

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 02.11.2016

DATE OF DECISION: 06.01.2017

CORAM

**THE HON'BLE MR.SANJAY KISHAN KAUL, THE CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE R.MAHADEVAN**

C.M.A.No.914 of 2000

T.T.V.Dhinakaran .. Appellant

-VS-

Special Director,
Enforcement Directorate,
VI Floor, Janpath Bhawan,
Janpath, New Delhi. .. Respondent

Appeal filed under Section 54 of the Foreign Exchange Regulation Act, against the order dated 05.05.2000 made in Appeal No.51/98 on the file of the Foreign Exchange Regulation Appellate Board, Ministry of Law, Justice and Company Affairs, New Delhi.

For Appellant : Mr.B.Kumar, Sr.Counsel for
Mr.M.A.Jenasenan

For Respondent : Mr.G.Rajagopal, Sr.Counsel for
Mr.M.Dhandapani

JUDGMENT**R.MAHADEVAN, J.**

This appeal has been filed challenging the order dated 05.05.2000 made in Appeal No.51/98 on the file of the Foreign Exchange Regulation Appellate Board, Ministry of Law, Justice and Company Affairs, New Delhi.

2.The facts leading to the filing of this appeal are as under:

(i)Originally, a total penalty of Rs.31 Crores has been imposed on the appellant for contraventions of the provisions of Sections 8(1), 9(1)(a) and 14 of the Foreign Exchange Regulation Act, 1973 ("FERA" in short), by way of an adjudication order passed by the Special Director, Enforcement Directorate (Foreign Exchange Regulation Act), New Delhi, the respondent herein, in Order No.SDE(APK)/111/03/98 dated 06.02.1998. This adjudication order was passed following the issue of show-cause notice T-4/26-D/95/(SCN-VIII) dated 29.01.1996. In addition to the imposition of a penalty of Rs.31 crores, the appellant was directed to repatriate to India and offer for sale to an authorised dealer in India, the foreign exchange amounting to USD 62,61,313/- held by him outside India together with interest and any other income that might have accrued thereon.

(ii)The said show-cause notice was issued on the allegations that a person resident in India other than an authorised dealer in

foreign exchange, without the general or special permission of the Reserve Bank of India -

(a) otherwise acquired foreign exchange totalling to USD 1,04,93,313/- from persons other than authorised dealer in foreign exchange and thereby contravening the provisions of Section 8(1) of the FERA;

(b) deposited the said foreign exchange amount of USD.1,04,93,313/- in the current account No.3001-8937 of M/s.Dipper Investments Ltd., a company incorporated in the British Virgin Islands, with Barclays Bank, Sutton, United Kingdom and thereby lent the said foreign exchange to a person not being authorised dealer, thus violating Section 8(1) of the FERA.

(c) made payments totalling to USD 1,04,93,313/- to the credit of Dipper Investments Limited, a person resident outside India thereby contravening the provisions of Section 9(1)(a) of the FERA;

(d) owned the said amount of USD 1,04,93,313/- but failed to offer it for sale or cause it to be offered for sale to an authorised dealer in foreign exchange in India within three months from the date of his becoming owner thereof, and thereby contravening the provisions of Section 14 of the Act r/w Central Government's Notifications dated 15.06.1977 (GSR 839) and 06.07.1978 (GSR 996) as amended;

(e)transferred and also made payments of foreign exchange of Pound Sterling 43,23,557/- to M/s.Meer, Care and Desai, Pound Sterling 90,000/- to M/s.Westback Limited and Pound Sterling 23,685.90 to an undisclosed account in the Bank of Ireland thereby contravening the provisions of Sections 8(1) and 9(1)(a) of the FERA.

(iii)The adjudicating authority found the appellant guilty on all counts in respect of the alleged transactions, but the authority reduced the amount involved in the charge, ie., USD 1,04,93,313/- to USD 62,61,313/- and imposed a penalty of Rs.25 crores for the first and second charges, Rs.2.5 crores each for the third and fourth charges respectively, and again a cumulative penalty of Rs.1 crore for the last charge. The reduction of the amount involved in the charge to USD 62,61,313/- was made for the reason that the material on record does not however, categorically bring out that the other monies included in the enclosure to Barclays Bank's letter dated 04.08.1994 were also credited to Dipper Investment Account.

(iv)Being aggrieved against the order imposing penalties as stated supra, the appellant filed an appeal before the Foreign Exchange Regulation Appellate Board, New Delhi. The appellant also filed a petition for dispensing with pre-deposit of the penalty.

3.(i)The Foreign Exchange Regulation Appellate Board ("appellate authority" in short), upon hearing the oral submissions made on both sides, asked the parties to mutually discuss the feasibility of moving the Supreme Court, to obtain an early disposal of the appeal pending in that Court against the judgment of this Court in HCP No.240 of 1996 that had been brought to the notice of the Board by the respondent. A suggestion was also put to them that, in the alternative, they may consider the feasibility of obtaining an appropriate direction from the Supreme Court. This suggestion was made in view of the contentious stand taken by the parties as to the applicability, relevancy and effect of this Court's judgment on the issue whether the appellant, at the relevant point of time, was a person resident in India, which was also a crucial issue before the adjudicating authority. The appellate authority was of the view that the necessity of dealing with that issue has arisen in view of the fact that the findings of the judgment on the said issue have not been referred to in the order passed by the adjudicating authority, though the High Court rendered its judgment much earlier. But no action was taken by the parties as to the suggestions put forth by the appellate authority.

(ii)Before the appellate authority, it was argued on behalf of the appellant herein that all the charges framed against the appellant are

based on the premise that the appellant was, during the relevant point of time, a person resident in India. Therefore, it was argued that if he is not found to be a person resident in India during the relevant period, he will have to be exonerated of all the charges and consequently, the order passed by the adjudicating authority would be liable to be set aside. On the other hand, if he is found to be a person resident in India, further examination would be needed as to whether he had acquired the said foreign exchange and thereafter lent the same and also transferred it as alleged, in violation of Section 8(1) of the FERA and as to whether he is guilty of the other charges alleged.

(iii) In connection with the question of the above legal status, it is seen from the records that after initiation of the adjudication proceedings by issue of the show-cause notice as stated, the appellant was put under detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act ("COFEPOSA Act" in short). The detention order was challenged before this Court in HCP No.240 of 1996 and this Court rendered its judgment in March 1996, in which it was held that since the adjudication proceedings had already been initiated, the detaining authority had arrived at the subjective satisfaction. There is no whisper about that observation in the order passed by the

adjudicating authority, but it had come to the same conclusion on that issue as arrived at by this Court. It was argued on behalf of the respondent that the Board is bound by the findings given by the High Court in respect of the legal status of the appellant by relying on this Court's judgment as a "judicial precedent". Refuting the said submission, it was argued on behalf of the appellant that the said judgment of this Court does not constitute a bar or preclude the Board from reaching a conclusion on the legal status of the appellant different from the one arrived by this Court, as this Court, in that HCP, has not decided the question as to whether or not the appellant is a non-resident Indian and that the point raised and argued is entirely different in its nature and substance. He further argued that any decision in a proceedings where a preventive detention order has been challenged, cannot be a precedent in any adjudicating proceedings where the issue is to be decided on objective standards after following the procedure similar to that of a trial.

(iv)The appellate authority, in the facts and circumstances of the case, held that the view taken by this Court in HCP No.240 of 1996 in respect of the legal status of the appellant at the relevant point of time, is binding and hence it should not proceed to redetermine that issue. Further, the appellate authority held that the only question that remains to be examined is whether the High Court

has expressed its opinion on the question of legal status of the appellant or not. It was finally observed by the Board that in the judgment made by this Court in the HCP, it was concluded by this Court that the appellant was not a non-resident Indian at the relevant point of time. Stating that the Board is bound to go by the opinion of this Court in the HCP, the appellate authority upheld the findings of the adjudicating authority in that respect. With regard to other acts and omissions attributed to the appellant, the appellate authority has examined the provisions of sections 8(1) and 9(1)(a) of the FERA and came to the conclusion that if the allegations emanate from the fact that the appellant had received 21 drafts totalling to USD 1,04,93,313/-, then the reason recorded by the adjudicating authority for reducing the said amount would not be tenable, since the adjudicating authority has not separately considered the evidence and has made no attempt to separately arrive at its findings in respect of every charge. With regard to the grounds taken by the learned counsel for the appellant ie., judicial bias, denial of due opportunity and non-application of mind, in support of his plea that the order of the adjudicating authority has to be set aside, the appellate authority proceeded to examine the evidences and also the legal position envisaged in the judgment of the Bombay High Court in State of Maharashtra v. Dr.Mahesh P.Mehta, reported in 1995 Cr. L.J.453, that in respect of a situation where a person found to be in possession of

any foreign exchange fails to prove that the foreign exchange came into his possession lawfully, it has to be concluded that he acquired the foreign exchange in violation of Section 8(1). Thereafter, the appellate authority observed that the company, ie. Dipper Investments Limited was not floated for the purpose of conducting the business as alleged and that it was merely a shell company with no business activity at all.

(v) Finally, it was held that the appellant did acquire the foreign exchange of the draft for his own benefit as owner thereof thereby violating Section 8(1) of the FERA and that he temporarily lent the said foreign exchange to Barclays Bank by depositing the said amount with them thereby contravening Section 8(1); that he assumed the ownership of the said amount again by instructing the bank to transfer the entire amount lying to the credit of that account, in different amounts, to M/s.Meer, Care & Desai, M/s.Westback Ltd and to the Bank of Ireland, thereby contravening Section 8(1). It was further held that all these acts have been committed by the appellant only in his individual capacity as owner of the foreign exchange, though he used the name of the company, ie., Dipper Investments Limited. Thus, it was held that the appellant did acquire the foreign exchange aggregating to USD 62,61,313/- in violation of Section 8(1). The appellate authority held that the said foreign exchange

amounting to USD 62,61,313/- is adequately established by the evidence on record and the findings of the adjudicating authority.

(vi)As regards the charge of lending the said foreign exchange to Barclays Bank in violation of Section 8(1), the appellate authority has held that the documentary evidence with regard to opening of the account and crediting the said amount by way of 13 drafts, substantiates the said charge.

(vii)With regard to the charge of contravention of Section 8(1) on the allegation that he transferred the said foreign exchange, it was held that since there is no factual allegation in the show-cause notice in that regard to show any independent transaction, the said charge has not been made out.

(viii)Further, having considered the legal position of Section 9(1)(a), it was held that the charge of contravention of Section 9(1) on the allegation of making payment of the said foreign exchange to the credit of Dipper Investments Limited, is totally misconceived and hence the findings of contravention of Section 9(1) on the part of the appellant were set aside.

(ix)It was also held that since the appellant did acquire the

foreign exchange of USD 62,61,313/- in violation of Section 8(1), the contravention of Section 14 on the part of the appellant stands proved as it was not disputed that the said foreign exchange was not brought into India as required by the notification referred to in the show-cause notice.

(x)As regards the charge of contravention of Section 8(1) on the allegation that the appellant transferred a total amount of Pound Sterling 44,37,242.90, in view of the evidence of the two letters written by the appellant on 15.08.1994 and 16.08.1994 instructing the bank to transfer the said amount and it is also corroborated by the further evidence of transcript of bank accounts which shows that the said foreign exchange was in fact transferred as per the instruction of the appellant and the account was closed, the said charge was upheld.

(xi)Further, while examining the findings on the similar charge in respect of the amount of USD 62,61,313/-, the finding of contravention of Section 9(1) in respect of the amount of Pound Sterling 44,37,242.90 was set aside.

(xii)Thus the appeal was dismissed, except as regards the findings of contravention of Section 9(1)(a) and the penalties

imposed therefor. The findings in respect of contraventions of Sections 8(1) and 14 in respect of the amount of USD 62,61,313/- were upheld and so the penalties imposed therefor. The finding of contravention of Section 9(1)(a) in respect of the said amount of USD 62,61,313/- and the penalty imposed therefor were set aside. The finding of contravention of Section 8(1) in respect of the total amount of Pound Sterling 44,37,242.90 was upheld, but the finding of contravention of Section 9(1)(a) in respect of the said amount was set aside. Accordingly, the penalty to the extent of Rs.50 lakhs only for contravention of Section 8(1) in respect of the amount of Pound Sterling 44,37,242.90 was upheld, while the penalty of the remaining amount of Rs.50 lakhs apportioned for contravention of Section 9(1)(a) was set aside. Accordingly, the order of the adjudicating authority was upheld with the modification only to the effect that the appellant is exonerated of the charges of contraventions of Section 9(1)(a) and the consequent reduction to the extent of Rs.3 crores in the total amount of penalty imposed under the order made by the adjudicating authority.

(xiii)The appellant was directed to pay the total penalty amount of Rs.28,00,00,000/- (Rupees Twenty Eight Crores Only) within a period of 45 days from the date of receipt of the order, in the manner indicated in the order passed by the adjudicating authority, failing

which the respondent was given liberty to recover the same in accordance with law.

(xiv)Challenging the said judgment, the present appeal has been filed by the appellant.

4.When this appeal came up before this Court on 15.06.2016, the learned Additional Solicitor General of India pointed out that no question of law has been framed in the appeal, even though the appeal is maintainable only on a question of law, for which the learned senior counsel appearing for the appellant submitted that he is placing the proposed questions of law. But, on a perusal of the same, this Court was of the view that they were not really the questions of law. Thereafter, the learned senior counsel for the appellant suggested the questions of law as under:

(i)Has not the Appellate Board committed serious error of law in stating that even if the adjudicating authority had investigated the large portion of the case and is shown as a prosecution witness in the criminal complaint filed by the department on the same set of facts, still its adjudication order would not stand vitiated on account of bias?

(ii)Has not the Appellate Tribunal abdicated its primary duty by not deciding the crucial question of

whether at the relevant time, the appellant was a non-resident Indian?

(iii) If the appellant was a non-resident Indian, then the charge under Section 8(1) of FERA would become unsustainable?

(iv) Has not the Appellate Board committed error in law that after stating that the basis of the order passed by the adjudicating authority and the show-cause notice itself were vitiated, proceeded to decide the appeal on an entirely different basis, overlooking the appellant was never called upon to answer such charge in the show-cause notice?

(v) Is the major premise on the basis of which the adjudicating authority has levied the huge penalty that if a person acts as a Director of a company he is the owner of the funds of the company such that it would amount to "otherwise acquiring" within the meaning of Section 8(1) of the Act, is tenable in law?

(vi) Is not the order passed by the appellate authority liable to be set aside solely on the ground that the judgment had been delayed by one year and two months after the arguments are over and consequently the order under appeal could not be valid in the eye of law?

5. The learned senior counsel appearing for the respondent filed

objections to the questions of law re-framed by the appellant, in which it is stated that the first question of law is without any substance as the adjudicating authority has rejected the same on the ground that he never investigated the matter. With regard to the second question as to whether the appellant is an Indian Resident or not, he submitted that the appellate authority had relied upon the judgment of this Court in HCP No.240 of 1996, and correctly held that the appellant is a "Resident Indian" and hence the same does not require any interference. With regard to the other questions of law, the learned counsel submitted that in view of the clear findings of fact recorded by the appellate authority regarding Section 52(4) of the FERA, no further questions will arise in the present case. Thus, he submitted that no questions of law will arise and on that score, the appeal has to be dismissed.

6. When this appeal came up before this Court on 29.06.2016, this Court framed the following questions of law:

(a) Whether the Appellate Tribunal was right in relying upon the judgment made in HCP No.240/1996 to conclude that the appellant was a resident within India and whether the Appellate Tribunal ought to have decided the legal status of the appellant independently before charging him under Sections 8(1) and 9 of the FERA Act?

(b) Whether the Appellate Tribunal having found that

on evidence, the charges held not proved, can exercise the suo motu powers under Section 52 and reframe the charges sitting in appeal and whether new evidence can be accepted by the Tribunal?

(c)Whether the order of the adjudicating authority is vitiated on account of bias, violations of principles of natural justice and fair play as he was a part of the investigating team and a witness in the criminal case initiated by the Department?

(d)Whether Section 3(1) of the Companies Act, which confers a separate legal entity to the company, absolutely dissolves the liability of the Director of a company under every circumstances?

7.Mr.B.Kumar, learned senior counsel appearing for the appellant submitted that the order passed by the appellate authority is against law and materially irregular and the same has resulted in serious miscarriage of justice. He submitted that the order passed by the appellate authority is liable to be set aside solely on the ground that the judgment had been delayed by one year and two months after the arguments were over and hence the order under appeal is not valid in the eye of law.

8.The learned senior counsel appearing for the appellant further submitted that the appellate authority has not decided the main

question, ie., whether at the relevant period, the appellant was a non-resident Indian or not? The reasons assigned for not deciding this issue is unsustainable and legally impermissible. The appellate authority ought to have analysed the material placed before it and given a finding on this crucial question, which is the basis for the entire proceedings. He further submitted that the appellate authority has failed to note that enough and proper opportunity for hearing had not been granted by the adjudicating authority.

9.The learned senior counsel appearing for the appellant has contended that the question of bias, put forth by the appellant was not considered by the appellate authority. He further submitted that in respect of the very same subject matter of the memorandum, a criminal complaint has been launched before the Court of Economic Offences, Egmore, Chennai and the said complaint has been taken on file and numbered as C.C.No.27 of 1996. In the said complaint, the 14th witness is shown as Shri.A.P.Kala, to prove the documents received from the foreign country, and that investigations were carried out under his instructions. Thus, Shri.A.P.Kala participated in every facet of investigation and hence he is disqualified from sitting as an adjudicating authority to decide about the validity of the investigation documents gathered. In other words, it is his submission that the proceedings initiated by the authorities is purely a bias and it

violates the principles of natural justice, since the person who was the investigating authority, later turned to be the person adjudicating the issue on hand. The learned senior counsel further stated that in the case of allegations of bias, it has to be seen whether there is substantial possibility of bias animating the mind of the Judge against the aggrieved party, and such reasonable apprehension must be based on cogent materials and must be in consonance with thinking of a reasonable man and the said principle cannot be attracted in vacuum.

10. The learned senior counsel for the appellant has also contended that the adjudicating authority had materially erred in stating that the judgment of the High Court having been brought to its attention, has to be relied upon, and that the judgment of this Court has not decided any question as to whether the detenu was a non-resident Indian at the relevant time, or not. In this respect, it is also his submission that the appellate authority had failed to see that the judgment given in the habeas corpus proceedings could never ever be relied upon in an adjudication proceedings which requires decision on objective standards and on evaluation of the evidence before it. Thus, according to the learned senior counsel appearing for the appellant, the order passed in a habeas corpus proceedings will not form part of the case on hand, and that with regard to preventive

detention, no adjudication had happened so far. In other words, it is his contention that for a case relating to violation of Foreign Exchange Regulation Act, placing reliance upon a preventive detention order will not be sufficient and proper. With regard to the finding that M/s.Dipper Investments Limited is in no way connected to the appellant and the dispute raised with regard to the registration of the company and the further allegation that for claiming non-resident Indian, no application was filed, the learned senior counsel for the appellant submitted that it is a jurisdictional fact and it is in no way connected to the offence framed under the Foreign Exchange Regulation Act. The learned senior counsel further stressed that the appellant is a Director, who only intends to become a non-resident Indian. Further, urging that the appellant is a permanent resident of Singapore, the counsel submitted that the offence relating to Income-tax Act in respect of the case on hand have nothing to do with the Foreign Exchange Regulation Act.

11.The learned senior counsel appearing for the appellant further submitted that the appellate authority is primarily concerned with the order of adjudication and if it is found to be erroneous, unreasonable and unsustainable, the only course open to the appellate court is to set aside the same and remit it for de novo enquiry.

12.The learned senior counsel for the appellant relied upon the following judgments:

(a)Judgment of the Hon'ble Supreme Court in Bhagwandas Fatechand Daswani and others v. HPA International and others, reported in (2000) 2 SCC 13 and the Division Bench judgment of this Court in Jones Investment Co. Inc. v. Intellectual Property Appellate Board, reported in 2015-4-L.W.30, in support of his contention that long delay in delivery of judgment gives rise to unnecessary speculations in the minds of parties to a case, in which case, the order impugned has to be set aside.

(b)Judgments of the Hon'ble Supreme Court in Shivsagar Veg. Restaurant v. Asst. Commissioner of Income-tax and another, reported in 2008 SCC OnLine Bom 1088 and in Devang Rasiklal Vora v. Union of India and others, reported in [2004(2) Mh.L.J. 208], to state that the order passed by the appellate authority suffers from non-application of mind and non-consideration of material on record and therefore bad in law.

(c)Judgment of the Hon'ble Supreme Court in Ram Parkash v. Union of India and others, reported in 2014 SCC OnLine P&H 860 and the unreported judgment of a Division Bench of this Court in R.Suresh

v. Deputy Director, Enforcement Directorate, Chennai, made in C.M.A. No.614 of 2008 dated 06.08.2015, to state that a witness cannot be the adjudicator and that the domestic enquiry must be held by an unbiased person who is unconnected with the incident so that he can be impartial and objective in deciding the subject matters of enquiry. He also relied on the judgment of the Hon'ble Supreme Court in Asia Tobacco Co. Ltd. v. Union of India and another, reported in 1988 (33) ELT 279 Mad, in support of his contention that the proceedings initiated by the authorities is purely a bias and it violates the principles of natural justice, since the person who was the investigating authority, later turned to be the person adjudicating the issue on hand.

(d) Judgment of the Hon'ble Supreme Court in State of U.P. vs. Mohammad Nooh, reported in AIR 1958 SC 86, in support of his contention that two roles could not obviously be played by one and the same person. In the present case, the 14th witness before the investigating authority, later turned to be the adjudicating authority. Therefore, according to the learned senior counsel, it violates the principle of "unconnected persons cannot be permitted to participate in the adjudication proceedings".

(e) Judgment of the Hon'ble Supreme Court in Union of India

and others v. Sanjay Jethi and another, reported in (2013) 16 SCC 116, in which it has been held that rational approach has to be adopted by the Court keeping in view the basic concept of legitimacy of interdiction in such matters, since challenge of bias, when sustained, makes the whole proceeding or order in question a nullity, same being coram non judice.

13.The learned senior counsel appearing for the respondent submitted that there are four sets of communications available with the Department and all these communications strengthen the case of the prosecution. According to the prosecution, no statement was recorded by Mr.A.P.Kala, who had investigated the case. Further nobody was examined to that effect. He further submitted that the appellant miserably failed to establish a single ground of bias. In this regard, the learned senior counsel for the respondent relied on the decision of the Hon'ble Supreme Court in State of Haryana v. Bhajan Lal reported in AIR 1992 SC 604 and submitted that if the allegations are bereft of truth and made maliciously, and when there are only allegations and recriminations with no evidence, the result of the investigation cannot be anticipated, to render a finding on the question of mala fides on the materials available at present. According to the learned senior counsel for the respondent, the

appellant claimed not a citizen before the Division Bench of this Court in the Habeas Corpus Petition. In the election petition filed by him, he claimed as an Indian citizen. But before the Foreign Exchange Regulation authorities, he claimed as if he is a non-resident Indian. Thus, dual stand has been taken by the appellant, which is not permissible under law, according to the learned senior counsel for the respondent.

14. In respect of bias, as put forth by the appellant, the learned senior counsel for the respondent submitted that this aspect was already rejected by the adjudicating authority and therefore the argument of bias is without any substance. In this regard, on the question whether the adjudicating authority investigating the case had participated in the investigation, it is submitted that the adjudicating authority has recorded in its order that it has not issued any summons nor recorded any statement nor participated in any searches. Thus, submitting that he only generally monitored the investigation and carried out correspondence, it is contended that the participation of the adjudicating authority in the investigation, cannot be termed as bias. Added further that even assuming that the adjudicating authority had participated in the investigation, considering the nature of the powers conferred on the Authority under

Foreign Exchange Regulation Act and the manner it has been done, the same does not require any interference.

15. In respect of the issue as to whether the appellant is an Indian citizen or not, it is submitted by the learned senior counsel for the respondent that the appellate authority had correctly relied upon the judgment of the Division Bench of this Court in HCP No.240 of 1996, wherein it was held that the appellant is a resident Indian. With regard to the so-called transactions referred to in the show-cause notice, and the contention that the said transactions were done only as a Director of M/s. Dipper Investments Limited and not as individual capacity, it is submitted that only after examining the entire evidence on record, the adjudicating authority came to the conclusion that the monies belonged to the appellant and therefore, the argument of the appellant in this respect, is without any substance.

16. The learned senior counsel appearing for the respondent further submitted that the appellate authority being the first forum of appeal, has suo motu powers under Section 52(4) of the FERA and the appellate authority-Board may consider the charges that could be made and sustain if any on the basis of evidence on record and give its own finding. This submission has been made in respect of the allegation that some materials not referred to in the show-cause

notice have been taken into consideration by the appellate authority. With regard to delay and denial of opportunity, as alleged by the appellant, it is submitted that there is no delay as alleged by the appellant and that enough opportunities have been given to the appellant.

17. Stating so, the learned senior counsel for the respondent prayed that this appeal has to be dismissed.

18. Heard the learned counsel on either side and perused the materials available on record carefully.

19. Even though many points were raised by the appellant challenging the impugned judgment, it is suffice to answer the questions of law framed by this Court. Accordingly, we will take up the questions of law one by one.

20. The first question of law is as to whether the appellate authority was right in relying upon the judgment made in HCP No.240/1996 to conclude that the appellant was a resident within India and whether the Appellate Tribunal ought to have decided the legal status of the appellant independently before charging him under

Sections 8(1) and 9 of the FERA. In this regard, it has to be noted that the appellant was put under detention under the provisions of the COFEPOSA Act and the said detention was challenged in HCP No.240 of 1996 before this Court, by his wife. In the judgment rendered in the Habeas Corpus Petition, one of the subjective satisfaction arrived at by the detaining authority was that adjudication proceedings on the charges contained in the show-cause notice had already been initiated. Even though it was decided in the judgment passed in the Habeas Corpus Petition that the appellant was not a person residing outside India, there is no whisper about the said judgment or finding in the order passed by the adjudicating authority, but the adjudicating authority also came to the conclusion that the appellant was not a person residing outside India. It is only a question of fact. Even though the appellate authority had stated that it relies upon the judgment made by this Court in the Habeas Corpus Petition, the finding given by the adjudicating authority as well as by this Court in the Habeas Corpus Petition, remains one and the same, that too when the judgment passed in the Habeas Corpus Petition has not been taken into account by the adjudicating authority. It is also seen from the records that the appellant claimed not a citizen before the Division Bench of this Court in the Habeas Corpus Petition. In the election petition filed by him, he claimed as an Indian citizen. But before the Foreign Exchange Regulation authorities, he claimed as if

he is a non-resident Indian. Thus, the appellant has taken different stands, which are not permissible under law. In such view of the matter, this Court deems it fit only to hold that the order passed by the appellate authority in this respect does not require any interference. Accordingly the first question of law is answered against the appellant.

21. The second question of law is as to whether the appellate authority, having found that on evidence, the charges held to be not proved, can exercise the suo motu powers under Section 52 and re-frame the charges sitting in appeal and whether new evidence can be accepted by the appellate authority. It is no doubt true that the appellate authority has observed that the findings and conclusions arrived at by the adjudicating authority do not logically follow, on several crucial matters, and that no reasons have been stated as to how those conclusions would emerge from the evidence on record. But the appellate authority has powers under Section 52(4) of FERA for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer. Section 52 of the FERA deals with Appeal to Appellate Board. At this juncture, it would be appropriate to extract Section 52(4) of FERA, which reads as under:

“(4) The Appellate Board may, for the purpose of

examining the legality, propriety or correctness of any order made by the adjudicating officer under Sec.50 read with Sec.51 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.”

22. Thus, the appellate authority has powers under Section 52(4) to suo motu modify the order passed by the adjudicating authority under Sections 50 and 51. The appellate authority, viz. the Board is vested with the authority to pass any order that could be passed by the adjudicating authority. As per Section 52(3), the appellate authority can, after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against. The adjudicating authority as well as the appellate authority have also been granted powers under Section 53 to exercise any of the powers of the civil Court under the Civil Procedure Code to call for records and documents, summoning of witnesses, collect evidence on affidavits, etc. Therefore, it is well within the domain of the appellate authority to consider the evidence before it. Unlike the powers of the High Court under Section 54 where the scope of the appeal is restricted to questions of law, the appellate authority is entitled to evaluate the facts and the evidence under Section 52(3) and (4). Obviously, the appellate authority has to proceed only on the basis of

the evidence collected by the adjudicating authority, unless it relies upon a new evidence, of which the party was put on notice. In the present case, the appellate authority has rightly considered only the evidence that was considered by the adjudicating authority and no new material was placed or considered. It is also not the case of the appellant that the appellate authority has based its findings on some evidence, alien to the adjudication proceedings, without granting any opportunity. In the case on hand, the appellate authority had to proceed with the examination of the evidence in accordance with Section 52, as the findings and conclusions arrived at by the adjudicating authority did not logically follow. The appellate authority has also held that the primary burden of the findings rendered by the adjudicating authority would appear to be to deal with the points taken in defence and not to examine the evidence so as to find out as to how the charges can be substantiated on that evidence, and that the adjudicating officer assumed the allegations in the show-cause notice as self-evident of the charges. Hence, on that score, it became necessitated for the appellate authority to deal with the evidence for corroborating the same with the points taken in defence. It is also evident from Page-96 of the order of the appellate authority that the learned counsel for the appellant also rightly admitted that the Board has the authority to consider the matter afresh based on the evidence already collected. Therefore, the appellant cannot now question the

authority, which even otherwise, is well protected under Section 52(3) and (4). The reason for such appreciation of the evidence was necessitated because of the failure of the adjudicating authority to give a finding on the acquisition and ownership of the drafts, though evidence was available before him, and he had presumed the same to exist based on the subsequent acts of transfer and lending. It is pertinent to mention here that the appellate authority has put the appellant on notice, heard the counsel elaborately on all the issues, perused and discussed the evidence meticulously and modified the order by which the appellant has been exonerated of the charges under Section 9(1). One of the clinching finding recorded by the appellate authority is about the so-called meeting between the Directors of M/s.Dipper Investments Limited on 25.06.1994 in Singapore, on which date, the appellant was in India. The modus operandi and the plea of ownership of Mr.Desai over the funds has been negated by the appellate authority by giving its findings in detail at Page Nos.66 to 74 (Paragraph Nos.81 to 89), of the order, based on facts culled out from the documentary evidences. In the backdrop of the said observations, this Court deems it fit to answer the second question of law against the appellant.

23.The third question of law is as to whether the order of the adjudicating authority is vitiated on account of bias, violations of

principles of natural justice and fair play as he was a part of the investigating team and a witness in the criminal case initiated by the Department. There is no dispute about the legal point that a witness cannot be the adjudicator and the enquiry must be held by an unbiased person who is unconnected with the incident so that he can be impartial and objective in the enquiry. There is also no dispute in the law laid down by the Hon'ble Supreme Court in its judgment in *Asia Tobacco Co. Ltd. v. Union of India and another* (stated supra), which has been relied on by the learned counsel for the appellant in support of his contention that the person who was the investigating authority should not adjudicate the issue on hand, and if it is otherwise, it would violate the principles of natural justice. If a man is authorized to prosecute as well as to judge, prejudice would be caused. In such a case, the action would be hit by the cardinal principle enunciated in the latin maxim "Nemo judex in causa sua". But in the present case, Mr.A.P.Kala, who was the adjudicating officer, had not issued any summons nor recorded any statement or participated in any searches. He only monitored the investigation and exchanged correspondences, as is evident from the records. It also cannot be said that the adjudicating authority had some vested interest against the interest of the appellant so as to divert himself from the evidence to decide against the appellant. There is nothing on record to show that the adjudicating officer was prejudiced on the

subject matter, which reflected in the adjudication process or in the decision. Upon perusal of the records, we find that the appellant was given a fair opportunity. As found by the appellate authority, the guilt of the appellant was culled out only from the documentary evidence, and the entire statements of the other witnesses were discarded. Thus the plea of bias put forth by the learned senior counsel appearing for the appellant, will not hold any water. Though the principles enunciated in the other judgments relied on by the learned senior counsel for the appellant, in respect of bias, are not in dispute, the same will not apply to the case on hand. Further, the plea of bias loses its significance in the present case, since the appellate authority had independently examined the issues based on evidence on record, afresh. Thus, the third question of law is answered against the appellant.

24. The fourth and the final question of law is as to whether Section 3(1) of the Companies Act, which confers a separate legal entity to the company, absolutely dissolves the liability of the Director of a company under every circumstances. The doctrine of lifting the corporate veil is not alien to the process of administration of law and dispensation of justice. It is a principle borne out of necessity not only to safeguard the shareholders to the extent of their liability but also to identify the miscreants shielding their illegal acts under the name

of a company. In *Union of India v. ABN Amro Bank*, reported in (2013) 16 SCC 490, the Apex Court has held as under :

“43. We are of the view that in a given situation the authorities functioning under FERA find that there are attempts to overreach the provision of Section 29(1)(a), the authority can always lift the veil and examine whether the parties have entered into any fraudulent, sham, circuitous device so as to overcome statutory provisions like Section 29(1)(a). It is trite law that any approval / permission obtained by non-disclosure of all necessary information or making a false representation tantamount to approval / permission obtained by practising fraud and hence a nullity. Reference may be made to the judgment of this Court in *Union of India v. Ramesh Gandhi* [(2012) 1 SCC 476)].

44. Even in *Escorts case* [(1986) 1 SCC 264)], this Court has taken the view that it is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc. In *Escorts case*, this Court held as follows:

“90. ... Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated

companies are inextricably connected as to be, in reality, part of one concern.”

45. In *Vodafone International Holdings BV v. Union of India* [(2012) 6 SCC 613], this Court has taken the view that:

“277. ... Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction.”

This Court further held:

“280. Lifting the corporate veil doctrine can, therefore, be applied in tax matters even in the absence of any statutory authorisation to that effect.”

FERA (Amendment) Act 29 of 1993 has no effect on the principle of lifting the corporate veil and the question as to whether it was established so as to circumvent the provision of Section 29(1)(a) can always be examined.”

Therefore, the protection given to a company is not an absolute bar to proceed against the directors and it is to be decided on the facts of the each case put to test. In this regard, the appellate authority, after analysing the matter in detail, and also considering the evidence placed on record, came to the conclusion that the name of the company Dipper Investments Limited was used for obtaining the bank

drafts, opening an account in Barclays Bank, and for crediting the amount of drafts in that account and transferring the funds so credited to the accounts of Meer Care & Desai, Westback Ltd., and Bank of Ireland. There is also a clear finding that none of these acts could be attributed to the company and that there is no evidence that these were done in the course of company's business. It has also been further held that all acts of a corporate entity are to be done in the name of that entity, but does not necessarily follow that whatever has been done in the name of a corporate entity must be held to be the acts of that entity. After a threadbare analysis of the evidence on record, the appellate authority has held that there is no evidence of any concrete proposal, much less of commencement of any business abroad by the company. With regard to the plea that the funds in the name of the company belong to the company only and the Directors of the company are not the owners of such funds and that the order challenged before the appellate authority has been made on the basic misconception in failing to distinguish between the company as a legal entity and the character and capacity of the Directors of the company, it has been held by the appellate authority that what the appellant has assumed as Department's case in the show-cause notice is only a narration of the transactions, as appearing on the face of the documentary evidence, and the view that the Department has taken on that evidence is reflected in the charges made against the

appellant and their proposal to proceed against the appellant on those charges. Even though the show-cause notice does not spell out as to how the charges can be made out on the basis of the evidence as narrated, that has been done in the inquiry during the adjudication proceedings. In view of the clear finding given by the appellate authority that the various acts done in the name of the company could not be attributed to the company and that there is no evidence that these were done in the course of company's business, it is clear that the appellant is legally liable for those acts. Accordingly, the fourth and final question of law is answered against the appellant.

25. In the result, all the questions of law are answered against the appellant and in favour of the revenue. The impugned order passed by the Foreign Exchange Regulation Appellate Board in Appeal No.51/98 dated 05.05.2000 is confirmed and the Civil Miscellaneous Appeal stands dismissed. No costs.

Index : yes/no
Internet : yes/no

(S.K.K.,CJ.) (R.M.D.,J.)
06.01.2017

KM

To

1. The Special Director, Enforcement Directorate,
VI Floor, Janpath Bhawan,
Janpath, New Delhi.

2.The Chairman,
Foreign Exchange Regulation Board,
New Delhi.

THE HON'BLE CHIEF JUSTICE
AND
R.MAHADEVAN, J.

KM

Judgment made in
C.M.A.No.914 of 2000

06.01.2017

<http://www.judis.nic.in>