

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 52/2011 & Crl.M.A. 491/2011 (stay)**

% Reserved on: 29th May, 2012
Decided on: 6th July, 2012

PARAG DALMIA Appellant
Through Mr. Sanjeev Anand, Mr. Abhash
Kumar, Advs.

versus

SPECIAL DIRECTOR OF ENFORCEMENT, ENFORCEMENT
DIRECTORATE Respondent
Through Mr. A.S.Chadhiok, ASG with Mr.
Saqib, Mr. Bhagat Singh, Mr. Vedit
Gupta, Ms. Hareen Singh, Mr. Akshay
Patani, Advs.

+ **CRL.A. 53/2011 & Crl.M.A. 493/2011 (stay)**

H S RUSTAGI Appellant
Through Mr. Sanjeev Anand, Mr. Abhash
Kumar, Advs.

versus

SPECIAL DIRECTOR OF ENFORCEMENT, ENFORCEMENT
DIRECTORATE Respondent
Through Mr. A.S.Chadhiok, ASG with Mr.
Saqib, Mr. Bhagat Singh, Mr. Vedit
Gupta, Ms. Hareen Singh, Mr. Akshay
Patani, Advs.

+ **CRL.A. 59/2011 & Crl.M.A. 561/2011 (stay)**

JAIHARI DALMIA

..... Appellant
Through Mr. Akhil Sibbal, Mr. Javaid
Muzaffar, Mr. Pradeep Chhindra,
Advs.

versus

DIRECTOR, ENFORCEMENT DIRECTORATE

..... Respondent
Through Mr. A.S.Chadhiok, ASG with Mr.
Saqib, Mr. Bhagat Singh, Mr. Vedit
Gupta, Ms. Hareen Singh, Mr. Akshay
Patani, Advs.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present appeals are directed against the order dated 7th October, 2010 passed by the Appellate Tribunal for Foreign Exchange under Section 68 of Foreign Exchange Regulation Act (in short FERA) against the adjudication order dated 25th May, 2010 passed by the Special Director, Enforcement Directorate, New Delhi.

2. Learned counsel on behalf of Parag Dalmia and H.S. Rustagi contends that in the case of imported goods, payment is to be made by Letter of Credit and in the Letter of Credit, money never comes into the hand of party and all the documents like Bill of Lading, etc. are to be received by the bank. The alleged offence was committed on 28th April, 1987. The Appellant Parag Dalmia was not a Director but a Delegate Director and an employee of the Company at the relevant time. Further H.S. Rustagi was not a Director in the year 1987-88 when alleged offence took place. The Appellants have discharged their burden by placing on record the annual reports. The defence of an accused has only to be probable and he has not to prove his

defence beyond reasonable doubt. Despite annual reports of the Company giving the address of the Company, letters were sent to incorrect addresses, and thus no notice was served on the Appellants. For an offence of the year 1987, for the first time, the Appellants were asked to reply in the year 2001. Since the Appellants Parag Dalmia was only an ex-employee, he had no access to the documents and thus he could not file any document in reply to the opportunity notice. The delay in serving the notice on the Appellants has caused prejudice as the documents relating to their defence are not available with them. Though, initially notices were given to all the 23 Directors, however only a few are being proceeded against. Even the bank records were destroyed thus forbearing the Appellants to prove their innocence. Though Parag Dalima was authorized signatory, Appellant H.S. Rustagi was not even the authorized signatory. Further, the Appellants cannot be held liable vicariously merely being the Directors of the Company. As per the order the onus has been shifted on the Appellants rather than the prosecution. All the records of the banks and the Govt. Department have been weeded out after 5 years and thus the Appellants were grievously prejudiced in putting forth their defence.

3. Learned counsel for Jai Hari Dalmia has, inter-alia, contended that by the impugned order the Appellant has been held to be guilty unless proved to the contrary. This is contrary to the fundamental principles of the law where the initial burden is on the prosecution to discharge. Only after the prosecution has discharged its initial burden of proving, then the role of defence comes to disapprove the same. Further, the defence has not to prove its case beyond reasonable doubt but has only to give a probable defence.

Section 68 of FERA applies both to criminal as well as adjudicatory proceedings. Merely because a person is a Director, he cannot be held liable. The onus is cast on the prosecution to prove that the Appellant was responsible and in-charge for the day-to-day functioning of the Company. As per Section 68(1) the initial burden is on the prosecution which is not discharged. In a complaint merely recital of the words of the Section is not sufficient and specific allegations are required to be alleged and proved against the person sought to be prosecuted. Reliance in this regard is placed on *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr. (2005) 8 SCC 89* wherein it was held:

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words

" who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc."

What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The

liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to Sub-section (2) of Section 141 fortifies the above reasoning because Sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

4. The records having been weeded out, grave prejudice has been caused to the Appellants in leading their defence. The annual report relied upon by the impugned order itself shows that the Appellants had earlier shifted from G-4, Atmaram Tolstoy Marg to G-4, South-Extn.-I, however the notices were sent at the old address. Further after 1993 no efforts were made to serve the Appellants till 2001 when it was held that Appellants had been deemed to be served.

5. Learned Additional Solicitor General on the other hand contends that in terms of Section 2(h) of FERA Foreign Exchange includes Letter of Credit, Bills of Exchange and any instrument payable at auction of the drawer or holder. Thus, the contention that there is no foreign exchange acquired is misleading. Further in terms of Rule 3 'b' and 'c' of the Foreign Exchange Regulation Rule, 1974 (in short FERR) last carried out address has to be looked into. All efforts were made to serve the notice at the address taken from the Reserve Bank of India, Canara Bank and efforts were also made to visit the place personally, however the same were of no avail as notices could not be served and thus, finally the notices were deemed to be served by pasting at the last known address on the 7th May, 2001. Thereafter, legal consultants were heard and statement was recorded who gave the addresses of the Appellants. In view of the statement of K.L. Sethi and the Appellant Parag Dalmia who was dealing with the day-to-day affairs of the Company and the fact that Parag Dalmia has filed the account opening form, the initial burden qua him that the Appellant Parag Dalmia was responsible and in-charge for the day-to-day affairs of the Company stands discharged. Further extensive efforts were made by the Respondents to

serve the Appellants, however they continued changing the address without intimation to the competent authority.

6. I have heard learned counsel for the parties. Both the sides have placed on record the list of dates and events. A perusal of the list of dates filed by the Respondent shows that on 13th June, 1989 a letter was addressed from Reserve Bank of India (RBI) Mumbai to the Respondent on 13th June, 1989 intimating the address of the company as 8-A, Atmaram House, 1 Tolstoy Marg, New Delhi. Pursuant thereto a notice dated 24th July, 1989 was sent to the Company M/s. Multitech International Ltd. at 8-A, Atmaram house, 1-Tolstoy Marg, New Delhi, however no response was received and thus a second letter was sent on 9th August, 1990. Fresh address of M/s. Multitech International Ltd. was sought from Bank of Tokyo which sent the current account opening form wherein it was informed that Mr. Parag Dalmia was the official signatory besides two other persons. However, the said account opening form did not give the address of the Company. The Reserve Bank of India again sent a letter dated 16th July, 1991 to the Respondent giving name and address of the defaulting Company as M/s. Multitech International Ltd. 8-A, Atmaram house, 1-Tolstoy Marg, New Delhi. Thus, a notice was again sent on the said address on 10th October, 1991. Pursuant to a letter to Canara Bank informing the failure of the Company to submit documentary evidence of import into India and requesting to give the relative Bills of Entries and furnishing the address of the proprietors/ Directors, a letter was received on 16th December, 1991 furnishing the address of M/s. Multitech Industrial Ltd. as 217, Hans Bhawan, Bahadurshah Zafar Marg, New Delhi. In this regard it may be

noted that the Canara Bank instead of giving the address of M/s. Multitech International Ltd. gave address of M/s. Multitech Industrial Ltd. On a letter sent reply was received from M/s. Multitech Filtration Engineers Pvt. Ltd. declaring that they had not imported any electronic component in October, 1995 for such a value. A fresh letter was sent to the Manager, Canara Bank on 9th December, 1992 asking him to furnish the names and address of Directors of Multitech Industrial Ltd. and the address of introducer of the said bank account. A letter was received on 18th December, 1992 from the Canara Bank informing that the address of M/s. Multitech International Ltd. (Fertilizers Division) was G-4, 4th floor, South-Extn-I, New Delhi-49 and the works and registered office was at 15-17, Industrial Estate, Dharuhera, Haryana. It also informed the name of the Directors in 1989-90 annual report as R.K. Krishnan, MD and N.K. Beri and Anil Aggarwal as Directors. Again a notice was sent to Multitech International Ltd. at South-Ex. Address on 6th January, 1993 and at Multitech International Ltd. 15-17 Industrial Estate, Dharuhera, Haryana. As regards Dharuhera address, the notice was received back with an endorsement that the Company was lying closed and instead of this a new company ICL was working which has refused to take the notice. On 19th March, 1996 again correspondence was made with the Canara Bank to give the addresses of the Directors and its introducers and a reminder in this regard was sent on 1st February, 2001. In response, the Canara Bank wrote that they had destroyed all records for the period up to 1988 and they were trying to contact the Janpath Branch from where if information received the same would be transferred. On 12th February, 2001 a letter was sent by Canara Bank to the Enforcement Directorate giving the last known address of the Company as per the bank's records to be 5-D,

Atmaram house, 1-Tolstoy Marg, New Delhi and works and registered office at 15-17, Industrial Estate, Dharuhera, Haryana. On 1st February, 2001 a notice was sent to Multitech International Ltd. at G-4, 4th Floor, South-Ex.-I which was pasted over there on 7th May, 2001 and a report was prepared regarding the non-availability and whereabouts of the party. A letter dated 15th February, 2001 was addressed by the Bank of Tokyo to the Assistant Director, Enforcement Directorate in response to the Directorate's letter seeking whether the Company had filed a exchange copy of relative Bills of entries with them or not. The Bank of Tokyo informed that the matter was old, however as per the search conducted it appears that the Bill of Entry was not filed by the Company with them. They informed the addresses as G-4, South-Ex-I, New Delhi and factory address as 15-17, Industrial Estate, Dharuhera, Haryana. They also informed the names of Directors as Parag Dalmia, Ranjit Singh Bhandari and Kamlesh Gagnani. However, on the basis of audited balance sheet of the Company ending March, 1996 the last known address was informed as 1101 Arunachal Building, 19 Barakhamba Road, New Delhi.

7. Pursuant to summons dated 24th May, 2001 Shri S.N. Mittal, Advocate legal consultant appeared before the officer who informed that he was a legal adviser with Dalmia Magnetic Corporation which was the concern of Dalmia Cement (Bharat) Ltd. He stated that he did not handle the legal matters of M/s. Multitech International Ltd and that Multitech International Ltd. was authorized to functioning from the same building in terms of lease-deed with Dalmia Cement (Bharat) Ltd. as perhaps sub-lessor at G-4, NDHC Part-I. He also informed the addresses of Appellant Parag Dalmia, however when

communication was sent on that address it was informed that Mr. Parag Dalmia has left the house and had shifted to Vasant Kunj. On a summon being issued under Section 40 of FERA, Mr. Parag Dalmia sent a reply on 6th August, 2001 stating that the Company Multitech International Ltd. was sold to Techfin Consultants Ltd. sometime in September 1992. Prior to this, sometime in 1990 both movable and immovable assets belonging to the Company were sold to India Ceroils Ltd. 403, Padma Tower, Rajender Place, New Delhi and that Parag Dalmia was a Delegate Director of the Company and only an employee. He further stated that he has no records available with him in respect of the Company and requested them to contact the Company. On an inspection of the ROC records, the names of the various Directors of the Company and their addresses were obtained and thus a memorandum was issued on 19th November, 2001. Appellant Parag Dalmia replied as above and Jai Hari Dalmia stated that he was only a Director on the Board of Multitech International Ltd. and his participation was limited to deliberations at the Board level only. He asked the Respondent to contact the executives of the Company for the information, however gave no name or address of the executives. Thus, a memorandum dated 7th March, 2002 was issued against the Company and its Directors followed by an opportunity notice. To the said opportunity notice replies were filed. The Respondent then passed the order dated 11th December, 2003 after giving hearing to the parties and held noticee No. 2 to 6, 8, 9, 12 & 16, 23, 26, 28, 29, 22, 11, 7, 13, 27, 10, 25 guilty of the contravention in terms of Section 68 of FERA and liable to penalty under Section 50 of FERA. On appeals being filed the matter was remanded back by the Learned Appellate Tribunal directing the adjudicating authority for fresh

adjudication by giving specific findings on the points recorded. On remand back again an order was passed by the Special Director on 25th May, 2010 imposing penalty on the Company and noticee numbers 9, 10, 11, 13, 25, 26, 28 & 29 under Section 50 of FERA. On appeals being filed by the Appellants herein before the Appellate Tribunal the same was disposed of by reducing the penalty amount to Rs. 60,000/- against each of the Appellants herein which are the orders impugned in the present appeals. The orders dated 7th October, 2010 of the Appellate Tribunal for Foreign Exchange and 25th May, 2010 of the Special Directorate of Enforcement are impugned in the present appeals.

8. The issues that arise for consideration are:

- (i) Whether there was delay in service of notice to the Appellants thereby causing prejudice to them in the defence.
- (ii) Whether the Respondent has discharged the initial burden of showing that the Appellants were responsible and in-charge of the day-to-day affairs of the company.
- (ii) Whether there is any evidence on record to show that the alleged contravention of the provisions of FERA, 1973 took place with consent or connivance or was attributable to any neglect on the part of the Appellants, and
- (iv) Whether the provisions of Section 8 sub-Section (3) & (4) of FERA were attracted in the present case as admittedly no foreign exchange was acquired by the Company and the same was paid only

by a bank (authorized dealer) under bank-to-bank transaction under a Letter of Credit (LOC).

9. This Court need not delve into issue No.(iv) as these appeals can be decided on issue Nos. (i) to (iii). Dealing with issue Nos. (ii) and (iii), it is to be noted that as regards Appellants Jaihari Dalmia and H.S. Rustagi, the impugned order does not even state that these Appellants are responsible for the day-to-day working of the company. The relevant portion of the order passed by the Special Director of Enforcement, Enforcement Directorate, Government of India, New Delhi reads as under:-

“7.18 Shri J.H. Dalmia, Noticee no.11 & Shri H.S. Rustogi – Noticee no.13

Shri S.K. Dubey, Advocate on behalf of noticees no.11 & 13 vide the written submission dated 15.3.2010 and oral submissions at the time of personal hearing submitted that the said notices were directors on the board of noticee no.1, however during the relevant period they were neither responsible for the conduct of the business nor were they involved in the day to day affairs of the noticee no.1.

As regards notice no.11 & 13, I find that both the noticees were on the board of directors in the noticee no.1 as is evident from copy of Annual Report of 1986-87. As per page 2 of the Annual Report of 1986-87 of noticee no.1, it was in the agenda of the AGM to be held on 26.11.87 to appoint Director in place of noticee No.11 & 13, who retired by rotation. This shows that both noticee no.11 & 13 were directors in noticee no.1 when impugned remittance was effected on 26.4.87 (Balance sheet period is at 31.5.87). They have failed to discharge the onus cast on them under proviso to sub-section (1) of Section 68. I am therefore inclined to hold them guilty of alleged contravention.”

10. It may be noted that the first order passed by the Special Director of Enforcement was set aside vide order dated 31st August, 2007 by the Appellate Tribunal for Foreign Exchange, inter alia, on the ground that there was no finding in the order that the Appellants were incharge and responsible for the working of the company which was an artificial person i.e. M/s Multitech International Ltd. Despite the remand back, there is no discussion and the Appellants Jaihari Dalmia and H.S. Rustagi have been held to be responsible merely because they were the Directors of the company when the impugned remittance was effected on 26th April, 1987. Even in the impugned order of the Appellate Tribunal for Foreign Exchange dated 7th October, 2010, there is no consideration of this fact. On the contrary, relying upon *N. Rangachari v. Bharat Sanchar Nigam Ltd.*, (2007) 5 SCC 108, it was held that the obligation was on the Appellants to prove that they were not responsible for the transaction in question since they were Directors. The learned Appellate Tribunal for Foreign Exchange while relying upon the said judgment failed to notice that in *N. Rangachari (supra)*, the Hon'ble Supreme Court held as under:-

“20. But as has already been noticed, the decision in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another* (2004) 7 SCC 15 binding on us, has postulated that a Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.”

11. In *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and another*, (2005) 8 SCC 89 a three Judge Bench of the Hon'ble Supreme Court while dealing

with provisions of Section 141 and 138 of the Negotiable Instruments Act, 1881, which are *pari materia* of Section 68 of FERA held as under:-

“10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are “every person”. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

“Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a

director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of “every person” the section would have said “every director, manager or secretary in a company is liable”..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any director, manager, secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement.”

12. In *National Small Industries Corp. Ltd. v. Harmeet Singh Paintal & another*, 167(2010) DLT 143 (SC) their Lordships held:-

“10. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability. A company may have a number of Directors and to

make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under Section 141.”

13. Thus, the contention of learned Additional Solicitor General that the opportunity notice given to the Appellants clearly stated that they were incharge and responsible for the day-to-day functioning does not hold any ground. Initial burden is cast on the prosecution to prove that the concerned Director is responsible and incharge of the day-to-day functioning of the company whereafter the burden shifts to the accused to disprove the same. In the present case neither in the order of the Special Director of Enforcement nor of the Appellate Tribunal for Foreign Exchange, the burden has been discharged by the prosecution and there is no finding that the Appellants Jaihari Dalmia and H.S. Rustagi were incharge and responsible for the day-to-day working of the company. In view of this position, the appeals being Crl.A. Nos. 59/2011 and 53/2011 deserve to be allowed on this short ground itself.

14. As regards Appellant Prag Dalmia, the order of the Special Director of Enforcement reads as under:-

“7.19 Shri Parag Dalmia – Noticee no.25

Shri S.K. Dubey, Advocate on behalf of noticee no.23 vide his written submission dated 15.3.2010 and oral submissions at the time of personal hearing submitted that the said noticee was only a delegate director and not a member of the board or even the executive director of the company. I take note of the plea taken by Shri K.L. Sethi Noticee no.15 during the course of earlier adjudication proceedings that Shri Parag

Dalmia alongwith S/Shri S.C. Mehta, K.K. Sharma & Kamlesh Gagrani looked after day to day affairs of the company. The copies of Annual Reports of the Company for the year 1986-87 and 1987-88 submitted by Shri Dubey show that Shri Parag Dalmia remained delegate Director for those two years. In this regard, I would like to refer to the provisions of sub-section 13 of Section 2 of the Companies Act, 1956 which states that : “director” includes any person occupying the position of director, by whatever name called. Moreover the list of employees in both the Annual Reports show that Shri Parag Dalmia had been employee of the company with effect from 1.6.1982. I am, therefore, inclined to hold Shri Parag Dalmia liable under Section 68(1) as he has also failed to give proof to hold the contrary.”

15. Learned counsel for the Respondent has relied upon the account opening form which was signed by the Appellant Parag Dalmia thereby showing that he was looking after day to day affairs of the company thus prima facie the prosecution has discharged the burden in case of Appellant Parag Dalmia that he was looking after day to day affairs of the company and was responsible and incharge thereof. However, the issue, which arises for consideration in Crl.A. 52/2011 filed by Parag Dalmia is that whether the delay in issuing notice to Appellant Parag Dalmia has resulted in prejudice to him so that he could lead his evidence and thus, the impugned order is liable to be set aside on this count. The contention of learned counsel for Appellant Parag Dalmia is that notice to the company is not notice to the Appellant especially when the company had been wound up. Though the

offence was allegedly committed on 28th April, 1987, Appellant Parag Dalmia was sent summons for the first time to appear on 16th July, 2001. Till that date no summons were ever issued to him. This belated issuance of summons after 14 years has caused serious prejudice to him as then nothing was available with him to show that he had no role to play in the alleged offence. He neither has the bills of entry nor the postal refer of 1987. In this regard one fact needs to be noticed that though from 1989 to 1993 efforts were made by the prosecution to trace the company, however, from 1993 to 2001 no efforts were made. Reliance by the learned Additional Solicitor General is placed on a letter dated 19th March, 1996 written to the Canara Bank to show that the process was on. However, it has been fairly conceded that the letter dated 19th March 1996 by the Canara Bank related to the second bill of entry with regard to the remittance of 95,68,900 UK Pounds which was ultimately dropped. The said letter has no connection with the adjudication proceedings regarding the remittance relating to the Bank of Tokio with regard to 54750 US Dollars. Though learned Additional Solicitor General has strenuously put forward that extensive efforts were made to trace out the address of the company and various letters were written to the bank, however, it may be noted that the least that was required

from the Respondent was to find out from the record of the Registrar of Companies about the address of the company. For the first time, the effort was made in 2001 after 1987 and notices were served to the Appellants.

16. In *Government of India v. Citedal Fine Phamaceuticals, Madras and others etc. etc.*, AIR 1989 SC 1771 their Lordships while dealing with Rule 12 of the Medicinal and Toilet Preparations (Excise Duties), Rules 1956 held that in the absence of any period of limitation, it is settled that the every authority is to exercise the power within reasonable period and what is a reasonable period would depend upon the facts of each case. It was held:-

“6. Learned counsel appearing for the respondents urged that Rule 12 is unreasonable and violative of Article 14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He urged that in the absence of any prescribed period for recovery of the duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the rule is to be made, but that by itself does not render the rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case

notice of demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case.”

17. In *Bhagwandas S.Tolani v. B.C. Aggarwal and others*, 1983 (12)

D.L.T. 44 (Bom.) it was held:-

“7. There is also one more aspect of the matter. In the reply, the firm has pointed out that almost all the relevant records have been destroyed and the persons who was in charge is no longer in their employment. In my view, even without considering the case that adjudication proceedings had in fact been held, I am of the opinion that this is otherwise also a stale matter which cannot be allowed to be reopened, since to allow it to be reopened, would cause serious detriment and prejudice to the petitioner. The fact that the petitioner is not able to produce the formal order is immaterial; that there were earlier adjudication proceedings may be reasonably borne out by the fact that the department did nothing for 11 years. The department has failed to clarify the position as regards the directions given to the Reserve Bank of India and an adverse inference is required to be drawn from such failure even otherwise in respect of such stale matter. In my opinion, the department is not entitled to take up old matters in this manner. If the department’s contentions as to limitation were to be accepted, it would mean that the department can commence adjudication proceedings 10 years, 15 years or 20 years after the original show cause notice which cannot be permitted. The position might have been different if there had been any default on the part of the petitioner or any act of omission or commission on his part which had resulted in this long period of delay. Then in such case, the petitioner could not be permitted to take advantage of his own wrong. This is not the department’s case in the present matter.”

18. In view of the fact that the alleged offence took place on 28th April, 1987 and for the first time summons were issued to Appellant Parag Dalmia for appearance on 16th July, 2001 i.e. after more than 14 years, I am of the considered view that serious prejudice is caused to the Appellant in leading his defence. This is not a case of delay on account of the acts of the Appellants but because of a casual approach adopted by the Respondent. Hence Crl.A. 52/2011 is required to be allowed on this count.

19. In view of the aforesaid discussion, the impugned order dated 7th October, 2010 passed by the Appellant Tribunal for Foreign Exchange and order dated 25th May, 2010 of the Special Director of Enforcement qua the Appellants are set aside. The amount of Rs.65,000/- deposited by the Appellant Jai Hari Dalmia in Crl.A. 59/2011 in terms of order dated 14th March, 2011 passed by this Court is directed to be returned to the Appellant in Crl.A. 59/2011 with interest, if any, accrued thereon.

20. The Appeals and applications are disposed of accordingly.

(MUKTA GUPTA)
JUDGE

JULY 06, 2012
‘ga’