

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CrI.M.C.5138/2006
Reserved on: 29th October, 2009
% Date of Decision: 27th November, 2009
RANJIT RAJ & ORS. Petitioner
! Through: Mr. Sushil Kumar, Sr.
Adv. with Mr. Rajesh Batra, Mr.
Aditya Kumar and Mr. Jitender
Anand, Advs.
Versus
\$ SANJAY MISHRA & ANR. Respondents
^ Through: Mr. Atul Nanda, Mr. N.
Matta and Ms. RAmeeza Hakeem,
Advs.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

: **V.K. JAIN, J.**

1. This is a petition initially filed under Article 226/227 of the Constitution read with Section 482 of the Code of Criminal Procedure, but, later on treated only as a petition under Section 482 of the Code of Criminal Procedure for quashing complaint case No.863/1 filed by the respondents against the petitioners, under Section 56 of Foreign Exchange

Regulation Act, 1973 read with sub-section (3) and (4) of Section 49 of Foreign Exchange Management Act, 1999.

2. In the complaint filed by the respondent, it was alleged that on scrutiny of the documents recovered from the office of accused No.1 - Nestle India Ltd. it was revealed that the company while ostensibly concluding certain contracts with a the Russian Company for sale of coffee, actually exported the goods to Finland. Though the consignments were booked for Moscow, delivery of the goods was taken in Helsinki, *en route* Moscow. The scrutiny of the record of accused No.1 also revealed that the Company had signed a contract with the Russian Company for export of coffee to Russia and accordingly, Bank of Foreign Economic Affairs, Moscow, had issued a LC for 100% value of goods against repayment of State credit on behalf of that Russian Company, for an amount of Indian rupees 110 crores in favour of accused No.1, but the goods exported by it never reached Russia. It was informed by RBI that funds for repayment of State credits could be utilized for export of goods to Russian Federation only and no third country exports were permitted to be financed out of these funds.

3. It has been alleged in the complaint that the exports made by accused No.1, Nestle India Ltd., are not covered under Repayment of State Credit Scheme and the said scheme was misutilized for the purpose of exploiting the benefits generated

under Indo-Russian Repayment of State Credit Scheme for debt reduction, by exporting the goods to NWTC at Helsinki and the Company and its Directors/persons in-charge of and responsible to the Company for conduct of its business contravened Circular No. 30 dated 28th September, 1993 issued by RBI under Section 73(3) of FERA, 1973 and thereby rendered themselves liable to action under Section 56 of FERA, 1973 read with Section 49(3) and 49(4) of FEMA, 1999. It has been further alleged that the goods which were exported by the Company to NWTC in Finland were sold by NWTC to off-shore companies located outside Russia and thus, the goods exported to Russia did not reach Russia as per declaration made by the Company and payment against these exports remain unrealized. According to the complainant, the accused persons thereby contravened the provisions of Section 16(1), 18(1) and 18(2) read with Central Government Notification No. F1/67 EC/73/1 & 3 both dated 1st January, 1974 and Section 18(3) of FERA, 1973 read with Rules 7, 8 and 9 of FERA and thereby rendered themselves liable to action under Section 56 of FERA, 1973 read with 49(3) and (4) of FEMA, 1999. It has also been alleged that since Nestle India Limited by transferring the title in the goods to NWTC got a right to receive payment in foreign exchange equivalent to Rs.1,99,25,68,631/-, but failed to take any action to recover the said amount in foreign exchange, the accused

persons also contravened Section 16(1) of FERA, 1973 read with Section 68 thereof and thereby rendered themselves liable to be proceeded action under Section 56 of FERA, 1973 read with Section 49(3) and (4) of FEMA, 1999.

4. It has been further alleged in the complaint that the accused persons were given an opportunity as required by the proviso to Section 61(2) (ii) of FERA, 1973 as to whether they had in terms of Section 16(1) read with 68 of FERA, 1973 Circular No. 3 dated 28th September, 1993 of RBI, under Section 73(3) of FERA, 1973, Section 18(2) and 18(3) of FERA, 1973 read with Rule 7, 8 and 9 of FER, 1974, Section 16(1), (a) and (b) read with 68(1) & 68(2) of FERA, 1973 obtained, any general or special permission of the RBI for the aforesaid transactions and dealings in foreign exchange. It has also been further alleged that accused persons failed to furnish any permission from the RBI, and therefore, they are guilty of violating the provisions of Section 16(1) read with 68 of FERA, 1973, Circular No. 3 dated 28th September, 1993 of RBI under Section 73(3) of FERA, 1973 Section 18(2) & 18(3) of FERA, 1973 read with Rule 7, 8 and 9 of Foreign Exchange Regulation Rules, 1974, Section 16(1) (a) (b) read with 68(1) & 68(2) of Foreign Exchange Regulation Act, 1973.

5. Vide this petition which now stands treated as a petition under Section 482 of Code of Criminal Procedure, the

petitioners have sought quashing of the above-referred complaint and order dated 31st May, 2002 passed by the learned ACMM, New Delhi summoning them to face trial in respect of the above-referred offences. They have also sought quashing of the opportunity notice dated 22nd May, 2002. Besides the grounds taken in the main petition, a number of additional grounds were taken by the petitioner vide Criminal Miscellaneous No.11768 of 2006. However, during arguments and in the Written Synopsis filed by them, the petitioners have pressed the petition only on the following three grounds:

- (i) The investigations in respect of FERA, 1973 contraventions could not have been continued after repeal of FERA on 1st June, 2000;
- (ii) The Opportunity Notice dated 22nd May, 2002 was not an opportunity in the eyes of law, which resulted in non-compliance of Section 61(2) of FERA, which is fatal to the prosecution and;
- (iii) The appointment of Enforcement Officer under Section 4 of FERA did not remain valid after repeal of FERA, and therefore, the investigation made and complaint filed by him vitiates the entire prosecution.

Ground No.1

6. Section 49 of Foreign Exchange Management Act, 1991, to the extent, it is relevant, reads as under:

“49. (1) The Foreign Exchange Regulation Act, 1973 is hereby repealed and the Appellate Board constituted under sub-section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(3) Notwithstanding anything contained in any other law for the time being in force, nor court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section(3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,-

(a)anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(6) Save as otherwise provided in sub-section (3), the mention of particular matters in sub-section (2), (4) and (5) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal."

7. A bare perusal of Section 4 would show that subject to provisions of sub-section (3), the offences which had been committed prior to 1st June, 2000 when FERA was repealed, would continue to be governed by the provisions contained in FERA. For this purpose, by a fiction of law, it shall be presumed as if FERA, 1973 had not been repealed. Since sub-section (3), to the extent it is relevant, prohibits the Court from taking a cognizance of offence committed under FERA, 1972 after expiry of two years from the date of commencement of FEMA, a combined reading of sub-section (3) and sub-section (4) would mean that though there was no time limit prescribed by the Legislature for concluding investigation of the offences committed under FERA, 1973, the Court could not have taken cognizance of such an offence after 31st March, 2002, when the sunset period envisaged in sub-section (3) expired. The provisions of sub-section (4) cannot be read to mean that no investigation in respect of offences committed under FERA could be continued after its repeal w.e.f. 1st June, 2000 and only the prosecution could be launched with the sunset period of two

years commencing from 1st June, 2000. Taking such an interpretation would amount to reading something in sub-section (4) which does not exist there at all. In fact, the interpretation suggested by the learned counsel for the petitioner, if taken, would lead to absurd consequences, and therefore, could never have been intended by the Legislature. To take an example, if an offence under FERA was committed just before it was repealed on 1st June, 2000, how can it be said that investigation into such an offence could not have continued beyond the date on which the FERA was repealed. In fact, the statutory provision is so clear and precise that it is incapable of any interpretation other than that investigation into all offences committed under the repealed Act could continue even after repeal of FERA, 1973 on the assumption as if FERA, 1973 had not been repealed at all. This is the only meaning which can be assigned to the express 'offences committed under the repealed Act shall continue to be governed', used in sub-section (4) of Section 49 of FEMA, 1999'.

8. I am unable to agree with the learned counsel for the petitioner that the provisions of sub-section 5(a) of Section 49 of FEMA prohibit continuance of the investigation into offences committed under FERA, 1973, after coming into force of FEMA, 1999 which does not envisage commission of any offence and the acts which constituted offence under FERA, 1973 entail only

adjudication and imposition of penalty under FEMA, 1999. What Section 5(a), to my mind, does is to validate certain actions initiated and rules, notifications, orders, inspections, etc. issued under FERA, 1973 to the extent they are not inconsistent with the provisions of FEMA. Sub-section 5(a), to my mind, does not deal with investigation into offences committed under FERA, 1973 which are dealt with in and saved specifically by sub-section (4) of Section 49.

9. In my view, besides Section 49(4), Section 6 of General Clause Act also saves the investigation in respect of offences committed under FERA, 1973, after repeal of that Act.

The aforesaid provision reads as under:-

“ 6. Effect of repeal – Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

- (a) Revive anything not in force or existing at the time at which the repeal takes effect, or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurrent under any enactment so repealed, or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or
- (e) Affect any investigation, legal proceeding or remedy in respect of any

such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

A bare perusal of Clause (c) and (e) would leave no doubt that if a criminal liability has been incurred by anyone under a repealed Act, that would not be affected in any manner by repeal of that Act and an investigation which is in progress at the time of repeal of enactment can continue on the assumption that the repealing Act had not at all been passed. In fact, during arguments, it was not at all disputed that if Section 6 of General Clauses Act applies, the investigation into offences committed under FERA, 1973 could continue even after repeal of that Act.

10. The contention of the petitioners is that since the provisions of Section 6 of General Clauses Act would apply, only if a different intention does not appear from the repealed Act and since sub-Section (5)(a) of Section 49 of FEMA conveys a legislative intent contrary to the provisions contained in Section 6 of General Clauses Act, the provisions of Sections 6 of General Clauses Act do not apply. In my view, sub-section (5) (a) of Section 49 of FEMA, does not at all relate to investigation of offences committed under FERA, 1973, and therefore, does not

express any legislative intention in respect of investigation of such offences. Therefore, the provisions of Section 6 of General Clauses Act squarely apply to such investigations.

11. In *State of Punjab vs. Mohar Singh*, 1955 SCR, 893, a judgment relied upon by the petitioner, to Hon'ble Supreme Court *inter alia* observed as under:

“Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material.”

Since no equivalent intent to the contrary appears from sub-section (5) (a) of FEMA, 1999, applicability of Section 6 of General Clauses Act cannot be disputed. In fact, the legal position in this regard is made amply clear by sub-section (6) of Section 49 of FEMA which says that the mention of particular matters in sub-section (2) (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of General Clauses Act with regard to the effect of repeal. The only exception this sub-section makes is sub-section (3) of the same Section. This would mean that the Section 6 of General Clauses Act would not apply in respect of an offence committed under FERA, 1973 only to the extent that no Court would be able to take cognizance of such an offence on expiry of sunset period of two years from the date of commencement of FEMA, 1999. But, for the provisions of sub-section (3), there would have been no bar on the Court taking cognizance of an offence committed under FERA, 1973, within the period of limitation otherwise prescribed for such an offence. Sub-section (6) makes it explicit that Section 6 of General Clauses Act would continue to apply to such offences except in respect of the time period within which the Court could take cognizance of such an offence, after repeal of FERA, 1973.

I, therefore, held that there is no merit in the first ground urged by the petitioners.

Ground No.2

12. During the course of arguments, the petitioner did not urge that appointment of Enforcement Officer under Section 4 of FERA came to an end with the repeal of FERA. However, in the Written Synopsis filed by the petitioner, it has been contended that since Section 49(5)(a) of FEMA validates only those appointments made in FERA, 1973 which are not inconsistent with the provisions of FEMA and since FEMA does not provide for offences and violations of the nature alleged in this complaint, if committed after coming into force, FEMA will lead to only imposition of penalty and can be investigated only by an officer not below the rank of an Assistant Director, the appointment of Enforcement Officer, who is lower in hierarchy to an Assistant Director, is inconsistent with the FEMA, and therefore, the investigation done by the Enforcement Officer vitiates the entire prosecution. In my view, there is no merit in the contention. No provision of FEMA invalidates the appointment of Enforcement Officer made under Section 4 of FERA, 1973. The powers of an Enforcement Officer to investigate the offences committed under FERA, 1973 do not come to an end with enactment of FEMA, 1999. Even without aid of any revalidation envisaged in sub-section (5)(a) of FEMA, 1993, the Enforcement Officer could have initiated as well as continued investigation into offences committed under FERA,

1973. In any case, merely because FEMA does not envisage commission of a crime offence by itself does not make the appointment of Enforcement Officer made under Section 4 of FERA inconsistent with the provisions of FEMA, 1999. No provision of FEMA is inconsistent with the provisions of Section 4 of FERA. The powers conferred by Section 37 of FEMA upon an officer not below the rank of an Assistant Director of Enforcement cannot be said to be inconsistent with the powers conferred upon the investigation officer under Section 4 of FERA, 1973 as, the officer referred to in Section 37 of FEMA would deal with those acts which are committed after repeal of FERA and commencement of FEMA whereas, the Enforcement Officer, appointed under Section 4 of FERA, 1973, investigates the offences committed under FERA, 1973. Therefore, there is no merit in the second ground taken by the petitioner.

Ground No.3

13. Admittedly, an opportunity notice was issued by the respondent on 23rd May, 2002 which was received by petitioner-company on 23rd May, 2002. A reply was sent to the notice on 27th May, 2002 and the complaint was filed in the Court on 31st May, 2002, the last date on which the sunset period expired. The contention of the petitioner is that the opportunity notice gave only three days time which was not enough and the request

of the company for giving more time was rejected. It has also been contended that neither the reply filed by the company was considered before filing the complaint nor was it filed in the Court alongwith the complaint.

14. The proviso to Section 61 (2) of FERA, 1973 reads as under:

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

A perusal of the above referred proviso would show that the notice envisaged under this proviso is not a show-cause notice. This provision is not based on the principles of *audi altrem partem*. The principle of *audi altrem partem* normally does not apply to criminal prosecutions, at pre-prosecution stage. It, therefore, does not require the complainant to give a notice to the accused persons, giving him an opportunity to show-cause as to why he be not prosecuted. This provision applies only to such offences which are committed by contravening any provision of the Act or of any rule, direction or order whereby doing of an act is prohibited without permission. If requisite permission is obtained, the impugned act would now constitute an offence. Therefore, the purpose of the notice

envisaged under such provision is to enable the accused to show that he had the requisite permission with him and that is why, the act committed by him does not constitute an offence. The person, who has been given opportunity notice envisaged under this provision, cannot seek to justify the act complained of. The opportunity given to him is only for the limited purpose of showing the permission, if any, available with him.

15. A bare perusal of the notice would show that noticees were given an opportunity as to whether they had obtained any general or special permission of RBI for the transactions mentioned in the notice and dealings in foreign exchange. They were informed that on their failure to do so, a complaint under Section 56 of FERA, 1973 read with Sections 49(3) and (4) of FEMA, 1999 will be filed against them. The notice was addressed to 10 persons, including petitioner No.1-Nestle India Limited.

16. A perusal of the reply dated 27th May, 2002 would show that no special or general permission from RBI in respect of transactions and dealings in question was sent with the reply, nor any further time was sought to furnish the requisite permission. This was not the plea taken in the reply that the Company had obtained the requisite permission and would furnish the same if more time was given for this purpose. On the

other hand, the plea taken in the notice was that no permission from RBI was required. It was also stated in para 17 of the reply that they had also filed a detailed representation dated 27th May, 2002 with the Directors of Enforcement of their contention.

17. As regards the contention that the reply submitted by the petitioners to the opportunity notice dated 22.05.02 was not considered by the respondents before filing the complaint, the contention of the learned counsel for the respondents was two-fold. His first contention was that it was not obligatory for the respondents to consider the averments made in the reply, as the only purpose of giving opportunity notice was to enable the accused to show the requisite permission from RBI and no such permission was disclosed in the reply. The second contention was that the plea taken in the reply dated 27th May, 2002 submitted by the petitioners was actually taken into consideration before filing the complaint. During the course of arguments, the learned counsel for the respondent did show a communication on his file which disclosed that the reply filed by the petitioner was considered before filing the complaint. It was pointed out that though notice were issued to 10 persons, prosecution was launched only against some of them which by itself would indicate that the reply submitted by the petitioners was duly considered before filing the complaint. Had the respondents not taken the reply into consideration and had it

filed the complaint mechanically, without due application of mind, the complaint would have been filed against all the noticees and not only against some of them. In fact, a perusal of the averments made in the complaint also indicates that the reply submitted by the petitioner was considered before filing the complaint. In para 3 of the complaint, it has been alleged that the accused persons were given an opportunity as required by the proviso to Section 61(2)(ii) of FERA, 1973. It has been alleged in para 4 of the complaint that the accused persons had failed to furnish any permission of RBI. It has been alleged in para 6 of the complaint that in the absence of any permission having been produced by accused persons, they were guilty of violating various provisions of FERA. Without considering the reply submitted by the petitioner, the respondents could not have known that they did not have the requisite permission from RBI and could not have said that despite opportunity notice, they had not furnished the requisite permission. Therefore, prima-facie, it appears that the reply filed by the petitioner was duly considered before filing the complaint. It was also contended by the learned counsel for the petitioners that only 3 days' time given to the petitioners in the opportunity notice was not adequate and, therefore, an adequate opportunity was denied to them. I find no merit in this contention as well. If the petitioners had the requisite permission from RBI, 3 days' time was more

than enough to furnish the same to the respondent. In any case, as noted earlier, this has not been the case of the petitioners either in the reply or even in this petition that they had the requisite permission from RBI and that had adequate time been given to them, the permission would have been furnished to the respondent.

18. The learned counsel for the petitioners has relied upon the judgment of a learned single Judge of this court in *Debashish Bhattacharya Vs. UOI & Anr.* 2009 (3) JCC 2320. A perusal of the above referred judgments would show that in that case the opportunity notice was served upon the petitioner on 25th May, 2002 giving him 3 days' time to furnish the requisite permission from RBI. The petitioner submitted a reply dated 27th May, 2002. Criminal Complaint against the petitioner was filed on 27th May, 2002 itself. Therefore, the judgment in the case of *Debashish Bhattacharya (Supra)* is completely distinguishable on facts. The complaint in that case having been filed on the same date on which the reply was furnished whereas the complaint in this case having been filed 4 days after the furnishing of reply, the facts of the two cases are altogether different. In the case of *Debashish (supra)*, the petitioner did not get even three working days to furnish the reply. On the other hand, in the present case, the petitioner gave reply on 27th May and, therefore, got 4 days from the date of receipt of the notice and the reply filed by

it, appears to have been duly considered before filing the complaint.

19. Another important aspect in this regard is that the judgment in *Debashish Bhattacharya (Supra)* does not take into consideration the decision of the Hon'ble Supreme Court in *Standard Chartered Bank Vs. Directorate of Enforcement* 2006 (4) SCC 278 where the Hon'ble Supreme Court discussed the nature and scope of the opportunity notice envisaged in Section 61(2)(ii) of FERA, 1973 and took a view on it.

20. The opportunity notice envisaged u/s 60(2)(ii) of FERA, 1973 came up for consideration before the Hon'ble Supreme Court in *Standard Chartered Bank Vs. Directorate of Enforcement* 2006 (4) SCC 278. A perusal of para 2 of the judgment would show that in one of the matters before the Hon'ble Supreme Court, writ petition No.2377/1966, individual notices issued u/s 61 of FERA were challenged. While considering such notices, the Hon'ble Court, *inter alia*, observed as under:-

“10. Before proceeding further it is necessary to point out that the notices issued under Section 61 of the FERA are merely notices of enquiry, giving an opportunity to the appellants of showing that they had the necessary permission from the concerned authority under the FERA in respect of the particular transaction. These notices, therefore, do not in any manner decide anything against the appellants and they merely set out the grounds based on which the appellants allegedly violated the provisions of the FERA and since one of the ingredients of the

offence is absence of permission from the concerned authority, they are intended only to give an opportunity to the appellants to show that they had the necessary permission and hence, there was no violation of the relevant provision or provisions of the FERA as sought to be made out in the notice. As pointed out by the learned Additional Solicitor General, on the failure of the appellants to show that they had the requisite permission, a complaint will have to be lodged before the concerned magistrate here it has been launched with the permission of this Court pending these appeals and the magistrate will consider whether the process should issue on the basis of the complaint made before him. In view of the fact that sufficient opportunities will be available to the appellants to put forward their contentions before the concerned criminal court, it cannot be said that there is any merit in the challenge to the notices issued under Section 61 of the FERA. The said notices are really in terms of Section 61 of the FERA and their scope and ambit is also controlled by Section 61 of the FERA and on receipt of those notices, it was open to the appellants to show that they had the necessary permission from the concerned authority under the Act. Of course, if they do not have such permission, apparently, in the case on hand, there was no such permission, they have necessarily to put forward their defences before the criminal court in the prosecutions that have been launched in that behalf."

"11. It is argued that the issue of a notice under Section 61 is not a mere formality and that it is a real right given to a person accused of an offence to establish that the proceedings are being initiated without jurisdiction or wholly in violation of the provisions of FERA. Article 20(3) of the Constitution is referred to and it is submitted that many rights including the right against self incrimination is available to a person accused of an offence. Section 61(2) of FERA makes it clear that no court can take cognizance of an offence except upon a complaint by the officer referred to therein. The proviso to Section 61(2) of the Act provides that no complaint regarding the offences referred to in that Section shall be made unless an opportunity is given to the concerned person to show that he had the requisite permission where the offence charged is an act which requires permission under the Act. We think that if the notice sets out the alleged contravention, (an act which could have been done with permission) and calls upon the person accused of the offence whether he had the requisite permission for the transaction, that will satisfy the requirement of the Section."

"14. At this stage, we cannot ignore the argument on behalf of the respondents that if the appellants are not able to show any

permission, complaints have to be filed before the concerned magistrate and that magistrate will issue process only on being satisfied that a case has been made out for such issue and that the attempt of the appellants to block the prosecution should not be countenanced. The object of the present notice, submitted counsel, is limited and the arguments attempted on behalf of the appellants can be raised before the criminal court when the occasion arises. We find merit in this submission. Obviously, it is open to the appellants to put forward all their defences to the prosecution at the appropriate stage.”

21. It was contended by the learned counsel for the petitioners that the above referred observations in Standard Chartered Bank’s case (Supra) were *per incurium* as there was no issue before the court with respect to the scope of the notice envisaged u/s 61(2)(ii) of FERA, 1973. As the individual notices issued to some of the petitioners were actually in challenge, the above referred observations of the Hon’ble Court cannot be said to be *per incurium* and in fact are binding upon this court.

22. As regards the contention that the reply submitted by the petitioner to the opportunity notice was not filed alongwith the complaint, the legal proposition is well settled. At the preliminary stage, the court is not required to go into the defence taken by the accused and has to examine the matter purely from the point of view of the complainant without advertng to any defence which the accused may have.

23. In *Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi* 1976(3) SCC 736, the Hon’ble Supreme Court while examining

the scope of Section 202 of the Code of Criminal Procedure, *inter alia*, held as under:-

“It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited – limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint – (i) on the materials placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all advertent to any defence that the accused may have.”

Therefore, the proceedings initiated against the petitioners cannot be quashed merely on account of the reply filed by them having not been filed alongwith the complaint.

24. During the course of arguments, it was submitted by the learned Senior Counsel for the petitioners that he was seeking quashing of the complaint in view of the decision of the Hon'ble Supreme Court in *State of Haryana Vs. Bhajan Lal* 1992 (1) SCC 335, *inter alia* holding therein that the criminal proceedings could be quashed in exercise of powers conferred upon the High Court u/s 482 of the Code of Criminal Procedure in a case where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the

proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

25. In the present case, since prima facie, there seems to be no violation of the proviso contained in Section 61(2)(ii) of FERA, 1973, it cannot be said that there was a legal bar to institution of the complaint filed by the respondent.

No other point was urged on behalf of the petitioners. The petition being devoid of any merit is hereby dismissed.

(V.K.JAIN)
JUDGE

NOVEMBER 27, 2009
bg/sk