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.936 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.

Smt. N.Sasikala : 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.1271 of 2014 in C.C.No.168 of 2001 of the Additional Chief Metropolitan Magistrate (Economic Offences Court No.I), 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

O R D E R

This petition is directed against the order passed in Crl.M.P.No.1271 of 2014 in C.C.No.168 of 2001 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences Court No.I), 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) of the Foreign Exchange Regulation Act 1973, punishable under Section 56(1)(i) of the said Act 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.I), 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 her stating that there is no sufficient material before this court in prima facie for framing charges against the accused under Section 8(1) 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 amounts remitted in the NRNR account of Smt.R.Susila, a friend of the accused, are by way of foreign currencies/remittances received aboard, which are non-repatriable and that the learned Magistrate failed to note that the friend of the accused R.Susila agreed to give a loan of Rs.3.00 crores to a third party one Chitra, based on the security of the NRNR deposits lying with the Indian Bank, Abiramapuram Branch, Chennai and in turn, the said amount was given as a loan to the accused and her associates/relatives and that the learned Magistrate failed to note that the said Chitra had foreclosed the loan herself with the NRNR deposits without repaying the same and that the learned Magistrate failed to note that the said Chitra has given the loan amount of Rs.3.52 Crores to the accused and her associates/relatives without any promissory note or written agreement with reference to the repayment of the said loan and that the learned Magistrate failed to note that the said Chitra had issued around 25 cheques, one in the name of Sri V.N.Sudhakaran for Rs.22 lakhs, one in the name of Smt.J.Elavarasi for Rs.22 Lakhs and other cheques without filling up the names and handed over the same to the respondent/accused and that the learned Magistrate failed to note that M/s,.Bharani Beach Resorts Pvt Ltd., a company to which, the loan was given in turn gave the amounts to the respondent accused and that the learned Magistrate failed to note that firms, which received loans from M/s.Bharani Beach Resorts Pvt Ltd, in which the respondent is one of the partners, did not function at their address and that the learned Magistrate failed to note that the said Susila was not the owner of the amounts remitted into her NRNR deposits and that the learned Magistrate failed to note that the depositions of the witnesses and documents marked in the case establishes the contraventions of Section 8(1) of FERA 1973 committed by the respondent for acquiring foreign exchange from persons not being authorised dealers in foreign exchange without any previous general or special permission of the Reserve Bank of India.

5.It is further submitted that the accused is a person of Indian Citizen and the Foreign Exchange Regulation Acts, 1973 applies to all citizens of India, outside India and that the learned Magistrate failed to note that the accused is a citizen of India and a person resident in India and had mobilized funds without the previous general or special permission of the Reserve Bank of India and thereby, contravened the provisions of Section 8(1) of FERA 1973 and that the learned Magistrate failed to note that the depositions of the witnesses and documents marked in the case, establishes the contravention of Section 8 (1) of FERA 1973 committed by the accused. The learned Magistrate, without considering the above facts, discharged the accused from the case. Hence, the 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 firms to which loans were granted were not arrayed as accused; the accused/respondent as Director of the firm, cannot be held vicariously liable 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:-

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 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 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 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 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.
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> 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. 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 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:-

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"

"Section 8:- 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.

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 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 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".

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 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

(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.

Explanation—For the purpose of this 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 the truth of the contents of such document”.

9.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,—

(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.”

10.The learned Senior counsel appearing for the respondent has contended that the firm in question has not been added as respondent and hence, the complaint made by the authorities against the accused/respondent is not at all maintainable and that the trial court has correctly come to the conclusion that no charge can be framed against the respondent and thereby, she cannot be held vicariously liable. The argument of the learned Senior counsel appearing for the respondent that since the firms 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.

11.In this case, the Enforcement authorities have every power to examine any person as per Sections 29 and 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 the 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.

12.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 offence and she is liable to be charged under Section 8(1) 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 material available in this case in prima facie for framing charge under Section 8(1) of FERA. Hence, the impugned order passed by the trial court is liable to set aside and accordingly, the same is set aside.

13.In the result, this revision is allowed and the order, dated 18th May 2015 passed in Crl.M.P.No.1271 of 2014 in C.C.No.168 of 2001 of the Additional Chief Metropolitan Magistrate (Economic Offences Court No.I), Egmore, Chennai 600 008, is set aside.

s/d-
Assistant Registrar

//True Copy//

Sub-Assistant Registrar

To
1. The Additional, Chief Metropolitan Magistrate,
   Economic Officers Court No I
   Egmore, Chennai-8
2. The Chief Metropolitan Magistrate
   Egmore, Chennai
3. The Assistant Director
   Directorate of Enforcement
   General of Indai, Ministary of Finance,
   2nd & 3rd Floor, Murugesh Naicker Complex,
   84, Greams Road, Chennai-6.

+1 CC to Mr. M. Dhandapani Spl. Govt. Pleader sr 6629
+1 CC to Mr. A. Asokan, Advocate sr 6555

Crl.R.C.No.936 of 2015

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