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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **LPA 339/2009**

NARENDRA SINGH & ORS ..... Appellants
Through: Mr. Dayan Krishnan, Senior Advocate with Mr Rajesh Batra, Ms Sonia Kukreja, Ms Smriti Sinha and Mr Rohit Chandra, Advocates.

versus

ENFORCEMENT DIRECTORATE & ANR ..... Respondents
Through: Mr. Jasmeet Singh, CGSC with Mr. Saurabh Tiwari, Mr.Aditya Madan and Mr. Srivats Kaushal, Advocates.

\+ **LPA 474/2014**

BRIJ MOHAN KHAITAN & ORS ..... Appellants
Through: Mr. Sudhir Nandarajog, Senior Advocate with Mr Rajesh Batra, Ms. Sonia Kukreja, Ms. Smriti Sinha, Mr. Rohit Chandra and Mr. Digvijay Singh, Advocates.

versus

ENFORCEMENT DIRECTORATE & ANR ..... Respondents
Through: Mr. Jasmeet Singh, CGSC with Mr. Saurabh Tiwari, Mr.Aditya Madan and Mr.Srivats Kaushal, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% 28.08.2019

Dr. S. Muralidhar, J.:

1. These two appeals arise out of the similar set of facts and are accordingly being disposed of by this common judgement.

2. LPA No. 339/2009 by six Appellants is against an order dated 27th April, 2009 passed by the learned Single Judge dismissing W.P. (C) No. 6198/ 2003 filed by them seeking the quashing of a show cause notice ('SCN')/ Memorandum for Adjudication ('MFA') dated 21st May, 2002 issued by the Enforcement Directorate ('ED') under Section 51 of the Foreign Exchange Regulation Act, 1973 ('FERA').

3. LPA No. 474/2014 is filed by five Appellants (who are also Appellants 2 to 6 in LPA 339/2009) and is directed against a judgement dated 2nd May, 2014 passed by the learned Single Judge dismissing W.P. (C) No. 2724/2014 filed by them challenging a notice dated 2nd September, 2003 issued by the ED under Section 51 of the FERA.

4. The factual background is that the six Appellants in LPA 339 of 2009 were non-executive directors of Nestle India Limited ('NIL'). NIL exported value added Nescafe Instant Coffee to Russia payable in Rupees Debt Repayment Letters of Credit. It is stated that Nescafe Instant Coffee was being manufactured in other countries as well and was also being imported into Russia from those countries. In order to standardize the product sold by

various companies, Nestle World Trade Corporation ('NWTC') was incorporated in Switzerland to act as a facilitating organization and to ensure standardized supply of Nestle products to Russia.

5. The Directorate of Revenue Intelligence ('DRI') is stated to have undertaken a search of the premises of NIL on 19th November, 1996. Thereafter on 22nd May, 2002 an 'Opportunity Notice' was issued both to NIL and its directors and officials under Section 61 (2) FERA read with Sections 49 (3) and 49 (4) of the Foreign Exchange Management Act, 1999 ('FEMA'). A separate SCN/MFA dated 21st May, 2002 under Section 51 FERA was also issued to each of the Appellants, NIL and certain other officials. Simultaneously, a criminal complaint under Section 56 FERA was filed against NIL and some of the co-noticees in the Court of the Additional Chief Metropolitan Magistrate ('ACMM'), New Delhi on 31st May, 2002.

6. The allegations in the Opportunity Notice were that the documents seized from NIL during the search revealed that while NIL had ostensibly concluded contracts with several Russian companies for sale of coffee in Indian rupees, the entire operation was actually controlled by NWTC in Switzerland and goods were actually exported to NWTC in Helsinki in Finland. Specific to the present Appellants, it was stated in paragraph 16 of the Opportunity Notice as under:

> "16. And whereas it appears that S/Shri Narender Singh, D.E, Ardeshir Lim Khing Fong, M.W.Q. Garrett. Brij Mohan Khaitan, Jean Daniel Luethi, Stephan Issesmann, Ranjit Raj and R.K. Sharma were directors/ in-charge of M/s Nestle India Ltd. during the relevant period and were

> responsible for the conduct of the said Company, It is, therefore, appears that they have also rendered themselves liable to be proceeded against and punished accordingly along with the Company for the contravention committed by the Company in terms of Section 68 of FERA, 1973"

7. In a reply dated 27th May, 2002 to the Opportunity Notice, Mr R.K. Sharma, Head of Exports, NIL (who was noticee No.10), *inter alia,* pointed out that the notice "seeks to implicate noticees 2 to 10 under a mechanical application of Section 68 of the FERA, without considering whether they fall within the scope of that provision".

8. Interestingly, the complaint filed by the ED in the Court of the learned ACMM, New Delhi under Section 56 FERA read with Sections 49 (3) and 49 (4) of FEMA, was only against NIL and three of its officials i.e. Mr D.E, Ardeshir (Director), Mr Ranjit Raj (Executive Vice-President and Mr R.K. Sharma (Head of Exports). In other words, no complaint was filed against any of the present six Appellants. In effect, therefore, the ED accepted, for the purposes of the criminal prosecution that the present Appellants were not be proceeded against.

9. However, as regards the SCN/MFA, the ED decided to proceed in the matter. It must be noticed at this stage that each of the present Appellants submitted a separate reply to the aforementioned SCN/MFA dated 21st May, 2002 pointing out that each of them fell outside the scope of Section 68 FERA. In other words, each of them pointed out that he was a Non-Executive Director of NIL and not in charge of or responsible to the NIL for the conduct of its business. Secondly, it was pointed out that each of them

was dropped from the criminal proceedings following the 'Opportunity Notice' dated 22nd May, 2002. Thirdly, it was pointed out that each of them had ceased to be the Director of NIL at the time of filing of the reply. Accordingly, each of the Appellants requested discharge from the adjudication proceedings.

10. Notwithstanding the aforementioned replies, on 2nd September, 2003, the ED decided to proceed with the adjudication proceedings fixed on 26th September, 2003 as the date in such proceedings calling upon each of the Appellants to appear before the Adjudication Officer.

11. The Appellants filed W.P. (C) No.6198/2003 challenging the SCN/MFA dated 21st May, 2002. In the said writ petition an interim order was passed on 24th September, 2003 that no final adjudication shall be made against any of the Petitioners (Appellants herein) pursuant to the SCN/MFA dated 21st May, 2002.

12. As far as further notice dated 2nd September, 2003 was concerned, an application was filed in the present LPA No.339/2009 being CM No.17820/2009 seeking leave to amend W.P.(C) No.6198/2003 to challenge the said notice. This application was dismissed by this Court on 18th January, 2010 by observing that the Appellants were seeking to introduce a new cause of action, which is not permissible. This led the Appellants to file W.P. (C) No.2724/2014 seeking quashing of the said notice dated 2nd September, 2003.

13. As far as W.P.(C) No.6198/2003 is concerned, it was dismissed by the

first impugned order dated 27th April, 2009 of the learned Single Judge, *inter alia*, holding as under:

> "21. The relevant paragraphs of the impugned show-cause notice, merely go on to say that as the petitioners herein are directors/in-charge of NIL, therefore they were liable for the contravention of law by NIL in the export of coffee to Russia. There undoubtedly are no specific allegation against them, which pinpoints their role in the alleged offence. A show-cause notice is not a mere empty formality, but a necessity, so that the person is informed of allegations against him to provide a proper, timely and reasonable opportunity to explain and present his case. Thus, the petitioners can arguably say that the show cause notice does not contain the essential foundational facts by which the company NIL's decision could be attributed to them, as directors or that they point to how they were in charge of, or responsible for the affairs of the said company."

14. Relying upon certain observations of the Supreme Court in ***Standard Chartered Bank v. Directorate of Enforcement (2006) 4 SCC 278***, the learned Single Judge was of the view that where individuals or concerns are issued show cause notices, the Courts should not interfere, and that the authorities should be left to proceed with the matter. A reference was also made to the observations in ***Special Director v. Mohd. Ghulam Ghouse (2004) 3 SCC 440***. Accordingly, the Appellants were asked to reply to the SCN/MFA dated 21st May 2002, and if aggrieved by the adjudication order, to seek appropriate remedies.

15. While admitting LPA 339/2009 by order dated 27th July, 2009, this Court continued the interim relief granted by the learned Single Judge on 24th September, 2003 in W.P. (C) No.6198/2003, to the effect that no final adjudication order shall be passed. That interim order has continued till date.

16. The second writ petition i.e. W.P. (C) No. 2724/2014, which challenged the ED's notice dated 2nd September 2003, came to be dismissed by the learned Single Judge by an order dated 2nd May, 2014, which reads as under:

> "Present writ petition has been filed challenging the notice dated 2nd September, 2003 issued under Section 51 of the Foreign Exchange Regulations Act, 1973 (for short 'FERA 1973') Mr. Maninder Singh, learned senior counsel for petitioners submits that the criminal prosecution as well as the adjudicatory proceeding proceed on the same basis, namely, that the accused had to be in charge of and responsible to the company for the conduct of business of the company.
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> Mr. Maninder Singh, learned senior counsel states that petitioners on the same factual matrix have been dropped/excluded as accused in the criminal proceedings. He consequently submits that the notice under Section 51 of FERA 1973 is without jurisdiction. However, this Court, upon perusal of the paper book, is prima facie of the view that as the impugned order is only a show cause notice and that too of the year 2003, the ends of justice would be met if the petitioners are given liberty to raise the issue of jurisdiction at the preliminary stage before the adjudicating authority itself The adjudicating authority is directed to decide the aforesaid preliminary issue. All rights and contentions of both the parties including the issue of delay and laches are left open.
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> With the aforesaid observations, present petition and application stand disposed of."

17. Aggrieved by the said order, LPA 474/2014 was filed which was directed to be heard along with LPA No.339/2009.

18. This Court has heard the submissions of Mr. Dayan Krishnan and Mr. Sudhir Nandarajog, learned senior counsel for the Appellants and Mr. Jasmeet Singh, learned CGSC for the Respondents.

19. The very basis for the ED to proceed against the present Appellants is Section 68 (1) of FERA which reads as under:

> "68. Offences by companies.
>
> (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention."

20. The adjudication proceedings are being pursued by the ED on the basis that each of the present Appellants was at the relevant time, "in charge of", and "responsible to" NIL for the conduct of its business. There can be no doubt that the above standard for fastening liability on a director of a company for contravention of the FERA, applies to both criminal proceedings that would result following an 'Opportunity Notice' as well as the adjudication proceedings that would follow an SCN/MFA issued under Section 51 FERA. This has been clarified by the Supreme Court in ***Standard Chartered Bank v. Directorate of Enforcement*** (*supra*) in the following words:

> "There does not appear to be any reason to confine the operation of Section 68 only to a prosecution and to exclude its operation from a penalty proceeding under Section 50 of the Act, since the essential ingredient of both is the contravention

> of the provisions of the Act. A company is liable to be proceeded against under both the provisions. Section 68 is only a provision indicating who all in addition can be proceeded against when the contravention is by a company or who all should or can be roped in, in a contravention by a company. Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine."

21. Therefore, the foundational fact that requires to be shown to exist for proceeding against a person under Section 51 of the FERA read with Section 68 (1) thereof is that such a person was at the relevant time, when the contravention occurred, "in-charge of" and "responsible to" NIL for the conduct of its business. A perusal of the adjudication notice in the present case reveals that the allegations in this regard are of a broad general nature without specifically indicating whether in fact the person was in-charge of and responsible to the company for the conduct of its business at the relevant time and was, therefore, liable for such contravention. Interestingly, both the Opportunity Notice as well as the SCN are identical in this respect. While ED decided not to proceed against these Appellants on criminal side, pursuant to the Opportunity Notice issued to them, thereby implicitly accepting their explanation that they fell outside the scope of Section 68 (1) of the FERA, it seemingly adopted a different standard as far as the adjudication proceedings are concerned. The Court sees no justification for applying a different standard for fastening liability on the Appellants whether the criminal liability consequent upon the Opportunity Notice or civil liability following the SCN. There appears to be no scope for adopting

a different yardstick in this regard.

22. The language of Section 68 (1) in this regard is no different from the language of Section 141 of the Negotiable Instrument Act, 1888 ('NI Act'), and in context of which, the legal position has been explained by the Supreme Court in ***SMS Pharmaceuticals Ltd. v Neeta Bhalla (2005) 8 SCC 89*** as under:

> "19. In view of the above discussion, our answers to the questions posed in the Reference are as under:
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> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint.
>
> Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
>
> (b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.
>
> (c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When

> that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141."

23. The above legal position has been reiterated in ***Pooja Ravinder Devidasani v State of Maharashtra (2014) 16 SCC 1***. Importantly, the Supreme Court has emphasized that it is not sufficient for the authority that seeks to proceed against such a person to merely repeat, in the SCN or notice, the language of the statute, as that would not satisfy the requirement of law.

24. While as a broad proposition, the Courts exercising jurisdiction under Article 226 of the Constitution, would not readily interfere with an SCN at the stage of adjudication, this is not an inflexible rule, particularly in a case where the foundational facts necessary for proceeding with such adjudication is shown not to exist. In the case of each of the present Appellants, it has not been disputed that each of them, at the relevant time, was a Non-Executive Director of NIL and, therefore, not a person "in-charge of and responsible to the NIL for the conduct of its business". With that position having not been questioned in the context of the criminal proceedings, requiring the Appellants to face the adjudication proceedings would be a futile exercise.

25. It may be added that the second impugned notice dated 2nd September,

2003 issued to these Appellants is in fact a cyclostyled notice containing identical paragraphs where it is mechanically stated that each of them have failed to reply to the SCN/MFA, when in fact, as already noticed hereinbefore, each of them had in fact filed such a reply. This additionally points to non-application of mind by the Adjudicating Authority while issuing the above notice dated 2nd September, 2003.

26. In these circumstances, the Court is of the view that the impugned judgments dated 27th April, 2009 of the learned Single Judge in W.P. (C) No. 6198/2003 and the judgment dated 2nd May, 2014 passed in W.P. (C) No. 2724/2014 are unsustainable in law. They are hereby set aside. The adjudicating proceedings are quashed.

27. The appeals are allowed in the above terms, but with no order as to costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 28, 2019
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