IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 3658 of 2014

Mrs. Meenakshi Jatia (nee Bajoria) & Anr.
-Vs-
Sri T.K. Dutta, Enforcement Officer, E.D. & Anr.

For the Petitioners	: Mr. Sudhir Mehta Mr. Sandipan Ganguly Ms. Sreyashee Biswas
For the Opposite Party	: Mr. Arijit Chakraborti Mr. Depak Sharma
Heard on	: 02.02.2023, 15.03.2023, 08.08.2023.
Judgment on	: 11.12.2023

Ananya Bandyopadhyay, J.:-

1. This instant criminal revisional application is filed by the petitioners against an order dated 01.10.2001 passed by the Learned Metropolitan Magistrate, Calcutta in connection with Case No.C/5050/2001 under Section 56 of the Foreign Exchange Regulation Act, 1973 for alleged non-compliance of summon issued under Section 40 of Foreign Exchange Regulation Act, 1973 and an application for quashing the proceeding including the cognizance taken by the Learned Chief Metropolitan Magistrate dated 01.10.2001 in connection with Case No.C/5050/2001 under Section 56 of the Foreign

Exchange Regulation Act, 1973 and an order dated 13.08.2014 passed by the Learned Metropolitan Magistrate, 11th Court, Calcutta in connection with Case No.C/5050/2001 whereby the petitioners have been directed to appear before him on 08.12.2014 for consideration of charge.

2. It is submitted by the petitioners that Sri. S. Balakrishnan, Enforcement Officer, Enforcement Director, Government of India, Kolkata issued summons dated 15.02.2001 under Section 40 of the Foreign Exchange Regulation Act, 1973 read with sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, 1999 directing the petitioners to appear before him on 27.02.2001 at 2 p.m. with the following documents:

   i. Passport, if any,
   ii. Bank Account Passbook,
   iii. Details of business interest, if any,
   iv. Details of Indian Bonds received by her and a copy of declaration made by her to the I.T. Authority, name and address of the donor of the said bonds and business interest in and outside India.
   v. Details of properties.

3. On 22.02.2001 challenging the issuance of the said summons under Section 40 of the Foreign Exchange Act, 1973 read with sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, the petitioners and their sisters and father, Late Arun Kmar Bajoria filed a writ application before the Hon'ble High Court at Calcutta being W.P. No. 389 of 2001 with the following prayers:

   a) A writ of and/or order and/or direction in the nature of mandamus commanding the respondents, their servants and/or *agents to withdraw, recall cancel and/or rescind the said purported summons dated 15th February, 2001 and all the purported proceedings thereunder and/or relating thereto and/or in pursuance thereof and to act according to law;*

b) *A writ of and/or order and/or direction in the nature of prohibition commanding the respondents, their servants and/or agents to forbear from giving any effect and/or further effect to and/or acting on the basis of and/or in furtherance of the said purported summons dated proceedings thereunder and/or relating thereto and/or in pursuance thereof;*

c) *A writ of and/or order and/or directions in the nature certiorari commanding the respondents, their servants and/or agents to transmit and certify the records relating to the said purported summons dated 15th February, 2001 and all the purported proceedings thereunder and/or relating thereto and/or in pursuance thereof so that the same may be quashed and/or set aside and/or conscionable justice might be rendered;*

d) *Rule Nisi terms of prayers (a), (b) and (c) above;*

e) *Injunction restraining the respondents, their servants and/or agents from giving any effect and/or further effect to and/or acting on the basis of and/or in furtherance of the said purported summons dated 15th February, 2001 and/or in any purported* *proceedings thereunder and/or relating thereto and/or in pursuance thereof pending the disposal of this application;*

f) *Ad-interim order in terms of prayer (e) above;*

g) *Costs of and incidental to this application to be paid by the respondent;*

h) *Such further or other order or orders be made and/or directions be given as would afford complete reliefs to petitioners.*

4. Ultimately on 03.04.2001 the petitioners withdrew the said writ application with liberty to raise all the points taken in the writ petition before the appropriate authority.

5. The petitioners stated that pursuant to the summons issued under Section 40 of the Foreign Regulation Act, 1973 read with sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, petitioners could not appear before the office of the appropriate authority on 27.02.2001 as on that date issuance of the said summons under Foreign Exchange Regulation Act, 1973 since the matter was sub-judice before the Hon'ble High Court at Calcutta and thereafter no other summons under Section 40 of the Foreign Exchange Act, 1973 was issued to the petitioners.

6. The petitioners stated that the Foreign Exchange Regulation Act, 1973 had already been repealed by Foreign Exchange Management Act, 1999 with effect from 01.06.2000 as issuance of summons under Section 40 of the Foreign Exchange Regulation Act, 1973 on 15.02.2001 in exercise of the powers conferred under the provisions of the said repealed Act was

absolutely without any authority of law and issuance of such summons was void ab initio.

7. The petitioners stated that in any event the proviso of sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, 1999 had neither saved nor observed the powers conferred under Section 40 of the Foreign Exchange Regulation Act, 1973 and as such summons issued on 15.2.2001 under Section 40 of Foreign Exchange Regulation Act, 1973 had no sanction of law.
8. The petitioners stated that gifts under the Indian Development Bonds by a non-resident Indian to a resident Indian were under the immunity of exemption provided under Foreign Exchange Bond (Immunity & Exemption) Act, 1991. As such, issuance of the said summons under Section 40 of the Foreign Exchange Regulation Act, 1973 had no sanction of law.
9. The petitioners stated that since the bonds were covered under sub-section 1 of Section 6 of Foreign Exchange Bonds (Immunity & Exemption) Act, 1991 no investigation and enquiry was permissible. As such issuance of the said summons under Section 40 of the Foreign Exchange Regulation Act has no sanction of law.
10. On 01.10.2001 the complainant/opposite party lodged a complaint being Case No. C/5050 of 2001 against the petitioners and their late father and also against the pro-forma opposite parties No.3 and 4 for alleged non-compliance of the summons dated 15.02.2001 under Section 40 of the Foreign Exchange Regulation Act, 1973.

11. The allegation in the petition of complaint precisely stated that the petitioner did not appear before the complainant pursuant to the summons issued under Section 40 of the Foreign Exchange Regulation Act, 1973 on 27.02.2001 and thereby committed an offence which was punishable under Section 56 of the Foreign Exchange Regulation Act and non-compliance with the said summons attracted the provisions of Section 56 of the Foreign Exchange Regulation Act. It was further alleged that the petitioner's father, Late Arun Kumar Bajoria claimed to have received gifts to the extent of US$ 75 Lakhs equivalent to approximately Rs.25 crores by way of Indian Development Bonds in the name of his four daughters and also in the name of the company in which he had been a director and declared the said gifts before the Income Tax Authorities and claimed exemption for non-payment of income tax in the following manner:

1)	Ms. Surbhi Bajoria	US$ 2,00,000/-
2)	Ms. Pooja Bajoria	US$ 2,00,000/-
3)	M/s. Bajoria Finance P. Ltd.	US$ 6,00,000/-
4)	M/s. Arun Properties P. Ltd.	US$ 6,00,000/-
5)	M/s. Hooghly Stocks & Bonds Ltd.	US$ 10,00,000/-
6)	M/s. Hooghly Holdings Ltd.	US$ 10,00,000/-
7)	M/s. Meenakshi Projects Ltd.	US$ 5,00,000/-
8)	M/s. Hooghly Investments Ltd.	US$ 10,00,000/-
9)	M/s. Victoria Glass Works P. Ltd.	US$ 10,00,000/-
10)	M/s. J & R Hutchison	US$ 10,00,000/-

11)	Ms. Meenakshi Bajoria	US$ 2,00,000/-
12)	Ms. Nidhi Bajoria	US$ 75,00,000/-

12. On receiving the said complaint the Learned Chief Metropolitan Magistrate, Calcutta took cognizance and issued process.
13. After receiving the summons issued by the Chief Metropolitan Magistrate, Calcutta, the petitioners appeared before him through a lawyer the petitioners filed an application under Section 205 of the Code of Criminal Procedure, 1973.
14. Ultimately on 15.12.2003 the application under Section 205 of the Cr.P.C., 1973 which was filed by the petitioners before the Learned Metropolitan Magistrate, Calcutta was allowed by the Learned Chief Metropolitan Magistrate, Calcutta.
15. The petitioners stated and submitted that cognizance taken by the Learned Chief Metropolitan Magistrate on 01.10.2001 in Case No.C/5050/2001 was bad in law in view of the fact that the Foreign Exchange Regulation Act, 1973 had been repealed with effect from June, 2000.
16. Thereafter, the prosecution/complainant examined two witnesses and concluded the case before framing of charge.
17. The petitioners stated and submitted that before framing of charge, prosecution witness no. 2, Mr. S. Bala Krishnan clearly stated in examination in chief that the petitioners had committed an offence and/or contravened the provisions of the Foreign Exchange Regulation Act, 1973 on 27.02.2001, by not appearing before herein on 27.02.2001 whereas it was

clear that on 27.02.2001/15.02.2001 no offence could be committed under the Foreign Exchange Regulation Act as it had been repealed with effect from June, 2000.

18. The petitioners stated and submitted that the deposition in Court by S. Balakrishnan could not be accepted as the petition of compliant clearly made out a case that the petitioners committed an offence and/or contravened the provisions of the Foreign Exchange Regulation Act, 1973 on 27.02.2001/15.02.2001 and not before that.

19. Since the Foreign Exchange Regulation Act had already been repealed with effect form June, 2000 question of committing an offence on 27.02.2001/15.02.2001 did not arise at all.

20. The petitioners stated that a separate show cause notice was issued against the petitioners and her father, Late Arun Kumar Bajoria and also against the proforma opposite parties and others being SCN No. T-4/4-C/91-SCN-II dated 23.05.2002 for alleged contravention of provisions of Section 64 (2) of the Foreign Exchange Regulation Act, 1973 by the petitioners.

21. The allegation in the said separate show cause notice was that scrutiny of the seized documents marked ‘A’ and ‘B’ seized from the residential premises of Sri Arun Kumar Bajoria (father of the petitioners) pertained to details of Indian Development Bonds worth of US$ 75 Lakhs received by the Notices No. 2 to 13 of the said show cause notice i.e. M/s. Bajoria Finance Pvt. Ltd., M/s Arun Properties (P) Ltd., M/s. Hooghly Stocks and Bonds Ltd., M/s. Hooghly Holdings Ltd., M/s. Meenakshi Projects Ltd., M/s. Hooghly

Investments Ltd., M/s. Victoria Glass Works, M/s. J & R Hutchison Ltd., Ms. Surbhi Bajoria, Ms. Pooja Bajoria, Ms. Meenakshi Bajoria, Ms. Nidhi Bajoria during September, 1992 as gifts from S/Sh. Narsi Dayaram Mukhi Narshi Dayaram Mukhi Neechamall and Sureen Narsi Mukhi. The gifts were received in the names of companies/persons as detailed below:

Sl.	Certificate No.	Amount	Transferred to
1.	E-101134 to 101137	US$ 200000	Surbhi Bajoria, 76, Garden Reach Road, Kolkata-43.
2.	E-101138 to 101141	US$ 200000	Pooja Bajoria, 76, Garden Reach Road, Kolkata-43
3.	E-101090 to 101101	US$ 600000	M/s. Bajoria Finance Pvt. Ltd. 10, Clive Row Kolkata-1
4.	E-101102 to 101113	US$ 600000	M/s. Arun Properties Ltd., 10, Clive Row Kolkata-700001
5.	E-305853 to 305872	US$ 1000000	M/s. Hooghly Stocks & Bonds Ltd.76, Garden Reach Road, Kolkata-700043
6.	E-305893 to 305912	US$ 1000000	M/s. Hooghly Hooghly Ltd.76, Garden Reach Road, Kolkata-700043
7.	E-305704 to 305713	US$ 500000	M/s. Meenakshi Projects Ltd., 10, Clive Row, Kolkata-1
8.	E-305873 to 305892	US$ 1000000	Hooghly Investments Ltd. 76, Garden Reach Road, Kolkata-43
9.	E-305833 to 305852	US$ 1000000	M/s. Victoria Glass Words, 10, Clive row, Kolkata-1
10.	E-101114 to 101133	US$ 1000000	M/s. J&R Hutchison Ltd. 10, Clive row, Kolkata-1
11.	E-101146 to 101149	US$ 200000	Ms. Meenakshi Bajoria, 76, Garden Reach Road, Kolkata-

			700043.
12.	E-101142 to 101145	US$ 200000	Ms. Nidhi Bajoria, 76, Garden Reach Road, Kolkata-700043

22. The petitioners stated that ultimately on 8.6.2005 Sri S.K. Panda, Special Director, Enforcement Directorate dropped the proceedings against the notice mentioned above for receiving Indian Development Bonds from S/Sh. Narsi Dayaram Mukhi Narsi Dayaram Mudkhi Neechamall and Sureen Narsi Mukhi against above notices.
23. The petitioners stated and submitted that since the adjudication proceeding has been dropped against the notices for receiving Indian Development Bonds from S/Sh. Narsi Dayaram Mukhi Narsi Dayaram Mukhi Neechamall and Sureen Narsi Mukhi, on the self-same ground appearance before the so-called Investigating Agency pursuant to a summon issued against her under Section 40 of the Foreign Exchange Regulation Act, 1973 did not arise at all.
24. Thereafter, the Learned Metropolitan Magistrate, 11th Court, Calcutta by His order dated 13.8.2014 directed the petitioners to appear before him on 8.12.2014 for consideration of charge.
25. The Learned Advocate for the petitioners submitted that :
    i. The cognizance taken by the Learned Chief Metropolitan Magistrate, Calcutta on 01.10.2001 in case No. C-5050 of 2001 was bad in law in view of the fact that the Foreign Exchange Regulation Act has already been repealed with effect from June, 2000.

ii. Since the Foreign Exchange Regulation Act, 1973 has been repealed by the Foreign Exchange Management Act, 1999 with effect from 1.6.2000 issuance of summon under Section 40 of the Foreign Exchange Regulation Act, 1973 on 15.02.2001 in exercise of power conferred under the provisions of the said repealed Act was absolutely without of law and issuance of such summons was void ab initio.

iii. In any event the provisions of sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, 1999 has neither saved nor preserved the power conferred under Section 40 of the Foreign Exchange Regulation Act, 1973 as such summons issued under Section 40 of the Foreign Exchange Regulation Act, 1973 had no sanction of law.

iv. Section 49(3) of the Foreign Exchange Management Act, 1999 empowers a Magistrate to take cognizance of an offence (where offence was committed within June, 2000 under the Foreign Exchange Regulation Act, 1973.

v. Section 49(3) of the Foreign Exchange Management Act empowers an adjudicating authority to take notice of a contravention under Section 50 of the repealed Act within a period of two years of offence/contravention which has been committed within June, 2000.

vi. The gift under the Indian Development Bonds by non-resident Indian to a resident Indian is under the immunity and exemption provided under the Foreign Exchange Bonds (Immunity and Exemption) Act, 1991, as such issuance of the said summon under Section 40 of the Foreign Exchange Regulation Act, 1973 has no sanction of law.

vii. Since the Indian Development Bonds are covered under sub-section 1 of Section 6 of the Foreign Exchange Bonds (Immunity & Exemption Act, 1991 no investigation and enquiry is permissible as such issuance of such summon under Section 40 of the Foreign Exchange Regulation Act, 1973 is bad in law.

viii. In any event the question of committing an offence under the Foreign Exchange Regulation Act, 1973 is not permissible after June 2000 when the said Act has been repealed.

ix. The Petitioners cannot commit an offence on 15.2.2001 under the Foreign Exchange Regulation Act, 1973.

x. From the evidence of P.W.2, Sri S. Balakrishnan who issued the process and also summon under Section 40 of the Foreign Exchange Regulation Act, 1973 clearly indicated that the petitioners have not committed any offence till 27.2.2001 which had been an admitted fact/case.

xi. In view of the fact that the adjudication proceedings started against the petitioners and others by Show Cause Notice No. T-

4/4-C/91-SCN-II dated 23.5.2002 for alleged contravention of provisions of Section 64(2) of the Foreign Exchange Regulation Act, 1973 by the petitioner and others in connection with receiving of Indian Development Bonds from S/Sh. Narsi Dayaram Mukhi Narsi Dayaram Mukhi Neechamall and Sureen Narsi Mukhi had been dropped by an order dated 8.6.2005 passed by Sri S.K. Panda, Special Director, Enforcement Directorate, New Delhi, Question of contravention 64(2) of the Foreign Exchange Regulation Act, 1973 by the petitioner did not arise at all.

26. In the year 1992 the petitioners received India Development Bonds issued by the Government of India under the Remittances of Foreign Exchange and Investment in Foreign Exchange Bond (Immunities & Exemption) Act, 1991 from his father, Late Arun Kumar Bajoria. The bonds were acquired in accordance with law and there was no breach of Foreign Exchange Regulation Act, 1973.

27. The Foreign Exchange Regulation Act, 1973 was repealed w.e.f 1.6.2000 by Foreign Exchange Regulation Act, 1973 was repealed with effect from 01.06.2000 by Foreign Exchange Management Act, 1999 which in sub-Section 3 and sub-Section 4 of Section 49 saved the offences committed under the Repealed Act to be governed by the provisions of the Repealed Act as if the Act has not been repealed.

28. The acquisition of Bonds by the petitioners were otherwise protected from any investigation or adjudication under the immunity conferred by Section 3(b) Remittances of Foreign Exchange and Investment in Foreign Exchange Bond (Immunities & Exemption) Act, 1991.

29. On or about 15.02.2001 the respondents issued a summons under Section 40 of Foreign Exchange Regulation Act, 1973 (since repealed) to the petitioner in connection with procurement of India Development Bonds by the petitioners directing the petitioner to appear before the Enquiry Officer on 27th February, 2001 at 2-00 p.m. In the summon it was mentioned that non-compliance of the summon would be punishable under Section 50 and Section 56 of the Foreign Exchange Regulation Act, 1973 though the Act was repealed. Section 50 deals the penalty proceeding and Section 56 deals with offences and prosecution under the Foreign Exchange Regulation Act, 1973.

30. Since the summons was issued without authority of law and contrary to the immunity granted under Section 3(b) of the Remittances of Foreign Exchange Bond (Immunity & Exemption) Act, 1999 (hereinafter referred to as the said Immunity Act), the petitioners challenged the summons by filing a writ application in the Hon'ble High Court which was withdrawn with liberty to take appropriate proceeding at the appropriate time.

31. The respondent after investigation filed a complaint/SCN No. B-4/4-C/91SPN II dated 23rd May, 2002 in relation to the acquisition of India Development Bonds by the petitioners which was subject matter of enquiry under the impugned summon issued under Section 40 of the Foreign

Exchange Regulation Act, 1973 for adjudication under Adjudication Proceeding and Appeal Rules 1974 which requires the adjudicating authority to make an enquiry and do adjudication.

32. The adjudicating authority after enquiry and considering the complaint filed by the Enforcement Officer under Foreign Exchange Regulation (Adjudication Proceeding and Appeal) Rules, 1973 held inter alia:

    (a) Enquiry or investigation against the recipient of India Development Bond could have been started only if the department was having any evidence to prove the Foreign Exchange was required to be brought into India under provisions of Foreign Exchange Regulation Act, 1973 where as there was no such allegation against the petitioner of those sorts.

    Paragraphs 56 and paragraph 57 of the order at page 149 of the petition which are set out hereinbelow:

    “56. Therefore, any enquiry or investigations against the recipients of Indian Development Bonds could have been started only if the department was having any evidence to prove that these foreign exchange was required to be brought into India under the provisions of the FERA, 1973 or the FERA, 1973 read with the Income Tax Act, 1961.

    57. In the context of the cases of notice nos. 2 to 13, there is no such allegation in the SCN against the said notices that they had any sort of business dealing with S/Sh. Nari Dayaram Mukhi or Sureen Narsi

Mukhi because of which they were legally bound to bring into India any foreign exchange to the extent of the value of the India Development Bonds i.e. amounts repartiable on account of exports, services rendered etc. as per the provisions of the FERA, 1973 or any of the provisions of Income Tax Act, 1961 read with the FERA, 1973. The allegation in the SCN is that Sh. A.K. Bajoria, notice no. 1 had foreign exchange funds lying in his foreign currency accounts in Discount Bank, Geneva which he had transferred to persons resident outside India viz. S/Sh. Narsi Dayaram Mukhi & Sureen Narsi Mukhi which were then gifted to the notices (notice nos. 2 to 13) in the form of IDEs."

(b) The adjudicating authority also held that the investigation in the matter of the receipt of the gift of an Indian was also contrary to law inasmuch as the notices were having protection form the Immunities Act, 1991.

Paragraph 59 is set out hereinbelow:

"59. Be that as it may, the notices, by all means, are entitled to have the protection from the Immunities Act, 1991 read with the amendments referred above and it would not be in proper appreciation of the provisions of the Immunities Act, 1991 to make any investigation in the matter of the said receipt of gifts of IDEs by the said notices and the said notices and the notices are right in claiming protection under the provisions of the said Act. Moreover, the said bonds had since matured and the investigations were initiated by the Directorate in the year, 1957."

(c) It also held that no enquiry or investigation could commence against a person who received the bond as gifts which would be clear from the provisions read with the Amendment isasmuch as the bonds were procured by the petitioner in accordance with law and when reflected in their bank account to be Bankers and the Income Tax Department and to the RBI.

Paragraph 61 which is set out hereinbelow:

"61. From the foregoing legal provisions of the scheme, it could be seen that the India Development Bonds could be purchased by any non-resident Indian or Oversea? Corporate body and the said bonds could also be gifted to persons residents in India. Further, in terms of Section 6(1)(a), no non-resident Indian or Oversea Corporate Body who or which owns the foreign exchange bonds or any person resident in India to whom a gifts of such bonds or any person resident in India to whom a gifts of such bonds has been made by such non-resident Indian or Overseas Corporate Body, shall be required to disclose, for any purpose whatsoever, the nature and source of the investment in such bonds and in terms of Section 6(1)(b), no enquiry or investigation shall be commenced against such non-resident Indian or Overseas Corporate Body or the resident Indian who received the bonds as gifts. It is also clear from the said provisions read with the amendments 12.11.1950 that the donor of the IDEs and the need not be blood-relations. The recipients respective of the number of bonds or the value thereof, were only bound to declare in the appropriate forms about the receipt of the gifts to the State Bank of India for the purpose of recording the transfer of bonds in the bank records as well as in the income-tax returns filed by such recipients in the following assessment year subsequent to receipt of the gifts. In this case, it is on record that the notices (notice no.2 to 13) had complied with the requisite provisions of laws of Immunity Act, 1991 by promptly declaring the receipt of the IDEs to the State Bank of India/RBI Central Office, Mumbai and also to the income-tax department thereby complied with all the directions issued by the RBI under the above Scheme framed under Act 41 of 1991."

(d) It further held that the Immunity Act were binding on investigating authority as well as on enquiry by referring to the judgment of the Court in Ramesh C. Mehta Vs. Directorate of Enforcement (Page 62 which is set out hereinbelow).

"62. In the case of Ramesh C Mehta v. Directorate of Enforcement [(1999) 104 Taxman 421 (FE.RAB)] the Hon'ble FERA Board held that despite the immunity granted to recipients of gifts in the form of India Development Bonds, the Enforcement Directorate had initiated proceedings against such recipients. It was opined that immunity-under the Act was directed not only against all authorities who are in-charge of investigations and enquiries but also against adjudicating and judicial authorities."

In the aforesaid manner the adjudicating authority held the enquiry initiated by the Respondent to be bad in law.

33. On merit of acquisition of Bonds, the adjudicating authority held that since the appellant procured the bonds in accordance with law and there was no debt receivable in India under the Foreign Exchange Regulation Act, 1973 and there was no allegation to the contrary charges were not sustainable.

Paragraphs 64, 67 and 75 are the relevant paragraphs where the adjudicating authority had held final view of the matter on merit. The relevant paragraphs are set out hereinbelow:

> "64. A careful consideration of the relevant provisions of the Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991 vis-à-vis the materials on record, I find that the notices are covered under the provisions of the said Act as they had discharged the obligations of the Act and further that they did not fail in the category of those persons who were not eligible to avail the immunity under the Act as discussed hereinbefore. In the circumstances, I hold that the charges against notice nos. 2 to 13 i.e. M/s Bajoria Finance Pvt. Ltd., M/s Arun Properties (P) Ltd., M/s Hooghly Stocks & Bonds Ltd., M/s Hooghly Holdings Ltd., M/s Meenakshi Projects Ltd., M/s Hooghly Investments I Victoria

Glass Works, M/s J & R Hutchison Ltd., Ms. Bajoria, Ms. Pooja Bajoria, Ms. Meenkshi Bajoria and Mr. Nidhi Bajoria were not sustainable as the said notices had complied with the provisions of the Immunities Act, 1991 and also that there is no materials in the relied upon documents in support of the violations attributed against the notices.

67. It is also noticed that in view of the adjudication order dated 18.06.2004 in SCN no. T-4/4-C/91(SCN-1) dated 8.3.1991 and which was accepted by the department, the allegation in the SCN of otherwise transferring foreign exchange to S/Sh. Narsi Dayaram Mukhi and Sureen Narsi Mukhi has become a non-issue. There is no documentary evidence that notice had indeed transferred any foreign exchange as alleged in the SCN. The notice, in his statements dated 30.06.1997, 19.07.1997 & 29.07.1997 neither admitted having transferred any such foreign exchange to the persons residents outside India nor having transferred any such foreign exchange to the persons resident outside India nor having transferred any funds from India by hawala thereby enabling him to bring back the same for availing the benefits of the Immunity Scheme, 1991. The department also has not brought out any evidence to substantiate the allegation. The whole allegation is dependent on the premises that Sh. Arun Kumar Bajoria was having the foreign currency accounts in the Discount Bank,

Geneva and the funds from the said accounts were transferred to S/Sh. Narsi Dayaram Mukhi and Sureen Narsi Mukhi, which ultimately came to India by was of India development Bonds. Now that the department has held that there was no such evidence of Sh. Arun Kumar Bajoria having accounts in the Discount Bank, the question of transfer of funds does not arise. Neither the department has produced any evidence indicating the mode of transfer of such funds.

75. Having regard to the findings and discussions as narrated hereinbefore, I hereby drop the proceedings against Sh. Arun Kumar Bajoria, M/s Bajoria Finance Pvt. Ltd., M/s Arun Properties (P) Ltd., M/s Hooghly Stocks & Bonds Ltd., M/s Hooghly Holdings Ltd., M/s Meenakshi Projects Ltd., M/s Hooghly Investments ltd., M/s Vistoria Glass Works, M/s J&R Hutchison Ltd., Ms. Surbhi Bajoria, Ms. Pooja Bajoria, Ms. Meenakshi Bajoria and Ms. Nidhi Bajoris (notice nos. 1 to 13) in SCN No. T-4/4-C/91(3CN-II) dated as the charges against the notices have not been proved on the basis of materials and evidences on record. Consequently, the proposal for confiscation of proceeds of the India Development Bonds which are the subject matter of the proceedings in terms of Section 63 of the FERA, 1973 also failed."

34. The respondent filed a complaint under Section 56 of the Foreign Exchange Regulation Act 1973 for not attending the summons on October, 2001

cognizance and which was taken on by the Learned Court below on non-compliance of summon on 27th February 2001 whereas Foreign Exchange Regulation Act 1973 was repealed w.e.f. 1st June 2000, cognizance of which was taken by the Learned Court below.

35. In the complaint it was alleged that the petitioners did not respond to the summon issued under Section 40 of the Act on 27.02.2001 and did not comply with the requirement of summons.

36. The petitioners have two fold submissions:-

Firstly, that no new offence can be born after repeal of the Act (Foreign Exchange Regulation Act being repealed w.e.f. 1st June 2000) and repealed Act could not create or begat a new offense or create cause of action on 27.02.2001. The saving clause saved "offenses committed" by the repealing Act i.e. Foreign Exchange Management Act, 1999 as would appear from Section 49(3) of the Act and did not save or provide for saving so creating any new cause of action.

Secondly, the complaint filed under Section 50 for penalty having been proceeded under Section 49(3) of the Act by adjudicating authority which held both investigation and charges are at all not sustainable in law.

37. The investigation under the Repealed Act was to be carried under the procedure prescribed under Foreign Exchange Management Act, 1999 which prescribed procedure for issue of summon under Section 37(3) of the Foreign Exchange Management Act which did not have any penal provision. It would be pertinent to mention that Foreign Exchange Management Act, 1999 did

not have any penal provision which was repugnant to Section 56 of the Foreign Exchange Regulation Act 1973.

38. Upon the complaint filed by the respondent under Section 50 of the Foreign Exchange Regulation Act 1973 before the adjudicating authority held the enquiry and charges bad in law.

39. The petitioner stated that the order passed by the adjudicating authority being the Apex Authority on 5th June, 2005 had been accepted by the department and all the charges against the petitioners had been dropped.

40. The appellant stated that the complaint proceeding and cognizance taken by the Learned Magistrate are liable to be quashed on the following ground :-

   i. Firstly for the alleged cause of action the adjudicating authority hold that the enquiry was bad in law and the acquisitions of Bonds were lawful.

   ii. Secondly, the repealed Act could not create any new offence after its repeal.

   iii. Thirdly, the complaint was without authority of law and without jurisdiction.

   iv. Fourthly, it would be an abuse of the process of law after the adjudicating authority exonerated the petitioner from all charges the respondents can not allowed to pursue criminal proceeding for the same cause of action which it has accepted in adjudication proceeding.

v. Fifthly, the penal provisions are to be continued strictly. There being no provisions or saving for creation or saving of any offence after repeal, FERA-73 could create any new offence.

41. In this connection the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of Radheshyam Kejariwal reported in 266 ELT page 294(SC) and also relied upon the judgment of the Supreme Court reported in Section 337 ELT page 3(SC) and 1993 suppl. (2) SCC 724(M/s P.V. Mohammad vs. Director of Enforcement.)

42. The Learned Advocate for the opposite party submitted that the Case No. C/5050/2001 was instituted within the sunset period of 2 years of coming into effect of the Foreign Exchange Management Act, 1999, whereby the Foreign Exchange Regulation Act was repealed since the Act of 1999 came into force with effect from 2000. It was further submitted by the Learned Advocate for the opposite party that by virtue of Foreign Exchange Regulation Act of 1973, non-compliance of Section 40 of the said Act was punishable under the provisions enumerated in Section 56 of the Foreign Exchange Regulation Act, 1973. Such investigation or proceeding was considered to be a judicial proceeding within the meaning of Sections 193 and 228 of the Code of Criminal Procedure was distinct from an adjudication proceeding and consequently deliberate violation of Section 40 of the aforesaid Act on summons being issued to the persons for attendance either to give evidence or to produce a document as envisaged therein is a criminal

offence punishable under Section 56 of the Foreign Exchange Regulation Act and the instant criminal revisional application shall be dismissed.

43. The petitioners were directed to appear before the Enforcement Director, Government of India, Kolkata on 27.02.2001 in compliance with the issuance of summons dated 15.02.2001 under Section 40 of the Foreign Exchange Regulation Act, 1973 read with sub-sections 3 and 4 of Section 49 of the Foreign Exchange Management Act, 1999.

44. Sub-Sections 3 and 4 of the Foreign Exchange Management Act, 1999 states as follows:

> *"49. Repeal and saving.— (3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.*
> *(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed."*

45. The relevant provisions under the Act in question are pertinent to be mentioned:

   i. Section 40 of Foreign Exchange Regulation Act states as follows:

> *"40. Power to summon persons to give evidence and produce documents.—(1) Any Gazetted Officer of Enforcement shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document during the course of any investigation or proceeding under this Act.*
>
> *(2) A summons to produce documents may be for the production of certain specified documents or for the production*

of all documents of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by authorised agents, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents as may be required:

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such investigation or proceeding as aforesaid shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code."

ii. Section 50 of the Foreign Exchange Regulation Act states as follows:

"*50. Penalty.—If any person contravenes any of the provisions of this Act [other than Section 13, clause (a) of sub-section (1) of 55[Section 18, Section 18-A] and clause (a) of sub-section (1) of Section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).*

iii. Section 51 of the Foreign Exchange Regulation Act states as follows:

"51. Power to adjudicate.—For the purpose of adjudging under Section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to

in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

iv. Section 56 of the Foreign Exchange Regulation Act states as follows:

"*56. 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 59[Section 18, Section 18-A] 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 judgement, impose 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 or with fine or with both.

(2) If any person convicted of an offence under this Act [not being an offence under Section 13 or clause (a) of sub-section (1) of 60[Section 18 or Section 18-A] or clause (a) of sub-section (1) of Section 19 or sub-section (2) of Section 44 or Section 57 or Section 58] is again convicted of an offence under this Act [not being an offence under Section 13 or clause (a) of sub-

section (1) of [Section 18 or Section 18-A] or clause (a) of sub-section (1) of Section 19 or sub-section (2) of Section 44 or Section 57 or Section 58], he shall be punishable for the second and for every subsequent offence 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, impose a sentence of imprisonment for a term of less than six months.

(3) Where a person having been convicted of an offence under this Act [not being an offence under Section 13 or clause (a) of sub-section (1) of [Section 18 or Section 18-A] or clause (a) of sub-section (1) of Section 19 or sub-section (2) of Section 44 or Section 57 or Section 58] is again convicted of an offence under this Act [not being an offence under Section 13 or clause (a) of sub-section (1) of [Section 18 or Section 18-A] or clause (a) of sub-section (1) of Section 19 or sub-section (2) of Section 44 or Section 57 or Section 58], the court by which such person is convicted may, in addition to any sentence which may be imposed on him under this section, by order direct that that person shall not carry on such business as the court may specify, being a business which is likely to facilitate the commission of such offence, for such period not exceeding three years, as may be specified by the court in the order.

(4) For the purposes of sub-sections (1) and (2), the following shall not be considered as adequate and special reasons for awarding a sentence of imprisonment for a term of less than six months, namely—

(i) the fact that the accused has been convicted for the first time of an offence under this Act;

(ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any

other penal action has been taken against him for the same offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;

(iv) the age of the accused.

(5) For the purposes of sub-sections (1) and (2), the fact that an offence under this Act has caused no substantial harm to the general public or to any individual shall be an adequate and special reason for awarding a sentence of imprisonment for a term of less than six months.

(6) Nothing in 61[the proviso to Section 188 of the Code of Criminal Procedure, 1973 (2 of 1974)], shall apply to any offence punishable under this section."

v. Section 64 of the Foreign Exchange Regulation Act states as follows:

"64. Preparation, attempt, etc.—(1) Whoever makes preparation to contravene any of the provisions of this Act [other than Section 13, clause (a) of sub-section (1) of 66[Section 18, Section 18-A], 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 and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, the contravention as aforesaid would have taken place, shall, for the purposes of Section 56, be deemed to have contravened that provision, rule, direction or order, as the case may be.

(2) Whoever attempts to contravene, or abets any contravention of, any of the provisions of this Act [other than Section 13, clause (a) of sub-section (1) of 67[Section 18, Section 18-A], 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, shall, for the purposes of this Act, be deemed to have contravened that provision, rule, direction or order, as the case may be."

46. A conjoint reading of the aforesaid provisions delineates that the provisions of Section 40 of the Foreign Exchange Regulation Act, 1973 will have no application under the Act of 1999, the Act of 1973 being repealed.

47. Section 6 of the Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991 states as follows:

> *"6. Immunities.—(1) Notwithstanding anything contained in the Wealth-tax Act, 1957 (27 of 1957), the Gift-tax Act, 1958 (18 of 1958), the Income-tax Act, 1961 (43 of 1961), the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Foreign Contribution (Regulation) Act, 1976 (49 of 1976),—*
>
> *(a) no non-resident Indian or overseas corporate body who or which owns the Foreign Exchange Bonds or any person resident in India to whom a gift of such Bonds has been made by such non-resident Indian or overseas corporate body, shall be required to disclose, for any purpose whatsoever, the nature and source of the investment in such Bonds;*
>
> *(b) no inquiry or investigation shall be commenced against any of the persons referred to in clause (a) under any of the said Acts on the ground that such person owns such Bonds;*
>
> *(c) the fact that any of the persons referred to in clause (a) owns such Bonds shall not be taken into account and shall be inadmissible as evidence in any proceedings relating to any offence or the imposition of any penalty under any of the said Acts.*

(2) Nothing in sub-section (1) shall apply to foreign exchange which is required to be brought into Indian under any of the provisions of—

(i) the Foreign Exchange Regulation Act, 1973 (46 of 1973); or

(ii) the Income-tax Act, 1961 (43 of 1961), read with the Foreign Exchange Regulation Act, 1973 (46 of 1973),

if the period within which such foreign exchange is to be brought into India has not expired or where such period has been extended, in any manner, by the Central Government or the Reserve Bank of India or any other authority, such extended period has not expired on the date of commencement of this Act."

48. The adjudicating authority after enquiry and considering the complaint filed by the Enforcement Officer under Foreign Exchange Regulation (Adjudication Proceeding and Appeal) Rules, 1973 held inter alia as aforesaid that the proceedings initiated against the petitioners were not sustainable and exonerated the petitioners and the proceedings were dropped against them as abovementioned.

49. In the case of ***Videocon Industries Ltd. and Ors. Vs. State of Maharashtra and Ors.***[1], the Hon'ble Supreme Court held as follows:

"16. In that context, the majority in Radheshyam Kejriwal (supra) has proceeded to pose the issue required to be adjudicated in the said case. It is as follows:

However, in a case like the present one in which the penalty proceeding Under Section 51 of the Act and the prosecution Under Section 56 of the Act though launched together but the penalty proceeding culminated earlier exonerating the person, the question would arise as to whether continuance of the prosecution would be permissible or not. In other words, the question with which we are concerned is the impact of the findings which are recorded on the

[1] MANU/SC/0666/2016

> *culmination of adjudication proceedings on criminal proceeding and in case in the adjudication proceedings the person concerned is exonerated can he ask for dropping of the criminal proceeding on that ground alone.*

17. Thereafter, it has referred to various authorities, namely, Collector of Customs v. L.R. Melwani MANU/SC/0279/1968 : AIR 1970 SC 962,B.N. Kashyap v. Emperor MANU/LA/0036/1944 : AIR 1945 Lah. 23,K.G. Premshankar v. Inspector of Police MANU/SC/0771/2002 : (2002) 8 SCC 87,Iqbal Singh Marwah v. Meenakshi Marwah MANU/SC/0197/2005 : (2005) 4 SCC 370,Uttam Chand v. ITO MANU/SC/0283/1979 : (1982) 2 SCC 543,G.L. Didwana v. ITC MANU/SC/1087/1995 : (1995) Supp (2) SCC 724 and K.C. Builders v. CITMANU/SC/0070/2004 : (2004) 2 SCC 731 and eventually ruled that:

> *We find substance in the submission of Mr. Sharan. There may appear to be some conflict between the views in Standard Chartered Bank (1) and L.R. Melwani holding that adjudication proceedings and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceedings is not binding on the criminal proceeding and the judgments of this Court in Uttam Chand, G.L. Didwania and K.C. Builders wherein this Court had taken a view that when there is categorical finding in the adjudication proceedings exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand. The judgments of this Court are not to be read as a statute and when viewed from that angle there does not seem any conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act.*

18. In the ultimate eventuate, the following principles were culled out from the decisions referred to in the judgment. The majority has put it thus:
The ratio which can be culled out from these decisions can broadly be stated as follows:

> *(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;*
> *(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;*
> *(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;*

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;
(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;
(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and
(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

19. Clarifying the position, the majority observed that the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court. On the basis of the aforesaid principles, the majority proceeded to analyse the factual matrix and analysed the finding recorded by the adjudicating authority and opined when there is a finding by the Enforcement Directorate in the adjudication proceeding that there is no contravention of any of the provisions of the Act, it would be unjust and an abuse of the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution.

20. We respectfully concur with the said view and do not perceive any reason to disagree with the same and refer the pronouncement in Radheshyam Kejriwal (supra) for reconsideration by the larger Bench."

50. In view of the above discussions and the fact that upon exoneration of the petitioner from the proceedings instituted by the Enforcement Directorate, considering that the petitioners have not committed any offence with regard to the provisions of Section 6 of the Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991 and considering the fact that the Foreign

Exchange Regulation Act, 1973 has been repealed, to allow the proceeding to continue in trial will result in abuse of process of law.

51. In view of the above discussions, the order dated 01.10.2001 passed by the Learned Metropolitan Magistrate, Calcutta in connection with Case No.C/5050/2001 under Section 56 of the Foreign Exchange Regulation Act, 1973 for alleged non-compliance of summon issued under Section 40 of Foreign Exchange Act, 1973 and an application for quashing the proceeding including the cognizance taken by the Learned Chief Metropolitan Magistrate dated 01.10.2001 in connection with Case No.C/5050/2001 under Section 56 of the Foreign Exchange Regulation Act, 1973 and an order dated 13.08.2014 passed by the Learned Metropolitan Magistrate, 11^{th} Court, Calcutta in connection with Case No.C/5050/2001 is quashed.
52. The criminal revisional application being CRR 3658 of 2014 is allowed.
53. Accordingly, CRR 3658 of 2014 stands disposed of.
54. There is no order as to cost.
55. Let the copy of this judgment be sent to the Learned Trial Court as well the police station concerned for necessary information and compliance.
56. All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

(Ananya Bandyopadhyay, J.)