(2003) 07 DEL CK 0128

Delhi High Court

Case No: CW 3448 of 1999

L.P. Desai	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision: July 7, 2003

Acts Referred:

- Constitution of India, 1950 - Article 226
- Imports and Exports (Control) Act, 1947 - Section 4I(1), 4K, 4L
- Income Tax Act, 1922 - Section 34, 34(1)

Citation: (2003) 108 DLT 334 : (2003) 71 DRJ 553 : (2004) 92 ECC 109 : (2004) 113 ECR 610 : (2004) 165 ELT 151

Hon'ble Judges: Badar Durrez Ahmed, J

Bench: Single Bench

Advocate: Mahender Anand and Meenakshi Arora, for the Appellant; Navin Chawla, for the Respondent

Final Decision: Allowed

Judgement

Badar Durrez Ahmed, J.

The petitioner, Sh. L.P. Desai, was a director in Shri Ambuja Petrochemicals Ltd. (hereinafter referred to as ''the said company''). The said company had applied for and was granted license by Respondent No. 4 under the Duty Exemption Scheme whereunder it was permitted to import orthoxylene against the obligation to export phallic anhydride.

2. Orthoxylene was imported by the said company and it used the same in the manufacture of phallic anhydride. It is alleged that due to circumstances and reasons beyond its control, the said company could not meet its export obligations in respect of phallic anhydride, as a result of which a show cause notice was issued to the said company on 07.11.1994 which culminated in the Order-in-Original dated 27.07.1995/07.08.1995 passed by the Additional Director General (Foreign Trade),

New Delhi. By virtue of this Order, the Additional Director General (Foreign Trade), inter-alia, imposed a penalty of Rs 1.25 crores on, inter-alia, the petitioner being a director of the said company. Being aggrieved by this Order, an appeal was preferred and the same was dismissed by the impugned Appellate Order dated 13.08.1997 passed by the Appellate Committee (Cell), Ministry of Commerce, Government of India.

3. The short point that arises for consideration in this Petition is this:-

Whether a penalty could at all have been imposed on the petitioner when no show cause notice was issued to him inasmuch as the show cause notice dated 07.11.1994 was addressed only to the company?

It is an admitted position that the said show cause notice was only addressed to the company and no separate show cause notice was either addressed to or served upon the petitioner. The only references to the directors were in paras 4 and 7 of the said show cause notice which, to the extent relevant, are set out hereunder:-

"4. I, Therefore, in exercise of the power vested in me u/s 4-K of the Imports & Exports (Control) Act, 1947 and Clause 8 of the Imports (Control) Order, 1995 require you to show cause u/s 4-L of the above Act and under Clause 10(1) of the said Order, within 30 days from the date of receipt of this notice as to why penalty be not imposed on you and your proprietary/partner directors u/s 4-I(1)(a) of the said Act...."

(underlining added)

"You are also advised to bring the contents of this show cause notice individually to all your partners/directors who should be asked to forward their written submissions separately if they so desire, regarding the alleged contravention of the above action is also proposed to be taken against you."

It is apparent that the show cause notice was directed to the company and not to the individual directors. It is also clear that indirectly and, if I may say so, casually the company was advised to bring the contents of the show cause notice individually to the notice of the directors. No specific acts of omission or commission were attributed to the directors including the petitioner.

4. In this context, it would now be relevant to note the provisions of Section 4-L of the Imports & Exports (Control) Act, 1947 (hereinafter referred to as "the said Act") which reads as under:-

"4L. Giving of opportunity to the owner of goods, etc.--No order of adjudication of confiscation or imposing a penalty shall be made unless the owner of the goods, materials, conveyance or animal, or other person concerned, is given a notice in writing-

(i) informing him of the grounds on which it is proposed to confiscate such goods, materials, conveyance or animal or to impose a penalty.

(ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein, and, if he so desires of being heard in the matter."

5. A reading of the aforesaid section clearly shows that it stipulates that no order of adjudication or confiscation or imposition of a penalty can be made unless a written notice is given to the owner of the goods, materials, conveyance or animal, or other person concerned. Assuming that the petitioner being a director of the company was covered under the expression "other person concerned", it was imperative that a notice in writing in terms of Section 4-L of the said act ought to have been issued to him. Admittedly, no separate notice other than the show cause notice dated 07.11.1994 which was issued to the company has been issued to the petitioner or indeed to any other of the directors. It is also pertinent to note that the company has paid the total customs duty of Rs 3,78,97,499/- as was demanded by the respondents.

6. Mr Mahender Anand, the learned Senior Counsel who appeared on behalf of the petitioner, submitted that the provisions of section 4L of the said Act were mandatory and substantive provisions. The section ensured that the valuable right of a person of being heard before a penalty was levied against him is not given a go-by. He emphasised that no order of adjudication of imposition of a penalty could be made unless and until the person on whom the penalty was sought to be imposed was given a notice in writing. The notice, according to him, was a condition precedent for any adjudication and/or imposition of a penalty. If the notice as contemplated in section 4L of the said Act was not given, there could be no adjudication and, consequently, no imposition of penalty. He further submitted that the notice was not just any ordinary notice. It had to be a notice in writing informing the person concerned of the grounds on which it was proposed to impose a penalty. From this, it is clear that the notice in writing had to be issued to the person concerned directly and specifically informing him of the grounds on which it was proposed to impose a penalty. Mr Anand further contended that in terms of section 4L (ii) the said written notice that is to be given is for the purpose of giving the person concerned a reasonable opportunity of making a representation in writing within such reasonable time (which also has to be specified in the notice itself) against the proposed imposition of penalty. The notice also required the giving of an opportunity to the person concerned, if he so desired, of being heard in the matter. These conditions, according to Mr Anand, are mandatory and if any of them are not complied with, the order of adjudication imposing a penalty would be vitiated. As general propositions, I am in agreement with these submissions based upon a plain reading of the provisions of section 4L of the said Act.

7. Mr Anand referred to the decision of the Supreme Court in the case of Chintapalli Agency Taluk Arrack Sales Cooperative Society Ltd. and Others Vs. Secretary (Food and Agriculture) Government of Andhra Pradesh and Others, . In this decision, the Supreme Court held as under:-

"11. The short question that arises for decision is whether the order of the Government in revision which was passed u/s 77 of the Act is invalid for non-compliance with Section 77(2) which provides that no order prejudicial to any person shall be passed under sub-section (1) unless such person has been given an opportunity of making his representation. It is submitted that the Government did not afford any opportunity to the appellant for making representation before it. The High Court rejected this plea on the ground that from a perusal of the voluntary applications filed by the appellant it was clear that the appellant had anyhow met with the points urged by the respondents in their revision petition before the Government. We are, however, unable to accept the view of the High Court as correct.

12. The question of amendment of the bye-laws is intimately connected in this case with the abridgement of the operation of business directly affecting the existing licenses which had already been granted to the appellant. Even though the appellant may somehow get a copy of the application or the appellant may have, on its own motion, submitted certain representations, the duty of a quasi-judicial authority, as the Government undoubtedly is, in disposing of a matter u/s 77, could not be avoided in affording the appellant an opportunity to make representation. This requirement u/s 77 (2) cannot be considered as an empty formality and sub-section (2) of Section 77 has to be complied with by the Government. This has not been done in this case.

xxxxx xxxxx xxxxx xxxxx xxxxx

21. As mentioned earlier in the judgment the Government did not give any notice communicating to the appellant about entertainment of the application in revision preferred by the respondents. Even though the appellant had filed some representations in respect of the matter, it would not absolve the Government from giving notice to the appellant to make the representation against the claim of the respondents. The minimal requirement u/s 77 (2) is a notice informing the opponent about the application and affording him an opportunity to make his representation against whatever has been alleged in his petition. It is true that a personal hearing is not obligatory but the minimal requirement of the principles of natural justice which are ingrained in Section 77(2) is that the party whose rights are going to be affected and against whom some allegations are made and some prejudicial orders are claimed should have a written notice of the proceedings from the authority disclosing the grounds of complaint or other objection preferably by furnishing a copy of the petition on which action is contemplated in order that a proper and effective representation may be made. This minimal requirement can on no account

be dispensed with by relying upon the principle of absence of prejudice or imputation of certain knowledge to the party against whom action is sought for.

22. It is admitted that no notice whatever had been given by the Government to the appellant. There is, Therefore, clear violation of Section 77 (2) which is a mandatory provision. We do not agree with the High Court that this provision can be bypassed by resort to delving into correspondence between the appellant and the Government. Such non-compliance with a mandatory provision gives rise to unnecessary litigation which must be avoided at all costs."

Mr. Anand also referred to the decision of the Supreme Court in the case of Y. Narayana Chetty & Anr. v. The Income Tax Officer, Nellore & Ors.: (1959) Supp.(1) SCR 189, for the proposition that the issuance of the notice was not a mere procedural requirement and that if no notice was issued or if the notice issued was shown to be invalid, then the adjudication order imposing a penalty on the petitioner itself would be illegal and void. In Narayana Chetty''s case (supra), the Supreme Court was considering the issuance of a notice u/s 34 of the Income Tax Act, 1922 and at page 194 of the said report it observed as under:-

"The argument is that the service of the requisite notice on the assessed is a condition precedent to the validity of any re-assessment made under s. 34; and if a valid notice is not issued as required, proceedings taken by the Income Tax Officer in pursuance of an invalid notice and consequent orders of re-assessment passed by him would be void and inoperative. In her opinion this contention is well-founded. The notice prescribed by section 34 cannot be regarded as a mere procedural requirement, it is only if the said notice is served on the assessed as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid, then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void."

8. Mr Anand next contended that there would be no vicarious liability of directors for the offences by the company merely because they are directors of the company. It is his contention that unless and until specific acts of omission and/or commission are set out against an individual director, he cannot be vicariously held liable for the offences that a company may commit merely because he happens to be a director of the company. This submission is made in view of the fact that the petitioner is a director of the said company and there is no specific allegation against the petitioner even in the show cause notice dated 07.11.1994 which was issued to the company. It is Therefore contended that the petitioner could not be held to be vicariously liable for the alleged offences committed by the said company. In this context, Mr Anand has placed reliance on the decisions of the Supreme Court in the case of State of Haryana Vs. Brij Lal Mittal and Others, , Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, and Abdul Aziz Aminudin Vs. State of Maharashtra, . In Brij Lal Mittal''s case (supra), the Supreme Court held as under:-

"8. Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the three respondents were being prosecuted as directors of the manufacturers with the aid of Section 34(1) of the Act [Drugs and Cosmetics Act, 1940] which reads as under:-

''34. Offences by companies.-(1) Where an offence under this Act has been committed by a company, every person who at the time the offence 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 offence 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 any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.''

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business."

This decision of the Supreme Court followed its earlier decision in the case of MCD v. Ram Kishan Rohtagi (supra), wherein it was observed as under:-

"15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, Therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused 4 to 7) has been made out ex facie on the allegations made in the complaint and the proceedings against them were rightly quashed."

The third case relied upon by the senior counsel appearing on behalf of the petitioner (i.e., Abdul Aziz Aminudin v. State of Maharashtra) (supra), does not appear to be relevant and in support of the aforesaid proposition.

9. Mr Anand next submitted that a show cause notice issued to the company without specifying any grounds of allegations in respect of the individual directors would, from the stand point of the liability of the directors, be too vague to be answered and would, Therefore, be invalid. In support of this proposition, he has placed reliance on the Supreme Court decision in Sawai Singh Vs. State of Rajasthan, . There can be no dispute with the proposition that if the grounds on which an adjudicating authority is seeking to impose a penalty on a person are themselves vague, then such person would be unable to reply to the same and a notice containing such vague grounds would be an illusory notice and would be void. The whole purpose behind the issuance of a notice is to inform the person concerned of the grounds on which it is proposed to impose a penalty. Unless this information is clearly conveyed to the person concerned, he would not be in a position of making a proper representation against the proposed imposition of penalty. This, ipso facto, would amount to a denial of an opportunity of making a representation. Hence, such a notice would be improper and illegal and any adjudication order following such notice would be bad in law.

10. In this context, Mr Anand also contended that the question in the present petition is not so much as regards the mode of service or the procedure of service of the notice as it is regarding the non-compliance with the provisions of section 4L of the said Act. He reiterated that the issuance of a notice to the person concerned as per the requirements specified in section 4L of the said Act was a condition precedent to the passing of any order of adjudication imposing a penalty on such person. Where the condition precedent is not met, or satisfied, any subsequent order based upon an invalid notice would be a nullity. I find myself to be in agreement with these submissions. In the context of the facts of the present case, the show cause notice was issued to the said company. No notice, admittedly, was addressed to the petitioner. It was left to the said company to communicate the contents of the notice to the petitioner. The question is not whether the company did or did not communicate the contents of the notice. The question is whether a notice was at all sent to the petitioner and whether the adjudicating authority discharged its mandatory obligation of sending a notice to the petitioner in terms of section 4L of the said Act. I find that the latter has not been done. The adjudicating authority ought to have specifically sent a notice to the petitioner. This notice ought to have been in writing and ought to have contained the specific grounds on which it was proposed to impose a penalty on him as distinct from a penalty on the said company in respect of his acts of omission and/or commission. It is only then that the duty cast upon the adjudicating authority under provisions of section 4L of the said Act could be said to have been discharged. That has not happened. The possibility that the said company upon the receipt of the said show cause notice may have communicated the contents of the notice to the petitioner is of no consequence. There is no duty cast upon the company to communicate the contents of the said notice to the petitioner. The duty is cast upon the issuing authority. This

duty has not been discharged. As such, the mandatory provisions of section 4L of the said Act have not been complied with and the order of adjudication imposing a penalty on the petitioner would be illegal and is liable to be set aside.

11. Mr Anand also submitted that while the said company had 14 directors, only 5 directors had been picked up randomly leaving out 9 other directors without any reason. When the question that why only 5 and not all the directors were foisted with the penalty was put to the counsel for the respondents, no plausible answer was forthcoming. One of the suggestions mooted was that only the names of 5 directors were known to the authorities. This, if it were true, was clearly indicative of the arbitrary manner in which the 5 directors including the petitioner were roped in leaving out the other 9 directors. In any event, no specific acts have been alleged to have been committed by these 5 directors alone and not the others. On this ground also, it appears that the notice was issued in an arbitrary fashion without proper application of mind.

12. Mr Navin Chawla, the learned advocate who appeared on behalf of the respondents, sought to justify the said notice and the subsequent orders of imposition of penalty on the said company and the petitioner. It was his submission that in the present case notice had been duly given. The said company replied to the show cause notice. A request for personal hearing was also made. A brief note was submitted by the company and it is only thereafter that the order in original dated 27.7.1995/07.08.1995 was passed by the Additional Director General of Foreign Trade whereby, inter alia, a fiscal penalty of Rs 1,25,00,000/- was imposed on the said company and its Chairman, Vice-Chairman and three other directors including the petitioner. Mr Chawla further submitted that being aggrieved by this order in original, the said company filed an appeal before the Appellate Committee, Ministry of Commerce. He submitted that apart from this, the 5 directors jointly filed a separate appeal against the said order in original and that the appeal memo did not anywhere disclose that the petitioner did not have any notice or information or knowledge of the issuance of the said show cause notice to the said company. He submitted that the only defect pointed out was that the notice was not directly addressed in the name of the petitioner but was addressed to the company with a direction to bring the same to the notice of all its directors including the petitioner.

13. According to Mr Chawla, the aforesaid defect in the notice is merely a procedural lapse which has caused no prejudice to the petitioner. That being the case, this Court ought not to interfere in exercise of its powers under Article 226 of the Constitution merely because some facet of the principle of natural justice was not followed particularly when no prejudice is shown to have been caused to the petitioner due to such non-compliance. In support of this proposition, Mr Chawla has placed reliance upon two decisions of the Supreme Court in State Bank of Patiala and others Vs. S.K. Sharma, and Aligarh Muslim University and Others Vs. Mansoor Ali Khan, . In the first decision, the Supreme Court held as under (pages

386-387):-

"In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteran partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/ "no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate-take a case where the person is dismissed from service without hearing him altogether (as in Ridge v. Baldwin 1964 AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935. It would be a case falling under the first category and the order of dismissal would be invalid-or void, if one chooses to use that expression (Calvin v. Carr (1980) AC 574: (1979) 2 All ER 440. But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer''s report Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., or without affording him a due opportunity of cross-examining a witness K.L. Tripathi Vs. State Bank of India and Others, it would be a case falling in the latter category of violation of a facet of the said rule of natural justice-in which case the validity of the order has to be tested on the touchstone of prejudice, ie., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct-in the light of the above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted, in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a proper hearing (i.e., adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice as aforesaid."

Clearly, there is a distinction between violation of a principle of natural justice and a violation of a facet of such a principle. Cases where there was no notice or no opportunity or no hearing whatsoever would fall within the category of cases where there was a violation of a principle of natural justice. On the other hand, cases where the complaint was that inadequate hearing was granted or that there was a violation of a procedural rule would fall in the category of cases which involved a violation of a facet of a principle of natural justice. In the aforesaid case, the Supreme Court expressly held that where there was a violation of a facet of the principle of natural justice, the complaint would have to be examined on the touchstone of prejudice caused to the complainant. It is also clear that where there was an alleged violation of the principle of natural justice itself, the question of prejudice caused to the complainant would not at all arise. This would be further clear from the observation of the Supreme Court in para 33 (3) of the said decision to the following effect:-

"except cases falling under-''no notice'', ''no opportunity'' and ''no hearing'' categories, the complained violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively."

Therefore, it would have to be seen as to whether the present case falls in the category of violation of principles of natural justice or in the category of violation of a facet of the principle of natural justice. In my opinion, since no notice at all was issued to the petitioner, which was a mandatory requirement u/s 4L of the said Act, the present case is one of violation of principles of natural justice and, Therefore, the question of prejudice caused would not at all arise. It is also pertinent to note that as the petitioner had no notice, obviously he had no opportunity nor was he granted any hearing.

14. The second decision [AMU''s case (supra)] relied upon by Mr Chawla has referred to the aforesaid decision in State Bank of Patiala''s case (supra) in the following terms (page 540):-

"The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala and others Vs. S.K. Sharma, . In that case, the principle of ''prejudice'' has been further elaborated."

In view of this, it is not necessary to examine the second case in great detail and the aforesaid discussion as regards the State Bank of Patiala''s case (supra) would be sufficient.

15. Mr Navin Chawla next argued that in the present case if it were to be contended that the said company did not bring the show cause notice to the knowledge of the petitioner, in that event the default would be of the said company and vicariously of its directors including the petitioner and as such, no shelter can be taken behind such a plea. Mr Chawla has placed reliance on the decision of the Supreme Court in the case of U.P. Pollution Board v. Modi Distillery: (1987) 2 Comp. LJ 298. In particular he relied upon the following observation in paragraph 6 of the said decision to the following effect:-

"The learned Single Judge has failed to bear in mind that this situation has been brought about by the industrial unit viz. Messrs Modi Distillery of Messrs Modi Industries Limited, because in spite of more than one notice being issued by the board, the unit of Messrs Modi Distillery deliberately failed to furnish the information called for regarding the particulars and names of the managing director, directors and other persons responsible for the conduct of the company. Having willfully failed to furnish the requisite information to the board, it is now not open to the chairman, vice-chairman, managing director and other members of the board of directors to seek the Court''s assistance to derive advantage from the lapse committed by their own industrial unit."

Frankly, I do not see how this supports the proposition advanced by Mr Chawla. If it is being suggested that the petitioner cannot make a complaint when the company itself did not inform the petitioner of the receipt of the show cause notice, this is certainly not borne out by the aforesaid decision. The facts were entirely different. There, information that was sought was not provided by the company. The Supreme Court held that this lapse on the part of the company could not be taken advantage of by its own chairman, vice-chairman, managing director and other members of the board of directors. This is certainly not the situation here. No notice was admittedly issued to the petitioner. Only in the notice issued to the company was it mentioned that the same be brought to the notice of the directors including the petitioner. Whether the company brought the aforesaid notice to the knowledge of the petitioner or not is not a relevant consideration and, Therefore, the factum of the company not informing the petitioner cannot be construed as a parallel situation to the one before the Supreme Court in the aforesaid decision. In the present case what is of utmost importance is the fact that no notice to the petitioner was issued by the respondents. That being the case, there was a clear violation of the mandatory statutory provision contained in section 4L of the said Act. That apart, there was a violation of the principles of natural justice.

16. On behalf of the respondents, Mr Navin Chawla next submitted that section 4I (1) (a) of the said Act provides for imposition of penalty on "any person". The company being an artificial person has to act through its directors and other principal officers. Therefore, in the case of a company, its directors and other principal officers would also be liable for a penalty that may be imposed on a company. He referred to the decision of the Supreme Court in T.J. Stephen and Others Vs. M/s. Parle Bottling Co. (P) Ltd. and Others, . This decision, however, does not help the respondents. While it is noted in the said decision that the company does not act by itself and has to act through someone it also records that in the case before it in the petition of the complainant there were clear allegations that the managing director had committed the offence acting on behalf of the company. This decision would have no applicability in the facts of the present case inasmuch as, while it is true that the company has to act through someone, no specific allegations have been made in the show cause notice as regards any acts of commission and/or omission on the part of the petitioner. Furthermore, recalling what was held by the Supreme Court in the case of MCD v. Ram Kishan Rohtagi (supra), insofar as the manager/managing director is concerned, from the very nature of his duties it can safely be inferred that he would undoubtedly be vicariously liable for the offences committed by the company. So far as the petitioner is concerned, there being no specific allegation against him in the said show cause notice issued to the company, he cannot be held to be vicariously liable for offences committed by the company. He being neither in-charge of nor responsible to the company for the conduct of its business. In such a situation, the mere fact that the petitioner was a director in the said company would not make him vicariously liable for offences committed by the

company unless it is established that he was party to the commission of such offence.

17. Lastly, Mr Chawla contended that this was a fit case for lifting of the corporate veil and thereby holding the petitioner liable. These considerations vis-a-vis penalty on the company and lifting of corporate veil would only arise if we were to go into the merits of the allegations as regards the liability of penalty. That stage would only arise if the mandatory provisions of section 4L of the said Act were complied with. When the notice itself was not issued to the petitioner, no opportunity was granted to him and consequently, he was not heard, the adjudication order imposing a penalty on the petitioner would be illegal and would be liable to be set aside. Moreover, the question in this petition is not with regard to the imposition of a penalty on the company but with regard to the imposition of a penalty on the petitioner who happens to be a director in the said company. Therefore, the submissions of Mr Chawla on this last aspect are not germane to the issues involved in the present petition.

18. Before parting with this case, it would be relevant to note that though the aforesaid discussion has proceeded on the assumption that no prejudice has been caused to the petitioner, in point of fact prejudice has actually been caused to the petitioner. This is so because the show cause notice was not issued to the petitioner. Even the show cause notice issued to the company did not contain specific allegations against the petitioner to which he could reply. No opportunity as such was given to the petitioner to represent against the proposed imposition of penalty. Obviously, the petitioner was not heard before the order in original was passed whereby the aforesaid penalty was imposed upon him. The mere fact that he filed an appeal and was heard in the appeal would not alter the situation. The proceedings against him were void ab initio. Had the petitioner been issued a notice in terms of section 4L of the said Act, he could have represented against the imposition of such penalty. He could have placed on record various facts and circumstances to show that no offence was committed by the company and that even if such offence was committed by the company, he had no hand in it. All these circumstances, if he were able to establish them, would have absolved him of the liability of penalty which he now bears like a garrotter round his neck. So, even if the question of prejudice were to be taken up, it would be clear that the order in original as well as the Appellate Order imposing a penalty on the petitioner could not be sustained.

19. As a result of the foregoing discussion, the order in original dated 27.07.1995/07.08.1995 and the Appellate Order dated 13.08.1997 passed by the respondent Nos. 2 & 3 respectively (being Annexures ''D'' and ''F'' respectively) are set aside to the extent that they impose a penalty on the petitioner. To this extent, the writ petition is allowed. Parties are left to bear their own costs.