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

%   *Order delivered on: 18th February, 2015*

+   **Crl. M.C. No.4162/2009**

SANJAY MALVIYA ..... Petitioner
Through Mr.Manoj Singh, Adv. with Mr.Abhay Singh and Mr.Manu Dev Sharma, Advs.

versus

R.K. RAWAL CEO ENFORCEMENT DIRECTORATE
..... Respondent
Through Mr.Vineet Malhotra, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition has been filed by the petitioner under Section 482 Cr.P.C. for quashing of complaint i.e. CC No. 880/1 titled as "*Enforcement Directorate vs. Sanjay Malviya & Ors.*" and the summoning order dated 27th May, 2002 passed by the Additional Chief Metropolitan Magistrate under Section 56 of Foreign Exchange Regulation Act, 1973 (FERA) read with Section 49 (3) and (4) of Foreign Exchange Management Act, 1999 (FEMA) in view of judgment dated 21st April, 2009 passed by this Court in Writ Petition (Crl.) No.800/2002 titled as ***Devashis Bhattarcharya vs. Union of India***, 159 (2009) DLT 780.

2. Brief facts of the case are that Mahanagar Telephone Nigam Ltd (MTNL) filed a complaint with Special Cell, Lodhi Road, Delhi Police on 3rd May, 2000 alleging that Integrated Services Digital Network (ISDN) connection was given to 12 subscribers each at business premises of the companies at E-380 Greater Kailash, New Delhi to petitioner's company M/s Intergroup C& E Ltd. and another company at M-70 Greater Kailash belonging to co-accused Shri Arindam Ganguly.

3. The modus operandi as alleged by MTNL in the complaint was that one ISDN line was made a permanent channel at each of the above premises and thereafter by using sophisticated equipment international calls were being distributed to Delhi & nearby areas illegally through PSTN (Public Switch Telephone Network). One ISDN line has a bandwidth of 144 Kbps and this bandwidth was misused to make about 24 voice calls in one single ISDN call, which caused loss equivalent to the charges for 22 ISD calls to the Govt. of India in terms of foreign exchange. It was averred that the above mentioned act resulted in loss of approx. Rs.5 crore to Govt. of India in foreign exchange

4. On the basis of complaint FIR No.136/2000 under Section 420/120 B IPC was registered at P.S. Greater Kailash, New Delhi and on the basis of the allegations, the police collected evidence in the case above.

5. Thereafter, as it is alleged by the petitioner, the respondent in a hast manner filed a Criminal Complaint No. 880/1 dated 27th May, 2002 under Section 56 of the FERA read with Section 49 (3) & (4) of

the FEMA before the Court of ACMM as initiation of prosecution under FERA was going to lapse on 31st May, 2002 due to the sun set clause incorporated in FEMA for violation of Section 16(1)(b), 4, 7, 29(1)(a) read with Section 64(2) & 68 of the FERA against the petitioner being one of the Director of Company namely M/s. Intergroup C & E Ltd. and other accused persons namely Devashish Bhattacharya, Deepak Gupta, and Arindam Ganguly, on the same set of facts and evidence collected and filed by the police.

6. The ACMM vide order dated 27th May, 2002 took cognizance of the offence under Section 56 of the FERA and summoned the accused. The present petition is filed assailing the summoning order dated 27th May, 2002 passed by the Trial Court.

7. The Metropolitan Magistrate trying the offence under Section 406/420/120B IPC in the Case FIR No. 136/2000 by order dated 24th July, 2004 held that there is no sufficient material on record to make out offence under Section 406/420/120B IPC against the petitioner and other co-accused and consequently discharged the petitioner and other co-accused for the said offences and only framed charges under Section 4 of Indian Telegraph Act, 1885.

8. It is stated that Devashish Bhattacharya, one of the co-accused in the abovementioned complaint case in similar facts to the present case filed a writ petition being W.P. (Crl.) No. 800/2002 before the Single Judge of this Court which was allowed and the proceeding arising out of Complaint case No. 880/1 dated 27th May, 2002 was quashed vide judgment dated 21st April, 2009.

9. Feeling aggrieved by the judgment dated 21st April, 2009, the respondent filed L.P.A. No. 638/2009 before the Division Bench of this Court which was dismissed vide judgment dated 21st November, 2011. No SLP was preferred by the respondent before Supreme Court and therefore the ratio of law laid down in ***Devashish Bhattacharya's*** case (supra) attained finality.

10. The summoning order issued against another accused namely Deepak Gupta in the above complaint case was also discharged by the Addl. Sessions Judge-01, New Delhi in Crl. Revision Petition No.49A/2002 vide judgment dated 7th February, 2012.

11. Feeling aggrieved by the summoning order dated 27th May, 2002 and cognizance taken by ACMM, the petitioner filed this present petition *inter alia* on the following grounds:-

i) The respondent did not observe the statutory and mandatory provisions of FERA before initiating the proceedings of criminal complaint against the petitioner as held by this Court for the co-accused of the present petitioner in Devashis Bhattacharya's case decided by this Court.

ii) That in terms with the proviso of Section 61(2) (ii) of the FERA, no magistrate shall take cognizance of the complaint if opportunity is not granted to the accused. In the present case, the respondent did not even mention full particulars of the date of notice and its service which are otherwise required to be mentioned in the complaint in order to satisfy the ACMM before taking cognizance of the offence.

iii) That opportunity notice dated 17th May, 2002 was served upon the petitioner upon 23rd May, 2002 giving the petitioner three days time to file reply, but the respondent filed a criminal complaint without having waited for the expiry of notice period i.e. 29th May, 2002 without considering the fact that the said notice was served on 23rd May, 2002 and 25th and 26th May, 2002 being a gazetted and public holiday, the three day period with effect from 23rd May, 2002 would have lapsed on or about 28th May, 2002.

iv) The respondent in a hast manner filed criminal complaint against the petitioner on 27th May, 2002 guided by the fact that in FERA sun-set period was due to expire on 31st May, 2002. Thus, the complaint filed by the respondent does not contain any averment as to the mode and manner of service of the notice upon petitioner and for this cognizance of the complaint taken by ACMM and issue of process against the petitioner vide the impugned order dated 27th May, 2002 is issued without any application of judicial mind and in routine manner as ACMM failed to appreciate mandatory and statutory provision envisaged in Section 61 (2) (ii) of the FERA.

v) The respondent in an arbitrary and mechanical manner filed the complaint against the petitioner without following the settled principles of natural justice which is the soul and spirit of Section 61 of the FERA.

vi) The complaint is malafide and is bad in law due to the fact that alleged violation of FERA is primarily based upon the complaint filed by MTNL to Special Cell, Delhi Police resulting into registration of FIR No. 136/2000 under Section 420/406/120B IPC read with Section 4 of Indian Telegraph Act, 1885 wherein the petitioner and other co-accused were discharged for the offences of Section 406/420/120B IPC by the MM vide order dated 24th July, 2004. It is stated that the case above and the complaint filed by the respondent rest on the same set of evidence.

12. In the present case admittedly the notice above was served upon petitioner on 23rd May, 2002 (Thursday) and petitioner had only one working day i.e. 24th May, 2002 (Friday) as 25th May 2002 (Saturday) and 26th May, 2002 (Sunday) were public holidays. It is submitted that period of three days was given in opportunity notice which did not include three working days. Second limb of the submission is that respondent without disposing the representation made and/ or even before receiving the reply submitted by petitioner filed the complaint against the petitioner on 27th May, 2002 which amounts to denial of principal of natural justice as envisaged in Section 61 (2) of the FERA.

13. The respondent stated that opportunity notice is served to petitioner as required in terms of proviso to Section 61 of the FERA however the compliant does not disclose the date of this notice and there is no mention of the reply submitted by the petitioner. It is apparent therefrom that complaint was drafted before or at the time of preparation of notice dated 17th May, 2002 and the same is filed

without considering the objections of petitioner in its reply dated 25th May 2002.

14. It is well settled law that where law mandates something to be done in a particular way, then it has to be done in that way or not at all is so well settled, that it needs no elaboration. The cognizance taken by ACMM is without jurisdiction and the process issued was illegal being in violation of proviso to Section 61 of the FERA and without application of judicial mind.

15. Learned counsel for the petitioner has referred paras 5, 8, 9, 11, 12, 13, 15, 16, 17, 27 and 38 to 52 of the Devashis Bhattacharya's case and submits that the present matter is wholly covered in the case as all the issues involved in the present matter has been discussed in the said referred paras and the prayer made in the present case is liable to be allowed.

16. FERA being a complete code in itself contains protection / mandatory provisions in compliance with principal of natural justice in form of proviso to Section 61 (2) which lays down a complete procedure to be adopted before initiation of prosecution, which is as follows :

"S. 61(2) No Court shall take cognizance----

(i) ....

(a). **********************************

(b).**********************************

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

(a) the Directorate of Enforcement; or

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

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

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

17. Therefore before initiation of proceedings under Section 56 of the FERA, an opportunity must be granted to the offender by the Magistrate before taking the cognizance of the offence and the Magistrate is under statutory duty to satisfy himself that an opportunity has been given to the offender before filing the complaint and if the offender failed to show any permission, complaints 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 that he has such permission. In other words, failure on part of the offender to show such permission to the Department is the genesis of the offence, which gives right to the department to initiate criminal prosecution and not the opportunity. Thus, the following are required for initiation of prosecution:-

a. Grant of opportunity before filing the complaint

b. Disposal of opportunity given to offender regarding having such permission or not from the RBI, if not,

c. Initiation of criminal prosecution and taking of cognizance by the Magistrate in view of the opportunity given to the offender.

18. In the present case, statutory requirement of issuance of notice under proviso of Section 61(2)(ii) of the FERA, its date and manner as well as the failure to consider the petitioner's reply has resulted in manifest error in the exercise of jurisdiction by ACMM . The order taking cognizance in the instant case and issuance of summons is contrary to law.

19. Reference is made to Section 10 of General Clauses Act, 1897 in respect to computation of time for complying with opportunity notice dated 17th May, 2002 served on 23rd May, 2002. Furthermore, Rule 3 of FERA provides method for service of directions, orders or notices made or issued under FERA or under any order or notification made thereunder, provides as follows:-

> "A direction, order or notice made or issued under the Act or these rules or any order or notification made thereunder shall be served on any person in the following manner, that is to say------
>
> (a) by delivering or tendering it to that person or to his duly authorized agent; Or
>
> (b) by sending it to him by registered post with acknowledgment due to the address of his place of residence of his last known place of residence or the place

where he carries on, or last carried on, business, or personally works, or last worked, for gains; or

(c) If it cannot be served in any of the manners aforesaid, by affixing it on the outer door or some other conspicuous part of the premises in which that person resides or is known to have last resided or carries on , or last carried on business, or personally works or last worked for gain and the written report whereof should be signed by two persons."

20. It is averred by the petitioner that in terms of Rule 3(a) of the FERA it received notice on 23rd May, 2002 and sent his reply dated 25th May, 2002 by Speed Post and Registered Post on 25th May, 2002 and 27th May, 2002, respectively, which did not even find mentioned in the complaint filed by respondent on 27th May, 2002 which shows that complaint was drafted even before dispatch and without waiting for the period granted in the opportunity notice the respondent filed the complaint in a haste manner being premature and the cognizance taken is bad in law.

21. It is contended by the respondent that the Enforcement Department on 17th May, 2002 straight away without adhering to Rule 3 of FERA resorted to clause (c) of Rule 3 affixed the opportunity notice upon the address of the petitioner hence compliance of Section 61 (2) is complete and cognizance was rightly taken by the trial court.

22. It is further contended that the instant case is not covered by Devashish Bhattacharya's Case, and is covered by ***"Ranjit Raj & Ors. Vs. Sanjay Mishra &Anr."*** 165 (2009) DLT 614**.**

23. In reply to the contentions of the respondent, the petitioner submits that respondent did not follow the procedure and manner prescribed under the rules above and allegedly affixed the opportunity notice upon the address of petitioner upon which the petitioner is not even residing and respondent having knowledge about the correct address of petitioner did not served him there. The correct address where petitioner is residing is duly found mentioned itself in the opportunity notice but was not served upon the same (opportunity notice -Annexure P3). Furthermore, the said opportunity was also not served in any manner upon the business address of the petitioner duly available with the respondent. It is the case of the petitioner that the factum of alleged mode of service of opportunity notice on 17th May, 2002 is not mentioned even in the list of documents filed along with complaint filed before the trial court of the petition nor the same is mentioned in the counter affidavit filed by respondent before this Court. The manner in which the respondent claiming service of the opportunity notice upon the petitioner is doubtful.

24. The issue of opportunity notice and service thereof in the present case is also discussed by this Court in paras 15-30 of ***Devashish Bhattacharya's*** case (supra) and ratio of law laid down therein is applicable to the present case.

25. With regard to second contention of the respondent, the ratio of law laid down in judgment ***Standard Chartered Bank vs. Directorate of Enforcement*** (2006) 4 SCC 278 (Para 10,11,12) in respect with Section (2) of the FERA considered by this Court in

"***Ranjit Raj & Anr. Vs. Sanjay Mishra & Ors***"; 165 (2009) DLT 614. is not applicable to the present case for reasons stated by the petitioner as below:-

(i) That the facts of ***Standard Chartered Bank's*** case (supra) is different as in the said case the officials of the bank filed a Writ Petition assailing the constitutional validity of Section 50,51, 56 and 68 of the FERA seeking a writ of prohibition against department from initiating any proceedings against them .

(ii) The Supreme Court in ***Standard Chartered's*** case (supra) did not discuss the nature and scope of notice issued under Section 61 (2) of the FERA as held in ***Ranjit Raj's*** case (supra), on the contrary the Supreme Court held therein that scope and ambit of Section 61 is controlled by Section 61 itself and hence declined to issue writ of prohibition.

(iii) This Court in para 18 of the judgment in ***Ranjit Raj's*** case (supra) distinguished the facts of ***Devashish Bhattacharya's*** case (supra), which is applicable to the present case.

(iv) It is not held in any of the judgments relied upon by respondent that cognizance can be taken by Magistrate without compliance of giving opportunity or making enquiry as held in ***Standard Chartered Bank's*** case (supra).

26. Thus impugned order of cognizance and summoning of petitioner by ACMM vide order-dated 27th May, 2002, is illegal and is against the settled law and is liable to be quashed as the petitioner was not given opportunity as envisaged in law under Section 61 of

the FERA which is apparent from the fact that complaint was filed and initiated in a haste manner before the ACMM even before the expiry of the period of opportunity granted to petitioner and the Trial Court in utter ignorance of the right given to the petitioner under Section 61 (2) and the bar imposed upon. The Trial Court thereby upon taking cognizance, issued process against the petitioner, which is apparent from the fact that the trial court did not even record in the impugned order about the fulfillment of statutory and mandatory requirement of Section 61 (2) of the FERA.

27. In the complaint neither any date of service of opportunity notice is given nor any proof of service to effect is filed by department in support of the complaint did not mention the factum of compliance with Section 61 (2) and only gave date of the notice in the complaint. The respondent in para 5 at page 22 of complaint simply stated that one opportunity notice and Show Cause Notice dated 4th April, 2002 was served upon the petitioner which means an opportunity under Section 61 (2) by affixation but no service report along with the same was filed at the time of initiation of proceedings before the trial court till date. On 17th May,2002 the respondent served the opportunity notice by way of affixing the same at a address given therein where the petitioner is not even residing despite the fact that the respondent was having the knowledge of present address of the petitioner where he is actually living which is also mentioned in the opportunity notice which reflects no proper care is taken to serve the notice in accordance with prescribed in Rule 3 of the FERA which clearly prescribe the mode and manner of service of notices issued under

the FERA and therefore cannot be considered as a proper service of the notice of opportunity.

28. With regard to Show Cause Notice for adjudication proceedings dated 4th April, 2002, which was served upon the petitioner on 22nd August 2002 i.e. after filing of the complaint, which was replied by petitioner vide reply dated in 19th September, 2002.

29. It is admitted fact that no proof of service of notice was filed by the respondent at the time of filing the complaint on 27th May, 2002 to establish that an opportunity in terms with Section 61 (2) was given to the petitioner and the petitioner failed to respond the same by showing that it has permission from the RBI or not making him liable for prosecution under Section 56 of the FERA.

30. In view of the above facts as well as the legal bar imposed in proviso to Section 61 of the FERA, is ought to have satisfied himself at the first instance before issuance of the process about compliance of proviso to Section 61 (2) about the factum of opportunity given to the accused and his satisfaction to this effect must be there before taking cognizance against the petitioner in exercise of his legal duty, as there is a statutory bar imposed upon the ACMM from taking cognizance. If the trial court would have exercised his legal duty diligently in terms of Section 61 (2) of the FERA the cognizance could not have been taken for want of granting an opportunity to the petitioner, as done by the trial court in a mechanical manner.

31. Therefore, it is apparent on the face of record that summoning of the petitioner in a mechanical manner is bad in law and is liable to

be set aside. The impugned order dated 27th May, 2002 is accordingly quashed by allowing the present petition.

32. No costs.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 18, 2015