

Sh. Devashis Bhattacharya Vs. Union of India (Uoi) and anr.

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Court : Delhi

Decided On : Apr-21-2009

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Judge : Gita Mittal, J.

Acts : Foreign Exchange Act, 1973 - Sections 40, 56, 56(3), 56(4), 57, 61, 61(2) and 62(2); [Foreign Exchange Management Act, 1999](#) - Sections 49(3) and 49(4); [Indian Telegraph Act, 1885](#) - Sections 4, 20 and 25; [Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 405, 406 and 420; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 29, 200 to 204 and 482; [Constitution of India](#) - Articles 14, 226 and 227

Appeal No. : Writ Petition (Crl.) No. 800/2002

Appellant : Sh. Devashis Bhattacharya

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : P.P. Malhotra, Additional Solicitor General, ; Naveen K. Matta, ;

Advocate for Pet/Ap. : S.K. Sharma, Adv

Judgement :

Gita Mittal, J.

1. By way of this writ petition under Article 226 of the [Constitution of India](#), the petitioner assails the proceedings in Complaint Bearing No. 880/1 dated 27th May, 2002 entitled Enforcement Directorate v. Sanjay Malviya and Ors. under Section 56 of the Foreign Exchange Act, 1973 read with Sub-section 3 and 4 of Section 49 of the [Foreign Exchange Management Act, 1999](#) and prays for quashing thereof primarily on the ground that the same have been commenced without effecting statutory compliance of the mandatory provision of the proviso to sub Clause (ii) of Sub-section 2 of Section 61 of the Foreign Exchange Regulation Act, 1973. The petitioner has also assailed the order of the learned trial judge taking cognizance of the complaint and issuing summons to the petitioner.

2. The petitioner claims to be an ordinary director of the Intergroup C & E Ltd. ('ICE Ltd' for brevity) which was allotted six Integrated Services Digital Network telephone connection ('ISDN connections' for brevity) at their office premises E-380, Greater Kailash I, New Delhi in February, 2000 without STD/ISD dialing facility. On 3rd May, 2000, the Mahanagar Telephone Nigam Ltd. (MTNL for brevity) which was a service provider for these connections filed a criminal complaint before the Special Cell of the Delhi police alleging that the subscriber was misusing the telephone connection in violation of the provisions of the [Indian Telegraph Act, 1885](#). The police raided the business premises of the company, arrested Sh. Sanjay Malviya, its managing director and Sh. Deepak Gupta, Technical Advisor and also seized all equipment attached with the telephone connection. A case bearing FIR No. 136/2000 was registered under Section 420/120B of the Indian Penal Code read with Section 4/20 of the [Indian Telegraph Act, 1885](#).

3. The allegations in the complaint were that one of the ISD and telephone lines was made into a permanent channel and thereafter by using sophisticated equipment, international calls were being distributed to Delhi and nearby areas illegally through the Public Safety Telephone Network (PSTN network for brevity). In the complaint allegations were also made by the MTNL that the channels/connection allotted to the company were found busy day and night which indicated that the ISD and lines were being misused. Transmission of data from the USA to the connection through ISD and connection was compressed. Instead

of 24 calls, only one call would suffice to transmit the compressed data. It was complained that this resulted in loss to the MTNL of Rs. 5 crores in foreign exchange. The further allegation in the complaint was that the equipment seized from the business premises of the petitioner was not of approved subscription of the telecom engineering centre, a nodal government agency under the Department of Telecommunication.

4. So far as the criminal case was concerned, the investigating agency of the special cell of the Delhi Police is stated to have filed a chargesheet against the petitioner and other accused persons in the court of the Metropolitan Magistrate, New Delhi under Sections 405/420/120B of the Indian Penal Code, 1860 read with Section 4/20 and 25 of the [Indian Telegraph Act, 1885](#). The Intergroup Conventions and Exhibitions Ltd. (ICE Ltd. for brevity) is stated to have a civil suit for permanent and mandatory injunctions Bearing No. 405/2000 entitled as ICE Ltd. v. Mahanagar Telephone Nigam Ltd. against the illegal disconnection of the telephone services to the company.

5. The petitioner states that a notice dated 18th April, 2002 was received from the Enforcement Directorate, respondent No. 2 herein. His statement is stated to have been recorded by the Directorate of Enforcement under Section 40 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA, 1973' for brevity) read with Section 49(3) & (4) of the [Foreign Exchange Management Act, 1999](#) (hereinafter referred to as 'FEMA, 1999' for brevity) on 13th November, 2000.

6. 'An opportunity notice' dated 17th May, 2002 was thereafter served upon the petitioner on the 25th May, 2002 in purported compliance of the proviso to Section 61(2)(ii) of the FERA, 1973 read with Section 49(3) and 49(4) of FEMA, 1999. This notice required the petitioner to state in writing within three days from the date of receipt of the notice, as to whether he had previous general or special permission of the Reserve Bank of India for the transactions detailed in the notice. The petitioner was also notified that if he failed to furnish the requisite information within the specified time, a complaint under Section 56 of FERA, 1973 read with Section 49(3) & (4) of the FEMA, 1999 for the alleged contravention shall be filed

in a court of law.

7. The petitioner contested the allegations made in the notice by a communication dated 27th May, 2002 and submitted a detailed reply denying that he had committed any violation of FERA, 1973. Certain clarifications were also sought with regard to the allegations and violations alleged by the respondent No. 2 in their notice under reply. On 7th June, 2002, the petitioner claims to have read a newspaper report in the newspapers 'English Daily' and Hindustan Times, stating that the respondent No. 2 has filed a criminal complaint against the petitioner and other accused persons for alleged violations of the provisions of FERA, 1973.

8. As per the available record, the respondent No. 2 filed criminal complaint No. 880/2001 dated 27th May, 2002 under Section 56 of the FERA, 1973 read with Sub-sections 3 and 4 of Section 49 of FEMA, 1999 before the court of Additional Chief Metropolitan Magistrate who took cognizance of the complaint vide an order dated 27th May, 2002 and summoned all accused persons including the petitioner for appearance on 20th August, 2002. It is submitted on behalf of the petitioner that on the inspection of the court record, it has been revealed that the respondent No. 2 illegally and arbitrarily did not place the communication dated 27th May, 2002 sent by the petitioner alongwith the criminal complaint which was filed in court.

9. Aggrieved by the action of the respondent No. 2 in filing the complaint before the expiry of the three days granted to show cause in answer to the notice dated 17th May, 2002 (served on the petitioner on 25th May, 2002), the petitioner has filed the present writ petition contending that the criminal complaint No. 880/2001 was filed by the respondent in breach of specific statutory provisions as well as the principles of natural justice and in violation of Article 14 of the [Constitution of India](#). The complaint and proceedings initiated by the respondent are also assailed as without jurisdiction and amounting to a misuse of the process of law. The petitioner also assails the order dated 27th May, 2002 passed by the Additional Chief Metropolitan Magistrate, New Delhi taking cognizance of the complaint and issuing of notice to the petitioner as being without application of mind.

10. In support of these submissions, learned Counsel for the petitioner places reliance on the statutory provisions governing the subject as well as on the pronouncements reported at 1998 SCC 1400 Pepsi Foods Limited v. Special Judicial Magistrate : 1992 CriLJ527 State of Haryana v. Ch. Bhajanlal (para 108 at page 629) : 37 (1989) DLT 251 Lachman Singh v. Mahendra Singh (paras 2 & 4).

11. The case of the petitioner rests on a specific challenge based on the provisions of FERA, 1973 and the rules framed thereunder. The submission is that inasmuch as the opportunity notice under Section 61(2)(ii) of FERA is statutorily required, full particulars of the date of notice and its service are required to be mentioned in the complaint.

The further submission is that in order for the complainant to make out a prima facie case, it is essential that the copy of the notice as well as the proof of its service upon the accused person is placed on the record of the court along with the complaint. Failure to do so as in the instant case, renders the entire action illegal.

It is further asserted that the complaint also does not contain any statement as to the mode and manner of service of the complaint. For this reason, it has been contended that cognizance of the complaint has been taken and notice issued in a routine manner and without any application of mind.

12. On the other hand, Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the respondent has contended that the fact that the petitioner has annexed a copy of the opportunity notice with the petition, itself evidences that he was duly served and had even filed a reply to the same. The submission of the learned ASG is that the petitioner's grievance is of insufficiency of notice which is a matter of his defence. It is contended that the petitioner would have adequate opportunity to establish the same in the trial at the pre-charge stage. It is submitted that according to the respondent, this notice was served by affixation in the presence of panchas and the panchnama in this behalf, would be proved before the trial court. In support of these submissions, reliance is placed on the judicial pronouncements reported at (1984) 3 ECC 319 A.S.G. Jothimani v. Dy. Director of Enforcement (page 18) (2002) 3 SCC 269 Medchl Chemicals &

Pharma (P) Ltd. v. Biological E. Ltd. : 2006 CriLJ1683 Musaraf Hossain Khan v. Bhagheeratha Engg. Ltd. and Ors.; 1999 (110) ELT 313 (para 11) Assistant Collector, Customs v. L.R. Malwani.

13. As far the service of the notice of the notice is concerned, the petitioner points out that no proof of service has been filed along with the complaint. So far as the examination of witnesses to the panchanama are concerned, the submission is that the respondents have not cared to cite any of the persons in the list of witnesses. It is contended that so far as the criminal trial is concerned, the respondent would stand precluded from examining any witness who has not been cited as a witness.

14. The entire challenge by the petitioner rests on the contention that the prosecution of the petitioner under FERA, 1973 is illegal and without jurisdiction for failure to comply with the proviso to Clause (ii) of Sub-section 2 of Section 61. In order to appreciate the submissions made by both sides, it would be appropriate for this Court to consider the relevant extract of the provisions of Section 61 in extenso which reads thus:

61. Cognizance of offences -

(1) Notwithstanding anything contained in Section 29 of the Code of Criminal procedure, 1973, it shall be lawful for any metropolitan magistrate and for any magistrate of the first class to pass a sentence of imprisonment for a term exceeding three years or of fine exceeding five thousand rupees on any person convicted of an offence punishable under Section 56.)

(2) No Court shall take cognizance -

(i) xxx

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

(a) the Director of Enforcement; or

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

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

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

15. Section 61 of the statute thus sets out the statutory requirements which are mandatorily to be satisfied in order to enable a court to take cognizance of the offences under the Act. Cognizance of an offence punishable under Section 56 and 57 of FERA, 1973 can be taken by a court only upon a written complaint made by the Director of Enforcement, the Central Government or the Reserve Bank of India or by a person authorised by anyone of them to make a complaint. As per the proviso to Clause 2 of Sub-section 2 of Section 61, in case of an alleged contravention which prohibits the doing of an act without permission, no complaint shall be made without giving an opportunity to such person to show that he had such permission. Inherent in this statutory requirement would be the opportunity to a person to show that there was no requirement of such permission.

16. In an unreported decision by the Bombay High Court in CrI.A. No. 39/1952 entitled State v. B. Albuquerque, it was held that the opportunity should be given by the Reserve Bank or the Central Government or a person authorised in that behalf and not by an investigating officer.

17. Having regard to the penal consequences of committing the contravention of FERA, 1973 noticed hereinabove which includes incarceration, there can be no manner of doubt that such an opportunity has to be a meaningful opportunity and not merely a notional compliance of the statutory provisions. The respondents do not dispute that the notice dated 17th May, 2002 has been served on the petitioner on 25th May, 2002 which was a Saturday. The three-day period with effect from

the 25th May, 2002 would have lapsed on about 28th May, 2002. Without going into the question as to whether the three-day period given by the respondent, was adequate notice or not, it may firstly be examined as to whether the period given in the notice, was adhered to by the respondent or not.

18. It is well settled that where an action under the statute entails civil consequences, then even if an opportunity of being heard may not be explicitly set out in the applicable legal provisions, the adherence to the principles of natural justice has to be read into such a statute. For this reason, so far as the provisions of FERA was concerned, the legislature has enacted the proviso to Clause (ii) of Sub-section 2 of Section 61 requiring an opportunity to show that the noticee had the requisite permission.

19. There can be no dispute that the action permitted under Section 61 of the FERA, 1973 certainly results in drastic penal consequences. The statute prescribes that it shall be lawful for any Metropolitan Magistrate and for any Magistrate of the First Class to pass a sentence of imprisonment for a term exceeding three years or of fine exceeding five thousand rupees on any person if found guilty of the offence under Clause (ii) of Sub-section 2 of Section 61 of the Act. The present case is not a case where the legislation does not prescribe compliance of the principles of natural justice.

20. This discussion would be incomplete without adverting to the highest pedestal on which this compliance has been placed by the Apex Court in the pronouncement reported at : [1978]2SCR272 Mohinder Singh Gill v. Chief Election Commissioner, wherein the Apex Court had placed natural justice on the highest pedestal which it observed that:

Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendry days of Adam and of Kautilya's Arthasastra - the rule of law has had this stamp of natural justice, which

makes it social justice. We need not go into these depths for the present except to indicate that the roots of natural justice and its foliage are noble and not newfangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experimental test, importing the right to be heard will paralyse the process, law will exclude it. It had been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and-death aspects of the supreme command by the then British Prime Minister to the distress of all our friends and to the delight of all our foes' - too historic to be lost on Jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.

21. So far as the nature and extent of inquiry is concerned, discretion in this behalf has been left to the authority concerned. There is no rigid rule nor absolute proposition with regard to the scope and extent.

The Apex Court analysed the requirement of flexibility in the application of principles of natural justice in : [2003]1SCR1112 State of Maharashtra and Anr. v. Jalgaon Municipal Council and Ors. and observed thus:

32. The caution of associating rules of natural justice with the flavour of flexibilities would not permit the Courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right

to hearing being excluded are: (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate exceptions, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, (v) express legislation. There is also a situation, which Prof. Wade & Forsyth terms as 'dubious doctrine' that right to a fair hearing may stand excluded where the Court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exceptional into play. (Administrative Law, *ibid*, at pp. 543-544).

22. In the pronouncement of the Apex Court reported at : [1981]1SCR746 S.L. Kapoor v. Jagmohan, the court held that the notice must be given in the context of the proposed action and merely furnishing the information casually or for some other purpose would not amount to proper notice. It was held that the requirement of natural justice are met only if opportunity to represent is given in view of the proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose.

23. In this background, the opportunity which the respondents are directed to give under the proviso to Clause (ii) of Sub-section 2 of Section 61 is a matter which is required to be treated with utmost seriousness with which the respondents do not appear to have treated the same in the instant case.

24. There can also be no dispute that the requirement of the statute is mandatory so far as giving the opportunity of the person accused of an offence under Section 56 or 57 is concerned.

25. The well settled principle that where law mandates something to be done in a particular way, then it has to be done in that way or not at all is so well settled that it needs no elaboration. (Ref : 1875 (1) CHD Div. 426 : 1945 LJ CH 373 Tailor v. Tailor Nazir Ahmed v. King Emperor ; : 1954 CriLJ910 Rao Shiv Bahadur Singh and Anr. v. State of U.P. ; : [1962]1SCR662 Deep Chand v. State of Rajasthan; : [1964]4SCR485 State of U.P. v. Singhara Singh and Ors. : [1999]1SCR1121 Babu

Verghese and Ors. v. Bar Council of Kerala and Ors....

26. The proviso to Sub-section 2 of Sub-section 1 mandates that no complaint can be made under FERA of 1973 unless the person accused of the offence has been given an opportunity of showing that he had such permission.

27. Sub para XIX of paras 2 of the complaint dated 17th May, 2002 filed by the respondents shows that the respondents have stated that the accused persons have been given an opportunity to the petitioner as required by the proviso of Section 61(ii) of FERA, 1973. It is stated that the accused persons were given an opportunity to state in writing within three days from the date of the receipt of this notice as to whether they had obtained any general or special permission of the Reserve Bank of India for the alleged transaction. The complaint does not disclose the date of this notice. However, in the list of documents, the same is mentioned as the 'Opportunity notice' at serial No. 2. There is certainly no mention of the reply received by the respondent from the petitioner. It is apparent therefrom that the complaint was drafted before or at the same time of the preparation of the notice dated 17th May, 2002. In any case, the same was before the receipt of the reply from the petitioner. Thus, the complaint appears to have been filed without considering the objections of the petitioner in its reply dated 27th May, 2002.

28. The complaint which has been filed by the respondent under Section 56 read with Sub-sections 3 & 4 of Section 56 of FERA, 1973 and Sub-sections 3 & 4 of Section 49 of FEMA, 1999 has been signed on 27th May, 2002 and filed in the court of ACMM.

29. The respondents have also admittedly received the petitioner's reply on 27th May, 2002. In this background, it is apparent on that the respondent did not wait the three-day period which they had notified the petitioner with regard to filing of its reply.

30. From the factual narration set out hereinabove, it would appear that the service of the notice dated or signed on 17th May, 2002 was merely in the nature of a technical and notional compliance of the legal provisions and that the respondent had no intention of awaiting the reply of the petitioner. It is pointed out that the

26th May, 2002 was a Sunday and hence not even the working day of the respondent. The complaint was filed on Monday, the 27th May, 2002, the first working day thereafter. There is apparently force in the contention of learned Counsel for the petitioner that the period of three days which did not include three working days, would certainly not be adequate for the petitioner to gather such material whereby it could justify actions and place the same before the respondents. 'Opportunity' has to be adequate and meaningful opportunity whereby a person against whom the respondent is able to place such material as to support its plea of innocence on the ground that it had complied with statutory formalities or that no such formality applied. It has to be held, therefore, that there is no compliance of the statutory requirements in the instant case.

31. In the decision of the Madras High Court reported at (1984) 3 ECC 319 A.S.G. Jothimani v. Dy. Director of Enforcement relied upon by the learned Additional Solicitor General, it was held that if a show cause notice is issued before the adjudication proceedings commences, it would undoubtedly constitute a valid notice under the proviso to Section 61(2) of FERA. This finding was based on the observation that the criminal prosecution is not a continuation of the adjudication proceedings and a prosecution cannot amount to a second stage of the proceedings warranting the issue of a second show-cause notice. The court held that Section 61(2)(ii) of the Act does not provide for two procedures and, therefore, the opportunity contemplated by the proviso to the section can also be afforded in the course of adjudication proceedings. Thus, according to this judgment, the accused is required to have been given an opportunity to show that he had obtained the requisite permission at some point prior to the filing of the complaint. It was not necessary that the show cause notice giving the opportunity must have been issued immediately before the filing of the complaint.

32. The record shows that the list of documents filed includes as serial No. 2 an 'Opportunity notice alongwith proof of service' and as serial No. 11 a 'show cause notice No. T-4/40/D/2000 dated 4.4.2002' even adequate if it were to be held that the notice dated 4.4.2002 was compliance of the proviso to Section 62(2)(ii), there is nothing on record to manifest that the petitioner was ever served with such notice.

Furthermore perusal of the complaint in its entirety would show that there is not even an idle reference to the notice to show cause issued during the course of adjudication. The respondents themselves have not treated issuance of the notice dated 4.4.2002 as adequate compliance of the requirement of the proviso to Section 61(2)(ii). The principles laid down in *A.S.G. Jothimani v. Dy. Director of Enforcement* (supra) judicial precedent thus do not come to the rescue of the respondents in the instant case.

Even if the failure to plead in the complaint was not to be read against the respondents, in the instant case as per the complaint, the respondents have themselves not treated the show cause notice as an opportunity notice.

33. So far as the objection of the petitioner that the panchnama of service of the opportunity notice has not been filed on record or that the panchas named thereto are not named as witnesses is concerned, in my view, this objection is fallacious to say the least. The petitioner does not dispute receipt of the notice, albeit only two days before the filing of the complaint. The petitioner has admittedly also sent a reply thereto.

In this view of the matter, in my view, nothing turns on not naming the panchas who were witness to the pasting of the notice in the list of witnesses.

34. This now brings us to the last but most important question in the matter. The complaint was filed before the learned ACMM who took cognizance of the offences under Section 56 of FERA, 1973 and directed issuance of summons to petitioner and other accused persons for the 20th August, 2002.

Serious objection has been raised by the petitioner to the effect that the learned trial court has acted without jurisdiction in taking cognizance of the complaint and that notice has been ordered to issue without application of mind.

35. Mr. S.K. Sharma, learned Counsel for the petitioner has placed reliance on several precedents reported at (1964) 1 SCR 63 *Chandru Deo Singh v. Prokash Chandra Bose* and Anr. : 1976 CriLJ1533 *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors.*; : AIR 1993 SC1616 *Punjab National Bank and*

Ors. v. Surendra Prasad Sinha : 1988 CriLJ853 Madhavrao Jiwajirao Scindia and Ors. v. Sambhajirao Chandrojirao Angre and Ors. in support of his objections.

36. The learned Additional Solicitor General has contended that such an order is not assailable inter alia on the ground that the plea of the petitioner forms its defence and it would have adequate opportunity to prove the same during trial. It is further urged that the challenge to the filing of the complaint and the order taking cognizance and issuing summons is not assailable by way of the present proceedings.

37. Learned Additional Solicitor General has placed a reliance on the pronouncement of the Apex Court reported at : 2006 CriLJ1683 Musaraf Hossain Khan v. Bhagheeratha Engineering Ltd. wherein the Apex Court considered the scope of jurisdiction of the High Court under Article 226 and 227 of the [Constitution of India](#) to highlight that the High Courts should not ordinarily interfere with an order taking cognizance passed by a competent court of law except in a proper case. The same principle has been reiterated in the several cases noted hereinabove. There can be no dispute to this well settled principle. The Apex Court has clearly delineated the boundaries within which such a discretion may be exercised by the courts which are noticed herein.

38. So far as the exercise of jurisdiction of this Court to quash a criminal proceedings is concerned, the circumstances in which this Court can exercise jurisdiction is well settled by a catena of binding pronouncements of the Apex Court. Both sides have placed reliance on the well settled principles laid down by the Apex Court which deserve to be considered. Learned Counsel for the petitioner has placed before this Court the pronouncement reported at 1998 SCC (Cri.) 1400 Pepsi Foods Limited v. Special Judicial Magistrate wherein the court held as follows:

No doubt the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceedings quashed against him when the complainant does not make out any case against him and still he must undergo

the agony of criminal trial.

Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable.

39. The principles which govern exercise of inherent jurisdiction under Section 482 of the Criminal Procedure Code are not very different from the exercise of writ jurisdiction by the High Court under Article 226 of the [Constitution of India](#) in quashing criminal proceedings. No hard and fast rule can be laid down for exercise of such powers which would be guided by the facts and circumstances of the case. In this behalf, this Court laid down the applicable principles in the judgment reported at 2002 III AD (Delhi) 1101 Smt. Sangeeta and Ors. v. The State and Ors. thus:

14. So far so good. But even so, basic position enunciated by the Apex Court remains intact and unaltered. As a matter of fact, it required to be appreciated that exercise of writ jurisdiction by the High Court was not a matter of arithmetical proposition. No hard and fast rule or any cut and dry formula could be laid for exercise of such a power which indeed was exercisable on self-restraint. Therefore, wherever the court felt satisfied and convicted that the uncontroverted allegations in a criminal proceeding even when taken on face value did not make out or constitute alleged offences and that it was surrounded, tainted or attended by elements of complainant's malafides, ulterior motive to wreck vengeance or oblique purpose to use the court process to settle the personal grudge and that its continuation would not service the ends of justice or would result in the abuse of process of court being frivolous and vexatious, it would be within its competence to strike down the proceeding notwithstanding any technicalities of law and procedure involved. The court would not, however, examine the genuineness, correctness or reliability of the allegations made in the complaint, nor hold any pre-trial in the light of probabilities of the case.

15. It would, however, depend upon the facts and circumstances of each case. There may be cases where several factors would exist warranting quashing of proceedings and there could be cases where the allegations in the complaint may prima facie constitute an alleged offence, yet the continuation of proceedings may be found to be vexatious, useless, serving no purpose or serving an oblique purpose and defeating the ends of justice. In such cases, the court would again be within its rights and boundaries to strike at the proceedings to serve the cause of justice and while doing so, it would not be transgressing the frontiers of 'rarest of rare' case category. It all depends on how the court perceives the contours of the proceedings which can't be reduced to a straight jacket formula.

40. The landmark judgment on this issue which authoritatively laid down the guidelines for the exercise of extraordinary powers under Section 226 and 227 of the Constitution or the inherent powers under Section 482 of the Code of Criminal Procedure to prevent abuse of process reported at : 1992 CriLJ527 State of Haryana v. Ch. Bhajanlal thus:

108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

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6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

41. In (2002) 3 SCC 269 Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. the court laid down the following caution:

2. Exercise of jurisdiction under the inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. With the lodgment of First Information Report the ball is set to roll and thenceforth the law takes its own course and the investigation ensues in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practicable nor warranted. In the event, however, the court on perusal of the complaint comes to a conclusion that the allegations levelled in the complaint or charge-sheet on the face of it does not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise upto the expectation of the people and deal with the situation as is required under the law.

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15. Needless to record however and it being a settled principle of law that to exercise powers under Section 482 of the Code, the complaint in its entirety shall have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The truth or falsity of the allegations would not be gone into by court at this earliest stage. Whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial. So the question is : Can it be said that the allegation in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused.

42. In : 1976 CriLJ1533 Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors., the Apex Court laid down the principles with regard to the scope of consideration of a Magistrate under Section 200 - 204 of the Code of Criminal Procedure and the manner of exercise of jurisdiction thereunder. The binding principles were laid down by the Apex Court in para 5 of the judgment which deserve to be considered in extenso and reads thus:

It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Sections 202 of the Cr PC which culminates into an order under Sections 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

- (1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
- (2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
- (3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

43. Again in the judgment reported at 2000 (I) AD (SC) 447 G. Sagar Suri and Anr. v. State of U.P. and Ors. the court emphasised the caution which is required to be exercised by criminal court before issuing process and held that inherent jurisdiction of the High Court under Section 482 of the Criminal Procedure Code has to be exercised to prevent abuse of process of the court or otherwise to secure ends of justice.

The same principles were laid down in : 1977 CriLJ1125 State of Karnataka v. L. Muniswamy and Ors. and : 1988 CriLJ853 Madhavrao Jiwajirao Scindhia and Ors. v. Sambhajirao Chandrojirao Angre and Ors.

44. Learned Counsel for the respondents have relied on the pronouncement Smt. Om Wati and Anr. v. State 2001 A.D. (CrL.) SC 693 wherein the court held thus:

We allow this appeal by setting aside the order of High Court and upholding the order of the trial court. We would again remind the high Courts of their statutory obligation not to interfere at the initial stage of framing of charge merely on hypothesis, imagination and for far fetched reasons which in law amount to interdicting the trial against the petitioner persons. Unscrupulous litigants should be discouraged culmination of the criminal cases by having resort to uncalled for and unjustified litigation under the cloak of technicalities of law.

45. Again in 2000 III AD (Cr.) SC 1 Maratt Rubber Ltd. v. J.K. Marattuklam, the court reiterated the principles that jurisdiction under Section 482 of the Cr PC should be sparingly and cautiously exercised by the high court and only when the court upon consideration, comes to a conclusion that otherwise it would be a case of abuse of process of court, or that there will be a gross miscarriage of justice, the court invoke its inherent jurisdiction. The Apex Court also laid the parameters that the High Court was not entitled to look to the several documents purported to have

been filed by the petitioner in several civil proceedings or to rely on some order/observations made therein. If it did so, it would be in excess of the jurisdiction conferred on the High Court under Section 482 of the Code of Criminal Procedure.

In view of the above discussion, there can be no manner of doubt that this Court is adequately empowered to examine the grievance made by the petitioner that the criminal prosecution initiated against him is an abuse of the process of law and totally without jurisdiction at this stage itself.

46. The principles laid down in : [1973]2SCR66 Nirmaljit Singh Hoon v. State of West Bengal are noteworthy wherein the Supreme Court referred to the scheme of Section 200 - 203 of the Cr PC and set out the manner in which the trial court is to proceed as follows:

The Section does not say that a regular trial of adjudging truth or otherwise of the person complained against should take place at that stage, for, such a person can be called upon to answer the accusation made against him only when a process has been issued and he is on trial. Section 203 consists of two parts. The first part lays down the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint. In Chandra Deo Singh v. Prakash Chandra Bose, where dismissal of a complaint by the Magistrate at the stage of Section 202 inquiry was set aside, this Court laid down that the test was whether there was sufficient ground for conviction, and observed (page 653) that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused. Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case.

47. In the instant case, it would appear that the statutory requirement of issuance of notice under proviso of sub Clause (ii) of Sub-section 2 of Section 61, its date and manner in the instant case as well as the failure to consider the petitioner's

reply or even place it before the court, has resulted in manifest error in the exercise of jurisdiction by learned trial judge. The order taking cognizance in the instant case and directing issuance of summons, is clearly without application of mind and cannot stand in law. In the light of the well settled principles noticed hereinabove, there is no embargo from quashing the proceedings which are pending before the learned trial court.

48. Learned Counsel for the petitioner has placed one more fact in support of its case. It is submitted that so far as the case arising out of FIR No. 136/2004 was concerned, the learned Metropolitan Magistrate has passed an order dated 24th July, 2004 holding that there is no sufficient material on record to make out offence under Sections 420, 406, 120-B of the IPC against the petitioner and has consequently discharged the petitioner for the said offences. The petitioner has been arrayed for trial for commission of offence under Section 4 of the [Indian Telegraph Act, 1885](#). The learned Counsel has cited at length the findings of the trial court in this order which are to the following effect:

In order to attract the provision of Section 406 IPC following ingredients have to be satisfied:- (i) that there was an entrustment of the property with the accused or the accused was having any dominion over the property, (ii) that the persons entrusted (a) dishonestly, misappropriated or converted that property for his own use, (b) dishonestly uses or disposed off that property or willfully suffers any other person so to do in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged (ii) of any legal contract made touching the discharge of such trust (2001) 8 SLT 439

In the facts and circumstances of the case, the accused persons cannot be said to have the dominion over the functioning of ISDN lines for their business purposes. The bandwidth of the ISDN lines cannot be altered by the accused persons and, therefore, the dominion over the ISDN lines, even after leasing of the said ISDN remains with the MTNL. Furthermore, the accused persons cannot be said to have misused the ISDN lines as they were doing the business for which they have been sanctioned the ISDN lines on lease by the MTNL. Furthermore, there is no specific way of calculation of wrongful loss to the Govt. Of India as well as the wrongful

gain to the accused. It is only stated that the ISDN lines were being used by the accused persons day and night and the ISDN lines were found busy at all times. Even the period of causing losses to the Govt. of India is not specific and it has been mentioned vaguely as 2-3 months. Furthermore, there is no material on record which shows that the accused persons have entered into a conspiracy to cause the wrongful loss to the Govt. of India by their unlawful activities. In order to attract the provision of Section 120B of IPC, there must exist some evidence in record to show the meeting of minds of the accused persons resulting in ultimate decision taken by them to commit the offence under Section 406/420 and Section 4 of the [Indian Telegraph Act, 1885](#).

49. In the instant case from a bare perusal of the complaint, it has been found that the complaint has been filed without compliance of the provisions of Section 61 of the FERA, 1973. No further inquiry is necessary or required to be conducted for the purposes. The compliance is mandatory and goes to the root of the matter. There is a statutory prohibition to the filing of a complaint without such statutory compliance. The objection raised by the petitioner to the filing and maintainability of the prosecution against it, is squarely covered under the guideline 6 of Para 8 laid down by the Apex Court in : 1992 CriLJ527 State of Haryana v. Chaudhary Bhajanlal (Supra) and : 1976 CriLJ1533 Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors.

50. The respondents have urged at length that the petitioner must be required to undergo the trial and establish his objections as a defence to the prosecution. The present case is one where examination of a statutory prohibition is required to be undertaken. In the light of clear principles laid down by the Apex Court, such an objection has to be held to be wholly misconceived. There would be no warrant for requiring the petitioner to defend a prolonged trial, if the filing of the complaint itself is statutorily prohibited. Continuation of such proceedings against the petitioner would, therefore, be vexatious, useless, serving no purpose and defeating the ends of justice.

51. In (2001) VII SLT 439 S.W. Palantkar and Ors. v. State of Bihar and Anr. the Apex Court has held thus:

15. In case of a complaint under Section 200 Cr.P.C. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words 'sufficient ground' used under Section 203 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction.

The court placed reliance on the pronouncement in *Nagawwa v. Veeranna Shivalingappa Konjalgi*, (supra) and further laid down that:

18. Cautioning against issuing of process so that it should not be an instrument in the hands of the private complainant as vendetta to harass the person needlessly, this Court in *Punjab National Bank v. Surendra Prasad Sinha* has this to say in para 6: (SCC pp.504-05, para 6)

6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the accused concerned should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At this stage, the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta. 19. Similarly in *Madhavrao Jiwajirao Scindia v. Sambhajirao Chandojirao Angre*, this Court has stated thus: (SCC p. 695, para 7) 7. The legal position is well settled that

when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak, and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

52. Learned Additional Solicitor General has also placed reliance on the pronouncement of the Apex Court reported at 1999 (110) ELT 313 Assistant Collector, Customs v. L.R. Malwani in support of the submission that even if an accused person may be given the benefit of doubt in departmental adjudication by the respondents, prosecution can be validly launched against him for being involved in commission of offences. The prosecution in the instant case is not a challenge by the petitioner on such a ground. The petitioner has however placed reliance on the order of the learned Metropolitan Magistrate to contend that he stands discharged with regard to most of the allegations made by the respondents against him.

53. The petitioner has placed several other grounds of challenge in the written submissions which are being filed. However in the light of the view which I have taken, it is not necessary to go into the same.

In view of the above discussion, this writ petition is allowed. It is directed that the proceedings arising out of Complaint No. 880/1 dated 27th May, 2002 entitled Enforcement Directorate v. Sanjay Malviya and Ors. pending in the court of learned Additional Chief Metropolitan Magistrate, New Delhi as against the petitioner alone shall stand quashed. The order dated 27th May, 2002 of the learned Metropolitan Magistrate taking cognizance of the complaint against the petitioner herein and directing issuance of summons to him shall also stand quashed.

There shall be no order as to costs.

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