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

Judgment delivered on: 09 March, 2016

+ **CRL.M.C. 3003/2002**

M/S NATIONAL FERTILISERS LTD.

..... Petitioner

Represented by: Mr. Dinesh Mathur, Senior
Advocate with Mr. Ghanshyam
Joshi and Mr. Chirag Joshi,
Advocates.

Versus

ENFORCEMENT DIRECTORATE

..... Respondent

Represented by: Mr. Rajesh Manchanda and
Mr. Rajat Manchanda, Advocates.

AND

+ **CRL.M.C. 5093/2003**

ARUN K. MAITRA & ORS.

..... Petitioners

Represented by: Mr. Rajiv Khosla, Advocate.

Versus

ENFORCEMENT DIRECTORATE

..... Respondent

Represented by: Mr. Rajesh Manchanda and
Mr. Rajat Manchanda, Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. By way of the present petitions filed under Section 482 Cr.P.C. petitioners seek directions thereby quashing of criminal complaint filed by

respondent Enforcement Directorate against the petitioners. The petitioners also seek directions to quash the order dated 30.05.2002, whereby they have been summoned.

2. Since both the petitions have arisen from the impugned order dated 30.05.2002 and issues are same, therefore, these petitions are being decided by this common judgment.

3. Crl. M.C. 3003/2002 has been preferred by a Company, i.e., M/s. National Fertilizers, a Public Sector Undertaking of the Government of India (hereinafter referred to as the petitioner company), whereas Crl. M.C. 5093/2003 has been preferred by employees of above named Company.

4. It is important to note that vide orders dated 03.10.2002 and 16.12.2003 proceedings against the petitioners have been stayed by this Court.

5. The facts of the cases in brief are that petitioners company deals in fertilizers, heavy chemicals and their by-products including manufacturing and distribution and in case of necessity arises for the country, the Company was authorized to import such items from any country outside India.

6. Mr. Dinesh Mathur, Id. Sr. Counsel appearing on behalf of the petitioners company and Mr. Rajeev Khosla, Id. Counsel appearing for the petitioners employees submitted that the complaint in question was filed during the sunset period, i.e., in the year 2002 alleging therein that in the year 1995, the petitioners employees along with other co-accused persons

while working in State Bank of India ('SBI') violated the provisions of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA') as the petitioners company while acting as a canalizing agency for import of fertilizers entered into a contract with one Turkish Company namely M/s. Karsan Ltd. for supply of 200000 Metric Tons of Urea and made full advance payment to them to the tune of US\$ 38 million without either obtaining any prior permission of the Reserve Bank of India ('RBI') or any guarantee from an International Bank of repute situated outside India to safeguard their money. The said Company was obliged to comply with these requirements for any payments exceeding US\$ 5000. Similar allegations are against the SBI. Accordingly, the petitioners company as well as SBI Officers allegedly were made liable under Section 56 of FERA and its employees become vicariously liable for the alleged acts of the said Company under Section 56 read with Section 68 of FERA. The petitioners were also sought to be made liable under Sections 6 (4) & (5), 8 (1),(3) & (4), 9(1)(f)(i) and (3), 49, 64(2) and 73 (3) read with Section 68 of FERA.

7. Ld. Sr. Counsel further submitted that the complaint is contrary to the investigation and chargesheet filed by the CBI in case bearing No.RC-3A/96-ACU-1. The CBI, in fact, found that the petitioners company was the victim of the conspiracy of the accused therein punishable under sections 120B/201/409 and 420 of IPC and Section 13 (2) read with Section 13 (1) (c) and (d) of Prevention of Corruption Act. Some of the petitioners employees therein were placed in column no. 2 of the chargesheet filed by CBI in above-mentioned FIR and have been cited as witnesses while remaining petitioners employees found no mention at all

in the chargesheet. Thus, the present case is completely opposed to the findings reached by the CBI. It cannot, therefore, be comprehended, how when one investigation agency had already investigated the facts and circumstances which amounts to the allegations in the instant case, that too in the year 1996 itself. Hence, the institution of the complaint in question is nothing but an attempt to abuse the process of law and appears to be based on frivolous charges and is an afterthought complaint.

8. Ld. Sr. Counsel further submitted that the petitioners employees have been arrayed as witnesses in CBI case mentioned above. Some of them have already been testified while others are now reluctant to do so, although their testimonies in that matter are of critical importance as they feared that the same would most certainly be used in some manner against them in the impugned case. Thus, CBI case shall be prejudiced and its progress may be hampered and hence, the prosecution of the petitioners employees would not be in the interest of justice.

9. Ld. Sr. Counsel further submitted that the effect of instance of prosecution would also prejudicially exposed the petitioners employees to testimonial compulsions which is prohibited by virtue of Article 20 (3) of the Constitution of India, 1950, which gives protection against self-incrimination, as upheld by the Supreme Court in the case of ***M.P. Sharma Vs. Satish Chandra, [1954] 1 SCR 1077.***

10. Further submitted that Id. Trial Court was mislead by the respondent as they suppressed the material fact that the petitioners company had initiated Arbitration proceedings for recovery of cheated/defrauded money

from M/s. Karsan and its Banks. The petitioners company has kept the Reserve Bank apprised of its steps to recover its amount of money from the aforesaid Company and its Banks. The proceedings contemplated in the instant case would also possibly have adverse consequences on the execution proceedings initiated by the petitioners company in different countries for bringing back the amounts paid in respect to contracts for the import of urea, and in fact negates the efforts of the petitioners Company and its Officers in recovering the money siphoned out by the actual culprits, i.e., the accused in the CBI case.

11. Ld. Sr. Counsel further submitted that as regards the petitioner company, a bare reading of the allegations shows that the Provisions of Section 56 of FERA along with alleged offences/violations are not even protected as none of the violations are alleged out against the petitioners company. Perusal of aforesaid Section shows that it is the duty of authorized agent that before engaging/undertaking in any transaction involving in foreign exchange, it has to take care of the directions and instructions issued by the RBI from time to time and in necessary cases it has to obtain previous permission of the Reserve Bank of India. Thus, in all the cases, it is the liability, responsibility and duty of the authorized dealer that he should be satisfied as to the genuineness of the dealings in foreign exchange and if not so satisfied, report to the RBI for its necessary directions. The authorized dealer in the instant case was the SBI and the petitioners company and its employees had neither any role to play nor any duty to perform in the light of the provisions of the aforesaid Sections. Furthermore, there is no question of attaching vicarious liability on the

petitioners for the actions of any entity of the Government including SBI.

12. Further there are no specific allegations in the complaint against the petitioners employees, except vague and general allegations that the petitioners were liable and responsible for the work of the petitioners company. Thus, the complainant failed to demonstrate the existence of nexus between the petitioners employees and commission of alleged offence under Section 56 read with Section 68 of FERA.

13. Ld. Sr. Counsel further submitted that the respondent Enforcement Directorate has filed the present complaint after a long delay of 7 years and that too in a matter which has already been investigated thoroughly by another Central Investigating Agency and after investigation chargesheet has been filed and the case is pending for trial.

14. It is pertinent to mention here that in affidavit dated 20.02.2010 filed by Sh. K.C. Abraham, officer of respondent / Department in Crl. M.C. 5093/03, there is one letter dated 12.06.1996 of Reserve Bank of India requesting the respondent / Department to coordinate with CBI in respect of the investigation in the afore-noted matter. The said fact has been concealed by the respondent in the complaint in question. Moreover, in Snap Inspection Report of RBI annexed with the said affidavit it is mentioned that Assistant General Manager / In-charge of concerned Branch with Manager (IP) are squarely responsible for the remittance. Therefore, on concealment of facts itself, the complaint and impugned order deserve to be quashed. To strengthen his arguments ld. Counsel have relied upon a case of *MCD Vs. State of Delhi and Anr. 2005 SCC*

(Cri.) 1322, wherein it is held as under:

“21. This apart, the respondent did not also disclose the fact in the criminal revision filed before the High Court that he has also been convicted in another Criminal Case No. 202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. Thus, the contesting respondent has come to the High Court with unclean hands and withholds a vital document in order to gain advantage on the other side. In our opinion, he would be guilty of playing fraud on the Court as well as on the opposite party. A person whose case is based on falsehood can be summarily thrown out at any stage of the litigation. We have no hesitation to say that a person whose case is based on falsehood has no right to approach the court and he can be summarily thrown out at any stage of the litigation. In the instant case, non-production of the order and even non-mentioning of the conviction and sentence in Criminal Case No. 202 of 1997 tantamounts to playing fraud on the Court. A litigant who approaches the Court is bound to produce all documents which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party. The second respondent, in our opinion, was not justified in suppressing the material fact that he was convicted by the Magistrate on an earlier occasion. Since the second respondent deliberately suppressed the crucial and important fact, we disapprove strongly and particularly, the conduct of the second respondent and by reason of such conduct, the second respondent disentitled himself from getting any relief or assistance from this Court. We, however, part with this case with a heavy heart expressing our strong disapproval of the conduct and behavior but direct that the second respondent to pay a sum of Rs.10,000 by way of cost to the appellant herein.”

15. Ld. Counsel further submitted that petitioner nos. 4 & 5 in Crl. M.C.

5093/2003 have died; and petitioner nos. 1, 3, 6 & 7 have retired in the year February, 2009, 2002, April, 2011 and March, 2010 respectively. However, their retirement benefits, i.e., gratuity, encashment of earned leave etc. have been withheld by the Company due to the pendency of the complaint before the Trial Court. Rest of the petitioners, i.e., petitioner nos. 2, 8 and 9 are serving and now they are at the fag end of their service. They have been denied of their promotions due to the pendency of the complaint whereas their juniors have been promoted. As such, the petitioners are facing day-to-day humiliation due to their non-promotion and being made accountable to their junior officers.

16. To strengthen his arguments, Id. Senior Counsel for the petitioner has relied upon a case of ***G. Sagar Suri Vs. State of Uttar Pradesh & Ors., 2000 (2) SCC 636***, wherein it is held as under:

“7. It was submitted by Mr. Lalit, learned Counsel for the second respondent, that the appellants have already filed an application in the Court of Additional Judicial Magistrate for their discharge and that this Court should not interfere in the criminal proceedings which are at the threshold. We do not think that on filing of any application for discharge. High Court cannot exercise its jurisdiction under Section 482 of the Code. In this connection, reference may be made to two decisions of this Court in Pepsi Foods Ltd. v. Special Judicial Magistrate : 1998 Cri LJ 1 and Ashok Chaturvedi v. Shitul H. Chanchani: 1998 Cri LJ 4091 , wherein it has been specifically held that though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court under Section 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against them when no offence has been made out against them and still

why must they undergo the agony of a criminal trial.”

17. On the other hand, Mr. Rajesh Manchanda, Id. Counsel appearing on behalf of the respondent submitted that the petitioners have violated the Procedures and Rules while signing the contract and accepting the terms of payment and delivery of the Urea and by paying the entire amount of US\$ 3.80 Lakh and US\$ 37.62 million respectively in advance through SBI, New Delhi, to Pamuk Bank Ankara, Turkey and Pictet Bank, Geneva, without prior approval bereft bank guarantee and insurance policy. The aforesaid remittance was made by the authorized dealer, i.e, SBI, who failed to comply with the conditions of RBI as prescribed in Paragraph 7A (1) (d) of the Exchange Control Manual, 1993. According to said provisions, if any amount of advance remittance exceeds US\$ 5000, a guarantee from the International Bank of repute situated outside India should be obtained. Thus, the petitioners have violated the aforesaid provisions as the specific import to India should be made within 3 months from the date of remittance. Moreover, the importer ought to have given an undertaking to furnish documentary evidence of import within 15 days from the close of relevant period. The contract in question was signed in violation of the aforesaid provisions. In addition, special permission was also required from RBI before acquisition of payment of aforesaid foreign exchange of US\$ 3.80 Lakh and US\$ 37.62 million without the same being backed by the requisite International Bank of repute guarantee. The petitioners company did not obtain any permission from RBI and even the SBI did not obtain any permission. In this manner, the aforesaid remittance was issued in violation of relevant provisions of FERA.

18. Ld. Counsel further submitted that the respondent made a relevant enquiry and investigation, and collected evidence, related documents and statements under Section 39 and 40 of FERA and on the basis of aforesaid, a complaint was filed against the accused persons including the petitioners.

19. As per Section 68 (1) of FERA, in an offence committed by a Company, every person in-charge and responsible to the Company for the conduct of its shall be deemed to be guilty.

20. Ld. Counsel submitted that the petitioners have committed an offence in collusion with other co-accused persons in a very calculative manner which has caused loss of foreign exchange amounting to US\$ 38 million to the Country. The aforesaid amount was remitted in advance in violation of the procedure, provisions and rules by the accused persons as the alleged Urea was not received against the said amount. Thus, the Trial Court has legally and justifiably passed the order dated 30.05.2002 and summoned the accused persons on the basis of violations made by them. The investigation conducted by CBI is independent for the offences other than the offences committed by the accused persons in the present complaint and as such there is no binding effect in the conclusion of investigation conducted by CBI and respondent. The Foreign Exchange Regulation Act, 1973, being a special Act containing comprehensive provisions of investigation, enquiry and trial for offences under the Act and the provisions of Cr.P.C. will not be applicable to the extent of provisions of FERA. The officers of the respondent are empowered to conduct the investigation pertaining to offence under FERA.

21. Ld. Counsel further submitted that alleged Arbitration proceedings and trial of CBI, case wherein the petitioners are stated to be the witnesses, creates no bar to prosecute them by filing complaint under Section 56 of FERA. No adverse inference can be drawn against the respondent for prosecuting the petitioners and other co-accused persons, who have committed offence in the present case. As per law, the Company is a juristic person and can act upon for officers responsible and liable for the work and as such the company as well as its officers are liable to be prosecuted.

22. The CBI investigated the matter and filed the chargesheet under Section 120B read with Section 409 IPC against the petitioners, whereas in the instant case, the petitioners have violated Sections 6 (4) & (5), 8 (1)(3)&(4), 9(1)(f)(i) &(3), 49, 64 (2) & (3) read with Section 68 of FERA punishable under Section 56 of FERA.

23. Ld. Counsel further submitted that only summons have been issued, charges are yet to be framed. Therefore, the petitioners have surpassed the procedure and the present petition is liable to be dismissed being premature. Moreover, the petitioners having violated the due procedure are liable for penal action under FERA.

24. To strengthen his arguments, Id. Counsel for the respondent has relied upon a case of ***Balasaheb @ Ramesh Laxman Deshmukh Vs. State of Maharashtra and Anr. 2010 XII AD (S.C.) 372*** wherein it is observed as under:

“6. We are of the opinion that for invoking the

constitutional right under Article 20(3) a formal accusation against the person claiming the protection must exist. Simply because the Appellant figures as the accused in the complaint case, a blanket protection as claimed by him cannot be granted. Reference in this connection can be made to a decision of this Court in the case of Raja Narayanlal Bansilal v. Maneck Phiroz Mistry and Anr. : AIR 1961 SC 29, wherein it has been held as follows:

“The effect of this decision thus appears to be that one of the essential conditions for invoking the constitutional guarantee enshrined in Article 20(3) is that a formal accusation relating to the commission of an offence, which would normally lead to his prosecution, must have been levelled against the party who is being compelled to give evidence against himself; and this conclusion, in our opinion, is fully consistent with the two other decisions of this Court to which we have already referred.”

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9. As observed earlier the Appellant is not an accused in the Police case and in fact a witness whose statement was recorded during the course of investigation under Section 161 of the Code of Criminal Procedure. In the Police case he utmost can be asked to support the case of the prosecution but no question intended to incriminate him can be asked and in case it is done the protection under Article 20(3) of the Constitution shall spring into action. What question shall be put to this Appellant when he appears as a witness is a matter of guess and on that basis he does not deserve the blanket protection under Article 20(3) of the Constitution. Even at the cost of the repetition we may observe that in the Police case when he appears and asked to answer question, the

answer whereof tends to incriminate him, he can refuse to answer the same pleading protection under Article 20(3) of the Constitution. In such eventuality the Court would decide the same. Therefore, at this stage the blanket protection sought by the Appellant is not fit to be granted.”

25. Further relied upon case of **M. Prabhulal Vs. Assistant. Director, Directorate of Revenue Intelligence, AIR 2003, SC 4311**, wherein it is observed as under:

“4. Assailing, therefore, the statements made by each of the appellant under Section 67, it was vehemently contended by Mr. R.K.Jain, Senior Advocate that the statements on basis whereof the appellants have been found guilty are not voluntary and thus their conviction cannot be sustained. The statements of the appellants have been recorded by officers of Department of Revenue Intelligence who are not police officers within the meaning of Section 25 of the Evidence Act, 1872. The confessional statements recorded by such officers are admissible in evidence. Learned counsel though not questioning the admissibility of the said statements contends that the same were obtained by torture and harassment and are involuntary and, therefore, the conviction of the appellants cannot be sustained. The delay in recording of the statements of the appellants is put forth as one of the reasons to support the contention that the statements were involuntary. Learned counsel submits that after apprehending truck and the car on the road at about noon time on 15th May, 1993, the seizure of the narcotics had taken place between 6 to 9 p.m. at the Customs House and the statements of accused Nos.2, 3 and 6 were recorded on the next day i.e. on 16th May, 1993 and the statement of accused No. 1 was recorded on 17th May, 1993. It may be noted that accused Nos.2, 3 and 6 were apprehended on the spot on 15th May, 1993 whereas accused No. 1 was arrested on 16th May, 1993. The courts below on appreciation of evidence have neither doubted the recovery nor has found

the statements to be involuntary.”

26. Also relied upon case of ***Mohit @ Sonu and Anr. Vs. State of U.P. and Anr. AIR 2013 SC 2248***, wherein it is observed as under:

“23. So far as the inherent power of the High Court as contained in Section 482 of Code of Criminal Procedure is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that inherent power of the court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged.”

27. Further relied upon case of ***State of Karnataka v. L. Muniswamy and Ors. (1977) 2 SCC 699***, wherein it is observed as under:

“7. The second limb of Mr. Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned Counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the CrPC, 2 of 1974, provides that:

If, upon consideration of the record of the case and the documents submitted therewith, and after

hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

This section is contained in Chap. XVIII called "Trial before a Court of Sessions." It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of the new Code, which corresponds to Section 561-A of the Code of 1898, provides that:

Nothing in this Code shall be deemed to limit, or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution,

the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.”

28. I have heard Id. Counsel for the parties and perused the record.
29. The issues arising for consideration in the present petition are that:
 - I. Whether on the basis of the facts stated in the complaint and the documents annexed thereto the petitioners can be held responsible for the contravention of the provisions of FERA alleged to have been committed by the Company and the accused persons merely being officers of the Company can be said to be in-charge and responsible for the conduct of the business of the Company as provided under Section 68 of FERA?
 - II. Whether petitioners can be held liable for the act of remittance of Foreign Exchange which has been made by the State Bank of India in the capacity of the Authorized dealer appointed by the Reserve Bank of India under Section 6 of FERA, 1973?
 - III. Whether there is any material on record suggesting that the petitioners connived with and abated the officials of State Bank of India in the said transaction and took / or obtained any monetary or other benefits?
30. There is no material on record or any specific allegation made against any of the petitioners in the complaint to suggest that even any of

these petitioners were involved remotely in the said offence being in-charge or responsible for the affairs of the Company and in that capacity conspired or abetted the offence. The allegations made by the respondent are vague and general and do not bring the petitioners under the ambit of Section 68 of FERA, which is evident from the contents of the complaint in Para 4 (xiv), which reads as under:

“.....Accused no. 4-13 were the officers working in Corporate office and Marketing Division looking after imports with NFL. All the aforesaid accused persons were liable and responsible for the work of M/s. NFL”. The same Para further state that “as these officers were working the Corporate office and Marketing Division looking after imports with the Company and all were liable and responsible for the work of the said Company and therefore were well conversant with the procedures and documentations for import and finance”.

31. After going through the complaint, it is established that except the allegations noted above, no averment is made in whole of the complaint against the petitioners. The only allegation made against one of the petitioners, namely, P.K. Kataria is in respect of directions being given by D.S. Kanwar ED(M) of petitioners company regarding sending letter to SBI to remit advance of US\$ 3.80 Lakh to M/s. Karsan Ltd. for obtaining Lloyds Insurance Cover, which was merely 1% of the contract value. However, the said amount has been returned back and could not be remitted and is lying with the SBI as Fixed Deposit.

32. The aforesaid allegations are general in nature and under no circumstances can bring the petitioners under the ambit of Section 68 of FERA, which prescribed that “*where a person committing contravention*

of any of the provisions of the Act or any rule, direction or order made thereunder in a company, every person who at the time when the contravention was committed was in-charge and was responsible to, the company for the conduct of business of the Company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.” The respondent, however, without ascertaining the facts about the same, without any documentary or other proof stated in the complaint that accused nos. 1 to 21 be prosecuted and punished under the law being officials of the Company and authorized agent, i.e., SBI for the offence committed by authorized agent as they were in-charge and responsible for the conduct of business of the petitioners company and SBI at that time.

33. For the sake of convenience, Section 68 of FERA is reproduced as under:

“68. Offences by companies.—

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section

(1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(i) “company” means anybody corporate and includes a firm or other association of individuals; and

(ii) “director”, in relation to a firm, means a partner in the firm.”

34. On perusal of the aforesaid provisions, it is established that respondent failed to consider the important aspects of Section 68 of FERA while naming the petitioners as accused without considering three important ingredients as prescribed under Section 68 of FERA. Further failed to bring or produce any document on record to show that all the petitioners were in-charge and responsible for day-to-day affairs of the Company at the time when offence was committed. Also failed to consider the fact that the petitioners company who was made accused no. 1 in the complaint is a Company registered under the Companies Act, 1956, and is governed by Memorandum and Articles of Association of the Company, which are statutory and public documents and the powers and duties of officials flow from the Articles of Association. The respondent deliberately did not file the said documents as the same would have

absolved all the petitioners from the offences covered under Section 68 of FERA. The respondent also failed to produce any document on record showing delegated powers to any of the petitioners as in-charge and responsible for the day-to-day affairs of the Company. Had the respondent placed the Memorandum and Articles of Association of the Company before the Court of ACMM, New Delhi, then the proceedings as provided under Articles 79 and 82 of the Memorandum and Article of Association of the Company would have pinpointed as to who were the officers in-charge and responsible for the day-to-day affairs of the company at the time of commission of the said offence. These facts along with documents filed and investigation made would have made it clear that only the Managing Director and Executive Director, namely, C.K. Ramakrishnan and D.S. Kanwar respectively, were in-charge and responsible for the affairs of the Company. This may be corroborated from their statements made under Sections 39 and 40 of FERA, which are admissible in law and the same also gets corroboration from the contents of the complaint as well as from the investigation conducted by CBI in case No. RC-3A/96-ACU-1, which after thorough investigation made said C.K. Ramakrishnan and D.S. Kanwar as the accused and absolved the petitioners from any connivance/conspiracy or abetment, however, made them as State witnesses.

35. The provisions of Articles 79 and 82 of the Memorandum and Article of Association of Petitioners Company will make it explicitly clear that only the Managing Director or the Executive Director/Functional Directors are responsible for the conduct and management of business of

the Company. The said Articles are being reproduced as under:

Article 79: Appointment of Managing Director.

“For the conduct and Management of the business of the Company in general and subject to the control and supervision of the Board of Directors, the President may empower the Chairman nominated under Article 92 to exercise the functions of the Managing Director or appoint one of the Directors to be the Managing Director who will be the Chief Executive Officer of the Company. The President may also appoint one or more of the Directors to be the Executive Director / Functional Director or Executive Directors / Functional Directors. The functions, duties and responsibilities of an Executive Director / Functional Director shall be such as may be determined by the President from time to time on the recommendations of the board of Directors.”

The Chairman so empowered or the Managing Director or an Executive Director / Functional Director or Executive Directors / Functional Directors so appointed shall be whole time employees of the Company and shall be paid such salary and Allowances as may be fixed by the President.

Article: 82 which deals with Delegation of Powers.

“The Board may, from time to time, delegate such of its powers as it may think fit and as are not required to be exercised by the Board at a meeting to the Standing / Executive Committee of Directors, Chairman, the Managing Director, an executive Director, a Functional Director, subject to such terms, conditions and restrictions as the Board may think fit to impose and the Board may, from time to time, revoke, amend or vary all or any of the powers as delegated.

“To Managing Director as Chief Executive of the Company may from time to time sub-delegate his powers

to the Functional Directors and /or General Managers and / or to any other officers of the Company as he may deem it fit”.

36. It is evident from the above that the said powers under Article 79 were vested only with above two persons and were not delegated to anyone under Article 82 as no documents in this respect has been filed in the Court. Moreover, the respondent has admitted in Para XIV of the complaint that accused nos. 2 and 3 were the CMD and AD (M). The said fact has been confirmed by CBI in the chargesheet filed by it in case RC-3A/96-ACU-1. As per the chargesheet, the investigation has revealed that C.K. Ramakrishnan was functioning as Managing Director and D.S. Kanwar was functioning as Executive Director (Marketing, Personnel and Administration) in the petitioners company during the period 1995-1996.

37. It is not in dispute that Petitioners Company is the complainant in the aforesaid case, whereas petitioners employees were witnesses therein.

38. The CBI after its depth investigation, filed the chargesheet against the aforesaid officers that they are responsible for contravention of rules and procedure, conspiracy and misappropriation of their funds as they were having domain over the funds of the petitioners company. Therefore, by no stretch of imagination, it can be construed that the petitioners committed any act making them liable under Section 68 of FERA.

39. As per the investigation of CBI, the contract was recommended by D.S. Kanwar on 31.10.1995 and approved by C.K. Ramakrishnan on 01.11.1995 and in terms of approved proposed contract, D.S. Kanwar gave instructions to remit 1% of the contract value in ‘Insurance Cover’ which

would show that it was only these persons who were at the helm of affairs of the petitioners company. This fact is further proved from the contents of Para X of the complaint that D.S. Kanwar sent a letter in the shape of directions on 13.11.1995 to SBI for releasing 99% of the contract value to M/s. Karsan by 14.11.1995 “positively” while the letter of petitioners company dated 10.11.1995 signed by Deepak Lal, accused no.4 in the complaint (since died) seeking the permission of RBI as required under the law, to remit the contract value was still under consideration. The said fact establishes that D.S. Kanwar, who had domain over the fund of the company, was interested to get the remittance made under all circumstances even without following due process as required by law. Accordingly, the officials of SBI, the authorized agent for dealing of remittance of foreign exchange, followed the directions of D.S. Kanwar and effected the remittance on 14.11.1995.

40. It is pertinent to mention here that as per the CBI, no role has been assigned to any of the petitioners. However, by the depth investigation it is established that the offence was committed by aforesaid two officers of the petitioners company in connivance with other co-accused. Even otherwise, the petitioners could not play any role in remittance and functioning of approval of foreign exchange which was done by authorized agent, i.e., SBI, as appointed by the RBI. However, in case of any conspiracy in remittance of amount, the offence may be looked into under the provisions of Section 68 of FERA only in respect of those persons who were in-charge and running the affairs of the Company at that time and had colluded with certain officials of the authorized banks which were

responsible for remittance of the foreign exchange.

41. As per the complaint, the respondent had failed to show any abetment on the part of the petitioners who were neither Managing Directors, Directors, Executive Directors nor having any power or domain over the funds nor instructed the SBI to remit the foreign exchange.

42. On the other hand, one of the subordinate officers, namely, Deepak Lal (since died) having equivalent position with petitioner nos. 1, 6 and 7 and was also made one of the accused by respondents, though requested the SBI to seek permission from RBI vide his letter dated 10.11.1995 for remittance of funds as per law, but the said request was deliberately ignored by SBI under the directions of D.S. Kanwar, AD (Marketing), who vide his subsequent letter dated 13.11.1995 directed the SBI to remit the amount positively by 14.11.1995.

43. From the facts recorded above, it is clear that petitioners are not covered under Sub-section (ii) of Section 49 of FERA for abetting or not complying with all or any such conditions.

44. It is important to note that summoning order dated 30.05.2002 was issued just two days prior to the repealing of the FERA Act as on that day hundreds of such complaints were filed and process was to be issued in all those complaints before 01.06.2002 when new Act in the shape of Foreign Exchange Amendment Act, 1999 (FEMA) was to come into force in place of FERA, 1973. The said summoning order itself shows that the Trial Court has not considered the aspect of criminal liability of the petitioners under Section 68 of FERA having position of subordinate officers other

than Managing Directors, Directors and Executive Directors as per the provisions of Section 68 of FERA.

45. Ld. ACMM failed to consider that vicarious liability is an exception to the normal rule of criminal jurisprudence and no person can be held criminally liable for the actions of another.

46. The Supreme Court in the case of ***Monaben Ketanbhai Shah & Anr. Vs. State of Gujarat and Ors. (2004) 7 SCC 15*** observed as under:

“7.....The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.”

47. Further in the case of ***K.K. Ahuja Vs. V.K. Vora and Anr. (2009) 10 SCC 48***, the Supreme Court observed as under:

“17.....the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company' (listed in para 14 above),

then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in-charge of the day to day management of the company' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company', he cannot be made vicariously liable under Section 141(1) of the Act.

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20 (iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, be averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

21.....the trauma, harassment and hardship of a criminal proceeding in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of Section 138 read and Section 141 of the Act are not fulfilled.”

48. It is pertinent to mention here that in Para 4 (xiv) of the complaint, it is stated that while effecting the advance remittance, the SBI failed to comply with the conditions prescribed by RBI as laid down in Para 7A (10)(d) of the Exchange Control Manual, 1993, wherein if any amount of advance remittance exceeds US\$ 5000, a guarantee from the International Bank of repute situated outside India should be obtained. Further stated, special permission was required to be obtained from RBI before acquisition and payment of the above said foreign exchange. Therefore, major role has been attributed to SBI and the only role attributed to the

petitioners employees is under the provisions of FERA for which all the documents and investigations lead to the conclusion pointing out the role of C.K. Ramakrishnan and D.S. Kanwar who acted upon without having any resolution, passed by the Board of Directors of petitioner company, in their favour.

49. It is not out of place to mention here that RBI in its letter dated 12.06.1996 requested the respondent on the lines that *“since the matter is already under investigation of CBI, we request you to kindly coordinate with them.”* Further, vide its letter dated 13.06.1996, RBI handed over the Snap Inspection Report dated 27.05.1996 and also other relevant papers to CBI in this regard. The Snap Inspection Report held the SBI responsible for remittance. However, it is nowhere mentioned therein that any of the petitioners had played any role in the remittance.

50. As per Section 2(b) of FERA, SBI is the ‘authorized’ dealer to deal in all foreign currencies as provided under Section 6 (2) (ii) of FERA. As provided under Section 6 (4) of FERA, the SBI in all its dealings in foreign exchange and in the exercise and discharge of powers and of the functions delegated to it under Section 74 of FERA complied with such general or special directions or instructions as the RBI made from time to time. Moreover, without the permission of the Reserve Bank, an authorized dealer shall not engage in any transaction involving any foreign exchange which is not in conformity with the terms of the authorization under this Section.

51. It is important to note that the respondent had admitted in Para 4 of

the complaint that instructions were given by PMO to accused C.K. Ramakrishnan, Managing Director of the petitioners company by calling him in the PMO to help accused Sanjeeva Rao, the relative of the then Prime Minister. The said averments of the complaint shows that the said contract was being dealt with at the highest level, i.e., at the level of the then Prime Minister as his relative Sanjeeva Rao kept on meeting accused C.K. Ramakrishnan between April to October, 1995 due to same, a contract was signed in July, 1995, which was not acted upon in its place. Therefore, another contract was signed on 09.11.1995. This fact has been corroborated with the statements of C.K. Ramakrishnan and D.S. Kanwar recorded under Section 40 of FERA.

52. In view of the facts recorded above, it is apparently clear that the respondents deliberately and willfully ignored the investigation conducted by CBI whereby, chargesheet at Para 2 confirmed that C.K. Ramakrishnan and D.S. Kanwar who were functioning as Managing Director and Executive Director respectively in the petitioners company were responsible having domain over the funds of the company during the year 1995-96 and they dishonestly in connivance with officials of M/s. Karsan Limited, a Turkish Company and other accused persons, directed the bank officers to remit US\$ 38 million to the account of M/s. Karsan Limited. Moreover, the facts of the investigation have been concealed by the respondent before the Trial Court and since the sunset period was expired, therefore, hurriedly without going through the material on record, the Trial Court had issued the summons against the petitioners.

53. It is further important to note that vide order dated 03.10.2002 and

16.12.2003, this Court stayed the proceedings against the petitioners company and the petitioners employees respectively.

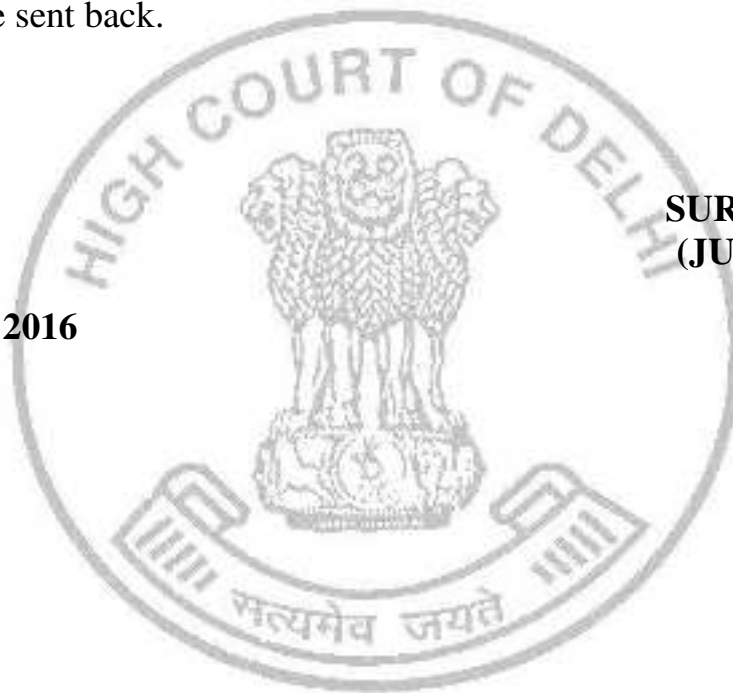
54. In view of the facts and law discussed above, I hereby quash the summoning order dated 30.05.2002 and consequently, the complaints filed against the petitioners are also quashed.

55. Accordingly, these petitions are allowed.

56. TCR be sent back.

MARCH 09, 2016

jg/sb



**SURESH KAIT
(JUDGE)**