

**IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Foreign Exchange)
Original Side**

**FEA 5 of 2008
IA No. GA 1 of 2008 (Old No. GA 2513/2008)
M/s. Travels and Rentals Private Limited & Ors.
Vs.
Union of India & Ors.**

With

**FEA 22 of 2009
M/S. R. R. Sen & Brothers Private Limited
Vs.
Union of India & Ors.**

with

**FEA 23 of 2009
Mohan Lal Sen
Vs.
Union of India & Ors.**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

For the Appellant : Mr. Pramit Bag, Adv.
In FEA 5 of 2008 : Mr. R. Mukherjee, Adv.
Mr. Shomrik Das, Adv.

For the Appellant in : Mr. Sanjay Bhoumik, Adv.
FEA 22 of 2009 & : Mr. A. K Dey, Adv.
FEA 23 of 2009 : Mr. Bhaskaromoy Dey, Adv.
Mr. Vineet Ojha, Adv.

For Enforcement : Mr. Arijit Chakraborti, Adv.
Directorate in : Mr. Deepak Sharma, Adv.
FEA 5 of 2008

For the Enforcement : Mr. Vipul Kundolia
Directorate in
FEA 22 of 2009 &
FEA 23 of 2009

Hearing concluded on : July 11, 2023
Judgment on : July 25, 2023

DEBANGSU BASAK, J. :-

1. Three appeals have been heard together as they involve similar issues.
2. The appellants in the three appeals have been represented by two sets of learned counsel. For the sake of convenience, facts and contentions of the appellants in the three appeals are adumbrated in order of time of the three appeals.
3. FEA No. 5 of 2008 had been filed prior to the other two appeals and for the sake of convenience is hereinafter referred to as the first appeal. The appellants in FEA 22 of 2009 and FEA 23 of 2009 have been represented by a different learned counsel. These two appeals, for the sake of convenience have been referred to as the next sets of appeals.
4. Learned advocate appearing for the appellants in the first appeal has drawn the attention of the Court to the facts of the present case. He has submitted that the memorandum dated March 31, 2002 was issued to the appellants on May 31, 2002. He has referred to the stand taken by the appellants both before the adjudicating officer as also at the subsequent stage before the appellate authority that, the

memorandum was issued on June 1, 2002 and therefore, beyond period prescribed by the sun set clause.

5. Learned advocate appearing in the first appeal has referred to Section 49 of the Foreign Exchange Management Act, 1999 (FEMA) and in particular Section 3 thereof and contended that, beyond May 31, 2002 provisions of Foreign Exchange Regulation Act, 1973 (FERA) cannot be invoked. He has referred to the memorandum dated May 31, 2002 and contended that, the same was received by the appellants in the first appeal on June 3, 2002. The department did not produce any document to establish that the memorandum dated May 31, 2002 has been sent by registered post and was put beyond the control of the department on May 31, 2002. In support of his contentions that the department did not establish the dispatch of the memorandum dated May 31, 2002 learned advocate appearing for the appellants in the first appeal has relied upon **1999 SCC Online Cal 722 (Rajesh Kumar Jain vs. Union of India)** and **1996 Volume 1 Calcutta High Court Notes 1 (Union of India and others vs. Shri Kanti Tarafdar & Ors.)**.
6. Learned advocate appearing for the appellants in the first appeal has contended that, since the department did not act

in terms of Section 49 of the Act of 1999 in invoking the provisions of FERA within the time period prescribed, therefore, the act of the department is invalid. In support of such contentions he has relied upon **199 Supplementary 1 SCC 471 (Collector of Central Excise, Madras Vs. M/s M. M. Rubber and Co. Tamil Nadu), All India Reporter 1939 Privy Council 253 (Nazir Ahmad vs. King Emperor), and 2021 Volume 6 Supreme Court Cases 707 (OPTO Circuit India Ltd. Vs. Axis Bank & Ors.)**.

7. Learned advocate appearing for the appellant has contended that, the adjudicating officer did not have jurisdiction to decide the claim. He has referred to a notification issued by the authorities in 2003. He has contended that exercise of powers under FERA was not available in 2003. He has drawn the attention of the Court to the fact that, the impugned order was passed on December 19, 2004 well beyond the time period prescribed. In support of such contention he has relied upon **2022 Volume 145 taxmann.com 83 (Bombay) vs. First Global Stockbroking (P) Ltd.**
8. Learned advocate appearing for the appellants in the first appeal has contended that, a fiscal statute is required to be strictly considered. In support of such contention he has

relied upon **2022 Volume 5 Supreme Court Cases 62 (Krishi Upai Mandi Samiti, New Delhi vs. CCE)** and **1991 Volume 4 Supreme Court Cases 467 (Commissioner of Income Tax, Gujrat vs. Cellulose Production of India Ltd.)**.

9. Learned advocate appearing for the appellants in the first appeal has contended that, Reserve Bank of India did not initiate any proceedings with regard to the so called violation of the terms of the license. In fact, Reserve Bank of India had renewed the license. Therefore, there was no valid ground for the authorities to initiate the proceedings under FERA. He has contended that the impugned action of the authority suffers from non-application of mind.
10. Learned advocate appearing for the department in the first appeal has contended that the memorandum is dated May 31, 2002. Since the Foreign Exchange Management Act, 1999 (FEMA) had come into effect from June 1, 2002 therefore, actions taken as on May 31, 2002 with regard to FERA was valid. He has contended that, the adjudicating officer took notice of the infractions and initiated proceedings on the basis of the memorandum dated May 31, 2002. Therefore, the proceedings were initiated validly within the

time period prescribed. He has referred to the Adjudication Proceedings and Appeal Rules, 1974 and in particular to Rule 3 thereof, in support of his contention. He has referred to the contents of the memorandum dated May 31, 2002 and contended that the adjudicating officer was conscious of the provisions of Section 9 (3) of the Act of 1999 and gave reasonable explanation in such memorandum as to the invocation of the provisions of FERA on May 31, 2002.

- 11.** Learned advocated appearing for the appellants in the next set of appeals has contended that, the noticee was a Full-fledged Money Changer (FFMC) authorized to purchase and sell Foreign Exchange in terms of Section 7 of the Act of 1973. As a FFMC, the appellants had followed the memorandum of instructions issued by the Reserve Bank of India (RBI). RBI had conducted regular inspection of the noticee in terms of Section 43 (5) of the FERA and did not find any wrong with the noticee.
- 12.** Learned advocate appearing for the appellants in the next set of appeals has contended that, the order of the Tribunal as also of the adjudicating authority are bad in law. He has contended that, adjudicating authority and the Tribunal failed to take into account that there was no allegation as

against the noticee by the Reserve Bank of India in the initial letter of complaint of Reserve Bank of India dated August 1, 2000. No search and seizure operation had been conducted at the place of the noticee. The noticee had filed all relevant documents with the RBI as well as the Enforcement Directorate. Noticee had entered in to transactions of sale of foreign currency during the years 1998-1999. There had been nine transactions in 1998 and five transactions in 1999 aggregating to 14 transactions in these two years. The noticee had sold foreign currency after examining the sponsorship letters, passenger, air tickets, and eligibility to obtain the foreign exchange before issuing the foreign currencies. The noticees have taken all reasonable measures required to be taken under the guidelines of the Reserve Bank of India in selling the foreign currencies. The noticees have followed all instructions of RBI contained in the memorandum of instruction and no foreign currency was sold in violation of any instruction of RBI. Therefore, there was no factual basis for the department to proceed as against the noticee.

- 13.** Learned advocate appearing for the appellants in the next set of appeals has relied upon **2007 Volume 8 Supreme Court**

Cases 89 (Commissioner of C. Ex., Nagpur vs. Ballarpur Industries Ltd.) and **2007 Volume 5 Supreme Court Cases 388 (Commissioner of C. Ex., Bangalore vs. Brindavan Beverages (P) Ltd.)** and contended that, the finding arrived by the Adjudicating Authority was beyond the scope of the show cause notice dated March 31, 2002.

14. Relying upon **2014 Volume 5 Supreme Court Cases 162 (Tulip Star Hotels Ltd. Vs. Special Director of Enforcement)** learned advocate appearing for the appellants in the next set of appeals has contended that, since the noticee sold the foreign currencies after following the instructions of the RBI, the noticees cannot be made responsible for the intended purpose of the purchaser or the misuse of such funds by the purchasers.
15. Learned advocate appearing for the Department in the next set of appeals has adopted the contentions of the department in the first appeal. In addition, he has submitted that, the appellants had violated various provisions of the guidelines issued by Reserve Bank of India. He has highlighted the fact that, the foreign currencies were sold by the appellants on numerous occasions to same natural persons within a short period of time. Therefore, the appellants had failed to take

reasonable care and adhere to the guidelines of the Reserve Bank of India.

- 16.** In the first appeal, the appellants had been issued a memorandum dated May 31, 2002. An Adjudication Order dated December 15, 2004 had been passed by the Adjudicating Officer imposing penalty for contravention of the Act of 1973 and Paragraph 11 of the Memorandum of Instructions to Full-Fledged Money Changer issued by Reserve Bank of India. The Adjudicating Officer had held that, the appellants without due care and attention sold foreign currency of US dollars 2,98,500 to fake passengers sponsored by 14 fake companies/firms. The Appellate Tribunal had, by the impugned order dated June 27, 2008, concurred with the findings of the Adjudicating Officer.
- 17.** In the second set of appeals, the memorandum dated May 31, 2002 had been issued as against the appellants. The Adjudicating Officer through an order dated December 1/2, 2004 had imposed penalty against the appellants for contravention of the Act of 1973 read with paragraph 121 of the Memorandum of Instructions to Full-Fledged Money Changer on the ground that the appellants repeatedly released and sold foreign currency without due care and

attention to certain persons under the Business Travel Quota Scheme which they unauthorizedly misused. The Appellate Tribunal had concurred with the Adjudicating Officer by the impugned order dated March 17, 2009.

- 18.** The contention of the appellants that the department had invoked the provisions of the repealed Act of 1973 subsequent to the Act of 1999 coming into force requires consideration. The Act of 1999 had repealed the Act of 1973 and dissolved the Appellate Board constituted under sub-Section (1) of Section 52 of the Act of 1973. Section 49 of the Act of 1999 has provided for the repeal and saving of the Act of 1973 which is as follows:—

“49. Repeal and saving.—

(1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under sub-section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(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.

(5) Notwithstanding such repeal,—

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) any appeal preferred to the Appellate Board under sub-section (2) of section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

(c) every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement: Provided that the High Court may

entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in sub-section (3), the mention of particular matters in sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeal.”

- 19.** Sub Section (3) contains a non obstante clause which has provided that, notwithstanding anything contained in any other law for the time being in force, no Court shall take cognizance of an offence under the Act of 1973 and no adjudicating officer shall take notice of any contravention under Section 51 of the Act of 1973 after the expiry of a period of 2 years from the date of commencement of the Act of 1999.
- 20.** The Act of 1999 came into effect from June 1, 2000 by virtue of a gazette notification dated May 1, 2000. Therefore, in terms of Section 49 (3) of the Act of 1999, no Court can take cognizance of an offence under the Act of 1973 and no adjudicating officer can take notice of any contravention under Section 51 of the Act of 1973 after May 31, 2002.

21. In all the three appeals, the adjudicating officer had issued notices under the Act of 1973 on May 31, 2002. The appellants in the first appeal have contended that, the department has to establish that the memorandum dated May 31, 2002 was placed out of the control of the Department on such date, for the department and the adjudication proceedings to be saved by the provisions of Section 49(3) of the Act of 1973.

22. *Rajesh Kumar Jain (supra)* has answered the points referred to a larger bench for consideration. It has inter alia, construed the true meaning and purport of the expression “given” as used in Section 110 (2) and Section 124 of the Customs Act and whether the expression “given” means “sending” or “being received”. The reference had centered around construction of Sections 110 (2), 124 and 153 of the Customs Act.

23. *Shri Kanti Tarafdar (supra)* has construed the provisions of Section 110, 124, and 153 of the Customs Act. It has held that, service of a notice as contemplated under such provisions of the Customs Act, will be complete either by tendering or by sending the same by registered post, since

the Legislature has equated both the situations by using the word “or”.

24. The ratio of the two authorities noted above, is not attracted to the facts and circumstances of the present case as, the provisions of Section 49 (3) of the Act of 1999 are not *pari-materia* with the provisions of Sections 110, 124 and 153 of the Customs Act.

25. *M/s M. M. Rubber and Co. Tamil Nadu) (supra)* has dealt with provisions of Section 35-E (3) of the Central Excise and Salt Act, 1944. It has held that, an order or a decision comes into force from the date it is passed and the concerned authority loses the power to change it. However, the commencement of limitation period depends upon the intention of relevant statutory provision. If the intention is to provide a remedy to the person adversely affected, the statutory provision has to be so construed that the limitation commences from the date of communication of the order. If however the relevant provision lays down only period in which competent authority should exercise its power, the date on which such power was exercised by making an order, is relevant. This is based on the principle that government is

bound by the proceedings of its officers but persons affected are not, unless the proceedings are communicated to them.

26. Although, the provisions of Section 35-E (3) of the Central Excise and Salt Act, 1944 are not *pari materia* with the provisions of Section 49 (3) of the Act of 1944, it lays down that date of the order is relevant when the relevant provision speaks of a time within which power is to be exercised. In the facts of the present cases, all the writings that is memorandum are on May 31, 2002 within the time prescribed.

27. *Nazir Ahmad (supra)* and *Opto Circuit India Ltd (supra)* have held that, if a particular act is to be done in a particular manner, it has to be done in such manner or not at all. In the facts and circumstances of the present case, the Adjudicating Officer had taken notice of contravention of the appellants in the 3 appeals under Section 51 of the Act of 1973, on May 31, 2002 and issued a memorandum with regard thereto. It is not the contention of the appellants in the three appeals that, the Adjudicating Officer had exceeded the jurisdiction in issuing the memorandum on May 31, 2002. Rather, it has been the contention of the three

appellants that, the jurisdiction had been exercised beyond time and therefore, the action was vitiated.

- 28.** As has been noted above, the Adjudicating Officer issued the memorandum on May 31, 2002. The memorandum has details of the contraventions of the provisions of the Act of 1973 alleged as against the appellants. Section 49 (3) requires the adjudicating officer to take notice of any contravention under Section 51 of the Act of 1973 within May 31, 2002. In the facts and circumstances of the three appeals, the adjudicating officer had taken notice of contraventions under Section 51 of the Act of 1973 on May 31, 2002. Therefore, the adjudicating officer had taken notice of the contraventions within the time period specified by Section 49 (3) of the Act of 1999.
- 29.** Section 49 (3) of the Act of 1973 does not require the Adjudicating Officer to complete the service of a notice on the noticee. What it requires is that, the adjudicating officer must take notice of the contraventions of Section 51 of the Act of 1973 within the time period specified. The department needs to establish that, the Adjudicating Officer took notice of the contraventions under Section 51 of the Act of 1973 within the time period prescribed.

30. In the facts and circumstances of the present case, the memorandum is dated May 31, 2002 which has recorded the fact that the Adjudicating Officer took notice of the contraventions of Section 51 of the Act of 1973 by the appellants. The appellants have not produced any materials on record to establish that, the memoranda were not dated May 31, 2002. The Department has discharged its burden of proof by producing a letter dated May 31, 2002, which signifies that the Adjudicating Officer took notice of the contraventions of Section 51 of the Act of 1973 by the appellants, within the period of limitation prescribed by the Act of 1999. The appellants have not produced any evidence to rebut the same.

31. In **First Global Stockbroking (P) Ltd (*supra*)** the authorities had initiated proceedings under the Act of 1973 by a person who was not authorized to act as an Adjudicating Officer. In such context, it has been held that, the notice of appointment of the Adjudicating Officer which was made after the period prescribed under Section 49 (3) of the Act of 1999, was invalid. In the facts of the present case, notices had been taken of the contraventions by an Adjudicating Officer duly authorized under the Act of 1973 within May 31,

2002. Subsequent to the coming into effect of the Act of 1999, the authorities had by the notification of 2003 designated personnel discharging functions under the Act of 1999 to discharge functions as an adjudicating officer under the Act of 1973.

- 32.** Section 49 (3) of the Act of 1999 does not require the proceedings initiated under the Act of 1973 within the time period specified under Section 49 (3) of the Act of 1999 to be completed prior to the coming into effect of the Act of 1999. Provisions of Section 49 has to be construed and read along with Section 6 of the General Clauses Act, 1897 with regard to the effect of repeal. Sub Section (4) of Section 49 of the Act of 1999 provides that subject to the provisions of sub Section (3) all offences committed under the Act of 1973 shall continue to be governed by the provisions of the Act of 1973 as if the Act of 1973 has not been repealed.
- 33.** In sub section (5) of Section 49, the Act of 1999 has provided that notwithstanding the repeal of the Act of 1973, anything done or any action taken under the Act of 1973, insofar as it is not inconsistent with the Act of 1999, be deemed to have been done or taken under the corresponding provision of the Act of 1999. Appeal preferred to the Appellate Board under

the Act of 1973 but not disposed of has been transferred to the Appellate Tribunal constituted under the Act of 1999. It has also provided for filing of appeal before the High Court under the Act of 1973 within the timeframe prescribed therein.

34. On a conjoint reading of the provisions of Section 49 of the Act of 1999 it can be safely said that, a violator of the provisions of the Act of 1973 would not be having a prosecution holiday or a discharge from a prosecution by reason of the repeal of the Act of 1973 and the coming into effect of the Act of 1999.

35. *Krishi Upai Mandi Samiti (supra)* and *Cellulose Products of India Ltd (supra)* have advocated that where the language is plain and unambiguous strict construction of a taxing statute is the mandate. Liberal construction to effectuate the object of the provision may be resorted to, only in case of genuine doubt or possibility of forming two alternative options.

36. It has been contended that, Section 49 (3) of the Act of 1999 requires fulfilment of both the conditions prescribed therein namely Court Taking cognizance of an offence under the Act of 1973 and the Adjudicating Officer taking notice of the

contraventions under Section 51 of the Act of 1973, within a period of 2 years of the Act of 1999 coming into force. In other words, the appellants have contended that, both, the Adjudicating Officer must take notice as also a Court of law must take cognizance of the contravention within May 31, 2002 for proceedings under the Act of 1973 to continue subsequent to the coming into effect of the Act of 1999.

37. Sub Section (3) of Section 49 of the Act of 1999 casts an embargo upon a Court from taking cognizance of an offence under the Act of 1973 and on the Adjudicating Officer from taking notice of any contravention under Section 51 of the Act of 1973, after the expiry of a period 2 years from the date of commencement of the Act of 1999.

38. The Act of 1973 has contemplated civil liability for contravention with the power to adjudicate on the same being vested with the Adjudicating Officer under Section 51. Section 56 of the Act of 1973 has provided that, without prejudice to any award of penalty by the Adjudicating Officer, if a person contravenes any of the provisions of the Act of 1973, other than Section 13, 18 (1) (a), 18 A, 19 (1) (a), 44 (2), 57 and 58 or any rule, direction or order made thereunder, such person upon conviction by a Court, be

punishable with the quantum of punishment as has been prescribed.

- 39.** The Act of 1973 has therefore contemplated both civil and criminal liability for contraventions of the provisions of the Act of 1973 to be scenario specific. Some contraventions are purely civil in nature while others entail both civil and criminal liability. Therefore, the Act of 1973 does not contemplate that in respect of a particular case, there must be simultaneous taking of notice of contravention by an Adjudicating Officer and cognizance of the same by the Court. The functions of the two Adjudicating authorities have been prescribed to be disjoint. In such circumstances, it would be appropriate to construe the word 'and' used in Section 49 (3) of the Act of 1999 as 'or'. Any other construction would militate against the scheme of the Act of 1973 and would do violence thereto.
- 40.** The appellants in the first appeal had sold foreign currency on sponsoring of fictitious firms who in turn sponsored fake names between the period April 1, 2000 and May 6, 2000. The records produced in court have established that, Manas Kumar Moitra and Mrs Rooma Maitra had formed some fictitious firms/companies who gave certain names or

sponsored persons for purchase of foreign currency projecting their impending foreign business tour but all such persons were not traceable. These persons had been sponsored repeatedly within a short period of time.

41. Similar is the case in the next two appeals where Manas Kumar Maitra along with 4 others had been involved in creating fake firms/companies for sponsoring persons for alleged business travel within a short period of time.

42. In both the set of cases, both at the level of the Adjudicating Officer as also at the level of the Appellant Authority, there is a concurrent finding that, the appellants had acted without due care and in violation of the guidelines of the Reserve Bank of India in selling foreign currency to those persons. It has been concurrently held that, the appellants had failed to discharge their duty of reasonable care in selling foreign currencies to those persons involved when such currencies were sought for within such a short period of time with same dates of travel.

43. In all the three appeals, there have been on current finding on facts. The adjudicating officer in all the proceedings had found violations of the guidelines of the Reserve Bank of India by the appellants, in their dealings with the sale of

foreign currency to the delinquents. The findings returned by the adjudicating officer and by the appellate authority on such factual aspects have not been established to be perverse in these appeals.

44. In such circumstances, the ratio of ***Ballarpur Industries Ltd. (supra)***, ***Brindavan Beverages (P) Ltd (supra)*** and ***Tulip Star Hotels Ltd (supra)*** are not attracted in the facts and circumstances of the case involved in the next two appeals.

45. In view of the discussions above, the appeals FEA 5 of 2008, FEA 22 of 2009, FEA 23 of 2009 being without any merit are dismissed without any order as to cost. All connected applications are also dismissed.

[DEBANGSU BASAK, J.]

46. I agree.

[MD. SHABBAR RASHIDI, J]