IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2017

ORDERS RESERVED DT:30.09.2016

ORDER DELIVERED DT:01.02.2017

CORAM:

THE HON'BLE MR.JUSTICE G.CHOCKALINGAM

Crl.R.C.No.935 of 2015

The Assistant Director,
Directorate of Enforcement,
Govt. of India, Ministry of Finance,
2nd & 3rd Floor,
Murugesa Naicker Complex,
No.84, Greams Road,
Chennai-600 006. : Petitioner/Complainant

Vs.

T.T.V.Dinakaran : Respondent/Accused

Prayer: This Revision is filed under Section 379 r/w 401 of Criminal Procedure Code, against the order, dated 18th May 2015 passed in Crl.M.P.No.524 of 2014 in E.O.C.C.No.84 of 2001 of the Additional Chief Metropolitan Magistrate (Economic Offences Court No.II), Egmore, Chennai 600 008.

For Petitioner : Mr.G.Rajagopalan
Additional Solicitor General
for Mr.M.Dhandapani
Special Public Prosecutor

For Respondent : Mr.B.Kumar
Senior counsel
for Mr.A.Asokan

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O R D E R

This petition is directed against the order passed in Crl.M.P.No.524 of 2014 in E.O.C.C.No.84 of 2001 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences Court No.II), Egmore, Chennai, dated 18.05.2015 discharging the respondent from the case.

2.The facts leading to the case are as follows:-

The petitioner/complainant preferred a complaint under Sections 8(1) and 9(1)(a) of the Foreign Exchange Regulation Act 1973, punishable under Section 56(1)(i) of the said Act

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r/w Sub Section 3(3) & (4) of Section 49 of the Foreign Exchange Management Act, 1999 before the Additional Chief Metropolitan Magistrate (E.O.II), Egmore, Madras-8 stating that the accused had acquired foreign exchange without previous general or special permission from the Reserve Bank of India during the year 1994/95 from persons not being authorised dealers in foreign exchange and deposited the amounts in a bank account outside India.

3.The trial court, after considering the evidences adduced on both sides and documents produced on the side of the complainant, passed an order on 18.05.2015 on the application filed by the respondent under Section 245(2) Cr.P.C. by discharging him stating that there is no sufficient material before this court in prima facie for framing charges against the accused under Section 8(1) & 9(1)(a) of FERA, 1973. Aggrieved by the order, the petitioner stands before this court by way of this revision.

4.The learned Additional Solicitor General appearing for the petitioner would submit that the learned Magistrate failed to note that the accused is a person of Indian Citizen and the Foreign Exchange Regulation Act, 1973 applies to all citizens of India, outside India and that learned Magistrate erred in coming to the conclusion that the funds were of M/s.Dipper Investments Ltd., U.K., and failed to note that M/s.Dipper Investments Ltd., U.K, M/s.Banyan Tree Enterprises Ltd and M/s.Turnkey Industries Ltd, which were only shell companies, wherein the accused is only the sole Director of the companies and that the learned Magistrate failed to note that funds were deposited into the Bank account of M/s.Dipper Investments, by the accused himself and the same were mobilized by him and that the learned Magistrate failed to consider the statements given by Shri Ramachandran of Singapore, Raju of Malaysia before the Chief Enforcement Officer under Section 39 of FERA, 1973 in the presence of High Commissioner of India and duly attested the Consular General are true and valid in law and that the learned Magistrate failed the note that the accused is a citizen of India and a person resident in India and had mobilized funds and deposited in the Bank account of M/s.Dipper Investments Ltd., a company incorporated outside India, without the previous general or special permission of the Reserve Bank of India and thereby contravened the provisions of Sections 8(1) and 9(1)(a) of FERA 1973 and that the learned Magistrate failed to note that in the statement, dated 23.10.1996 of Shri N.C.Rangesh, he had stated that the funds were arranged by the accused with Shri Raju and also in his further statement, dated 24.10.1996, he has stated that the accused arranging funds into M/s.Dipper Investments Ltd from June 1994 onwards and all the funding into the shell companies viz., Dipper Investments, Ltd., Banyan Tress Enterprises Ltd and M/s.Turnkey Industries Limited, were arranged by the accused and that in the statement of Raju, dated 08.11.1996, he had explained the investment made by the

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accused and US currency brought to Kualalumpur by the accused for investments and used it for obtaining drafts in favour of M/s.Dipper Investments Ltd., from the Standard Chartered Bank, Petalang Jaya and the

5.It is further submitted that the learned Magistrate failed to note that the transcripts of the Bank account No.7047-2689 of M/s.West Back Ltd duly authenticated by Ms.Valerie Jane Blean and duly certified by the High Commissioner of India, London, shows a receipt of £1,00,000/- and £90,000/- from M/s.Dipper Investments Ltd on 14.07.1994 and 17.08.1984 indicating acquisition and transfers of the said amounts by the accused through M/s.Dipper Investments Ltd and that the learned Magistrate failed to note that the depositions of the witnesses and documents marked in the case, establishes the contravention of Sections 8(1) and 9(1)(a) of FERA, 1973 committed by the accused for acquiring foreign exchange of US$ 36,36,000/- and £1,00,000/- and making payment for the credit of a person resident outside India without the general or special exemption of the Reserve Bank of India. The learned Magistrate without considering the above facts, discharged the accused from the case. Hence, the impugned order passed by the learned Magistrate has to be set aside and the revision has to be allowed.

6.Per contra, the learned Senior counsel appearing for the respondent would submit that the learned Magistrate, after considering entire case records, has come to the conclusion that the companies were registered outside India and it will not attract the provisions of the FERA and the relevant provisions stated in the complaint alleged to have been violated outside India and and it will not attract the provisions of FERA and the relevant provisions stated in the complaint and that the statements recorded by the Enforcement Officer are not admissible in evidence, since the statements made by living persons cannot be used as evidence in the court proceedings and that the order of the learned Magistrate in rejecting the evidence of the persons outside India, is perfectly valid in law. Hence, he prayed that the order of the learned Magistrate has to be confirmed and the revision has to be dismissed. In support of his contention, the learned counsel appearing for the respondent has relied upon the following decisions:-

1.(1986)2 SCC 716 [R.S.Nayak Vs. A.R.Antulay] wherein it has been held that:

> "43.As pointed out by the Constitution Bench in the judgment to which reference has been made, the relevant Sections of the Code of Criminal Procedure ('Code' for short) for the trial of a case of this type are Sections 244, 245 and 246, Section 245(1) provides:-

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If, upon taking all the evidence referred to in Section 244 the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

While Section 246(1), on the other hand requires:

If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Caper, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. Under Section 227, the Trial Judge is required to discharge the accused if he "considers that there is not sufficient ground for proceeding against the accused" Obligation to discharge the accused under Section 239 arises when "the magistrate considers the charge against the accused to be groundless." The power discharge is exercisable under Section 245(1) when "the magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrubutted would warrant his conviction". It is a fact that Section 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the

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police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the Trial court is satisfied that a prima facie case is made out, charge has to be framed.

2.2002 SCC On Line Mad 913 [Karam Chand Thaper and Brothers (Coal Sales) Ltd. vs. T.G.Vasanth Gupta], wherein, it has been held as follows:-

"7. The counsel for the respondent argued that since the company has not been added as an accused, the Managing Director alone cannot be an accused. To this, the revision petitioner replied what is complained against the respondent is the offence of cheating which requires a mental element. A corporate body cannot have a mental status. Further, the complaint by the complainant is only against the misrepresentation made dishonestly by the Managing Director who is the respondent herein. Therefore, non-inclusion of the company as an accused does not affect the case of the petitioner. This argument of the counsel for the revision petitioner is acceptable. It is a case of dishonest representation made by the Managing Director and hence, company need not be an accused.

...

10. A reading of the evidence of P.Ws.1 to 4 clearly makes a prima facie case against the respondent. If this evidence remains unrebutted, a conviction can be sustained. The mere fact that ultimately the accused may be acquitted is not a ground to discharge the accused exercising the power under Section 245(1) Cr.P.C. Therefore, at

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that stage, the Magistrate has no power to assess the evidence and pass a judgment. Therefore, the act of the Magistrate in assessing the evidence and rendering a judgment holding that some evidence cannot be believed in the absence of corroborative evidence. The Magistrate has no right to conclude, especially in the absence of cross-examination that there was no whisper of any telephone call either by P.W.3 or P.W.1 and to hold that absolutely there is no proof to say that the accused made any such promise; such a conclusion can be arrived at only after cross-examining the witness or examining the defence witnesses; that is by way of rebuttal evidence. Therefore, before adducing rebuttal evidence, the Court has to take the evidence on record as a whole. It cannot doubt the statement made in evidence. Therefore, applying the test laid down by the Supreme Court in Antulay's case, the power of the Magistrate under Section 245(1) is only to see whether a prima facie case has been made out. For that, he has to take the evidence as it is and arrive at a conclusion. Applying this test, the order passed by the Magistrate does not appear to be within the scope of Section 245(1) Cr.P.C. Therefore, the order of the Magistrate is liable to be set aside as it is not warranted for the Magistrate to weigh or assess the evidence. Therefore, the order of discharge is liable to be set aside and accordingly, it is set aside. Revision Petition is allowed."

3.(2008)2 SCC 561 [Onkar Nath Mishra and others vs. State (NCT of Delhi and another], wherein it has been held as follows:-

"11.It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, discharged the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the materials on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting

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the accused has been made out. At that stage, even strong suspicion found on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

4.(1996)4 SCC 659 [State of Maharashtra vs. Momnath Thapa & others], wherein it has been held as follows:-

"32.The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.

5.(2009)14 SCC 115 [Ajaykumar Ghose vs. State of Jharkhand & others], wherein it has been held as follows:-

"21.However, in a warrant trial instituted otherwise than on a police report, when the accused appears or is brought before the Magistrate under Section 244(1) CrPC, the Magistrate has to hear the prosecution and take all such evidence as may be produced in support of the prosecution. In this, the Magistrate may issue summons to the witnesses also under Section 244(2) CrPC on the application by prosecution. All this evidence is evidence before charge. It is after all this, evidence is taken, then the Magistrate4 has to consider under Section 245(1) CrPC, whether any case against the accused is made out, which, if unrebutted, would warrant his conviction, and if the Magistrate comes to the conclusion that there is no such case made out against the accused, the Magistrate proceeds to discharge him. On the other hand, if he is satisfied about the prima face case against accused, the Magistrate would frame a charge under Section 246(1) CrPC. The complainant then gets the

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second opportunity to lead evidence in support of the charge unlike a warrant trial on police report,where there is only one opportunity.

6.(2001)3 SCC 1 [Bipin Shantilal Panchal vs. State of Gujarat], wherein it has been held as follows:-

> 13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fall out of the above practice is this : Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the Appellate or Revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves? Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.
>
> 14. When so recast, the practice which can be a better substitute is this : Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided "at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration.

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In our view there is no illegality in adopting such a course. (However, we make it-clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed).

15. The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is recanvassed an reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery of expenses.

16. We, therefore make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material of any item of oral evidence."

7.1967 SCC Online Cal 19 [In re, K.K.Ray (Private) Ltd., wherein it has been held as follows:

"31.The position in made abundantly clear by Section 3 of the DIPLOMATIC AND CONCSULAR OFFICER (Oath and Fees) Act, 1948, which this Court's office missed and which provides inter alia as follows:

(1)"Every diplomatic or consular officer may, in any foreign country or place where he is exercising his functions administer any oath and take any affidavit and also do any notarial act which any notary public may do within a State; and every oath, affidavit and notarial act

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administered, sworn or done by or before any such person shall be effectual as if duly administered, sworn or done by or before any lawful authority in a State.

(2)Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any person authorised by this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, of the official character of that persons."

32.Now that being the express statute in India, there is no difficulty here. The Notarial Act of Elizabeth Levy has not only been certified under the seal of the County Clerk and Clerk of Supreme Court, New York, but has also been forwarded under the certificate of the Consulate General of India in New York for legislation of the seal of the Clerk of the County of New York. In that context, I see no difficulty whatever, legal or otherwise, in admitting this affidavit on the records of the court I need hardly quote R.6 of the Company Rules, 1959 of this Court which says'

"Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any of the documents which is presented otherwise than in accordance with this rules of the practice and procedure of the Court."

33.As I have said above, admitting this affidavit on the records of this Court will be following the practice and procedure of this Court. That is how I understand the cursus curiae of this Court for may years.

7.This court has carefully heard the submissions made on either side and perused the entire materials available on record.

8.In this case, it is useful to refer the following Sections:-

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Sec.1 of FERA, 1973 deals with "Short title, extent, application and commencement".

Section 1 of FERA, 1973,

(1)This Act may be called the Foreign Exchange Regulation Act, 1973.
(2)It extends to the whole of India.

(3)It applies also to all citizens of India outside India and to branches and agencies outside India of companies or bodies corporate, registered or incorporated in India.
(4)it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf,

Provided the different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to this coming into force of that provision.

On seeing the said provision, the Act having jurisdiction all over India and also every citizens of India outside India and to branches and agencies outside India of companies or bodies corporate, registered or incorporated in India.

As per Section 1(3) of FERA, 1973, it seems that FERA, 1973 not applicable to Companies or bodies corporate, registered or incorporated outside India.

Sec.8 of FERA, 1973 deals with "Restrictions on dealing in foreign exchange"

(1)Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:

Provided that nothing in this sub section shall apply to any purchase or sale of foreign currency effected in India between any person and a money changer.

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Explanation: For the purposes of this sub section, a person who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

(2)Except with the previous general or special permission of the Reserve Bank, no person, whether an authorised dealer a money changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank.

(3)Where any foreign exchange is acquired by any person, other than any authorised dealer or a money changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, failed to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money changer.

(4)For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity deferent from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it, or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes

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for which it was acquired.

(5)Nothing in this section shall be deemed to prevent a person from buying from any post office, in accordance with any law or rules made thereunder for the time being in force, any foreign exchange in the form of postal orders or money orders.

Section 9: Restrictions on payments:

(1)Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall-

(a)make any payment to or for the credit of any person resident outside India:

(b)receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India.

Explanation: For the purposes of this clause, where any person in or resident in India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised dealer) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised dealer.

(c)draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actually or contingent) to receive a payment is created or transferred in favour of any person resident outside India:

(d)make any payment to or for the credit of any person by order or on behalf of any person resident outside India.

(e)place any sum to the credit of any person resident outside India.

(f)make any payment to, or for the credit of, any person or receive any payment for, or by order or on behalf of, any person as consideration for or in association with--

(i)to receipt by any person of a payment or the acquisition by any person of

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property outside India.

(ii)the creation or transfer in favour of any person of a right (whether actual or continent) to receive payment or acquire property outside India".

(g)draw, issue or negotiate any bill of exchange or promissory note, transfer any security or acknowledgment any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person as consideration for or in association with any matter referred to in clause(f)

(2).Nothing in sub-section(1) shall render unlawful--

(a)the making of any payment already authorised either with foreign exchange obtained from an authorised dealer or a money-changer under Section 8 or with foreign exchange retained by a person in pursuance of an authorisation granted by the Reserve Bank;

(b)the making of any payment with foreign exchange received by way of salary or payment for services not arising from any business in, or anything done while in, India.

(3).Save as may be provided in, and in accordance with, any general or special exemption from the provisions of this sub-section, which may be granted conditionally or unconditionally by the Reserve Bank, no person shall remit or cause to be remitted any amount from any foreign country into India except in such a way that the remittance is received in India only through an authorised dealer.

(4).Nothing in this section shall restrict the doing by any person of anything within the scope of any authorisation or exemption granted under this Act.

(5).For the purposes of this section and Section 19, "security" includes coupons or warrants representing dividends or interests and life or endowment insurance policies".

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Sec.27 of FERA, 1972 deals with : Restrictions on persons resident in India associating themselves with or participating in concerns outside India."

Sec.27 of FERA, 1973 (Rep. by Act 29 of 1993)

Sec.56 of FERA, 1973, deals with "Offences and Prosecutions"

"(1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act other than section 13, clause (a) of sub-section (1) of Section 18, section 18A, clause (a) of sub-section (1) of section 19, sub-section (2)of section 44 and sections 57 and 58, or of any rule, direction or order made thereunder he shall, upon conviction by a court, be punishable--

(i)in the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine;

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, imposed a sentence of imprisonment for a term of less than six months;

(ii)in any other case, with imprisonment for a term which may extend to three years with fine or with both".

Sec.59 of FERA, 1973, deals with "Presumption of culpable mental state"

Sec.59 of FERA, 1973,

"(1)In any prosecution of any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation—In this section, "culpable

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mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2)For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

(3)The provisions of this section shall, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in relation to any prosecution for an offence under this Act."

Sec.61 of FERA, 1973, deals with "Cognizable of offences"

Sec.61 FERA, 1973,

"(1)Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973 (2 of 1974), it shall be lawful for any metropolitan magistrate and for any magistrate of the first class to pass a sentence of imprisonment for a term exceeding three years or of in exceeding five thousand rupees on any person convicted of an offence punishable under section 56.

(2)No court shall taken cognizance--

(i)of any offence punishable under sub-section (2) of section 44 or sub-section (1) of Section 58,--

(a)where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(b)where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement; or

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

(a)the Director of Enforcement; or

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

(c)any officer of the Reserve Bank authorised by the Reserve Bank by a general of special order:

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

Section 68 of FERA, 1973, deals with "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 contravention was committed, was in charge of, any 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 exercise all due diligence to prevent such contraventions.

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.

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section--

(i)"Company" means any body corporate and includes a firm or other association of individuals; and

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

Sec.72 of FERA, 1973, deals with "Presumption as to documents in certain cases".

Sec.72 of FERA, 1973,

"Where any document--

(i)is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii)has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed)in the course of investigation of any offence under this Act alleged to have been committed by any person,

and such document is tendered in any proceedings under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court of the adjudicating office, as the case may be, shall--

(a)Presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonable assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b)admit the document in evidence notwithstanding hat it is not duly stamped, if such document is otherwise admissible in evidence;

(c)in a case falling under clause(i), also presume, unless the contrary is proved

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the truth of the contents of such document".

9.It is admitted by both sides that the contravention made by the petitioner was proceeded with by the Enforcement authorities departmentally and levied penalty. Against which, the respondent preferred appeal, in C.M.A.No.914 of 2000 [T.T.V. Dhinakaran Vs. Special Director, Enforcement Directorate] before the High Court and in the said appeal, on 06.01.2017, the Hon'ble 1st Division Bench of this Court has passed order, which reads as follows:-

> "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

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appellate authority has not decided the main question, i.e., 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

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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

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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 MANU/SC/0028/2000 : (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 [MANU/MH/0640/2003 : 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 MANU/TN/0049/1987 : 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. v. Mohammad Nooh, reported in MANU/SC/0125/1957 : AIR 1958 SC 86, in support of his contention that two roles could not obviously be played by one and the

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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 MANU/SC/0115/1992 : 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

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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

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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

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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

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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

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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

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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 cause 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 looses 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

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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 [MANU/SC/1339/2011 : (2012) 1 SCC 476)].

44. Even in Escorts case [MANU/SC/0015/1985 : (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

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be, in reality, part of one concern."

45. In Vodafone International Holdings BV v. Union of India [MANU/SC/0051/2012 : (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

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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."

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10.From the perusal of the above judgment, the Hon'ble 1st Division Bench of this court has answered the questions of law raised, holding that present respondent is a citizen of India and he is liable to be prosecuted under FERA, if any contravention made by him.

11.Further, it is seen from the records that the case was registered in India under Sections 2(g) and 2(p) of FERA. Since the respondent is a resident of India, he is liable to be prosecuted for any contravention or violation made by him

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under FERA. Hence, the contention of the respondent that the respondent is not a citizen of India and the order of the trial court has to be confirmed has no merit.

12. Further, at this juncture, it is useful to refer Section 166-A Cr.P.C, which reads as follows:-

> "166-A.Letter of request to competent authority for investigation in a country or place outside India.-
>
> (1) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.
>
> (2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.
>
> (3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation under this Chapter.
>
> Letter of request from a country or place outside India to a Court oran authority for investigation in India.

13.Further, it is useful to refer Sections, 39 and 71 of the Foreign Exchange Regulation Act, 1973, which read as follows:-

> "39.Power to examine persons.-The Director of Enforcement or any other officer of Enforcement authorised in this behalf by the Central Government, by general or special order, may, during the course of any investigation or proceeding under this Act,—

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(a) require any person to produce or deliver any document relevant to the investigation or proceeding;

(b) examine any person acquainted with the facts and circumstances of the case.

71.Burden of proof in certain cases.

(1) Where any person is prosecuted or proceeded against for contravening any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.

(2) Where any person is prosecuted or proceeded against for contravening the provisions of sub-section (3) of section 8, the burden of proving that the foreign exchange acquired by such person has been used for the purpose for which the permission to acquire it was granted shall be on him.

(3) If any person is found or is proved to have been in possession of any foreign exchange exceeding in value 1[fifteen thousand rupees], the burden of proving that the foreign exchange came into his possession lawfully shall be on him.

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14.The learned Senior counsel appearing for the respondent has contended that the companies are not added as respondents and hence, the complaint made by the authorities against the respondent is not at all maintainable and the trial court has correctly come to the conclusion that no charge can be framed against the respondent. Admittedly, the present respondent is a citizen of India and the alleged companies mentioned in the investigation are not registered in India and only incorporated outside India. Though the companies are incorporated outside India and they will not come under the preview of FERA, the respondent, who is a resident of India is liable to be punished for any violation of the provisions of FERA. Hence, the argument of the learned

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Senior counsel appearing for the respondent that since the companies were not added as accused/respondents in the complaint preferred by the petitioner is not a valid ground to discharge the respondent from the case and accordingly, the argument of the learned Senior counsel appearing for the respondent is rejected.

15.In this case, the Enforcement authorities have every power to examine any person, as per Section 39 of the FERA, who is residing in India or outside India. Further, in this case, the duly authorised officer alone has recorded the statements of persons residing outside India and placed the materials to show that the witnesses were examined outside India by the duly authorised officials. Whether the documents collected and the statements of witnesses recorded outside India are true or not, cannot be decided in the present stage, since there are sufficient materials produced on the side of the enforcement authorities to proceed further and it cannot be simply thrown out.

16.Further, it is relevant to extract the letter, dated 20.05.1996, written by the respondent to the Secretary, Ministry of Finance, Department of Revenue, Central Intelligence Economic Bureau, New Delhi, which reads as follows:-

"From,
T.T.V.Dhinakaran
COFEPOSA Detenu
Central Prison,
Madras

To,

The Secretary,
Ministry of Finance,
Dept. of Revenue,
Central Intelligence Economic Bureau
Lok Nayak Bhawan
Khan Market,
New Delhi.

Through The Superintendent, Central Prison,
Madras.

Sir,

Ref: Detention order passed by the Joint Secretary in F.No.673/6-96-CUS.VIII dated 5.2.1996 settlement of dispute and revocation of the detention order.

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The detention order has been passed against me on the ground that by my activity I have caused prejudice to the augmentation of foreign exchange resources of the country.

It is my claim that I am a non-resident Indian having obtained that status and complied with all the formalities under Foreign Exchange Regulation Act and made necessary declaration to the Reserve Bank of India. I had also intended to migrate to Singapore and obtained permanent residency status.

The dispute in my case devolves around a bank account in U.K. With Barclaya Bank. It is my contention that monies in the bank belong to the clients of a Solicitor in London. By operation of the account on his behalf I have not violated the provisions of FERA since I happened to be a non-resident Indian. A show cause notice had been issued in respect of this occurrence in the adjudication proceedings and I had replied to the same and explained my stand.

I have suffered deeply on account of detention under COFEPOSA. Unable to stand the mental strain caused by there detention proceedings against he, my wife who was then in the advanced stage of pregnancy had an abortion and the dead child was taken out of the womb. My mother has also become seriously ill on account of my incarceration and the consequent mental strain caused to the whole of the family. In view of these, I must humbly project that the loss of foreign exchange mentioned in the grounds of detention as well as in the show cause notice would be brought to India to that loss of foreign exchange would no longer be a factor. It is my admission that the proceedings appear to be a revenue related issue. After giving my earnest thought I feel that I can persuade the parties in question to remit the monies to India in a project that will be set up and for a length of time. This would, however, require such time. However, I have interest of the revenue in mind and I am making this proposal of a matter of settlement with the only plea that the order of detention under COFEPOSA be revoked, as I am willing to reach a lawful settlement of the dispute. As

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regards other matters, namely adjudication and prosecution proceedings, the same may have to be dealt with in accordance with law.

It is requested that the fullest consideration would be given to my said plea and I am willing offer such other particulars as may be necessary. I hereby implore you to urgently look into this matter and relieve me of the hardship.

sd/xxxxxx"

17.On perusal of the letter written by the respondent, the contention of the respondent that he is not the citizen of India and he will not come under the purview of FERA is not at all acceptable for the reason that with regard to the aspect, the Hon'ble 1st Division Bench of this court has already decided the question, in C.M.A.No.914 of 2000, dated 06.01.2017 between the same parties.

18.In view of the above circumstances, this court is of the considered view that there are so many incriminating materials available to presume that the respondent would have committed the offences and he is liable to be charged under Sections 8(1) and 9(1)(a) of FERA, 1973. The trial court, in the considered view of this court, without considering the materials available on record, has come to the conclusion that there is no incriminating materials available in this case in prima facie for framing charges under Section 8(1) of FERA & 9 (1)(a) of FERA. Hence, the impugned order passed by the trial court is liable to set aside and accordingly, the same is set aside.

19.In the result, this revision is allowed and the the order, dated 18th May 2015 passed in Crl.M.P.No.524 of 2014 in E.O.C.C.No.84 of 2001 by the Additional Chief Metropolitan Magistrate (Economic Offences Court No.II), Egmore, Chennai 600 008, is set aside.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

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To:

1.The Additional Chief Metropolitan Magistrate,
Economic Officer Court No.II
Egmore,Chennai-8.

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2.The Chief Metropolitan Magistrate,
Egmore, Chennai-8.

3.The Assistant Director,
Directorate of Enforcement,
Government of India, Ministry of Finance
2nd &3rd Floor, Murugesa Naicker Complex
84, Greams Road, Chennai-6.

+1cc to Mr.M.Dhandapani SPC sr.6630

+1cc to Mr.A.Asokan, Advocate sr.6554

Crl.R.C.No.935 of 2015

ss(8/2/2017)

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