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

% Judgment delivered on: 05.04.2018

\+ CRL.REV.P. 642/2017

UNITED INDIA AIRWAYS LTD & ANR ..... Petitioners

versus

CHIEF ENFORCEMENT OFFICER , ENFORCEMENT DIRECTORATE ..... Respondent

Advocates who appeared in this case:
For the Petitioner : Ms. Sangita Bhayana, Advocate.

For the Respondents : Ms. Shreya Sinha, Advocate.

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT
05.04.2018

SANJEEV SACHDEVA, J. (ORAL)

CRL.REV.P. 642/2017 & Crl.M.A.14087/2017 (stay)

1. The petitioners impugns Order-on-Charge dated 11.07.2017 framing charge against the petitioners for alleged violation of Section 9(1)(e) of Foreign Exchange Regulations Act, 1973 (hereinafter referred to as FERA).

2. Learned counsel for the petitioners, *inter alia*, contends that the respondent has failed to comply with the mandatory requirement of

proviso to Clause (ii) of sub Section (2) of Section 61 of FERA and no opportunity notice, as mandated by law, was served on the petitioner.

3. It is contended that proviso to Section 61(2)(ii) of FERA prohibits taking of cognizance by a Court of an offence punishable under Section 56 and 57 of FERA unless an opportunity has been given to the accused of showing that he had the requisite permission.

4. Learned counsel for the petitioners submits that no such opportunity was granted and the opportunity notice, which was addressed to the petitioners, was, admittedly, incorrectly addressed and was never served on the petitioners. She submits that since there is non-compliance of the mandatory provisions, the Trial Court could not have taken cognizance and framed charge against the petitioners and all proceedings consequent thereto are liable to be quashed.

5. Learned counsel for the respondent though concedes that there is a requirement of giving an opportunity to the accused to show that he had requisite permission, however, she submits that there is no mandatory requirement of giving an "opportunity notice". She submits that when the accused had appeared before the Authority for recording his statement under Section 40 of FERA, he was asked as to whether he had the requisite permission; in response to which, he failed to produce the permission and, accordingly, the requirement of giving an opportunity was satisfied.

6. Section 61 of FERA reads as under:-

"61. Cognizance of offences:

*(1) ***** ***** ******

(2) No court shall take cognizance—

*(i) ***** ***** ******

(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 authorised 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 or special order:

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

7. The requirement of proviso to Clause (ii) of sub Section (2) of Section 61 is that an opportunity of showing that the accused had the requisite permission, is a mandatory requirement.

8. A Coordinate Bench of this Court in *Sanjay Malviya vs. R.K. Rawal CEO Enforcement Directorate*: (2015) 149 DRJ 231 has held that there is a statutory bar imposed under Section 61 of FERA on a magistrate on taking cognizance unless it is shown that the opportunity of showing availability of permission has been granted to the accused.

9. It is well settled that where law mandates something to be done in a particular way, it has to be done in that way or not at all.

10. Before initiation of proceedings under Section 56 of the FERA, an opportunity must be granted to the accused. Before taking the cognizance of the offence Magistrate is under statutory duty to satisfy himself that an opportunity has been given to the accused before filing the complaint. Magistrate will issue process only on being satisfied that a case has been made out for such issue.

11. The offence is alleged to have been committed in the year 1995. The statement of the accused was recorded in 1996. It is this statement, which is sought to be relied upon by the learned counsel for the respondent. The subject statement was recorded under Section 40 of FEAR when, admittedly, an investigation was going on into the alleged offence.

12. Admittedly, an "Opportunity Notice" was issued by the respondents on 24.05.2002 specifically requiring the petitioners to

show as under:-

*“ ***** ***** ******

NOW THEREFORE, the said M/s United India Airways Ltd. and S/Shri Rakesh Gupta and Ashok Chawla are hereby given an opportunity notice whether they had in terms of section 8(1) and 9(l)(c) and r/w 68 (1), 8(1) and 9(1)(c) r/w 64 (2) of the Foreign Exchange Regulations Act, 1973 obtained any general/ special permission / exemption of the RBI in respect of the aforesaid transaction and acknowledgement of debt of Foreign Exchange failing which a complaint under section 56 RERA, 1973 read with Section 49(2) &(4) of FEMA, 1999 will be filed in the Court of Law against them.

This notice is issued in pursuance of Section 61(2) of the FERA, 1973 read with section 49(3) & (4) of FEMA, 1999.”

13. The Notice issued by the Respondents on 24.05.2002 was titled “OPPORTUNITY NOTICE”. It specifically stated that it was being issued in pursuance of Section 61(2) of FERA and gave an opportunity to the Petitioner to show if they had the requisite permission.

14. It is also an admitted position that the notice dated 24.05.2002 was addressed to the petitioners at “A-34, Connaught Place, New Delhi”. This is apparent from the notice itself. The witness of the Respondent-Prosecution *PW3 – Om Prakash* from the office of the Asstt. Enforcement Directorate has deposed that he had affixed the

notice at *A-34, Connaught Place*. In his cross-examination, he has deposed that the premises *A-34, Connaught Place* was locked and the office of the petitioners was not found in existence at *A-34, Connaught Place* and some other office was functioning. It is also an admitted position that the office of the petitioners was not at *"A-34, Connaught Place"* but at *"E-34, Connaught Place"* which is a distinct and different property. Clearly, the Opportunity Notice was neither sent to the correct address nor served on the petitioner.

15. In case the contention of the respondent were to be accepted that an opportunity was given to the petitioners at the time of recording the statement under Section 40 of FEAR in compliance of Section 61(2) of FERA, then there was no requirement for the respondent to have issued a specific *Opportunity Notice* calling upon the petitioners to show as to whether they have the requisite permission or not and specifically stating therein that the same was in compliance of Section 61(2).

16. The subject complaint was filed on 29.05.2002. Since petitioners were never granted an opportunity, as mandated by Section 61(2) of FERA, there is clearly a breach of the mandate of law. Since the requirements of Section 61(2) of FERA have not been complied with, reliance placed by the respondent on the statement recorded at the time when proceedings under Section 40 of FERA were being undertaken and reliance on the same in the impugned order as

sufficient compliance of Section 61(2) of FERA, is clearly misplaced.

17. Since respondents have failed to comply with the mandatory requirement of Section 61(2) of FERA, the Trial Court clearly erred in taking cognizance.

18. In view of the above, the impugned order on charge dated 11.07.2017 cannot be sustained and is liable to be set aside. The impugned order dated 11.07.2017 is, accordingly, quashed. The present petition is allowed. There shall be no order as to cost.

19. Order *Dasti* under signatures of Court Master.

SANJEEV SACHDEVA, J

APRIL 05, 2018
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