special Director and the Assistant Director respectively of the Directorate of Enforcement.

3. Mr.Setalvad, the learned Additional Solicitor General, stated that the respondents did not wish to file an affidavit in reply. He reiterated the statement even during the course of the hearing.

4. The petition in effect challenges the opinion of respondent No.1 under rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereafter referred to as the "Adjudication Rules") to hold an inquiry as to whether the petitioner has contravened the provisions of section 13 of the Foreign Exchange Management Act, 1999 (hereafter referred to as "the Act"). The "opinion" is referred to in a letter dated 21.03.2013 which is also challenged.

In view of a judgment of the Supreme Court and a judgment of a Division Bench of this Court, we have upheld the challenge on the ground that the respondents failed to furnish the documents relied upon by the first respondent in the show cause



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notice and on the ground that there are no reasons for the opinion.

5. The petitioner seeks an order directing the respondents to supply all the documents referred to in a complaint dated 13.07.2011 and not annexed to the complaint and the show cause notice and an order quashing a letter dated 04.06.2013 by which the respondents refused to furnish the documents to the petitioner.

6. The petitioner also seeks an order setting aside the decision contained in a letter dated 16.12.2011 passed by respondent No.1 and an order directing the respondent's to implement the decision contained in a letter dated 22.09.2011. By the letter dated 22.09.2011 (wrongly mentioned as 2010) respondent No.1 agreed to furnish respondent No.2 copies of the documents sought by the petitioner. Subsequently by the letter dated 16.12.2011 respondent No.1 referred to do so.

In the alternative the petitioner seeks an order directing the respondent No.1 to recall the show cause notice dated 20.07.2011.

The petitioner has also sought an order directing the respondents to furnish the opinion formed by respondent No.1 in terms of rule 4 (3) of the Adjudication Rules. Mr.Setalvad stated that there was no opinion separately recorded. This relief therefore does not survive. The petitioner has therefore challenged the purported



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"opinion".

7. The Board of Control for Cricket in India (hereinafter referred to as the BCCI) is a Society registered under the Tamil Nadu Societies Registration Act. BCCI has formed several committees to assist its functioning including the Indian Premier League (hereinafter referred to as the IPL). The IPL has a Governing Council comprising of thirteen members which included the office bearers of the BCCI as ex-officio members. The decisions relating to the IPL are taken by the Governing Council. The petitioner was one of the Vice Presidents of the BCCI and was appointed as the chairman of the Governing Council of the IPL at the relevant time. He continued in this position upto 26.04.2010.

8. Section 13 of the Act provides for penalties for contravention of the provisions of the Act or any rule, regulation, notification, direction or order issued in exercise of the powers under the Act or the contravention of any condition subject to which an authorisation is issued by the Reserve Bank of India (RBI). Section 16(1) of the Act entitles the Central government to appoint as many officers of the Central government as it thinks fit as the Adjudicating Authorities for the purpose of adjudication under section 13. Respondent No.1 is an Adjudicating Authority. Section 16 provides that :-



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

The respondents have initiated proceedings against the petitioner on the ground that he is vicariously liable in view of his aforesaid position/office in the BCCI. Section 42 of the Act which provides for vicarious liability reads as under: –

> **"42. Contravention by companies.—**
>
> (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.
>
> (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished



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accordingly.

*Explanation*.—For the purposes of this section—

(*i*) "company" means any body corporate and includes a firm or other association of individuals; and

(*ii*) "director", in relation to a firm, means a partner in the firm."

9. Respondent No.2, the Assistant Director, on 13.07.2011 filed a complaint before the Special Director, respondent No.1, who is appointed as the Adjudicating Authority to hold an enquiry against the petitioner and five others for adjudication of the contraventions mentioned in the complaint. The complaint is filed against the petitioner, the BCCI, the honorary secretary and honorary treasurer of the BCCI, the State Bank of Travancore and its chief manager. For the purpose of this petition it is not necessary to refer to the contents of the complaint in detail. The contents of the complaint relevant for the purpose of this petition and at this stage are as follows.

On receipt of certain reliable information inquiries were initiated by the Directorate of Enforcement regarding the conduct of Twenty20 cricket tournaments known as the IPL organised by the BCCI. On the basis thereof, directives were issued to the BCCI to furnish information and details. Information was also received from various other sources. The same indicated large scale irregularities in the conduct and functioning of the IPL necessitating a



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comprehensive investigation in respect of IPL and its franchisees. The petitioner's position in BCCI is mentioned. During the course of the investigation it was learnt that International Management group (UK) Limited (hereinafter referred to as IMG) had been appointed by the BCCI for providing consultancy services to the IPL and that BCCI had made payments to it totalling about Rs.30.00 crores. BCCI had made several other payments as well on account of consultancy fees to IMG. The consultancy services were procured from IMG from outside India which required prior approval of the RBI under section 5 of the Act read with rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000. BCCI had however not made any application to the RBI in relation to procuring the consultancy services from IMG. The result of the investigation as stated in the complaint was that the BCCI had drawn foreign exchange in excess of the permissible limits and had entered into the transactions without the prior approval of the RBI and thereby contravened the provisions of section 5 of the Act. Accordingly, the complaint concluded that in view of section 42 of the Act and in view of his position in the BCCI, the petitioner was vicariously liable for the said offences. Respondent No.2, the complainant, inter alia sought permission to rely upon the documents mentioned in the "Annexure" to the complaint. The Annexure referred to 13 documents inspection



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whereof was granted to the petitioner. The question is whether the petitioner was also entitled to the other documents mentioned in the complaint.

10. Pursuant to the complaint, respondent No.1 served a show cause notice dated 20.07.2011 upon the BCCI, the petitioner, the honorary secretary and the honorary treasurer of the BCCI. The notice stated that a perusal of the complaint indicated contraventions by the BCCI of section 5 of the Act and the Rules thereunder to the extent of Rs.88,48,01,059 and that the other parties to the show cause notice were vicariously liable in terms of section 42 (1) of the Act. In view of the submissions on behalf of the petitioner and the respondents, it is necessary to note that the show cause notice does not itself refer to any documents.

11. The petitioner by his advocates' letter dated 22.08.2011 stated that the show cause notice relied upon various documents some of which had not been supplied and sought inspection of the documents particularised in the letter. During the course of the hearing of this petition, the respondents agreed to give the petitioner inspection of all the documents except those pertaining to the franchisees referred to in paragraph 3(f) and the documents referred to in paragraph 3(k) of the said letter. It is however, important to set out paragraph 3 in view of the submissions on behalf of parties. The



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petitioner also sought inspection of any other documents or statements in the respondent's possession which he may find relevant for the purpose of drafting a reply. Paragraph 3 of the letter which specified certain documents reads as under :-

> "3. However, having gone through the same we find that the Show Cause Notice and the Complaint upon which it is based rely upon various documents, some of which have not been supplied to us. Without those documents, we would be seriously prejudiced and handicapped in preparing any meaningful and effective reply. Those documents as evidenced from bare reading of complaint are -
>
> (a) The "reliable" information and order initiating enquiries alongwith scope thereof as relied upon in para 1.1 of the complaint.
>
> (b) Directives dated 29.05.2008 and 14.07.2008 issued to the BCCI by ED as relied upon in para 1.1 of the complaint.
>
> (c) Letters dated 4.07.2008, 7.08.2008 and 30.10.2009 within by BCCI to ED as relied upon in para 1.1 of the complaint.
>
> (d) Print and Electronic Media Reports relied upon by ED as relied upon in para 1.1 of the complaint.
>
> (e) Directives requisitioning documents from BCCI, franchisees, media and commercial right holders and the concerned Authorised Dealers as relied upon in para 1.1 of the complaint.
>
> (f) Replies and Documents supplied by BCCI, franchisees, media and commercial right holders and the concerned Authorised Dealers in terms of above directives as relied upon in para 1.1 of the complaint.



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(g) The letters dated 25.6.2010 and 26.6.2010 of the BCCI and the documents received therewith as relied upon in para 1.3 of the complaint.

(h) The statement of Mr.N. Srinivasan dated 8.7.2010 relied upon in para 2.5 of the complaint is in continuation to his statement recorded on 7.7.2010 and is therefore incomplete. The statement dated 7.7.2010 of Mr.N. Srinivasan has not been provided.

(i). Directive dated 21.05.2010 issued to IMG as relied upon in para 2.7 of the complaint.

(j). Letter dated 16.07.2010 given by IMG to ED as relied upon in para 2.7 of the complaint.

(k) The statement of Mr.Andrew Wildblood of 12.10.2010 relied upon in para 2.10 by reference confirms and incorporates the statements of Paul Manning, John Loffhagen and Peter Griffiths tendered on 29th and 30th Sept 2010 to ED. The statements of Paul Manning and John Loffhagen have not been provided which makes the statement of Andrew Wildblood incomplete."

12(A). The enforcement officer for the Special Director - respondent No.1 by his letter dated 22.09.2011 addressed to respondent No.2 stated that the respondent No.1 desired "that copies of the documents referred to in the complaint but not mentioned in the Annexure to the complaint, may be supplied to the noticee ….." By a further letter dated 24.11.2011 respondent No.2 - the Assistant Director informed the petitioner's advocate to collect the copies of the documents relied upon in the show cause notice. It is important to note that this letter was written with reference to the petitioner's said



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letter dated 22.08.2011 demanding inspection.

(B). As the respondents failed to furnish inspection of the documents, the petitioner addressed reminders. Ultimately the Enforcement Officer for the Special Director addressed the impugned letter dated 16.12.2011 which reads as under: –

> "I am directed to refer to your letter dated December 6, 2011 and this office letter of even no. dated 22/09/2010 on the subject ; and inform you as under.
>
> This office has already supplied copies of th documents listed in the Annexure to the complaint. As far as other documents mentioned in the complaint, the IO has stated that it cannot be supplied at this stage as the matter is still under investigation and the Department is not relying on those documents as the references of these documents in the complaint do not give rise to any prejudice to the detriment of the noticee.
>
> If any specific document is relevant to your defense, you may request for the same with specific reasons for such a request."

Thereafter further correspondence ensued between the parties in the course of which they raised their rival contentions. As the same were raised before us we would refer to them while dealing with their submissions.

13. The petitioner by a letter dated 25.07.2011 submitted a preliminary reply without prejudice to his contentions regarding the respondent's failure to give him inspection of the said documents.

14. Respondent No.1 did not entertain the application for



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inspection of documents any further. Instead by his letter dated 21.03.2013, which is also impugned, he informed the petitioner that after considering the cause shown by him he was of the opinion that the adjudication proceedings as contemplated under section 13 of the Act should be held against him in accordance with the procedure laid down in Rule 4 of the Adjudication Rules and fixed a date for personal hearing before him. The petitioner was by the said letter granted an opportunity to appear himself or through a legal practitioner / chartered accountant before respondent No.1 for a personal hearing. He was also informed that if he failed to appear, respondent No.1 may proceed with the case in his absence and pass an adjudication order on the basis of the material and evidence available to him.

In view of one of the contentions raised by Mr.Chinoy it is of vital importance to note that this letter stated nothing more. It furnished no reasons for the first respondent's decision to initiate adjudication proceedings against the petitioner under rule 4. Mr.Setalvad confirmed that no reasons for this order are separately recorded or even passed.

15. The first issue pertains to the determination of the documents that the person served with a notice under section 13 of the Act is entitled to inspection of.



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Mr.Chinoy submitted that the authorities are bound to furnish all the documents that are relevant to the case irrespective of whether they are referred to and relied upon in the notice to show cause or not. Alternatively he submitted that the authorities are bound to furnish inspection of all documents referred to or relied upon in the notice to show cause. In the further alternative he submitted that the authorities are in any event bound to furnish inspection of documents relied upon by the authorities in the notice to show cause. Mr.Setalvad submitted that the authorities are bound to furnish inspection only of the documents relied upon in the notice to show cause.

16. The manner of holding an Inquiry for the purpose of adjudication under section 13 is prescribed by rule 4 of the Adjudication Rules, which reads as under : –

> "4. *Holding of inquiry*.—
>
> (1) For the purpose of adjudicating under Section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, *the adjudicating authority shall, issue a notice to such person requiring him to show cause* within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.
>
> (2) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him.



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(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.



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(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 provisions of Section 13 of the Act.

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

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

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

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

17. This case concerns only the first stage which is covered by sub rules (1), (2) and (3) of rule 4. The procedure under sub rule (1) is not contemplated by any of the provisions of the Act *per se*. It is provided only by rule 4. The Legislature could well have provided for a hearing of the matter directly without giving the said person an opportunity of showing cause even against the holding of an inquiry under section 13. This aspect of rule 4 was dealt with in paragraph



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23 of the judgement of the Supreme Court in *Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255,* which reads as under :–

> **"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."

18. The Supreme Court then dealt with the question as to which documents the authority is bound to supply to the said person even at the stage under sub-rule (1), (2) and (3) as under :-

> **"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



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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.

***Part V: Duty of Adequate Disclosure***

**32.** The real question that arises for consideration is whether the adjudicating authority even at the preliminary stage is required to furnish copies of all the documents in its possession to a noticee even for the purposes of forming an opinion as to whether any inquiry at all is required to be held.

**33.** In this regard, the learned Senior Counsel for the appellant pressed into service the doctrine of duty of adequate disclosure which according to him is an essential part of the principles of natural justice and doctrine of fairness. A bare reading of the provisions of the Act and the Rules do not support the plea taken by the appellants in this regard. Even the principles of natural justice do not require supply of documents upon which no reliance has been placed by the authority to set the law into motion. Supply of relied on documents based on which the law has been set into motion would meet the requirements of the principles of natural justice. No court can compel the authority to deviate from the statute and exercise the power in altogether a different manner than the prescribed one.

**36.** In the present case, the inquiry against the noticee is yet to commence. The evidence as may be available upon which the adjudicating authority may



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place reliance, undoubtedly, is required to be furnished to the person proceeded against at the second stage of inquiry into allegations of contravention. It is at that stage, the adjudicating authority is not only required to give an opportunity to such person to produce such documents as evidence as he may consider relevant to the inquiry, but also enforce attendance of any person acquainted with the facts of the case to give evidence or to produce any document which in its opinion may be useful for or relevant to the subject-matter of the inquiry. It is no doubt true that natural justice often requires the disclosure of the reports and evidence in the possession of the deciding authority and such reports and evidence relevant to the subject-matter of the inquiry may have to be furnished unless the scheme of the Act specifically prohibits such disclosure.

**44.** In our opinion, these decisions do not assist the appellants' case in any manner whatsoever because the documents which the appellants wanted in the present case are the documents upon which no reliance was placed by the authority for setting the law into motion. Observations of the courts are not to be read as Euclid's theorems nor as provisions of the statute. The observations must be read in the context in which they appear. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision to impute a different meaning to the observations (see *Haryana Financial Corpn.* v. *Jagdamba Oil Mills*.)

**47.** It appears that those Acts recognise rights of accused persons in a criminal case to a fair trial. It is clear that disclosure of unused material in criminal proceedings in the United Kingdom is regulated by the provisions of those Acts and applicable to criminal trials where the accused are charged with criminal offences. Duty of disclosure of unused material is not a definite concept to be applied in any and every case in this country. There is no such Act or law as in the United Kingdom, nor any procedure prescribed for disclosure of unused material in criminal proceedings.



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> In the present case, the appellants are not defendants in any criminal trial. The judgment has no application as to the fact situation and the law applicable in the United Kingdom is not applicable to either the adjudicatory proceedings or even criminal trials in this country.
>
> **48.** On a fair reading of the statute and the Rules suggests that there is no duty of disclosure of all the documents in possession of the adjudicating authority before forming an opinion that an inquiry is required to be held into the alleged contraventions by a noticee. Even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read. Any other interpretation may result in defeat of the very object of the Act. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework."

19. Paragraphs 44, 47 and 48 of the judgement are a complete answer to Mr.Chinoy's submission that the person is entitled to all documents in the possession of the Adjudicating Authority irrespective of whether they have been relied upon by him or not. Even on principle this extreme proposition is not well founded when a person is showing cause at the stage contemplated by sub-rules (1), (2) and (3) of rule 4. At this stage a person is merely entitled to satisfy the authorities that the basis on which he is proceeding is erroneous.

20. Nor do we find the judgement to support Mr.Chinoy's first



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alternative submission that in any event a person is entitled to all the documents referred to in the show cause notice. By the words "referred to" we mean merely mentioned in the show cause notice. If the information or documents are merely mentioned in the show cause notice the person would not be entitled to particulars or inspection thereof. It is only those documents which are relied upon by the Adjudicating Authority in the show cause notice that a person is entitled to inspection of. There is no magic in the expressions "referred to" and "relied upon". A person is entitled at this stage to information or documents relied upon by the Adjudicating Authority meaning thereby information or documents which are the basis on which the show cause notice is issued. In other words they are entitled to information or documents which have led to the Adjudicating Authority to issue the show cause notice. A person would not be entitled to inspection of a document which is merely mentioned in the show cause notice for it played no part in the formation of his opinion that an inquiry should be held.

21. The show cause notice may refer to documents which the Adjudicating Authority relied upon. Such documents may in turn refer to other documents. Whether a party is entitled to such other documents would depend upon whether the Adjudicating Authority relied upon them as well. That would depend upon the facts of each



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case. Merely because the Adjudicating Authority relied upon a document in the show cause notice, it does not necessarily follow that all the documents referred to in such documents were also relied upon by him or formed the basis on which he formed his opinion that an inquiry should be held.

22. A view to the contrary would render the entire proceedings unwieldy at the outset causing an enormous delay in the Inquiry. The opportunity to persuade the authority not to even proceed with the inquiry is an additional right conferred by the rules and ought not to be permitted to be abused by persons against whom inquiries are proposed to be held, to delay the inquiry.

23. Mr.Chinoy's reliance upon paragraph 25 of the judgment of the learned single Judge of the Delhi High Court in *Natwar Singh's* case, *(2007) Law Suit (Del) 345,* is also not well founded. We will refer to the judgment again in another context. Paragraph 25 records the statement on behalf of the Directorate to the effect only those documents which are “referred to or relied upon” have to be disclosed to the affected parties and that the documents “which are neither referred to nor relied upon” are not required to be disclosed to such persons. It was therefore, submitted by Mr.Chinoy that even according to the department, it is bound to furnish inspection and copies not merely of the documents relied upon in the show cause



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notice but also the documents referred to therein.

24. Neither the Act nor the Adjudication Rules can be interpreted on the basis of the statements or concessions made by counsel. This is assuming that the stand of the respondents before the Delhi High Court was that even the documents not relied upon but merely referred to in the show cause notice must be furnished to the persons. It is doubtful whether the said concession was even intended to be made. For instance, in several parts of the judgment the words “relied upon” are used and not the words “referred to”. In fact in several parts of the judgment, the words “relied upon” and “referred to” are used interchangeably.

25. The exercise in each case is to determine whether the documents of which inspection is sought by the person were relied upon by the first respondent or whether they were merely mentioned in the show cause notice. Before we do so, it would be convenient to deal with two broad propositions advanced by Mr.Setalvad.

26. Mr.Setalvad contended that even if some of the documents referred to in the complaint are sufficient to sustain an order directing an inquiry, it is not necessary to furnish all the documents even if they are held to have been relied upon in the show cause notice.

27. The submission is contrary to the judgment in *Natwar*



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*Singh's* case. Every document relied upon in the show cause notice ought to be furnished to the said person. A view to the contrary would involve a cumbersome procedure and hearing before the Court in every case where a party challenges the holding of an inquiry under clause (3) of rule 4.

28. In the present case we are not inclined to accept this submission even assuming it is well founded. As we noted earlier the respondents opted to proceed to the final hearing of this matter without an affidavit in reply. It is difficult in this case to ascertain whether the show cause notice was issued on the basis of each or some of the documents relied upon or whether it was issued on the basis of all the documents taken together. Vicarious liability under section 42 is not absolute. The person charged is entitled to defend himself on merits contending that there is no contravention. He is also entitled in a case where the contravention is clear to establish under the proviso to section 42 that the contravention was without his knowledge or that he exercised all due diligence to prevent such contravention. Thus even if some of the documents relied upon indicate a contravention under section 13, it would not be a ground for denying a person inspection of all the documents relied upon. They may be relevant regarding the persons personal defence under the proviso to section 42.



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29. This view is supported by the judgment of a Division Bench of this court in the case of *Shashank Vyankatesh Manohar vs. Union of India & Anr. 2013(12) LJSOFT 81 = 2013(5) ALL MR 551* where the Division Bench rejected a similar contention.

> "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."

30. We express no opinion regarding cases where the



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documents though relied upon are not furnished for any special reason such as where granting inspection would prejudice investigations. Such a defence would have to be pleaded and established. The respondents have not even filed an affidavit. That point is therefore, kept open.

31. Mr.Setalvad submitted that in the case before us the complaint relied upon only the documents listed in the Annexure thereto and not to the other documents referred to in the complaint. He contended that even in *Natwar Singh's* case, the authority had granted inspection only of the documents mentioned in the annexure and had refused inspection of several documents, which were only referred to in the rest of the show cause notice. Neither the submission nor the contention on the reading of *Natwar Singh's* case is well founded.

32. Merely because a notice encloses an annexure, it would not follow that the documents referred to in the rest of the show cause notice are not relied upon. The question would still remain whether such documents i.e. documents referred to in the notice other than those mentioned in the annexure thereto are relied upon or not. If they are the authorities are bound to furnish them. In the present case the complaint does not in any event state that the documents other than those referred to in the annexure thereto are



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not relied upon. In fact the last sentence specifically stated "That the complainant (Respondent No.2) seeks permission of the Adjudicating Authority (Respondent No.1) to refer to and rely *inter-alia* on the documents mentioned in the "Annexure" to the complaint." It is clear from the expression *"inter-alia"* that the complaint did not rely only upon the documents referred to in the Annexure thereto.

33. The judgment in *Natwar Singh*'s case does not support Mr.Setalvad's contention in this regard either. From a reading of the judgment as a whole and alongwith the judgment of the learned single Judge and of the Division Bench in that case, it is apparent that the petitioner therein sought not merely the documents relied upon but also those in the "possession" of the authorities which he believed supported his case on merits. It is to these documents that he was held not to be entitled to. For instance in paragraph 7, it is recorded that the appellant had, after receiving the show cause notice required the Adjudicating Authority to furnish copies of all the documents "in possession" of the authorities in respect of the case including the 83,000 documents, allegedly procured from a party in USA in connection with the case. In paragraph 7, it is further noted that the copy of all such documents "as relied upon by the Adjudicating Authority" were furnished. The fact that the appeal was dismissed, does not indicate that the 83,000 documents were relied



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upon by the Adjudicating Authority. The fact is that what the appellant sought in that case was the copies of the documents "in possession" of the Adjudicating Authority and not the copies of the documents relied upon by them. Had the Supreme Court come to the conclusion that those documents had been relied upon in the show cause notice, the result would have been entirely different. This is obvious from the fact that in the paragraphs quoted above, the Supreme Court held that fairness required the Adjudicating Authority to furnish the copies of those documents upon which reliance had been placed in the show cause notice. In paragraph 31, it is expressly stated that all the documents relied on by the Adjudicating Authority are required to be furnished to the noticee. In paragraph 33, it is observed that the principles of natural justice do not require supply of documents upon which no reliance has been placed by the Adjudicating Authority. In paragraph 48, it is held that there is no duty of disclosure of all the documents in "possession" of the Adjudicating Authority. It appears clear therefore, that the 83,000 documents were not even referred to in the show cause notice and were merely in the possession of the Adjudicating Authority. This becomes clearer from the judgment of the learned single Judge and of the Division Bench of the Delhi High Court in that case.

34. From the judgment of the learned single Judge in *Natwar*



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*Singh's* case *2007 Law Suit (Del) 345*, relied upon by both the learned counsel, it is clear that what the petitioner sought was the documents, which were "in possession" of the Adjudicating Authority because according to them, those documents helped their case (paragraph 1). This is clearer from paragraph 3, where the learned single Judge recorded that the petitioners had requested for supply of the entire documents "available with" the Directorate of Enforcement, pertaining to the show cause notices "including the documents not relied upon." Throughout the judgment, there are references to the petitioner's demand for copies of the documents which were in "possession" of the authorities.

Mr.Setalvad relied upon paragraph 19 of the judgment wherein the learned Judge has quoted a part of the show cause notice. Mr.Setalvad relied upon the following words in the show cause notice :- "IN ISSUING this Show Cause Notice, reliance, *inter alia*, is placed on the documents mentioned in the Annexure to this Notice." He relied upon the fact that these were the very words in the show cause notice in the case before us. In view thereof, he contended that all that the learned Judge held the petitioner to be entitled to was the documents listed in the annexure to the notice and nothing else.

We are not inclined to speculate in this manner and in this



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regard. The entire show cause notice is not set out in the judgment. It is difficult to say that the documents other than those mentioned in the annexure to the show cause notice were relied upon. It appears that the 83,000 documents referred to in the judgment however, were not relied upon for the purpose of the show cause notice. This is clearer from paragraph 20 which refers to the petitioner's demand for documents "allegedly procured by Shri Virender Dayal ….." and "allegedly in the possession of the Directorate". The word "allegedly" indicates that the stand of the respondents was that the documents were not even in the possession of the Directorate.

35. Mr.Setalvad relied upon an earlier judgment of the learned single Judge of the Delhi High Court dated 18.12.2006 in a different writ petition viz. Writ Petition (C) No.18901/2006 also filed by *Natwar Singh* only for the purpose of determining whether the documents of which inspection was sought by the petitioner in that case were relied upon in the show cause notice therein. Paragraphs 9 and 12 of the judgment in fact indicate that they were not. In paragraph 9, the learned Judge recorded that the petitioner therein had demanded the documents produced by the said Dayal from USA and demanded the same on the premise that the documents were in the possession of the respondents and available with them though they had not been specifically relied upon by the petitioner. The petitioner sought



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inspection though the documents were not specifically relied upon on the ground that they were relevant. In paragraph 12, the learned Judge recorded that the petitioner's counsel insisted that the petitioner was entitled to documents “which though have not been relied upon by the respondents, but which are alleged to be in possession of the respondents”. It is clear therefore, that in that case what was sought was relevant documents and not documents which were relied upon.

36. This brings us to the judgment of the Division Bench of the Delhi High Court in *Natwar Singh's* case *149 (2008) DLT 18*.

Paragraph 15 of the judgment makes it clear that the documents of which inspection was sought by the petitioner were those which were not referred to in the show cause notice but were only in possession of the Directorate of Enforcement. Paragraph 15 of the judgment reads as under :-

> “15. It is not in dispute that the entire material referred to in the show cause notice and relied upon by the Directorate of Enforcement has been furnished to the noticees in the present cases. The noticees, therefore, knew the exact basis on which the Adjudicating Authority proposed to initiate an inquiry. They had an opportunity to explain their position qua the said material. The attempt made by the petitioner however was to seek disclosure of all the documents in possession of the Directorate of Enforcement regardless of whether or not the Directorate was placing any reliance upon the same. What is significant is that the Adjudicating Authority was at that stage taking only a prima facie view of the matter



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> and was not either by the provisions of the Rule or by any other principle of fairness or considerations of equity, required to supply the material upon which the Enforcement Directorate did not place any reliance against the noticees. The insistence on the part of the appellants for disclosure of documents that were not being pressed into service against them was therefore unsupported by any legal requirement under the rules or principles of natural justice as applicable to such inquiries. The Adjudicating Authority was in that view legally correct in declining the request for supply of documents not relied upon by the Directorate of Enforcement. So also was the learned single Judge correct in declining interference with the view taken by the Adjudicating Authority."
>
> (emphasis supplied)

37. Mr.Chinoy and Mr.Setalvad relied upon the judgments in cases relating to preventive detention under the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974. We are not sure that the principles under these enactments can be applied to the provisions of the Act and the Adjudication Rules. In any event we are bound by the judgment of the Supreme Court in *Natwar Singh's* case, which directly dealt with the provisions of the Act and Adjudication Rules and the judgment of the Division Bench of this Court in *Shashank Manohar's* case. Further there is nothing in the judgments cited by Mr.Chinoy and Mr.Setalvad that militates against the view taken in these judgments. We will now deal with these judgments.

(A). In *(1981) 2 SCC, 436, Kirit Kumar Chaman Lal vs. Union* of India relied upon by Mr.Chinoy, the Supreme Court held :-



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"**12.** The matter does not rest here but two additional points which have been taken in the writ petition before us are sufficient to void the order of detention passed against the detenu. In the first place, it was submitted that the endorsement on the file produced before us by the government shows that the documents concerned were examined not by the detaining authority but by the Secretary and there is nothing to show that the note or endorsement of the Secretary was placed and approved by the detaining authority. In these circumstances, therefore, it must be held that there was no decision by the detaining authority that the documents were irrelevant. It was, however, submitted by Mr Phadke that the documents concerned were merely referred to in the grounds of detention but did not form the basis of the subjective satisfaction of the detaining authority at the time when it passed the order of detention. It was, however, conceded by Mr Phadke that before the grounds were served on the petitioner, the documents were placed before the detaining authority and were, therefore, referred to in the grounds of detention. It is manifest, therefore, that the subjective satisfaction could only be ascertained from or reflected in the grounds of the order of detention passed against the detenu otherwise without giving the grounds the mere subjective satisfaction of detaining authority would make the order of detention incomplete and ineffective. Once the documents are referred to in the grounds of detention it becomes the bounden duty of the detaining authority to supply the same to the detenu as part of the grounds or pari passu the grounds of detention. There is no particular charm in the expressions "relied on", "referred to" or "based on" because ultimately all these expressions signify one thing, namely, that the subjective satisfaction of the detaining authority has been arrived at on the documents mentioned in the grounds of detention. The question whether the grounds have been referred to, relied on or based on is merely a matter of describing the nature of the grounds. Even so in the case of *Ramchandra A. Kamat* v. *Union of India &* three-Judge-Bench decision of this Court to which one of us (Fazal Ali, J.) was a party, clearly held that even



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> the documents referred to in the grounds of detention have to be furnished to the detenu. In this connection the court observed as follows: [SCC p. 273: SCC (Cri) p. 417, para 8]
>
> "This Court has repeatedly held that the detenu has a constitutional right under Article 22(5) to be furnished with copies of all the materials relied upon or *referred to* in the grounds of detention, with reasonable expedition."
>
> Thus, it is absolutely clear to us that whether the documents concerned are referred to, relied upon or taken into consideration by the detaining authority they have to be supplied to the detenu as part of the grounds so as to enable the detenu to make an effective representation immediately on receiving the grounds of detention. This not having been done in the present case the continued detention of the petitioner must be held to be void."
>
> (emphasis supplied)

The subjective satisfaction of the authority had been arrived at on the documents mentioned in the grounds of detention. The words "referred to" do not support Mr.Chinoy's extreme proposition for even in this judgment the decision was arrived at "on the documents". This of course, is assuming that the ratio of this judgment is applicable to cases such as the one before us.

(B). The judgment of the Supreme Court in *Chandrama Tewari vs. Union of India 1987 (Supp) SCC 518,* relied upon by Mr.Setalvad does not carry his case further. Mr.Setalvad relied upon the following observations in paragraph 4 of the judgment :-

> "..... However, it is not necessary that each and every document must be supplied to the delinquent



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> government servant facing the charges, instead only material and relevant documents are necessary to be supplied to him. If a document even though mentioned in the memo of charges is not relevant to the charges or if it is not referred to or relied upon by the enquiry officer or the punishing authority in holding the charges proved against the government servant, no exception can be taken to the validity of the proceedings or the order. If the document is not used against the party charged the ground of violation of principles of natural justice cannot successfully be raised."

It is not the respondents case that the documents of which inspection is sought by the petitioner are not relevant to the charges. We will assume that the judgment requires the person concerned to be furnished only with the documents relied upon. We have come to the conclusion that the documents, of which the petitioner sought inspection were relied upon by the first respondent in forming his opinion.

(C). For the same reasons, the judgment of the Supreme Court in *Radhakrishnan Prabhakaran vs. State of T.N., (2000) 9 SCC 170,* does not carry Mr.Setalvad's case any further. This again is assuming that the cases under the CAFEPOSA apply to cases such as the one before us.

38. This brings us to a consideration of the question whether the documents of which the petitioner seeks inspection were relied upon in the show cause notice.

39. We enumerated earlier the documents of which the



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petitioner sought inspection in paragraph 3 of his advocate's letter dated 22.08.2011. Mr.Setalvad stated that the respondents are now agreeable to furnish the petitioner all the documents except those relating to the franchisees referred to in paragraph 3(f) and the documents mentioned in paragraph 3(k). It is necessary therefore, to only consider whether the petitioner is entitled to these documents.

40. Before considering this aspect, it is necessary to refer to the show cause notice once again. As mentioned earlier, the show cause notice refers to the complaint under section 16(3) and states :

> *"On perusal of the said complaint and after considering the cause shown by the complainant in his complaint there appears to be contravention of the following provisions of the Act as specified in the complaint."*

The show cause notice itself does not refer to any documents whatsoever except the complaint. Thus while deciding whether a document was relied upon by the first respondent, it is necessary to read the complaint itself for the complaint has in effect been incorporated into, and forms an integral part of the show cause notice.

It is also important to note that the last sentence of the show cause notice states "Reliance has been *inter alia* placed on the documents listed in Annexure to the complaint." (emphasis supplied) Thus for the purpose of issuing the show cause notice, reliance was



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placed not merely on the documents listed in the annexure to the complaint.

41. This brings us to a consideration as to whether the petitioner is entitled to the two sets of documents, the first of which are those relating to the franchisees which are referred to in paragraph 1.1 of the complaint.

Paragraph 1.1 of the complaint states that upon receipt of reliable information, inquiries were initiated by the Directorate of Enforcement regarding the conduct of Twenty-20 cricket tournament organized by the BCCI ; on the basis of the information directives were issued under section 37 of the Act to the BCCI ; the BCCI by their letters furnished certain details and subsequently the information was received from other sources pointing to large scale irregularities. Paragraph 1.1 further states :- “In order to conduct a thorough investigation in the matter, documents were requisitioned from the BCCI, the Franchisees, Media and Commercial rights holder of the BCCI and the concerned Authorised Dealers. The documents received from the aforesaid sources were examined in detail. The following paras briefly describe the background of issues covered by the Complaint.” (emphasis supplied)

42. A plain reading of paragraph 1.1 indicates that the information and the documents requisitioned from the franchisees



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were relied upon by the respondents. In fact the documents were examined in detail. What followed in the complaint was obviously based on all the documents referred to in paragraph 1.1. The respondents do not exclude any particular document referred to in paragraph 1.1.

43. The petitioner is therefore, entitled to the documents requisitioned and received from the franchisees.

44. This brings us to a consideration of the documents referred to in paragraph 3(k). For convenience the same is reproduced again :-

> "(k) The statement of Mr.Andrew Wildblood of 12.10.2010 relied upon in para 2.10 by reference confirms and incorporates the statements of Paul Manning, John Loffhagen and Peter Griffiths tendered on 29th and 30th Sept 2010 to ED. The statements of Paul Manning and John Loffhagen have not been provided which makes the statement of Andrew Wildblood incomplete."

The petitioner has been furnished a copy of the statement of Andrew Wildblood. It is referred to in paragraph 2.10 of the complaint. Paragraph 2.2 of the complaint reads as under :-

> "2.10 Further, Mr. Andrew Wildblood, Vice President, IMG (UK) Ltd., appeared in this office on 12.10.2010 and in his statement he explained the services provided by IMG to BCCI-IPL in relation to the conduct of the Indian Premier League and stated that they had researched the correct split of rights between those that would be sold centrally by the BCCI and those to be sold locally by the respective



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franchises in order to arrive at the optimum financial position and that all of this would have been educated estimates of potential value as no precedent existed for the launch of such a league and that it was this financial research that would have suggested the reserve price that was set for the first franchise tender. He further stated that the MoU signed with BCCI, sets out IMG's obligations and compensation arrangements as follows :

- Developing the concept for the sporting, commercial and investment structuring of this league.

- The preparation and drafting of legal documents necessary for such an enterprise.

- The sale of the commercial rights and in the case of the media rights, the preparation of the tender documents.

- The preparation of the tender documents in respect of the sale of the franchises.

- Preparation of the player agreements, the operational rules.

- The implementation of the league.

- Under a separate agreement, the production of the Television coverage." (emphasis supplied)

45. In fact the statement of Andrew Wildblood referred to above does not reflect the contents of paragraph 2.10 of the complaint. The contents of paragraph 2.10 have obviously been obtained by respondent No.1 from the documents referred to in Wildblood's statement. The relevant portion in Andrew Wildblood's statement pertaining to the present matter i.e. the transaction



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between the BCCI - IPL and IMG is as under :-

> "Today I have been shown copies of the statements dated 29th and 30th September 2010 tendered by the following IMG officials :
>
> 1. Mr. Paul Manning
> 2. Mr. John Loffhagen
> 3. Mr.Peter Griffiths
>
> I have read the above statements and have put my dated signatures thereon confirmation of their contents. I state that the contents of these statements tendered by the aforesaid IMG officials are true and correct except those portions which are not within my knowledge. However, I confirm that their statements present true and correct facts and I am in agreement with the same. I also confirm that whatever has been attributed to me in the said statements are correct."

The statement of Andrew Wildblood by itself contains nothing regarding the contents of paragraph 2.10 of the complaint. The statement affirms the contents of the statements of Paul Manning, John Loffhagen and Peter Griffiths and is therefore, expressly incorporated by him therein. It is clear therefore, that what respondent No.1 relied upon was the statement not merely of Andrew Wildblood but the statements of Paul Manning, John Loffhagen and Peter Griffiths referred to in Wildblood's statement.

46. In the circumstances, the petitioner is entitled to be furnished the documents referred to in paragraph 3(k) of the letter dated 22.08.2011.

47. The petitioner was denied the copies or even inspection



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of the documents referred to in paragraph 3 of the letter dated 22.08.2011. The respondents have now, during the course of this hearing, agreed to furnish all the documents except those relating to the franchisees referred to in paragraph 3(f) of the said letter and the statements referred to in paragraph 3(k) of the said letter. We have held that the petitioner is entitled to those documents as well. It must follow therefore, that the decision to proceed to the inquiry is liable to be set-aside, as the petitioner had no opportunity of showing cause against the respondents conducting the inquiry. Respondent No.1 would be entitled to proceed with the proposed inquiry only in the event of his furnishing the documents referred to in paragraph 3 of the letter dated 22.08.2011. Alternatively, the respondents would be entitled to issue a fresh show cause notice and proceed accordingly. They are at liberty to do so even now afresh.

48. Mr.Chinoy further submitted that the opinion is liable to quashed and set aside as it contains no reasons. As we mentioned earlier, no reason for the opinion is separately recorded. The only document relied upon by the respondents is the letter dated 21.03.2013. A plain reading of this letter establishes that it contains no reasons whatsoever. Mr.Chinoy's reliance upon the judgment of the Division Bench of this Court in the case of *Shashank Vyankatesh Manohar vs. Union of India and the Directorate of Enforcement,*



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*2013(12) LJSOFT 81 = 2013(5) ALL MR 551*, is therefore, well founded.

49. The petitioner in that case had also challenged the show cause notices issued to him on the ground that he was vicariously liable in view of section 42 of the Act. The petitioner therein was the President of the BCCI. The proceedings were also in respect of the IPL. The Assistant Director, Directorate of Enforcement had filed a complaint under section 16(3) of the Act with a specific direction alleging violation of the Act to the extent of Rs.1314.00 crores. On the basis of the complaint, eleven show cause notices were issued including to the noticees in the show cause notices in the case before us. The petitioner therein filed his replies to the show cause notices in which he raised various grounds, including that the notices were issued without jurisdiction. The petitioner also raised various contentions on merits, including that he was only the ordinary President of the Board and had no role in conducting the relevant IPL in South Africa. On 06.06.2013, the Special Director called the noticee in that case for a personal hearing for adjudication. The notice stated that the same was issued after the Special Director considered the cause shown by the petitioner and was of the opinion that the adjudication proceedings as contemplated under section 13 of the Act should be proceeded with in accordance with rule 4 of the



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Adjudication Rules. The petitioner challenged the show cause notices and the communication dated 06.06.2013. The Division Bench held as under :-

> 14. ..... 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



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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 noticeee 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.

19. ..... 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 pre-suppose 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



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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."
>
> (emphasis supplied)

50. Mr.Chinoy's submission that the purported "opinion" of respondent No.1 under rule 4(3) that an enquiry should be held against the petitioner as stated in the letter dated 21.03.2013 is liable to be quashed and set aside, as it contains no reasons is well founded. Mr.Setalvad agreed that there are no separate reasons for the opinion even on the files of the respondents on the basis of which



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the inquiry is sought to be held under rule 4(3). The letter merely states that after considering the cause shown by the petitioner, respondent No.1 was of the opinion that the adjudication proceedings, as contemplated in section 13 of the Act should be held against him in accordance with the procedure laid down in rule 4 of the Adjudication Rules. The letter thereafter merely fixes the date of the hearing and permits the petitioner to appear himself or through a legal practitioner / chartered accountant. The letter says nothing more except that if the petitioner fails to appear, the matter will be proceeded with on the basis of the material and evidence available. The letter therefore, is merely a communication of an opinion. The opinion is admittedly not in writing. There admittedly are no reasons recorded in respect of the opinion.

51. Contrary to Mr.Setalvad's suggestion, the judgment is clear and leaves no room for doubt. Mr.Setalvad submitted that the judgment in *Shashank Manohar's* case must be restricted to the facts of that case alone. We do not see how that can be so. The Division Bench has dealt with the question of law viz. the interpretation of the provisions of Act and Adjudication Rules in detail. The interpretation of the statutory provisions can never be restricted to the facts of a case. The application of a judgment to a given case is another matter altogether. Indeed that would depend upon the facts of the case.



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However, the ratio of the judgment especially as contained in the portions quoted above, apply to the provisions of the Act and the Adjudication Rules in general and cannot be restricted to that case alone.

52. Mr.Setalvad relied upon the observations of the Division Bench in paragraph 36 in support of his contention that the judgment was only in view of the peculiar facts of that case. In paragraph 36, the Division Bench noted that since the material on record was sufficient to take the view that the petitioner therein was not in charge of and responsible for opening and operating the bank accounts etc. it would be necessary for the Adjudicating Authority to form an opinion whether the petitioner could at all be considered to be vicariously liable under section 42(1) of the Act. In paragraph 37, the Division Bench observed that there was nothing on record that indicated that the Adjudicating Authority had considered various aspects before forming his opinion to proceed further with the inquiry under rule 4(4) of the Adjudication Rules. In paragraph 35, the Division Bench also noted that even in a case of a person holding the position of a Managing Director, he would not be liable if he had no knowledge of the contravention or even if he had exercised all due diligence to prevent the contravention of the Act.

The above observations only indicate that the case of the



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petitioner in that case even on facts was very strong. That however, does not restrict the ratio of the judgment relating to the interpretation of the provisions of the Act and the Adjudication Rules only to that case. The ratio of the judgment is binding on us.

53. In the circumstances, rule is made absolute in terms of prayers (a), (aa) and (b). The respondents shall be entitled to either issue a fresh show cause notice and proceed afresh on the basis thereof in accordance with law or to furnish the documents in paragraph 3 of the letter dated 22.08.2011 and thereafter form an opinion afresh under rule 4 after affording the petitioner a fresh opportunity to show cause as contemplated under Rule 4.

On Mr.Setalvad's application, the operation of this judgment and order is stayed for a period of six weeks, in view of his statement that in the meantime the Special Director, Directorate of Enforcement will not proceed with the hearing pursuant to the impugned notices. This stay will not however, prevent the respondents from proceeding with the matter in accordance with this judgment.

***(B.P. COLABAWALLA, J.)*** ***(S.J. VAZIFDAR, J.)***



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