Date : 5th December, 2010

To,

The Regional Passport Officer,
Regional Passport Office,
Manish Commercial Centre,
216-A, Dr. Annie Besant Road,
Worli,
Mumbai 400030.

Re : (1) Hearings held on 18th and 26th November; and

(2) Our letters dated (i) 29th November, 2010 bearing Ref No. DJM/HC/10082/9634/10; and (ii) 1st December, 2010 bearing Ref No. HC/DJM/10082/9748/10

Sir,

1. We refer to our letters dated 29th November, 2010 and 1st December, 2010. We regret to observe that no response (either written or oral) has been received by us.

2. We reiterate the requests contained in our letters dated 29th November, 2010 and 1st December, 2010. We request that, at the very least, you confirm that a next date of hearing will be fixed. This request was made in our letter dated 1st December, 2010. Your

continued refusal to even respond to such a simple request, is a cause for concern.

3. The continued silence to even confirm that a next date of hearing will be fixed, has caused an apprehension in the mind of our client, that perhaps no further date of hearing may be fixed and these proceedings may be treated as closed. We hope that this apprehension is unfounded.

4. In these circumstances, we consider it appropriate to briefly record, the submissions that were advanced before you on 18th November, 2010 and on 26th November, 2010, so that the record correctly reflects what was argued by Counsel instructed by us, during the course of these hearings. This letter is not a substitute for detailed Written Submissions, which our client intends to file, once the hearings are completed.

5. The main submissions made by Counsel during these hearings are summarised below (not necessarily in the order in which they were made).

6. Counsel argued that:-

   a. the proceedings under Section 10(3) of the Passports Act, 1967 ("the Act") are quasi judicial in nature;

   b. there is a duty imposed upon the Adjudicating Authority to follow the principles of natural justice;

c. considering the nature of the power sought to be invoked / exercised under Section 10(3) of the Act, it was incumbent that there be absolute/strict compliance with the principles of natural justice : the burden of complying with the rules / norms of natural justice, in this case was extremely high, regard being had to the consequences of an adverse order;

d. the Supreme Court of India, had described the act of impounding of a passport as a "punishment".

In this behalf (and on various other counts) Counsel invited your attention to the judgment of the Hon'ble Supreme Court of India in the case of Maneka Gandhi vs. Union of India (reported in AIR 1978 SC p. 597). Your were taken through the relevant paragraphs in the said judgments. Your attention was particularly invited to the following paragraphs in the said judgement :

> "56. The question immediately arises : does the procedure prescribed by the Passports Act, 1967 for impounding a passport meet the test of this requirement ? Is it 'right or fair or just' ? The argument of the petitioner was that it is not, because it provides for impounding of a passport without affording reasonable opportunity to the holder of the passport to be heard in defence. ***To impound the passport of a person, said the petitioner, is a serious matter, since it prevents him from exercising his constitutional right to go abroad and such a drastic consequence cannot in fairness be visited without observing the principle of audi alteram partem***. Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21. ……The principle of audi alterantm partem, which mandates that no one shall be condemned unheard, is part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, Nemo Judex in Sua Causa and audi alteram partem. We are not concerned here with the former, since there is no case of bias urged here. The question is only in regard to

the right of hearing which involves the audi alterant partem rule. Can it be imported in the procedure for impounding a passport ?

62. ***Now, here, the power conferred on the Passport Authority is to impound a passport and the consequence of impounding a passport would be to impair the constitutional right of the holder of the passport to go abroad during the time that the passport is impounded.*** Moreover, a passport can be impounded by the Passport Authority only on certain specified grounds set out in Sub-section (3) of Section 10 and the Passport Authority would have to ***apply its mind to the facts and circumstances of a given case and decide whether any of the specified grounds exists which would justify impounding of the passport.*** …….. It is clear on a consideration of these circumstances that the test laid down in the decisions of this Court for distinguishing between a quasi-judicial power and an administrative power is satisfied ***and the power conferred on the Passport Authority to impound a passport is quasi-judicial power. The rules of natural justice would, in the circumstances, be applicable in the exercise of the power of impounding a passport even on the orthodox view*** which prevailed prior to A. K. Kraipak's case. The same result must follow in view of the decision in A. K. Kraipak's case, even if the power to impound a passport were regarded as administrative in character, because it seriously interferes with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences.

63. ..... The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person

affected must ***have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise***. That is why Tucker, L.J., emphasised in Russel v. Duke of Norfolk [1949] 1 All Eng. Reports 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a ***reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated fullfledged hearing or it may be a hearing which is very brief and minimal*** : ……***It would not, therefore, be right to conclude that the audi alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport.***

7. Counsel then submitted that any adjudication conducted by the Regional Passport Officer would be without jurisdiction and the assumption of jurisdiction by the Regional Passport Officer midway through the proceedings, was both illegal and improper. It was urged that where adjudication proceedings are commenced by one Adjudicating Authority, those proceedings must be taken to their logical conclusion by that Adjudicating Authority alone. Such proceedings cannot be taken over and adjudicated, midway, by another Authority, even if the latter were superior in rank to the former or could exercise departmental supervision over the former. This may be permissible as a part of the routine administrative functioning of a Government Department. This was however not permissible in the case of quasi judicial proceedings. Parallels with adjudications under a host of other statutes, eg The Customs Act, The Central Excise Act, were drawn. In none of these cases was, what was being done in the present case, ever done. The quasi judicial nature of the present proceedings was emphasized and the consequences flowing therefrom and the implications

thereof were highlighted. Your attention was therefore invited to the fact that the general principles applicable to the administrative functioning of a government department could not be used as a guide in the present case.

8. Counsel then dealt with the stand taken that the Regional Passport Officer was the head of the Passport Office at Mumbai and that it was the Passport Office which would be adjudicating the matter. Counsel explained that the adjudication was required to be done by an adjudicating authority. A department could never be an adjudicating authority. The contents of the letter dated 19th November, 2010 were reiterated. It was pointed out that very strange and anomolous consequences would result if the stand of the department was accepted. Under the Act read with the Rules, the Passport authority would include not only the Regional Passport Officer but also include the Assistant Passport Officer ; Public Relation Officer; and Superintendant. There would be about 30 persons who would answer this description in the Regional Passport Office at Mumbai. Surely, there could never be an adjudication where any one or more of these persons could participate.

9. Counsel also pointed out that delegation of powers by the Regional Passport Officer to the Assistant Passport Officer (Policy) for departmental administration purposes was very different and no parallels could be drawn to the present case. In quasi judicial matters, a power to adjudicate can neither be delegated to a subordinate nor be

abdicated in favour of a superior. In the present case, in any event, the adjudication proceedings had been commenced by the Assistant Passport Officer (Policy) in his own name and capacity and not as a delegate of the Regional Passport Officer. Counsel invited attention to the various communications addressed by the Assistant Passport Officer (Policy) and our responses to the same. In particular, attention was drawn to the letter dated 15th October, 2010, by which these proceedings were commenced. This clearly established that the Adjudicating Authority was the Assistant Passport Officer (Policy). This letter and the subsequent letters clearly established that the Assistant Passport Officer (Policy) was not acting as a delegate. It was pointed out that the Regional Passport Officer, came on the scene and purported to act as an Adjudicating Authority, for the first time on 18th November, 2010, when he attended the hearing. Prior thereto, it was the Assistant Passport Officer (Policy), who was in charge of the adjudication proceedings. It was also pointed out that at the hearing held on 18th November, 2010, it was expressly urged by Counsel that the introduction of the Regional Passport Officer into the proceedings was an attempt to mitigate the adverse consequences flowing from the fact that we had addressed communications recording the fact that the Assistant Passport Officer (Policy) was acting under the dictates of the Regional Passport Officer, who was de facto conducting the matter and that the record corroborated this. Counsel also drew attention to the fact that it is only in the letter

dated 23rd November, 2010, that, for the first time a reference was made to proceedings being conducted by the Regional Passport Officer. The Regional Passport Officer could, therefore, not take over the proceedings midway. It was also contended that submissions were being made by Counsel before the Regional Passport Officer without prejudice to the aforesaid contentions.

10. Counsel next urged that the Show Cause Notice was vague and did not indicate which head under Section 10(3)(c) of the Act was being invoked or alleged to have been violated or transgressed or infringed by our client. It was pointed out that it was a well settled principle of law that a Show Cause Notice must not be vague but must clearly and precisely spell out the charge made against a person and/or the legal provision whose infraction is alleged or which is sought to be invoked. It was pointed out that in the case of proceedings where the potential consequences of an adverse order were drastic and/or far reaching and affected civil rights and/or personal liberty, the requirement to clearly and specifically indicate what the charge was and which provision of law had been violated and/or infringed and/or was attracted was that much greater.

11. Counsel pointed out that Section 10(3)(c) of the Act contemplated several distinct heads and the Show Cause Notice (or any subsequent communication) did not indicate which of these heads had been allegedly violated by our client or under which head action was proposed against our client. Counsel repeatedly requested you, to clarify, even at this point (ie

during the hearing), which head (under Section 10(3)(c) of the Act) our client was alleged of having violated and/or was proposed to be being invoked against him. It was pointed out that the scope and ambit of the different heads under Section 10(3)(c) of the Act was very different and, therefore, even at this stage, this should be made clear by the Adjudicating Authority. Despite this question being repeatedly posed, no answer was forthcoming. Counsel then invited your attention to each of the individual heads to show how different and distinct they were and how unfair it would be for it not to be clarified, even at this stage, which head our client was alleged to have violated. It was emphasized that a failure to do so, even at this stage, would seriously prejudice our client and violate established norms of natural justice. It was submitted that without specifying the head under which action was being proposed it was not possible to file a Reply to the Notice and that this itself would violate the rule of audi alteram partem.

12. In this behalf, Counsel invited your attention to the judgment of the Hon'ble Supreme Court of India in the case of *Amrit Foods vs. CCE* ((2005) 13 SCC 419). Your attention was particularly invited to the following paragraphs in the said judgment:

> "5. The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173-Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither ***the show-cause notice nor the order of the Commissioner specified which particular clause of Rule 173-Q had been allegedly contravened by the appellant***. We are of the view that the finding of the Tribunal is correct. ***Rule 173-Q contains six clauses, the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature***

of contravention for which the assessee was liable under the provisions of Rule 173-Q. This not having been done, the Tribunal's finding cannot be faulted. The appeal is, accordingly, dismissed with no order as to costs.

13. It was further submitted that even issuing of a Show Cause notice was a Quasi Judicial function and should not have been done without application of mind merely on the basis of a request letter from the Enforcement Directorate. The Adjudicating Authority should have ascertained all the facts and come to a prima facie conclusion that a notice was necessary to be issued prior to issuing the Show Cause Notice. In this context *S. A. International* v. *Collector of Customs*, (1988 (36) ELT 445 (Cal)) was referred to.(copy not given). The following paragraph in the said judgment is relevant:

> "33. It was not possible nor could it said to be possible for the adjudicatory authority to issue show cause notice when the concerned authority was not certain about what would be the result of the examination and ascertainment. The adjudicating authority at the material time on the basis of incomplete investigation could not have arrived even at the conclusion. The show cause notice was founded upon a mere fancy and surmise of the adjudicatory authorities. There was a complete absence of fairness in the present case. ***The customs authority in issuing the show cause notice under Section 124 of the said Act acted in a quasi-judicial capacity.*** The show cause notice not having been transmitted to the petitioner before 15th May, 1985 the petitioner's right of effectively replying to the said show cause notice was seriously prejudiced. No explanation was offered by the customs authority as to why and in what circumstances the show cause notice was sent to the petitioner after the expiry of the period of reply to the show cause notice as aforesaid. No explanation was given as to why the said show cause notice reached the petitioner only on 23rd May, 1985. It is evident that the customs authority failed to act reasonably and with a sense of responsibility in discharge of statutory function. The reply to the show cause notice in my view was asked for by adjudicatory authority for supplementing the show cause notice."

14. Left with no choice, Counsel then, under protest and in the alternative urged that it appeared that the case of the Enforcement Directorate was that our client was not responding to Summons issued by the Enforcement Directorate. Counsel asserted that this did not fall under any of the heads under Section 10(3)(c) of the Act. The alleged non response to a Summons issued under the provisions of the Foreign Exchange Management Act, 1999 ("FEMA") could not be said to fall under the heads of "interest of the sovereignty and integrity of India; or "the security of India" or "friendly relations of India with any foreign country"; or "in the interest of general public". Counsel requested, once again, that it be clarified which of (and how) these heads were said to have been attracted. In the absence thereof, our client and his lawyers would simply not know what case they had to meet. This was compounded by the fact that :-

a. they were not being given access to the material supplied by the Enforcement Directorate to the adjudicating authority ;

b. They were not being given a right to inspect the official file of the adjudicating authority;

c. the Enforcement Directorate or the Police were not being called for (despite it having been accepted during the course of the argments that the Enforcement Directorate had only selectively disclosed material to the adjudicating authority);

d. the records of the Enforcement Directorate and the Mumbai Police were not being called for;

e. the officials of the Enforcement Directorate were not being called for the hearng , despite the proceedings having been commenced at their instance and despite they being a party to the lis being adjudicated upon.

Counsel submitted that the result of this was that the Enforcement Directorate and their communications/requests were both being coccooned from scrutiny and the adjudicating authority could not take everything said by the Enforcement Directorate at face value and as the gospel. It was pointed out that it was settled law that issuance of a Show Cause Notice was itself a quasi judicial decision or act. The manner in which the Show Cause Notice had been issued and the fact that even at this stage, the precise charge against our client was not being specified and the several requests of our client were being ignored clearly vitiated the proceedings.

15. Counsel then submitted that the manner in which the present proceedings had been conducted, clearly indicated a lack of bona-fides. In this behalf, what has been stated above was reiterated. The official media briefing given by the Foreign Secretary, Government of India, during the pendency of these proceedings, was adverted to. Counsel also extensively argued on the point that the refusal to supply us / our client with copies of the communications addressed by the Enforcement

Directorate, and the denial of our requests was illegal, unconstitutional and improper and a complete violation of the principles of natural justice. Counsel also urged that this was abhorent and/or anathema to principles of fair adjudication. Your attention was specifically invited to the fact that the Show Cause Notice merely referred to a Complaint dated 16th September, 2010 and a Show Cause Notice dated 20th September, 2010 (both from the Enforcement Directorate) and no other document. Our client however came to know of the existence of the letters dated 4th October, 2010 and 15th October, 2010, from media reports. These were, however, not mentioned in the Show Cause Notice. This was a text book case of violation of natural justice.

16. The next argument advanced by the Counsel was on the fact that none of the applications / formal requests made to the Adjudicating Authority (Assistant Passport Officer (Policy)) had been responded to. It was pointed out that applications seeking (i) that our client be furnished with the entire records submitted by the Enforcement Directorate to the Adjudicating Authority; (ii) our client be permitted to inspect the official records of the Adjudicating Authority; (iii) that directions be issued to the Enforcement Directorate to produce its file on record; (iv) our client be permitted to cross examine the representative of the Enforcement Directorate; (v) the Enforcement Directorate be required to remain present at the adjudicatory hearings; and (vi) that orders / decisions be passed / made on these requests and copies thereof be made available to our client, had all being singularly

ignored. The manner in which the proceedings were being conducted, exhibited great haste. In this context, the following judgments were cited :

a. Kothari Filaments vs CCE (2009) 2 SCC 192. The relevant paragraphs are :-

> "15. The statutory authorities under the Act exercise quasi-judicial function. By reason of the impugned order, the properties could be confiscated, redemption fine and personal fine could be imposed and in the event an importer was found guilty of violation of the provisions of the Act. In the event, a finding as regards violation of the provisions of the Act is arrived at, several steps resulting in civil or evil consequences may be taken. **The principles of natural justice, therefore, were required to be complied with.**
>
> 16. The Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with mis-declaration is entitled to know the ground on the basis whereof he would be penalized. He may have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply."

b. *Hussain Ahmed vs. Union of India,* (AIR 1999 Jammu & Kashmir 136), which was a Passport Act case and where the court held that material (being the objectionable conduct of the Appellant) must be communicated. The relevant paragraphs are:

> "5. Single Judge found that petitioner deserves to be apprised of the material which formed he basis for passing order under Section 10(3)(e) of the Passport Act, 1967, otherwise effective appeal cannot be made by him and in case, the material is not communicated, at least the file containing the material be shown to him and that would meet the requirement of law laid down by the Supreme Court of India in the case of Maneka Gandhi v. Union of

India,MANU/SC/0133/1978 : AIR 1978 SC 597. Consequently, the single Judge passed the following order:-

> "The appellate order is set aside. The petitioner would accordingly appear before the appellate authority on 30th November, 1998. On that date or any other date to which the hearing is adjourned, the petitioner be apprised of the material which led to the impounding of his passport. This would enable him to effectively pursue his appeal. The net result is that the appellate order shall stand quashed, leaving the appellate authority to pass fresh order in accordance with law.
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> It be seen that the validity of the passport has since expired. The petitioner in any case has to get that passport renewed. The decision in the appeal would also help the petitioner and the authorities in deciding the issue regarding re-newal/issuance of fresh passport."

6. We have examined the impugned order. We find that no better order than this could be passed in the facts and circumstances of this case. The appellate order has been set aside and the petitioner has been extended opportunity to represent his case afresh before the appellate authority."

c. *Nagarjuna Constructions vs. Government of Andhra Pradesh*((2008) 14 SCALE 476)The relevant paragraphs are:

> "18. The basic stand of the appellants in the appeals is that the basic principles of natural justice have not been followed in the present case. The authorities have acted on certain materials which were collected behind the back of the appellants and the reports submitted by certain authorities. The High Court's conclusion that no prejudice was caused by non supply is really a conclusion without any foundation. Finally, in view of the accepted stand of the State Government in the earlier writ petitions it would not be open for the State Government to take diametrically opposite stand to levy the seigniorage fee. It was also submitted that the report of the Department of Civil Engineering of Andhra Pradesh University was obtained by Governmental authorities. The High Court should not have accepted the stand of the State Government as to why the report was not to be considered. It was also pointed out that the portion of the contract as quoted by the High Court was incomplete. Therefore, it was submitted that view of the High Court is clearly unsustainable.

30. The basic principles of natural justice seem to have been disregarded by the State Government while revising the order. It acted on materials which were not supplied to the appellants. Additionally the High Court for the first time made reference to the report/inspection notes which was not even referred to by the State Government while exercising revisional power."

d. *Kellogg India private Limited v. Union of India,* (2005(6) BomCR 492 wherein it was held as follows:

"50. In the case of Brajlal v. Union of India, 1964 Mh.L.J. 500, the Apex Court was pleased to set aside the order of review passed by the Central Government. In that case the application for grant of renewal of a certificate of approval was dismissed by the State Government on the ground that the partners composing the firm had changed. The firm then applied to the Central Government for review of the State Government's order under rule 57(2) of the Mineral Concession Rules. The Central Government asked for a report from the State Government and after taking it into consideration rejected the application for review. The contents of the State Government's report were not made known to the firm, nor was any reasonable opportunity given to the firm for presenting their case. It was contended before the Apex Court that the Central Government was acting as a quasi-judicial authority and the order which was passed taking into consideration the report of the State Government and without their knowing the contents of the report and without affording them a reasonable opportunity of presenting their case was contrary to the principles of natural justice and, therefore, void. The Apex Court upheld this submission and ruled that the Central Government could not act on the basis of the material as regards which the appellants had no opportunity to make their representation.

51. In our view, the above principle would apply even where the petitioner has been denied opportunity to have the contents of the test reports relied upon by the respondents before the adjudicating authority. In our view, the adjudicating authority was, obviously, in error in not directing the respondents to supply copies of the test reports to the petitioners. A document to be relevant may support either the Revenue or the petitioner. No adjudicating authority can, therefore, refuse production of such a document simply because that document which is to be used against the subject is not relevant in its perception. This would certainly amount to refusal of reasonable opportunity to defend. This

> being the settled legal position, we hold that the adjudicating authority was, obviously, in error in refusing to direct the respondents to hand over the copies of the test reports to the petitioners which has, necessarily, prejudiced the defence of the petitioners.

17. Counsel therefore requested that, even at this stage, it was not too late and matters be remedied and rectified. The response to this was this was the "final hearing" of the case and the letter dated 23rd November, 2010 addressed to our client said so. Hence the hearing would have to be closed today come what may. In response thereto, Counsel pointed out that it would be impossible to complete arguments on that day and that a further date of hearing would be necessary. A ot of ground remained to be covered and that rather than laying down any hard and fast rules, the adjudicating authority should atleast hear the matter with an open mind and decide on whether a further hearing was necessary at the end of whatever time could be alllotted on that day. Counsel also pointed out that there was a well settled distinction between "final hearing" and "final date of hearing". It was pointed out that our request that a further date of hearing be given could not be rejected on the ground that the letter dated 23rd November, 2010, used the expression "final hearing". This expression meant and was understood to mean and could only be understood to mean that the hearing held on 29th November, 2010 would be a final hearing and not an interim hearing and could never be understood to mean that this would be the last date of hearing. It was also argued that it was for the Adjudicating Authority to decide whether a further hearing was required or

necessary. This decision ought to be taken depending on how the present hearing progressed and there could be no hard and fast inflexible rules. Consequently, you were not bound by what was stated in the letter dated 23rd November, 2010, even assuming whilst denying that the said letter stated that this would be the last date of hearing. As an Adjudicating Authority, you always had the power to fix a further date of hearing. This power was required to be exercised in the present case considering that (a) there were no emergent circumstances involved; (b) Senior Counsel was in the midst of arguments; (c) the nature of the power and jurisdiction exercised and the seriousness of an adverse order; (d) the fact that these proceedings had been commenced more than a month earlier; and (e)the peculiar, unique and gross facts and circumstances of this case which were being placed before you to show the utter lack of justification to even issue the Notice under the Act.

18. Another submission advanced by the Counsel was that the claim of confidentiality raised in the letter dated 1st November, 2010 was totally misconceived and contrary to law, for several reasons :-

a. Firstly it was submitted that no confidentiality could be claimed in the present case. The communication addressed by the Enforcement Directorate to the Adjudicating Authority was in the nature of requests on the basis of which proceedings had been commenced. It was the fundamental tenet of natural justice that our client be permitted to see these requests, since

this was the basis on which, the present proceedings had been commenced;

b. Secondly, it was submitted that you were, in receipt of the said communication(s) not as a Government servant, but as an Adjudicating Authority. If something could be disclosed to you as an Adjudicating Authority, it was incumbent, both on considerations of natural justice and a fair hearing that this material, be disclosed by the Adjudicating Authority to the person whose rights were being adjudicated upon. To not do so, would transgress fundamental considerations of fairness and justice and violate all norms and canons of justice and fairplay. It would mean that one party to an adversarial lis, could behind the back of the other, privately interact with the Adjudicating Authority and that the Adjudicating Authority, upon being called upon to disclose this interaction, could refuse to do so. Such a scenario would be abhorrent to the rule of law and not only would justice not appear to have been done, but justice would not be done. This is because there was every possibility that the adjudicating authority would be influenced, consciously or subconsciously by what the Enforcement Directorate told you, which our client, for want of knowledge, could not dispel;

c. Thirdly, the communication dated 1st November, 2010 did not indicate under which provision of law such confidentiality was being claimed. During the course of arguments, Counsel repeatedly enquired, that at least at this stage,

the legal basis for claiming confidentiality be made known. Merely stating that this was correspondence between two Government Departments, did not clothe such communication with confidentiality. Communications between Government Departments, were not per se confidential;

d. Forthly it was not even the case of the Adjudicating Authority that the Enforcement Directorate had specifically requested that these communications not be disclosed. It was repeatedly enquired whether the Enforcement Directorate had requested that these communications not be disclosed. It was requested that if any such request had been made then atleast this part of the communication be shown. There could be nothing confidential about a request to keep things confidential. Even to this there was no response;

e. Fifthly if the Enforcement Directorate had not requested that these communications be kept confidential, then the Adjudicating Authority could never suo-moto or suo-sponte, claim confidentiality;

f. Sixthly, if (on the other hand) the Enforcement Directorate had in fact asked that these be kept as confidential (which is not the stand of the Adjudicating Authority), then the Adjudicating Authority was required to hear our client on this request and then decide on whether confidentiality should be invoked. The

adjudicating authority could never unilaterally decide to cull out parts from these communications, after unilaterally deciding what could be disclosed nd what could not.

g. Seventhly,the manner in which the Adjudicating Authority was functioning, in this behalf, was extremely unsatisfactory;

h. Lastly, and in any event, in quasi judicial proceedings, such confidentiality could not be claimed, particularly when important civil rights and the personal liberty of an individual was involved.

19. Your attention was invited to the judgment of the Supreme Court in *Superintnedent and Remembrancer of Legal Affairs, West Bengal vs. Satyen Bhowmick,* (AIR 1981 SC 917) wherein the Supreme Court read down the S. 14 of the Official Secrets Act and held that getting copies of statement of witnesses and documents, even though such documents could have been prejudicial to the interest of the State, was an important right protected by Art. 14 and 21 and the same could not be done away with. The relevant paragraphs are:

> "20. The question, however, is: does the first part of Section 14 empower the court to take away the valuable right of an accused of getting copies of the statements recorded by the Magistrate before the Court? Even before the amending Act of 1955, under the criminal rules framed by various High Courts, an accused was undoubtedly entitled to have copies of the statements of witnesses recorded by the police. This is a very valuable right because without having the statements recorded by the police in his possession, it would be difficult, if not impossible, for an accused to defend himself

> effectively. It is well settled that fouler the crime the higher should be the proof. If an accused is not supplied either the statements recorded by the police or the statements of witnesses recorded at the inquiry or the trial, how can he possibly defend himself and instruct his lawyer to cross-examine the witnesses successfully and effectively so as to disprove the prosecution case. We, therefore, think that Section 14 could never have intended to take away or deprive an accused of this valuable right which has been conferred on him by the criminal law of the land. The legislature when it passed the Act in 1923 was aware of the provisions of the CrPC which had conferred the valuable right on an accused in order to defend himself. Indeed, if any of these rights were to be taken away, we should have expected a clearer and more specific language used in Section 14 to connote such an intention. Our reading of Section 14 is merely this : that the first part of the section does not prohibit or exclude giving to an accused copies of the statements of witnesses either during police investigation or in court but is mentioned merely as a motive or reason for holding the proceeding in camera. The entire sentence starting from 'application is made by the prosecution on the ground that the publication of any evidence to be given or of any Statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion ,of the public shall be excluded during any part of the hearing has to be read conjunctively as one composite sentence and there is no warrant for truncating it into two separate parts dealing with different subject-matters. The words 'publication of any evidence' on which great stress has been laid by Mr. Mukherjee and the High Court do not indicate that the accused should not be allowed access to the evidence recorded by the Court, (they) are merely made to highlight the ground for holding the proceedings in camera because if public are allowed to be present during the hearing the evidence which is recorded in their presence it will amount to publication and it is in that sense alone that the word 'publication' has been used in Section 14.
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> 21. Indeed, if the interpretation put by the High Court or by Mr. Mukherjee is accepted then the provisions of Section 14 will have to be struck down as being violative of Articles 14 and 21 of the Constitution of India."

20. Another argument raised by the Counsel was that considering the stand that the Adjudicating Authority had taken on the various requests made by our client, it was essential, for a fair enquiry that our client be permitted to cross examine the

officers of the Enforcement Directorate. Only by this process could the correctness of the allegations by the Enforcement Directorate be ascertained. Otherwise the Enforcement Directorate could be free to make whatever allegations it wanted to; deliberately not adjudicate thereon itself; and request the Adjudicating Authority, under the Act, to exercise drastic powers under the Act. In this behalf, the following judgements were relied upon :-

a. *Kellogg India private Limited v. Union of India,* (2005(6) BomCR 492 wherein it was held as follows:

> 43. The rules of natural justice are the minimum standards of fair decision-making imposed on persons or bodies acting in a judicial or quasi-judicial capacity. Where the relevant person or body is required to determine questions of law or fact in circumstances where its decisions will have a direct impact on the rights or legitimate expectations of the individuals concerned, an implied obligation to observe the principles of natural justice arises. One of the shades of the rules of natural justice is a right to fair hearing. The right to fair hearing required that an individual shall not be penalised by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him and a fair opportunity to answer the same and to present his own view point.
>
> 44. Right to fair hearing involve prior notice of hearing; opportunity to be heard together with right to legal representation. Generally, when an oral hearing is conducted, the parties must be allowed to call witnesses, make submissions and cross-examine the witnesses called by others. Where an oral hearing is necessary, it has been laid down in number of reported judgments that the Tribunal must: (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; and (d) allow to comment on the evidence and argument on the whole case. The last two rights include right of cross-examination.

45. The opportunity to cross-examine involves not only notice of the adverse material but also a sufficient interval of time to prepare for cross-examination. The notice of the adverse material and opportunity of cross-examination is necessary because wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that testimony could not or need not be disputed at all or be shaken by cross-examination. In this view of the matter, right to cross-examine or to have opportunity to effectively exercise that right is an essential part of principles of natural justice.[see MANU/AP/0843/2001 : 2002(141)ELT24(AP)].

46. Thus affected person must be given fair opportunity not only to answer the case against him but to adduce positive evidence in support of his own case together with right to contradict all adverse allegations, if necessary, by permitting him to cross-examine the witnesses of the opponent.

47. It is needless to mention that although the principles of natural justice are aimed at ensuring a fair hearing, nevertheless, depending on all the circumstances of the case, a decision reached or hearing conducted in breach of the principles of natural justice is reviewable in an action of judicial review.

48. It is a settled law that an order passed by the administrative, quasi-judicial or judicial authority in violation of principles of natural justice is void and not curable. Lord Reid in Ridge v. Baldwin, (1964) AC 40; (1963) 2 ALL ER 66 observed that decision given without regard to the principles of natural justice is void. Attorney General v. Ryan, (1980) 2 WLR 143, the Privy Council held that the decision of a Minister which affected right of the respondent and which was made in violation of the principles of natural justice is a nullity.

49. The Apex Court in the case of State of Orissa v. Binapani Devi, MANU/SC/0332/1967 : (1967)IILLJ266SC observed that if there is power to decide to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If an order is passed to the prejudice of a person ignoring the essentials of justice, the order is a nullity. In A.K. Kraipak v. Union of India, MANU/SC/0427/1969 : [1970]1SCR457 and several other cases the Apex Court has laid down that any order passed in violation of the principles of natural justice is ultra vires and void.

b. *GTC Industries v. Union of India*, ((1991) 56 ELT page 29(Bom)) wherein it was held as follows:

> "2. …… By a letter dated 6th March 1991 addressed by the petitioners 'advocates to the 3rd respondent, cross-examination was demanded of 30 witnesses to test the veracity of statements made by them. The reasons for requiring the cross-examination were set out in detail, it was stated, in the reply to the show cause notice. It is the petitioners' case that at the hearing which took place on 6th March 1991 the 3rd respondent only heard submissions on the matter of summoning these witnesses for cross-examination and that no arguments on any other point, much less on the merits of the case, were heard on that day. The impugned order was passed on 5th April 1991 without any further hearing. In the order the 3rd respondent noted that the petitioners had requested the cross-examination of the 30 witnesses, the examination of their own witnesses, the production of documentary evidence in defence of their case and a personal hearing. The order stated that the case was not, primarily, based on the oral evidence of the witnesses whose cross-examination had been sought. A considerable number of documents recovered by the Income-tax and Excise authorities were before the 3rd respondent. Those documents spoke for themselves and could not be silenced by a general denial in the petitioners' reply, other letters and the personal hearing. The 3rd respondent commented upon the petitioners' "act of not exhaustively utilising the instrument of written reply to put forth their defence with sufficient force, and then asking for the leading of further evidence by way of cross examination of the Department's witnesses and examination of their own witnesses only tantamount to protracting the present proceedings with ulterior motives." Thus, the 3rd respondent found "that the cross examination of the witnesses now asked for are not required to be arranged for fulfilling any requirements of the concept of 'fair play'. Naturally, I also do not find any reason for giving opportunity to produce any of the party's own witnesses to lead any fresh evidence."
>
> 3. The order appears a travesty of the principles of natural justice. It may be that for good ground the 3rd respondent might have found reason to deny the petitioners the cross-examination of all or some of the 30 witnesses. But it did not and could not follow that the petitioners were to be denied the right to lead oral and documentary evidence in support of their case and a personal hearing in that behalf. There can be no question but that the impugned order must be set aside for breach of the principles of natural justice.
>
> 4. We are invited to set out some sort of a time schedule within which the authorities shall now proceed to hear and pass order upon the show

> cause notice issued to the petitioners. The 3rd respondent shall first have to pass an order stating whether or not he allows the petitioners to cross-examine the thirty witnesses mentioned by them. If he disallows the cross-examination of any of these witnesses, he shall have to set out the reasons for so doing. That order must be passed and communicated to the petitioners within three weeks from today.
>
> 5. The 3rd respondent shall permit the petitioners to cross-examine such witnesses as he allows them to do and to lead their own evidence, oral and documentary. It shall be open to him to conduct the proceedings from day-to-day and we have the undertaking of the petitioners, given to us by counsel, that they shall fully co-operate in this regard. After the examination and cross-examination of witnesses on either side is over, the 3rd respondent shall give to the parties a break of at least a week. He shall then hear arguments on either side. After the arguments have been heard, the 3rd respondent shall pass a fresh, reasoned order and, in doing so, shall not have regard to the order which we have set aside. It is expected that all this, including the communication of the fresh order to the petitioners, shall be completed within a period of eight months from today."

21. Counsel then submitted that in any case our client's passport could not be revoked. The argument advanced in this behalf was that a reference to the revocation of our client's passport, was made for the first time in the communication dated 15th November, 2010. This was completely misconceived and without jurisdiction. It was pointed out that the present proceedings, had been admittedly instituted on the basis of a request / communication made by the Enforcement Directorate. Although the correspondence exchanged between the Enforcement Directorate and the Adjudicating Authority had not been made available, the sanitised / censored content thereof as extracted in the letter dated 1st November, 2010, clearly showed that the Enforcement Directorate had merely sought the impounding of our client's passport. The entire proceedings had,

therefore, been instituted on a request to impound our client's passport. The proceedings and the jurisdiction exercised could, therefore, not extend beyond the request to impound. There was, therefore, no question, in these proceedings, of our client's passport being revoked. The reference to "revocation" in the letter dated 15th November, 2010 was clearly in excess of jurisdiction and travelling beyond the scope of the proceedings and the Show Cause Notice.Furthermore, your Notice dated 15th October, 2010 did not make any reference to revocation of our client's passport. Your only request was to "produce" the Passport. This could only be to impound the same.

22. Counsel then urged that the request of the Enforcement Directorate to impound our client's passport, ought to be summarily rejected because such a request was not possible. This was in addition to the submission that no case for impounding had been made out. It was submitted, that the expression "impound" had a settled and clearly understood connotation in law, viz., "to retain". It was pointed out that a request to impound, necessarily presupposed an ability to impound. This, in turn, presupposed that the passport sought to be impounded was available for impounding. Our client, to the knowledge of all, including the Enforceent Directorate and the Adjudicating Authority, was out of India since long before the Enforcement Directorate Summons and the notice of the Assistant Passport Officer (Policy), in May 2010 and had expressed his inability to return to India on account of serious security concerns. Consequently,

in these circumstances, there was no question of our client's passport being impounded. The cases of impounding passports, were those where a person was in India and was considered a flight risk or there were apprehensions that he/she would leave the country and his/her passport was therefore taken charge of in compliance of the requirements of Section 10(3) of the Act.. In the present case, this scenario simply did not exist.

23. In this behalf, your attention was invited to the judgement of the Supreme Court of India in the case of Suresh Nanda vs CBI (AIR 2008 SC 1414(. The relevant paragraphs are as follows :

> "7. Sub-section (3) (e) of Section 10 of the Act provides for impounding of a passport if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India. Thus, the Passport Authority has the power to impound the passport under the Act. …. "Impound" means to keep in custody of the law. There trust be some distinct action which will show that documents or things have been impounded. According to the Oxford Dictionary "impound" means to take legal or formal possession. In the present case, the passport of the appellant is in possession of CBI right from the date it has been seized by the CBI. When we read Section 104 of Cr.P.C. and Section 10 of the Act together, under Cr.P.C., the Court is empowered to impound any document or thing produced before it whereas the Act speaks specifically of impounding of the passport.
>
> 8. Thus, the Act is a special Act relating to a matter of passport, whereas Section 104 of the Cr.P.C. authorizes the Court to impound document or thing produced before it. Where there is a special Act dealing with specific subject, resort should be had to that Act instead of general Act providing for the matter connected with the specific Act. As the Passports Act is a special act, the rule that "general provision should yield to the specific provision" is to be applied. See: Dam Vaiaji Shah and Anr. v. Life Corporation of India and Ors. AIR 1966 SC 1351; Gobind Sugar Mills Ltd. v. State of Bihar and Ors. MANU/SC/0486/1999 :

AIR1999SC3097 ; and Belsund Sugar Co. Ltd. v. State of Bihar and Ors. MANU/SC/0457/1999 : AIR1999SC3125 .

9. The Act being a specific Act whereas Section 104 of Cr.P.C. is a general provision for impounding any document or thing, it shall prevail over that Section in the Cr.P.C. as regards the passport. Thus, by necessary implication, the power of Court to impound any document or thing produced before it would exclude passport.

10. In the present case, no steps have been taken under Section 10 of the Act which provides for variation, impounding and revocation of the passports and travel documents. Section 10A of the Act which provides for an order to suspend with immediate effect any passport or travel document; such other appropriate order which may have the effect of rendering any passport or travel document invalid, for a period not exceeding four weeks, if the Central Government or any designated officer on its satisfaction holds that it is necessary in public interest to do without prejudice to the generality of the provisions contained in Section 10 by approaching the Central Government or any designated officer. Therefore, it appears that the passport of the appellant cannot be impounded except by the Passport Authority in accordance with law. The retention of the passport by the respondent (CBI) has not been done in conformity with the provisions of law as there is no order of the passport authorities under Section 10(3)(e) or by the Central Government or any designated officer under Section 10A of the Act to impound the passport by the respondent exercising the powers vested under the act.

11. Learned Additional Solicitor General has submitted that the police has power to seize a passport in view of Section 102(1) of the Cr.P.C. which states:
Power of police officer to seize certain property; (1) Any police officer may seize any property which may be alleged or suspected to have seen stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

In our opinion, while the police may have the power to seize a passport under Section 102(1) Cr.P.C, it does not have the power to impound the same. Impounding of a passport can only be done by the passport authority under Section 10(3) of the Passports Act, 1967.

12. It may be mentioned that there is a difference between seizing of a document and impounding a document. a seizure is made at a particular moment when a person or authority takes into his possession some property which was earlier not in his possession. Thus, seizure is done at

> a particular moment of time. However, if after seizing of a property or document the said property or document is retained for some period of time, then such retention amounts to impounding of the property/or document. In the Law Lexicon by P. Ramanatha Aiyar (2nd Edition), the word "impound" has been defined to mean "to take possession of a document or thing for being held in custody in accordance with law". Thus, the word 'impounding" really means retention of possession of a good or a document which has been seized."

24. Counsel then dealt with the completely misconceived and mischievous nature of the requests made by the Enforcement Directorate. This was argued at some length and your attention was invited to the fact that (i) the Enforcement Directorate had not issued any Show Cause Notice alleging any substantial violation of FEMA; (ii) the Summons issued by the Enforcement Directorate merely recorded, in general terms that an investigation into alleged FEMA violations was being carried out by the Enforcement Directorate and that our client was required to attend their office with certain identified documents; (iii) our client had duly supplied those documents; (iv) our client had explained with full details and particulars the serious threat to his life and the elevated security concerns, which prevented him from returning to India at this moment; (v) our client had produced correspondence with the Police department and extensive material which established the threat, perception and risk, beyond doubt; (vi) our client had even suggested that this fact could be independently ascertained from the Mumbai Police Authority and/or intelligence agencies; (vii) our client had justifiably contended that there was a valid explanation for his non attendance; (viii) our client was fully cooperating

with the Enforcement Directorate and had repeatedly offered to answer all written questions; orally respond via video conference and even appear before the Enforcement Directorate authorities in London; (ix) to show his sincerety, our client had offered to make arrangements for their travel; (x) the Enforcement Directorate had issued a Show Cause Notice calling upon our client to explain whether this failure to attend was wilful or not, to which our client had filed a Reply and which issue still remained to be decided. The upshot of all of these therefore was that the Enforcement Directorate itself had not concluded that our client's non attendance was wilful or that the explanation given by our client was not valid or credible. If that be so, surely the Enforcement Directorate (which itself was still to decide on the issue) could never activate an Adjudicating Authority under the Act to take proceedings under Section 10(3)(c) of the Act. The least that was required, in the circumstances and the minimum requirement of fairness and justice, was that the Adjudicating Authority defer these proceedings, until the conclusion of the adjudication by the Enforcement Directorate. This request had been made, but been simply ignored. This request was reiterated.

25. In this behalf, Counsel also argued that historically the Enforcement Directorate had claimed a power to impound a passport. After the judgment of the Supreme Court of India in Suresh Nanda's case, however, this power / right was taken away and was held to be not available to the said authorities. It was held that this power could only vest in the

authorities under the Passport Act. FEMA is a statute which only involves civil consequences. Only a penalty can be imposed for substantive violation of FEMA. In the present case, no Show Cause Notice had been issued in the present case alleging any substantive violation of FEMA. The Show Cause Notice issued by the Enforcement Directorate was only to explain non attendance pursuant to a Summons. The Enforcement Directorate did not have the power of custodial interrogation. What the Enforcement Directorate, was seeking to do was, therefore, to do indirectly what it could not directly do. The Enforcement Directorate therefore wanted the Adjudicating Authority to do what it could not do itself. In this behalf, reliance was placed on the judgment of the Bombay High Court in the case of Avinash Bhosle vs DRI (2008) Vol 110 (9) Bom L.R. 3405. The relevant papragraph is as follows :-

> "11. In Suresh Nanda's case, while interpreting Section 104 of Cr.P.C., which expressly deals with power to impound documents by the Court, the Apex Court has held that phrase impound any document or thing does not include a passport. After considering the relevant provisions in relation to search and seizure, the Apex Court has recorded a clear finding that the term document would not include a passport. What is to be borne in mind is that the Apex Court was dealing with power of a Court to impound a document and, in that context, held that Document does not include a passport. Section 131 of the Income Tax Act vests power in regard to search and seizure in the authorities under the Income Tax Act. The authority has been vested with power to seize documents. While interpreting Section 104 of Cr.P.C., which categorically deals with power of the Court to impound documents, it is held that document does not include a passport. If by an interpretative process the Apex Court has held that even a Court cannot impound a passport, then, it would be highly inappropriate to interpret the term documents used in Section 131(3) of Income Tax Act, so as to enable the executive authorities to impound the passport. It is also to be borne in mind that power to seize cannot be equated with power to impound. Impounding tantamount the retention over a period of time after seizure is made. Thus, it is, not possible to hold that power of seizure under Section 131(3) of the Income Tax Act could be extended to validate impounding of passport.

> 12. In view of the clear pronouncement by the Supreme Court holding the Passports Act to be a complete code in dealing with impounding of the passport, we have no iota of doubt that the respondent's act of impounding of the Petitioner's passport is without authority of law. In the result, we cannot accept the submission made on behalf of the learned Solicitor General that impounding of the passport could be made by having recourse to general provision under the Income Tax Act, regulating the seizure of documents. The writ petition, therefore, must succeed. In view of the clear pronouncement by the Supreme Court in case of Suresh Nanda, we do not propose to deal with the High Court judgments, relied upon by the learned Solicitor General."

26. The next argument raised by the Counsel was that the request for impounding our client's passport, was totally unnecessary and in event merely an act of harassment. It did not serve any purpose. Our client was not in India. His passport could not be physically impounded. Our client was in London. Any order of impounding of his passport could never secure his presence before the Enforcement Directorate. Consequently, the request of the Enforcement Directorate that our client's passport be impounded, clearly was not out of any genuine concern or desire to ensure his presence, but was merely to harass him and as a part of a persecution attempt against our client and render him passportless in a foreign country.

27. On the scope of powers, Counsel relied on the judgment of the Supreme Court of India in the case of CBI vs Dawood Ibrahim Kaskar (AIR 1997 SC 2494). In this case, the Supreme Court of India held that a court does not have the power to issue a warrant in aid of an investigating agency. It was argued that if a court could not issue a warrant in aid of an investigating agency, then it was much less that the

Adjudicating Authority under the Act could do so. The relevant paragraph is as follows:-

> "25. Now that we have found that Section 73 of the Code is of general application and that in course of the investigation a Court can issue a warrant in exercise of power thereunder to apprehend, inter alia, a person who is accused of a non-bailable offence and is evading arrest, we need answer the related question as to whether such issuance of warrant can be for his production before the police in aid of investigation. It cannot be gainsaid that a Magistrate plays, not infrequently, a role during investigation, in that, on the prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc. However, in performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence who is produced before him pursuant to a warrant of arrest issued under Section 73. On such production, the Court may either release him on bail under Section 439 or authorise his detention in custody (either police or judicial) under Section 167 of the Code. Whether the Magistrate, on being moved by the Investigating Agency, will entertain its prayer for police custody will be at his sole discretion which has to be judicially exercised in accordance with Section 167(3) of the Code. Since warrant is and can be issued for appearance before the Court only and not before the police and since authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him, Mr. Desai was not absolutely right in his submission that warrant of arrest under Section 73 of the Code could be issued by the Courts solely for the production of the accused before the police in aid of investigation."

The request of the Enforcement Directorate, as summarised in your letter dated 1st November, 2010,for impounding our client's Passport, is to asecure his presence for their investigation. Not only was our client willing to and did join their investigation, but there were various means to do so, whilst he was in London.

28. Counsel then argued on the exercise of powers under Section 10(3)(c) of the Act. The interplay between the provisions of the Passport Act and the provisions of FEMA was explained and it was argued that the drastic power under Section 10(3)(c) of the Act was not the power which could or ought to be exercised at the instance of the Enforcement Directorate. The mischief of the Enforcement Directorate was highlighted. The Summons was to produce documents which were in the custody of the BCCI. The 3rd, 4th and 5th Summons were identical to the 2nd Summons of 24th August, 2010, which had been replied on 7th September, 2010 and documents were furnished. Yet, without applying its mind to the fact that the Summons had been complied with (except physical attendance), further Summons were issued and a Complaint of non compliance was prepared under Section 16 of FEMA to falsely justify the Show Cause Notice dated 20th September, 2010.It was apparent that the Summons were issued only to lay the foundation of the present action. The Enforcement Directorate was itself not even deciding the Show Cause Notice issued by it, to which our client had responded. In other words, let alone alleging any substantive violation of FEMA, the Enforcement Directorate was deliberately going slow on even deciding whether our client's failure to respond to a Summons issued by it was wilful. The Enforcement Directorate, had consciously chosen to go slow on the Show Cause Notice issued by it and therefore could not use the drastic powers under Section 10(3)(c) of the Passport Act for arm twisting our client into attending before it. It was once again

therefore reiterated that the basic minimum requirement, in the present case, was that the Adjudicating Authority, await a decision of the Enforcement Directorate, before taking any further steps in the matter. It was explained, at some length, the absurdity that would follow if the Adjudicating Authority proceeded in the matter. It was very well possible (for the purposes of argument) that if the Adjudicating Authority under the Act continued with the proceedings, unfortunate and absurd consequences might result. At the very least and as a minimum threshold jurisdictional condition precedent, the Adjudicating Authority should insist upon a decision by the Enforcement Directorate, for exercising jurisdiction under the Act. The Passport Authority could not assume jurisdiction, let alone exercis jurisdiction, on a mere request by the Enforcement Directorate, which the Enforcement Directorate itself had chosen not to adjudicate upon.

29. Counsel then extensively argued that the record clearly established that the non attendance of our client pursuant to the Summons being issued by the Enforcement Directorate was not wilful and on account of genuine concerns about the safety of his life and that of his family and elevated threat perception. You were extensively taken by Counsel through the material on record which established this fact. It is beyond the scope of this letter to specifically advert to this material. However, you were shown:-

a. the communications between our client and the Mumbai Police;

b. media reports which specifically adverted to the fact that it was the intelligence bureau / intelligence authority which had picked up the existence of threat to our client's life;

c. the threatening email received by our client;

d. the large number of communications between our client and the Mumbai Police on the issue of our client's security;

e. the fact that our client had engaged, in addition to the official security provided by the police, engaged the best close protection security experts, including experts from Israel and South Africa;

f. how our client had been provided enhanced security cover whenever he had travelled outside Mumbai;

g. credible material to show that the operative of the underworld had made an unsuccessful bid on our client's life and that our client had narrowly escaped in the nick of time;

h. the fact that our client had to remove his son from the American School in Mumbai and take him to England;

i. the fact that our client's son was being followed by certain persons from the underworld who were monitoring his movements etc.

Your particular attention was also invited to our letter dated 26th November, 2010 (and the accompanying compilation) which set out in detail with full particulars, the existence of this elevated security risk. You were taken in great detail through this letter and the accompanying compilation to show that the existence of this risk has been accepted and acknowledged by the Police Department itself. This issue was urged and it was argued at great length since it was for you to be independently satisfied about what the Enforcement Directorate had said. You were requested that if you still harboured any doubts about this, you could call for the file of the Police Department. In fact, an application that this be done had been filed before you, but you had not decided on the same. It was also argued that the reason why our client left the country was not to avoid any investigation by any agency. Our client had in fact, prior to his departure, appeared before the Income Tax Department, pursuant to their summons and answered all their questions. Our client was left with no option but to leave considering the enhanced security risk to his life coupled with the fact that the post IPL Season 4, the security provided to our client was drastically reduced. The security threat existed since long prior to the commencement of the investigation against our client and there was, thus, no question of our client raising this as a

bogey to avid the Enforcement Directorate, as alleged by them.

30. Counsel very briefly gave an over view of how the allegations attributed to the Enforcement Directorate as extracted in the letter dated 1st November, 2010, were completely misconceived and singularly meritless. It was urged that there was a foreign exchange gain and not loss and the bald allegations of hundreds of crores of rupees had no substance but were only for effect. That there was no merit therein was established by the fact that the Enforcement Directorate had nt even isued a Show Cause Notice alleging any substantive violation. Counsel submitted that this was a new topic and would be urged at the fresh hearing since this would take time.

31. At the time when you halted proceedings, our Counsel was addressing you on the fact that the Enforcement Directorate could not in these circumstances, insist that our client appear before them, by disregarding the risk to his life. Our counsel had cited the judgment in the case of Ratilal Bhanji Mithani vs State of Maharashtra (AIR 1972 SC 1567) which dealt with recording of Witness evidence by way of sending a Commission abroad and was about to cite the judgement of the Supreme Court of India (Variava J) in the case of Dr. Praful Patel, on recording of statements by video conference.

32. We wish to record that as a result of the proceedings being halted, counsel could not complete the submissions on a host of other issues and

therefore a further date of hearing was sought. It may be pointed out that Senior Counsel, who was arguing the matter on 26th November, 2010, made every attempt to expedite the matter and only illustrative cases on every point were cited, so that time could be saved.

33. The above is only a summary recount that the arguments that were made during the course of the hearing. Our client shall file detailed written submissions within a short time from the conclusion of the hearing. This letter may not therefore be taken as a substitute for the same.

Yours sincerely,

For Wadia Ghandy & Co,

Partner