APPELLATE TRIBUNAL FOR SAFEMA, FEMA, PMLA, NDPS & PBPT ACT AT NEW DELHI

Date of Decision:- 20.09.2019

1. FPA-FE-91/MUM/2007

Standard Chartered Grindlays Ltd. ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

2. FPA-FE-92/MUM/2007

Girija Pande ... Appellant

Versus

The Deputy Director,
Directorate of Enforcement, Mumbai ... Respondent

3. FPA-FE-93/MUM/2007

Mrs. Preetha Sundaram ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

4. FPA-FE-94/MUM/2007

Mr. Rajagopalan Ram Kumar ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

5. FPA-FE-95/MUM/2007

Paul Pereira ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

6. FPA-FE-96/MUM/2007

Mr. Sunil Sawant ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

7. FPA-FE-97/MUM/2007

M/s Standard Chartered Grindlays Ltd. ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

8. FPA-FE-105/MUM/2007

M/s Standard Chartered Grindlays Ltd. ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

9. FPA-FE-106/MUM/2007

Mr. Girija Prasad Pande ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

10. FPA-FE-107/MUM/2007

Mrs. Preetha Sundaram ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

11. FPA-FE-108/MUM/2007

Allwyn Roche ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

12. FPA-FE-109/MUM/2007

R. B. Dhage ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

13. FPA-FE-110/MUM/2007

M/s Standard Chartered Bank ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

14. FPA-FE-112/MUM/2007

Standard chartered Grindlays Ltd. ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

15. FPA-FE-113/MUM/2007

Navin Puri ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

16. FPA-FE-114/MUM/2007

T.R. Subramaniam ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

17. FPA-FE-121/MUM/2007

Standard Chartered Grindlays Ltd. ... Appellant

Versus

The Special Director,
Directorate of Enforcement, Mumbai ... Respondent

18. FPA-FE-122/MUM/2007

Standard Chartered Grindlays Ltd. ... Appellant

Versus

The Deputy Director,
Directorate of Enforcement, Mumbai ... Respondent

Advocates/Authorized Representatives who appeared

For the Appellant : Shri Amit Desai, Sr. Advocate with Shri Vikram Mehta, Advocate
Mr. Subhadeep, Advocate on behalf of Standard Chartered Grindlays Ltd. & its group of appellants

For the Respondent : Shri Ashok Kumar Panda, Sr. Advocate, Ms. Sumita Hazarika, Advocate, M. Paikaray, Shri Aniruddha Purushotham & Ms. Ipsita Behura, Advocates

CORAM
JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT

FPA-FE-91-97, 105-110, 112-114/MUM/2007, & FPA-FE-121-122, /MUM/2007

1. The above said 18 appeals are divided into 4 batches being Appeal Nos. 91-97, 105-110, 112-114 & 121-122 of 2007. These appeals have been filed against the four adjudication Orders passed by the Special Director of Enforcement dated 29.05.2007, 04.06.2007, 15.06.2007 & 04.07.2007. The same are being decided by common single order by this Tribunal.

2. The **first** set of appeals being Appeal Nos. 91-97 of 2007 arises out of adjudication Order dated 29.05.2007 which pertains to nine Show Cause Notices being Nos. 1, 5, 9,13, 17, 21, 25, 29 & 33, wherein the Appellant Bank and its officers namely Girija Pandey, Preetha Sundaram, Rajagopalan

Rajakumar, Sunil Ganpat Sawant, Karan Bhalla & Paul Pereira (since expired) have been charged for contravention of Sec. 6(4) & 6(5) r/w Sec. 49 of FERA 1973; Sec. 8(1) of FERA r/w Para 10.3 (ii), 10.12 & 10.17 of Chapter X of ECM 1987; Sec. 9(1)(a) & 9(1)(e) and Sec.68 of FERA 1973. Vide the said adjudication Order a total penalty of Rs.5,15,91,000 has been imposed upon the Appellants. Appellant wise break up of the penalty imposed is given in the table below:

Sr. No.	Name of Appellant	Penalty (Rs.)
1.	ANZ Grindlays Bank Ltd.	4,00,00,000/-
2.	Shri. Girija P. Pande	18,40,000/-
3.	Smt. Preeta Sundaram	92,00,000/-
4.	Shri Paul Parela	9,20,000/-
5.	Shri Karan Bhalla	4,55,000/-
6.	Shri. Rajagopalan Ram Kumar	2,28,000/-
7.	Shri. Sunil GanpatSawant	2,28,000/-

3. The **second** batch of appeals being Appeal Nos. 105-110 of 2007 arise out of adjudication Order dated 04.06.2007 which pertains to ten Show Cause Notices being Nos. 37, 42 ,47, 52, 57, 62, 67, 71, 76 & 80, wherein the Appellant Bank and its officers namely Girija Pandey, Preetha Sundaram, Allwyn Roche, R.B. Dhage & P.S. Khatu have been charged for contravention of Sec. 6(4) & 6(5) r/w Sec. 49 of FERA 1973; Sec. 8(1) of FERA r/w Para 10.3 (ii), 10.12 & 10.17 of Chapter X of ECM 1987; Sec. 9(1)(a) & 9(1)(e) and Sec.68 of FERA 1973. Vide the said adjudication Order a total penalty of Rs.2,10,18,000 has been imposed upon the Appellants. Appellant wise break up of the penalty imposed is given in the table below:

Sr. No.	Name of Appellant	Penalty (Rs.)
1.	ANZ Grindlays Bank Ltd.	1,94,45,000/-
2.	Shri. Girija P. Pande	7,85,000/-

3.	Smt. Preeta Sundaram	3,94,000/-
4.	Shri. Anil Bhuse	1,97,000/-
5.	Shri. Allwyn Roche	16,000/-
6.	Shri. R.B. Dhage	80,000/-
7.	Shri. P.S. Khatu	1,000/-

4. The **third** batch of appeals being Appeal Nos. 112-114 of 2007 arise out of adjudication Order dated 15.06.2007 which pertains to Show Cause Notice No. SCN-I, wherein the Appellant Bank and its officers namely Naveen Puri & T.R. Subramaniam have been charged for contravention of Sec. 8(1) of FERA r/w Para 29-B.8 of ECM 1987 & r/w Para 4 & 5 of NR(E) Account Rules 1970; Sec. 9(1)(a), 9(1)(e), 6(4) & 6(5) r/w Sec. 49 & r/w Sec. 68 of FERA 1973. Vide the said adjudication Order a total penalty of Rs.51,000 has been imposed upon the Appellants. Appellant wise break up of the penalty imposed is given in the table below:

Sr. No.	Name of Appellants	Penalty (Rs.)
1.	ANZ Grindlays Bank Ltd.	45,000/-
2.	Shri. Navin Puri	5,000/-
3.	Shri. T.R. Subramaniam	1,000/-

5. The fourth batch of appeals being Appeal Nos. 121-122 of 2007 arise out of adjudication Order dated 04.07.2007 which pertains to Show Cause Notice No. SCN-VIII, wherein, the Appellant Bank and its officer namely R.B. Dhage has been charged for contravention of Sec 6(4), 6(5), 8(1), 9(1)(a), 9(1)(e), 49 & 73(3) of FERA 1973 r/w Para 10.3(ii), 10.12 & 10.17 of Chapter 10 of ECM 1987. Vide the said adjudication Order dated 04.07.2007 a total penalty of Rs.44,000 has been imposed upon the Appellants. Appellant wise break up of the penalty imposed is given in the table below:

Sr. No.	Name of Appellants	Penalty (Rs.)
1.	ANZ Grindlays Bank Ltd.	40,000/-
2.	Shri. R.B. Dhage	4,000/-

6. Apart from the Appellant Bank, a large number of public sector banks such a,s Canara Bank, Indian Overseas Bank, Punjab National Bank etc. have also been charged under FERA, 1973 in respect of the transactions out of which the present Appeals arise. In fact the appeals of Canara Bank being Appeals Nos.10-13 of 2008 and 50-57 of 2008 are being heard alongwith the present Appeals.

7. The appellants have deposited with the entire penalty amount.

8. Before hearing, it was agreed on behalf of other appellants whose appeals are pending to await the decision of two set of appeals and it was agreed by all parties that let these two batches of appeals be decided on merit as the order passed in these appeals shall have bearing for determination rest of the appeals.

9. **Previous background of litigation in the subject matter is that:-**

The Enforcement Directorate has proceeded against ANZ Grindlays Bank Ltd. as well as Standard Chartered Bank. At the relevant time, they were two distinct entities and were separately noticed by the Enforcement Directorate. Thereafter, Standard Chartered Bank acquired ANZ Grindlays Ltd., and the two entities stood merged into one, which the Hon'ble Supreme Court has recorded, vide Orders dated 14.01.2004 and 31.03.2005. Both these banks earlier had independently and severally moved the judicial fora challenging the Notices *qua* them and also challenged the validity of various provisions of the FERA, 1973.

9.1. CASE AGAINST ANZ GRINDLAY BANK LTD. AS PER RESPONDENT

The ANZ Grindlays Bank Ltd has been charged for contravention Section 6(4), 6(5) read with Section 49; Section 8(1) read with para 10, para 10.12 and 10.17 of Chapter 10 of the Exchange Control Manual 1987 Edition Vol. 1 ("ECM" for short); 9(1)(a) and 9(1)(e) of the Foreign Exchange Regulation Act, 1973:-

(i) for crediting a total sum of Rs. 47,08,98,791/- to the rupee account of Giro Bank, London, a non-resident, thereby for having engaged in a transaction involving foreign exchange which was not in conformity with the terms of their authorisation granted under sec. 6(4)and 6(5) read with sec. 49 of the FERA 1973;

(ii) for crediting the said amount to Giro Bank Plc., London, account and thereby making payment and otherwise transferring foreign exchange to a person not being an authorised dealer in contravention of the provisions of 8(1) of FERA 1973;

(iii) for making the said payment to or for the credit of a person resident outside India, in contravention of Sec. 9(1)(a) of FERA 1973; and

(iv) for placing the said amount to the credit of a person resident outside India in contravention of the provisions of sec. 9(1)(e) of FERA, 1973.

9.2. CASE AGAINST STANDARD CHARTERED BANK AS PER RESPONDENT

(i) The case against the Standard Chartered Bank emanates from the chain of events where the Bank of Economic Affairs of the USSR issued a cheque bearing No. 401449 dated 08.10.91 for Rs.79.5 Lakhs favouring M/s Eastern Suburbs Ltd and drawn on M/s ANZ

Grindlays Bank, New Delhi from Standard Chartered Bank, Manchester along with schedule/ advice Nos. CP 12/1198, dated 21.11.91 for collection and credit of the proceeds to Standard Chartered Bank (London) account on behalf of Standard Chartered Bank, Manchester.

(ii) Thereafter, Standard Chartered Bank, Mumbai made a payment of Rs.79,49,900/- being the amount on the Cheque bearing No. 401449 dated 08.10.91 by crediting convertible rupee account of Standard Chartered Bank, London on 06.12.91. After having received Rs.79,49,900/-, the Standard Chartered Bank, Mumbai, an authorized dealer in foreign exchange in India, without the previous general or special permission/ exemption of/ from the Reserve Bank of India, credited the sum of Rs.79,49,900/- on or about 6.12.91 to the non – resident rupee account standing in the name of Standard Chartered Bank, London, a non – resident, in their books, and thereby converted the non – convertible rupee funds of the Bank into convertible funds and transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Standard Chartered Bank, London, a person resident outside India. It is the case of the Enforcement Directorate that by crediting the aforesaid non – convertible funds to the convertible account of Standard Chartered Bank, London, a person resident outside India, the Appellants Bank violated the provisions of the Foreign Exchange Regulations Act, 1973. Accordingly show – cause notices were issued to Standard Chartered Bank, during 1993 – 94 for contraventions of Section 6, 8(1), 9(1) (a) and 9(1) (e) of the FERA 1973 read with RBI Regulations (Chapter X of the Exchange Control Manual, 1987) for crediting non – convertible rupees into

convertible vostro accounts of foreign banks maintained by these banks.

SHOW CAUSE AND OPPORTUNITY NOTICES

10. The Appellant banks were issued Show Cause Notices as to why directions in terms of Sec. 63 of the FERA, 1973 should not be issued to them to bring back the aforesaid amounts. The Special Director, in the impugned Orders, confirmed the Show Cause Notices against the Appellant Banks. Opportunity Notices preceding the Criminal prosecution were issued under the proviso to Section 61(2), and the Show Cause Notices preceding the adjudication proceedings were issued under Section 51 of the FERA, 1973.

11. The Appellants raised several issues in their appeals and grounds, and inter-alia, submitted that Authorized Dealers are on a special footing, and are solely governed under Section 6 of the Act, and hence cannot be proceeded against for contravention of any other provision of the Act.

12. The Show Cause Notices and Opportunity Notices were challenged by ANZ Grindlays Bank as well as Standard Chartered Bank before the Hon'ble High Court of Bombay in W.P. (C) Nos. 1972/1994 and 509/1994 and the same were disposed of vide judgment dated 07.11.1998, reported 1998 SCC OnLine 530.

13. The Hon'ble High Court firmly rejected this proposition. It cannot be said that prosecution is unnecessary simply because section 6(3) provides necessary safeguards such as revocation of authorization. It held that

revocation of authorisation is neither a penalty nor a punishment for commission of contraventions.

Extracts from the judgment:

> ***"58.*** *Mr. Diwan, thereafter, contended that the Company is an authorised dealer under section 6 of the Act, 1973. Sub-section (3) of section 6 provides necessary safeguard, such as revoking of authorisation in public interest or on non-compliance of any of the condition. As such, in the submission of learned counsel, prosecution for contravention is totally unnecessary. Submission has hardly any merit. Revocation of authorisation for the grounds shall in future disentitle the dealer from further dealing in foreign exchange. However, it is neither a penalty nor a punishment for commission of contravention. For such contravention, the person concerned is liable to be penalised in addition to revocation of the authorisation."*

14. The judgment of the Hon'ble Bombay High Court was challenged in Civil Appeal Nos. 1748 of 1999 (ANZ Grindlays Bank vs. Directorate of Enforcement) with 1749-51 of 1999.

15. Vide Order dated 16.07.2004, the Hon'ble three judge bench of the Supreme Court referred the issues to the Constitution Bench.

The relevant excerpts are as under:

> ***"3.*** *In this case the Company is the "authorised dealer" within the meaning of Section 2(b) of the Act. The authorised dealer indisputably is required to comply with the statutory requirements contained in Sections 8, 9 and 49 of the Act read with Chapter X of the RBI Manual. The contraventions of the provisions of the Act having allegedly taken place at the hands of the authorised dealer, that is, Appellant 1, and, thus, although it is a company it is liable to be proceeded against. Section 56 of the Act provides for different punishments for commission of different offences. It is true that in an offence of this*

> *nature a mandatory punishment has been provided for but offences falling under other part of the said section do not call for mandatory imprisonment. Section 56 of the Act covers both cases where an offender can be punished with imprisonment or fine and a mandatory provision of imprisonment and fine. In the event it is held that a case involving graver offence allegedly committed by a company and consequently, the persons who are in charge of the affairs of the company as also the other persons, cannot be proceeded against, only because the company cannot be sentenced to imprisonment, in our opinion, the same would not only lead to reverse discrimination but also go against the legislative intent. The intention of Parliament is to identify the offender and bring him to book.*

16. It is stated on behalf of the respondent that the findings and Order of the Hon'ble Supreme Court is final and binding, irrespective of it is in the form of a referral order or final judgment. If the appellants were aggrieved by the findings, they could have moved an appropriate application for modification or clarification.

17. It is also the submission of the Respondent that the findings and the law declared by the Hon'ble High Court of Bombay on the issues of *Mens Rea* and "Authorized Dealer" attains finality after having been merged with the Judgment and Order of the Hon'ble Supreme in Standard Chartered Bank Vs. Directorate of Enforcement (2006) 4 SCC 278.

18. As per the *Doctrine of Merger*, findings of a lower court on a particular issue can only be upset when there is consideration of that issue by a superior court.

19. In absence of such consideration, the findings of the lower court become final and receives the imprimatur of the superior court as well. Furthermore,

the final judgment passed by the Supreme Court neither overrides nor sets aside the referral order, as the findings therein were final, and thus, were not further considered in the final judgment.

20. Therefore, it is not tenable for the Appellants to raise the same questions of law before this Tribunal, after having lost before the Hon'ble High Court and the Supreme Court.

21. Let me now first deal with the first issue raised on behalf of respondent by Shri A.K. Panda, learned Senior Counsel appearing on behalf of his client. His arguments are that the appellants, in view of decisions rendered, are debarred to agitate the same issues before this Tribunal.

22. On behalf of appellant, Shri Amit Desai, Sr. Advocate who has submitted that the Respondent incorrectly submitted that the following questions of law are covered in the above-mentioned judgments and orders more particularly in the case of ***ANZ Grindlays Bank &Ors. vs. Directorate of Enforcement &Ors. (1998) SCC Online Bom 530:***

i. The Appellants do not occupy any special or unique place under FERA, 1973 despite being an authorized dealer and are therefore covered under section 8 and 9 of the FERA 1973.

ii. Section 6 of the FERA 1973 is not a complete code in itself.

iii. Chapter X of Exchange Control Manual, 1987 covers the Appellants and has application to the present case.

iv. *Mens rea* is not an essential ingredient for prosecution of the Appellants for violations of the provisions of FERA, 1973.

v. The Appellants are not protected under the safeguards provided in Section 6 of the Act.

It is submitted on behalf of appellants that the issues before the Hon'ble High Court of Bombay in the matter of ***ANZ Grindlays Bank & Ors. vs. Directorate of Enforcement & Ors. (1998) SCC Online Bom 530*** arose out of the Show Cause Notices served by the Directorate of Enforcement upon the appellants therein under Section 68 read with Section 50 read with Section 51 and under proviso to Section 61 of FERA 1973 for contravention of certain provisions of the Act. The appellants in the said case filed writ petitions against the initiation of the proceedings pursuant to these Notices.

23. The issues which arose for consideration of the Hon'ble High Court of Bombay in the said matter were as follows:

i. Constitutionality of Section 68 of FERA-Whether Section 68 of the FERA is violative of guarantee enshrined under Article 14 and 21 of the Constitution.

ii. The liability of the persons in-charge and responsible for conduct of the business of the company for any violation of the provisions of FERA 1973 by a company.

iii. Whether a company can be prosecuted for the contravention of provisions of the Act under Section 56 of the FERA 1973 which mandatorily provides for imprisonment as a company being a juristic person cannot be imprisoned.

iv. Whether penalty proceedings can be initiated with respect to Section 68 of FERA, 1973 against a company?

24. It is submitted that the Hon'ble High Court upheld the constitutional validity of Section 68 of FERA 1973, although it held that the authorities shall have due regard to the provisions of Section 50 and 51, while imposing penalty against the company, being the only person contravening the Act. It is submitted that the issues before the Hon'ble High Court were entirely different

and have no connection with the issues involved in the present appeals. Further, any observations made by the Hon'ble High Court on points such as *mens rea*, section 6 of the FERA etc., which were otherwise not in issue are not binding and do not have the value of precedent as the same constitute only an *obiter dicta*. It is a submitted that a judgment is an authority on the point of law it decides and not what logically flows from it.

25. It is submitted that against the judgment of the Hon'ble High Court of Bombay, cross appeals were filed by ANZ Grindlays Bank, Standard Chartered Bank and Enforcement Directorate and the matter was clubbed together under the number C.A. No. 1748 of 1999. By judgment dated 24.02.2006 reported in ***Standard Chartered Bank &Ors. vs. Directorate of Enforcement &Ors. (2006) 4 SCC 278,*** the Hon'ble Supreme Court dismissed the aforementioned Civil Appeal and upheld the constitutional validity of section 68 of the FERA 1973. Pertinently, the Hon'ble Supreme Court does not deal with any observations of the Hon'ble High Court with respect to ancillary issues such as *mens rea* and/or Section 6 of FERA 1973 and there is no discussion on the said points in the said judgment.

26. This Appellate Tribunal is agreeable with the submissions of Mr. Amit Desai, Learned Sr. Counsel that it is a settled position of law that on an appeal from any judgment or order of any lower court to a superior court, the judgment of the lower court stands merged with that of the superior court and the judgment of the superior court becomes operative so that there are no two orders on the same subject matter and thereby the findings or recording of the lower court loses its significance. As such, in the present matter, the above-mentioned judgment of the Bombay High Court got merged into the judgment dated 24.02.2006 of the Supreme Court. Thus, there is no binding on the findings in the judgment of the Bombay High Court. Even otherwise, the said

findings in the said Bombay High Court judgment are obiter dicta as mentioned by the appellant. When the Hon'ble Supreme Court has already decided upon the matter, the judgment of the Hon'ble High Court of Bombay cannot be relied upon.

27. The Appellant has referred the judgment of the Hon'ble Supreme Court reported in ***Kunhayammed and others vs. State of Kerela and another (2000) 6 SCC 359*** in support of the above submission. The relevant paragraphs of the judgment are reproduced hereinbelow for ready reference:

> *"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below.*
>
> *44. To sum up our conclusions are:*
>
> *(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*
>
> *…(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation…"*

The Respondent has wrongly relied upon the referral order of the Supreme Court dated 16.07.2004 reported in ***ANZ Grindlays Bank & Ors. vs. Directorate of Enforcement &Ors. (2004) 6 SCC 531*** in support of its contention that section 8, 9 and 49 of the FERA 1973 are applicable to an authorised dealer.

28. It is a matter of fact that during the proceeding of the above-mentioned Civil Appeal No. 1748 of 1999, the Hon'ble Supreme Court vide Order dated 16.07.2004, referred a specific question of law to a five-judge Constitutional Bench of the Hon'ble Supreme Court viz., whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment. Subsequently, the Constitution bench, vide judgment dated 05.05.2005, ***Standard Chartered Bank &Ors. vs. Directorate of Enforcement &Ors. (2005) 4 SCC 530*** held that prosecution proceedings can be initiated against a company thereby overruling the earlier judgment of the Hon'ble Supreme Court in the case of ***Assistant Commissioner vs. Vellippa Textiles (2003) 11 SCC 405***.

29. It is a matter of fact that a reference order was placed before a larger bench for its consideration. The same cannot be treated as a binding precedent on any observations made therein. In the case of ***Abdulla A. Latifshah vs. Bombay Port Trust and Ors. reported in 1992 1 L.L.N 314***, the Hon'ble Court has held that the observations made by the Supreme Court in the course of an order referring the matter to a larger bench cannot be treated as binding obiter dicta, for the referral is more often than not made because a contrary view has already been taken. Therefore, it is clear that observations made in a referral order cannot be relied upon by the Respondent as the larger bench has decided limited issue. The other issues mentioned in the referral order were not decided on merit of the case.

The issues considered before the Constitution Bench were completely different issues from the issues at hand. The observations made in the referral order were not considered in the judgment of the larger bench and therefore, reliance on the referral order is misplaced.

30. The doctrine of merger will also apply to the referral order. In the present case the referral Order stood merged with the final judgment of the Supreme Court dated 05.05.2005 and as such no reliance can be placed on the said referral Order and no reliance can be placed upon the judgment dated 07.11.1998 of the Bombay High Court as the same stood merged into the judgment of the Supreme Court dated 24.02.2006. The findings in the judgment of the Bombay High Court and the referral Order are not binding and cannot be treated as a binding precedent.

The observations in the judgment of the Bombay High Court with regard to any legal proposition, other than the main issue of the constitutionality of Section 68, is *obiter dicta* and, therefore, not binding.

31. The judgment of ***Arun Kumar Aggarwal v. State of Madhya Pradesh (2014) 13 SCC 707,*** has relied upon. The relevant paragraph is reproduced hereinbelow for ready reference:

> *"27. Black's Law Dictionary, (9th Edn., 2009) defines the term "obiter dictum" as:*
> *"Obiter dictum.—A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). — Often shortened to dictum or, less commonly, obiter. …*

'Strictly speaking an "obiter dictum" is a remark made or opinion expressed by a judge, in his decision upon a cause, "by the way"—that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the Judge or court merely by way of illustration, argument, analogy, or suggestion.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as "dicta", or "obiter dicta", these two terms being used interchangeably.'

34. In view of the above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment."

32. The Hon'ble Supreme Court has also held in the judgment of ***State of Haryana vs. Ranbir (2006) 5 SCC 167,*** which is reproduced hereinbelow:

"12. It is in that context the Court clearly came to the opinion that the provisions of sub-section (1) of Section 50 were not required to be complied with. The said conclusion was arrived at, inter alia, upon noticing the provision of sub-section (4) of Section 50 of the Act. It was, therefore, not necessary for the Bench, with utmost respect, to make any further observation. It was not warranted in the fact of the said case. A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See ADM, Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521]. It is also well settled that the

statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative.

13. In Director of Settlements, A.P. v. M.R. Apparao [(2002) 4 SCC 638] it was held: (SCC pp. 650-51, para 7)

"An 'obiter dictum' as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such a obiter may not have a binding precedent … but it cannot be denied that it is of considerable weight."

14. We may usefully refer to an observation of Devlin, J. made in Behrens v. Bertram Mills Circus Ltd. [(1957) 2 QB 1 : (1957) 1 All ER 583 : (1957) 2 WLR 404] which is in the following terms: (All ER pp. 593 I-594 C)

[I]f the judge gives two reasons for his decisions, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observation obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of the precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is the matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course he has adopted from the language used and not by consulting his own preference."

33. The Hon'ble Court also held in its judgment of ***Divisional Controller, KSRTC vs. Mahadev Shetty and Another (2003) 7 SCC 197*** as under:

"23. So far as Nagesha case [(1997) 8 SCC 349] relied upon by the claimant is concerned, it is only to be noted that the decision does not

indicate the basis for fixing of the quantum as a lump sum was fixed by the Court. The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority."

34. It is matter of fact that the Hon'ble High Court of Bombay or the Hon'ble Supreme Court have at no point of time adjudicated upon the inapplicability of Section 8 and 9 of FERA 1973 to the authorised dealers or with respect to Section 6 of FERA 1973 or with regard to any violation of Section 49 of FERA 1973 or Chapter X of ECM 1987. There is no decision on the issue of mens rea in the aforesaid judgments. These are matters of adjudication by this Tribunal only where the jurisdiction lies. In the light of above, the submissions made on behalf of respondent in this regard are not accepted.

35. The Order of the Bombay High Court and the referral order of the Supreme Court stood merged into the final order of the Supreme Court in its judgment *Standard Chartered Bank vs. Directorate of Enforcement (2006) 4 SCC*

278 would still be valid and the findings therein could be referred to and relied upon.

36. Thus, there is no force in the first submission of the respondent about reliance on the aforementioned judgments and orders by stating that the appellants are estopped raising the said issues before this Tribunal by challenging the impugned order.

37. Let me now decide the above said 18 appeals on merit. The brief facts as pleaded by the appellant is that the appellant was served the Show Cause Notice being SCN Nos. T-4/19-B/93 (SCN 1), T-4/19-B/93 (SCN 5), T-4/19-B/93 (SCN 9), T-4/19-B/93 (SCN 13), T-4/19-B/93 (SCN 17), T-4/19-B/93 (SCN 21), T-4/19-B/93 (SCN 25), T-4/19-B/93 (SCN 29) AND T-4/19-B/93 (SCN 33) (hereinafter collectively called SCNs), dated 25/06/1993 AS AMENDED ON 10/8/1993, 19/1/1994 AND 16/9/1994 along with its officers alleging therein as follows:

a) <u>T-4/19-B/93 (SCN 1):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 5,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London, a non-resident in their books, being the amount covered by TT No. 95/2024 dated 20.07.1991 issued by ANZ Grindlays Bank, Connaught Place, New Delhi out of the funds held with them by the Bank of Foreign Trade, USSR (hereinafter referred to as 'BEFT') and thereby transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank Plc., London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 5,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London, a non-resident in their books, being the amount covered by TT No. 95/2024 dated 20.07.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR, the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the Exchange Control manual, 1987 Edition Vol. I (hereinafter referred to as 'ECM'); 9(1)(a) and 9(1)(e) of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA'). The Appellate craves leave to refer and submit the same as and when called for.

b) <u>T-4/19-B/93 (SCN 5):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 3,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank Plc, London, a non-resident in their books, being the amount covered by TT No. 6/2044 dated 20.07.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by BEFT and thereby transferred the said amount in foreign exchange / paid the said amount in foreign exchange to Girobank Plc. London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 3,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank Plc, London, a non-resident in their books, being the amount covered by TT No. 6/2044 dated 20.07.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held

with them by the BEFT, USSR, the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA. The Appellant craves leave to refer and submit the same as and when called for.

c) <u>T-4/19-B/93 (SCN 9):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 5,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London, a non-resident in their books, being the amount covered by TT No. 2/1826 dated 01.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT and thereby transferred he said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank Plc. London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 5,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank plc, London, a non-resident in their books, being the amount covered by TT No. 2/1826 dated 01.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR the Appellant had committed a contravention fo the provisions of S.6(4), 6(5) read with S. 49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA; the Appellant craves leave to refer and submit the same as and when called for.

d) <u>T-4/19-B/93 (SCN 13):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 8,44,06,119/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London, a non-resident in their books, being the amount covered by TT No. 3/1605 dated 01.8.1991 issued by ANZ Grindlays Bank, Connaught Place, New Delhi out of the funds held with them by BEFT and thereby transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank Plc., London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 8,44,06,119/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank plc, London, a non-resident in their books, being the amount covered by TT No. 3/1605 dated 01.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the chapter 10 of the EMC; 9(1)(a) and 9(1)(e) of FERA. The Appellant craves leave to refer and submit the same as and when called for.

e) <u>T-4/19-B/93 (SCN 17):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 3,46,10,145/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London, a non-resident in their books, being the amount covered by TT No. 37/1750 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT and thereby transferred the said amount in foreign exchange/

paid the said amount in foreign exchange to Girobank Plc., London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 3,46,10,145/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank Plc, London a non-resident in their books, being the amount covered by TT No. 37/1750 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with apra 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA. The Appellant craves leave to refer and submit the same as and when called for.

f) <u>T-4/19-B/93 (SCN 21):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 3,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank plc, London, a non-resident in their books, being the amount covered by TT No. 34/1920 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT and thereby transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank Plc., London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 3,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London a non-resident in their books, being the amount covered by TT No. 34/1920 dated 09.08.1991 issued by ANZ

Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49;8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM: 9(1)(a) and 9(1)(e) of FERA. the Appellant craves leave to refer and submit the same as and when called for.

g) <u>T-4/19-B/93 (SCN 25):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 3,60,37,050/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank plc, London, a non-resident in their books, being the amount covered by TT No. 36/1233 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT and thereby transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank Plc., London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 3,60,37,050/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro Bank Plc, London, a non-resident in their books, being the amount covered by TT No. 36/1233 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA. The Appellant craves leave to refer and submit the same as and when called for.

h) <u>T-4/19-B/93 (SCN 29):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 7,58,45,852/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank plc, London a non-resident in their books, being the amount covered by TT No. 35/1572 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by BEFT and thereby transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank plc, London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 7,58,45,852/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank plc, London a non-resident in their books, being the amount covered by TT No. 35/1572 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, new delhi out of the funds held with them by the BEFT. USSR the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA. The Appellant craves leave to refer and submit the same as and when called for.

i) <u>T-4/19-B/93 (SCN 33):</u>

The Appellant, an authorized dealer in foreign exchange credited a sum of Rs. 3,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank Plc, London a non-resident in their books, being the amount covered by TT No. 38/1898 dated 09.08.1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the

BEFT and thereby transferred the said amount in foreign exchange/ paid the said amount in foreign exchange to Girobank Plc., London, a person resident outside India.

It was alleged that in crediting a sum of Rs. 3,99,99,925/- to the non resident rupee account no. 01CBB8136400 standing in the name of Giro bank Plc, London, a non-resident in their books, being the amount covered by TT No. 38/1898 dated 09-08-1991 issued by ANZ Grindlays Bank, Connaught place, New Delhi out of the funds held with them by the BEFT, USSR the Appellant had committed a contravention of the provisions of S.6(4), 6(5) read with S.49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA. The Appellant craves leave to refer and submit the same as and when called for.

38. The Appellant by its letter dated 02/01/1997 filed its common reply refuting all the allegations and detailing how the SCN did not make out any contravention against the Appellant and therefore was not maintainable.

39. It is stated on behalf of appellants that the Adjudicating officer has in his impugned order completely disregarded the submissions made on behalf of the Appellant and held them guilty of contravening the provisions of S. 6(4), 6(5) read with S. 49; 8(1) read with para 10.3(ii), 10.12 and 10.17 of the Chapter 10 of the ECM; 9(1)(a) and 9(1)(e) of FERA and has imposed a total penalty of Rs. 4,70,00,000 (Rupees Four Crore Seventy lakhs only) [T-4/19-B/93 (SCN 1): Rs. 60,00,000 (Rupees Sixty lakhs only), T-4/19-B/93 (SCN 5): Rs. 40,00,000 (Rupees Forty lakhs only), T-4/19-B/93 (SCN 9): Rs. 60,00,000 (Rupees Sixty Lakhs only), T-4/19-B/93 (SCN 13): Rs. 85,00,000 (Rupees

Eighty Five Lakhs only), T-4/19-B/93 (SCN 17): Rs. 35,00,000 (Rupees Thirty five Lakhs only), T-4/19-B/93 (SCN 21): Rs. 40,00,000 (Rupees Forty Lakhs only), T-4/19-B/93 (SCN 25): Rs. 35,00,000 (Rupees Thirty five Lakhs only), T-4/19-B/93 (SCN 29): Rs. 75,00,000 (Rupees Seventy Five Lakhs only), T-4/19-B/93 (SCN 33): Rs. 40,00,000 (Rupees Forty Lakhs only)] without any evidence or material to fasten the guilt.

40. The above said impugned orders have been challenged by the banks as well as their officials on various grounds by filing of 18 appeals. All the appellants have denied allegations of contravention of any provisions of FERA.

41. The following are the main findings arrived in the impugned orders: -

(a) In Sec. 8(1), the authorized dealer is not excluded from the term person, i.e. the term person includes an authorized dealer.) As far as these transactions are concerned, the license would be deemed to have been ceased / cancelled. All these transactions are without any permission and / or authority. Chapter 10 of the Exchange Control Manual, 1987 contains instructions issued to authorized dealers for dealing with foreign exchange. In all these transactions by crediting to rupee account of non-resident convertible rupee account by an authorized dealer:

i. Is equivalent to remittance of foreign currency from India.

ii. Be for specific purpose

iii. Can be made only with prior permission of RBI

(b) Credit made to a non-resident convertible rupee account, without prior permission of RBI amounts to committing offence within meaning of Sec. 9 of FERA, 1973.

(c) The ECMs have been issued in exercise of power conferred on RBI under FERA 1947 / 1973 and it is clear that the circulars and guidelines issued to the authorized dealers how to deal with foreign exchange in a given situation. The authorized dealers are obliged / required to follow these circulars and guidelines.

(d) The Appellant has contravened the provisions under Section 8(1) of FERA, 1973 and Chapter 10 of ECM, 1987. As per Sec. 8(1) of FERA, 1973 any amount credited into the account of a non-resident bank is considered as foreign exchange. The record shows that the Grindlays Bank, New Delhi had sent nine TTs to Grindlays Bank, Mumbai advising them to credit total amount of Rs. 47,089,8791/- to the account of Eastern Suburbs Ltd. The Grindlays Bank had transferred the amount from the non-resident non-convertible account of BFEA to a non-resident convertible account of Girobank London maintained in their branch at Mumbai without permission of RBI.

(e) The RBI starting from the First Exchange Control Manual in Chapter XVII Para 8, issued in the year 1949, has been issuing instructions to the authorized dealers that any credit of rupees to the account of non-resident is treated as transfer of foreign exchange. These provisions are included in the subsequent manuals issued in the years 1959, 1965, 1971, 1978, 1987 and 1993 and also continued in FEMA, 1999.

(f) As per Chapter 10 of ECM, 1987, transfer of rupees to the account of non-resident should not be made until a copy of the application form in A1 or A2 as the case may be has to be returned by the RBI permitting to transfer the amount. In this case no such

permissions were taken from RBI. Thus the appellant has contravened the provisions under Sec. 8(1) of FERA, 1973.

(g) The Appellant has contravened the provisions under Sec. 9(1)(a) and 9(1)(e) of FERA, 1973**.** It was held that fromthe wording of the section, it is clear that Sec. 9 is applicable to any person. As submitted earlier, the term 'person' includes an "authorized dealer". The Appellant had not taken any general or special exemption from the RBI under this section while transferring the said amount to Girobank Plc, London for crediting the account of M/s. Eastern Suburb Ltd. As per Sec. 71(1), the burden of proof lies on the appellant to furnish necessary exemptions but they have failed to furnish the same. Thus, the Appellant has contravened the provisions under Sec. 9(1)(a) and 9(1)(e) of FERA, 1973

(h) The Appellant has contravened the provisions under Sec. 6(4), 6(5) and Sec. 49 of FERA, 1973 as Sec. 6(5) of FERA expects three distinct possibility for an authorized dealer while dealing with foreign exchange:

i. Firstly, an authorized dealer shall require a person to make such declaration and give such information as will reasonably satisfy him that the transaction will not involve, and is not designated for the purpose of contravention or evasion of the provisions of this Act or of any rule, notification, direction or Order made there under.

ii. Secondly, if the said person refuses to comply with any such requirement or makes only unsatisfactory compliance

therewith, the authorized dealer shall refuse to undertake the transaction.

iii. Thirdly, if the authorized dealer has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person report the matter to the reserve bank.

(i) The Grindlays Bank has failed to follow the first step and hence they could not follow the second step. When the authorized dealer realized their mistakes, and responsibilities, they requested the account holder to repatriate the amount in foreign exchange to set up the loss of foreign exchange. When realized their mistake, they refused any further transaction and followed the third step by informing the RBI about the transactions already taken place.

Thus, the Appellant has contravened the provisions under Sec. 8(1), 9(1)(a), 9(1)(e) and 6(4) read with 6(5) and Sec. 49 of FERA, 1973.

(j) Contravention of Provisions of FERA and ECM, 1987 by the officers of the Appellant Bank and Charges under Section 68.

i) The Hon'ble Supreme Court has in CA No. 1748 of 1999, confirmed that adjudication proceedings can be held against the officers of the appellant bank.

ii) The purpose of the remittance is stated to be against a contract, but no such contract appears to have been filed or perused before actually passing the credits. This is only to cover up their mistakes.

42. The argument of Shri A.K. Panda Learned Senior Counsel appearing on behalf of respondent who has referred a note dated 27.11.2018 where he tried to rely upon the chapter of Trade and Commerce and also two agreements. In order to facilitate trade and commerce between India and the USSR, there existed a Bilateral Trade Agreement between the two countries. With the permissions from RBI, Nostro and Vostro accounts in accordance with the Banking Agreement between the RBI and the BFEA (Bank for Foreign and Economic Affairs, also known as *Vneshtorgbank* and later in 1988 as *Vnesheconombank*) by the respective Banks. In order to check illegal transactions, authorised dealers/agents were engaged/appointed by the RBI to check trade documents. The Banking Agreement between the RBI and the BFEA is placed before this Hon'ble Tribunal for appreciation.

The present transactions have been effected in pursuance of an alleged contract executed between the Russian entity V/O Sojuzzdravexport and M/s. Eastern Suburbs, London for purchase of Medical Equipment by the Russian Entity. However, executing the contract through the Indian banking channel is outside the purview of the Bilateral Agreement between India and USSR and as such is impermissible. M/s. Eastern Suburbs is a stranger to the said Bilateral Trade Agreement.

43. The details of the Documents are:-

(i) Trade Agreement between the Government of India and the Government of the Union of Soviet Socialist Republic (USSR) dated 10.12.1980;

(ii) Banking Agreement between the BFEA and RBI dated 18.08.1981;

44. It has been submitted that under Chapter IV of ECM, the Note A to para 4.4, it is mentioned that *"in case of Bilateral Group countries, the currencies to be used for contracting and invoicing purposes will be governed by the provisions in the Trade and Payments Agreements with countries concerned"*. It is submitted that original instructions for effecting the transactions which have resulted in the contravention of the provisions of the FERA, 1973 were issued by the Bank of Foreign Economic Affairs (BFEA of USSR), which was the central bank of the erstwhile USSR, and the said bank handled all transactions involving imports and exports.

45. The respondent has also relied upon the following:-

Letters exchanged between third parties:-

(i) Letter dated 19.09.1991 from B. Lewis to Mr. W. Grove Esq.

(ii) Letter dated 19.09.1991 from Mr. T.W. O'Brien to Mr. Dobby.

(iii) Letter dated 20.09.1991 from G.C Dobby to Mr. O. Brien.

(iv) Letter dated 12.11.1991 from C.D.D Boswell to P.D Panjwani.

(v) Letter dated 13.11.1991 from Mr. Arvind Sethi to Mr. C.D.D. Boswell.

(vi) Letter dated 14.11.1991 from Mr. Dobby to Mr. O'Brien.

46. The Respondent has also filed the following Documents in Appeal No. 79 of 2009:

(i) No objection letter dated 12.02.1983 of the RBI to BFEA for opening representative office at Bombay on 1st March, 1983.

(ii) Letter dated nil from Appellant BFEA to the Russian Governmental Authorities.

(iii) Copy of the minutes of meeting dated 16.03.1993 between Representatives of Appellant BFEA & ANZ.

(iv) Letter dated 31.05.1993 from RBI to BFEA.

(v) Copy of the letter dated 27.07.1993 from BFEA to RBI.

(vi) Copy of letter from the US Business information Company.

(vii) RBI Letter to BFEA dated 06.04.2000 setting out restrictions on the functions of representative offices.

(viii) RBI letter to BFEA dated 01.06.2000 granting approval for setting up representative office at New Delhi.

(ix) BFEA's certificate of state registration as a non-commercial organization dated 08.06.2007 to reflect name change along with English translation.

(x) BFEA's letter to RBI dated 10.07.2007 intimating name change.

(xi) RBI letter to BFEA dated 27.08.2007 noting BFEA's name change.

Other documents:

(i) RBI letter dated 19.04.1993 to the CEO of Standard Chartered Bank mentioning irregularities in Vostro Accounts.

(ii) Copy of the letter of Standard Chartered Bank dated 29.04.1993 to RBI.

(iii) Letter of Standard Chartered Bank to Additional Controller, RBI dated 24.06.1993.

47. Statements relied upon by the Respondent:

(i) Statement of NK Jetly, Assistant Manager, ANZ Grindlays Bank, Connaught Place, New Delhi signed on 25.01.1993.

(ii) Statement of Shri Kuldip Singh Sood signed on 27.01.1993 and 28.01.1993.

(iii) Statement of Shri Anil Dattatroya Bhuse signed on 29.01.1993, 01.02.1993, 03.02.1993 and 10.03.1993.

(iv) Statement of Shri R. B. Dhage, Officer in Charge, Clearing Section, ANZ Grindlays Bank signed on 04.02.1993 and 05.02.1993.

(v) Statement of Shri Allwynd Roche signed on 10.02.1993 and 11.02.1993.

(vi) Statement of Sunil G. Sawant signed on 12.02.1993.

(vii) Statement of Shri Rajagopalam Ramkumar signed on 17.02.1993.

(viii) Statement of Paul Pereira signed on 23.02.1993.

(ix) Statement of Shri KK Prabhu, Senior Manager, Foreign Dept, Canara Bank, Bombay signed on 25.02.1993.

(x) Statement of Shri Padmanabha Upadhyaya signed on 01.03.1993.

(xi) Statement of Mr. Barry M McCance, GM South Asia & Chief Executive Officer, India under Sec. 40 of FERA, 1973

48. **Chain of Events & Flow**

The BFEA (USSR) held a Non-Convertible Indian Rupee Account with ANZ Grindlays Bank, Connaught Place.

BFEA issued instruction to ANZ Grindlays Bank, C.P., New Delhi to pay M/s Eastern Suburbs, London from its funds held with bank.

On the said instruction, ANZ Grindlays Bank, New Delhi, raised a T.T. to ANZ Grindlays Bank, Bombay Branch (the Authorized Dealer) for transfer of the said amounts to Eastern Suburbs (Account Holder with Girobank Plc., London)

ANZ Grindlays, Bombay Branch, acting upon the said T.T., credited the Vostro Account of Girobank Plc., London.

Griobank Plc., London upon such credit, transferred local currency Pounds to the account M/s. Eastern Suburbs, London.

49. The Respondent contention is that it is not correct for the appellant to plead that no funds went out of India. The beneficiary, i.e. M/s Eastern Suburbs received funds into its account held with Girobank Plc., London, which were denominated in Great British Pounds. The source of this GB Pounds is from the Non-convertible Rupee Account of BFEA maintained with the ANZ Grindlays Bank, CP, New Delhi. The funds which went out of India, forming the subject matter in the 9 SCNs in the present appeal are tabulated as:

Sr. No.	Date of Credit	Amount Credited
1.	24.07.91	59999925
2.	24.07.91	39999925
3.	02.08.91	59999925
4.	02.08.91	84406119
5.	10.08.91	34610145
6.	10.08.91	39999925
7.	10.08.91	36037050
8.	10.08.91	75845852
9.	10.08.91	39999925
	TOTAL RS.	**470898791**

50. It is stated on behalf of respondent that the amounts had emanated from the non-convertible funds of the Bank for Foreign Trade (or Bank for Foreign Economic Affairs – BFEA) of the USSR with the ANZ Grindlays Bank, Connaught Place Branch, New Delhi. Though in the telex, the purpose of the remittance is stated to be against a contract, no such contract appears to have been filed or perused by the Appellant (Authorized Dealer) before actually passing the credits. The Officer of the Appellant Bank who sent the TT from Connaught Place and the Officer who subsequently credited the non-resident rupee account of Girobank Plc, London failed to verify the nature of the remittance, though they were required to verify these documents before effecting such payments.

51. It is submitted by the learned Sr. Counsel appearing on behalf of respondent that it has been admitted by Shri Sunil Ganpat, an officer of the Remittance Section in the Appellant Bank that after crediting the account of

Girobank Plc., London, he did not enquire whether the relevant forms (A1, A2 & A3) were received by the Bank and returns submitted to RBI in this regard. While crediting the account of Girobank Plc., London, he did not follow the procedure for crediting the vostro account as laid down in Exchange Control Manual/ Rules and he also admitted that crediting this amount, was a lapse.

52. It is further submitted that these directions can be changed from time to time without the need to notify any person of the same and the knowledge of the same cannot be imputed to any person. It is further submitted that the violation of these directions can at best result in some administrative action but not penalization in criminal and quasi criminal proceedings. In this regard the following judgments may be seen:

a. **V.P. Gill Vs. Air India , AIR 1988 Bom 416 at Paragraph 8;**
b. **N. Venktachalapathy Vs. State of Karnataka, 1989 Cr L J 519 at Paragraph 10;**
c. **R. Sai Bharathi v. J. Jayalalitha, (2004) 2 SCC 9 at Paragraphs 49 and 50**.

53. The Special Director has in the impugned Orders erroneously accepted the submission of the Department that it has to be presumed that Chapter X has statutory force inasmuch as similar provisions in both prior and subsequent ECMs had statutory force. It is submitted that the said finding is perverse in law inasmuch whether a 'Direction' is Law or not is not a matter of inference but it has to be proved by reference to a specific notification/circular, etc. which in the present case the Department has miserably failed to prove.

54. The List of Transactions (Tested Telex matched with Show Cause) is as follows:

SCNs	TT No. and Date	Account No. Credited	Amounts (Rs)
SCN-1 (T-4/19-B/93)	TT No. 95/2024 dated 20.07.1991	01CBB8136400	5,99,99,925.00
SCN-5 (T-4/19-B/93)	TT No. 6/2044 dated 20.07.1991	01CBB8136400	3,99,99,925.00
SCN-9 (T-4/19-B/93)	TT No. 2/1826 dated 01.0.1991	01CBB8136400	5,99,99,925.00
SCN-13 (T-4/19-B/93)	TT No. 3/1605 dated 01.08.1991	01CBB8136400	8,44,06,119.00
SCN-17 (T-4/19-B/93)	TT No. 37/1750 dated 09.08.1991	01CBB8136400	3,46,10,145.00
SCN-21 (T-4/19-B/93)	TT No. 34/1920 dated 09.08.1991	01CBB8136400	3,99,99,925.00
SCN-25 (T-4/19-B/93)	TT No. 36/1233 dated 09.08.1991	01CBB8136400	3,60,37,050.00
SCN-29 (T-4/19-B/93)	TT No. 35/1572 dated 09.08.1991	01CBB8136400	7,58,45,852.00
SCN-33 (T-4/19-B/93)	TT No. 38/1898 dated 09.08.1991	01CBB8136400	3,99,99,925.00
		TOTAL	**47,08,98,791.00**

55. It is stated that the present set of contraventions lie in the transfer of non-convertible Indian Rupees (maintained in the accounts of BFEA with various Indian Banks, including ANZ Grindlays Bank, Connaught Place, New Delhi) to a freely convertible foreign exchange Vostro account of Girobank, Plc. (the correspondent Bank) maintained in ANZ Grindlays, M.G. Road, Bombay Branch. It is an admitted position that:

(a) The balances maintained in the accounts of BFEA with various Indian banks could not be converted into foreign exchange.

(b) That the said balances of BFEA could be used only for payment to Indian residents against exports to the USSR.

(c) That, there was no actual export of goods to the USSR by an Indian resident against which the payments have been made for.

(d) USSR is a country in the 'Bilateral Group' and the United Kingdom is a country in the 'External Group'. The Exchange Control Manual (ECM), at several places, clearly prohibits transfers from 'Bilateral Group' to 'External Group' countries.

(e) That, payments were made to the person-resident outside India (Eastern Suburbs incorporated in the United Kingdom) against which no goods were imported into India.

(f) That the Authorized Dealer had failed in its responsibility in ensuring and verifying that the transactions were permissible under the Exchange Control.

(g) The Reserve Bank of India in its various communications found that there were contraventions by the Appellants and the Appellants in response have also admitted the same by bringing into India the equivalent foreign exchange.

(h) The findings of the adjudicating authorities are based on the statements of the officers of the Appellant Bank, wherein contraventions are clearly admitted.

Thus, the Appellants had wrongfully converted Indian currency to foreign currency:

- The balances maintained in the accounts of BFEA were only payable in Indian Rupees.

- The deposits / credits made into the account of Girobank, Plc., although expressed in Indian currency, were payable in foreign currency, and further, as per Para 10.12(i) of the Exchange Control Manual, 1987, "balances in rupee accounts of branches and correspondents situate in countries included in the External Group may be converted into any permitted currency without prior approval of Reserve Bank".
- Therefore, as per **S. 2(g) r/w 2(h)(i) of FERA, 1973,** the said credits are 'foreign currency'.

> ***Section 2.*** *Definitions – In this Act, unless the context otherwise requires, -*
>
> ***X X X***
>
> ***2(g)*** *"foreign currency" means any currency other than Indian currency;*
>
> ***2(h)*** *"foreign exchange" means foreign currency and includes –*
>
> *(i) all deposits, credits and balances* ***payable*** *in any foreign currency and any drafts, traveler's cheques, letters of credit and bills of* exchange, expressed or drawn in Indian currency but payable in any foreign currency;
>
> **X X X**

55.1 The provisions contained in Chapter 10 of the Exchange Control Manual ("ECM"), 1987, being in the nature of directions passed by RBI further explain the above definitions in the context of Vostro Account dealings. Para 10.3(ii) of "Chapter 10 – Rupee Accounts of Non-Resident Banks", reads as:

> *"(ii) Under Exchange regulations credit to the rupee account of a non-resident branch or correspondent of an authorized dealer is* ***equivalent*** *to a remittance of foreign currency from India to the country in which the branch or correspondent is situate"*

Thus, the above definition under the ECM is congruent to that of the definitions under Sec. 2(h)(i).

55.2. Chapter 10 of ECM are binding "rules and regulations governing opening of and operations on rupee accounts in the names of branches and correspondents outside India, other than those in Nepal and Bhutan, maintained by authorized dealers…" (Para 10.1). They carry the statutory character under Section 73(3) of the FERA, 1973.

55.3. The implications of Rupee credits to accounts of non-resident banks is contained in Para 10.3(i), wherein the "Reserve Bank has permitted credit of rupees to accounts of non-resident banks as one of the methods of payment to persons resident outside India. This permission is subject to the condition that payment made in such manner by any person for the purpose declared by him on the appropriate application form viz. A1 or A2, as the case may be, ***shall actually be towards that purpose and not any other purpose***. ***If the payment is used towards any other purpose, it will amount to a breach of the condition subject to which permission has been granted."*** It is an admitted position that the payments have been effected for other purposes, and thus the Appellants clearly stand in breach of this condition.

55.4. The Appellants **did not have the authority** to remit the funds to the account of Girobank Plc., as "Rupee transfers may be made by authorized dealers without prior approval of Reserve Bank only in those cases where they could have remitted funds to the country concerned under powers delegated to them in various Chapters of this Manual. ***Applications for rupee transfers which are not covered by powers delegated to authorized dealers should be forwarded to Reserve Bank on form A1 if purpose of remittance is to meet cost of import into India and on form A2 if it is for other purposes, for prior approval together with appropriate documentary evidence.***

55.5. Transfer of rupees to the account of the non-resident branch or correspondent ***should not be made until*** a copy of the application form (A1 or A2, as the case may be) has been returned by Reserve Bank together with a permit authorizing the transfer." (Para 10.3(ii))

Further, Para 10.6 **clearly prohibits the transfer of funds from a Bilateral Group country (i.e. U.S.S.R.) to an External Group country (i.e. United Kingdom)** – "there is no objection to credit being made to the account of a bank situate in another country, ***provided both the country of origin of the goods and the country to whose account the credit is to be made are in the External Group"***.

55.6. The ***duties*** of Authorized Dealers are elaborated in Para 10.8 of the ECM, wherein, "Form A3 should be used for reporting all credits to accounts of non-resident banks arising from **permitted transfers** from accounts of other non-resident banks and remittances received from abroad. … In case of transfers from account of one-resident bank with an authorized dealer to the account of another non-resident bank with another authorized dealer, the ***responsibility of ensuring that the transaction is in conformity with the Exchange Control regulations*** will rest with both authorized dealers.

(a) It is admitted position that the transactions effected by the Appellants were not permitted transfers, in view of the Trade Agreement between the Government of India and the Government of the Union of Soviet Socialist Republic (USSR) dated 10.12.1980 read with the Banking Agreement between BFEA and RBI dated 18.08.1981. As authorized dealers, the Appellants are required to ensure compliance of the terms of these agreements. As agent of

the RBI, they cannot plead ignorance of these agreements, especially in view of the fact that they are public documents.

(b) The responsibility for ensuring that the transactions are in conformity with the Exchange Control regulations rests with the Appellants, being the authorized dealers.

(c) Therefore, they have failed in discharging their responsibility and thus, have contravened Section 6(4) and 6(5) of the FERA, 1973.

(d) After having been an active participant in the effectuation of these transfers, in utterly failing in their duties, they cannot plead themselves to be 'victims' of some external conspiracy.

55.7. Para 10.11 is further explicit in this regard, as it states that "***transfer of rupees*** from the account of an overseas branch or correspondent to another ***is permissible only if the transferor and the transferee banks are situate in the same country or if they are situate in countries both of which are in the External Group***. All such transfer should be reported to Reserve Bank on form A3. ***Transfers of funds between rupee accounts of banks in different countries which are not covered by this paragraph should be referred to Reserve Bank for prior approval on form A3***."

55.8. There is a further prohibition under Para 10.12 (ii) to the effect that "balances held in accounts of branches and correspondents in any of the countries in the ***Bilateral Group should not be converted into any foreign currency without prior approval of Reserve Bank***".

55.9. Para 10.13(i) also imposes a twin-fold responsibility on the authorized dealer, whereby the "authorized dealer on whom the cheque or draft is drawn is responsible to Exchange Control for ensuring that (1) Exchange

Control regulations have been duly complied with in respect of the particular transaction, in the same manner ***as if the amount was being remitted abroad through his medium*** in foreign currency; and (2) all the particulars required to be given on relative form have been correctly furnished."

55.10. In view of these provisions, the Appellants contention that 'they had only placed Indian currency into the vostro account of Girobank' and there is 'no actual conversion of currency' is not tenable. Further, it is added that as per Note A to Para 10.2 of the ECM, all credits to any Vostro account ***have to necessarily be made only in Indian currency***. 'Note A' specifically provides that "opening of accounts expressed in any foreign currency in the names of overseas banks in the books of authorized dealers in India is ***not permitted***." The underlying object is to prevent the running of a foreign currency account within India. This thereby prevents the creation of a lien over the country's foreign exchange reserves and locking the exchange rate. Therefore, all credits into a vostro account are made in Indian currency, and the correspondent can withdraw the money in foreign currency at the spot exchange rate.

55.11 Further, the submission that Chapter 10 is ultra vires the FERA, 1973 is also not tenable. If the Appellants contentions were to be accepted, it would mean that it can effectively siphon off the entire foreign exchange reserves of the country, by merely being an authorized dealer. Chapter 10 places the restrictions on the dealings of foreign exchange by authorized dealers. Striking down Chapter 10 would also mean that an authorized dealer can run a parallel foreign exchange market and effectively usurp the powers of the RBI.

55.12 There are clear and binding directions and responsibilities imposed on the authorized dealer, and they are mandated by the FERA, 1973 as well as the RBI to follow these directions to the letter. They have contravened Sections 6(4) and 6(5) of the FERA, 1973, and for perpetuating these illegal transactions, they have contravened Sections 8(1) and Section 9(1)(a) and 9(1)(e) of the FERA, 1973, read with the relevant provisions of the Exchange Control Manual, 1987.

56. The Learned Sr. Counsel appearing on behalf of the respondent has referred the preface to the ECM, 1987 and states that "the Manual incorporates all directions of a standing nature to authorized dealers..." (Para 3). It further states that "amendments to the Manual will continue to be communicated to authorized dealers in the form of A.D. (M.A. Series) Circulars" (Para 5).

In Chapter 1 – "Introduction" at Para 1.3, "the types of transactions which are affected by the Foreign Exchange Regulation Act are, in general, all those having ***international financial implications***. In particular, the following matters are regulated by Exchange Control:

xxx

(c) Payments to non-residents or to their accounts in India

xxx"

56.1. The powers of Authorised Dealers are outlined at Para 1.14, wherein "authorized dealers may exercise powers ***within the parameters laid down in this Manual*** and in circulars issued from time to time by the Reserve Bank, subject to fulfilment of the conditions, if any, indicated therein."

In connection and in furtherance of Section 6 of the FERA, 1973, Para 1.15 specifically stipulates the issues on which the authorized dealers should refer to the Reserve Bank:

> "Authorised dealers should refer to Reserve Bank any application for foreign exchange or other transaction which they are called upon to undertake and ***which does not fall within the scope of the powers delegated to them***.
>
> xxx
>
> Authorised dealers should also refer to Reserve Bank any application which has ***unusual features even though it is within the scope of the powers*** delegated to them."

56.2. As part of the duties of the Authorised Dealer, they "should report to Reserve Bank cases which come to their notice, of evasion of, or of attempts, either direct or indirect, to evade the provisions of the Foreign Exchange Regulation Act or any Rule, Notification, Order, Direction or Regulation issued thereunder." (Para 1.21)

56.3. Chapter 4 of the ECM sets out the regulations governing permitted currencies and methods of payment to be used for settlement of financial transactions between residents and non-residents through authorized dealers. The Note A to Para 4.4. states that "in case of Bilateral Group countries, the currencies to be used for contracting and invoicing purposes will be ***governed by the provisions in the Trade and Payments Agreements*** with the countries concerned." Para 4.6 and 4.7. clearly stated the permitted method for transaction of countries in the bilateral group (U.S.S.R.) is only in Rupees.

57. It is stated that the findings as regards to the contravention of the provisions of FERA which have been mentioned in the show cause notice have been so recorded on the basis of the materials from the records of the Appellant Bank, which includes the statements of their bank officials. Though an authorized dealer can enter into foreign exchange transactions in terms of their license, the said transactions are governed by the provisions of the FERA, 1973, including Sections 6(4) and 6(5).

58. It is also alleged on behalf of respondent that the Appellants had not made the mandatory and diligent inquiry as postulated in Section 6(4) and 6(5) of the FERA, 1973 - as is apparent from the record, and also from their own admissions made during the course of their arguments. Section 6 of the FERA, 1973 is not a complete code in itself, but is in addition to the other provisions of the FERA, 1973, in view of the fact that authorized dealers have been conferred with greater powers, responsibilities and duties than other persons.

59. It is argued that as an Authorized Dealer (agent), the Appellants cannot act beyond the jurisdiction of the RBI itself, as stipulated in the Agreement entered into between the RBI and BFEA. Therefore, the authorized dealer could not have exchanged currency which the RBI itself could not have done. An Authorized Dealer cannot be treated differently as from the other Noticees. An Authorized Dealer is neither above/ beyond the purview the FERA, 1973 nor specially situate by virtue of their position.

60. It is stated that, no doubt, Authorized Dealers are an extension / agent of the Reserve Bank of India for strict compliance of the provisions of FERA and the Exchange Control Manual, 1987. The role of the Appellants cannot be

construed in a manner so as to be in conflict with the provisions of FERA and ECM and make the provisions thereof otiose.

61. The Appellants had a dual role in effecting transactions, the first as an Authorized Dealer and second, as a normal commercial bank. It has acted as a normal commercial bank when transferring the funds from the BFEA Account (which was maintained by ANZ Grindlays, Bank, C.P., New Delhi) and as an Authorized Dealer when transferring the said sums into the account of Girobank Plc. (maintained in the ANZ Grindlays, Mumbai Branch). Therefore, Section 8(1) is attracted as for the particular transactions, in view of their second role as a normal commercial bank.

62. In view thereof, Section 9(1)(a) and 9(1)(e) are attracted, and unlike section 8, authorized dealers have not been specifically excluded from the ambit of Section 9. The term 'person' includes juristic persons – and thus, includes the Appellants. The Appellants have contravened these provisions as they have made payments to and for the credit of a person resident outside India; and placed a sum to the credit of a person resident outside India; (i.e. Girobank Plc. and Eastern Suburbs, UK)

63. In a Show Cause Notice, only the documents which are integral to establishing the contravention are relied upon. However, this does not mean that other documents having relevance in establishing the background cannot be referred to. The only impermissibility is placing reliance on a document to establish the contravention, which otherwise has not been relied upon in the Show Cause Notice. In the present case, the contravention is purely established by the relied upon documents, and the additional documents only serve to appraise this Tribunal about the background of the matter.

64. It is stated that *Mens rea* is not a necessary ingredient to constitute a contravention as per the scheme of the FERA, as enunciated by the Supreme Court in Hans Mayer George and MCTM Corporation, in establishing blameworthy conduct on the part of the delinquent/ defaulter for imposing penalty for the breach of civil obligations. The judgments passed by the Division Bench of the Appellate Tribunal for Foreign Exchange in *Bank of Ireland* and *American Express* squarely cover the issues in the present appeals and are binding as per the principles of precedence.

65. When the transaction itself is against the provisions of law, the Authorized Dealer cannot plead that they were empowered to conduct and effectuate the transaction in their capacity as an Authorized Dealer. Reliance is placed on Para 1.26, wherein it states that "nothing in this manual authorizes any transaction which is contrary to any of the provisions of any statute (including the Foreign Exchange Regulation Act, 1973) or any Rule, Notification, Order, Direction or Regulation issued thereunder."

66. The Learned Sr. Counsel appearing on behalf of respondent has supported the impugned orders and submits that the appellant bank is clearly guilty of contravention of various provisions. He also submits as under:-

(i) There were clear cut instructions form the RBI that the form A2 must be prepared by the actual remitter of the funds, but no such forms were collected.

(ii) The employees of the appellant bank had also stated that A3 forms in certain cases were not received from New Delhi but prepared by the Mumbai branch.

(iii) Though there was clear cut instructions from the RBI to credit the rupees fund into external account only after instructions from RBI, but the appellants did not wait and credited to the Girobank Plc., London.

(iv) The act of the noticee bank and its employees certainly amount to gross negligence resulted in huge loss of foreign exchange. The ignorance of law is not an excuse, as the bank is run by well trained professionals who were well versed with their duties and responsibilities as an authorized dealer.

(v) Shri G.P. Pande is responsible for these contraventions: The CEO of the bank is in-charge of the business and also responsible for the misdeed of the lower level officers. Shri G.P. Pande is responsible for all these contraventions in terms of Sec. 68(1) of FERA, 1973. ***(Para 100)***

(vi) All these illegal transactions had taken place due to negligence of these bank officers only. They handle these transactions in a routine manner. Had they been vigilant in the first place, these transactions would not have taken place.

(vii) **Shri Kiran Bhalla is responsible for these unauthorized transactions:** Shri Kiran Bhalla was the manager in charge of New Delhi branch. He sent the T.T. with the beneficiary name as "eastern Suburbs Ltd." and giving the account number of Girobank without mentioning the

name of the actual account holder. He could have asked the Russian authorities for necessary documents to confirm the purpose of this remittances.

(viii) **Shri Sunil Sawant is responsible for these unauthorized transactions:** He was primarily responsible to verify the fund transfers and the right person who should have stopped these transactions. *In his statement, he stated that he had noticed the difference in account number and account holders name and sought the advice of his superior Shri Paul Pereira to whom he was reporting.* When the account number did not match with the beneficiary's name, he should have straight away rejected the transaction.

(ix) **Shri Paul Pereira is also responsible:** He was a contractual employee retained by the bank for a specific work related to day to day transactions of clearances in the bank and other regular employees were reporting to him and his orders were being obeyed by them. In his statement dated 02.03.1993 Shri Paul Pereira has confirmed that he had written an endorsement as "Please credit GIROBANK" in one of the TTs received from New Delhi branch. He had also tried to pass on the responsibility to Smt. Preetha Sundaram that he had given these advices after consulting her. He could have given different opinion in stopping these illegal transactions.

(x) Mrs Preetha Sundaram is also responsible for these unauthorized transactions: She was the Country Manager, Correspondent Banking Services. Therefore, for all these transactions she was in charge and responsible.

(xi) **Shri Rajagopalan Ramkumar is responsible for these unauthorized transactions:** He was the officer-in-charge of Remittance Section and Shri Sunil Sawant was one of the officers working under him. He was aware that crediting the non-resident rupee account of Girobank with funds from non-convertible account thereby converting the said funds into foreign exchange, was not allowed as per the Exchange Control Regulations.

(xii) Thus, all these officers are held guilty for contravening the provisions of the FERA, 1973

67. Therefore, Grindlays Bank is rightly charged and the following findings arrived are correct and should not be interfered with:-

iii) under Sec. 8(1) of FERA read with Chapter 10 of the ECM, 1987 for transferring funds outside India without taking permission form RBI.

iv) under Sec. 9(1)(a) and 9(1)(e) for crediting to the accounts of person's resident outside India.

v) under Sec. 6(4) and 6(5) read with Sec. 49 of FERA for not complying with the conditions of authorization.

68. In reply to the argument addressed on behalf of learned senior counsel for the respondent, with regard to trade commerce, the Learned Sr. Counsel appearing on behalf of appellants submitted that the corresponding documents and the facts stated in relation the facts stated in relation thereto, cannot be considered in these proceedings because the same do not form part of the Show Cause Notices issued to the Appellants and the relied upon documents

therein. Counsel for the Appellants has referred reliance on the following judgements in support of its contention:

a) Commissioner of Central Exercise, Bangalore vs. Brindavan Beverages (P) Ltd (2007) 5 SCC 388

b) Commissioner of Central Exercise, Bhubaneshwar – I vs. Champdany Industries Ltd. (2009) 9 SCC 466.

c) Biecco Lawrie Ltd. &Anr. vs. State of West Bengal and Anr. (2009) 10 SCC 32.

d) Gorkha Security Services vs. Government of NCT of Delhi (2014) 9 SCC 105.

e) SACI Allied Products Ltd., U.P. vs. Commissioner of Central Exercise, Meerut (2005) 7 SCC 159.

f) Commissioner of Central Exercise, Chandigarh-II vs. Steel Strips Limited and Ors. (2003) 5 SCC 216

g) Without prejudice to the aforesaid, it is submitted that a perusal of the said documents would show that - Article 14 of the Trade Agreement between Government of India and the Government of the USSR dated 10.12.1980 states that the same shall remain valid upto 31.12.1985.

h) Further, a perusal of the Agreement between the BFEA and RBI would also show that the same would be in force only during the validity of the Trade Agreement which as mentioned above was valid upto 31.12.1985.

i) Since the impugned transactions in the subject appeals took place in the year 1991 i.e. after both the Agreements had already expired, as such it cannot be said that the said transactions were covered by the said Agreements and that there is any violation of the said agreements.

69. It is further submitted that it is settled law that an International Treaty can be given the effect of law in India only if the said treaty is given the effect of law in India only if the said treaty is incorporated as a local/municipal law by an act of the Parliament, which has the power has to make laws for giving effect to such treaties under Article 253 of the Constitution of India, 1950. It is submitted that the Treaty dated 10.12.1980 (Trade Agreement between Government of India and the Government of the USSR) has not been given the effect of law by the Parliament and thus, the said treaty does not have the force of law and there is no question of violation of the same. The same argument would also apply to the above-mentioned alleged Agreement between BFEA and RBI dated 18.08.1981. It is stated that *firstly* it is not the charge in the Show Cause Notice that the Appellants have violated the said paragraph of the ECM, *secondly* the Trade Agreement between India and USSR is not a relied upon document in the said SCNs and thus no reliance can be placed upon the same and *thirdly* without prejudice to the above mentioned arguments, it is submitted that on the date of the impugned transactions the said Agreement - Trade Agreement between India and USSR had already expired, after 31st December, 1985.

70. It is submitted on behalf of appellants that the corresponding letters are third party correspondence having no reference to the present Appellant. It is further submitted that these letters have no relation with the impugned transactions and are therefore, irrelevant for the purposes of the present proceedings.

71. On behalf of the appellants, it is submitted that the corresponding letters and documents etc. do not form part of the subject Show Cause Notices and the documents relied upon therein and in fact the Respondent has itself stated that the said correspondence and documents form part of another Appeal of BFEA being Appeal no. 79 of 2009. Thus, since the said documents do not form part of the Show Cause Notices issued to the Appellants and the relied upon documents therein, the same cannot be relied upon by the Respondent in the present proceedings. It is submitted that the corresponding documents and the facts stated in relation thereto, cannot be considered in these proceedings because the same do not form part of the Show Cause Notices issued to the Appellants and the relied upon documents therein.

72. It is stated on behalf of the appellant that the Respondent has for the purposes of their submissions, relied upon only the statements of some of the officers. Further, the Respondent has not even placed their complete statements and has only relied upon some parts of the same.

73. It is submitted that a reading of the statements recorded in the subject matter would show without any doubt that the Appellant Bank and its Officers have not in any manner benefited from the impugned transactions and in fact they were victims of an external conspiracy hatched by certain individuals to which the Appellant Bank along with several other Banks including Nationalised Bans.

As such, none of these statements substantiate the case of the Respondent Department.

74. Admittedly, many alleged facts stated are not mentioned in the Show Cause Notices. It is contended on behalf of the appellant that in view of settled

law the said relied upon documents cannot be looked into at this stage of the proceedings.

75. It is stated on behalf of the appellants that the Appellant Bank opened the bank account of BFEA in pursuance to the Bilateral Trade Agreement dated 10.12.1980 and the Banking Agreement dated 18.08.1991 between the BFEA and the RBI. It is submitted that the Appellant Bank had no knowledge of these Agreements as both these agreements are private secretive documents which were not put in circulation.

Apart from the same, it is submitted that even if there was a breach of the terms of these agreements, the same would at best be a breach of contract and nothing more. It is also submitted that the concept of VOSTRO and NOSTRO accounts are standard accounts which are available in relation to all foreign trade and cannot be said to have been opened under these agreements. It is further submitted that the said documents are not relied upon documents.

76. It is submitted that a perusal of the said documents would show that both the said Agreements were valid upto 31.12.1985. The impugned transactions in the subject appeals took place in the year 1991 i.e. after both the said e expired and as such it cannot be said that the said transactions were covered by the said Agreements and that there is any violation of the said agreements.

77. It is submitted that it is well settled law that an International Treaty can be given the effect of law in India only if the said treaty is incorporated as a local/municipal law by an the Parliament, which has the power to make laws for giving effect to such treaties under Article 253 of the Constitution of India, 1950. It is submitted that the Treaty dated 10.12.1980 (Trade Agreement

between Government of India and the Government of the USSR) has not been given the effect of law by the Parliament and thus, the said treaty does not have the force of law and there is no question of violation of the same. The same argument would also apply to the above-mentioned Agreement between BFEA and RBI dated 18.08.1981.

It is submitted that the facts stated therein are incorrect. It is submitted that there is no contravention of the provisions of FERA. It is submitted that every show cause notice deals with a separate set of facts and circumstances and the chain of events set out by the Respondent is not correct.

78. In the said Flowchart, it has been shown that the amounts which were credited to the account of Giro Bank were converted into pounds and were credited to the account of Eastern Suburbs. This is a completely incorrect statement because there is no material on record to show that these amounts were in fact converted into Pounds or that these amounts were remitted abroad. In fact, there is no such allegation in the SCNs. Therefore, the narration of facts as given in the flowchart and the chain of events as given in the said note are incorrect. The facts available on record only suggest that the amounts were credited in rupees to the account of Giro Bank.

The said Flowchart shows that the Appellant Bank only honoured the instructions issued by the nationalised banks such as the Canara Bank and the BFEA Bank which was the central bank of the erstwhile USSR and this itself shows that there was no malafide on the part of the Appellant Bank.

79. It is submitted that the said paragraph is factually incorrect as the funds had been transferred to the other banks locally and further the show cause notices only state that rupees were credited to the Vostro Account of Giro

Bank, U.K. and there is no allegation that these rupees were subsequently converted into foreign exchange. The credit of rupees to the Vostro account cannot be considered as dealing in foreign exchange. Vostro accounts are rupee accounts.

80. It is submitted that the Appellant Bank was acting as a collecting bank and was carrying out the instructions received from the correspondent bank/branch. The Appellant Bank did not acquire any right, title or interest in the rupees that were credited to the account of Giro Bank. Furthermore, the officers of the Appellant Bank acted in good faith and the Adjudicating Officer has also not found any malafide on the part of the Appellants. It is submitted that neither the Officers nor the Bank benefited from the said transactions. The Appellants only acted on the instructions of the reputed nationalized Banks and BFEA, which was the central Bank of the erstwhile USSR, equivalent to the RBI in India.

It is submitted that as mentioned above the Appellant Bank had after discussing with the RBI remitted the entire foreign exchange back to India which formed the subject matter of the impugned transactions. As such, no loss of foreign exchange was caused to the country because of the impugned transactions.

81. It is submitted that documents which were not relied upon in the SCN can be relied upon by the Respondent to establish the background facts. The submission of the respondent is contrary to the settled position in law that only the SCN and the relied upon documents therein can be referred to in the Adjudication Proceedings and the Appeals thereafter and no other document can be referred to, as a reliance on such documents would tantamount to a violation of Principles of Natural Justice.

82. No doubt, as far as transactions in question are concerned, the same are to be dealt with as per merit as to whether the appellants are guilty of contraventions as alleged by the respondent or not and as to whether provisions invoked by the respondent against all the appellants are sustainable or not. However, new materials which were not part of show cause notices and relied upon documents in the present set of cases cannot be relied upon at the time of hearing, however, while passing the order, the chain of documents and events will be kept in mind. The present appeals are to be decided on the basis of materials, documents and pleading and relied upon documents, otherwise there would be no end in producing the documents during the hearing of appeals.

83. **Nostro & Vostro Accounts**

(i) Financial institutions, the world over, establish relationships with other financial institutions in foreign countries to facilitate receipts and payments of funds for and on behalf of their clients and themselves.

(ii) When a local Indian bank has a relationship with a foreign bank, the foreign bank becomes its correspondent bank or counterparty.

A correspondent bank is defined as a financial institution that provides financial services on behalf of another financial institution residing outside the jurisdiction of the correspondent bank. Since physical movement of currency and establishment of branches in every country is impractical, the correspondent bank conducts business transactions, accept deposits and gather documents on behalf of the foreign financial institution. Thus, it acts as a domestic bank's agent abroad through correspondent acc

(iii) Correspondent Banking is one of the core areas of international banking activity which dates as far back as 1800 in the US when interbank deposits were established to provide a means of redeeming bank notes outside of one's own geographical area. Correspondent accounts usually take the form of two accounts called the **nostro** and **vostro** accounts.

84. In the facts of the present case, Nostro **account is a bank account held in a foreign country (e.g. Girobank) by a domestic bank (e.g. ANZ Grindlays Bank), usually denominated in the currency of that foreign country. The word "nostro" is borrowed from a Latin word "noster" which translates to "ours". In simple terms, a "nostro" account is interpreted as "our account of our money, held by you".**

On the other hand, a "**vostro**" account derived from "voster" is a bank account of foreign bank held with a local bank in domestic currency. In simple terms, a "vostro" account is interpreted as "your account of your money, held by us".

85. **SUBMISSIONS OF INDIVIDUAL OFFICERS**

A. <u>GIRIJA PANDE</u>

Appeal No. 92/2007 arising out of SCN No.1, 5, 9, 13, 17, 22, 25, 29, 33, 33 and Appeal No. 106/2007 arising out of SCN 67, 71 and 80)

The Show Cause Notices were issued under S. 68(1) wherein it has been alleged that the officer was "in charge of, and was responsible to, the Company for the conduct of business of the Company, as well as the Company."

It was stated by the appellant that he was not the directing or the controlling mind of the Bank. Hence, the basis on which the Special Director has proceeded, is erroneous in law. The commercial banking activities of ANZ GB were conducted by another division of the Bank i.e. the Retail Banking Division, in which the Vostro transactions were handled. It is submitted that the present Appellant did not have the knowledge of the transactions mentioned in the said Show Cause Notices. The Adjudication orders have been passed on a complete misconception of the role and responsibility of the present appellant in the Bank at the relevant time.

It is submitted that there were 4 separate General Managers for different divisions of the Bank at the relevant time. The present noticee was the General Manager of only one Division i.e. the Investment Banking Division at Bombay. The General Managers, in turn, reported to the Chief Executive Officer of the Bank in India.

The present appellant was not engaged in any of the transactions mentioned in the said Show Cause Notice. The area of functioning of the present officer was related to the Investment & Treasury functions of the Bank, and not the commercial or retail banking functions, which were under the control of GM Retail Banking. The Investment Banking & Retail Banking functions were clearly separated as per the Bank's policy and organizational structure. The appellant was managing the Bank's overall portfolio of Investments and Portfolio accounts in securities. He was also responsible for statutory compliance of the Statutory Liquidity Ratio and Cash Reserve Ratio of the Bank. The Correspondent Banking Service Unit (CBS) was reporting to him as one of the units, headed by

Manager. The CBS Unit was not in any manner connected with the operations/ processing of any transactions, or any business related to operations of the Vostro Accounts of the Overseas banks, which were maintained by the branches, and came under the direct responsibility of GM Retails Banking.

The bank had a strict policy of separating the responsibility between the marketing functions of the CBS, and the Operations relating to transaction processing which was the exclusive responsibility of the Retail Banking Division. The retail banking functions were being carried out at the branches of the Bank where the transactions were processed. It was the stated policy of the Bank of separating marketing and compliance functions between the various Divisions of the Bank.

The Vostro Accounts were being maintained in the Retail Banking branches of ANZGB in Mumbai, Delhi, Calcutta and Chennai. The responsibility of handling day to day transactions, ensuring compliance with the Exchange Control Manual and/or other Bank Regulations, and debiting /crediting Vostro Accounts were clearly not within the domain of the CBS Unit. These accounts were maintained by the various retail branches of ANZGB, which formed part of the Retail Banking Division.

The CBS was separately staffed and functioned under the responsibility of the Country Manager-CBS, who was clearly charged with the responsibility of the marketing function, and no one in the CBS unit had any authority to credit or debit accounts. The authority of crediting/ debiting any customer or bank accounts, was carried out by the Retail Banking Staff who had designated signing authorities and limits, which were delegated within the Retail Bank, and was not in the

domain of the CBS Unit. The CBS staff were not empowered to approve any debts or credits to the Vostro Accounts maintained in the Retail bank branches.

The appellant did not authorize, or sign, or deal in any manner whatsoever with any of the transactions in question, nor were the same even referred to him. There is no evidence whatsoever to show that the notice had authorized, or ratified, the processing of any of the transactions in question.

Therefore, the present appellant has not contravened any of the provisions of the FERA 1973, nor can the present appellant be held vicariously liable under S.68(1), since he was not in charge of, or responsible to the Bank, for the conduct of the business of the said bank in the whole of India, as alleged. It is submitted that the present Appellant has erroneously been made liable through a legal fiction under S.68(1) of the Act. It is submitted that the Constitution of India does not permit prosecution or imposition of penalty in quasi criminal proceedings through a legal fiction. There has been no overt or covert act attributed to him, making him liable for imposition of penalty.

The Special Director in Para 100 of the impugned order dated 29.05.2007 and para 121 of the order dated 4.6.2007, erroneously held that Shri G.P. Pande was the General Manager in charge of the Operations of the Bank in India. It has been wrongly assumed that he was the 'head of the organization' and was in charge of and responsible to the bank for the conduct of its business in India.

The Special Director has completely misunderstood the organizational structure of the Bank, and the functions of each of the Departments. There is no factual basis for the aforesaid finding, nor is it supported by any reasons in the impugned order.

86. **Preetha Sundaram**

Appeal No. 93/2007 arising out SCN No. 1, 5, 9, 13, 17, 21, 25, 29, 33,

Appeal No. 107/2007 arising out of SCN 67, 71 and 80

She at the relevant time, was posted in the corporate office of the Correspondent Banking Services "CBS" at Bombay. She was the Country Manager Correspondent banking Services 'Bombay'. She was heading the Corporate office of the CBS unit of the Bank. Her role and function in the bank was to develop the business of the bank, and was in charge of the relationship management with other foreign and domestic Banks, marketing and business development. Her responsibility was to carry out re-structuring of the Correspondent Banking Unit to carry out new responsibilities relating to credit- limit for banks, new product development, recruitment of staff and training, etc. On account of the international scenario where India' external credit rating was down-graded by global credit rating agencies resulting in cancellation of credit facilities to India and India borrowers by many international banks, ANZ GB undertook to invest a 100 million US # and obtain a similar investment from other international financial institutions/ banks under the FCBOD (Foreign Currency Banks and Other Deposits) Scheme, as a token of its commitment to the national economy. This port folio was under the responsibility of the present appellant, who was reporting to Mr. Girija Pandey.

The Corporate office was not concerned with the banking transactions which were carried out in the branches.

86.1 The present Appellant was issued Show Cause notice Nos, 1, 5, 9, 13, 17, 21, 25, 29, 33, 37,. 42, 47, 52, 57, 62, 67, 71, 76 and 80 u/s 68(1) on the basis of vicarious liability under the FER Act, 1973 as allegedly being responsible for the proper conduct of the business of the Bank, and the when the transactions took place. It is submitted that the appellant was not in charge of the conduct of the business of the Bank, as alleged or even otherwise. The appellant was holding a managerial position in the CBS unit of the Bank. She was not in charge of the operation of Vostro accounts maintained by the Bank, which were maintained in the retail branches the four metropolitan cities. Transaction processing, posting checks, operational controls were under the direct control of the retail branches. The present Appellant had no role to play with regard to the authorization, or processing of the transactions in any manner, and/or at any stage. She was not, in any way concerned with the transactions processed in the branches. The appellant was not in charge of the conduct of the business of the Bank as required by S.68 (1). The appellant could not be held to be vicariously liable, as she was not incharge of the affairs of the bank in India, or the directing and controlling mind of the Bank. Hence the impugned order passed under S. 68(1) is entirely misconceived in law, and on facts, and therefore, liable to be set aside.

86.2 It is submitted that the Appellant had no knowledge of the transactions covered by in the various Show Cause Notices, and cannot be penalized for the same. The present noticee has not contravened any of the provisions of the FERA, 1973 nor can the present Appellant be proceeded

against vicariously under S.68(1), since she was not in charge of, and responsible to the Bank, for the conduct of its business in India.

86.3 In the present case, there is no evidence of any act of omission or commission by the present Appellant. The present Appellant has not processed of the transactions. The said documents were not passed through her hands for processing or authorization in terms of operating procedures, which were handled by the retail branches. The telex and transaction vouchers do not bear her initials or her signatures, nor has she issued any instructions with regard to the crediting the account.

86.4 It is pointed out that **of the 17 SCNs** on which the impugned Adjudication Orders have been passed, **10 of these Notices pertain to transactions which are took place during the period 10.8.91 to 21.9.91, when she was not admittedly in the country**. The 10 Show Cause Notices pertaining to this period of her absence from the country is set out herein below:-

SCN #	Date of Transaction	Penalty (Rs)
SCN 17	10.08.1991	60000
SCN 21	10.08.1991	80000
SCN 25	10.08.1991	70000
SCN 29	10.08.1991	150000
SCN 33	10.08.1991	80000
SCN 37	21.08.91	60000
SCN 42	22.08.91	60000
SCN 47	22.08.91	50000
SCN 67	17.08.91	2000
SCN 80	22.08.91	2000
Total		Rs. 6,14,0000

The relevant extract from her Passport has been filed.

87. **KARAN BHALLA**

Appeal No. 97 of 2007

Mr. Karan Bhalla was the Manager of the Connaught Place Branch of ANZ Grindlays Bank from October, 1990 to December 1992. The Branch consisted of about 80 officers and staff.

The impugned Order dated 29.5.2007 has been passed with respect to 9 Show Cause Notices issued to Mr. Karan Bhalla pertaining to the group of Tested Telexes, being SCN Nos. 1, 5, 9, 13, 17, 21, 25, 29 and 33. The notices were issued under S. 68(1) of the FER Act, 1973 on the ground that the officer was allegedly in charge of, and responsible to the Bank for conduct of its business, as well as the Bank.

It is stated that the Appellant was proceeded against only by virtue of S. 68(1) of FERA, 1973. The said provision can be invoked only against such Officer/s who constitutes the directing and controlling mind of the Company through a legal fiction. It is not the case of the Department that the present Appellant was at the relevant time, the directing or controlling mind of the bank. The Appellant has not done any act of commission or omission, which may have resulted in contravention of FERA, 1973. Article 21 of the Constitution does not permit prosecution of a person through legal fiction. The initiation of legal proceedings, which are quasi-criminal in nature, against the present appellant, merely because he was the Manager of the Connaught Place Branch at the relevant time.

It is stated that the present Appellant has not contravened any of the provisions of the FERA 1973, nor can the present Appellant be held vicariously liable under S. 68(1), since he was not in charge of, or responsible to the Bank, for the conduct of the business of the said Bank in the whole of India, as

alleged. It is submitted that the Constitution of India does not permit prosecution or imposition of penalty through a legal fiction. There has been no overt or covert act attributed to him, making him liable for imposition of penalty. The present Appellant was the Manager of the Connaught Place Branch ANZGB during the period October 1990 to December 1992. As the Manager of the Branch, the transactions in question were never placed before the present Appellant or for any other purpose. In fact, there was no requirement to present transactions in question, or any document pertaining to the transactions, before the present Appellant. The present Appellant had no knowledge of any of the impugned transactions in question, nor has the present Appellant signed any vouchers, or any other documents, pertaining to the said payments.

87.1 The procedure that was followed by the Bank in the case of Tested Telexes, which are the subject matter of Show Cause Notice Nos. 1, 5, 9, 13, 17, 21, 25, 29 and 33 was as follows:

In the case of telex transfers, the procedure that was followed was as under:

Telex messages were first received at the H-Block Connaught Circus Branch, New Delhi, which was the centralized office for receiving telex instructions. At this office, decoding / testing of the said instructions took place to verify the authenticity of the instructions. After such verification, the Telex instructions were forwarded to the Branch concerned, where the transactions were processed.

87.2. In the present group of Show Cause Notices, telex instructions were received from the Bank for Foreign Trade Russia "BFTR", the 11

centralized Soviet Bank, having its Vostro account with the Connaught Place branch of ANZ Grindlays Bank at that time. The said instructions were forwarded from the Connaught Circus Branch, to the Connaught Place Branch, to debit the Vostro Account of BFTR maintained by it, and remit the proceeds to Account No. 01CBB8136400 given by BFEA belonging to Eastern Suburbs with the Bombay Branch of ANZ. The officers were not aware that the said account actually belonged to Giro Bank. On the face of the instructions, there was nothing to indicate that Eastern Suburbs was not a party resident in India.

87.3 The address of Eastern Suburbs was given as 90, M.G. Road, Bombay. Hence, the officers at the New Delhi branch believed the transaction to be a local credit, to a resident entity. There was nothing in the documents to indicate that the credit was for Giro Bank. The Officers / staff of ANZ at the Connaught Place branch, New Delhi did not know that Eastern Suburbs did not have an account with ANZ, Mumbai Branch. The instructions were processed bonafide by the lower level Officers / Clerks, without the knowledge that the instructions were for transfer of funds from a non-convertible account into a convertible account. The same were processed by the lower level staff in the normal course of inter-banking business, in good faith.

87.4 It is submitted that the present Appellant had no role whatsoever to play with regard to the authorization, or processing, of any of the transactions, in any manner whatsoever, at any stage.

There can be no vicarious liability for any acts committed by subordinate officers. In the absence of any finding of willful or conscious defiance of law, the Imposition of penalty is unjustified.

88. **RAM KUMAR RAJAGOPALAN**

Appeal No. 94 / 2007 arising out SCN No. 1, 5, 9, 13, 17, 21, 25, 29, 33

The present Appellant was issued 9 Show Cause Notices being SCN Nos. 1, 5,9, 13, 17, 21, 25, 29 and 33 dated 16.9.94 which pertain to the Tested Telex group of cases, on which the impugned Adjudication Order dated 29.5.2007 has been passed.

The present Appellant was at the relevant time, a Grade III Officer in the Remittance Department at the Bombay branch of ANZ in March, 1991. It is submitted that daily transactions in Vostro Accounts were not reported to him. Vostro Accounts were not being handled by the Remittance Department. The Vostro Accounts were being maintained by the branches.

The present noticee was a **mid-level officer**, who was working in the Remittance Department of the Bank at the relevant time. The present Appellant was reporting to the Assistant Manager-Customer Services, who in turn was reporting to the Assistant Manager-Operations, who in turn was reporting to the Senior Manager of the Branch. The Senior Manager was required to report to the Chief Manager, and above the Chief Manager was the General Manager.

88.1 In the present case, Telex instructions were received from the Delhi office to credit the account of Eastern Suburbs, Mumbai. These instructions were processed by the subordinate clerical staff. **These instructions were not placed before the present Appellant concerned. The present Appellant had no knowledge of the said transactions, and has not processed any of the transactions in question, nor authorized the same, at any point of time whatsoever. The present Appellant has not signed on any voucher, or authorized the**

transactions, or any document pertaining to any of the transactions in question.

88.2 The Show Cause Notices were issued to the present Appellant under S. 68(1) of the FER Act, 1973 on the purported ground that he was allegedly also responsible for the proper conduct at the business of said ANZ Grindlays Bank, when the aforesaid alleged contraventions had taken place".

88.3. The Vostro Accounts were neither maintained, nor monitored by the Remittance Department. Hence, the present noticee could never have been considered to be liable for the alleged contraventions as mentioned in the Show Cause Notice, and much less vicariously liable u/S. 68(1) for the conduct of the affairs of the Company.

88.4 The Special Director has in the impugned Order dated 29.5.2007 in **para 106** has observed that the present Appellant did not advise the officers working under him not to carry out the transactions in question, as the subordinate officers were working under him. On this ground, the Special Director has held him responsible for the alleged unauthorized transactions. The Special Director has held him **guilty under S. 68(2)** of the Foreign Exchange Regulation Act, 1973 as it has been held that **it was due to the alleged "negligence that the said contravention took place"**.

88.5 It is submitted that the Show Cause Notice does not Invoke the provisions of S. 68(2) of the Act, which provides that where a contravention has taken place with the "consent" or "connivance of" or

"is attributable to any neglect", such officer shall be deemed to be guilty of the contravention, and shall be liable to be proceeded against / and punished accordingly.

89. **Sunil Ganpat Sawant**

Appeal No. 96/2007 arising out SCN No.1, 5, 9, 13, 17, 21, 25, 29, 33

The present Appellant was issued Show Cause Notice Nos. 1, 5, 9, 13, 17, 21, 25, 29 and 33 by the Enforcement directorate wherein the provisions of Sec. 68(1) of FERA, 1973 had been invoked on the purported ground that he **"was also responsible for the proper conduct of the business" of ANZ Grindlays Bank at the relevant time,** when the aforesaid alleged contraventions took place. It is relevant to point out that there is **no allegation in the SCN u/S. 68(2)** that the contravention took place either with the "consent", or "connivance of", or "is attributable to any neglect" of the officer under S. 68(2) of the Act.

Mr. Sunil Ganpat Sawant was a Clerk-cum-Typist till 1.1.90. Thereafter, he was appointed as a Junior Officer, Grade I in 1990. He was working as a Relief Officer from 1.1.90 to 18.1.91 On 19.1.91, he was transferred to the Remittance Dept. as Officer-Funds Transfer (Local Currency). The noticee being a Junior Officer, Grade I could not have been responsible for the conduct of the business of the Bank for the alleged contraventions.

89.1 **The Appellant was an Officer at the junior most level in the Remittance Department**. The Vostro accounts were not maintained by the Remittance Department, but by the respective branches concerned.

89.2 As the Officer-Funds Transfer, the appellant was required to process two types of transactions i.e.:

(i) processing inward / outward local remittances for the branch customers at Mumbai;

(ii) processing inward remittances from foreign banks maintaining Vostro Account for onward payment to various beneficiaries having accounts with various banks across the country.

89.3 The present Appellant was required to process and authorize Tested Telexes received from various branches / centres of the Bank allover India. The volume of telexes received and processed each day, was in the vicinity of about 200-300 such messages.

The procedure which was followed was as under:-

(i) After a Telex was received in the Telex Department, Bombay, the same was authenticated and verified by the Output Department. After verification, the tested telex was forwarded to the Remittance Department for processing. The Remittance department was bound to comply with the time schedule in processing these transactions. On a daily basis, about 70% of the inward payment messages which were received pertained to inter-bank funding, which were required to be processed by 12.00 p.m. of the same day, to avoid interest claims and complaints from Vostro banks. The balance 30% constituted credits to local customers.

(ii) After the instructions were authorized, the credit voucher was forwarded to the Input Department for posting. Thereafter, the transactions were verified by the Output Department for

correctness of the report called Daily Transaction Report, and from a compliance perspective from the report called 'Protected Transaction List, after which the vouchers were bundled and sent for storage.

These telexes and foreign remittances were required to be cleared by 12 p.m. on the same day, if it was an inter-bank transaction, and by 3.00 pm if it was a customer transaction.

89.4 The present Appellant was at the lowest rung in the Officer Grade of the Remittance Dept., which would be apparent from the following structure of the Department :-

Chief Manager (Grade VIII - IX)

↑

Branch Manager (Grade VII)

↑

Manager – Operations (VI)

↑

Assistant Manager (Grade IV)

↑

Office in Charge (Grade III)

↑

Office – (Grade I)

89.5 It is further submitted that when the very first remittance was received from Connaught Place Branch, the present appellant noticed that the A/c No. as per the Telex did not match the A/c title, and hence did not process the same. The present Appellant referred the TT to Mr. Paul Pereira for advice, and informed him of the discrepancy. Mr. Paul Pereira, the Consultant who was engaged on a retainership basis by M/s ANZ

Grindlays Bank who had 33 years experienced in Foreign Exchange and International Banking business in SBI. **The present Appellant informed Mr. Paul Pareira that he was returning the remittance since the account number and the name of the beneficiary, did not tally**. However, Mr. Paul Pereira gave a written endorsement on the Telex to credit the account of Giro Bank as "Please Credit Giro Bank". This has been confirmed by Mr. Paul Pareira in his Statement dated 2.3.1993 to the Enforcement Directorate that he had written the said endorsement in one of the telexes received from ANZ, New Delhi.

A copy of the Statement made by Mr. Paul Pereira before the Chief Enforcement Officer along with the Tested Telex as **Enclosure-III**. A copy of the Statement made by Mr. Sunil G. Sawant before the Chief Enforcement Officer as **Enclosure-IV**.

89.6 On this basis, the remaining transactions were processed by the present Appellant. The Special Director in **para 104** of the judgment dated 22.5.2007 has held that: "Therefore, it proves beyond doubt the statement of Shri Sunil Sawant that he had consulted Shri Paul Pareira, and with his consent only, he passed the transaction. The Special Director holds that Shri Paul Pareira was "mainly responsible" for clearing these transactions and holds him responsible for the contravention under FER Act. The Special Directors further held that had Mr. Paul Pareira given a different opinion, Shri Sunil Sawant would not have gone ahead to clear these transfers. After recording these findings, the Special Director was not unjustified in holding Sunil Sawant also responsible for these contraventions under S. 68(2) on the ground of alleged negligence.

The impugned order is unsustainable in law inasmuch as the finding of neglect under S. 68(2) is beyond the allegations made in the Show Cause Notice.

89.7 **In October 1991, two Telex transfers were received from the Delhi Branch to credit Rs.68,49,925 and Rs.81,75,000 to the account of Eastern Suburbs**. The present Appellant referred the said instructions to Mr. Anil Bhuse, who instructed the present noticee not to credit the account, **but to park the funds in a Suspense Account, pending clarification sought from the Delhi Office, Since the Bombay Office did not get clear instructions, the said funds were not credited, and the funds were returned**.

This clearly proves the bona fides of the present Noticee.

89.8 It is submitted that there has been no allegation of mens rea on the part of the present Appellant. The present Appellant has **acted in good faith, with due diligence, and is not found guilty of any culpability whatsoever**. Hence, the Impugned Order is liable to be quashed and set aside.

90. <u>Statement of Paul Pereira</u>

Mr. Paul Pereira have appeared today before the Chief Enforcement Officer and made statement in continuation to my statement given on 23 February 1993.

I have been shown tile telex dated 20th July, 1991 received from ANZ Grindlays, Connaught Place, New Delhi to ANZ Grindlays, Bombay. In the said telex, it was advised to pay in "yourselves a/c Eastern Suburbs Ltd." and the a/c no. was given as OIC / BB / 8136400. On the

face of the telex some pencil hand written endorsement was there. Against the a/c no. GIRO Bank was written, there was an endorsement to the effect “please credit GIRO Bank”.

Q. In your statement dated 23.2.93 you stated that you made such endorsement in one of the telex received from ANZ Connaught Place branch. Is it the same endorsement you have made on this telex dated 20.7.91 in respect of credit GIRO Bank A/c with Rs. 5,99,99,925/.

A. 1 have seen the telex as referred to above and put my signature with date on this ill token of having seen the same. The endorsement made on the telex to the effect, please credit “GIRO Bank” be me. The date was wrongly put. It was written by me.

91. Statement of Sunil G. Sawant, s/o Arjun Ganpat Sawant Grindlays Bank, M.G. Road, Bombay on 12/2/93 under section 40 of FERA 1993 before the chief enforcement officer

I, Sunil G. Sawant S/o Ganpat Arjun Sawant aged 30 years residing at A/2, 4/3 Lok Palace Co-op Hsg. Soc., Bhandarwada, Malad (West), Bombay - 400 064 have appeared before the Chief Enforcement Officer in compliance with summons no. t-3 / 42 /B / 93 dtd 12-2-93 issued u/s 40/44 of Foreign Exchange Regulation Act 1973. I have been explained the provisions of section 40 of the said Act and understand that I have to make true and correct statement, I have also been told that for giving false statement I shall be liable to proceeded with in the court of law and as such I am making true and correct statement in reply to the question being put to me. I am an Indian National and have been residing at the above address from the last 2 years with my mother, wife and son.

After having completed my graduation in commerce from Bombay University, I Joined the office of the Regional Provident Fund Commissioner as LDC. I joined Grindlays Bank and worked as Clerk for about a year.

I worked in Southern branch for 2 years as a clerk. In 1990 I became officer of this bank and worked as a relieving officer to various branches in Bombay till I was posted to M.G. Road branch in 1991. From February 91, I was working at M.G. Road branch as funds transfer officer and my duty as Funds Transfer Officer is as under:

1. Crediting Vostro accounts of different bank maintained with us as per instructions received from our branch outside Bombay as well as instruction received from other correspondent banks who maintain an account with us.

2. To make Individual and bank payment on Instruction received from correspondent bank.

Question: Who was your officer in charge to whom you were answerable for your work during 1991 June-August?

Answer: Mr. Ramkumar was officer in charge of remittance department and still he is there to whom I was answerable.

Question: Who was your branch manager at relevant time as mentioned above?

Answer: Mr. Ravi Shekhar at present he is in main branch but not as a Manager.

Question: What is vostro account and the system of its operation as per exchange control regulation?

Answer: A rupee a/c maintained by bank abroad in India. System of operation at present in our bank:

1. When instructions received from correspondent bank to make payment to other vostro a/c maintain with local banks, we prepare F A-3 in duplicate. One copy is sent alongwith the cheque and duplicate is given to the accounts department.

2. When instructions are received from our upcountry branches (like Delhi, Calcutta) to credit vostro a/c, we credit it and F A-3 sent alongwith the voucher by the up branch country not received every time, is taken by the a/c department and voucher is passed on to us to offset entry in our book. If F A-3 is not received alongwith the (CMA) voucher then it is prepared by the accounts department on the strength of the credit voucher initiated by us.

3. When upcountry payment for vostro a/c are made we prepare form F A-3 in duplicate and it is given in a/c dept.

I am not fully aware of the procedure laid down under Exchange Control Regulations. I have now been shown the photocopy of the vouchers in respect of crediting account of GIRO Bank maintained with our branch. These vouchers were forwarded to the enforcement directorate by our bank under letter dated 21/1/93. I have put my signatures with date on the photocopy of the vouchers in token of having seen the same.

Regarding the voucher approved by me for crediting the GIRO Bank A/c with us I have to state as under:

Both the voucher dated 24/7/91 were approved by me for crediting Rs. 5,99,99,425/- and Rs. 3,99,99,925/- to the a/c of GIRO Bank. This was done

on the basis of the message received from our Connaught Place branch at New Delhi. Out of the two telexes for the above two amounts, copy of one telex dated 20-7-91 in respect of the amount Rs.3,99,99,925 is available among the documents sent by your bank and the other telex copy for amount Rs. 3,99,99,925/- is not available in these documents. Both the telexes I remember had identical instructions for crediting a/c Eastern Suburbs Ltd, quoting the a/c no. of 01CBB8136400. On verification it was found that Eastern Suburbs Ltd. was maintaining an a/c with us and the a/c figuring in the telex was for GIRO Bank. In the circumstances, I contacted Mr. Paul Pereira correspondent bank services, who was then looking after vostro account in the absence of Mr. Anil Bhuse.

Mr. Pereira advised us that the amount mentioned in the telex should be credited to the a/c of GIRO Bank and as 1 remember he also made an endorsement on the telex to the effect that "to be credited to GIRO Bank". Accordingly, I credited the a/c of GIRO Bank with amounts mentioned above to the account of GIRO Bank. I have seen the photocopy voucher dated 21/8/91 this was approved be me for crediting Rs. 8,44,06,119/- to the credit of GIRO Bank as per telex dated 1/8/91 received from our Connaught Place Branch, New Delhi. I have seen the photocopy of the voucher dated 2/8/91 approved by me for crediting GIRO Bank account with Rs. 5,99,99,925/- on the basis of telex dated 1.8.91 from Connaught Place New Delhi. I have seen the photocopy of the tested telex dated 3.8.91sent by Mr. Paul Pereira to GIRO Bank confirming crediting. GIRO Branch a/c as per instructions received from Connaught Place, New Delhi branch. 1 have also seen the photocopy of the voucher dated 10/8/91 which was approved be me for crediting the account of GIRO Bank on the basis of the telex from Connaught Place branch for Rs. 3,99,99,925/-. I have seen the tested telex sent by Mr. Pereira. I have seen the photocopy of the voucher dated 10/8/91 which was approved be me for

crediting a/c of GIRO bank with Rs. 2,58,45,552/-. This was done on the basis of the telex received from our Connaught Place branch.

I have seen the photocopy of the voucher dated 10/8/91 which was approved by me for crediting a/c of GIRO Bank with Rs. 3,46,10,145/-. This was also done on the basis of telex received from our Connaught place branch.

I have again seen the photocopy of the voucher dated 10/8/91 which was approved by me for crediting a/c of GIRO Bank with Rs. 3,99,99,925/-. This was also done on the basis of telex received from our Connaught Place branch. I have again seen the photocopy of the voucher dated 10/8/91 which was approved by me to credit GIRO Bank ale with Rs. 2,58,45,552/-. This was also done on the basis of instructions received from Connaught Place branch. I have seen copy of the telex dated 10/8/91 sent by Mr. Pareira to GIRO Bank.

Question: It is now observe that you have credited altogether total sum of Rs. 47,08,98,791/- with a/c of GIRO Bank maintained with your bank on the basis of instruction received from your Connaught Place branch at New Delhi. Before crediting the a/c of GIRO Bank with the above why did you not call for the relevant forms A1, A2, A3 on the strength of which credit voucher for the purpose of remitting the account of GIRO bank as per Exchange Control Regulation

Answer: As per the practice prevailing in our bank during that time, the required form used to be received subsequently alongwith the voucher sent by the originating branch. If it is not received then in that case our a/c's department who sends the required return to RBI, used to prepare the form all the strength of the credit voucher prepared by us.

Question: Did you check up with you're ale section subsequently to know whether they received the required form from your Connaught Place branch for crediting the GIRO Bank ale with Rs. 47,08,98,791/-.

Answer: No

Question: Are you aware whether your accounting section raised any form in respect of the above said credit and sent it to RBI alongwith R5 Return.

Answer: No

Question: Will you check up with you're a/c section now whether they received the required form from the Connaught Place branch or otherwise they prepared the form themselves in respect of the above said credits and please furnish the forms.

Answer: shall check up with account section to let you know the correct position and the forms will be supplied in case a/c section received from Connaught Place branch or they prepared themselves.

Question: Is not a lapse / impropriety on your part by not following the correct procedure as laid down in the Exchange Control Manual before crediting the a/c of GIRO Bank with Rs. 47,08,98,791/-.

Answer: I was not fully aware of the correct procedure as laid down in Exchange Control Manual and followed the practice prevailing during that time. If any lapses occurred was not intentional.

Question: Any permission from Reserve Bank of India was taken for crediting the above amounts to GIRO Bank.

Answer: No.

Question: Were you knowing one Mr. Kuldeep Singh Sood of M/s. Transworld International, New Delhi?

Answer: No.

Question: Do you know Eastern Suburbs, Indo International and Keith Fairbrother of U.K.?

Answer: No.

Question: Whether you had any discussion with Mr. Bhuse before crediting the a/c of GIRO Bank as credited earlier.

Answer: No he was on leave / absent at that relevant time.

Question: As you have stated that you were not aware fully the procedure to be adopted before crediting the vostro account, did you consult your superior 'or any officer to know the procedure?

Answer: No.

Question: As per the procedure laid down in the Exchange Control Regulations you have not submitted A1, A2 as the .....the instruction .....for credit Vostro a/c but you have .....why was ..... It so? (Not legible).

Answer: I was not aware of the correct procedure.

92. The statement given by me is true and correct to the best of my knowledge.

I, Sunil Ganpat Sawant have appeared before Chief Enforcement Officer at his office today and make the statement in reply to questions put to me. I have now been shown credit voucher dated 2/8/91, telex dated 20/7/91, 9/8/91 of ANZ Grindlays Bank Connaught Place, New Delhi branch to Bombay. In the above said credit voucher and telexes the name of GIRO Bank in red ink was written by me as the respective credits was to made to GIRO Bank. I have written this on the basis of written endorsement of Mr. Paul Pareira on the telex dated 20/7/91 that the amount mentioned in the telex should be credited to the GIRO Bank.

93. **Statement of R.B. Dhage**

Appeal No. 109/ 2007 & Appeal No. 121 / 2007

R.B. Dhage was a **Grade III Officer** in the Clearing Department at the relevant time. He was issued 2 Show Cause Notices No. 57 and 62, which are the subject matter of Appeal No. 109/2007. Appeal No. 121/2007 arises out of SCN No. T-4/19- B/94 SCN VIII.

The Show Cause Notices have been issued by invoking the provisions under S. 68(1) of the FERA, 1973. The ingredients of S. 68(1) of the FERA, 1973 would require that it is only an Officer who was in charge of, and was responsible to the Company for the conduct of the business of the Company, could be deemed to be guilty of the contravention. It is stated that the Show Cause Notices did not even allege that the noticee was in charge of the conduct of the business of the Company. Hence, the ingredients of S. 68(1) of FERA, 1973 are not satisfied.

93.1 It is stated that S. 68(1) can be invoked only against the Company, or the Officer who is the directing and controlling mind of the Company.

The present Officer was a junior Officer at Grade III, and certainly could not be deemed to be the directing and controlling mind of the Bank. Hence, the allegation that the present Officer was also responsible for the proper conduct of the business of ANZ Grindlays Bank, is misconceived both in law, and in fact.

93.2. It is submitted that the Hon'ble Supreme Court in the case of Shanti Prasad Vs. Directorate of Enforcement (AIR 1962 Supreme Court 764) has held that proceedings under FERA, 1973 are quasi criminal in character, and it is the duty of the prosecutor to make out beyond reasonable doubt that there has, been a violation of the law. The notices do not even allege that any act or omission has been committed with mens rea which would constitute an offence under the Act. The appellant is being prosecuted only on the ground that he was allegedly responsible for the proper conduct of the business of ANZ Bank.

93.3 The present Officer was the officer in charge of Clearing, which entailed the monitoring and smooth functioning of all the products in the Department, and to look after the requirements of the Department, such as stationary, equipments / machinery and timely servicing, monitoring the processing of timely clearings, and reconciliation of accounts, and reporting to the Unit Head. The various products being monitored by the present officer were as under:

- Outward Clearing
- Inward Clearing
- High Value Clearing
- Inter-bank Clearing
- Non-Fort, Non MICR and National Clearing.

- Processing of Interest Warrant, Dividend Warrant and Refund Orders.

93.4 The present Officer was handling large volumes as he was deputed to ensure timely processing of high value transactions. The officer was in charge of the clearing and processing pertaining to MICR clearing / which is Magnetic Ink Character Recognition Clearing, pertaining to cheques presented over the counter from 10 am to 2 pm which were required to be processed on the same day itself, and thereafter forwarded to the RBI. The Department was also in charge of high value clearing instruments which are Cheques of Rs.1 lac and above of the Fort area, Mumbai, which are deposited over the counter and were required to be processed and sent through a personal messenger to the RBI by 12.30 pm. The third kind of transactions which was entrusted to the Department of the present noticee was the Fort area, Mumbai, Return Clearing which are cheques presented on the previous day under MICR relating to Fort area, which are returned for clearing. Fourthly, all interbank clearing instruments were presented in the special clearing to this Department. The inter-banking instruments were also required to be processed on the same day latest by 3.30 p.m. and forwarded to the RBI. Lastly, the Department also processed non-Fort Return Clearing Instruments.

The Appellant was discharging a very high volume of work, required to be processed within a few hours on a daily basis. Every day several cheques were processed and credited to the accounts of Correspondent Banks by the Clearing Department. The present noticee

was reporting to a Grade IV Officer in the Department, who in turn was required to report to a Manager in the Grade V level.

93.5 The structural organization of the Department at the relevant time was as under:

Chief Manager (Grade VIII - IX)

↑

Branch Manager (Grade VII)

↑

Manager – Operations (VI)

↑

Assistant Manager (Grade IV)

↑

Office in Charge (Grade III)

↑

Office – (Grade I)

93.6 That Show Cause Notice Nos. 57 and 62 which are subject matter of Appeal No. 109/2007 were issued to the present Officer. These pertain to two Bankers Cheques issued by Canara Bank, a nationalized Indian Bank, which were sent through National Clearing to M/s ANZ Grindlays Bank. The covering letter from Canara Bank dated 6.6.91 offered to provide a Foreign Inward Remittance Certificate. The instrument was returned by ANZ in the first instance, since it had no account of Eastern Suburbs ltd. Thereafter, fresh instructions were received from Canara Bank to credit Account No. 60710029**.** The Cheque was received with the Credit Voucher from Canara Bank.

The Credit Voucher was thereafter verified by the Assistant in the Department, and thereafter placed for approval of the Officer-in-charge. The present Appellant has merely initialed the Credit Voucher in the normal course of banking business.

It is stated that the Appellant was wholly unaware of the first limb of the transaction, that the funds emanated from the account of BFEA, which was a non-convertible Vostro Account maintained with Canara Bank. This information was only known to Canara Bank. Hence, the present Appellant, and the Bank cannot be held liable for any alleged conversion of funds from a non-convertible account to a convertible account, either willfully, or otherwise.

93.7 It is alleged that the instructions emanated from a nationalized Indian Bank who was an Authorized Dealer, the officers assumed that the transaction was permissible. Hence, there has been no violation by the present Appellant of the alleged conversion of funds from a non-convertible account to a convertible account, either willfully or otherwise.

93.8 Show Cause Notice No, 57 dated 25.6.1991 pertains to a remittance dated 25.6.1991 for Rs.3.88 crores which was accepted by the Customer Services Officer, and thereafter forwarded to the Clearing Department with written instructions on the covering letter to credit the account of Giro Bank. These instructions were required since there were discrepancies in the title and account number. The cheque was processed and sent for clearing to credit the Resident Account of Giro Bank after obtaining instructions from the Consultant / Expert appointed by ANZ on retainership basis i.e. the Customer Services Officer, Mr. Paul Pareira.

93.9 The second remittance covered by Show Cause Notice No. 62 dated 5.7.1991, was a Bankers Cheque dated 5.7.1991 received from Canara Bank, Mumbai. On this Cheque, there is no mention of "Eastern Suburbs Ltd.". In this case also, the officers of ANZ Grindlays Bank were not aware of the first limb of the transaction, that the amounts emanated from BFEA, and instructions were given by Vnesh Bank to Canara Bank. Since there were discrepancies in the title and account number, this was referred to the Customer Services Officer to ascertain whether the same was permissible. The transactions were initially rejected. However, on receiving further instructions from the Canara Bank, the cheques were recalled and processed as per the instructions received from Canara Bank. Upon receiving confirmation, the cheque was processed and sent through clearing to credit the Resident Rupee Account of Giro Bank. Hence, there is no contravention committed by the present Officer.

93.10 The present Appellant has in his statements recorded by the Enforcement Directorate on 4.2.1993, 5.2.1993 and 10.2.1993 stated that the Customer Services Officer was contacted on account of the discrepancies found in the covering letters. The Customer Services Officer confirmed that the account number appearing in the covering letter was that of Giro Bank, and that the amount of the said cheque should be credited to Giro Bank account. Accordingly, the said Appellant gave effect to the said transaction. Hence, no mens rea could be attributed to him, and the Penalty proceedings are wholly without jurisdiction, and liable to be set aside.

93.11 The Special Director in para 124 of the impugned Order dated 4.6.2007 has held the present Appellant responsible for violation in terms of S. 68(2) of the Foreign Exchange Regulation Act, 1973 on the ground of 'negligence'.

The Special Director has, however, accepted that the negligence was a '**bonafide mistake**', and that there was no malafide attributed to the officers. The Special Director also accepts that the officers stopped subsequent transactions, after they discovered their mistake. In this background, since there was no willful negligence, the Special Director ought not to have imposed a penalty of Rs. 80,000/- on the present Appellant. The said penalty has been imposed under S. 68(2) of the FER Act, 1973. It is submitted that the Show Cause Notice does not even invoke the provisions of S. 68(2). The entire Show Cause Notice is based on the provisions of S. 68(1) i.e. that the officer was also responsible to the Bank for the conduct of its business.

It is submitted that the invocation of S. 68(1) pre-supposes that the Company is guilty of an offence. It is well-settled that a Company cannot be guilty of an offence, unless it is alleged that the directing and controlling mind of the Company is guilty of the act or omission which constitutes the offence. S. 68(1) can be invoked through a legal fiction making the officer vicariously liable for the offence. A Company can be guilty of an offence only if the act or omission which constitutes the offence is committed by the directing and controlling mind of the Company. In the present case, the present Appellant was certainly not the directing and controlling mind of the Company. Hence, the imposition of penalty is wholly unjustified.

93.12 Appeal No. 121 arises out of a transaction covered by SCN No. T-4/9-B/94 SCN VIII. In this case, four drafts were purchased by Kuldip Singh Sood of Transworld International from four Nationalised Banks, i.e. Bank of Maharashtra, Bank of India, Oriental Bank of Commerce, State Bank of Patiala. All the bank drafts are dated 8.3.1991. The said drafts were

presented to Standard Chartered Bank, which issued a Pay Order 29.4.1919 for Rs. 2 lacs issued by Standard Chartered Bank in favour of ANZ Grindlays Bank. The Pay Order was sent for realization through RBI clearing and after realization the credit was to be given to M/s. Giro Bank. It is pertinent to mention that no A-1 or A-2 Forms were received from the Standard Chartered Bank along with the Pay Order which is required under the Exchange Control Manual. Hence, the Officer of ANZ Grindlays Bank were under the bonafide impression that it was a local instrument. At the time of crediting the account of Giro Bank on 30.4.1991, the Noticee Bank bonafide believed that the Pay Order represented the Transfer of Funds from Giro Bank's account with Standard Chartered Bank to Giro Bank's account with ANZ Grindlays Bank. So far as the Noticee Bank is concerned, the credit given to the Giro Bank was by way of transfer of an amount already lying to the credit of the same bank, i.e. Giro Bank with another Authorised Dealer, i.e. Standard Chartered Bank in Mumbai hence, in so far as ANZ Grindlays Bank is concerned, the credit of Rs. 2 lacs into Giro Bank's account in their books amounted to only transfer of Rupees from the account of Giro Banks itself and therefore did not require permission from the RBI at any stage, as it is exempted by virtue of Para 10.10 and 10.11 of Chapter 10 of Exchange Control Manual. Para 10.10 of the Exchange Control Manual provides as under:

"Transfer of Rupees from the Account from one center in India of any Overseas Branch or correspondent to another Account of the same branch or correspondent at the same center or at any other center in India may be freely made under report to RBI on Form A3."

It is stated that the ANZ Grindlays Bank has complied with the aforesaid by filing requisite A-3 Form along with R-5 Returns with the RBI.

93.13 It is submitted that the Show Cause Notice was issued to the Appellant under Section 68(1) of the said Act on the purported ground that the said Officer, at the relevant time when the alleged contravention had taken place, was responsible to the Bank for the conduct of the business of the said transactions.

93.14 It is submitted that Section 68(1) can be invoked only where a person is in-charge of and was responsible to the Bank for the conduct of the business of the Bank, as well as the Bank. The present Appellant was certainly not in-charge of and responsible for the conduct of the business of the Bank. Hence, the invocation of Section 68(1) is legally misconceived. It is further submitted that the Special Director of Enforcement Directorate vide a Order dated 4.7.2007 erroneously held that there was negligence on the part of the Officers of Grindlays Bank in crediting the non-rupee account of Giro Bank.

94. Statement of **Allwyn Roche**

Appeal No. 108 of 2007

Mr. Allwyn Roche was served with the following Show Cause Notices No. 37, 42, 47, 52, 67, 71 and 76, on which the Adjudication Order dated 4.6.2007 has been passed. The Show Cause Notices have been issued by invoking the provisions of S. 68(1) of the FERA, 1973 alleging that the officer was also

responsible for the proper conduct of the business of the said ANZ Grindlays Bank at the relevant time, when the aforesaid alleged contravention took place.

He was posted at the M.G Road Branch in Feb 1991 as the 2nd Officer in Clearing Department. He was a Grade I Officer at the entry level.

The following Chart would show that the said Noticee was working at the lowest rung of the officer cadre in the said Department:-

Chief Manager (Grade VIII - IX)

↑

Branch Manager (Grade VII)

↑

Manager – Operations (VI)

↑

Assistant Manager (Grade IV)

↑

Office in Charge (Grade III)

↑

Office – (Grade I)

94.1 The Appellant was working as a **Relief Officer** i.e. a backup Officer to provide support in various departments, in case any Officer was on leave, including the Clearing Department, Fixed Deposit, Remittances etc. The job profile of the present Appellant was to verify the name of the beneficiary and tally the same with the account number, after which he was required to prepare the voucher. The Voucher would thereafter be forwarded to the Clearing Department. The Clerk in the Clearing Department would prepare the Voucher, and forward it to the Appellant to tally the name of the Account with the payment instructions. After verifying the same, the instrument would go to the Clearing Department.

94.2 As per RBI instructions with respect to the Clearing House, Cheques having a value of over Rs. 1 lac, were required to be processed by 11.30 a.m. on the same day. The Appellant was required to process about a hundred instruments of high value within a short period of about 45 minutes, since these transactions had to be processed within banking hours from 10.45 a.m. to 2.45 p.m. Thereafter, the credit would be effected.

The job function of the Appellant was of receiving the various Cheques, Bank Pay Orders, Dividend / Interest Warrants etc., presenting the same for payment and realization of proceeds after segregating the same bank-wise, and totaling the value of such instruments set out for clearing with the value of deposit slips received. He was also responsible to receive cheques from the Clearing House drawn on Grindlays Bank branches in Bombay, by the Bank's customers, and forward them to Departments for posting into Customer's Accounts. He would receive thousands of instruments each day, and his job was a mechanical one, of totaling the particulars on the instrument, with instructions by way of processing function.

94.3 The SCNs have been issued under S. 68(1) of the FER Act, 1973 on the alleged ground that he was also responsible for the proper conduct of the business of the said ANZ Grindlays Bank. That Sec 68(1) can be invoked only if a person was “incharge of and was responsible to the Company for the conduct of the business of the Company”.

94.4 It is stated that the Appellant was merely a **Relief Officer in Grade I, i.e. at the junior most level**, and hence could never be considered to be

the Directing & Controlling mind of the Company, or responsible for the affairs of the Bank, and hence the proceedings under Sec. 68(1) are wholly misconceived. It is not the case of the department that the present Appellant has done any act of commission or omission, which has resulted in the contravention of FERA 1973. S. 68 has consequently no application whatsoever.

The notice under S. 68(1) requires that it is only a person who "was incharge of and responsible to the Company for the conduct of the business of the Company" can be proceeded under this provision. The Show Cause Notices do not even allege that the present noticee was in charge of the conduct of the business of the Company. From the above mentioned facts, it is abundantly clear that the Appellant was not in charge of, and / or responsible to the Company for the conduct of its business. Hence, S. 68(1) of the FER Act, 1973 which has been invoked by the department in the Show Cause Notices is legally misconceived. The Special Director therefore ought to have dropped the Show Cause Notices issued to the present Appellant under S. 68(1) as being misconceived in law, and on facts.

94.5 On the contrary, the Special Director has held the present Appellant to be liable under S. 68(2) of the Act, i.e. the contravention occurred due to the alleged 'negligence' of the officers. It is relevant to state that the provisions of S. 68(2) have not even been invoked in the Show Cause Notices by the Enforcement Directorate. Hence, the Appellant did not get an opportunity to meet the same. The Adjudication Order passed under S. 68(2) is, therefore, liable to be set aside.

Furthermore, the Special Director in the adjudication order holds that the transactions occurred due to the alleged negligence of the bank officers. **It is also recorded in para 122 that subsequent transactions were stopped by them. Hence, since there was no willful violation of the provisions of the Act, the imposition of penalty was not justified**.

94.6 It is submitted that the finding of the Special Director that the present Appellant is liable under S. 68(2) on the ground that the contravention had taken place with the alleged 'neglect' of the officer, and hence shall be deemed to be guilty of the contravention. It is submitted that the provisions of S. 68(2) have not been invoked by the Department. Hence, the impugned Order is unsustainable in law, since the Show Cause Notice did not even contain the ingredients of S. 68(2).

It is alleged that the Appellant was not involved in the operation of the Vostro Account maintained by ANZ GB, and was not even aware of the system of operation of Vostro Accounts. The operation of these accounts were directly under the control of the respective branches in. different cities. Transaction processing / posting, checks, operational controls etc. on the accounts were maintained by the branches, which were under the direct control / charge of the respective branches. The Clearing Department where the Appellant was working, was not in any way involved with the operation of the Vostro Account.

It is further submitted that S. 8(1) could not be invoked against the present Appellant in as much there is no allegation on him having acquired or dealt with the foreign exchange, in any manner whatsoever, and thereby contravened the said provisions.

It is further submitted that the charge under Sec. 9(1) (a) and 9(1) (e) of the Act, cannot be invoked against the present Appellant in as much as there is no allegation in the Show Cause Notice that the present Noticee had made any payment to, or for the credit of any person resident outside India, or placed any sum to the credit of any person resident outside India. The present Noticee has not placed any funds for the credit of any person outside India, in contravention of the said provision.

It is submitted that there is no finding of any deliberate or conscious act of omission or commission, or violation on the part of the present Appellant. Hence, the imposition of Penalty is wholly unjustified.

95. **Statement of P.S. Khatu**

Appeal No. 110/2007

The present Appellant was issued a single Show Cause Notice bearing No. T-4/19-B/**SCN-80** dated 25.6.1993 under S. 68 of the FERA, 1973, on the alleged ground that Mr. P.S. Khatu was "also responsible for the proper conduct of the business of said ANZ Grindlays Bank, at the relevant time, when the aforesaid alleged contraventions had taken place".

He was a **Grade I Officer i.e. at the junior most level, and was posted in the Output Verification Unit in the Investment Banking segment of ANZ**. His function was to verify and tally the posting details of the accounts of customers with the enumeration on the Cheques and Vouchers. The verification process was a mechanical function. The present Appellant was **not in charge of the operation of the Vostro accounts maintained by ANZGB**.

It is stated that on the date on which the transaction covered by SCN 80 took place, the Officer was merely asked to act as a **Relief Officer for half an hour in the Clearing Department**, when the Officer in charge of the Clearing Department had gone to RBI. In his absence, the present Appellant merely initialed the Credit Voucher prepared by the Clerk. The Credit Voucher was verified with respect to **Demand Draft** dated 14.6.1991 for Rs. 1,36,000/- issued by **Punjab National Bank, Vinay Nagar Branch, New Delhi**, drawn on **Punjab National Bank, CDPC, Bombay**. It is submitted that the Demand Draft was presented in clearance, issued by Punjab National Bank, Vinay Nagar Branch, New Delhi and was drawn on Punjab National Bank, Mumbai favouring Eastern Suburbs.

The procedure that was followed was that High Value Cheques were sent for credit to RBI. **The present Appellant did not even see the Demand Draft**.

95.1 The Show Cause Notice issued under S. 68(1) to the present Appellant is wholly misconceived in law inasmuch as S. 68(1) necessarily requires that it is only a person who "was in charge of and responsible to the Company for the conduct of the business of the Company" would be deemed to be guilty of the contravention. It is stated that the above-mentioned facts would clearly reveal that the present Appellant was an Officer at the lowest rung of the officer level, and was certainly not In charge of, or responsible to the said Bank, for the conduct of its business.

95.2 The Special Director vide **Order dated 4.6.2007** with respect to Show Cause Notice No. 80 has recorded in **para 20** of the judgment that Mr. p.s. Khatu was a "**Staff Relief Officer**" at the Main Office, Bombay. He was required to work in different places such as the Output Department, Staff Department, Safe Custody and Correspondent Department in the absence of any officer in the respective Department. It is alleged that on

the fateful day, he merely verified the Credit Voucher by tallying the particulars of the instrument with the Voucher, and initial the Voucher. The Voucher initialed by him related to a Demand Draft drawn by Punjab National Bank, Main Branch, He was wholly unaware that the Voucher approved by him related to a Demand Draft drawn by PNB, Main Branch favouring Giro Bank. The Demand Draft was treated as a local transaction, since there was nothing on the face of the instrument to indicate that the remittance was to Giro Bank.

95.3 The Special Director vide Order dated 4.6.2007 with respect to the Show Cause Notice in question has in **para 118** mentioned the Show Cause Notice No. 80. However, the transaction is not discussed in the impugned order. **The Special Director has stated that the Demand Draft was treated as a local transaction between New Delhi and Bombay**. The Special Director has held that there was 'negligence' on the part of the officers of Grindlays Bank in crediting the amounts to the credit of Giro Bank. The Special Director holds the present Appellant as guilty of contravening the provisions of S. 8(1), 9(1) (a), 9(1) (e) and 6(4) r. w. S. 49 r. w. S. 68(2) of the Foreign Exchange Regulation Act, 1973.

It is submitted that the finding of the Special Director that the present Appellant is liable under S. 68(2) on the ground that the contravention had taken place with the neglect on the part of the officer, and hence shall be deemed to be guilty of the contravention. It is submitted that the specific provisions of S. 68(2) have not been invoked by the Department. Hence, the impugned Order is unsustainable in law, since the Show Cause Notice does not even specify which limb of S. 68(2) is being invoked against the Appellant. The present Appellant had no opportunity to meet the charge of neglect contained in the impugned Order. Hence, the Order is without jurisdiction and liable to be set aside.

The Special Director ought not to have imposed a penalty on the present Appellant. The imposition of a penalty on the Appellant would have an adverse impact on his career progression. Furthermore, the Hon'ble Supreme Court has held in the case of Hindustan Steel vs. State of Orissa (1969) 2 SCC 627, and various other judgments, that the liability to pay penalty does not arise merely upon proof of default. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not be ordinarily imposed unless the party acted deliberately in defiance of law, or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. It was held that whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judiciously, and on a consideration of all the relevant circumstances. It is submitted that there has been no default by the Appellant whatsoever, in merely tallying the particulars of the demand drafts with the instructions while acting as a relief officer for half an hour.

96. **Statement of Navin Puri**

Appeal No. 113 of 2007

The Appellant was served with Show Cause Notice No. I under S. 68 (1) of the FERA, 1973 on the basis of him being the Branch manager of the D.N. Road Branch in Mumbai. It is alleged in the Show Cause Notice that the present Noticee was allegedly "in charge of and was responsible to the Bank for the conduct of the business of the said Bank". The present Appellant has been held vicariously liable for the credit made to an NRE account by an officer of his branch.

It is denied that the Appellant was in charge of, and responsible to the Bank, for the conduct of the business of the bank.

The Show Cause Notice issued under S. 68(1) is misconceived in law, and in fact.

It is submitted that in the present case there has been **no contravention even by the Bank**. The present case is not of credit to a Vostro Account, but an NRE Account of a non resident. Hence, the notice issued under S. 68(1) is misconceived even for this reason.

In the present case, the D.N. Road Branch, Mumbai received a telegraphic transfer for Rs.4,51,145/= from the Connaught Place Branch, New Delhi to credit the account of Mr. Gyanendra Bhandari who maintained a Non Resident (External) Rupee Account. The remittance was made by Order of Linparko, USSR towards commission payable to him and the same was executed under the instructions of Bank for Foreign Trade of USSR ["BFTR"] Account maintained with the Connaught Place branch of ANZ, New Delhi. The D.N. Road Branch, Mumbai credited the amount on 11 November 1991 to Mr. Bhandari's NRE account. It is important to point out that rupees were credited to the account of Gyanendra Bhandari. Subsequently, Mr. Gyanendra Bhandari issued a cheque in favour of a party viz. Trustwell Investments for Rs.2,99,569/- to utilize funds locally. This was a local payment. Hence, funds credited earlier utilized for local requirements of the customer. Balance remained in the Rupee account of the customer.

96.1 On 3.2.1993, ANZ called upon Mr. Bhandari to make a remittance of US$ 15,000= to his non-resident external account held with the bank in Mumbai.

On 4.2.1993, the before mentioned amount of US$ 15,000/- was remitted by Mr. Bhandari through T.T. The amount of Rs. 4,76,569/- was hence remitted to his account, and the credit was reserved.

96.2 **ANZ Grindlays reversed the credit entry of Rs. 4,51,145/- dated 11th November 1991** from the account held in Non Resident Ordinary Account of Mr. Bhandari. In view of the reversal of the credit, there was **no outflow of foreign exchange** whatsoever from Mr. Bhandari's account, as the rupees credited to a Non Resident External Rupee Account **was reversed**.

It is further submitted that the present Appellant was wholly unaware of the credit made to the account of Mr. G. Bhandari, as it was not possible for any Branch Manager to acquaint himself with each and every credit transaction conducted by customers due to large volume of accounts maintained in the Branch. Moreover, the credit in the present case was not passed by the present Office.

In these circumstances, the Special Director has acted in an arbitrary and wholly unjustified manner in imposing penalty on the present Appellant, and holding him liable under S. 68(1).

97. **Statement of T.R. Subramaniam**

Appeal No. 114 of 2007

The subject Show Cause Notice has been issued to Mr. T.R. Subramanian under S. 68 of the FERA, 1973. It is alleged in the Show Cause Notice that the present Appellant was allegedly "responsible for crediting the said account of a non-resident person" Hence, Show Cause

Notice I was issued by holding the present noticee vicariously liable for an offence alleged to have been conducted by the Bank.

It is stated that there has been no contravention whatsoever, either by the Bank, or by the present notice as the D.N. Road Branch, Mumbai received a telex from the Connaught Place Branch, New Delhi to credit the account of Mr. Gyanendra Bhandari, by Order of Linparko, USSR towards commission payable to him. The D.N. Road Branch, Mumbai credited an amount of Rs. 4,51,145/= to the non-resident external Account of Gyanendra Bhandari. It is relevant to mention that rupees were credited to the account of Gyanendra Bhandari. Out of this account, Mr. Gyanendra Bhandari issued a local cheque of Rs. 2,99,569/= to a local party viz. Trustwell Investments. This was a local payment. Hence, rupees earlier credited utilized for a local transaction.

On 3.2.1993, ANZ called upon Mr. Bhandari to make a remittance of US$ 15,000/= to his NRE (Non-Resident External) account, which when converted was Rs. 4,76,569/-.

On 4.2.1993, the above dollar amount was remitted by Mr. Bhandari through T.T. and the proceeds of Rs. 4,76,569/= were credited to his NRE account. On the same date, the earlier credit dated 11.11.1991 for Rs. 4,51,145/- was reversed and the funds were remitted back into Mr. Bhandari's Non Resident Ordinary account. Hence, there was no outflow of foreign exchange. This was done much prior to the issuance of the Show Cause Notice. Hence, the proceedings against this officer are wholly unjustified and un warranted.

It is submitted that the present noticee presumed that the said credit was permissible, and carried out the same in good faith. In any event, there has been no foreign exchange violation, inasmuch as Rupees were credited to a

local Rupee Account. There was no outflow of foreign exchange from the account of Mr. G. Bhandari.

In view of the aforesaid incontrovertible facts, the impugned Order against the Appellant is liable to be quashed.

98. The learned Sr. Counsel appearing on behalf of respondent explained about the negligence of the officers of the appellants bank. It is stated by him that Shri G.P. Pande is responsible for these contraventions**.** The CEO of the bank is in-charge of the business and also responsible for the misdeed of the lower level officers. Shri G.P. Pande is responsible for all these contraventions in terms of Sec. 68(1) of FERA, 1973.

All these illegal transactions had taken place due to negligence of these bank officers only. They handle these transactions in a routine manner. Had they been vigilant in the first place, these transactions would not have taken place.

Shri Kiran Bhalla is responsible for these unauthorized transactions: Shri Kiran Bhalla was the manager in charge of New Delhi branch. He sent the T.T. with the beneficiary name as "eastern Suburbs Ltd." and giving the account number of Girobank without mentioning the name of the actual account holder. He could have asked the Russian authorities for necessary documents to confirm the purpose of this remittances.

99. **Shri Sunil Sawant is responsible for these unauthorized transactions:** He was primarily responsible to verify the fund transfers and the right person who should have stopped these transactions. *In his statement he stated that he had noticed the difference in account number and account holders name and sought the advice of his superior Shri Paul Pereira to whom he was*

reporting. When the account number did not match with the beneficiary's name, he should have straight away rejected the transaction.

100. Shri Paul Pereira is also responsible: He was a contractual employee retained by the bank for a specific work related to day to day transactions of clearances in the bank and other regular employees were reporting to him and his orders were being obeyed by them. In his statement dated 02.03.1993 Shri Paul Pereira has confirmed that he had written an endorsement as "Please credit GIROBANK" in one of the TTs received from New Delhi branch. He had also tried to pass on the responsibility to Smt. Preetha Sundaram that he had given these advices after consulting her. He could have given different opinion in stopping these illegal transactions.

101. Mrs Preetha Sundaram is also responsible for these unauthorized transactions: She was the Country manager, Correspondent Banking Services. Therefore, for all these transactions she was in charge and responsible.

102. Shri Rajagopalan Ramkumar is responsible for these unauthorized transactions: He was the officer-in-charge of Remittance Section and Shri Sunil Sawant was one of the officers working under him. He was aware that crediting the non-resident rupee account of Girobank with funds from non-convertible account thereby converting the said funds into foreign exchange, was not allowed as per the Exchange Control Regulations.

Thus, all these officers are held guilty for contravening the provisions of the FERA, 1973

103. On 25.06.1993, Memorandum T-4/19-B/93 **(SCNs 37, 42, 47, 52, 57, 62, 76** as amended on 10.08.1993, 19.01.1994 and 16.09.1994 were issued to the following Noticees

i. ANZ Grindlays Bank, 90 M.G. Road, Bombay
ii. Mr. G.P. Pandey
iii. Ms. Preeta Sundaram
iv. Mr. Anil Bhuse
v. Mr. Allwyn Roche

Along with this, Memorandum T-4/19-B/93 **(SCNs 67-BOB, 71-IOB, 80-PNB)** all dated 25.06.1993 as amended on 10.08.1993, 19.01.1994 and 16.09.1994 were also issued.

The memorandum states that Bank for Economic Affairs of the USSR issued a Cheque No. 001980 dated 12.07.91 drawn on Canara Bank for Rs. 3,00,00,000 (Rs. 3 Crores) favouring ANZ Grindlays Bank Sub Account Girobank. The cheque was deposited personally by Kuldip Singh Sood of M/s Transworld International to ANZ Grindlays Bank, Bombay on 21.08.91.

Canara Bank, Bombay made a payment of Rs. 3 Crore being the amount of Cheque No. 001980 to ANZ Grindlays Bank, after debiting the account of BFEA.

Thereafter, ANZ Grindlays credited the said sum of Rs. 3 Crores into the non-resident rupee account No. O1CBB8316400 standing in the name of Girobank Plc., a non-resident in the books of ANZ Grindlays Bank, and thereby converted the non-convertible rupee funds and thus transferred the said amount in foreign exchange/paid the said amount in foreign exchange to M/s. Girobank Plc.

(a) Mr. G.P. Pandey; Ms. Preeta Sundaram; Mr. Anil Bhuse; and Mr. Allwyn Roche all of ANZ Grindlays Bank, Bombay were responsible to the Bank for the conduct of the business of the said transactions, and hence, liable for the above contraventions u/s 68 of the FERA, 1973.

The differences between the set of transactions Noticed in the first batch of SCNs (from SCN No. 1) and the present batch of SCNs, is the mode of transfers. In the SCN No. 1, & etc. batch of transactions, the TTs emanated from ANZ Grindlays Bank, C.P., New Delhi Branch. In the present SCN No. 37, & etc. batch of transactions, payment instructions (through Cheques; Demand Drafts and T.T.s) were received by ANZ Grindlays Bank, Bombay from other Banks – i.e. Canara Bank; Bank of Baroda; Indian Overseas Bank and Punjab National Bank.

Therefore, broadly, the analysis of SCN No. 1 would be applicable to the present SCN No. 37 as many of the documents and statements are identical, and for brevity and convenience, only the relevant additional documents and statements as contained in SCN No. 37 are being highlighted in this set of submissions, which are as per the following:

Findings of Fact in the Order dated 04.06.2007

104. Enquires were initiated by the ED on the basis of information received from the RBI. Show Cause Notices were issued to the appellants as they had debited ***non-convertible*** rupees from the Vostro account of BFEA, USSR held with their New Delhi branch and credited to the ***convertible*** rupees account Girobank Plc, London maintained in their branch in Mumbai. This order relates to **Ten** transactions where seven cheques or Demand Drafts were issued by Canara Bank, and one each by Bank of Baroda, Indian Overseas Bank and Punjab National Bank. All these cheques were deposited with

Grindlays Bank, Mumbai for the credit of the account of Girobank plc., London favouring M/s. Eastern Suburbs Ltd.

(c) Sr. Counsel for respondent has again referred the Tabular Chart of transactions:

Sl. No.	SCN #	Date	Amount (Rs.)	Details of instrument
1.	37	21.08.91	3,00,00,000	Chq. No. 001980 dt. 12.07.91 issued by BFEA of the USSR on Canara Bank, Bombay, favouring Grindlays Bank sub A/c Girobank.
2.	42	22.08.91	3,00,00,000	Chq. No. 001981 dt. 12.07.91 issued by BFEA of the USSR on Canara Bank, Bombay, favouring Grindlays Bank sub A/c Girobank.
3.	47	22.08.91	2,50,00,000	Chq. No. 001982 dt. 12.07.91 issued by BFEA of the USSR on Canara Bank, Bombay, favouring Grindlays Bank sub A/c Girobank.
4.	52	02.07.91	2,50,00,000	Chq. No. 001791 dt. 14.06.91 of BFEA of the USSR favouring Girobank sub a/c. Eastern Suburbs Ltd. drawn on Canara Bank, Bombay.
5.	57	25.06.91	3,88,79,195	Chq. No. 4/1738/91 dt. 24.06.91 issued by the Canara Bank, on the instruction of BFEA of the USSR favouring Grindlays Bank sub A/c "Current Account – NRE Corr. Bank" of Girobank.
6.	62		3,99,99,8875	Chq. No. 4/1879/91 dt. 05.07.91 issued by the Canara Bank, on the instruction of BFEA of the USSR favouring Grindlays Bank sub A/c "Current Account – NRE Corr. Bank" of Girobank.
7.	67		49,500	Demand Draft No. 570493 dt. 14.06.91 purchased by Shri S.K. Sood from Bank of Baroda, Chanakyapuri branch New Delhi drawn on its Churchgate branch at Mumbai. The same was sent by the Girobank plc. London to the Grindlays Bank Mumbai with a request to credit the same to the

				sub account of Eastern Suburbs Ltd.
8.	71		40,48,485	The IOB, Mahalingapuram had issued a TT on their Bombay branch on behalf of Shri Hariram of Nucleus Consultancy Services, Madras with instruction to transfer the amount to credit the ANZ Grindlays Bank account Girobank. The IOB Bombay issued bankers cheque No. 3426 dated 24.07.91 favouring the ANZ Grindlays Bank.
9.	76	26.04.91	2,36,400	DD No. 7888192 dt. 22.04.91 purchased by Shri G.D. Saha of Agun International from Canara Bank, S.D. Area, New Delhi in favour of Eastern Suburbs Ltd. and deposited with Grindlays Bank, Bombay for the Credit of Girobank.
10.	80	22.08.91	1,36,000	DD No. 749541 dt. 14.06.91 purchased by Shri Kuldeep Singh Sood from PNB, Vinay Nagar of Delhi in favour of Eastern Suburbs Ltd. and deposited with Grindlays Bank, Bombay for the Credit of Girobank.

Findings Against Officers:

105. It is submitted by the Sr. Counsel for respondent that the contravention of Provisions of FERA and ECM, 1987 by the officers of the Appellant Bank and Charges under Section 68 as mentioned in paras 116 to 126 of the impugned order of the impugned order wherein it was held that the purpose of the remittance is stated to be against a contract, but no such contract appears to have been filed or perused before actually passing the credits. This is only to cover up their mistakes. There were clear cut instructions form the RBI that the form A2 must be prepared by the actual remitter of the funds, but no

such forms were collected. Though there was clear cut instructions from the RBI to credit the rupees fund into external account only after instructions from RBI, but the appellants did not wait and credited to the Girobank Plc., London.

The act of the noticee bank and its employees certainly amount to gross negligence resulted in huge loss of foreign exchange. The ignorance of law is not an excuse, as the bank is run by well trained professionals who were well versed with their duties and responsibilities as an authorized dealer.

Pertaining to individual officer, Counsel has tried to justify the impugned orders passed;

(a) Shri G.P. Pande is responsible for these contraventions in terms of Sec. 68(1) of FERA, 1973: The CEO of the bank is in-charge of the business and also responsible for the misdeed of the lower level officers. Shri G.P. Pande is responsible for all these contraventions in terms of Sec. 68(1) of FERA, 1973.

All these illegal transactions had taken place due to negligence of these bank officers only. They handle these transactions in a routine manner. Had they been vigilant in the first place, these transactions would not have taken place.

(b) Mrs Preetha Sundaram is also responsible for these unauthorized transactions in terms of Sec. 68(1) of FERA, 1973: She was the Country manager, Correspondent Banking Services. Therefore, for all these transactions she was in charge and responsible.

(c) Shri Allwyn Roche is responsible for these violations in terms of Sec. 68(2) of FERA, 1973: Shri Allwyn Roche was the officer who cleared the credits in respect of SCN 37, 42, 47, 52, 76 & 71. He claimed ignorance of law. However, ignorance of law is no excuse.

(d) Shri R.B. Dhage is responsible for these violations in terms of Sec. 68(2) of FERA, 1973: Shri R.B. Dhage was the officer who cleared the credits in respect of SCN 57 & 62. He claimed ignorance of law. However, ignorance of law is no excuse.

(e) Shri P.S. Khatu is responsible for these violations in terms of Sec. 68(2) of FERA, 1973: Shri P.S. Khatu Roche was the officer who cleared the credits in respect of SCN 80. He claimed ignorance of law. However, ignorance of law is no excuse.

(f) Shri Anil Bhuse is responsible for these unauthorized transactions in terms of Sec. 68(2) of FERA, 1973: He was the Customer Service Officer for the Bank. He allowed these credits on the advice of Mrs. Preeta Sundaram and Shri Kamal Grover. He is the person who actually noticed the discrepancies and noticed the higher officers.

Thereafter, all these officers are held guilty for contravening the provisions of the FERA, 1973.

106. On 15.02.1994, Memorandum No. T-4/16/B/94/SCN-I was issued to the following Noticees:

i. ANZ Grindlays Bank, 270, D.N. Road, Bombay

ii. Mr. Navin Puri, The then Branch Manager

iii. Mr. T.R. Subramanian, the then officer in charge remittances

Date(s)	Particulars	Comments	Ref.
8/9 Nov 1991	A TT was issued by the ANZ Grindlays Bank, Connaught Place branch out of the	This statement shows that ANZ Grindlays Bank issued TT to	22

	funds held with them by the Bank for Foreign Trade, USSR in favour of Mr. Gyanendra Bhandari to credit amount of Rs. 4,51,145.00 being commission payable to him as an agent.	credit of a Non-Resident Account of Mr. G. Bhandari.	
11 Nov 1991	M/s ANZ Grindlays Bank, D.N. Road Branch, Bombay an authorized dealer in Foreign Exchange credited an amount of Rs. 4,51,145/- to NRE account of Mr. Gyanendra Bhandari of M/s. Emirates Trading Agency, Dubai without the previous general or special permission / exemption of / from the Reserve Bank of India.	This statement shows that ANZ Grindlays Bank credited the Non-Resident Account of Mr. Gyanendra Bhandari.	22
12 Nov 1991	A cheque bearing no. 187974 dated 12.11.1991 drawn by Bhandari on his NRE account in favour of Trust Well Investment for local payment.	Money was taken out of the NRE account.	23
3 Feb 1993	Bhandari was contacted in his Dubai address and asked to repatriate the amount. US Dollars 15,000.00 TT received.	The ANZ Grindlays Bank realised its mistake and asked to repatriate the amount	28
4 Feb 1993	M/s. ANZ Grindlays Bank credited Rs. 4,76,569.00 an equivalent of US Dollars 15,000.00 from its Sharjah	For repatriate the amount the ANZ Grindlays Bank credited an equivalent	24 & 25

	Branch to the Account of Mr. Gyanendra Bhandari.	of US Dollars 15,000.00 to the Account of Mr. Gyanendra Bhandari.	
4 Feb 1993	The entry of 11 November 1991 reversed by debiting the account of Mr. G Bhandari to rectify the mistake of credit.	This shows the bank admitted its mistake.	26
10 Feb 1993	Bank wrote to RBI about the mistake and advised that the funds repatriated back by the customer.	This the admission on the part of the bank that they have rectified their mistake.	28
17 Feb 1993	Vide its letter Mr. Vineet Verma, Manager of M/s. ANZ Grindlays Bank informed Mr. G. Bhandari in his Dubai address and was intimated that the amount was credited erroneously, as under the existing exchange control regulations remittance from USSR cannot be credited to convertible NRE account. The bank informed Mr. Bhandari that in order to rectify the erroneous credit, it has debited Mr. Bhandari's account on 4 Feb 1993 with Rs. 4,51,145 being credit given on 11 Nov 1991.	The ANZ Grindlays Bank informed Mr. G. Bhandari that under the existing exchange control regulations remittance from non-convertible funds of USSR cannot be credited to convertible NRE account.	27
10.3.1993	Statement of T.R. Subramanian recorded. He stated that he thought the remittance is from	He admitted that it was lapse on his part. He admitted that he did not call for any	32

	foreign country USSR and was unaware of the fact that the fund was from the local fund at that point of time and hence lapse.	document from their Delhi branch to confirm that the fund which was to be credited was sent from abroad.	
8 Apr 1994	Bank files its reply to above SCN stating that ED had ignored the fact about credit entry reversal. As mistake was rectified, ED should not have proceeded with.	The bank has admitted its mistake.	46 – 56
8 Apr 1994	Mr. Subramanian files his reply to the SCN and denied that he was in charge of or responsible for the conduct of the business of the bank at any time. He submitted that the charge under Sec. 68(2) of FERA, 1973 requires mens-rea and he presumed that the credit had all necessary approvals.	He admitted that he had approved the credit on the basis of instruction received from their CP Branch. He should have verified the record before effecting the transaction.	59 – 60
11 Apr 1994	A similar reply was filed by Mr. Navin Puri.	Being the Branch Manager at that time, he should have verified the instruction before crediting the NRE account.	57-58

(a) SCNS: T-4/16-B/94 (SCN I) dated 15.02.1994, Transaction amount Rs. 4,51,145/- to the credit of Mr. Gyanendra Bhandari, Dubai as instructed by BFT, USSR.

The allegation is that ANZ Grindlays Bank, without the general or special permission / exemption of/from the RBI, credited a sum of Rs. 4,51,145/- to the NRE account No. 01SDP0689300 standing in the name of Shri Gyanendra Bhandari of M/s Emirates Trading Agency, Dubai, UAE, a non-resident in their books, being the amount covered by TT No. 45/1485 dated 08.11.91 issued by ANZ Grindlays Bank, Connaught Place, New Delhi out of the funds held with them by the Bank for Foreign Trade, USSR and thereby transferred the said amount in foreign exchange / paid the said amount in foreign exchange to Shri Gyanendra Bhandari, person resident outside India.

- Therefore, the ANZ Grindlays Bank Ltd. was charged u/s 6(4) & 6(5) read with Section 49, 8(1) read with Para 29B.8 of the ECM 1987 – Vol. 1; Section 9(1)(a) and 9(1)(e) of the FERA, 1973.

- Shri Navin Puri, the ten Branch Manager and Shri T.R. Subramanian of the ANZ Grindlays Bank were also charged u/s 68 of the FERA, 1973.

(b) Mr. T.R. Subramanian was examined on 11.03.1993 wherein he stated that he was working as a Customer Services Officers and his duties were to issue and receive payment for local, foreign DDs, TTs, MTs, issue and payment of fixed deposits, FCNR and to attend to customer enquiries. He stated that he was aware that the credit to NRE account should be from foreign remittance and local credits should be accompanied by a certificate that the funds were from NRE account. He admitted that he approved the credit on the basis of instruction received from their CP Branch. He stated that he was not aware that the funds emanated from the account of Russian Bank with their CP Branch. He thought that the amount was received by the Delhi branch from Russia. He admitted that crediting of NRE account with local rupee fund was not permitted and at that point of time he was not aware that the funds were

from the local account. He admitted that he did not call for any document from their Delhi branch to confirm that the fund which was to be credited was sent from abroad. He was not aware that their Delhi branch has got an account of the BFT of the USSR and that the lapses occurred. The telex which was received from ANZ Grindlays Bank, C, New Delhi read as under:

- "Mr. Gyandendra Bhandari, 21-D.N. Road, Bombay Ac/ OIS/DP/O6893/OO Gyandendra Bhandari Rs. 4,51,145/-by order Bank for Foreign Trade of USSR B/O Linparko, Moscow under Ref. No. – on account of commission"
- The account of Gyanendra Bhandari was credited on 11.11.91 by Shri T.R. Subramanian, as so admitted by him.

107. It is stated on behalf of appellant that in the Show Cause Notices, there are no allegations either against the Chief Executive Officer of ANZ Grindlays Bank or any of its Directors. The Show Cause Notices have not even named the Chief Executive Officer or any of the Directors, and have named only certain junior officers who under no circumstances can be said to have been in charge and responsible for the Bank or for the Conduct of its business.

108. The onus of proving that a particular person was in charge of the conduct of the business of the company at the time the contravention is alleged to have taken place lies squarely on the Department. Learned Sr. Counsel has referred the case of Shri **Girdhari Lal Gupta v. DH Mehta & Anr AIR 1971 SC 28 at Paragraph 13**).

109. It is submitted that in the impugned Orders the Adjudicating Officer has erroneously held Mr. G.P. Pandey, Ms. Preetha Sundaram and Mr. Karan Bhalla as being liable under Section 68(1) of FERA. It is submitted that the said officers cannot be said to be persons in charge of, and responsible for the

conduct of the business of the Bank/ Company. In this regard a reference may be made to the Organisational Chart of ANZ Bank at the relevant point of time which is annexed hereto and marked as **Annexure A**. Further, individual submissions on behalf of the said officers, as given later in these submissions, may also be referred to in this regard.

110. Admittedly, in the impugned Orders Mr. Rajgopalan Ramkumar, Mr. Sunil G. Sawant, Mr. R.B. Dhage, Mr. Allwyn Roche, Mr. P.S. Khatu, Mr. T.R. Subramaniam and Mr. Paul Pereira have been held liable under Section 68(2) of FERA for allegedly contravening the provisions of Section 8(1), 9(1)(a), 9(1)(e) and 6(4) read with Section 49, on the ground that the alleged contraventions took place due to their alleged "negligence".

111. It is submitted on behalf of appellants that the said finding of the Adjudicating officer is not only erroneous but perverse in law because Section 68(2) of FERA was not even invoked in the Show Cause Notices issued to these officers. Section 68(2) uses the terms 'consent, 'connivance' and 'negligence' disjunctively since each of these charges is distinct and mutually exclusive.

112. The Show Cause Notices do not contain any allegation of consent, connivance, or any action attributable to any neglect on the part of the officers in the SCNs. The Show Cause Notices did not make any such allegation but merely stated that the officer was incharge of and responsible for the conduct of the business of the bank. It is submitted that the said Appellants could not have been proceeded against under S. 68(2) in the absence of any allegations in the Show Cause notice. The following judgments are apposite in this regards:

(a) K. K. Ahuja v. V.K. Vora and Anr. (2009) 10 SCC 48 at Paragraphs 25- 27 and 30.

(b) R. Banerjee v. H. D. Dubey, (1992) 2 SCC 552 at Paragraph 9.

(c) Nalin Thakor v. State of Gujarat, (2003) 12 SCC 461 at Paragraph 5.

(d) Keki Bomi Dadiseth & Ors. vs. State of Maharashtra, 2002 (3) Mh. L.J. 246 at Paragraphs 35-39.

It is submitted that the Adjudicating Officer has erroneously returned a finding that the above-mentioned officers were 'negligent' and have found them guilty under Section 68(2) of FERA. Such a finding, in the absence of any allegation under Section 68(2) in the SCNs is unsustainable in law. It is well settled law that an SCN must be specific and must indicate the precise scope of notice and points on which the officer concerned is expected to give a reply. It is submitted that when the foundation of the charge is not made out in the SCN, then the impugned Order passed under Section 68(2) cannot be sustained. In this regard the following cases may be referred to:-

(a) BD Gupta v. State of Haryana (1973) 3 SCC 149 at Paragraph 9

(b) Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Ltd (2007) 5 SCC 388 at Paragraph 13 and 14

(c) Commissioner of Central Excise, Bhubaneshwar – I v. Champdany Industries Ltd (2009) 9 SCC 466 at Paragraph 38

(d) Biecco Lawrie Ltd & Anr v. State of Bengal & Anr (2009) 10 SCC 32 at Paragraphs 24-25

(e) Gorkha Security Services v. Government NCT of Delhi (2014) 9 SCC 105, Paragraphs 21-22

(f) SACI Allied Products v. CCE (2005) 7 SCC 159 at Paragraph 16

It is submitted that the finding of the Adjudicating Officer holding the above-mentioned officers liable under Section 68(2) is beyond the SCNs and ought to be set aside on this ground alone.

Assuming while denying that the above-mentioned officers could have been held liable under Section 68(2), it is submitted that the Ld. Adjudicating Officer has erred in returning the finding that the said officers were "grossly negligent".

The Hon'ble Supreme Court in the case of **Jacob Mathew v. State of Punjab & Anr 2005 (6) SCC 1 at Paragraphs 12** and 48(5) has held that to fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredients of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

113. The Adjudicating Officer has not attributed any culpability to any of the officers. Further, in the case of **Shanti Prasad Jain (supra)** it has been held by the Hon'ble Supreme Court that the proceedings under FERA are quasi-criminal in nature. Therefore, it is imperative for the department to establish mens rea before imposing penalty on the officers. In the present case, the Adjudicating Officer did not attribute any mens rea to any of the officers, hence the imposition of penalty was wholly unjustified. In this regard a reference may be made in to the Organisational Chart of ANZ Bank at the relevant point of time (Annexure A). Further, individual submissions on behalf of the said officers, as given later in these submissions, may also be referred to in this regard.

114. It is submitted that during the course of the hearing of the present Appeals Mr. Paul Pereira who was the Appellant in Appeal No. 95 of 2007 passed away on 05.09.2010 and hence the Appeal of Mr. Paul Pereira would abate. Copy of the Death Certificate of Mr. Paul Pereira has been filed alongwith an English translation of the same.

115. On behalf of the appellants, arguments were mainly addressed from time to time mainly on the following issues:

(a) Inapplicability of sections 8 (1) and 9 (1) (a), (e) of FERA

(b) Sections 50 and 51 of FERA inapplicable to an Authorised Dealer - Section 6 - a complete code

(c) No violation of Sections 8 and 9

(d) No contravention of S.6 (4) and 6 (5) as alleged

(e) Exchange Control Manual – Mere Guide Book – Violation not an offence

(f) No violation of S. 49 of FERA

(g) Section 63 of FERA not applicable

(h) Show Cause Notices not maintainable, as provisions of the Exchange Control Manual Repealed

(i) No offence contemplated under alleged paras of Exchange Control Manual

(j) Chapter X of the ECM, 1987 is ultra vires the FERA, 1973

(k) Penal provisions of FERA, 1973 to be strictly and not purposively interpreated

(l) No case for invoking section 68(1) of FERA made out

(m) Pending of “neglect” under section 68(2) not susbtainnable in law in the absence of a charge in the Show Cause Notice

(n) Acts done in good faith by the officers

(o) no case for impostion of penalty

(p) Adjudicating Authority bound by decision of the board/higher courts

116. Shri A.K. Panda, learned Sr. Counsel appearing on behalf of Respondent has argued for long time and has also filed written-submissions. He has also supported the impugned orders passed by the trial court. He also refuted all the arguments addressed on behalf of the appellants. His submission is that all the appeals are liable to be dismissed with costs. His main submission is that in the present set-of cases, the appellants are guilty of contraventions of all the provisions mentioned in the show-cause notices issued to the parties.

117. Before discussion of legal issues and dealing with the argument of the parties, it is necessary to refer certain admitted position in the matter. ANZ Grindlays Bank on becoming aware of the fraud played on it, made a proposal to make repatriate the foreign exchange equivalent to the rupees credited to the Vostro account. The said proposal was accepted by the Reserve Bank of India who imposed certain conditions as communicated to the Bank by a letter of Reserve Bank of India dated 30.03.1993.

118. In compliance with the directions given by the Reserve Bank, ANZ has voluntarily repatriated an amount which far exceeds the amount involved in the alleged transaction which was Rs.66.42 Crores. The repatriation was prior to the issuance of the Show Cause Notices.It is evident that Bank has in good faith made good the foreign exchange loss, if any, to the country.

119. The Adjudicating Officer has found that there was no malafide intention on the part of the Noticee Officers in processing the transactions in question.

The Noticee Officers were not involved in the abetment of the alleged offences. There was no ill will or malice in the actions of the Noticee Officers. The Noticee Officers or Bank did not benefit from the transactions in question. No motive has been attributed to the Noticee Officers in the findings of the Adjudicating Officer.

120 It is neither argued on behalf of respondent nor there is any material on record that neither the Appellant Bank nor any of its officers have benefited from the impugned transactions in any manner whatsoever. Rather the bank after having got the knowledge about the fact that the Appellants are themselves a victim of the contraventions, the Appellant bank has already in discussions with the RBI remitted the entire foreign exchange back to India that was allegedly transferred abroad under the impugned transactions. As such no loss of foreign exchange was caused to the country because of the impugned transactions.

121. Let me now discuss the issues raised by the parties. It is undisputed fact that the appellant is the authorized dealer. Section 74 of FERA empowers the Reserve Bank of India to delegate some of its powers to an "Authorized Dealer". S.74 of FERA provides as follows :

> *"**S.74. Delegation.** – The Reserve Bank may, with the previous approval of the Central Government, by Order, delegate any of its powers or functions –*
> *(i) Under section 8, 9 or 10 or sub-clause (b) of Clause (A) of sub-section (2) of section 18 or sub-section (7) of section 18 to any authorized dealer;*
> *Or*
> *(ii) Under S. 8 or 9 to any money changer"*

S.2 (b) defines an authorised dealer as under;

> *"2(b) "Authorized Dealer" means a person for the time being authorized under Section 6 to deal in foreign exchange"*

Section 6(1) provides as under :

> *"**6. Authorised dealers in foreign exchange**. – (1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to deal in foreign exchange.*

122. Section 74 which enables the Reserve Bank of India to delegate its powers and functions under Sections 8 and 9 to any authorised dealer, the authorised dealer becomes the agent of the Reserve Bank of India and has all the powers of dealing in foreign exchange as possessed by the Reserve Bank of India.

123. After delegation of powers by the RBI to authorised dealer under Section 74 of the Act, the authorised dealer is authorise to deal in foreign exchange under Section-6 of the Act, subject to conditions, there is a restriction on dealing in foreign exchange under section 8 of the Act and restriction of payment under section 9 of the Act, subject to other provisions.

124. Section 8(1) of the FERA, 1973 is reproduced as follows:

> **8. Restrictions on dealing in foreign exchange -**
>
> ***(1)*** *Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:*
>
> *Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.*
>
> *Explanation.—For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.*

125. It is stated on behalf of respondent that applicability of the provision, attention is drawn to the finding of the Supreme Court in the case of *Needle Industries Vs. N.I.N.I.H Ltd. (AIR 1981 SC 1298).* It was held that a permission granted subject to certain conditions would cease to exist in the event of non-compliance of the conditions. In the present case, the licence to deal in foreign exchange was granted to ANZ Grindlays Bank subject to the RBI. It was one of the instructions that the balance held by ANZ Grindlays Bank in Vostro Account through its bank or correspondent situate in a country of Bilateral Group shall not be transferred to the account of a non-resident Bank. The ANZ Grindlays Bank has acted contrary to this instruction and has violated the conditions of the licence. Therefore, the licence would be deemed to have ceased to exist as far as these transactions are concerned. The whole transactions are without any permissions.

The contravention under S.8(1) is residuary, and arises from the contravention of S. 6(4) & 6(5). These particular sub sections address the contraventions of the directions and instructions set out by the RBI on Authorized Dealers. Penalties must indeed by imposed for such contraventions, and have rightly been applied by the Directorate. However, question regarding the application of S. 8(1) arises. *Why must an Authorized Dealer be subjected to separate penalties for the same offence?* In answer of this, it is important to notice that S.8(1) *will not* be mandatorily invoked on contravention of S.6(4) & S.6(5). The Bank may contravene these provisions without engaging in purchase, sale, lending, acquisition, exchange or transfer of any foreign exchange, and thereby, excluding the application of S.8(1).

126. It is submitted by Mr. Panda, learned senior counsel appearing on behalf of respondent that an Authorized Dealer holding special powers and

permissions from the RBI, must be subjected to a greater degree of care and accountability. An Authorized Dealer transacts in foreign exchange on a near daily basis. Thus, it must ensure that they operate *well* within the confines of the law and rules. They must employ a great level of caution when dealing with foreign exchange and their procedure must be immaculate. An Authorized Dealer Bank gains additional and extraordinary rights as compared to others. Thus, applying the principles of natural justice, they must also gain additional liabilities, especially when considered in light of the FERA. Such liabilities may interpreted to be in the form of strict applications of the FERA. The Authorized Dealer does not receive a blanket protection for its acts for being in a special position. It is indecorous to defend the wrongful transactions, claim protection through status and to escape liability.

Burden of proof in certain cases.—

(1) *Where any person is prosecuted or proceeded against for contravening any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him.*

It is for the appellants to show that they had necessary authority, permission or exemptions required to effect the transfer the funds into the account of Girobank. It is not the burden or duty of the Directorate to show that the appellants did not have the necessary permissions or exemptions.

127. It is submitted that on 28.01.1994, Memorandum No. T-4/9-B/94 (SCN-VIII) was issued to the following Noticees:

i. ANZ Grindlays Bank, 90 M.G. Road, Bombay

ii. Shri R.B. Dhage, Officer, ANZ Grindlays Bank, Bombay

The memorandum states that on 08.03.1991, Mr. Kuldip Singh Sood, Proprietor of M/s Transworld International, purchased 4 Demand Drafts in favour of M/s. Eastern Suburbs Ltd., U.K. and handed over the same to the representative of M/s Eastern Suburbs. The details of the Demand Drafts are:

Sl.	Drawing Bank	Drawee Bank	Draft No. & Date	Amount
1.	Bank of Maharashtra, C.P., New Delhi	Bank of Maharashtra, Service Branch, Bombay	Draft No. 018990 Date: 08.03.1991	Rs. 50,000
2.	Bank of India, C.P., New Delhi	Bank of India, Bombay	Draft No. 020218 08.03.1991	Rs. 50,000
3.	State Bank of Patiala, Indl. Finance Branch, C.P., New Delhi	State Bank of Patiala, Nariman Pt., Bombay	Draft No. 645853 Date: 08.03.1991	Rs. 50,000
4.	Oriental Bank of Commerce, C.P., New Delhi	Oriental Bank of Commerce, Service Branch, Bombay	Draft No. 374780 Date: 08.03.1991	Rs. 50,000

(a) Between 09.03.91 to 11.03.91: M/s. Standard Chartered Bank, Bombay, received the above four Demand Drafts, and in turn presented the Demand Drafts for clearing. The Drawee Banks received the Demand Drafts through RBI clearing, and cleared the same. Pursuant to this, SCB Bombay realized the proceeds of the Demand Drafts, totalling Rs. 2,00,000. Standard Chartered Bank.

12.03.1991: Standard Chartered Bank, Bombay (hereinafter "SCB, Bombay") this amount (Rs. 2 Lakhs) to the Non-Resident Rupee Account (No.

014/09/32668) of Girobank Plc. (vostro account), which was being maintained by Standard Chartered Bank, Bombay Branch.

30.03.1991: SCB, Bombay reversed the Rs. 2 Lakhs credit made to the Girobank Plc Vostro Account and issued Draft No. 062349 in favour of M/s Eastern Suburbs Ltd, payable at New Delhi.

29.04.1991: Standard Chartered Bank cancelled the Draft No. 062349 and issued a Pay Order No. 151498 for Rs. 2 Lakhs favouring ANZ Grindlays Bank, Bombay – A/c M/s Eastern Suburbs.

Thereafter, on **30.04.1991**, ANZ Grindlays Bank, Bombay credited the said amount of Rs. 2 Lakhs to the Vostro Account No. OIC BB 8136400 of Girobank Plc. On account of M/s Eastern Suburbs Ltd. U.K.

ANZ Grindlays, by effecting the Pay Order of Rs. 2 Lakhs issued by SCB, Bombay, engaged in a transaction involving foreign exchange which was not in conformity with the terms of their authorisation granted under Section 6 of the FERA, 1973.

As per the respondent and impugned order, Mr. R.B. Dhage of ANZ Grindlays Bank, Bombay was responsible to the Bank for the conduct of the business of the said transactions, and hence, liable for the above contraventions u/s 68 of the FERA, 1973.

(b) **Analysis of Relevant Documents and Statements chart supply on behalf of respondent**

Date	Particulars	Comment
12.03.91	Credit transaction voucher issued by Standard Chartered Bank (SCB) for the Non-Resident Account maintained by Girobank, Plc. with SCB, Bombay	This statement shows that SCB credited the local Demand Drafts into the Non-Resident Account of Girobank, Plc.

10.05.93	The RBI issued a letter the E.D., stating that the entry pertaining to remittance of Rs. 2 Lakhs to Girobank Plc. Was reversed by SCB, Bombay on 30.03.1991 and that the relative Form A-3 was not received by the RBI from SCB. Only the covering R-5 form was sent. [Form R-5 dated 15.03.91 has been annexed with the letter.]	SCB, Bombay upon realizing the improprieties of their transactions, reversed the transactions for Rs. 2 Lakhs. Furthermore, SCB did not supply the RBI with required Form A-3 in order to hide the illegal transaction dated 12.03.91.
31.05.93	Mr. Kuldip Singh Sood, proprietor of M/s Transworld International, tendered his statement u/s 40 of the FERA, 1973.	Mr. K.S. Sood, inter alia, stated that: - He had purchased the 4 Demand Drafts for Rs. 50,000 each. - Mr. Keith Fairbrother, telephonically requested that the Demand Drafts be made payable at Bombay, and he accordingly obliged. - He handed over the DDs to the Indian Representative of Mr. Keith Fairbrother.
21.09.93	SCB, Bombay issued a letter to the E.D. in reply to E.D.'s request for documents.	SCB, Bombay, has conveniently stated that it could not trace the covering letter with regard to four cheques favouring Eastern Suburbs Ltd. Furthermore, SCB stated that it could not find any instructions for reversing the credit made into Girobank, Plc. against the local Demand Drafts.
28.09.93	Mr. Sandeep Kothare, Staff Officer of SCB, Bombay tendered his statement u/s 40 of the FERA, 1973.	In this statement, he has, inter alia, stated that SCB recivied 4 drafts of Rs. 50,000/- each. These drafts wwere drawn in their respective branches in Bombay and the proceeds of the said drafts were to be credited to the Girobank, Plc. account. When confronted with the endorsement "Recd. From Transworld International" written on the Drafts in red

		ink, he stated that he had written the same. When asked to elaborate this endorsement, he stated that there would be some covering letter, which is now not traceable. He further stated that he did not receive any Forms along with the Drafts. He further stated that he processed the Drafts due to ignorance of the law. He states that thereafter, M/s Transworld requested that the entry be reversed, and in its place, a Draft in favour of M/s Eastern Suburbs Ltd., payable at New Delhi, be issued. He stated that he had reversed the entry, issued the relevant vouchers and accordingly prepared Draft No. 062349. He states that he was not aware about the subsequent cancellation of Draft No. 062349 and issuance of a Pay Order for Rs. 2 Lakhs, although he admits that they have been effected by SCB.
28.09.93	Mr. Vasant Shertukude, Special Assistant, Standard Chartered Bank, Bombay tendered his statement u/s 40 of the FERA, 1973.	He admitted that he was one of the processing officers with regard this transaction.
04.10.93	Mr. Ashok Parulekar, Officer of Standard Chartered Bank, Bombay tendered his statement u/s 40 of the FERA, 1973.	He stated that the pay order for Rs. 2 lacs favouring ANZ Grindlays was issued by the bills payable section in cancellation of demand draft drawn on the New Delhi Branch. He stated that at the request of the purchaser, the DD was cancelled and he had accordingly prepared the Pay Order.
06.10.93	Mr. H.D. Vinekar, Clerk, Clearing Dept., ANZ Grindlays Bank, Bombay tendered his	States that he prepared the credit voucher for the Rs. 2 Lakh Pay Order issued by

	statement u/s 40 of the FERA, 1973.	SCB, Bombay, under a covering letter. However, states that the covering letter and the credit voucher are both not traceable. States the narration column in the Girobank Plc., account statement, the reference "ICS\381-94 N Delhi Br." occurs, which is the cover letter issued by the SCB Bombay.
06.10.93 **22.10.93**	Mr. R.B. Dhage, Officer, CDC Department, ANZ Grindlays Bank tendered his statement u/s 40 of the FERA, 1973. Further Statement of Mr. R.B. Dhage.	Admits that his section received the pay order for Rs. 2,00,000 favouring ANZ Grindlays Bank A/c Eastern Suburbs Ltd. Admits that he had effected the credit to Girobank Plc., against the Pay Order and is responsible for the same.

(c) On 30.04.1991, ANZ Grindlays Bank Ltd. without the general or special permission / exemption of/from the RBI, credited a sum of Rs. 2,00,000/- to the non-resident rupee account No. 01CBB8136400 standing in the name of Giro Bank Plc, London, being the amount covered by Pay Order No. 15/498 dated 29.04.91 issued by Standard Chartered Bank, Mumbai favouring ANZ Grindlays Bank sub-account M/s. Eastern Suburbs Ltd. Out of the funds received by them in the form of 4 Demand Drafts deposited by Shri Kuldip Singh Sood of M/s Transworld International, New Delhi; and thereby transferred the said amount in foreign exchange / paid the said amount in foreign exchange to M/s Giro Bank Plc. London, a person resident outside India.

(d) In the impugned order, it was observed from the records that there was a deliberate attempt to transfer foreign exchange illegally out of India in this case:

- Shri Kuldip Singh, Proprietor of M/s Transworld International had purchased the above 4 drafts for a total amount of Rs. 2 Lakhs;
- The drafts contained the endorsement on the reverse that the proceeds of the same were to be credited to Girobank Plc A/c No. 014/09/326668 Sub-A/c – 60710029 Eastern Suburbs Ltd. London;
- These drafts were deposited at Standard Chartered Bank Bombay;
- That SCB realised the proceeds of the above 4 drafts through RBI clearing;
- That the SCB credited Rs. 2 lakhs to Girobank Plc Account on 12.03.91;
- That on 30.03.1991 , i.e. after 17 days, they debited the account of Girobank for the same amount and issued a Demand draft favouring M/s Eastern Suburbs Ltd. Payable at New Delhi;
- These drafts were later cancelled at the request of Mr. K.S. Sood of M/s Transworld International and replaced with a bankers cheque in favour of ANZ Grindlays Bank on account of Eastern Suburbs Ltd.;
- That ANZ Grindlays Bank credited the said amount to the Rupee Account of Girobank Plc. London, maintained with them which was finally remitted out of India.

(e) It was also observed that there were two things worth mentioning:

- Firstly, Mr. K.S. Sood purchased these drafts out of funds received by him on behalf of Mr. Keith Fairbrother of Eastern Suburbs Ltd. Ultimately, these drafts were deposited with SCB, Bombay by Transworld International as per notings on the credit advice prepared by the CB staff. Though the Bank staff stated that there was a forwarding letter from Transworld International, the SCB Mumbai preferred not to produce the same during the course of investigation.
- Secondly, SCB collected the funds and credited it to the non-resident account of Girobank Plc. London through the drawing bank, and had

given the Payee Name as “Eastern Suburbs” only. This credit is against all banking norms.

No ‘A’ Form was insisted by Grindlays Bank.

- Since Grindlays Bank was not maintaining any account of Eastern Suburbs Ltd., they should have returned this cheque to the depositor.
- On the contrary, the Grindlays Bank has credited the funds to the account of a different entity (i.e. Girobank Vostro A/c), other than the one whom it was issued. This is against the accepted norms of banking operations.
- It therefore, is clear that the Grindlays Bank and its Staff connived with SCB and Kuldip Singh Sood in transferring foreign exchange out of India clandestinely.

128. It is alleged by Mr. Panda that the appellants have wrongly contended that they are the agents and delegates of the RBI, and through such relationship, S.8 and S.9 are not applicable to them. The appellants have elucidated this contention by drawing focus to S. 74, therein interpreting the same, to exclude ‘authorized dealers’ from ‘person’ as so used in S. 9 of the Act.

129. It is argued that Section 74 provides the Reserve Bank may and with the previous approval of Central Government, by order delegate any of its powers or functions u/s 8, 9 or 10 or 18(2A)(b) of the FERA to any authorised dealer.

130. Thus, Section 74 does not delegate the powers and functions under Section 8 & 9 to the Authorized Dealer. It merely envisages that such powers *may be* delegated. Thus, if such powers have indeed been delegated, such delegation must be express and clearly stated. Furthermore, the mere licence obtained by the Authorized Dealer under S. 6 of the Act, does not ipso facto

grant such delegation of the functions, as it is clear, that it is a separate power and function and distinct from S. 6.

The appellants in the present case have failed show that they have been delegated any such power u/s 74. Furthermore, through the communications made by the RBI, it is clear that the RBI has made no delegation. Thus, it is not tenable for the appellants to seek shelter from Sec. 74, and incorrect to state Authorized Dealers are excluded from 'persons', by reading Sec. 74 with the scheme of the Act.

131. It is stated that the charged contraventions are not listed exemptions under S. 50. If it was indeed the intent of the legislature to exclude the appellants from the purview of the Enforcement Directorate, such exclusion would be included under S. 50. Therefore, Authorized Dealers are not excluded from the provisions of Sec. 9, and in the present case, their contravention also attracts the provisions of S. 8.

132. **The submission of the appellant with regard to contravention of Sec. 8(1) of FERA, 1973**

The Appellant has two-fold submissions on the contravention of section 8. Firstly, that Section 8 is not applicable to an authorised dealer and secondly without prejudice to the aforesaid, there has been no contravention of section 8 of the Act.

133. It is stated on behalf of appellant that the adjudicating officer failed to consider that the Supreme Court in *Ram Ratan v. Director of Enforcement, (AIR 1966 SC 495)* while dealing with the scope and application of S. 4(1) of the 1947 FERA which is in *pari materia* with Section 8 of FERA, 1973 held as follows:

> *"4… Section 4 (1) of the Act was amended in year 1964, but we are concerned only with the said sub-section as it stood before the amendment. To attract Section 4(1), a resident of India other than an authorized dealer shall have lent to any person, not being an authorized dealer, any foreign exchange. It is not disputed that the said bank was not an "authorised dealer" within the meaning of the said sub-section. If so, the only question is whether the appellant, in depositing the said amounts in the current accounts of the various branches of the said bank, lent the said amounts to the bank."*

134. It is submitted on behalf of appellant that the scheme of the Act has to be taken into consideration while interpreting the statute and different words should not be construed in isolation of the other sections of the statute, as well as the scheme of the statute. The Appellant has relied upon the following cases in support of its submissions:

a. *Darshan Singh vs. State of Punjab, (AIR 1953 SC 83) at Paragraph 10*

> *"10. These arguments though somewhat plausible at first sight, do not appear to us to be sound or convincing. It is a cardinal rule of interpretation that the language used by the Legislature is the true depository of the legislative intent, and that words and phrases occurring in a statute are to be taken not in an isolated or detached manner disassociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself."*

b. *Mangoo Singh vs. Election Tribunal (AIR 1957 SC 871) at Paragraph 9*

> *"…9. When the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of according to lexicographers."*

c. *P.K. Renguntawar vs. Deputy Director of Enforcement ([1981] 51 Comp Case 163 (Bom)) at Paragraph 14*

> *"14. The provisions of s. 4 enact restrictions on the persons with regard to dealings in foreign exchange. The provisions themselves have to be understood and interpreted so as to further the*

express object of the Act, one of it being to regulate certain payments and dealings in foreign exchange. The provision is in two parts, being permissive as well as prohibitive. Unless the first exists or is shown to have existed the prohibition operates. Unless as may be excepted by a general or special permission of the Reserve Bank, no foreign exchange can be acquired by any person other than an authorised dealer in India and resident of India nor one can deal in such foreign exchange while such person is outside the country. The restriction is against the persons who are in India as well as against the persons who are Indian residents while they are abroad. The section by itself permits acquisition from various dealers in the country as well as outside the country. If the transaction is not between the person and an authorised dealer, there is a total statutory embargo on buying or otherwise acquiring, borrowing or selling or otherwise transferring or lending of any foreign exchange. Once it is shown that the person of the category mentioned in the section has acquired foreign exchange not from the authorised dealer, then as the width and amplitude of the section stands, the only defence available is the previous general or special permission of the Reserve Bank."

d. *State of Maharashtra vs. Mahesh Mehta (1983(1) Bom C R 600),*

"*12. …On proper analysis it would be clear that the absence of permission, either general or special, from the Reserve Bank is the foundation of the contravention indicated therein. The further restrictions are put on any person resident of India except the authorised dealer while a more generalised category is carved out which would include by any person, who may or may not be a resident of India, but who is not an authorised dealer. This, therefore, relates to the capacity of the person concerned. The third clause relates to the various modes which are annexed to the foreign exchange which can be tagged with the said person. The restriction suggests that any purchase or borrowing or selling or lending or otherwise transferring are various modes of contravention, and a residuary clause in that category includes when a person is said to have otherwise acquired foreign exchange. As to who is an authorised dealer and money-changer has been defined under the Act. The respondent 1 admittedly does not fall in that category. Similarly, admittedly no permission was obtained from the Reverse Bank and lastly fact that the respondent is not a resident of India would hardly make any difference since he can be covered by the other clause about his capacity as being a person not being an authorised dealer.*"

e. **Marubeni India v.. Special Director of Enforcement (MANU/DE/0404/2014) at Para 10,**

> *"10. The Court does not wish to repeat, what has already been held by it in Mitsubishi Corporation and Fuji Bank Ltd. However, the following portion of the judgment in Mitsubishi Corporation in the context of exparte employees of foreign corporation being seconded to Indian liaison offices (LOs) would equally apply to the present appeals as well:*
>
> *17. …*
>
> *18. Under Section 8(1)(b) FERA, there is a prohibition on a person "other than authorized dealer" purchasing, acquiring or borrowing or selling otherwise transferring or lending or exchange with any person not being an authorized dealer, any foreign exchange either in India or outside India. The question then arises is whether on the facts of the present case, the Appellant can be said to have "purchased or otherwise acquired or borrowed" any foreign exchange in India.*
>
> *19. …"*

135. It is alleged that the Respondent has tried to distinguish the aforementioned judgment by stating that this judgment discussed the ambit of Section 8 and not Section 9 of the FERA, 1973 and that the judgment focused on the contravention of an individual, not an authorized dealer. The submission of the Respondent has no substance as the judgment lays down that the restrictions placed under section 8 are not applicable to an authorised dealer irrespective of the fact that the person charged therein was an individual. The said principle laid down therein will apply in case of section 9 also.

K. Sadasivam vs Special Director ED- MANU/TN/0626/2010 at Para-9

> *"9. With regard to the first fold of submission, I find that it is the contention of the appellant that the S.B.I. Extension Counter at Anna International Airport is the authorised dealer, within the meaning of* Section 6 of the FERA Act. *The appellant was working as Assistant Manager in the said bank, the authorised dealer, the appellant is empowered to purchase and sell foreign exchange. Section 8 of the FERA Act deals with the prohibition of a person dealing, selling and purchasing of foreign currencies other than the authorised dealer. Therefore, the contention of the appellant is that when he was an employee under the authorised dealer, the show cause notice issued under the provisions of Sections 8(1) and (2), which are meant for other than the authorised officer, is not legally sustainable. In this regard, I find that the allegation against the appellant is that he had purchased the foreign currencies by using his own money with an intention to sell the same for a higher price. Moreover, as the employee of the authorised dealer, namely, State Bank of India, Extension Counter, Anna International Airport, he is dealing with the foreign currencies. When once he contravenes or violates the provisions of the FERA Act, his action is totally independent in nature and not connected with the activities of the authorised dealer, namely, the State Bank of India. Therefore, in my considered opinion, the notice issued by the respondent under Sections 8(1) and 8(2) of the FERA Act as against the appellant cannot be said to be ex-facie illegal. Therefore, in my considered opinion, there is no need for the respondent, by treating the appellant as an authorised agent, to issue notice under different section, namely, 6(4) of the Act."*

136. It is submitted that section 6 of the FERA 1973 is a complete code in itself for an authorised dealer. Further, even otherwise there has been no contravention of the Act as there has been no outflow of foreign exchange and no loss of foreign exchange has been caused. Admittedly, the Appellant has already brought back the foreign exchange, which is the subject matter of the present proceedings, into India.

The word "person" used in section 50 is to be interpreted to persons who are subject to the prohibition/restriction contained in Sections 8 to 31 of the Act i.e., persons other than authorised dealers. The Legislature distinguishes

between authorised dealer and other persons. The authorised dealer is a delegated of the Reserve Bank of India by virtue of Section 74 and having powers to deal with foreign exchange in accordance with the terms of the authorization under Section 6, the Legislature did not intend for the investigative wing to punish a delegate of the Reserve Bank of India.

A perusal of Sections 8 to 31 which imposes various restrictions on "person" in dealing with foreign exchange, are by their very nature, inapplicable to authorised dealers, whose very business as authorised by the Reserve Bank of India, is to deal in foreign exchange. Under S.18, an authorised dealer is even empowered to ensure compliance of the Section by another "person". Hence, the penalty imposed under S.50 and 51 are not applicable to an authorised dealer. Any violation of S.6, which is the only section that applies to an authorised dealer cannot attract penalty under S.50, as S.50 applies to a "person" other than an "authorised dealer".

The Appellant have relied upon M.G Wagh to show that when a provision is complete which provides appropriate measures to safeguard the interest of foreign exchange then no other provision is applicable as such an aid will render the provision which is complete in itself. In this case it was upheld that Section 12 in itself is a complete code and hence Section 10 of the 1973 Act is also not applicable.

137. The Respondent has tried to distinguish the case law from the facts of the present case by stating on behalf of appellants that there is a distinction wherein there is no correlation between S.12 and S.10. These are independent provisions codified to ensure performance in the two separate situations. Section 6 & 8 are connected sections if those are read co-jointly. While Section 6 provides only and only for the duties and obligations of an authorized dealers

in matters of foreign exchange, Section 8 deals with the restrictions that a person has to face while dealing with foreign exchange. In Section 6(4) the word "instructions" are also used. Section 50 only refers to the term "direction" but the word "instruction" is not mentioned therein and as such the Enforcement Directorate cannot penalise a person for not following instruction under Section 50 and it is only the RBI which can take action for breach of such instructions under Section 6, who even cancelled the licence depending upon the seriousness of the matter. Since Section 6 deals with every possible situation and provides for appropriate action against authorised dealers is specifically and specially dealt with therein, there is no valid reason for extending Section 50 to an authorised dealer. Section 6 deals with the appointment of an authorised dealer, punishment by revocation of licence and the obligations and duties of an authorised dealer. Since this section is all encompassing, there appears to be no need to import the provisions of Section 50 for actions of the authorised dealer because the authorised dealer being a delegate/agent of the Reserve Bank of India and carries on the functions of the Reserve Bank of India as its agent. The authorised dealer, under Section 6 (4), is required to comply with general or special directions or instructions issued by the Reserve Bank of India from time to time. This would generally relate to dealings in foreign exchange pursuant to the powers delegated under Section 74. The Reserve Bank of India also has the power to conduct inspection of authorised dealer since all authorised dealers are scheduled banks (see para 1.4 of the Exchange Control Manual) who are governed by the Banking Regulations Act. Furthermore, the Reserve Bank of India is the most appropriate authority to understand, appreciate and deal with the breaches of the obligations of an authorised dealer since they are essentially carrying out the functions of the Reserve Bank of India itself.

138. In the present case, after realizing its overlap, the appellant bank has brought the entire amount, RBI is aware about it. Despite of breach, RBI has not chosen to revoke the licence. It may be the reasons that bank has not derived any benefit out of such lapse/breach. The bank after the said lapse has done thousands of transactions without any allegation of breach.

139. Counsel for the appellant has also addressed the alternative argument without prejudice, it is submitted that section 8 has not been contravened. In view of definition of foreign exchange provided in section 2(h), it is submitted that credit of rupees to Vostro account does not constitute foreign exchange and hence, section 8 has no application. The Appellant submits that to be able to "otherwise transfer" within the meaning of section 8 it is necessary that the person transferring should have complete dominion on the amount and right of disposition over it. The Appellant not having acquired any interest in the property could not have committed any contravention of transferring the same within the meaning of section 8.

140. The Appellant relied upon the judgment of the FERA Board in ***H.H. Naeems & Co. vs. B.O.E. [1989] 46 Taxman 32 (Paras 31, 34 to 41, 44 and 48 to 50)*** wherein it has been held that the right to convert rupees into foreign exchange does not make the rupees foreign exchange within the meaning of section 2(h). It is further submitted that in light of the judgment in the case of H.H. Naeems the aforesaid issue was no longer res integra and the adjudicating officer ought to have followed the same. In this regard the judgment in the case of ***Safiya Bee vs. Mohd. Vajahath (2011) 2 SCC 94 (Paras 27, 28, 29 and 30)*** *is also ref*erred.

It is stated that the Respondent has tried to distinguish this case on the ground that it is a FERA Board Order and that it is not binding upon this

Tribunal. It is submitted that the subject matter was with regard to a contravention made by a Company, not an authorized dealer and that an Authorized Dealer is inherently in a position to acquire, maintain dominion and disposition over the foreign exchange, unlike that of a company. The contention of the Respondent has no force as the order of the FERA board will be binding on this Tribunal unless it is distinguished or varied or overruled by the Tribunal. Further, the said judgment lays down the meaning and scope of 'foreign exchange' independently of the person who is being charged for the offence of acquiring foreign exchange and will therefore be applicable to the present case also involving an authorised dealer.

141. The Appellant also placed the reliance upon the judgment in the case of ***R.R. Holdings Vs. Director of Enforcement, ([1997] 90 Taxman 322)*** wherein the Hon'ble Court held that it is well established that the question of transferring the property or foreign exchange in violation of Section 8 would arise only if the person charged is already in complete control of the same.

It is stated on behalf of the appellants that the respondent has tried to distinguish the said case on the ground that it is a FERA Board Order and hence, is not binding upon this Tribunal. The Respondent has stated that the charges levied against the appellants are on par and compatible with the rationale derived in the above order. The case of RR Holdings deals with the said situation as is clear from the aforesaid paras of the judgment:

> "*12...There can be no transfer unless a person has a complete domain on the amount and the right of disposition over it, Since, under the contracts, amounts were not to be paid immediately to the appellants, the question of having acquired a right of disposition on the said amount did not arise and accordingly the question of the transfer thereof by the appellants would also not arise...*
> *13. An inchoate right to receive payment does not cloth the person having that right with the*

authority to own and dispose off the amounts to be so paid at his discretion…
14. It is well established as to whena person can be sad to have acquired any species of property including foreign exchange. The process of acquisition follows the concrete results in the taking of the property so that the acquirer comes into actual possession and is in a position to appropriate the same. It is 'taking' in law for all purposes. The question if transferring property or foreign exchange in violation of Section 8(1) would arise only if the person charged is already in complete control of the same reference is invited to Pandharinath Kishtnah Reugultawar v. DY. Director of Enforcement (1981) 51 Comp. Cas. 163 (BOM). The transfer involves actual giving away. A mere right created by words of mouth or otherwise will not amount to a transfer of property as such. In the instant case the Appellant not having complete domain on the amounts which were simply payable to them, cannot be said to have otherwise transferred the same to APA."

142. It is alleged that the Appellant Bank had merely dealt with rupees and no other currency. In the said account all moneys were maintained in India Rupees only with a right to receive the same in foreign currency. The Foreign Constituent had merely received a right to receive foreign exchange but the same was not converted into foreign exchange and there is not even an allegation to this effect. The Appellant having thus not acquired any interest in the property could not have committed the contravention of transferring the same within the meaning of section 8 of FERA.

143. It is further submitted that Appellant Bank had in fact returned the instructions from Canara Bank for crediting the VOSTRO convertible account, since it found that there was a discrepancy/ error in the instructions. The Appellant Bank had exercised due diligence to satisfy itself that the transaction was not designed for the purpose of any contravention, or evasion of the provisions of the FERA Act, 1973, or of any rule, direction, notification or order made thereunder.

The Appellant has relied upon the judgments in the case of ***Eastern Agencies Vs. Union of India ([1935] 58 Comp. Cas. 267)*** and ***P.K. Renguntawar Vs. Deputy Director of Enforcement, ([1981] 51 Comp Cas 163 (Bom)) (Para19)***.

144. No doubt, the Respondent has relied on the case of *Needle Industries vs N.I.N.I.H Ltd. (AIR 1981 SC 1298)* to submit that a permission granted subject to certain conditions would cease to exist in the event of non-compliance of the conditions. On breach of this condition, the license will cease to exist. The judgment in the case of Needle Industries is not applicable to the facts of the present case. The factual matrix of the Needle Industries case is different and the ratio of Needle Industries has to be restricted to the facts of that case itself. Needle Industries case was rendered in the context of section 29 which provides for condition precedents for establishment of business in India. Whereas, in the present case, the compliance of instructions issued by the RBI by the authorised dealer is a condition subsequent and contravention of any such condition does not terminate the license automatically.

145. Section 8 deals with restrictions on dealings in foreign exchange and prohibits dealings in foreign exchange without the previous general or special permission of the Reserve Bank of India except through an authorized dealer.

146. Section 2(h) of FERA, 1973 defines 'foreign exchange'. Section 2(h) provides as follows:

> *"(h) " Foreign exchange" means foreign currency and includes—*
>
> *(i) All deposits. Credits and balances payable in any foreign currency and any drafts. Travellers' cheques, letters of credit and bills of exchange, expressed or drawn*

in Indian currency but payable in any foreign currency:

(ii) Any instrument payable, at the option of the drawee or holder thereof or any other party thereto, either in Indian currency or in foreign currency or party in one and party in the other

147. The section provides that foreign exchange means foreign currency and also includes any instrument which is payable in foreign currency or where at the option of the drawee or holder of the instrument or any other person is payable in foreign currency. Section 2(g) defines 'foreign currency' as any currency other than Indian currency section 2(g) provides as follows:

"2(g)" foreign currency" means any currency other than Indian currency"

148. In view of the definition of foreign exchange, it is submitted that the credit of rupees to the Vostro Account did not constitute foreign exchange and hence section 8 has no application to the charge levelled against the Noticee i.e. crediting of rupees to the Giro bank account. The vostro accounts are rupee accounts opened pursuant to the general permission granted by the Reserve Bank of India. By virtue of para 10.3, the Reserve Bank of India has permitted credit of rupees to the accounts. By virtue of para 10.12, the rupees lying in the Vostro Accounts can be freely converted into foreign exchange without the prior permission of the Reserve Bank of India. It is submitted that balances in accounts which are "convertible" into foreign exchange are not the same as balances "payable" in foreign exchange. There is no concept of "non-convertible rupees" inasmuch as all rupees are capable of being converted into foreign exchange pursuant to general or special permission granted by the Reserve Bank of India. In view thereof, rupees lying in a bank account are always convertible freely subject to the limits imposed by the Reserve Bank of India from time to time. For example, in view of the recent Circular dated 26th

December, 2006 of the Reserve Bank of India every resident individual is allowed to freely remit upto US Dollars 50,000 out of the country. Consequently, all rupees lying in the accounts of individuals to the extent of US Dollars 50,000 would be capable of being freely converted into foreign exchange. Balances "payable" in foreign exchange within the meaning of Section 2(h) would refer to balances denominated in foreign currency such as are lying NRE Foreign Currency Account and like the Nostro Account, EEFC Account RBI approved foreign currency account, Escrow Dollars account, RSC Account etc.

149. It is stated that when balances in rupee account are to be converted into any permitted currency as per para 10.12, all such transactions are to be reported to the Reserve Bank of India on Form A2 for the foreign currency leg and on Form A3 for the rupee leg of the transactions under cover of the relevant R Form. When rupees are credited to the Vostro Account, information of the same is to be given to the Reserve Bank of India under Form A3 or Form A1 or A2. Form A2 applicable to para 10.12 is an application for remittance in foreign currency, wherein the Applicant applies to the Reserve bank of India for purchase of foreign currency. From A2 applicable for crediting of Indian rupees to the account of a non-resident bank is different from the earlier Form A2 inasmuch as under this Form, the Applicant is seeking to transfer rupees to the account of the non-resident bank. The contrast between the two forms makes it abundantly clear that at the time of credit to the Vostro Account, there is no acquisition of foreign exchange since the relevant A2 Form is only an application of crediting of Indian rupees whereas at the time of converting the rupee balances into foreign exchange under para 10.12 the relevant A2 Form is an application for purchasing the foreign exchange. Thus, it is only at that stage that there is a dealing in foreign exchange for the first time. Form A3 is also a form for transfer of rupees from/to the account of a non-resident

bank. This form also does not relate to any dealing in foreign exchange. Thus, until foreign exchange is made available pursuant to the application under From A2 relevant to para 10.12, there is no dealing in foreign exchange whatsoever. Although para 10.3(ii) states "under Exchange Control Regulation, credit to the rupee account of non-resident branch or correspond of an authorised dealer is equivalent to a remittance of a foreign exchange from India to the country in which the branch or correspond is situate". It cannot be said there is any dealing in foreign exchange within the meaning of the act. This para is a mere administrative fiction for administrative purposes. This is so because the definition of foreign exchange in Section 2(h) does not create any such fiction; the Reserve Bank of India cannot administratively expand and extend the definition of foreign exchange contained in the act; that from a Scheme of Chapter 10, it would appear that the Reserve Bank of India may treat balances in Vostro Account as a contingent liability in foreign exchange; but an administrative fiction give rise to penal consequences. This is more so if FERA is to be treated as a statute creating strict/absolute liability (which is denied).

150. From the above said submission, it appears that the right to convert rupees into foreign exchange does not make the rupees foreign exchange within the meaning of section 2(h). The FERA Board in *H.H. Naeems & Co. vs. B.O.E.* ([1989] 46 Taxman 32) observed as under:

> *"31 In the present case, the application was for permission to transfer rupees for the payment of goods imported or to be imported into India. While the object of filing in the form might be to make payment to a non-resident,* ***the form by itself is not a request for the acquisition of foreign exchange or for its transfer to non-resident. Even if the necessary permission is granted under it, the applicant does not become the owner of foreign exchange even*** *for a moment nor does he become entitled to own foreign exchange. This is clear from the wording of the from itself. Rupees are transferred from*

the account of the applicant to another person who is the transferee, but who happens to be a non-resident."

"34. Shri Soundara Rajan, realizing this difficulty, sought to surmount it by referring to the procedure prescribed in the *Exchange Control Manual*, for making remittances in the case of imports. He particularly invited attention to the provisions of the Fifth edn. of the *Exchange Control Manual* which were in force during that period. Special stress was also laid on the provisions of paragraph 3 of section XX dealing with the rupee account of a non-resident bank. ***This clearly stipulated that the transfer of rupees to the account of a non-resident branch or correspondent was regarded by the Reserve Bank as being equivalent to a remittance of foreign currency to the country in which the branch of the correspondent was situated and that such transfers without the prior approval of the Reserve Bank was to be permitted only in those cases where authorized dealers could have remitted the funds to the country concerned under the authority delegated to them as***, *for example, in the case of payments against imports. Paragraphs 7 of the same section also provided that rupee payments into the accounts of branches and correspondents overseas against imports of goods into India, whether against bills received or otherwise, are regarded as equivalent to remittances in foreign currency and are subject to the same regulations which apply to transfer in foreign currency in payment for imports."*

"35. It is no doubt legitimate to infer form the foregoing that the exchange control authorities regarded payment in rupees to the account of a non-resident as being equivalent to a remittance of foreign exchange."

"36. But insofar as the present appellants are concerned, the charge against them is one of contravention of section 4(3). ***Before Section 4(3) can be invoked, it is necessary to show that foreign exchange has been acquired by the persons proceeded against."***

"37. The contention put forward on behalf of the appellants was that they had no time acquired foreign exchange. It is common ground between the parties that the payments in the present case were made by transferring rupees to a non-resident account. A-7 Form in which all the

transactions were entered is also one seeking permission for such transfer of rupees only."

"38. By way of contrast, reference might be made to Form A which is an application for a remittance in foreign currency where in the applicant seeks permission to purchase foreign currency. Similarly, SA-1 Form is an application for permission to make a payment in sterling or in a sterling area country. A-6 Form is also an application to purchase foreign currency in London against sterling. In all these cases, the form contemplates the making of payment for goods imported or to be imported into India as in the case of transactions for which A-7 Form is used. However, the main difference between them is that in cases of transactions covered by A-7 Form, what is transferred is only rupees.'

"39. It is no doubt true that a transfer of rupees is not inconsistent with the acquisition of foreign exchange. In fact, rupees may have to be transferred as the purchase price of foreign exchange. But the real question is whether there has been any acquisition of foreign exchange on the part of the appellants at any time. The term "acquire' has various meanings. According to Ramanatha Aiyar's Law Lexicon, the term 'acquire' would be 'to become the owner of property; to make property one's own'. According to Black's Law Dictionary, the term 'acquire' means:

"To gain by any means, usually by one's own exertions; to get as she's own' to obtain by search, endeavour, practice, or purchase; recent or gain in whatever manner; come to have."

It would, thus, be noticed that the term 'acquire' would include not only getting as one's own but also coming to have. In Black's law dictionary, it is further observed that the term does not necessarily mean that title has passed. Generally, it means to get as one's own. Even if an enlarged meaning is given to the term 'acquire' by adopting the meaning to be found in Black's law dictionary, it would still require that before a person can be said to have acquired foreign exchange, he should have come to have it."

"40. Hence, before an individual can be said to have acquired foreign exchange, he should have had at least an interest or possession of the foreign exchange. This need not be for any length of time. Having an interest even for a scintilla of time might be sufficient to constitute acquisition.

"41. But there is nothing in the present case to indicate, far less to prove, that the appellants had at any moment of time any interest in foreign exchange as such. All that they parted with were rupees which were thereafter paid into the account of a non-resident. It was only the non-resident who could thereafter withdraw or convert the rupees into foreign exchange. No doubt, by the appellants' action in transferring rupees to a non-resident account, they enabled or put it in the power of the non-resident to acquire or to take out more foreign exchange from the country than be could have done otherwise. But that is not the same thing as acquisition of foreign exchange on the part of the appellants themselves."

"44. To repeat A-7 Forms being only requests for authorization for the transfer of rupees to the account of a non-resident, the appellants cannot be said to have acquired any interest in foreign exchange by reason of any transfer made on the basis of their applications."

"47. The ***definition of foreign exchange' contained*** *in section 2(d) of the 1947 act also does not materially assist the department. The definition is as follows :*

"Interpretation – In this Act, unless there is anything repugnant in the subject or context , ---

(a) To (c) **

**

**

(d)Foreign exchange' means foreign currency and include all deposits, credits and balances payable in any foreign currency, and any drafts, trayeller's cheques letters of credit and bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency;""

"48. In the present case, there is no question of any drafts, traveller's cheques, letters of credit or bills of exchange being expressed or drawn Indian currency or in any foreign currency. It is true that the definition includes all deposits, credits and balances payable to any foreign currency. ***Possibly, insofar as the non-resident was concerned, his rupee holdings were payable to him if he so chose, in foreign currency. But that would at the most only mean that the non-resident had acquired foreign exchange in the form of a deposit,***

although it is not necessary for the purposes of this appeal to express any final opinion on that issue.*"*

"49. But none of the appellants had any interest in the non-resident accounts. The moment their accounts were debited or the cash paid by them or on their behalf was credited to the account of the non-resident, it was the non-resident alone who could operate on it. *There was not even a scintilla of time when any of the appellants could be said to have acquired foreign exchange."*

"50. Shri Soundara Rajan's last contention is based upon paragraph 3 of Section XX of the ***Exchange Control Manual*** *which is to the effect -that the transfer of rupees to the account of a non-resident branch for correspondent is regarded by the Reserve bank as being equivalent to a remittance of foreign currency to the country in which the branch/correspondent is located. From this, the inference was sought to be drawn that this case was equivalent to a transfer of foreign exchange by the appellants and which would be possible only if they had acquired it. Insofar as this argument is concerned it has to be kept in mind that provisions of the Manual cannot have any greater legal status than the statutory directions issued by the Reserve Bank to authorized dealer under section 20(3) of the act. Such directions cannot modify the provisions of the act under which they are issued or give o the term 'foreign exchange' a wider meaning than that given to it by the Parliament. Further, if the crediting of non-resident rupee accounts was, in fact, an acquisition or remittance of foreign exchange, there was no need for any deeming provisions in the manual."*

151. The scope of "otherwise transfer" within the meaning of section 8 is now well settled.

(a) The FERA Board in *R. R. Holdings v. Director of Enforcement*, {(1997] 90 Taxman 322) held as follows:

"12. There can be no transfer unless a person has complete dominion on the amount and the right of disposition over it. Since under the contract, amounts were not to be paid immediately to the appellants, the question of having acquired a right of disposition on the said amount did not arise and accordingly the question of the transfer by the appellants would not also arise."

"13. An inchoate right to receive payment does not clothe the person having that right with the authority to own and dispose of the amounts to be so paid at his discretion...."

"14. It is well established as to when a person can be said to have acquired any species of property including foreign exchange. The process of acquisition follows the concrete results in the taking of the property so that the acquirer comes into actual possession and is in a position to appropriate the same. It is "taking' in law for all purposes. The question if transferring property or foreign exchange in violation of Section 8(1) would arise only if the person charged is already in complete control of the same. Reference is invited to Pandharinath Kishtnah Reguntawar v. Dy. Director of Enforcement. [(1981] 51 Comp. Cas. 163 (Bom). The transfer involves actual giving away. A mere right created by words of mouth or otherwise will not amount to a transfer of property as such. In the instant case the appellant not having complete domain on the amounts which were simply payable to them, cannot be said to have otherwise transferred the same to APA."

(b) The Bombay High Court in *Eastern Agencies v. Union of India* ([1-35] 58 comp Case. 267) held as follows:

"6. The interpretation of the phase "owns or holds" in s. 9 would appear to be res integra. The phrase must be interpreted in the context of the fact that it refers to moneys in foreign currencies and s. 9. Requires the tender thereof for sale to the Reserve Bank. The phrase must also be interpreted in the light of S.10 which sets out the duty of a person who has "a right

to receive" foreign exchange. A person who "owns" foreign exchange for the purpose of s. 9 must, therefore, be one who has title to and control over the moneys in foreign currencies so as to be able to offer or cause them to be offered for sale to the Reserve Bank. And a person who "holds" foreign exchange for the purposes of s. 9 must, therefore, be one who has control over the money in foreign currency so as to be able to offer or cause them to be offered for sale to the Reserve Bank."

(c) The Bombay high Court in *P. K. Renguntawar v. Deputy Director of Enforcement,* ([1981] 51 Comp Cas 163 (Bom)) held as follows;

"19. The process of acquisition with relation to any species of property including foreign exchange basically and primarily is the process known to a law involving transfer of interests in property. It is a dual process in that it implies giving and taking. The passing of property is made obviously by these elements. When the giver gives, he is said to transfer, while the taker takes, he is said to acquire. The giver gives what he possesses and is entitled to so give; while the taker takes and as such acquires what the giver thus possessed and was entitled to. The acquisition, therefore, is synonymous with taking of the property. Elementary taking involves the possession of the things so taken as well as power or authority to deal with it on one's own account."

152. It is stated that the Noticee bank was acting as a collecting bank in the transaction relating to the credit of rupees to the Giro Bank Account. The bank was having the instructions received by it from the correspondent bank/branch which was received either by tested telex or instructions in writing or as per the mandate of the account holder issuing instructions for credit of rupees to the account of Giro Bank. The notice while acting in such capacity did not acquire any right, title or interest in the rupees that came to be credited to the account of Giro Bank. The banker was merely facilitated the transfer of rupees from BFEA/Canara Bank/IOB/PNB/BOB/SCB to the Giro

Bank account. In such capacity, the bank was to carry out the instructions to credit the rupees to the Giro Bank Account, it must have wrongly credited sum the bank did not acquire complete dominion and the right to disposition of the rupees when the rupees were initially credited into the account of the Noticee bank (as a collecting bank) it acquired a limited right in respect of those rupees later on if the said rupee amount is converted into foreign exchange by the the Giro Bank Account. The entire blame cannot be attributed to bank who never acquired any right to appropriate the rupees.

153. It is submitted that the said provisions may not be applicable to an "authorised dealer" under such situation. The prohibitions under section 8 & 9 are against a person other than an authorised dealer. Under the scheme of FERA all dealings in foreign exchange are conducted by the Reserve Bank of India through an authorised dealer. The Act has drawn a distinction between an authorised dealer and other persons who deal in foreign exchange. Section 74 read with Section 6 makes this obvious. The Legislature has carved out from the generalized category of persons an authorised dealer. It is not correct on the part of respondent to argue that section 74 does not delegate the power and function to the authorized dealers.

154. In view of Section 74 which enables the Reserve Bank of India to delegate its powers and functions under sections 8 & 9 to any authorised dealer, the authorised dealer becomes the agent/delegate of the Reserve Bank of India and has all the powers of dealing in foreign exchange as possessed by the Reserve Bank of India. Consequently Sections 8 & 9 which deal with prohibitions on dealings in foreign exchange inherently cannot apply to an authorised dealer whose power to deal in foreign exchange is overriding in view of Section 74 read with Section 6.

155. It is submitted that the said provisions have no application to an "authorised dealer". The prohibitions under Sections 8 and 9 ex-facie are against a person other than authorised dealer. This interpretation is consistent with the scheme of FERA. Under the scheme of FERA all dealings in foreign exchange are conducted by the Reserve Bank of India through an authorised dealer. The Act has drawn a distinction between an authorised dealer and other persons who deal in foreign exchange. Section 74 read with Section 6 makes this obvious. The Legislature carved out from the generalised category of persons an authorised dealer.

156. The Noticee having thus not acquired any interest in the property could not have committed the contravention of transferring the same within the meaning of Section 8(1).

157. The Noticee has also been charged of contravention of Sections 9(1)(a) and 9(1)(e). It is submitted that for the act of making payment to person resident outside India a sum of money, there must be a acquisition and transfer of payment/ credit of the entire right, title and interest in the property i.e. the money without which there cannot be a contravention of the said provisions. As submitted above, the Noticee Bank not having acquired any such interest in the property and consequently not being able to transfer any such interest, the Noticee bank could not be held liable for contravention of Section 9(1)(a) and Section 9(1)(e).

This is apart from the submissions that the act of making payment or placing to the credit of Giro was an act which was undertaken pursuant to the powers delegated to the Noticee under Section 74 and hence, immunized by virtue of Section 9(4) which reads as under:

"(9)(4) Nothing in this section shall restrict the doing by any person of anything within the scope of any authorisation or exemption granted under this Act."

158. The next submission of the respondent is that appellants have contravened Sec. 9(1)(a) & 9(1)(e) of the FERA, 1973. These provisions have been reproduced below:

9. Restrictions on payments.—

(1) Save as may be provided in, and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall—

(a) make any payment to or for the credit of any person resident outside India;

***

(e) place any sum to the credit of any person resident outside India;

159. On the other hand, submissions are made on behalf of respondent that the Appellant has contravened the provisions under Sec. 9(1)(a) and 9(1)(e) of FERA, 1973.

i) From the wording of the section, it is clear that Sec. 9 is applicable to any person. As submitted earlier, the term 'person' includes an "authorized dealer".

ii) The Appellant had not taken any general or special exemption from the RBI under this section while transferring the said amount to Girobank Plc, London for crediting the account of M/s. Eastern Suburb Ltd.

iii) As per Sec. 71(1), the burden of proof lies on the appellant to furnish necessary exemptions but they have failed to furnish the same.

iv) Thus, the Appellant has contravened the provisions under Sec. 9(1)(a) and 9(1)(e) of FERA, 1973

160. **The Appellant has contravened the provisions under Sec. 6(4), 6(5) and Sec. 49 of FERA, 1973** as Sec. 6(5) of FERA expects three distinct possibility for an authorized dealer while dealing with foreign exchange:

i) Firstly, an authorized dealer shall require a person to make such declaration and give such information as will reasonably satisfy him that the transaction will not involve, and is not designated for the purpose of contravention or evasion of the provisions of this Act or of any rule, notification, direction or Order made there under.

ii) Secondly, if the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorized dealer shall refuse to undertake the transaction.

iii) Thirdly, if the authorized dealer has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person report the matter to the reserve bank.

161. It is stated that the Grindlays Bank has failed to follow the first step and hence they could not follow the second step. When the authorized dealer realized their mistakes, and responsibilities, they requested the account holder to repatriate the amount in foreign exchange to set up the loss of foreign exchange. When realized their mistake, they refused any further transaction and followed the third step by informing the RBI about the transactions already taken place.

Thus, the Appellant has contravened the provisions under Sec. 8(1), 9(1)(a), 9(1)(e) and 6(4) read with 6(5) and Sec. 49 of FERA, 1973.

162. Contravention of Provisions of FERA and ECM, 1987 by the officers of the Appellant Bank and Charges under Section 68.

The purpose of the remittance is stated to be against a contract, but no such contract appears to have been filed or perused before actually passing the credits. This is only to cover up their mistakes.

163. The Appellants in reply have contended they had only transferred Indian currency by demonstrating that the amounts reflected in the books of the Vostro Account of Girobank Plc. were in rupees. However, this contention is not tenable as it is not permissible in law to maintain Vostro Account balances in foreign exchange, as clear from Note A to Para 10.2 of the ECM:

> "Opening of accounts expressed in any foreign currency in the names of overseas banks in the books of authorized dealers in India in **not permitted**."

Therefore, the balances in Vostro Accounts must necessarily be maintained in Indian currency, which may be drawn into foreign exchange at the spot exchange rate.

164. In this connection, the Appellant's contention that Chapter X of the ECM is ultra vires the FERA, 1973 is also not tenable. If the said contention were to be accepted, it would mean that an Authorized Dealer can effectively send out the entire country's foreign exchange to a correspondent bank; and that they also can maintain balances in foreign currency of their correspondent banks, thereby creating a lien over the foreign exchange reserves of the country, which defeat all the objects and purposes of FERA, 1973, and also would in effect transpose the Authorized Dealer into a Reserve Bank in itself.

165. It is stated on behalf of respondent that in the facts of the present case, the transactions in the nature of a credit to a rupee account of a non-resident by an authorised dealer is (i) equivalent to a remittance of foreign currency from India, (ii) be for specific purpose and (iii) can be made only with prior permission of RBI. If credit is made without prior permission of RBI, that would amount to committing an offence within the meaning of Sec.9 of FERA. Hence, it becomes clear that there is a contravention of S. 9 of the Act.

166. It is stated on behalf of respondent that the appellants having indeed placed a sum of Rs. 66 Crores to the credit of Eastern Suburbs, through Girobank Plc, both being persons resident outside India, hence standing in contravention of this provisions. This provision Sec. 9(1)(a). 1(a) arises from the *payment* to a person ROI, whereas 1(e) arises from the act of *placing* the funds to the credit of another person. One provision does not necessarily inculcate the other, but the context envisages a situation where indeed both provisions may be invoked simultaneously, as it so proven to apply in the present case. Each clause must be applied independently and does not stand to have qualified effect or validity. This is the object of the Act.

167. The appellants have failed to furnish evidence to the effect that they were exempt or had special permission to conduct the transaction. The mere acquisition of licence does not inherently confer the exemption. The appellants have insofar, failed to elucidate this point. Counsel for respondent has referred *Notification No. A.D. (G.P. Series) Circular No. 10, dated 23rd April, 1991* (Annexure 3), with the relevant provisions reproduced as below:

> *Authorised dealers are hereby directed that every transaction of sale foreign exchange or payment to or for the credit of any person resident outside India, of the equivalent of above Rs. 2.5 crores, [other than for*

repayment of balance in Foreign Currency (Non-Resident) accounts and Non-Resident (External) Rupee accounts and inter-bank transactions] must be referred to Reserve Bank for clearance before effecting the transaction until further notice. Payments representing inter-bank transactions should be reported to the concerned regional office of the Exchange Control Department on a day-to-day basis. These directions shall come into force with effect from April 23, 1991 and shall also apply to the sale of foreign exchange or making payment as the case may be, pursuant to any permission already issued by Reserve Bank and subsisting on the date of these directions. Applications should be made, with full particular supported by necessary documentary evidence sufficiently in advance, to the office of the Exchange Control Department within whose jurisdiction the applicant person, firm or company resides or functions.

It is stated by the counsel that from the Notification, any subsisting permission would not be operative for transactions above Rs. 2.5 Crores. The individual transactions were above the said amount, and thus, the permission had to be obtained, prior to effecting such transfer, as the transfers were effected post publication of the said notification. Furthermore, given the nature of transactions, it is not that of inter-bank transfers, as the Bank Accounts were not at par with each other. Merely because the appellants has filed the said transfer as inter-bank transfer, the transaction itself does not gain such identity. Therefore, it has further strengthened by the application of the Notification, that the appellants stood in violation of Sec. 9(1)(a) & Sec. 9(1)(e).

168. It is submitted on behalf of respondent that considering the scheme of the Act, it is not for the judiciary to interpret the Act if authorized dealers were to be excluded in the definition of the person, express exclusion would have been made, as the legislature has so done in other provisions. Abiding by the well-settled definition of 'person', it includes companies and corporate bodies. Secondly, as per the Act, the converse of "any person excluding authorized dealer" is "a person is inclusive of authorized dealer". The express exclusion of

person in particular provisions, has the converse application of including authorized dealers in every other provision that inculcates the term 'person'. Such is interpretation derived from applying the Golden Rule of Interpretation. Continuing the application of this rule, once the doubt and uncertainty is cleared in application, it is not necessary to delve further and applying obscure rationale to derive supporting or contradicting interpretation.

169. If such contention of the appellant bank is to be accepted, the interpretation of Sec 74 excludes authorized dealers from Sec. 8 & 9, the natural question arises as "Why does Sec 8 specifically exclude authorized dealers when Section 9 does not?" Both these provisions are listed under Section 74, but only one specifically excludes authorized dealers. Hence, it is increasingly difficult to state that Section 9 excludes authorized dealers. Thus, the context has made it quite clear that the term 'person' includes Authorized Dealers in S. 9. This is in conformity of the ratio laid in *Mango Singh Vs. Election Tribunal (AIR 1957 SC 871):*

> *"When the context makes the meaning of a word quite clear, it becomes unnecessary to search for and select a particular meaning out of the diverse meanings a word is capable of, according to lexicographers."*

This is further emphasized by *Afcons Infstratucture Vs. Cherian Varkey Construction*, wherein it cited *Shamrao V.Parulekar v. District Magistrate, Thana, Bombay [AIR 1952 SC 324].* The Supreme Court reiterated the principle from Maxwell:

> *".....if one construction will lead to an absurdity while another will give effect to what common sense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."*

170. Applying this principle to the present scenario, the blanket exclusion of 'Authorized Dealers' from the purview of S. 9 gives rise to an absurdity, and goes against the object of the Act, in the frame that specific exclusion has been made in Sec. 8. Hence, the effect of common sense is that Sec. 74 does not exclude Authorized Dealers from the purview of Sec. 9. This is supported by the Apex Court's understanding as expressed in *LIC Vs. Escorts (AIR 1986 SC 1370):*

> 7.2 The proper way to interpret statutes is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non-use in another provision may not be disregarded. Every word has different shades of meaning and different words may have the same meaning. It all depends upon the context in which the word is used.

171. In reply to the submission pertaining to section 9 it is submitted on behalf of appellant that for the act of making payment to a person resident outside India or of placing to the credit of a person outside India any sum of money as contemplated in section 9(1) and 9(1)(e), there must be an acquisition and transfer of payment/credit of entire right, title and interest in the money. Since the Appellant bank has not acquired any such interest in the property and consequently, not being able to transfer any such interest, the Appellant could not have been held liable for contravention of section 9(1)(a) and 9(1)(e). In any case, the act of making payment or placing to the credit of Giro was an act which was undertaken pursuant to the powers delegated under section 74 and hence immunised by virtue of section 9(4).

It is submitted that the Department has without any basis come to an erroneous conclusion that the BFEA did not have the capacity to make payments. There is nothing on record to substantiate this submission. In relation to para 38, the submission of the department is erroneous as the judgment of ***H.H. Naeems & Co. vs. B.O.E. [1989] 46 Taxman 32*** is binding on the present tribunal, being that of an equivalent tribunal. The rule of precedence is to protect the institutional integrity and hierarchy of the Courts.

172. It is regarding a conditional permission granted to a company to carry on certain business and the company not following the said conditions and the consequences arising therefrom. The case of Authorised Dealers is quite different. Authorised Dealers are statutorily recognized under FERA, 1973 and as mentioned above Authorised Dealers are delegates of the RBI under Section 74 of FERA and are a class unto themselves and only the RBI under Section 6 Section 73 has been given the power to deal with them. Further, the Appellant bank has not violated any condition of the license issued to it by the RBI and admittedly the RBI did not cancel the license of the Appellants for the alleged contraventions. It is thus submitted that entire premise that there was a deemed cancellation of the license of the Appellant Bank is erroneous.

173. DELEGATION OF POWER

It is submitted on behalf of appellant that as per Section 74 which enables the Reserve Bank of India to delegate its powers and functions under sections 8 & 9 to any authorised dealer, the authorised dealer becomes the agent/delegate of the Reserve Bank of India and has all the powers of dealing in foreign exchange as possessed by the Reserve Bank of India. Consequently, Sections 8 & 9 which deal with prohibitions on dealings in foreign exchange

inherently cannot apply to an authorised dealer whose power to deal in foreign exchange is overriding in view of Section 74 read with Section 6.

The act does not define "person", however, in section 2(p) is defined "person resident in India" and in Section 2(q) defined "person resident outside India".

It is submitted that in the various provisions of the Act, the term "Authorised Dealer" has been used in contradistinction to "person". It is submitted that there is a clear distinction in the entire scheme i.e., all sections containing prohibitions (S.8 to S.32) are applicable to persons other than Authorised Dealers and that S.6 and Section 73A are applicable to Authorised Dealers. It is thus submitted that the mere use of the word "person" in Sections 8 and 9 cannot include an authorised dealer. An authorised dealer having been delegated powers under Section 8 and 9 and as Sections 8 and 9 requires a person to deal in foreign exchange only through or with an authorised dealer, an authorised dealer cannot commit a contravention of the said sections. The case of Authorised Dealers is quite different. Authorised Dealers are statutorily recognized under FERA, 1973 and as mentioned above Authorised Dealers are delegates of the RBI under Section 74 of FERA and are a class unto themselves and only the RBI under Section 6 Section 73 has been given the power to deal with them. Further, the Appellant bank has not violated any condition of the license issued to it by the RBI and admittedly the RBI did not cancel the license of the Appellants for the alleged contraventions. There is no force in the submission of the respondent that there was a deemed cancellation of the license of the Appellant Bank when no such order is passed by RBI.

174. The Respondent has argued that even if it is considered that Section 8 expressly excludes "Authorized Dealers" from the ambit of the word "Person", it does not do the same when it comes to interpreting Section 9 of the Act, 1973. The Respondent has relied upon the following judgments in support of its contentions:

a) *LIC vs. Escorts, AIR 1986 SC 1370*

b) *Shankar Ram & Co. v. Kasi Naiker, 2003 1 SCC 699*

c) *Jaipur Zila Sahakari Bhoomi Bank Ltd. Vikas v. Shri Gopal Sharma &Ors, AIR 2002 SC 643.*

175. The Appellant submits that the judgments relied upon by the Respondent infact support the case of the Appellant that the legislature intended to exclude 'authorized dealers' from the ambit of Section 9. The said difference is evident by a reading of Explanation to Section 9(1)(b) wherein it stipulated as follows:

> *"Explanation. —For the purposes of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through* ***any other person (including an authorised dealer)*** *without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised dealer;"*

Therefore, as per the explanation, it is clear that when the legislative intent was to include authorized dealers within the ambit and scope of the term "Person", the legislature did so by using qualifiers to emphasise the same. Like, in the explanation above, where the drafters of the statute deemed it necessary *to include authorized dealers as any other person* from whom any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India, they indicated so by placing a qualifier/inclusive clause.

It is submitted that had the drafters of the Act wanted the authorized dealers to be included within the ambit the person who were to be liable in case of contravention of Section 9, they would have done the same by using the inclusive clause/qualifier to indicate the same like they did with Explanation to Section 9(1).

The Appellant argues that no external aid of construction is required to interpret the terms of the Act when the drafters of the provisions have made the context in which the words are being used quite clear and plain. Reliance must be placed on the judgment relied upon the same principle on which the relied upon in the matter of *Mango Singh v. Election Tribunal (AIR 1957 SC 871*).

176. The Respondent is not correct when argued that there is wholly exclusion of "Authorized Dealers" from the purview of Section 9 by placing on the judgment in the case of *Afcons Infrastructure vs. Cherian Varkey Construction.* It is submitted on behalf of appellant that the interpretation of Section 9 suggested if it is construed that Authorized dealer do not form part of "Person" under Section 9, it is not the case of the appellant that an Authorized dealer cannot be held liable for contravening provisions of the Act. Provisions like Section 6 read with Section 73A makes sure that contravention by an authorized dealer will lead to penalization. The Respondent tries to distinguish the judgment of ***the State of Maharashtra v. Mahesh Mehta*** (1983) 1 Bom C.R 600 on the basis of it dealing with Section 8 & not Section 9. However, the principle in general elucidated in the judgment is applicable on the Act as a whole. It is the same position about the notification dated 23.04.1991 is issued. In fact of intervention, no doubt, RBI was empowered to take action even by revoking the license, but it has not happened. It appears that RBI did not take such steps once the entire amount has brought back.

177. This is apart from the submissions that the act of making payment or placing to the credit of Giro was an act which was undertaken pursuant to the powers delegated to the Noticee under Section 74 and hence, immunized by virtue of Section 9(4) which reads as under:

> *"(9)(4) Nothing in this section shall restrict the doing by any person of anything within the scope of any authorisation or exemption granted under this Act."*

178. The Adjudicating Officer wrongly applied upon the judgment in the case of *American Express Bank v/s Directorate of Enforcement*, (Order dt. 08.02.97 in Appeal Nos. 149,150,176-178/1999) to hold that S.8 of FERA is applicable to authorised dealers. It is submitted that the said judgment is *per incuriam* as it does not take into account the relevant provisions of law and the binding judgments/precedents of the Hon'ble Supreme Court of India and various High Courts. It is submitted that the said Judgment did not deal with the issues arising in the present Appeals and thus, could not be considered as binding precedents for the purposes of the present Appeals. The *said Case,* para 17-28 do not deal with the submissions made before the Tribunal in the present proceedings and that the said case applies incorrect principles of Law. The *said Case* is in appeal before the Bombay High Court in FERA Appeal No. 27-31 of 2007. It is stated on behalf of appellants that the judgment in the case of *American Express Case* is not applicable because it did not consider the arguments which were made before the Tribunal and such a ground had been taken in the said Appeal itself. Furthermore, in the judgment of *American Express* a finding had been returned that the term person includes an authorized dealer.

179. It is submitted that such a submission was never canvassed before the Tribunal in the said case and the submission in fact made was that Authorized Dealers were treated as a separate class under the provisions of FERA, 1973 and, therefore, the only provisions which applied to authorized dealers were Section 6 read with Section 73A and 74. It is submitted that the above findings of the Ld. Special Director are *per incuriam* inasmuch as the same have been passed in ignorance of well settled law. In this regard the judgment in the case of ***A.R. Antulay v. R.S. Nayak*** **(1988) 2 SCC 602 at Paragraphs 42 and 183** is referred to.

> *"42. It appears that when this Court gave the aforesaid directions on February 16, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar case. See Halsbury's Laws of England,4th edn., Vol. 26, page 297, para 578 and page 300, the relevant notes 8,11 and 15 ; Dias on Jurisprudence, 5th edn., pages 128 and 130 ; Young v. Bristol Aeroplane Co. Ltd. Also see the observations of Lord Goddard in Moore v. Hewitt and Penny v. Nicholas. "Per Incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle v. Wakeling. Also see State of Orrisa v. Titaghur Paper Mills Co. Ltd. We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.*
>
> *183. But the point is that the circumstance that a decision is reached per incuriam, merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. When a previous decision is so overruled it does not happen – nor has the overruling Bench any jurisdiction so to do – that the finality of the operative order, inter parties, in the previous decision is over-ruled by a larger Bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter parties. Even if the earlier decision of the Five Judge Bench is per incuriam the operative part of the order cannot be interfered within the manner now sought to be done. That apart the Five Judge Bench gave its reason. The reason, in our opinion, may or may not be sufficient. There is advertence to Section 7(1) of the 1952 Act and to the exclusive jurisdiction created thereunder. There is also reference to Section 407 of the Criminal Procedure Code. Can such a decision be characterized as one reached per incuriam? Indeed, Ranganath Misra, J. says this on the point: (para 105)*
>
> *Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision*

without effecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being a larger Bench."

180. The Appellants has distinguished the Judgment in the case of *Bank of Ireland v Enforcement Directorate (Appeal No. 70 of 2009)* which has been relied upon by the Respondent Department. The Judgment in the case of Bank of Ireland *(supra)* is per incurium as it does not take into account the binding judgments inter-alia in reference to Section 6 of FERA, 1973. The Judgment in the case of Bank of Ireland is distinguishable on facts. In the case of *Bank of Ireland* (supra), although the amount which had been transferred abroad was brought back by the **Indian Overseas Bank (IOB)**, however, IOB did so under the directions of the Special Director, Enforcement Directorate. In this respect, Para 49 of the *Bank of Ireland* (supra) judgment may be referred to which reads as under-

"*49. It is vehemently contended by Ld. Senior Counsel Ms. Indu Malhotra that foreign currency taken out of country, has been brought back and thus no loss of foreign currency has occurred in this case. The penalty imposed against the appellants was not just justifiable.* ***However, the Special Director, directed the IOB to repatriate the amounts in question which was then repatriated to India.*** *Under the circumstances of this case, subsequent remedial act of bringing equivalent amount in foreign exchange back into India may not wipe out the character of the transactions and we find no force in the contention raised on behalf of the appellants."*

Para 49 above it is apparent that the said moneys were repatriated by the Indian Overseas Bank pursuant from a direction by the Special Director, ED. Under Section 63 of FERA, 1973 such a direction could be made by the Adjudicating Officer/ Special Director. The relevant part of Section 63 reads as under-

> *"**63. Confiscation of currency, security etc.**- Any court trying a contravention under Section 56 and **the adjudicating officer** adjudging any contravention under Section 51 may, if it or he thinks fit **and in addition** to any sentence or **penalty** which it or he may impose for such contravention, direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and **further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof, shall be brought back into India** or shall be retained outside India in accordance with the directions made in this behalf."*

180.1 However, in the present case the Appellant Bank had without any direction of the Adjudicating Officer in consultation with the Reserve Bank of India had repatriated the amounts which form the subject matters of the present appeals in the year **1993** itself and whereas the adjudication orders were passed in the subject matters only in the 2007.

It is for this reason that in the show cause notices that were issued to the Appellants, which form subject matter of the present appeals, although Section 63 had been relied upon by the Respondent/ Enforcement Directorate, but in the Adjudication Order, no Order/ Direction for repatriating the amounts was passed because as mentioned above the said amounts had already been repatriated by the Appellant Bank in 1993 and therefore in 2007, when the Adjudication Orders were passed, there was no occasion for the Special Director to pass such a direction.

180.2 The other fact in the case of *Bank of Ireland (supra)* the charge was that an amount of Rs. 4 Crores had actually been transferred abroad and that foreign exchange had left the shores of India, whereas in the present Appeals, it is not even a charge in the SCNs that any amounts were transferred abroad. In

the present Appeals the charge is limited to crediting a convertible vostrow account. Further, there is nothing on record to show that any amounts were transferred abroad from the said convertible vostrow account. Admittedly, Bank of Ireland was not an Authorized Dealer and was subject to the provisions of FERA unlike the Appellant Bank in the present matter which was an Authorized Dealer and to whom all the provisions of FERA did not apply. Detailed submissions in this respect have been made by the Appellants in their Written Submissions which may be referred to.

180.3 The Appellant Bank in the said case being an Authorized Dealer and a delegate of the Reserve Bank of India, has already been dealt with by the Reserve Bank of India for the same transactions, as in consultation with the Reserve Bank of India the Appellant Bank had remitted the entire foreign exchange which formed a subject matter of the present appeals, whereas in the case of *Bank of Ireland,* the only punishment which has been meted out to it is the imposition of the penalty amounts.

180.4 The repatriation of the foreign exchange by the Appellant Bank was in consultation with the RBI and no directions were issued to it by the Special Director, whereas in the case *Bank of Ireland (supra),* IOB repatriated the amounts only after a direction to that effect by the Special Director.

The main issue that arose for determination in the case of *Bank of Ireland (supra)* was the issue of abetment and the reference to Chapter X of ECM, 1987, the paras 39 to 47 of the said judgment have recorded the said aspect, thus ,*Bank of Ireland (supra)* does not deal with the legal arguments which have been raised by the Appellants in the present Appeals.

181. In the case of ***Needle Industries vs. NINIH Ltd.,*** **AIR 1981 SC 1298,** it is held that the license of the Appellant Bank ceased to exist so far as the transactions were concerned and therefore the Appellant Bank had contravened Section 8(1) of FERA. The facts and circumstances in the present case are different. The case of ***Needle Industries case*** is distinguishable on facts. *Needle Industries case* does not deal with authorised dealers or the licenses granted to them or the conditions contained therein. It is regarding a conditional permission granted to a company to carry on certain business and the company not following the said conditions and the consequences arising therefrom. The case of Authorised Dealers is quite different. Authorised Dealers are statutorily recognized under FERA, 1973 and as mentioned above Authorised Dealers are delegates of the RBI under Section 74 of FERA and are a class unto themselves and only the RBI under Section 6 Section 73 has been given the power to deal with them. Further, the Appellant bank has not violated any condition of the license issued to it by the RBI and admittedly the RBI did not cancel the license of the Appellants for the alleged contraventions. It is thus submitted that entire premise that there was a deemed cancellation of the license of the Appellant Bank is erroneous.

182. In the present case, admittedly the license was issued to the bank without any such conditions as conditions of Needle Industries, Secondly, the licence in the present case has not been cancelled under Section 6(2) of the Act. Thirdly after impugned transactions, the appellant banks have done thousand of transactions without any objections. Thus, the same does not help the case of the respondent.

183. The act does not define “person”, however, in section 2(p) is defined “person resident in India” and in Section 2(q) defined “person resident outside

India". The term "Authorised Dealer" has been used in contradiction to "person".

In the light of above, it is found that there is a clear distinction in the entire scheme i.e., all sections containing prohibitions (S.8 to S.32) are applicable to persons other than Authorised Dealers and that S.6 and Section 73A are applicable to Authorised Dealers. Mere use of the word "person" in Sections 8 and 9 cannot include an authorised dealer. An authorised dealer having been delegated powers under Section 8 and 9 and as Sections 8 and 9 requires a person to deal in foreign exchange only through or with an authorised dealer. All restrictions imposed under the said provisions are applicable to the person(s) other than the authorized dealer who cannot be charged by the ED to contravene the sections in dealing with itself.

184. In the present case, no doubt, that the contravention has happened, it may be due to oversight or negligence of the official of the bank, but it is clear that there was no mens rea involved. In the facts of the present case, this Tribunal is of the considered view that if any action was to be taken, it was to be taken by RBI. But it is not a such case where the appellants can be burdened with criminal liabilities. More than 28 years have already been passed from the date of transactions. The entire penalty amount has been deposited with the respondent. The appellants have made the statement that they are not pressing the refund of said amount. Many officers have retired. One of the appellants is passed away against whom the allegation was that he was the main officer who gave the advice to other officers which is contrary to the provisions.

185. Now, I shall deal with the provision of sub-section (4) and (5) of Section 6 of the Act. The relevant provision sub section (4) & (5) of Sec. 6 referred by the respondent has been reproduced below:

> ***6. Authorised dealers in foreign exchange.—***
>
> ***(4)*** *An authorised dealer shall, in all his dealings in foreign exchange and in the exercise and discharge of the powers and of the functions delegated to him under section 74, comply with such general or special directions or instructions as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised dealer shall not engage in any transaction involving any foreign exchange which is not in conformity with the terms of his authorisation under this section.*
>
> ***(5)*** *An authorised dealer shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declarations and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of, any contravention or evasion of the provisions of this Act or of any rule, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised dealer shall refuse to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person report the matter to the Reserve Bank.*

186. It is the case of the Respondent that Section 6(4) is a far reaching clause imposing multiple duties on the authorized dealer. The points that come to significance in the present case is the clause 'comply with such general or special directions or instructions". The validity has already been upheld in the earlier section of the memorandum. Without prejudice to the Respondent's submissions, it is submitted that even if the ECM does not gain the authority of a notification, it is to the very least to be interpreted as instructions, as clear from the grammatical construct of the cited Paras. Hence, the non-compliance of the said instructions transitions to the contravention of Sec. 6(4), as there is a failure of to perform the positive act (as so indicated by the use of the term 'shall').

It is stated that the second aspect of Sec. 6(4) is the refrain from performance, as so indicated by the use of the negative term 'shall not', through which it is elucidated that the authorized shall not act in anything which is conformity with his licence. The appellants have failed to furnish a copy of their licence and the terms and conditions laid therein. Hence, the Respondent is unable to analyse this clause further in terms of the present facts.

187. It is submitted that there is also a modifier clause in Sec. 6(4), namely 'all his dealings'. This is a deliberate and explicit insertion. Given the presence of this clause, the appellants' contention of acting in good faith stands nullified, as there is no scope for good faith delineated in the same. Operation in good faith stands cursory to the legislation, and only gains significance in the absence of particular legislation shaping the *modus operandi* of the performance of an act. Acting in 'good faith' does not override or frustrate any provisions of a legislation, especially the FERA, 1973, considering its nature. Furthermore, operations in good faith must be done with extreme care, and the reputation alone of an entity does not automatically attribute it worthy of good faith or entitle it to become lax in its compliances. This point is finely illustrated by the fall of Lehman Brothers, in 2007.

188. It is admitted on behalf of respondent that this section also confers a certain level of discretionary powers to the Authorized Dealers, but through the conduct of the appellants, it is clear that they have not exercised such powers. The cheque bearer did not furnish adequate information when depositing the same with the bank to effect the transfer. Furthermore, the bank, on its own volition filled out the necessary paperwork and structured the same in manner

to misrepresent and therein, circumvent acquisition of the necessary permissions of the RBI. Indeed, the language employed in this provision allows for a certain degree of relativity and allows for the application of the Authorized Dealer's own mind, but there are lines drawn and limiters placed. Analyzing the conduct of the appellants, the prudent may easily deduce that the appellants have not applied their mind when effecting the transaction. Instead of refusing the transaction, as so mandated under the clause, the appellants have acted in consort with the transferor. The appellants thereon, have failed to perform their duty of reporting the matter to the RBI. In light of all the stated, the appellants stand in contravention of the Sec. 6(5) of the FERA, 1973, on multiple aspects.

189. It is submitted that the reliance of the judgment by the appellants have relied on *M.C. Wagh v Jay Engineering Works*, which is not applicable as the Apex Court in the said case held that Sec. 12 was a complete code and envisioned all possibilities in the scope of imports. Hence, a person was liable to be charged with the contravention of Section 12 and Section 10 of the erstwhile Act. They have used the word 'all' to determine it as a complete code. There is a differentia between the repealed 1947 Act and the 1973 Act.

190. It is submitted that there is a distinction wherein there is no correlation between S.12 and S.10. Those are independent provisions designed to ensure performance in the two separate cases. The former S. 12 dealt exclusively with foreign exchange with regard to exports. It was the only provision of the former act to do so. However, it may be noted that the present section 6 & 8 are connected sections. The circumstances in which the provisions have been applied is also of material relevance. The contravention of directions issued by the RBI in the present situation ensure that the license issued to the

authorized dealer has been temporarily kept as invalid. Hence, they would be categorized for contravening in the provisions. S.6 primarily regulates Authorized Dealers. Whereas S.8 and S.9 are for contraventions made by all persons, including Authorized Dealers. The Authorized Dealer is not being charged for the same offence twice, rather he is being charged for the independent actions conducted that attract the liabilities.

191. It is alleged that there is no overt indication, as present in Section 12 of the erstwhile Act, that Section 6 is a complete code and immune to the other provisions of the Act. As so is the position, the Court may also not interpret the same to be a complete a code, as enforced in *CST v. Parson Tools and Plants - 1975 (4) SCC 22:*

> "If the Legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission by engraving on it or introducing in it, under the guise of interpretation, by analogy or implication, something what it thinks to be a general principles of justice and equity. To do so "would be entrenching upon the preserves of Legislature". The primary function of a court of law being jus dicere and not jus dare."

The legislature has wilfully omitted to make any indication, proposition or stance that Section 6 of the FERA is a complete code. It merely enlists the powers, functions, duties and prohibitions of the Authorized Dealer, therein delineating scope of such authorization. However, through this, there is no express or interpretative indication that the Authorized Dealer is exempt from committing any contraventions listed in the remainder of the Act. Rather a reading of the other provisions of the Act, 1973, stand to indicate the contrary. There is also a key differentiating factor between Sec. 12 and Sec. 6. Section 12

discusses in complete regard to 'exports'. Such is possible as the 'exports' is inanimate, therein having no intrinsic will. Thus, there is limited scope on the subject and possibilities are capable to be enumerated within the Section. However, Authorised Dealers are animate and are capable of exercising will. Hence, it is not possible to control the entirety of their actions within the scope of Section 6. Therefore, it was the wisdom of the legislature to cast a narrow net to ensure the control of specific functions, powers and duties of authorised dealers, whilst still ensuring that they are caught in the wide net of the remainder provisions of the Act. Hence, as there is no assertion of the legislature through Section 6 that it is a complete code, as per the cited authority, it is not appropriate to interpret Section 6 as a complete code, therein immunizing the authorized dealer from the other provisions of the Act.

192. It is submitted on behalf of respondent that the applicability of Section 6 gains further force when read with the provisions of Sec. 49(i) &Sec. (ii)(a), as reproduced below:

> ***49.*** *Failure to comply with conditions subject to which permissions, or licences have been given or granted under the Act to be contravention of the provisions of the Act.—Where under any provision of this Act any permission or licence has been given or granted to any person subject to any conditions and—*
>
> ***(i)*** *such person fails to comply with all or any of such conditions; or*
>
> ***(ii)*** *any other person abets such person in not complying with all or any of such conditions, then, for the purposes of this Act—*
>
> ***(a)*** *in a case referred to in clause (i), such person shall be deemed to have contravened of such provision; and*
>
> ***(b)*** *in a case referred to in clause (ii), such other person shall be deemed to have abetted the contravention of such provision.*

The failure to abide by and comply with the provisions of the ECM, with the relevant notifications tantamount to the breach of the conditions under which

the licence was issued. Hence, it may be noticed that, through the application of this Sec., the escape clause of Sec. 74 become mute.

192.1 **VALIDITY OF EXCHANGE CONTROL MANUAL, 1987**

It is submitted on behalf of respondent that the concerned provisions of the Exchange Control Manual, 1987 are valid, have the force of being direction and mandatory rules laid by the RBI, and have pertinent effect in the present case. It is the wrong contention of the appellants that the provisions of the Exchange Control Manual, 1987 are not, as not backed by notification, further that they have not contravened any other provisions, due to the nature of the relationship with the RBI, and finally that such provisions are repealed and no longer are effective on the present appellants.

The opening clauses of the ECM clearly state inforce certain provisions of the manual to be rules and directions issued by the RBI. This is iterated by Chapter 1.13 of the ECM, 1987 edition reads as under:-

1.13 – All amendments to Exchange Control Manual and other operative instructions to authorised dealers will be communicated in the form of A.D. Circulars. These Circulars will be issued in three separate annual series:

i) A.D. (M.A. Series) Circulars containing amendments to the Manual.

ii) A.D. (G.P. Series) Circulars containing general and procedural directions

iii) A.D. (COX Series) circulars notifying names of exporters placed in Exporters Caution List and deletions therefrom.

It is submitted that the Reserve Bank of India has been treating the Exchange Control Manual as the rule book as far as exchange control

is concerned; and that it will be issuing only "amendment" to the ECM. The AD (MA Series) Circulars are always issued by the Reserve Bank of India under Sec. 73(3) of FERA, 1973. Furthermore, the ECM is a "compendium or collection of various *statutory directions, administrative instructions,* advisory opinions, comments, notes, explanations suggestions, etc." Hence, the entirety of the ECM may not be merely dismissed as guidelines, as so attempted by the appellants.

192.2 The validity is further reinforced through the interpretation of the powers of the RBI, made in *Shakir Hussain v. Candoo Lal & Ors., (AIR 1931 All. 567)* and subsequently *Vasudev Ramachandra Shelat v. Pranlal Jayanand Thakur, ([1975] 1 S.C.R. 534)* wherein it was held that:

> *"Further a power possessed by the Reserve Bank under a Parliamentary legislation cannot be so cut down as to prevent its exercise altogether. It may be open to subordinate legislating body to make appropriate rules and regulations to regulate the exercise of a power which the Parliament has vested in it so as to carry out the purposes of the legislation, but it cannot divest itself of the power."*

192.3 The perusal of Para 10.1 of the ECM, clearly shows that the provisions laid therein are rules and regulations, not guidelines:

> **10.1 – General**
>
> *Rules and regulations governing opening of and operations on rupee accounts in the names of branches and correspondents outside India, other than those in Nepal and Bhutan, maintained by authorised dealers, are laid down in this Chapter. Rupee accounts maintained by foreign Governments and Government organisations outside India with authorised dealers in India are treated on par with accounts maintained by non-resident banks and hence are subject to the same regulations as applicable to accounts of non-resident banks.*

It is stated that the Exchange Control Board of RBI intended to treat the same as rules and regulations, at par with the directions issued through their circulars and notifications, and *not* in the manner of procedural guidelines.

192.4 The validity of the ECM is further emphasized by the fact that instructions have been issued to authorised dealers by the RBI that any credit of rupees to the account of a non-resident is treated as transfer of foreign exchange right from inception, when the Exchange Control came in India, and even before the first ECM was issued in 1949.

192.5 The relevant provisions in Chapter XVII Para 8 of the Exchange Control Manual, 1949 reads as under: -

> *"8. The transfer of rupees to the account of any non-resident bank branch or correspondent of an authorised dealer is regarded by the Reserve Bank of India as being equivalent to a remittance of foreign currency to the country in which he foreign bank is situated. Applications to make such transfers must be made on Form A-7, and must be referred to the Reserve Bank of India except in cases where authorised dealers would have been permitted to approve the applications had they been made for a remittance of foreign currency (vide Section VIII)."*

192.6 The same provisions continued in subsequent Manuals issued in 1959, 1965, 1971, 1978, 1987 and 1993, but under different chapters and is prevalent even now under the present Foreign Exchange Management, 1999. Under the FEMA 1999, the RBI had issued a *Circular No. A.P. (Dir Series) Circular No. 92 dated 4.4.2003* under Sec. 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999.

192.7 Focusing on the Notes to Form A3, the validity of the ECM, is heightened:

> *"While forwarding the application to Reserve Bank for approval, reference to Exchange Control Manual paragraph/AD circular in terms of which the reference is being made should invariably be cited."*

Further persuasive value is attributed to the validity of the Chapter /*X, ECM, 1987, by analyzing the provisions of the *Non-Resident (External) Account Rules, 1970* (Annexure 4), wherein transfers, in similar nature to the ones presently effected, into such accounts are prohibited. The basic nature of a Vostro Account and a NRE Account are the same. Hence, a parallel may be drawn to the same, wherein it is clear that crediting NRE Accounts are subject to the permission of the RBI. There is no such *intelligible differentia* between the two accounts, when scrutinizing the basic structure and nature of the accounts. Prudently speaking, the Respondent notices that the appellants have acted in willful disregard with the well settled rules and principles.

192.8 It is alleged that the violation of the ECM provisions are **not treated** as a separate contravention **nor** have any penal consequences been attributed to the same. The appellants are charged with the contravention of provisions laid in FERA, 1973, which arise out of the non-compliance of the ECM provisions.

192.9 It is submitted that the appellants are guilty of direct defiance against the directions of the ECM, is elucidated as under **Chapter 10.12** of the Exchange Control Manual, 1987, as reproduced below:

> **10.12 – (i)** Balances in rupees account of branches and correspondents situate in countries included in the External Group may be converted into any permitted currency without prior approval of the Reserve Bank. All such transactions are to be reported to the Reserve Bank both of form A2 on the foreign

currency leg and on form A3 for the rupee leg of the transaction, under the cover of the relevant R Returns.

(ii) Balances held in account of branches and correspondents in any of the countries in the Bilateral Group should not be converted into any foreign currency without prior approval Reserve Bank.

There is a clear prohibition on the conversion of the balances of the Bilateral Group of Accounts, as so stipulated in clause (ii). This is aligned to the nature of the policies engaged with the foreign country, and hence, the Authorized Dealer's conformity to this clause gains significant importance (discussed in depth in a later stage). For the present, it clear that by way of effecting the transfer, Grindlays has contravened and disobeyed the said clause, as the funds in the convertible account, are in the nature of foreign currency, and hence for the Authorized Dealer to have effected the transfer, they must have converted the funds of the Bilateral Account into foreign currency, keeping in line with Sec. 2(h) & 2(g), Para 10.3(ii) and 10.12 of ECM, 1987. Through this, the appellants stand in violation of Sec. 8(1) and Sec. 9(1)(a)&(e) of the Act.

192.10 The appellants are guilty in violation of **Chapter 10.17** – Credits to Accounts of Non-resident Banks, and through such violation, they have contravened Sec. 6(4) & Sec. 6(5) of FERA, 1973. Para 10.17 has been reproduced as below:

Following credits may be made to accounts of non-resident banks, subject to conditions stated against each:

(Form A1, A2 or A3, as indicated, should be completed in every case)

(a) Payments against imports into India covered by bills drawn in rupees and falling within the authority given to authorised dealers (Form A1)

(b) Payments for other purposes by residents of India of a type which authorised dealers are permitted to approve without prior reference to Reserve Bank (Form A2)

(c) Payments against TTs etc. in any permitted currency purchased by authorised dealer from overseas bank (Form A3)

(d) Transfers from other rupee accounts of overseas banks permitted under paragraphs 10.10 and 10.11 (Form A3)

(e) Transfers from Ordinary Non-resident Rupee accounts of individuals, firms and companies (other than banks) of a type which authorised dealers are permitted to approve without prior reference to Reserve Bank, provided *both transferor and transferee accounts are of the same country or of countries in the External Group (Form A2)*

(f) Transfers from Non-Resident (External) Accounts, provided transferor and transferee accounts are of the same country or of countries in the External Group (Form A2)

(g) Any other credit *specifically approved* by Reserve Bank on form A1, A2 or A3 as the case may be, provided conditions, if any, laid down by Reserve Bank are complied with.

NOTE: Rupee funds lying in these accounts cannot be accepted as interest-bearing deposits. If such a facility is desired by a bank from any Bilateral Group country, authorised dealers should seek approval of Reserve Bank before agreeing to grant the facility.

192.11 The transaction effected do not fall under the permissible transactions enlisted in the above paragraph, and hence, stand in direct

contravention of the same. It is important to note that the appellants may have negligently credited the account in incorrect belief that both the accounts were part of the External Group, but that the does not exonerate the appellants.

Furthermore, they have wilfully filed the incorrect form and misrepresented the nature of transaction on the Form A3. It is clear given from the nature of effected transaction, it is prohibited, and it may only be effected with the prior approval of RBI, therein falling within the purview of Form A1 or A2 was mandatorily to be fulfilled prior to the effect of the transfer. Hence, they stand in failure of compliance of the above rules. Their blatant disregard for the FERA and ECM is illuminated by the callous manner in which they filled the form (Annexure 8)

192.12 As the appellant have debited the non-resident bank account of BFEA, **Chapter 10.18** comes into application, wherein it reads as follows:

> 10.18 Following debits may be made to accounts of non-resident banks subject to conditions laid down against each:
>
> (Form A3 should be completed where specifically indicated)
>
> a) Payments to residents of India
>
> b) Transfers to Ordinary Non-resident Rupee accounts of persons, firms and companies (other than banks) and Non-resident (External) Rupee. FCNR accounts provided both transferor and transferee accounts are of the same country or of countries in the External Group.
>
> Note: ***

c) Interest on overdraft, if any, on the account

d) Transfers to other rupee accounts of overseas banks permitted under paragraphs 10.10 and 10.11 (Form A3)

e) Transfers in foreign currency permitted under paragraph 10.12 (Form A3). (Form A2 should also be completed for the foreign currency leg)

f) Any other debit specifically approved by Reserve Bank on form A3, provided conditions, if any, laid down by Reserve Bank are complied with.

This provision is clearly exhaustive in nature, and the debits made by the appellants do not fall under any of the above-listed provisions. Hence, the debit of the Non-Convertible (Bilateral) Account of USSR against the credit of the Convertible (External) Account of Girobank was not permissible, and with the application of this, stand in contravention of Sec. 8(1) of FERA, 1973.

192.13 The validity of the Exchange Control Manual of the Chapter X provisions are interpretively validated and supported by *Notification No.: A.D. (G.P. Series) Circular No. 1 dated 19.01.1991*, issued by the Exchange Control Department. This circular was issued prior to the transactions effected by the appellants. Furthermore, the appellants have incorrectly contended that there is no notification [Annexure 1] on this issue, therein failing their duty prescribed by the FERA, 1973, requiring the appellants to produce the relevant notifications prevailing at the time. The Notification reads as:

3. Submissions of R 5 Returns

(b) As the various *Debit & Credit (A1/A2/A3) forms submitted in support of transactions* are not properly sorted and attached in the order in which the various non-resident rupee accounts of banks are reported in the R 5 Returns, scrutiny and reconciliation of figures reported in the Returns become difficult.

(c) Although forms *A3 are required to be submitted in support of credits/debits to Non-residents rupee accounts* reported under column *'overseas banks/correspondents in R 5 Return,* some of the authorised dealers are not submitting the requisite A3 forms.

7. Irregularities in Forms A1 and A2

(a) *Sometimes the transactions are not reported on the appropriate remittances forms. The transactions required to be reported on A1 forms are reported on A2 and vice versa.*

(b) Rupee equivalent of foreign currency sold in not stated on the form. In certain forms, the amounts indicated in words and figures do not tally.

(c) *Single remittance form is used to cover more than one remittance.*

(d) In many cases, purposes of remittances is not stated and certificate on the reverse of the remittance form is not completed.

***

(g) *Full particulars of the import license etc. are sometimes not furnished in sections A and B of the remittance form (A1).* Also importer's code number is not recorded in the provided for the same in form A1.

***

192.14 It is submitted on behalf of respondent that from the relevant excerpts of the above Notification, it is clear that the provisions of Chapter X are indeed rules and directions of the RBI. This circular makes explicit reference to the forms and emphasizes the need for the forms and returns to be correctly filled and submitted. Even if it is to be said that Chapter X gains authoritative validity through this Notification, it is

still published prior to the effect of the transactions. Hence, it is clear that the Authorized Dealer violated the directions of the RBI, through the violation of Chapter X of the ECM.

Any doubt and contra opinion is completely abolished by way of *Notification No.: A.D. (G.P. Series) Circular No. 2, dated 16.02.1993* (Annexure 2), wherein the relevant clauses are reproduced below:

> *1. Attention of authorised dealers is invited to A.D. (G.P. Series) Circular No. 1 dated 29th January, 1991 wherein they were advised to avoid irregularities/discrepancies in compilation of R Returns and enclosures thereto before submission to Reserve Bank. Our Regional Offices have also been advising concerned branches of authorised dealers from time to time to strictly follow the instructions/provisions laid down in the Exchange Control Manual (1987 Edition).*
>
> *3. In this connection attention of authorised dealers is particularly drawn to provisions contained in Chapter 10 of Exchange Control Manual in regard to rupee accounts of non-residents banks (i.e. Vostro Accounts). As credits in the rupee accounts in the names of branches/correspondents outside India tantamount to remittance of funds outside the country, authorised dealers must obtain and submit forms A1 or A2 or A3, as the case may be, separately for each credit giving full details of the remittance as required. Forms A3 are to be submitted strictly for transactions relating to transfers from rupee accounts of other non-resident banks or for remittances received from abroad and full details as required should be furnished therein. It has also been observed that in some cases, authorised dealers have reported a few transactions relating to credits in rupee accounts of non-resident banks in forms A3 indicating purpose as 'inter-bank transfers' although they did not represent transfers from rupee accounts of other non-resident banks. Authorised dealers are, therefore, advised to ensure that in respect of all credits in Vostro Accounts which are on account of payments for imports and non-imports for transactions with public in India, forms A1 (for imports) or A2 (for non-imports) should invariably be obtained and submitted along with R Returns giving all the details as required. Further, authorised dealers should ensure before the funds are credited to a Vostro Account that they are convertible in the currency of the country of the Vostro Account holder as per Exchange Control Regulations. Authorised dealers may please note, in this regard, that if any credits made by them to the Vostro Accounts are found to be in violation of Exchange Control rules it will be viewed seriously by Reserve Bank of India and they will be liable for penal*

action. Further, it will also be the responsibility of authorised dealers to bring back the funds remitted by them in an unauthorised/irregular manner.

193. The case of the Appellant Bank is that it has not breached the provisions of sections 6(4) and 6(5) of the FERA 1973. Sections 6(4) and 6(5) primarily deal with the duties of an authorised dealer to comply with general and special instructions issued by the RBI and to not engage in any transaction outside the terms of its authorisation. There is no violation of the said provisions by the Appellants as is clear from the following:

(i) The SCNs do not refer to any particular general or special instruction of the RBI that has been violated by the Appellant bank.

(ii) The impugned transactions occurred in the course of inter-bank transactions and in many cases were initiated on the clear advice of reputed nationalised banks like Canara Bank etc. and BFEA the Central Bank of erstwhile USSR (equivalent to the RBI)and there was no reason to believe that the instructions being given by Public Sector Banks and the Central Bank of USSR were incorrect instructions and the said transactions were undertaken by the Appellants in good faith.

(iii) None of the transactions involved foreign exchange and the Appellant bank merely dealt with rupees and no other currency.

(iv) Assuming without admitting, it is submitted that every procedural irregularity does not amount to a contravention of a provision and does not attract adjudication proceedings. In support of the said contention, the Appellant has relied upon on the following judgments cited:

(a) Mohibali Naser vs. DOE (AIR 1989 Bom 237) (Paras 17 and 20).)(Pg. 127 of Vol. I)

"17. In view of the above decisions it must be held that it is not each and every infringement of any and every direction and instruction of the Reserve Bank which can attract adjudicating proceedings under FERA." ……

"20. It is apparent from the aforesaid decisions that it is not each and every infringement of FERA but is only those which result in infringement of any provision, directions or instructions of some matter or substance that would attract *adjudication proceedings. Since the signing of application forms by the employees or representatives of the petitioner has not resulted in any defalcation of foreign exchange or infringement of any matter of substance, in my judgment, the proceedings for adjudication and the findings arrived at therein culminating in order of confiscation are bad in law and liable to be struck down."*

(b) UOI vs. Mohibali Naser – (MANU/MH/0341/1992) (Paragraph 5)(Pg. 143 of Vol. I)

"5. As regards the impugned order of adjudication dated 20.06.1988, we agree with the finding of the Ld. Single Judge that the Petitioners could not be held guilty of aiding or abetting the contravention of the provisions of the Act by the bank. In fact, we have been informed that the prosecution against the bank has been dropped by the Government…

In the case of Needle Industries (India) Limited vs. Needle Industries Newey (India) Holdings Limited reported in MANU/SC/0050/1981 : [1981] 3 SCR 698, the Supreme Court has held that all the conditions to a license or permit may not be of the same importance or rigour but when a condition which is vital is breached it would result in an offence. In other words, mere breach of condition would not Ipso facto result in contravention. In the present case as mentioned herein above in the evidence indicates irregularity or a breach but none the less it would not constitute contravention by the Petitioners and therefore, the Ld. Single Judge was right in coming to the conclusion that the Petitioner were not guilty aiding or abating the contravention of the provisions of the Act as found against the bank.

(c) Tulip Star Hotels Limited vs. Special Director of Enforcement (2014) 5 SCC 162 (Paragraphs 7-10, 13-18 and 22) (Pg. 150 of Vol. I)

194. It is submitted that S.6(4) & 6(5) have not been contravened as alleged. S. 6(4) and S.6(5) deal with the duties of an Authorized Dealer.

Section 6(4) provides as follows:

> *"S.6 (4) An authorized dealer shall, in all his dealings in foreign exchange and in the exercise and discharge of the powers and of the functions delegated to him under Section 74, comply with such general or special directions or instructions as the Reserve Bank may, from time to time, think fit to give and except with the previous permission of the Reserve Bank, an authorized dealer shall not engage in any transaction involving any foreign exchange which is not in conformity with the terms of his authorization under this Section."*

195. Section 6 (4) contains two limbs:

(a) the duty of the authorised dealer in all his dealings in foreign exchange to comply with such general or special directions or instructions of the Reserve Bank; and

(b) the duty of the authorised dealer not to engage in any transaction involving foreign exchange that falls outside the terms of its authorization to deal in foreign exchange.

196. It is submitted that the Noticee Bank in the present case has not breached either of these conditions. That the present Show Cause Notice does not refer to any particular general or special directions or instructions of the Reserve Bank that has been violated by the Noticee Bank. The Show Cause Notice has merely alleged contravention of certain provisions of the Exchange

Control manual without any reference to any notification issued by the reserve bank containing the said Direction/ instruction.

197. S.6(5) provides as follows:

> *"(5) An authorized dealer shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declarations and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorized dealer shall refuse to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person report the matter to the Reserve Bank."*

198. It is submitted that the Noticee Bank has duly discharged its obligation under S.6(5). It is submitted that nearly all the transactions involved in the subject Show Cause Notices occurred in the course of Inter-Bank Transactions and in many cases were initiated on clear advice from reputed nationalized Indian bank like Canara Bank, Indian Overseas Bank, Bank of Baroda, Punjab National Bank, and overseas Banks like Standard Chartered Bank and BFEA, which is a nationalized Russian bank. There were underlying import contracts in some of the transactions where under payments were permissible under the Exchange Control Manual. It is further submitted that Noticee Bank had returned the Instructions to Canara Bank and Standard Chartered Bank for crediting the VOSTRO convertible account, since it found that there was a discrepancy/error in the instructions. The Noticee Bank had exercised due diligence to satisfy itself that the transaction was not designed for the purpose

of any contravention, or evasion of the provisions of the FERA Act, 1973 or any rule, notification, direction or order made thereunder. As submitted above none of the transactions involved foreign exchange. The Noticee Bank merely dealt with rupees and no other currency. In the said account all moneys were maintained in Indian Rupees only with a right to receive the same in foreign currency. The Foreign Constituent had merely received a right to receive foreign exchange but utilized the rupees locally only and there was not even a single foreign currency transaction out of the said funds.

199. It is also submitted that ever procedural irregularity could not be said to be an offence, and especially an inadvertent irregularity. In the instant case there was an external conspiracy of which the Bank became a victim. The Noticee has gained absolutely nothing and in fact has suffered losses. On plain reading of section 8 makes it apparent that the provisions of section 8 do not have any application to an 'authorised dealer' and the prohibitions under section 8 are against a person other than an authorised dealer.

200. The Act has specifically drawn a distinction between an 'authorised dealer' and 'other person' who deals in foreign exchange as is apparent from section 74 read with section 6. The Appellant being delegates of RBI authorised to deal with Foreign exchange under section 8 and 9. An authorised dealer has powers under sections 8 and 9 which requires a person to deal in foreign exchange only through or with an authorised dealer, an authorised dealer cannot commit a contravention of the said section. The adjudicating officer failed to consider that the Supreme Court in *Ram Ratan v. Director of Enforcement, (AIR 1966 SC 495)* while dealing with the scope and application of S. 4(1) of the 1947 FERA which is in *pari materia* with Section 8 of FERA, 1973 held as follows:

> "*4… Section 4 (1) of the Act was amended in year 1964, but we are concerned only with the said sub-section as it stood before the amendment. To attract Section 4(1), a resident of India other than an authorized dealer shall have lent to any person, not being an authorized dealer, any foreign exchange. It is not disputed that the said bank was not an "authorised dealer" within the meaning of the said sub-section. If so, the only question is whether the appellant, in depositing the said amounts in the current accounts of the various branches of the said bank, lent the said amounts to the bank.*"

201. It is submitted on behalf of appellant that the scheme of the Act has to be taken into consideration while interpreting the statute and different words should not be construed in isolation of the other sections of the statute, as well as the scheme of the statute.

202. It is stated that the Respondent has tried to distinguish the aforementioned judgment by stating that this judgment discussed the ambit of Section 8 and not Section 9 of the FERA, 1973 and that the judgment focused on the contravention of an individual, not an authorized dealer. The submission of the Respondent has no substance as the judgment lays down that the restrictions placed under section 8 are not applicable to an authorised dealer irrespective of the fact that the person charged therein was an individual. The said principle laid down therein will apply in case of section 9 also.

K. Sadasivam vs Special Director ED- MANU/TN/0626/2010 at Para 9(Pg. 51of Vol. I)

> *"9. With regard to the first fold of submission, I find that it is the contention of the appellant that the S.B.I. Extension Counter at Anna International Airport is the authorised dealer, within the meaning of* Section 6 of the FERA Act. *The appellant was working as Assistant Manager in the said bank, the authorised dealer, the appellant is empowered to purchase and sell foreign exchange. Section 8 of the*

FERA Act deals with the prohibition of a person dealing, selling and purchasing of foreign currencies other than the authorised dealer. Therefore, the contention of the appellant is that when he was an employee under the authorised dealer, the show cause notice issued under the provisions of Sections 8(1) and (2), which are meant for other than the authorised officer, is not legally sustainable. In this regard, I find that the allegation against the appellant is that he had purchased the foreign currencies by using his own money with an intention to sell the same for a higher price. Moreover, as the employee of the authorised dealer, namely, State Bank of India, Extension Counter, Anna International Airport, he is dealing with the foreign currencies. When once he contravenes or violates the provisions of the FERA Act, his action is totally independent in nature and not connected with the activities of the authorised dealer, namely, the State Bank of India. Therefore, in my considered opinion, the notice issued by the respondent under Sections 8(1) and 8(2) of the FERA Act as against the appellant cannot be said to be ex-facie illegal. Therefore, in my considered opinion, there is no need for the respondent, by treating the appellant as an authorised agent, to issue notice under different section, namely, 6(4) of the Act."

203. It is submitted that section 6 of the FERA 1973 is a complete code in itself for an authorised dealer. Further, even otherwise there has been no contravention of the Act as there has been no outflow of foreign exchange and no loss of foreign exchange has been caused. Admittedly, the Appellant has already brought back the foreign exchange, which is the subject matter of the present proceedings, into India.

204 The word "person" used in section 50 is to be interpreted to persons who are subject to the prohibition/restriction contained in Sections 8 to 31 of the Act i.e., persons other than authorised dealers. The Legislature distinguishes between authorised dealer and other persons. The authorised dealer is a delegated of the Reserve Bank of India by virtue of Section 74 and having powers to deal with foreign exchange in accordance with the terms of the authorization under Section 6, the Legislature did not intend for the investigative wing to punish a delegate of the Reserve Bank of India.

205. A perusal of Sections 8 to 31 which imposes various restrictions on "person" in dealing with foreign exchange, are by their very nature, inapplicable to authorised dealers, whose very business as authorised by the Reserve Bank of India, is to deal in foreign exchange. Under S.18, an authorised dealer is even empowered to ensure compliance of the Section by another "person". Hence, the penalty imposed under S.50 and 51 are not applicable to an authorised dealer. Any violation of S.6, which is the only section that applies to an authorised dealer cannot attract penalty under S.50, as S.50 applies to a "person" other than an "authorised dealer".

206. The Appellants have relied upon M.G Wagh to show that when a provision is complete which provides appropriate measures to safeguard the interest of foreign exchange then no other provision is applicable as such an aid will render the provision which is complete in itself. In this case it was upheld that Section 12 in itself is a complete code and hence Section 10 of the 1973 Act is also not applicable.

207. The Respondent has tried to distinguish the case law from the facts of the present case by stating that there is a distinction wherein there is no correlation between S.12 and S.10. These are independent provisions codified to ensure performance in the two separate situation. Section 6 & 8 are connected sections if those are read co-jointly. While Section 6 provides only and only for the duties and obligations of an authorized dealers in matters of foreign exchange, Section 8 deals with the restrictions that a person has to face while dealing with foreign exchange. In Section 6(4) the word "instructions" are also used. Section 50 only refers to the term "direction" but the word "instruction" is not mentioned therein and as such the Enforcement Directorate cannot penalise a person for not following instruction under

Section 50 and it is only the RBI which can take action for breach of such instructions under Section 6, who even cancelled the licence depending upon the seriousness of the matter. Since Section 6 deals with every possible situation and provides for appropriate action against authorised dealers is specifically and specially dealt with therein, there is no valid reason for extending Section 50 to an authorised dealer. Section 6 deals with the appointment of an authorised dealer, punishment by revocation of licence and the obligations and duties of an authorised dealer. Since this section is all encompassing, there appears to be no need to import the provisions of Section 50 for actions of the authorised dealer because the authorised dealer being a delegate/agent of the Reserve Bank of India and carries on the functions of the Reserve Bank of India as its agent. The authorised dealer, under Section 6 (4), is required to comply with general or special directions or instructions issued by the Reserve Bank of India from time to time. This would generally relate to dealings in foreign exchange pursuant to the powers delegated under Section 74. The Reserve Bank of India also has the power to conduct inspection of authorised dealer since all authorised dealers are scheduled banks (see para 1.4 of the Exchange Control Manual) who are governed by the Banking Regulations Act. Furthermore, the Reserve Bank of India is the most appropriate authority to understand, appreciate and deal with the breaches of the obligations of an authorised dealer since they are essentially carrying out the functions of the Reserve Bank of India itself.

208. In the present case, after realizing its overlap, the appellant bank has brought the entire amount, RBI is aware about it. Despite of breach, RBI has not chosen to revoke the licence. It may be the reasons that bank has not derived any benefit out of such lapse/breach. The bank after the said lapse has done thousands of transactions without any allegation of breach.

209. Counsel for the appellant has also addressed the alternative argument without prejudice, it is submitted that section 8 has not been contravened. In view of definition of foreign exchange provided in section 2(h), it is submitted that credit of rupees to Vostro account does not constitute foreign exchange and hence, section 8 has no application. The Appellant submits that to be able to "otherwise transfer" within the meaning of section 8 it is necessary that the person transferring should have complete dominion on the amount and right of disposition over it. The Appellant not having acquired any interest in the property could not have committed any contravention of transferring the same within the meaning of section 8.

210. The Appellant relied upon the judgment of the FERA Board in ***H.H. Naeems & Co. vs. B.O.E. [1989] 46 Taxman 32 (Paras 31, 34 to 41, 44 and 48 to 50)*** wherein it has been held that the right to convert rupees into foreign exchange does not make the rupees foreign exchange within the meaning of section 2(h). It is further submitted that in light of the judgment in the case of H.H. Naeems the aforesaid issue was no longer res integra and the adjudicating officer ought to have followed the same. In this regard the judgment in the case of ***Safiya Bee vs. Mohd. Vajahath (2011) 2 SCC 94 (Paras 27, 28, 29 and 30)*** *is also ref*erred.

211. The Respondent has tried to distinguish this case on the ground that it is a FERA Board Order and that it is not binding upon this Tribunal.

212. It is rightly submitted that the subject matter was with regard to a contravention made by a Company, not an authorized dealer and that an Authorized Dealer is inherently in a position to acquire, maintain dominion and disposition over the foreign exchange, unlike that of a company. The contention

of the Respondent has no force as the order of the FERA board will be binding on this Tribunal unless it is distinguished or varied or overruled by the Tribunal. Further, the said judgment lays down the meaning and scope of 'foreign exchange' independently of the person who is being charged for the offence of acquiring foreign exchange and will therefore be applicable to the present case also involving an authorised dealer.

213. The Appellant also placed the reliance upon the judgment in the case of ***R.R. Holdings Vs. Director of Enforcement, ([1997] 90 Taxman 322)*** wherein the Hon'ble Court held that it is well established that the question of transferring the property or foreign exchange in violation of Section 8 would arise only if the person charged is already in complete control of the same.

214. The Respondent has tried to distinguish the said case on the ground that it is a FERA Board Order and hence, is not binding upon this Tribunal. The Respondent has stated that the charges levied against the appellants are on par and compatible with the rationale derived in the above order. The case of RR Holdings exactly deals with the said situation as is clear from the aforesaid paras of the judgment:

> "*12…There can be no transfer unless a person has a complete domain on the amount and the right of disposition over it, Since, under the contracts, amounts were not to be paid immediately to the appellants, the question of having acquired a right of disposition on the said amount did not arise and accordingly the question of the transfer thereof by the appellants would also not arise...*
> *13. An inchoate right to receive payment does not cloth the person having that right with the authority to own and dispose off the amounts to be so paid at his discretion…*
> *14. It is well established as to whena person can be sad to have acquired any species of property including foreign exchange. The process of acquisition follows the concrete results in the taking of the property so that the acquirer comes into actual possession and is in a position to appropriate the same. It is 'taking'*

in law for all purposes. The question if transferring property or foreign exchange in violation of Section 8(1) would arise only if the person charged is already in complete control of the same reference is invited to Pandharinath Kishtnah Reugultawar v. DY. Director of Enforcement (1981) 51 Comp. Cas. 163 (BOM). The transfer involves actual giving away. A mere right created by words of mouth or otherwise will not amount to a transfer of property as such. In the instant case the Appellant not having complete domain on the amounts which were simply payable to them, cannot be said to have otherwise transferred the same to APA."

215. The Appellant Bank had merely dealt with rupees and no other currency. In the said account all moneys were maintained in India Rupees only with a right to receive the same in foreign currency. The Foreign Constituent had merely received a right to receive foreign exchange but the same was not converted into foreign exchange and there is not even an allegation to this effect. The Appellant having thus not acquired any interest in the property could not have committed the contravention of transferring the same within the meaning of section 8 of FERA.

216. It is further submitted that Appellant Bank had in fact returned the instructions from Canara Bank for crediting the VOSTRO convertible account, since it found that there was a discrepancy/ error in the instructions. The Appellant Bank had exercised due diligence to satisfy itself that the transaction was not designed for the purpose of any contravention, or evasion of the provisions of the FERA Act, 1973, or of any rule, direction, notification or order made thereunder.

217. The Appellant has relied upon the judgments in the case of ***Eastern Agencies Vs. Union of India ([1935] 58 Comp. Cas. 267)*** and ***P.K. Renguntawar Vs. Deputy Director of Enforcement, ([1981] 51 Comp Cas 163 (Bom)) (Para19)***.

218. On the other hand, the Respondent has relied on the case of *Needle Industries vs N.I.N.I.H Ltd. (AIR 1981 SC 1298)* to submit that a permission granted subject to certain conditions would cease to exist in the event of non-compliance of the conditions. On breach of this condition, the license will cease to exist. The judgment in the case of Needle Industries is not applicable to the facts of the present case. The factual matrix of the Needle Industries case is different and the ratio of Needle Industries has to be restricted to the facts of that case itself. Needle Industries case was rendered in the context of section 29 which provides for condition precedents for establishment of business in India. Whereas, in the present case, the compliance of instructions issued by the RBI by the authorised dealer is a condition subsequent and contravention of any such condition does not terminate the license automatically.

219. M/s ANZGB was holding 200 Vostro Accounts in its branches at Connaught Place, New Delhi and M.G. Road, Mumbai. There had been no irregularity in the handling of these accounts, except during the period April 1991 to Dec 1991, when ANZGB along with various other Nationalized Indian Banks and Foreign Banks, became the victims of a conspiracy external to the Banks.

220. It is stated that in the transactions covered by all Show Cause Notices, all the credits were made to Giro Bank sub A/c Eastern Suburbs. Eastern Suburbs had opened an account with M/s Giro Bank during the period April 1991 to August 1991. M/s. Eastern Suburbs was a Private Limited Company of which the Directors were one Mr. Keith Fairbrother and his wife. They had appointed Mr. Kuldeep Singh Sood of Transworld International in India as their agent. Mr. Kuldeep Singh Sood in his Statement before the Enforcement Directorate dated 27.01.1993 had stated that he was rendering "Consultancy

Service" and arranging finances from international sources and from Indian Banks. He also stated that Eastern Suburbs Limited was a client of their Organization. He has further admitted that his Consultancy Service was earning a "Commission" for affecting the said transfers.

221. It is alleged on behalf of appelalnts that in all the transactions covered by SCNs 1,2,5,7,9,13,17,21,25,29,33,37,42,47,52,57,62,67,71 and 80, the beneficiary was "M/s Eastern Suburbs Limited". The Modus Operandi that was adopted by Keith Fairborther of M/s Eastern Suburbs in collusion with Kuldeep Singh Sood of Transworld International, was that in all cases, Bankers cheques were issued and presented to the Paying Bank which was maintaining the VOSTRO Account of BFEA. The Paying Bank would issue instructions to the collecting bank, which was maintaining the convertible rupee Account of Giro Bank to effect the credit. M/s Eastern Suburbs was maintaining an account with GIRO Bank.

- In the very first transactions covered by SCN 57, 62, 76 Bankers Cheques, Demand Draft (in SCN 76) were issued by Canara Bank, Nationalized Indian Bank;

- In SCN 2,7,37,42,47,52,67,71 and 80 Bankers Cheques from BFEA were issued. It is pertinent to mention that BFEA was the Nationalized Bank of USSR.

The aforesaid would reveal that these transactions occurred in the course of Inter-Bank Transactions. It is pertinent to mention that the first three transactions, in point of time were initiated from a Nationalized Indian Bank which had forwarded the Cheques with its covering advice and with an offer to provide the Foreign Inward Remittance Certificate. As a consequence, M/s ANZGB was misled into believing that these were permissible genuine transactions.

222. It is alleged that the Modus Operandi employed was to debit the non-convertible VOSTRO account of BFEA held with various Indian Banks and issue instructions from these banks for effecting credit to the Convertible Rupee Account of Giro Bank, and Standard Chartered Bank, with which Eastern Suburbs was maintaining its accounts.

223. It is submitted to mention that the BFEA had 14 accounts with 11 banks in India at the relevant time viz –

- SBI – 3 Accounts of BFEA
- Central Bank of India
- Bank of Baroda
- Indian Overseas Bank, Madras
- Indian Bank
- Bank of India
- Canara bank
- UCO bank
- Punjab National Bank
- Union Bank
- ANZGB
- Reserve bank

With respect to SCN Nos. 1,5,9,13,17,21,25,29 and 33, Tested Telexes were sent by BFEA to ANZ, payable to Indian beneficiaries as per their records. Sample Contracts relating to the said transactions were provided. The Seller viz. Eastern Suburbs gave its address as 90, M.G. Road, Bombay. The Buyers were “Soujuzzdravexport”, Moscow.

224. The Contract was signed in January. 1991, with details of Contract no., Item, and Payment Terms/Instructions. The permission to import was obtained via Ministry of Foreign Economic Relations, Moscow in 1991. Sojuzzdravexort was a fully owned State enterprise in 1991. These were underlying import contracts in which payments were permissible under the Exchange Control Manual.

225. ANZ also made representations with RBI to take up the issue of "defective" import permits issued by the Ministry of Foreign Economic Relations of Russia in this case.

226. Later enquiries with Giro bank revealed that eastern suburbs had opened its account with Giro Bank in April 1991. Once these transactions were completed in August 1991, Eastern Suburbs closed its account, with Giro Bank.

227. It is submitted that the noticee Bank had acted bonafide. The monies were credited to the local accounts of non-resident banks in good faith, in the course of inter-bank transactions with reputed banks, including nationalized banks such as Canara Bank, Indian Overseas Bank, Bank of Baroda, Punjab National Bank, and overseas Banks like Standard Chartered Bank, on their clear advice.

228. It is further submitted that M/s ANZGB had in the case of the earliest transaction viz Canara Bank returned the Instructions for crediting the VOSTRO convertible account, since it found that there was a discrepancy/error in the instructions. However, Canara Bank subsequently issued fresh instructions to M/s ANZGB along with its covering letter and offered to provide the FIRC, if required. As a consequence, the transaction was processed.

229. Even in the case of the two transactions, covered by M/s SCB i.e. SCN 2 and 7, M/s ANZGB returned the advice. However, subsequently the cheques were put through National Clearing of RBI with almost 1000 other cheques resulted in the processing of the transactions. Thereafter, no further transactions were processed by ANZGB.

230. In fact the Connaught Place Branch of ANZGB returned instructions when it received the following Tested favouring Eastern suburbs on

- 16.10.1991-Rs INR 6,580,000
- 16.10.1991 – RS INR 8,175,000
- 14.01.1991 – Rs. 56,762.76

These telexes were returned unprocessed, and ANZ prevented a further amount of Rs. 1.5 crores from being further credited.

231. It is further submitted that M/s ANZGB and its officer have acted in a completely bonafide manner which would be evident from the fact that all the transactions were faithfully and reported by the filing of A-3 forms and R-5 return to the RBI which contained the particulars of the transactions. There is no evidence whatsoever of any staff collusion in respect any of the alleged transactions.

232. The Appellants have contended they had only transferred Indian currency by demonstrating that the amounts reflected in the books of the Vostro Account of Girobank Plc. were in rupees. However, this contention is not tenable as it is not permissible in law to maintain Vostro Account balances in foreign exchange, as clear from Note A to Para 10.2 of the ECM:

"Opening of accounts expressed in any foreign currency in the names of overseas banks in the books of authorized dealers in India in **not permitted**."

Therefore, the balances in Vostro Accounts must necessarily be maintained in Indian currency, which may be drawn into foreign exchange at the spot exchange rate.

233. The Appellant's contention is that Chapter X of the ECM is ultra vires the FERA, 1973 is also not tenable. If the said contention were to be accepted, it would mean that an Authorized Dealer can effectively send out the entire country's foreign exchange to a correspondent bank; and that they also can maintain balances in foreign currency of their correspondent banks, thereby creating a lien over the foreign exchange reserves of the country, which defeat all the objects and purposes of FERA, 1973, and also would in effect transpose the Authorized Dealer into a Reserve Bank in itself.

234. In view of the aforesaid, it is clear that when there is no substantial breach or defalcation of foreign exchange, an authorized dealer should not be penalized. Consequently, no case for imposition of penalty has been made out against the Noticee Bank. It is evident that it was an inadvertent lapse. The bank or any of its officials were not involved in any conspiracy. They do not have any link or nexus either with Keith Fairbrother, Kuldeep Singh or any employee of his company. It is a matter of fact that Easgtern Suburbs was maintaining an account with Giro Bank.

SECTION 63 OF FERA

235. S. 63 provides for confiscation by a Court or any adjudicating officer of currency, security or any other money or property in respect of which contraventions have taken place. It is submitted that S.63 has no application to an authorised dealer as they are merely agents of the Government/ Reserve

Bank of India and the foreign exchange held by the authorised dealer really belongs to the Government and the authorised dealer is dealing in the same only in the capacity as a delegate of the Reserve Bank of India.

Admittedly, ANZ Grindlays Bank on becoming aware of the fraud played on it, made a proposal to make repatriate the foreign exchange equivalent to the rupees credited to the Vostro account. The said proposal was accepted by the Reserve Bank of India who imposed certain conditions as communicated to the Bank by a letter of Reserve Bank of India dated 30.03.1993. In compliance with the directions given by the Reserve Bank, ANZ has voluntarily repatriated an amount of Rs.82,428 Crores which far exceeds the amount involved in the alleged irregular transaction which was Rs.66.42 Crores. Admittedly, the proposal of the Appellant, acceptance of the Reserve Bank of India as well as the repatriation was prior to the issuance of the Show Cause Notices. Thus, it shows that Bank has in good faith completely made good the foreign exchange loss, if any, to the country. Therefore, nothing survives under Section 63 of FERA.

235.1 It is submitted that the transactions in question took place in the year 1991, which allegedly are in contravention of this Exchange Control Manual, 1987. However, in 1993, in keeping with the Government's Policy of liberalization, the Exchange Control Manual underwent a significant change, and various provisions relied upon in the show cause notices, were drastically amended or deleted.

235.2 It is submitted that the present Show Cause Notices were issued in 1993 prior to the Exchange Control Manual of 1993 becoming operational on 31.12.1993. It is submitted that the offences alleged in the Show Cause Notice are not ex-facie offences under the sections of the FERA but only under the Exchange Control Manual issued by the Reserve Bank. It is submitted that,

the relevant directions i.e., Chapter 10 of the Exchange Control Manual, 1987 were omitted in the next Exchange Control Manual i.e. 1993.

235.3 It is submitted that the omission is not accompanied with any saving clause. Section 6 of the General Clauses Act does not come to the aid of the omitted directions as it is applicable only to repeal of Acts and not to repeal of Rules; also because S.6 is not applicable to omissions but only to repeals. The following judgments are apposite in this regards:

a. **Rayala Corporation (P) Ltd. and MR Pratap Vs. Director of Enforcement, New Delhi, (AIR 1970 SC 494) at Paragraphs 15 and 16.**
b. **Kolhapur Canesugar Works Ltd. Vs. Union of India &Ors., (2000 (2) SCC 536) at Paragraphs 32, 34, 35 and 38**

235.4 It is also well settled that in order to save delegated legislation, the saving clause must expressly mention the name and title of delegated legislation i.e. cost of save. In this regard the judgment in the case of **Air India Vs. Union of India (AIR 1996 SC 666) at Paragraph 8** may be seen.

235.5 The appellant has denied that the Exchange Control Manual constitutes a form delegated legislation, it is submitted that the same must be expressly and specifically saved. Section 49(4) of the FEMA, 1999 whilst setting out the various notices and permissions, etc. issued under FERA 1973 could be saved insofar as they are not inconsistent with the provisions of FEMA. However, S.49(4) has not specifically named the Exchange Control Manual. In view of the aforesaid decision, the Exchange Control Manual, 1987 is not saved and hence, no alleged contravention of the same can be made out.

235.6 The various show cause notices allege contravention of paras 10.3 (ii), 10.12 (ii) and 10.17. It is submitted that 10.3 (ii) of the Exchange Control Manual merely deals with the crediting a Vostro Account and it provides that any remittance to rupee account of non resident branch or correspondent would be equivalent to remittance of foreign currency.

However, the Exchange Control Manual does not provide that the same would be an offence under the Manual or under any provision of FERA, and therefore, the violation of the said provision may give a cause of action to the RBI to initiate disciplinary proceedings against the Bank, if at all, but would not constitute any offences.

It is submitted that para 10.12 (ii) prohibits only converting of rupee balances of non-resident branch or correspondent in bilateral group into foreign currency and does not apply to the said transactions as the allegations against the notice bank is that of crediting a Vostro Account, which is covered by 10.3 (1) (ii).

235.7 It is submitted that none of the Show Cause Notices mention as to which clause of para 10.17 of the Exchange Control Manual was violated and therefore the said clause could not be invoked as the show cause notices are vague and therefore void.

In light of the aforesaid, it is submitted that violation of the alleged paras of Exchange Control Manual does not constitute an offence.

235.8 It is stated that the assuming while denying that Chapter X of the ECM, 1987 is a piece of delegated/ subordinate legislation it is submitted that the same is ultra vires the FERA, 1973. It is submitted that the definition of

'foreign exchange' as contained in section 2(h) of FERA cannot be expanded by way of a delegated legislation.

235.9 It is submitted that it is settled law that a delegated legislation cannot widen the scope or reach of the parent statute. The Judgment in the case of **Agricultural Market Committee v. Shalimar Chemical Works Ltd., (1997) 5 SCC 516 at Paragraph 26, 27 and 28** may be referred to in this regard.

235.10 It is submitted that the concept of convertible rupee accounts, vostro accounts, etc. are alien to the FERA, 1973 and find mention only in Chapter X of the ECM, 1987. Thus, the deeming provision in Chapter X of the ECM, 1987 that merely crediting a convertible rupee accounts is deemed to be a dealing in foreign exchange is a concept beyond than what is envisaged in the parent statute i.e. FERA, 1973 where-under there is no such deeming provision or legal fiction. It is submitted that the RBI which issues the ECM does not have the power to widen the scope of the parent statue by introducing the concept of 'equivalent to' and the definition of 'foreign exchange' cannot be widened by the ECM. Furthermore, the RBI cannot create new offences which are not there in the parent statue as the same would be a case of excessive delegation. It is submitted that an offence must have a sense of permanence. It is pertinent to note that neither the ECMs are made public nor are they gazetted but are only given to the Authorised Dealers. It is submitted that the adjudication proceedings under FERA are quasi-criminal in nature and therefore the provisions of the said statute have to be strictly construed. It is thus submitted that the scope and application of FERA cannot be widened by a delegated piece of legislation and the delegated piece of legislation i.e. the Chapter X of the ECM, 1987 is ultra vires the FERA, 1973 to that extent.

235.11 It is submitted that Chapter X of ECM, 1987 does not widen the scope of FERA, 1973 and that FERA contemplates the credit to a convertible rupee account to be a transaction in foreign exchange. The respondent on the other hand interprets Sec. 2(g) & (h) of FERA 1973 to submit that as 'Foreign Exchange' means 'Foreign Currency'. It is submitted that the aforesaid interpretation is totally fallacious as there is no concept of "non-convertible rupees" inasmuch as all rupees are capable of being converted into foreign exchange pursuant to general or special permission granted by the RBI and as such all balances in all accounts are technically "payable" in foreign exchange. It is submitted that "foreign exchange" as contemplated under Sec. 2(h) refers to balances denominated in foreign currency. It is submitted that if the interpretation of Department is accepted then all the funds lying in an account will be treated as foreign exchange which would lead to absurdity. Further, the Department has made contrary interpretations as per its own convenience, as on one hand it has stated that any balance or transfer into an account, although maintained in INR but payable in foreign currency at option is still foreign currency, but on the other hand it has stated that it is necessary to examine the nature of an account as in an ordinary rupee account, an Indian may freely remit foreign exchange which will not be considered as foreign exchange till the time of remission of the funds. It is submitted that the Department contention that Para 10.3(ii) of ECM, 1987 does not create any administrative fiction or expands the scope of FERA but merely expresses the definitions of Sec. 2(g) & (h) is contrary to their own Show Cause Notices, wherein Appellants have been charged with violation of FERA Act by treating Para 10.3(ii) of ECM as a charging provision by using the term 'read with' for Para 10.3(ii) of ECM which was not necessary if the alleged violation was within the scope of FERA Act. It is submitted the ECM can't widen the scope of the parent statue by introducing the concept of 'equivalent to' which is not there in FERA Act to widen the definition of 'foreign exchange'. It is also submitted that

the deeming provision in Chapter X of the ECM, 1987 that merely crediting a convertible rupee amount also amounts to dealing in foreign exchange is a concept beyond than what is envisaged in the parent statute i.e. FERA, 1973 where-under there is no such deeming provision. Moreover, ECM does not provide that credit to rupee account of a non-resident branch or correspondent would be an offence under the Manual or FERA, and therefore, any violation, if at all, at best may only initiate disciplinary proceedings by RBI. It is submitted that the right to convert rupees into foreign exchange does not make the rupees foreign exchange within the meaning of Section 2(h). It is thus submitted that crediting a convertible rupee vostro account does not constitute a foreign exchange transaction.

236. The approach of the Special Director in the impugned Orders that purposive construction ought to be given to the penal provisions of FERA, 1973 is fundamentally against the basic tenets of interpretation of penal provisions. It is submitted that the penal provisions in FERA have to be strictly construed and cannot be purposively construed, but it has to be strictly contemplated under the statute itself. It is submitted that the deeming fiction as given in Chapter X of ECM, 1987 that a credit to the convertible rupee account is "equivalent" to a transaction in "foreign exchange" cannot be read into FERA, 1973 by purposively construing the said Act and the Special Director has committed a fatal mistake in doing so in the impugned Orders.

237. It is submitted that it is well settled law that the doctrine of purposive construction can be resorted to only if there is ambiguity or difficulty in interpreting the provisions of a statute. The golden rule of interpretation of a statute is to give the provision its plain and literal interpretation and only if that is not possible can one resort to purposive interpretation. Further, the said doctrine can never be applied to widen the scope of a penal provision or

affect the substantive rights of parties, though it may be used to iron out the creases in a statute regarding the procedure/ machinery provided in the statute for its working. It is submitted that the Courts cannot rewrite the statute under the guise of purposive interpretation. In this context the following judgments may be referred to:

(a) J.K. Synthetics Ltd Vs. Commercial Tax Officer reported in 1994 (4) SCC 276 at Paragraph 9.

(b) M/s Hindustan Steel Ltd. Vs. State of Orissa reported in 1969 (2) SCC 627 at Paragraph 8.

(c) Sri Ram Saha v. State of W.B., (2004) 11 SCC 497 at Paragraph 19.

(d) Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 at Paragraph 20.

(e) CIT v. Anjum M.H. Ghaswala, (2002) 1 SCC 633 at Paragraph 29.

(f) Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn., (2009) 8 SCC 646 at Paragraph 89, 90 and 95.

238. In the present case the application of the doctrine of purposive construction is completely erroneous inasmuch in the impugned Orders there is no discussion whatsoever that there was any difficulty or ambiguity in interpreting the provisions of FERA. In the absence of a specific finding to this effect the Adjudicating Officer could not have resorted to the doctrine of purposive construction.

239. Section 50 provides as under:

> *"50. Penalty – if **any person** contravenes any of the provisions of this Act other than section 13, clause (a) of sub-section (1) of section 18, section 18A 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)."

The word "person" used in the abovementioned Section must be interpreted to mean persons who are subject to the prohibition/restriction contained in Sections 8 to 31 of the Act i.e., persons other than authorised dealers. As submitted above, the Legislature distinguishes between authorized dealer and other person. The authorized dealer being a delegate/agent of the Reserve Bank of India by virtue of Section 74 and having all powers to deal with foreign exchange in accordance with the terms of authorization under section 6, legislature did not intend for the investigative wing to discipline/punish a delegate of the Reserve Bank of India.

Section-6 of constitutes a complete code for authorized dealer. The Section provides all aspects in relation to the functioning of an authorised dealer.

240. On an examination of the provisions of section 6(2) which is set out below, it is apparent that the Reserve Bank of India has the power to hold an authorized dealer liable in the event of a contravention of the act, rule, direction or order made under it. Section 51 empowers the adjudicating authority to impose penalty for a contravention of the "provisions of the Act…. Rule, direction or order made thereunder". An authorized dealer can be dealt with by the Reserve Bank of India u/s 6(2) for a contravention of the "provisions of the act. Rule, direction or order made thereunder." In that event, for the same act, an authorized dealer cannot be punished again by an adjudicating authority. In this context, it is important to bear in mind the settled legal maxim "nemo debet bis vexari pro una t eadem causa" i.e. no man shall be vexed twice for the same act. This maxim has been recognized in Article 20 of the Constitution as well as Section 26 of the General Clauses Act.

The Legislature has not specifically intended that an authorized dealer must be in every case penalised twice for a contravention of the provisions of the act, rule, direction or order. Thus, Section 50 is to be construed in the context of the legislative scheme, the said provision excludes its ambit an authorized dealer.

241. Section 6(2) of FERA provides as follows:

> "(6)(2) An authorisation under this section shall be in writing and-
>
> (i) May authorise dealings in all foreign currencies or may be restricted to authorising dealings in specified foreign currencies only;
>
> (ii) May authorise transactions of all descriptions in foreign currencies or may be restricted to authorising specified transactions only;
>
> (iii) May be granted to be effective for a specified period or within specified amounts;
>
> (iv) May be granted subject to such conditions as may be specified therein."

242. The Calcutta High Court in *Grindlays Bank PLC v. Union of India*, (2001(130) E.L.T. 419) held as follows:

> *"21. In section 23 of the said Act, a clear provision has been made that for any violation of the provision made in Section 10 of the Act, the penal consequence will follow. Since section 10 off the said act comprising section 10(1) as well as section 10(2), Section 10(1)(a) cannot be taken out separately without looking into the provisions of Section 10(2) of the Act itself, as the same would result in two situations and/or contingencies as are contrary to each other. For argument, if it is assumed that section 10(1)(a) is independent of section 10(2) of the said act, then for violation of such, that is, delay to repatriate the foreign exchange for any period whatsoever it may be, since, the time for such delay as would attract the provisions has not been mentioned, would attract, on the one hand, a penal provision under section 23(1)(a) of the said Act, which is to be dealt with by the*

adjudicating authority under the Act and on the other hand for such violation, the RBI would proceed to deal with the matter under section 10(2) of the said Act by passing necessary directions. ***So, practically for violation of section 10(1)(a) of the said Act, it would result in two consequences for one cause of action, which is contrary to the settled legal concept****. In other way, another situation would crop up, namely, if Section 10(1)(a) of the said Act is considered as an independent provision to attract the penal provisions of Section 23 of the said Act, a citizen would face a further penal consequence under the said Section 23 not only for failure to comply with Section 10(1)(a) of the said Act, but also for violation of Section 10(2) of the said Act, when such direction as would be passed by the Reserve Bank of India, would be violated.* ***Hence, for one cause of action of delay in terms of Section 10(1)(a) of the said Act, a citizen would be penalized twice, one for violation of Section 10(1)(a) of the said Act by an 'adjudicating proceeding' under Section 23 of the said Act and another for non-compliance with the direction for such delay as would be passed under Section 10(2) of the said Act by the RBI, by another proceeding under Section 23(1)(a) of the said Act. The same is not permissible, hence the interpretation would be to avoid such consequences by interpreting that the violation of section 10(1) would be completed, when there will be non-compliance with the direction under section 10(2) of the said Act****., Unless and until, the entire process, namely, decision by the RBI under Section 10(2) of the said Act is completed, Section 10(1)(a) independently cannot attract penal consequence under Section 23(1)(a) of the said Act. It is a settled legal position on interpretation of statutes that a harmonious construction of the statute is to be made…"*

243. The legislature recognizing lacunae in the act for imposition of monetary penalty against authorized dealer introduced Section 73A w.e.f. 8-1-1993. Section 73A provides as under:

> ***"73A. Penalty for contravention of direction of Reserve Bank or for failure to file returns****.- Without prejudice to the provision of sections 50 and 51, where any authorised dealer contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may after giving a reasonable opportunity of being heard, impose on the authorised dealer a penalty which may extend to ten thousand*

rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues."

Section 73A makes it abundantly clear that it is the Reserve Bank of India, only who can impose penalty on an authorized dealer i.e., its delegate. Thus, the introduction of Section 73A also supports the construction of Section 50, but it does not extend to an authorized dealer.

244. A perusal of the scheme of FERA makes it clear that S.6 r/w s.73A provides a complete code to deal with an Authorized Dealer. S.6(3)(ii) empowers RBI to revoke the authorization granted to the Reserve Bank for contravention of any of the provisions of FERA or of any rule, notification, direction or Order made thereunder. Under the scheme of the Act prior to 08.01.1993 only the extreme penalty of revocation of license could be imposed against an Authorized Dealer. Hence, the legislature, by an amendment to the Foreign Exchange Regulation (Amendment) Act, 1993 w.e.f. 8.1.93 inserted S. 73A, whereby the RBI was empowered to impose penalty on an Authorized Dealer for contravention of any direction given by the RBI or for failure to file any Return.

245. A perusal of Sections 8 to 31 which imposes various restrictions on "person" in dealing with foreign exchange, are by their very nature, inapplicable to Authorized Dealers, whose very business as authorized by the Reserve bank of India, is to deal in foreign exchange. Under S.18, an Authorized Dealer is even empowered to ensure compliance of the Section by another "person". Hence, the penalty imposable under S.50 and 51 are not applicable to an Authorized dealer. That any violation of S.6, which is the only Section that applies to an Authorized Dealer cannot attract penalty under S.50 as S.50 applies to a "person" other than an "Authorized dealer"

246. The Supreme court in *M.G. Wagh and others vs. Jayesh engineering works limited*, (AIR 1987 SC 670) had occasion to hold that Section 12 of FERA, 1947, (similar to section 18 of FERA 1973) was a complete code relating to export of goods and negatived the argument that Section 10 of FERA 1947 (similar to Section 16 of FERA, 1973) would also apply for non-realization of foreign exchange arising from exports of goods from India. The Supreme Court observed as follows:

> *"2.... It is our firm opinion that Section 10 has no application in respect of foreign exchange earnings related to export of goods. Section 10 is designed primarily to impose an obligation on persons who have a right to receive any foreign exchange from a person resident outside India. This section has nothing to do with the foreign exchange earned by export of goods. The entire matter pertaining to payments for exported goods and the foreign exchange earnings arising therefrom in our considered opinion, has been dealt with in Section 12 which is a complete code in itself. It would be an irrational approach to make to hold that while section 12 deals with payments for exported goods and foreign exchange earnings arising therefrom in all situations, it excludes from its purview one particular situation namely that arising in the context of failure to repatriate the sale proceeds of goods exported pursuant to a completed transaction of sale.* ***Evidently section 12 has been very carefully designed. Every possible situation has been conceived of and appropriate prophylactic measures to ensure the preservation of foreign exchange and prevention of siphoning off the foreign exchange, which is very much essential to the economic life of the Nation, have been embedded therein. The entire subject of foreign exchange earnings relatable to export of goods has been specifically and specially dealt with in section 12.*** *It would therefore be futile to search for an alibi in Section 10 merely in order to support the plea that Section 12 does not take within its fold the foreign exchange earnings relatable to transactions of completed sales. Pray what is the reason or the purpose for doing so? Why take care to deal with "all' matters pertaining to export of gods and foreign exchange earnings therefrom in section 12, but even so exclude foreign exchange earnings arising out of completed transaction of sale from its scope and ambit?* ***When there is a specific provision which an reasonable, be interpreted to cover this aspect***

of foreign exchange earnings also, be embodied in section 12, which appears to us to be a complete Code in itself, why leave this important vital matter of no less importance to be dealt with by Section 10 which essentially deals with foreign exchange receivable from individuals and has nothing to do with export of goods."

247. It is alleged on behalf of the appellants that if the same principles are applied to Section 6 which deals with every possible situation and provides for appropriate prophylactic measure and the entire subject of authorized deals is specifically and specially dealt with therein, there is no valid reason for extending Section 50 to an authorized dealer. Section 6 deals with the appointment of an authorized dealer, punishment by revocation of licence and the obligations and duties of an authorized dealer. Since this section is all encompassing, there appears no need to import the provisions of Section 50 for actions of the authorized dealer. The authorized dealer being a delegate/ agent of the Reserve Bank of India and carrying on the functions of the Reserve Bank of India, the Legislature obviously thought it most appropriate for the Reserve Bank of India to deal with its agent. The authorized dealer, under Section 6(4), is required to comply with general of special directions or instructions issued by the Reserve Bank of India from time to time. This would generally relate would generally relate to dealings in foreign exchange pursuant to the powers delegated under Section 74. The Reserve Bank of India also has the power to conduct inspection of authorized dealer since all authorized dealer are scheduled banks (as para 1.4 of the Exchange control Manual speaks for itself) who are governed by the Banking Regulations Act. The Reserve bank of India is the authority to deal with the breaches of the obligations of an authorized dealer since they are essentially carrying out the function of the Reserve Bank of India itself.

247.1 The introduction to the Exchange Control Manual, 1987 at para 1.9 provides as follows:

> *"1.9. This Manual is a compendium of various statutory directions, administrative instructions, advisory opinions, explanatory notes, comments, etc., issued by Reserve Bank from time to time in connection with the administration of Exchange Control and is intended to serve as a guide for authorised dealers, money-changers, airline and shipping companies, etc. in their day to day business. It also embodies the directions of Standing Nature issued by Reserve Bank to authorised dealers under the Foreign Exchange Regulation Act, 1973 setting forth their authority to buy and sell foreign exchange and to do other things incidental to foreign exchange banking as also procedures to be followed by them while dealing with matters relating to Exchange Control…."*

247.2 It is the case of the appellants that the said provision makes it clear that it is a mere guide book provided by the Reserve Bank for the smooth functioning of the Activities of the authorised dealers in relation to Foreign exchange. The Supreme Court in *LIC v. Escorts,* (AIR 1986 SC 1370) while dealing with a earlier Exchange Control Manual held as follows:

> *"69.. The submission of Shri Nariman was two-fold. He urged that paragraph 24-A1 was a statutory direction issued under Section 73(3) of the Foreign Exchange Regulation Act and, therefore, had the force of law and required to be obeyed. Alternately he urged that it was the official and contemporary interpretation of the provision of the Act and was, therefore, entitled to our acceptance. The basis for the first part of the submission was the statement in the preface to be Exchange Control Manual to the effect:*

247.3 It is stated that the present edition of the Manual incorporates all the direction of a standing nature issued to authorised dealers in the form of circulars up to 31st May, 1978. The directions have been issued under Section

73(3) of the Foreign Exchange Regulation Act which empowers the Reserve Bank of India to issue directions necessary or expedient for the administration of exchange control. Authorised dealers should hereafter be guided by the provisions contained in this Manual.

247.4. On behalf of appellants, it is submitted that a *perusal of the Manual shows that it is a guide book for authorised dealers, money changers etc and is a compendium or collection of various statutory directions, administrative instructions, advisory opinions, comments, notes, explanations suggestions, etc. For example, paragraph 24-A.1 is styled as Introduction to Foreign Investment in India. There is nothing in the whole of the paragraph which even remotely is suggestive of a direction under Section 73(3). Paragraph 24-A.1 itself appears to be in the nature of a comment on section 29 (1) (b), rather than a direction under section 73(3).* Directions under Section 73(3) are separately issued as circulars on various dates no circular has been placed before the appellants which corresponds to any part of paragraph 24-A.1. The appellants do not have the doubt that paragraph 24-A.1 is an explanatory Statement of guideline for the benefit of the authorised dealers. It is neither a statutory direction nor is it a mandatory instruction. It reads as if it advice given to authorised dealers that they should obtain prior permission of the Reserve Bank of India, so that there may be no later complications. It is merely a suggestion, rather than a mandate."

247.5 Further it is submitted that Chapter 10 of the Exchange Control Manual, upon which the Department has relied, does not provide that it is issued under any Section of FERA, 1973. From a reading of the chapter it is clear that it contains mere opinions of the Reserve Bank. Also as stated by the Supreme Court if the directions were to be issued under section 73(3) the same were issued by way of circulars and not through the Exchange control manual.

It is further submitted that the Exchange Control Manuals are neither gazetted nor publicized through public notices. Para 1.19 of the Exchange control manual does not provide for any gazetting or publication but merely directs the Authorised Dealers to inform their clients.

Therefore, it is submitted that this being a guidebook, at best administrative directions that can only result in administrative action against the Authorised Dealers but no criminal or quasi criminal proceedings can be initiated. Further the Exchange control manual itself provides for the administrative actions that can be taken by Reserve Bank for violation of these guidelines in para 1.8 and para 1.23. Para 1.8 of the Exchange Control Manual provides as follows:

> *"1.8. Reserve Bank may revoke the license/authorisation granted by it to an authorised dealer, commercial/co-operative bank, money-changer, airline/shipping company or travel agent at any time if the holder of the licence/ authorization is found to have failed to comply with any condition subject to which it was granted or to have contravened any provision of FERA 1973 or of any Rule, Notification, Direction or Order made thereunder."*

Para 1.23 of the Exchange Control manual provides as follows:

> *"1.23. if any non-resident branch or correspondent of an authorised dealer is found to have contravened or attempted to contravene any of the Exchange Control Regulations in force in India, all rupee transfers on its account may be made subject to prior permission of Reserve Bank or totally prohibited."*

247.6 It is further submitted that these direction can be changed from time to time with out the need to notify any person of the same and the knowledge of the same cannot be imputed to any person. It is further submitted that these

violation of these directions can at best result in some administration action but not penalisation in criminal and quasi criminal proceedings.

247.7. The High court of Bombay in *V.P.S. Gill v. Air India*, (AIR 1988 Bom 416) while dealing with similar directions under the Air Corporations Act held as follows:

> *"8.... In law 'direction' would mean 'guidance or command." Section 34 speaks of such directions "as to the exercise and performance of their functions by the Corporations. This is not a legislative function. That power i.e. to enact legislation and/or approve the same is lodged in sections 44 and 45 of the AC Act. Section 34, being what it is, does not mandate writing as a compulsory condition for its existence or validity."*

247.8 The Hon'ble Karnataka High Court in *N. Venkatachalpathy v. State of Karnataka,* (1989) Cr LJ 519) while dealing with direction issued under the provisions of the Karnataka police act observed that the direction/pursuant to section 12 cannot be construed law and the breach of which cannot be the subject matter or penalty. The Hon'ble High court held as follows:

> *"10... From the Manual, it is apparent that it is compendium of departmental orders issued by the inspector General of police for the administrative guidance of police officers. Through they are stated to have been issued under mysore Police Act, 1963, they have no statutory basis and consequently no statutory force and merely acquire the attribute of executive or departmental instructions intended for the guidance of the Police Officers. Order No .1059 containing clauses (a) to (d) is no exception. In no sense, the said order could be construed as "a law" which the State is empowered to make under the appropriate clauses (2) to (6) of Article 19 in order to regulate the fundamental right guaranteed by the sub-clauses of article 19(1) and obviously not a procedure established by law within the ambit of Article 21."*

247.9 It is submitted that the transactions in question took place in the year 1991, which allegedly are in contravention of the Exchange Control Manual, 1987. However, in 1993, in keeping with the Government's Policy of

liberalisation, the Exchange Control Manual underwent a significant change, and various provisions relied upon in the Show Cause Notices, were drastically amended or deleted. It is submitted that the present Show Cause Notices were issued in 1993 prior to the Exchange Control Manual of 1993 becoming operational on 31.12.1993. It is submitted that the offences alleged in the Show Cause Notices are not offences under the sections of the FERA but only when read with the Exchange Control manual issued by the Reserve Bank. It is further submitted that the Exchange control manual has undergone drastic changes. More specifically, it is submitted that, the relevant directions i.e., Chapter 10 of the Exchange Control Manual, 1987 were omitted in the next Exchange Control Manual i.e., 1993. Annexed herewith is a comparison of the relevant chapters of the Exchange Control Manual 1987 and 1993 are marked as Annexure – D.

247.10 It is submitted that the omission is not accompanied with any saving clause. Section 6 of the General Clauses Act does not come to the aid of the omitted directions as it is applicable only to repeal of Acts and not to repeal of rules; also because s. 6 is not applicable to omissions but only to repeals. The following judgments are apposite in this regards:

(a) In Rayala Corporation (P) Ltd. And M. R. Pratap v. Director of Enforcement, New Delhi, (AIR 1970 SC 494) the Apex Court while dealing with the 'omission' of rule 132 of the Defense of India Rules and the applicability of Section 6 of the General Clauses Act to such 'omission'. The Court held as follows:

> *"15. Reference was next made to a decision of the Madhya Pradesh High Court in State of Madhya Pradesh vs. Hiralal Sutwala but, there again, the accused was sought to be prosecuted for an offence punishable under an Act on the repeal of which Section 6 of the General Clauses Act had been made applicable. In the case before us, section 6 of the General Clauses Act cannot obviously*

apply on the omission of Rule 132A of the D.I. Rs. For the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule. If Section 6 of the General Clauses Act or Regulation and not of a Rule. If Section 6 of the General Clauses Act had been applied, no doubt this complaint against the two accused for the offence punishable under Rule 132A of the D.I. Rs. Could have been instituted even after the repeal of that rule."

"16. ….As we have indicated earlier, the notification of the Ministry of Home Affairs omitting Rule 132A of the D.I. Rs. did not make any such provision similar to that contained in section 6 of the General Clauses Act. Consequently, it is clear that, after the omission of Rule 132A of the D.I.Rs., no prosecution could be instituted even in respect of an act which was an offence when that Rule was in force."

247.11 The Supreme Court in *Kolhapur Canesugar Works Ltd. & Anr. V. Union of India & Ors.,* (2000 (2) SCC 536) a full bench followed the constitutional bench's dictum and reiterated that the term "repeal" used in Section 6 did not include "omission". The Supreme Court held as follows:

"32….. The decision of the Constitution Bench is directly on the question of applicability of Section 6 of the General Clauses Act in a case where a rule is deleted or omitted by a notification and the question was answered in the negative. The Constitution Bench said that. 'Section 6 only applies to repeals arid not to omissions, and applies when the repeal is of a central act or regulation and not of a Rule." (Page 656 of the Supreme Court Report)."

"34…… With respect we agree with the principles laid down by the Constitution Bench in M/s. Rayala corporation case AIR 1970 SC 494 : 1970 Cri LJ 588 (supra). In our considered view the ratio of the said decision squarely applies to the case on hand."

"35…… It is not correct to say that in considering the question of maintainability of pending proceedings initiated under a

particular provision of the rule after the said provision was omitted the Court is not to look for a provision in the newly added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. It is our considered view that in such a case the Court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceeding shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by S.6 of the General Clauses Act or there is a part material provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the Rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceedings was initiated being deleted/omitted.…"

"38. The position is well-known that at common law, the normal effect of repealing a statue or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this Rule, an exception is engrafted by the provisions of Sections 6(1). If a provision of a statue is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statue is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the

intention of the Legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new Provision."

247.12 The Notice alleges contravention of paras 10.3(ii), 10.12(ii) and 10.17. It is submitted that 10.3(ii) of the Exchange Control Manual merely deals with the crediting a Vostro Account and it provides that any remittance to rupee, account of non-resident branch or correspondent would be equivalent to remittance of foreign currency. Para 10.3.2 of the Exchange Control Manual provides as follows:

"(ii) Under Exchange Control regulations credit to the rupee account of a non resident branch or correspondent of an authorised dealer is equivalent to a remittance of foreign currency from India to the country in which the branch or correspondent is situate. Transfers of rupees to non-resident branches and correspondents are, therefore, subject to the same regulations as applicable to transfers in foreign currency for the purpose for which rupee transfers have to be made. Illustratively, rupee transfers against imports into India will be subject to regulations regarding imports laid down in Chapter 14. Rupee transfers may be made by authorised dealers without prior approval of Reserve Bank only in those cases where they could have remitted funds to the country concerned under powers delegated to them in various Chapters of this – Manual. Applications for rupee transfers which are not covered by powers delegated to authorised dealers should be forwarded to Reserve Bank on form A1 if purpose of remittance is to meet cost of import into India and form A2 if it is for other purposes, for prior approval together with appropriate documentary evidence. Transfer of rupees to the account of the non-resident branch or correspondent should not be made until a copy of the application form (A1 or A2, as the case may be) has been returned by Reserve Bank together with a permit authorizing the transfer."

The Exchange Control Manual does not provide that the same would be an offence or criminal liabilities against the authorised dealer specifically, if the transactions are done without any mens rea, under the Manual or under any provision of FERA. Therefore, it might be violation in case of the Chapter X and other provisions, it may give a cause of action to the RBI to initiate disciplinary proceedings against the Bank, if at all, but would not constitute any offence.

247.13 It is submitted that para 10.12(ii) prohibits only converting of rupee balances of non-resident branch or correspondent in bilateral group into foreign currency and does not apply to the said transactions as the allegations against the noticee Bank is that of crediting a Vostro Account, which is covered by 10.3(1)(ii). Para 10.12(ii) of the Exchange Control Manual is as follows :

> *"10.12(ii) Balances held in accounts of branches and correspondents in any of the countries in the Bilateral Group should not be converted into any foreign currency without prior approval of Reserve Bank."*

It is submitted that none of the Show Cause Notices mention as to which clause of para 10.17 of the Exchange Control Manual was violated and therefore the said Clause could not be invoked as the show cause notices are vague and therefore void.

247.14. In reply, counsel appearing on behalf of respondent that the submissions of the Counsel for the Bank, that the Exchange Control Manual is not issued under Sec. 73(3) of the FERA, 1973 and as such it is not rule/law, is not correct. The inter-bank transfers are regulated by the provisions contained in the Exchange Control Manual which is a compendium of, inter-alia, various directions and procedural instructions issued by the RBI under Sec. 73(3) of FERA, 1973.

Chapter 1.13 of the ECM 1987 reads as under:

"1.13 All amendments to Exchange Control Manual and other operative instructions to authorized dealers will be communicated in the form of A.D. Circulars. These circulars will be issued in three separate annual series:

(i) A.D. (M.A. Series) Circulars containing amendments to the Manual.

(ii) A.D. (G.P. Series) Circulars containing general and procedural directions.

(iii) A.D. (COX Series) Circular notifying names of exporters placed in Exporters Caution List and deletions there form."

The RBI has been treating the Exchange Control Manual as rule book for exchange control in India.

247.15 It is stated that the First Exchange Control Manual was issued in the year 1949. In the first ECM, instructions had been issued to the authorized dealers that any credit of rupees to the account of non-resident is treated as transfer of foreign exchange. In the subsequent manuals issued in the years 1959, 1965, 1971, 1978, 1987 and 1993, the provisions are continued under different chapters. Even the same is prevalent under FEMA, 1999. The FERA board in para 35, also accepted the same in the case of *H.N. Naeems & Co. vs. D.O.E. (1989) 46 Taxman 3*.

As per the guidelines issued by the RBI, ***the money lying in the non-resident account whether it is maintained in Indian currency or foreign currency, can be taken out of India at the will of the account holder***. The said Indian currency can be converted to any foreign currency at any time and sent out of India.

The ECMs have been issued in exercise of power conferred on RBI under FERA 1947 / 1973 that the circulars and guidelines issued to the authorized dealers how to deal with foreign exchange in a given situation. The authorized dealers are obliged / required to follow these circulars and guidelines.

It is submitted on behalf of appellants that the word "person" used in section 50 must be interpreted to mean persons who are subject to the prohibition/restriction contained in Sections 8 to 31 of the Act i.e., persons other than authorised dealers. The Legislature distinguishes between authorised dealer and other persons. The authorised dealer being a delegate/agent of the Reserve Bank of India by virtue of Section 74 and having all powers to deal with foreign exchange in accordance with the terms of the authorization under Section 6, the Legislature did not intend for the investigative wing to discipline/punish a delegate of the Reserve Bank of India.

Thus, the power of the RBI for the imposition of fines is additional and not in conjunction or connection with the powers u/s 50 and 51. Thus 73A has no bearing over the powers of the Enforcement Directorate.

Respondent reply

247.16 It is submitted on behalf of respondent that the provisions of section 73 A are in addition to the powers available to the Enforcement Directorate against an Authorised Dealer in sections 50 and 51. The Respondents have argued that the words 'without prejudice to the provisions of sections 50 and 51' in section 73 A means that this is an additional penal provision in the Act in addition to section 50.

It is also stated that the provisions of section 50 and section 73 A will have to be read harmoniously. It is submitted that section 73 A is not in the nature of any additional penalty over and above the penal provision envisaged in section 50of the Act. Section 73 A deals with the power of an authority

(being the RBI) to impose a penalty on an authorised dealer for contravention of any direction of RBI. Section 73 A was introduced by the 1993 amendment.

247.17 The words 'without prejudice' in section 73 A of the Act are aimed to define/limit the scope of the adjudicating authorities empowered to impose the penalties in sections 50 and 73 A respectively being the RBI incase of an authorised dealer and the ED in case of any other person respectively. This is clear from a bare reading of the sections in as much as Section 50 deals with power of imposition of penalty by the Directorate of Enforcement on any person whereas section 73A deals with power of imposition of penalty by RBI on an authorised dealer. Therefore, it is submitted that the words 'without prejudice' in section 73 A emphasise on the power of authority concerned and not the person on whom the penalty is being imposed. The interpretation sought to be imputed by the Respondent is not correct.

The RBI was always conferred with the powers to regulate the conduct of the authorised dealers. Section 73 A is only an additional power. Further section 73A was inserted by the 1993 amendment act and is to operate prospectively. Therefore, the transactions which were done in 1991 cannot be covered by the section.

247.18 The provisions of Section 6 (2) which is set out below, it is apparent that the Reserve Bank of India has the power to hold an authorised dealer liable in the event of a contravention of the act, rule, direction or order made under it. Section 51 empowers the adjudicating authority to impose penalty for a contravention of the "provisions of the Act, ….rule, direction or order made thereunder". An authorised dealer can be dealt with by the Reserve Bank of India u/s 6 (2) for a contravention of the "provisions of the Act, ……rule,

direction or order made thereunder." In that event, for the same act, an authorised dealer cannot be punished again by an adjudicating authority.

248. It is submitted that violation of the alleged paras of Exchange Control Manual does not constitute an offence. As far as interventions of Exchange Control Manual and Circular is concerned, it has happened but these are not the part of the provisions of the statute and can not be read with the statutory provisions of Section-6 and 8 of the Act. No doubt, in case of breach it constitute an offence against the other than authorised dealer, but against the authorised dealer, the RBI is entitled to take the act for revocation of license as well as additional action under section 73A of the Act if so advise.

Reply to Notificatins published by RBI

i) It is submitted that the Notification No: A.D.(G.P. Series) Circular No. 1 dated 19.01.1991 (Annexure 1); Notification No: A.D.(G.P. Series) Circular No. 2 dated 16.02.1993 (Annexure 2) and Notification No: A.D.(M.A.) Circular No. 1 dated 07.01.1991 (Annexure5) were not relied upon in the Show Cause Notices and nor was there any allegation that the same was violated and hence scope of the Show Cause notice cannot be widened now by the department.

ii) Further the reliance of the department on Notification No: A.D.(G.P. Series) Circular No. 2 dated 16.02.1993 (Annexure 2) is also misplaced as the same was issued post the alleged transactions and were also not relied upon documents in the Show Cause Notice.

249. The scope of FERA cannot be widened by adding the Chapter X of the ECM, 1987. The deeming provision in Chapter X of the ECM,1987 that merely

crediting a convertible rupee amount also amounts to dealing in foreign exchange is a concept beyond than what is envisaged in the main statute i.e. FERA, 1973 where no such deeming provision. Further, ECM does not provide that credit to rupee account of a non-resident branch of correspondent would be an offence udner the Manual or FERA. Therefore, any violation, if at all, at best may only initiate disciplinary proceedings by RBI. The right to convert rupees into foreign exchange does not make the rupees foreign exchange within the meaning of Section 2(h). Crediting a convertible rupee vostro account does not constitute a foreign exchange transaction. By any Manual or notification or Circular, the soul of any provision can not be frustrated unless the main provision is amended by the Parliament. In the impugned orders, the said aspect has not been dealt legally.

250. It is alleged on behalf of appellants that if such an interpretation as suggested by the Respondent is accepted, it would be against the rule of double jeopardy which provides that no individual shall be vexed twice for the same cause. It is submitted that two authorities cannot impose penalties on the same person for the same act. If such an interpretation is imputed on section 73A, it would render the section ultra vires the constitution. However, there is a presumption of constitutionality in every statue which prohibits any interpretation which will render the statute unconstitutional.

251. It is stated that there can only be one civil penal remedy available for the contravention of any Act, Rule, Direction, as the Authorised Dealer being the delegate of RBI ought to be dealt with by the RBI under section 6 read with section 73A of FERA.

252. The Respondent has failed to distinguish the said judgments. The Respondent is not correct when says that the Appellant has not furnished a

copy of its license as an Authorised Dealer. There is no charge in relation to the same and the same is not even a relied upon document in the Show Cause Notices.

253. The burden is on the Department to produce the same if it wanted to rely upon the document. A copy of the license is available at SCN 47. There are no conditions/ directions/ instructions that were given to the Appellant Bank in the same. License as of today has not been cancelled by the RBI rather thousands of transactions have been done by the bank after the said relevant date as informed.

254. It is submitted on behalf of respondent that section 49 of FERA penalizes failure to comply with conditions laid down by the Reserve Bank of India subject to which it granted licence to the Noticee under FERA.

255. S. 49 provides as follows:

> *"S. 49 Failure to comply with conditions subject to which permissions or licences have been given or granted under the Act to be contravention of the provisions of the Act. - Where under any provision of this Act any permission or licence has been given or granted to any person subject to any conditions and –*
>
> *(i) Such person fails to comply with all or any of such conditions; or*
>
> *(ii) Any other person abets such person in not complying with all or any of such conditions, then, for the purposes of this act, -*
> *(a) In a case referred to in clause (i), such person shall be deemed to have contravened such provisions; and*
>
> *(b) In a case referred to in clause (ii), such other person shall be deemed to have abetted the contravention of such provision."*

It is submitted on behalf of appellants that S. 49 is inapplicable in the present case, as no conditions have been imposed on the Noticee bank in the Licence issued to it as an Authorized Dealer. A perusal of the License dated 25.1.90 issued by the Reserve Bank to the Noticee Bank clearly shows that the authorization given to the Bank is not subject to any conditions, which could have been prescribed by the Reserve Bank under S.6(2) of FERA. It is submitted that the Legislature has intentionally omitted the word "authorisation" from S.49, and confines itself to "permissions" and "licenses". It is therefore submitted that S.49 has no application to Authorised Dealers. It is further submitted that there is a distinction between "condition" imposed by the Reserve Bank and "directions" issued by the Reserve Bank. While conditions are imposed under S.6 (2) of FERA at the time of issuance of license, directions may be issued at any time by the Reserve Bank under S. 73(3) of FERA.

256. It is submitted that as the License/Authorization granted to the Noticee Bank as an Authorized Dealer is not subject to any conditions either at the time of issuance or vide subsequent notification, S.49 is wholly inapplicable and therefore the Bank cannot be held liable under Section 49 for failure to comply with any conditions subject to which the licence have been given.

257. ***'MENS REA'***

It is argued on behalf of respondent that Mens rea is not an essential ingredient when charging an individual or company for contravening the provisions of the Act. In *LIC Vs. Escorts (AIR 1986 SC 1370)*, it is observed that FERA, 1973 being a special legislation, and the burden of proof falling on the offender, *mens rea* is interpretively be ruled out.

"Our attention was drawn to the very serious nature of the consequences that follow the failure to obtain the permission of the Reserve Bank, and the circumstance that even the burden of proof that requisite permission had been obtained, was on the person prosecuted or proceeded against for contravening a provision of the Act or rule or direction or order made under the Act thus ruling out *mens rea* as an essential ingredient of an offence. It is true that the consequences of not obtaining the requisite permission where permission is prescribed are serious and even severe. It is also true that the burden of proof is on the person proceeded against and that *mens rea* may consequently be interpreted as ruled out."

258. The nature of proceedings was considered by a Constitution Bench of the Supreme Court in *Maqbnol Hussain v. State of Bombay (1953 AIR 325)* considered the nature of proceedings under the Sea Customs Act and FERA, 1947 and paralleled it with the principle and scope underlying Article 20(2) of the Constitution. In that case gold was found in possession of the appellant therein when he landed at the Santa Cruz Airport. The appellant was detained and searched by the Customs Authorities and gold was seized from his possession. Proceedings under Section 167(8) of the Act were taken by the Customs Authorities and after recording evidence, an order was passed confiscating gold and giving an option to the owner to pay fine in lieu of such confiscation Under Section 188 Customs Act. Since nobody came forward to redeem the gold, a complaint was filed in the Court of the Chief Presidency Magistrate, Bombay against the appellant charging him with having committed an offence Under Section 8 FERA, 1947.

The Court examined in detail the ambit, scope and applicability of the principle of "double jeopardy" in the light of the fundamental right guaranteed under Article 20(2) of the Constitution. The Court opined:

It is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein: "convicted", "commission of the act charged as an offence" "be subjected to a penalty", "commission of the offence", "prosecuted and punished" "accused of any offence", would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a Court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

The Court then laid down various tests for determining when a tribunal can be considered to be a judicial tribunal and after referring to a catena of authorities relevant provisions of the Sea customs Act, 1878 and the nature of the adjudicator proceedings as contained in that Act, opined that an adjudicator authority functioning under the Act was merely an administrative machinery for the purpose of adjudging confiscation, determination of duty or the increased rate of duly and for imposition of penalty as prescribed under the Act and not a judicial tribunal.

The Constitution Bench then laid down that though the administrative authorities functioning under the Sea Customs Act had the jurisdiction to confiscate gold, illegally brought into the country, and levy penalty on the defaulter, none the less the authorities were not trying a criminal case but deciding only the effect of a breach of the obligations by the defaulter under the Act. On a parity of reasoning what holds true for the adjudicator machinery under the Sea Customs Act holds equally true for the administrative or adjudicator machinery, designed to adjudge the breach of a civil statutory obligation and provide penalty for the said breach, under the FERA, 1947, whether the breach was occasioned by any guilty intention or not is irrelevant.

259. The non-applicability of *mens rea* was reiterated *M R Pratap V. Director of Enforcement (1962 Cri LJ 1582 (Mad.))* by the Madras High Court, abiding by the principles laid in the Maqbool Hussain judgment. This matter once again emerged for consideration in *Directorate of Enforcement Vs. MCTM Corporation (AIR 1996 SC 1100)*, wherein it was held at para 7 that:

> *"Mens-rea" is a state of mind. Under the criminal law, means-rea is considered as the "guilty intention" and unless it is found that the "accused" had the guilty intention to commit the "crime" he cannot be held "guilty" of committing the crime. An "offence' under Criminal procedure Code and the General clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force".*

It is thus the breach of a "civil obligation" which attracts "penalty" Under Section 23(1)(a) FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10 FERA, 1947 would immediately attract the levy of "penalty" under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary

guilty intention or in other words the requisite "mens-rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his "blameworthy" conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof of the existence of "mens-rea".

The Supreme also examined the scope of *mens rea* in relation to contraventions committed by companies in *State of Maharashtra V. Mayor Hans George (AIR 1965 SC 722)*, when the old Act, FERA, 1947 was in force. It held that *mens rea* in the sense of actual knowledge that the act done is contrary to law is not an essential ingredient of the offence.

> *"If mens rea is intended to be an essential ingredient of the primary offences under this statute, companies cannot be found guilty. It is clear from S. 68 of the Act that companies are liable for offences under the Act."*

260. The importance of penalties and therein, the lack of *mens rea* was highlighted in *The Chairman, SEBI V. Sriram Mutual Fund & Anr. (JT 2006 (11) SC 164),* when discussing the powers of SEBI, and the consequences that results from curtailing it:

> *"In our view, the impugned judgment of the Securities appellate Tribunal has set a serious wrong precedent and the powers of the SEBI to impose penalty under Chapter VIA are severely curtailed against the plain language of the statute which mandatorily imposes penalties on the contravention of the Act/Regulations without any requirement of the contravention having been deliberated or contumacious. The impugned order sets the stage for various market players to violate statutory regulations with impunity and subsequently plead ignorance of law or lack of mens rea to escape*

the imposition of penalty. The imputing mens rea into the provisions of Chapter VI A is against the plain language of the statute and frustrates entire purpose and object of introducing Chapter VIA to give teeth to the SEBI to secure strict compliance of the Act and the Regulations."

It is submitted on behalf of respondent that applying the above ratio to FERA, 1973, the plain language in this statute also mandatorily imposes penalties for contraventions. The imputing of *mens rea* into the provisions of FERA, 1973, frustrates the entire purpose of the Act.

Reply by appellants

261. It is argued on behalf of appellant that mens rea is an essential ingredient in proceedings of quasi-criminal nature as is in the present case before this Tribunal. It is submitted that the Respondent is not correct in its stand that mens rea is not applicable in the present facts and circumstances.

262. There is no doubt that FERA Act, 1973 is a penal statute and the proceedings thereunder are quasi-criminal in nature. Further, in the case of *Shanti Prasad Jain v. Director of Enforcement, AIR 1962 SC 1764*, it has been held by the Hon'ble Supreme Court that the proceedings under FERA, 1973 are quasi-criminal in nature and therefore, it is imperative for the department to establish mens rea before imposing penalty on the officers. In the present case, the Adjudicating Officer did not attribute any mens rea to any of the officers.

263. It is stated on behalf of appellants that mens rea is an essential ingredient for any criminal proceeding. In support of its contention, the Appellant relies upon the judgment of the Hon'ble Supreme Court in *Nathulal v. State of M.P., AIR 1966 SC 43 (Para 4)*, which states that mens rea is an essential ingredient of a criminal offence. Its further states that mens rea by

necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated.

Further, the Hon'ble Supreme Court in *Kalpnath Rai v. State, (1997) 8 SCC 732 (Para 52)* has also upheld the proposition that mens rea is an essential ingredient unless specifically excluded by the legislature.

264. Section 59 of the FERA 1973 puts it beyond any doubt that mens rea is an essential ingredient even for adjudication proceedings. The said Section reads as under:

> *"59. Presumption of culpable mental state*
> *(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*
> *Explanation. —In this section, "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.*
> *(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*
> *(3) The provisions of this section shall, so far as may be, apply in relation to any proceeding before an adjudicating officer as they apply in relation to any prosecution for an offence under this Act."*

265. *The respondent has relied upon the decision in the case of Directorate of Enforcement Vs. MCTM Corporation (AIR 1996 SC 1100)*. The said judgment does not take into account and discussed the Supreme Court judgment of Shanti Prasad Jain v. Director of Enforcement which is a judgment by the Constitutional bench, nor does it take into consideration S. 59 of FERA. In view

of the conflict of cases, the constitution Bench Judgment has to be followed. The said judgment dealt with the provisions of Foreign Exchange Regulation Act, 1947 which did not have a provision equivalent of S. 59 and is therefore distinguishable and not applicable to the present case.

266. The Respondent has relied upon the judgment of *LIC Vs. Escorts (AIR 1986 SC 1370),* wherein it is observed that FERA, 1973 being a special legislation, and the burden of proof falling on the offender, *mens rea* is interpretively be ruled out.

On behalf of the Appellant, it is submitted that interpretation sought to be attributed by the Respondent is absolutely incorrect. The Respondent is relying on stray sentences in the judgment to contend that *mens rea* is ruled out in offences under FERA. However, the judgment merely provides that action under section 50 of the Act is not automatic and that the person can be called upon to show that he had applied for permission under section 29 and had a reasonable prospect of obtaining the permission. The Court further holds that burden of proof is on the person proceeded against and *mens rea* as an ingredient 'may' as opposed to 'shall' be ruled out depending on the explanation given by the person.

In any case, the issue involved in the case dealt with the interpretation of the word "permission" in section 29 of the FERA, 1973. The observation relied upon by the Respondent constitutes only obiter dicta and is therefore not having any precedentiary value.

267. The Respondent has also relied upon the judgments in *State of Maharashtra V. Mayor Hans George (AIR 1965 SC 722),* when the old Act, FERA, 1947 was in force and *SEBI, V. Sriram Mutual Fund & Anr. (JT 2006 (11)*

SC 164). It is submitted on behalf of the appellant that the in the judgment of *Mayer Hans George,* the Hon'ble Supreme Court dealt with the provisions of Foreign Exchange Regulation Act, 1947. The Supreme Court in *Sriram Mutual* dealt with the SEBI Act. It neither of the two statutes had a provision equivalent of S. 59 of FER 1973 and is therefore the said judgments are distinguishable and not applicable to the present case.

268. The Supreme Court in *Bharjatiya Steel Industries v. CST, (2008) 11 SCC 617*has doubted the law laid down in *Directorate of Enforcement Vs. MCTM Corporation (AIR 1996 SC 1100)* and held as follows:

> *"17. Reliance has also been placed on Director of Enforcement v. M.C.T.M. Corpn. (P) Ltd. [(1996) 2 SCC 471 : 1996 SCC (Cri) 344 : JT (1996) 1 SC 79] This Court was dealing therein with the Foreign Exchange Regulation Act, 1947. It was opined that Section 23(1)(a) of the Act confers adjudicatory function on the conduct of the delinquent, stating: (SCC p. 478, para 8)*
>
> *8. …*
>
> *18. The attention of the Court therein, however, was not drawn to the earlier binding precedent in Hindustan Steel [AIR 1970 SC 253]. Furthermore, the question as to whether mens rea is an essential ingredient or not will depend upon the nature of the right of the parties and the purpose for which penalty is sought to be imposed.*
>
> *19. A distinction must also be borne in mind between a statute where no discretion is conferred upon the adjudicatory authority and where such a discretion is conferred. Whereas in the former case the principle of mens rea will be held to be imperative, in the latter, having regard to the purport and object thereof, it may not be held to be so.*
>
> *20. …*
>
> *21. In SEBI v. Shriram Mutual Fund [(2006) 5 SCC 361] this Court held: (SCC p. 376, para 35)*

> *"35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.*

> *22. It is, therefore, difficult to accede to the contention of Mr Banerjee that under no circumstances absence of mens rea would not be a plea for levy of penalty. An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of mens rea becomes a relevant factor. We may notice that in the show-cause notice itself, the authorities stated:*
>
> > *"You have sold away 239.966 tons of iron and steel without payment of any sales tax with the assistance of Form III-B, amounting to Rs 10,73,850.89, whereas the receipt thereof was also issued under the provisions of Section 4-B on the basis of full exemption from the tax, with the assistance of Form III-B. In this way, the material purchased for the purposes of production under the provisions of Section 4-B, while utilising the same for the same purposes, was sold away in the same condition, which is a violation of the provisions of Section 4-B, and is punishable under the aforesaid sub-section of the Act."*
>
> *23. …*
>
> *24. We, however, are of the opinion that in the facts and circumstances of this case, existence of mens rea on the part of the appellant is evident.*

269. If the argument of the Respondent is accepted for penalising the authorised dealer twice for the same act, as the E.D. will charge an authorized dealer for the violation of the provisions of FERA. The RBI will impose a penalty

for the violation of its directions and instructions. The same is not the intention of the statute pertaining to authorised dealer.

270. The Respondent has placed reliance on the following judgments:

(i) In *Maqbool Hussain V. State of Bombay (AIR 1954 SC 325),* their Lordships held that the principle of double jeopardy will not come into play when the proceedings were before a tribunal which entertained departmental or an administrative enquiry even though set up by a statue and where such tribunal is not required to proceed on legal evidence given on oath.

The said judgment is clearly distinguishable on facts as in that case, the Hon'ble Court was concerned with the punishment prescribed under the Sea Customs Act, 1878 and the FERA 1947. In that case, the Hon'ble Court came to finding that the Sea Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. None of the issues which arose in that case have been agitated in the present case. In the instant case, the Tribunal is concerned with the applicability of two penal provisions on the Appellants under the same act even though by two different authorities. In this context, reliance is placed on ***Grindlays Bank PLC Vs. Union of India, (2001 (130) ELT 419) at Paragraph 21 (Page. 59 of Vol. 1).*** Therefore, the said judgment is clearly distinguishable on facts.

In the light of abovesaid discussion, it is held that mens rea is an essential ingredient as the FERA proceedings are quasi-criminal proceeding where the criminal liabilities was also involved.

271. It is submitted that the officers have been made liable by invoking S.68(1) of FERA. It is submitted that this section creates vicarious liability. Under S.68(1) only a person in charge of, and responsible for the conduct of the business of the Company can be made vicariously liable for an offence committed by a company.

272. It is admitted position that the provisions of S.68 have to be strictly construed, as it was a penal provision, and by a legal fiction imposed penal consequences on a person in charge of, and responsible for the conduct of the business of the company for any offence committed by the Company. Hence the averments in the Show Cause Notice must necessarily make out all the ingredients of the offence. The Supreme Court and various High courts have consistently held that merely repeating the golden words of the section is not sufficient to create liability under this section. It is necessary that something more has to be brought on record to show that the person was in charge and responsible to the functioning of the company and thereby liable under sub clause 1 of this section. In fact a full bench of the Supreme Court in a recent Judgment in *S.M.S. Pharmaceuticals v. Neeta Bhalla,* (AIR 2005 SC 3512) settled the law on this issue when dealing with an identical provision under the Negotiable Instruments Act. The court held as follows:

> *" 15. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before persons can be subjected to original process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability.*

A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent tails within parameters by of section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a Director in a Company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trail."

"16 in view of the above specifically aver in a complaint under: (a) It is necessary to specifically aver in a complaint under Section 141 that at the time of offence was committed, the person accused was in charge of, and responsible for the conduct of business of the Company. This averment is essential requirement ction 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 …."

The supreme court *in Girdharilal gupta v. Directorate of Enforcement,* (AIR 1971 SC 28) as far back as in 1971 while dealing with the similar provision under the old FERA held as follows :

"5. It seems to us quite clear that S. 23C (I) is a highly penal section as it makes a person who was in-charge and responsible to the company for the conduct of its business vicariously liable for an offence committed by the company. Therefore in accordance with well-settled principals this section should be construed strictly."

"6. What then does the expression 'a person in charge and responsible for the conduct of the affairs of a company mean"? it will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director-in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in over all control of the day to day business of the company or firm. This inference follows from the wording of S. 23C (2)."

"7 It mentions director, who may be a party to the policy being followed by a company and yet not be in charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all-charge. Similarly the other officers may be in charge of only some part of business."

The Supreme Court in *State of Haryana v. Brijlal Mittal*, (AIR 1998 SC 2327) held as follows :

"8... it is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both that the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business."

No doubt, the initial burden is not discharged by the department as is clearly borne by the cases cited above wherein prosecutions were quashed at the initial stage itself as no prima facie case made out.

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273. It is submitted on behalf of appelalnts that the Respondent has also relied upon this judgment to state that a Show Cause Notice need not be exhaustive in nature. However, the Respondent ought to have appreciated that

in the present case, the allegations contained in the show cause notice against the concerned officers are not even specific making such a SCN deficient and any consequential action on such notice also liable to be set aside. In any event, it is denied that in the present case, the Show Cause Notice issued to the Bank and the Officers meets the requirements and complies with the principles of natural justice.

For the above proposition the Appellant also relied upon the following judgments:

a) ***Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Ltd (2007) 5 SCC 388 (Paragraph 13 and 14)***
b) ***K. K. Ahuja v. V.K. Vora and Anr. (2009) 10 SCC 48 (Paragraphs 21, 22 to 25 and 30)***
c) ***BD Gupta v. State of Haryana (1973) 3 SCC 149 (Paragraph 9)***
d) ***Commissioner of Central Excise, Bhubaneshwar – I v. Champdany Industries Ltd (2009) 9 SCC 466(Paragraph 38)***
e) ***Biecco Lawrie Ltd. &Anr v. State of Bengal &Anr (2009) 10 SCC 32 (Paragraphs 24-25)***
f) ***SACI Allied Products v. CCE (2005) 7 SCC 159 (Paragraph 16)***

It is stated on behalf of respondent that the finding of the Adjudicating Officer is correct and it is rightly held that the above-mentioned officers liable under Section 68(2) is beyond the SCNs and ought to be set aside on this ground alone.

In reply, it is stated on behalf of the appellants that the officers have throughout acted honestly in discharging their duties. There is no adverse finding pertaining to lack of honesty or good faith of the officers, by the

Adjudicating Officer. The transactions were effected by the officers in good faith, in the bonafide belief that the transactions are legal and permissible. The Officers acted in pursuance of instructions received from reputed nationalized Banks which are Authorized Dealers, or the centralized Bank of Soviet Union i.e., BFEA, or Giro Bank of London. Admittedly, the transactions were done in good faith and as such no penalty can be imposed on the Officers. The acts of the officers would be covered by good faith as per Section 3(22) of the General Clauses Act. Therefore, by virtue of Section 3(22) of the General Clauses Act read with Section 78 of FERA, the officers are entitled to statutory protection provided by Section 78 of FERA.

The following judgment may kindly be referred to in this regard:-

a. General Officer Commanding v. CBI & Anr. (2012) 6 SCC 228 at Paragraphs 70, 71, 73, 74, 75 and 78.

273.1 The officers have throughout acted honestly in discharging their duties. There is no adverse finding pertaining to lack of honesty or good faith of the officers, by the Adjudicating Officer. The transactions were effected by the officers in good faith, in the bonafide belief that the transactions are legal and permissible. The Officers acted in pursuance of instructions received from reputed nationalized Banks which are Authorized Dealers, or the centralized Bank of Soviet Union i.e., BFEA, or Giro Bank of London. Admittedly, the transactions were done in good faith and as such no penalty can be imposed on the Officers. The acts of the officers would be covered by good faith as per Section 3(22) of the General Clauses Act. Therefore, by virtue of Section 3(22) of the General Clauses Act read with Section 78 of FERA, the officers are entitled to statutory protection provided by Section 78 of FERA.

The following judgments are referred to in this regard:-

b. General Officer Commanding v. CBI & Anr. (2012) 6 SCC 228 at Paragraphs 70, 71, 73, 74, 75 and 78.

273.2 S.68 (1) of FERA has no application to the present group of show cause notices. S.68 pertains to "Offences by companies". S.68(1) can be invoked only if the person alleged to have committed the contravention, is a company. Furthermore it can be invoked only against a person who is the person incharge and responsible of the Company. This position in law has been settled by a catena of decisions of the Indian Supreme Court.

273.3 For the invocation of S.68, and for a Company to be charged with the offence, there has to be an allegation that the person who is the directing mind or will of the Company, has committed an act or omission constituting the offence. In the present case, there is not even an allegation that the notices are persons who would constitute the directing mind or will of ANZ Grindlays Bank, who have allegedly committed the contravention. Consequently, the Show Cause notices issued under S.68(1) are liable to be dropped.

273.4 a) The House of Lords in *Lennard's Carrying Co. Ltd. V. Asiatic Petroleum Co. Ltd.* (1914-15 ALL E.R. 280) has held as under :

> *"Did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation."*
>
> ***"It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody from whom the company is liable because his action is the very action of the company itself."***

b) The House of Lords in *Tesco Supermarkets ltd. Vs. nattrass* (1971 (2) All.E.R. 127), which has been followed by the Indian Supreme Court, has held as under:

> *"In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of act done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence,* ***is it be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directions, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company****. This test is in conformity with the classic statement of Viscount Haldane LC in Lennard's Carrying Co. Ltd vs Asiatic Petroleum Co. Ltd."*

c) The Hon'ble Supreme Court in *J.K. Industries Ltd. & Ors V. Chief Inspector of Factories & Ors,* (1996(6) SCC 665) at Para 45 has held that:

> *"We are in complete agreement with the view propounded by lord diplock and viscount Haldane, lord chancellor and hold that under the Act only one of the directors, the directing mind and will of the company, its alter ego, can be nominated as an occupier for the purposes of the act."*

The latest decision being Assistant Commissioner II, *Bangalore vs Velliapph Textiles Ltd.* ([2003] 11 SCC 405), wherein it has been held that a company can be said to have committed an offence only if its directing mind and will i.e. *"the very ego and centre of the personality of the corporation*" has done the act or the omission, which constitutes the alleged offence. Hence, any proceeding under S.68 of the act must be against only such a natural person who has allegedly committed the contravention and is the directing mind and will of the company, to be proceeded under S.68(1) of the Act. [this judgment was overruled by a subsequent Constitution Bench only on the question of

mandatory imprisonment, and not on the aspect of directing mind and will of the company.]

The Hon'ble Supreme court in Paras 10,11,12, and 13 of the judgment of justice G.P. Mathur refers to the judgment in *lennards carrying co., tesco supermarkets and Halsbury's Laws of England*. In para 12.1.3 the court has held as under:

> *"Criminal liability of a corporation arises where an offence is committed in the course of the corporation's business by a person in control of its affairs to such a degree that it may be fairly said to think and act through him so that his actions and intent are the actions and intent of the corporation."*

Justice Srikrishna in Para 28 of the Judgment has held as under:

> *"The question of criminal liability of a juristic person has troubled legislatures and judges for long. Though, initially, it was supposed that a corporation could not be held liable criminally for offences when mens rea was requisite, the current judicial thinking appears to be that the mens rea of the person in charge of the affairs of the corporation, the alter ego, is liable to prosecuted for such an offence. I am fully in agreement with the view expressed on this aspect of the matter in the judgment of Brother Mathur, J. What troubles me is the question whether a corporation can be prosecuted for an offence even when the punishment is a mandatory sentence of imprisonment."*

Justice Rajendra Bahu in para 56 of the Judgment has held as follows ;

> *"In order to trigger corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the ego, the centre of the corporate personality, the vital organ of the body corporate, the alter ego of the employer corporation or its directing mind. Since the company/corporation has no mind of its own its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego*

and centre of the personality of the corporation. To this extent there are no difficulties in our law to fix criminal liability on a company. The common law tradition of alter ego or identification approach is applicable under our existing laws."

274. It has come on record that ANZ Gridlays Bank has a history of banking in India since 1854 and was one of the largest and oldest foreign banks in India with 56 branches in various cities all over the country. During this time, it has provided the best banking facilities to several valuable customers in India and abroad. It had ranked No.1 among all International Banks as arrangers of syndicated cross border foreign currency finance for Indian Corporates, mainly in the public sector. Such foreign currency loans to Indian Borrowers totaled US $ 1.7 Billion (between January 1991 and September 1993). This was then a market share of nearly 43% of the total loans made to India and is more than double that of our nearest competitor. All this was done during the period when the International Agencies downgraded India's External Credit Rating resulting in the cancellation of lines of credit to India and Indian borrowers by many International Banks. In addition, ANZ mobilized foreign currencies under the Foreign Currency Banking Over Draft (FCBOD) Scheme where its own contribution was US $ 100 M and such deposits from other international financial institutions/banks was US $ 72.5 M. It was also amongst the leading banks for collection of NRI's of over Rs.500 crores under the Indian [Development Bond Scheme. ANZ also floated two offshore Indian] Investment Funds, and has been instrumental in introducing many new treasury products into the Indian Market.

275. It is submitted that section 68 creates vicarious liability. Under Section 68(1) only a person in charge of, and responsible for the conduct of the business of the Company can be made vicariously liable for an offence committed by a company. The provisions of Section 68 have to be strictly

construed, as it is a penal provision, and by a legal fiction imposes penal consequences on a person in charge of, and responsible for the conduct of the business of the Company for any offence committed by the Company. Hence the averments in the Show Cause Notice must necessarily make out all the ingredients of the offence.

It is submitted that the Show Cause Notice must necessarily establish that the concerned officer was incharge of, and responsible for conduct of the company and further, spell out the offence committed by such officer. Only certain junior officers have been namedin the SCNs who can under no circumstances be said to be incharge and responsible for the bank or for conduct of its business. Further, onus to prove that a person was responsible for conduct of business of company is on the Department, which it has failed to discharge.

276. In the impugned Orders Mr. Rajgopalan Ramkumar, Mr. Sunil G. Sawant, Mr. R.B. Dhage, Mr. Allwyn Roche, Mr. P.S. Khatu, Mr. T.R. Subramaniam and Mr. Paul Pereira have been held liable under Section 68(2) of FERA for allegedly contravening the provisions of Section 8(1), 9(1)(a), 9(1)(e) and 6(4) read with Section 49, on the ground that the alleged contraventions took place due to their alleged "negligence" even when section 68(2) was not invoked in the SCNs.

Section 68(2) uses the terms 'consent, 'connivance' and 'negligence' disjunctively since each of these charges is distinct and mutually exclusive. It is submitted that the Show Cause Notices do not contain any allegation of consent, connivance, or any action attributable to any neglect on the part of the officers in the SCNs but merely stated that the officer was incharge of and responsible for the conduct of the business of the bank. However, the

impugned Order has been passed under Section 68(2) of FERA returning a finding that the above-mentioned officers were 'negligent' and have found them guilty under Section 68(2) of FERA. Such a finding, in the absence of any allegation under Section 68(2) in the SCNs is unsustainable in law. It depends upon case to case if the contravention was made by the defaulter with the guilty intention or not. The same is the main test. The guilty intention is missing in the present case on behalf of all the appellants if the statements are read.

277. It is well settled law that an SCN must be specific and must indicate the precise scope of notice and points on which the officer concerned is expected to give a reply. It is submitted that when the foundation of the charge is not made out in the SCN, then the impugned Order passed under Section 68(2) cannot be sustained. In reference to the above submissions the Appellant relies upon the following judgmentand the relevant paragraphs of the said judgment is reproduced hereinbelow:

a) Gorkha Security Services v. Government NCT of Delhi (2014) 9 SCC 105 (Paragraphs 21 and 22)

> *"21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.*
>
> *22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable*

the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

. b) **Commissioner of Central Excise, Bangalore vs. Brindavan Beverages (P) Ltd (2007) 5 SCC 388**

"13. We find that in the show-cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchise-holder (sic franchiser). On a perusal of the show-cause notice the stand of the respondents clearly gets established.

14. There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show-cause notice is the foundation on which the Department has to build up its case. If the allegations in the show-cause notice are not specific and areon the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by CEGAT cannot be faulted."

c) Commissioner of Central Excise, Bhubaneshwar – I vs. Champdany Industries Ltd. (2009) 9 SCC 466

> *"38. Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show-cause notice. It is well settled that unless the foundation of the case is made out in the show-cause notice, the Revenue cannot in Court argue a case not made out in its show-cause notice. (See Commr. of Customs v. Toyo Engg. India Ltd. [(2006) 7 SCC 592]) Similar view was expressed by this Court in CCE v. Ballarpur Industries Ltd. [(2007) 8 SCC 89] In para 27 of the said Report, learned Judges made it clear that if there is no invocation of the Rules concerned in the show-cause notice, it would not be open to the Commissioner to invoke the said Rules."*

d) Biecco Lawrie Ltd. &Anr. vs. State of West Bengal and Anr. (2009) 10 SCC 32

> *"24. It is fundamental to fair procedure that both sides should be heard—audi alteram partem i.e. hear the other side and it is often considered that it is broad enough to include the rule against bias since a fair hearing must be an unbiased hearing. One of the essential ingredients of fair hearing is that a person should be served with a proper notice i.e. a person has a right to notice. Notice should be clear and precise so as to give the other party adequate information of the case he has to meet and make an effective defence. Denial of notice and opportunity to respond result in making the administrative decision as vitiated.*
>
> *25. The adequacy of notice is a relative term and must be decided with reference to each case. But generally a notice to be adequate must contain the following:*
>
> *(a) time, place and nature of hearing;*
>
> *(b) legal authority under which the hearing is to be held;*
>
> *(c) statement of specific charges which a person has to meet."*

e) **SACI Allied Products Ltd., U.P. vs. Commissioner of Central Exercise, Meerut (2005) 7 SCC 159**

> *"16. …It was argued that the first proviso to Section 4(1)(a) of the Act was never invoked by the Department either in the show-cause notice or in the impugned order and it was for the first*

time that the Appellate Tribunal in the impugned order has sought to sustain the impugned order by invoking the first proviso to Section 4(1)(a) of the Act. It is thus seen that the Tribunal has gone totally beyond the show-cause notice and the order of the Collector, which is impermissible. The Appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show-cause notice or in the order."

f) Commissioner of Central Exercise, Chandigarh-II vs. Steel Strips Limited and Ors. (2003) 5 SCC 216

"20. Before us, it was also contended on behalf of the respondents that the show-cause notice issued to the respondents was defective inasmuch as the show cause notice, apart from referring to the fact that the two items were covered by two separate and distinct sub-headings, did not state that the process undertaken by the respondents resulted in the manufacture of a new product. Since that was not stated in the show- cause notice, the Department cannot be permitted to go beyond the facts stated in the show cause notice. This aspect of the matter has also not been considered by the authorities under the Act."

278. The Respondent has relied upon the judgment in the case of ***Girdhar Lal Gupta vs. D N Mehta, AIR 1971 SC 28*** to contend that when a partner incharge of a business proceeds abroad, it did not mean that he ceased to be incharge unless there was evidence that he gave up the charge. The said judgement does not help the case of the respondent as under the Partnership Act, if one partner does breach any law, otherwise is liable for same. But the situation in the present case is different. Rather, the said judgment supports the contention of the Appellants. It is not sufficient merely to allege that a person is incharge and responsible and there has to be specific allegation of how one was in charge and responsible to the business of the company, relevant to the allegations in question. As mentioned above, apart from bald statements, there are no specific allegation against the Officers. The relevant part of the said judgment reads as under:

"5. It seems to us quite clear that Section 23-C(1) is a highly penal section as it makes a person who was in-charge and responsible to the company for the conduct of its business vicariously liable for an offence committed by the company. Therefore, in accordance with well-settled principles this section should be construed strictly.

1. *What then does the expression "a person in-charge and responsible for the conduct of the affairs of a company" mean? It will be noticed that the word "company" includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person "in-charge" must mean that the person should be in over-all control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in over-all charge. Similarly the other officers may be in-charge of only some part of business.*

2. *In State v. S.P. Bhadani [AIR 1959 Pat 9 : 1958 BLJR 436 : 1959 Cri LJ 68 : (1959) 1 Lab LJ 157] Kanhaiya Singh, J., in construing a similar provision of the Employees Provident Fund Act (1952), Section 14-A — held that the first sub-section would be confined only to officers in the immediate charge of the management of the company. Later he observed that "it is, therefore, manifest that all the officers of the company not in direct charge of the management of the business are immune from the liability for the offence, unless they have contributed to its commission by consent, connivance or neglect".*

8. In R.K. Khandelwal v. State [(1964) 62 ALJ 625] D.S. Mathur, J., in construing Section 27 of the Drugs Act, 1940, a provision similar to the one we are concerned with, observed:

"There can be directors who merely lay down the policy and are not concerned with the day to day working of the company. Consequently, the mere fact that the accused person is a partner or director of the Company, shall not make him criminally liable for the offence committed by the Company unless the other ingredients are established which make him criminally liable."

9. In Public Prosecutor v. R. Karuppian [AIR 1958 Mad 183] Somasundaram, J., while dealing with a case arising under the Prevention of Food

Adulteration Act, 1954 [(Section 17(1)] observed that the Secretary of the Cooperative Milk Society, on the facts of the case, could not be held to be a person in-charge of the Society. On the facts of that case the business of selling milk was done by the clerk of the Society and the secretary was only an honorary Secretary and was not coming to the Society daily."

None of the abovementioned officers were the controlling mind of the bank. Further, none of them have failed to exercise due diligence in the conduct of their duties. As such, they cannot be held liable under section 68 of the FERA.

279. Section 78 of FERA provides immunity to the Central Government, Reserve Bank, their Officers, and other Authorized persons exercising any powers or performing duties under FERA. The acts of the officers would be covered by good faith as per Section 3(22) of the General Clauses Act. Therefore, by virtue of Section 3(22) of the General Clauses Act read with Section 78 of FERA, the officers are entitled to statutory protection provided by Section 78 of FERA. The Appellant has placed the reliance on the following cases in support of its submissions:

a) *General Officer Commanding v. CBI &Anr. (2012) 6 SCC 228 (Paragraphs 70, 71, 73, 74, 75 and 78)*

b) *Costao Fernandes v. State, (1996) 7 SCC 516(Paragraphs 15 & 17)*

"15. Faced with the position that the wounds were not self-inflicted and the killing could have been, and indeed was, in self-defence, the submission is that protection of Section 155, nonetheless, is not available because killing of a smuggler is not a part of the official duty, which alone is protected by this section. It is laboured hard to impress that the official duty, in the present case, was confined to stop the movement of the vehicle and no farther. After

the vehicle was got stopped, the submission is, that the act in performance of official duty was over and the appellant could not have scuffled with the deceased leading to the latter's death. We cannot agree inasmuch as on 16-5-1991 itself it was stated at the spot by some watchers to the police officer who came there that the appellant was "trying to grab the ignition key" of the vehicle which was being driven by the deceased. This shows that the appellant was trying to prevent the mobility of the vehicle. If while engaged in such an act, the appellant was assaulted, and 22 times at that, with an instrument like knife causing bruises, abrasions, incised wounds on various parts of body like cheek, chest, back, shoulder, arm, leg and thigh, he could not have allowed himself to be killed, but had to defend himself by retaliation. The killing was thus not divorced from the performance of the duty enjoined by Section 106 of the Act.

17. The Additional Solicitor General has another submission to make. The same is that being faced with an organised underworld of smugglers, the appellant should have remembered that "discretion is the best part of valour". If the appellant would have done so, he would have perhaps saved his skin, but could not have saved the larger interest of the society and nation, which does lie in preventing smuggling. The appellant showed valour not in taking to heels, but in fighting. We have all praise for such an officer and we would not allow him to be prosecuted, much though the smugglers would want it to be so. Indeed the appellant is being persecuted, not prosecuted, as the action smacks of revenge seeking to take his life because he has taken the life of a smuggler; of course, one close to political high-ups of Goa. Let this not be countenanced. Let this head-hunting be not permitted."

280. It is a well settled principle of law that merely because penalty may be imposed, unless there is a deliberate defiance of law or the party is guilty of contumacious conduct or dishonest conduct or has acted in connections.

In this regard the following judgment may be referred to:

a. **Hindustan Steel Vs. Steel of Orissa, (AIR 1970 SC 253) at Paragraph 7**. This judgment has been followed by several judgments including the Supreme Court and the said judgment is also

applicable to an adjudication proceedings and have been followed by various boards including the FERA Board.

b. Cement Marketing v Asst. Comm of Sales Tax, 1980(1) SCC 71 at Paragraph 5.

c. **Dodsal (P) Ltd. v. Foreign Exchange Regulation, Appellate Board, MANU/MH/1088/2002 at Paragraph 8.**

d. **Nestle India Limited vs. State, 2000 (101) Comp Cas. 263) at Paragraph 20.**

In the impugned Orders Mr. Rajgopalan Ramkumar, Mr. Sunil G. Sawant, Mr. R.B. Dhage, Mr. Allwyn Roche, Mr. P.S. Khatu, Mr. T.R. Subramaniam and Mr. Paul Pereira have been held liable under Section 68(2) of FERA for allegedly contravening the provisions of Section 8(1), 9(1)(a), 9(1)(e) and 6(4) read with Section 49, on the ground that the alleged contraventions took place due to their alleged "negligence".

It is submitted that the said finding of the Adjudicating officer is not only erroneous but perverse in law because Section 68(2) of FERA was not even invoked in the Show Cause Notices issued to these officers. Section 68(2) uses the terms 'consent, 'connivance' and 'negligence' disjunctively since each of these charges is distinct and mutually exclusive. It is submitted that the Show Cause Notices do not contain any allegation of consent, connivance, or any action attributable to any neglect on the part of the officers in the SCNs. The Show Cause Notices did not make any such allegation but merely stated that the officer was incharge of and responsible for the conduct of the business of the bank. It is submitted that the said Appellants could not have been proceeded against under S. 68(2) in the absence of any allegations in the Show Cause notice. The following judgments are apposite in this regards:

(a) **K. K. Ahuja v. V.K. Vora and Anr. (2009) 10 SCC 48 at Paragraphs 25- 27 and 30.**

(b) **R. Banerjee v. H. D. Dubey, (1992) 2 SCC 552 at Paragraph 9.**

(c) **Nalin Thakor v. State of Gujarat, (2003) 12 SCC 461 at Paragraph 5.**

(d) **Keki Bomi Dadiseth & Ors. vs. State of Maharashtra, 2002 (3) Mh. L.J. 246 at Paragraphs 35-39.**

281. As mentioned above, the Adjudicating Officer has wrongly given its finding that the above-mentioned officers were 'negligent' and have found them guilty under Section 68(2) of FERA. Such a finding, in the absence of any allegation under Section 68(2) in the SCNs is unsustainable in law. It is well settled law that an SCN must be specific and must indicate the precise scope of notice and points on which the officer concerned is expected to give a reply. When the foundation of the charge is not made out in the SCN, then the impugned Order passed under Section 68(2) cannot be sustained

It is submitted that the finding of the Adjudicating Officer holding the above-mentioned officers liable under Section 68(2) is beyond the SCNs and ought to be set aside on this ground alone. The finding therefore is not correct the said officers were "grossly negligent".

The Hon'ble Supreme Court in the case of **Jacob Mathew v. State of Punjab & Anr 2005 (6) SCC 1 at Paragraphs 12** and 48(5) has held that to fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredients of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

In the case of **Shanti Prasad Jain (supra)** it has been held by the Hon'ble Supreme Court that the proceedings under FERA are quasi-criminal in nature. Therefore, it is imperative for the department to establish mens rea before imposing penalty on the officers. In the present case, the Adjudicating Officer did not attribute any mens rea to any of the officers, hence the imposition of penalty was wholly unjustified. In this regard a reference may be made in to the Organisational Chart of ANZ Bank at the relevant point of time. Further, individual submissions on behalf of the said officers, as given later in these submissions, may also be referred to in this regard.

282. It is alleged on behalf of appellants that the various propositions of law that have been raised above have been well settled by the Foreign Exchange Regulation Board/High Court of various states/the Supreme Court and the adjudicating officer is bound to follow the said decisions. It is submitted that the impugned Order is perverse inasmuch as it did not deal with many of the Judgments of the Supreme Court and various High Courts that were cited and which were binding upon the Adjudicating Officer. For the proposition that the adjudicating authority is bound by the decision of the Board and Higher Courts, the following judgments can be referred to:

a. **Wimco Ltd. Vs. Director of Enforcement, 1997 [94] Taxman 542 at Page No. 547**
b. **Union of India Vs. Kamalakshi Finance Corporation Ltd., 1992 Supp (1) SCC 648) at Paragraphs 6 and 8.**

283. It is the admitted position that power of RBI to punish an Authorised dealer was included in FERA only in the year 1993 whereas these contraventions were taken place in the year 1991.

284. Counsel appearing on behalf of appellants has also argued in the alternative, it is submitted that in any event assuming without admitting that any contraventions as alleged have taken place, no case for imposition of penalty is made out in the facts and circumstances set out hereinafter.

285. It is stated that the Noticee became one of the victims of an elaborate fraud on the banking system perpetrated by persons external to the banking system as set out above. There is not the slightest material nor even an allegation of any collusion between the bank officials and the outside persons. The banking officials acted in complete good faith and in the ordinary course of their banking business viz. to carry out the mandate of their constituents or the instructions received from reputed nationalized banks in a timely manner in accordance with the requirements of the Reserve Bank of India.

Apart therefrom, there has been absolutely no loss of foreign exchange from the Noticee Bank. All the amounts credited to the Giro Bank Account were utilized in India only.

286. There was no remittance of foreign exchange by Giro Bank out of this account with a Noticee Bank. All debits to the Giro Bank Account were in respect of transfer of other local banks. Annexure – E is a copy of the Bank Statement of Giro Bank along with the R—5 Returns filed with the Reserve Bank of India. The R-5 Returns are filed in respect of local transfer from the Vostro Account.

287. The Noticee Bank voluntarily offered to remit to India an amount equivalent to the amount that was credited into the Giro Bank account at the exchange rate prevalent at the time of the inward remittance. The Reserve Bank of India accepted the offer of the Noticee Bank. The Noticee brought back a sum of Rs. 82.48 Crores approximately in foreign exchange against an

amount of Rs. 66.4 Crores that was credited to the Giro Bank Account with the Noticee. In terms of the condition imposed by the Reserve Bank of India, the Noticee did not earn interest on this amount for a period of two years consequently. It is rightly alleged that the Noticee has already suffered a financial loss of Rs. 12.02 Crores computed as under:

Amount repatriated by the Bank (Rs./ Crores)	82.43
Amount required to be held for CRR (14%) and SLR (37.75%) on repatriation per RBI instructions	42.65
Loss of interest at maximum Commercial Bank lending rate prevailing during the time at 20% for two years	17.06
Less interest paid on CRR @ 3% and SLR around 7% for two years to the Bank	(5.04)
Net loss of interest to the Bank on Rs. 42.65 crores	12.02

288. Annexures F,G,H and I are copies of the letters dated 21st January 1993, 11th February, 1993, February 17, 1993 and March 22, 1993 and the RBI's acceptance of the offer on 30th March 1993 respectively.

289. It is a well settled principle of law that merely because penalty may be imposed, unless there is a deliberate defiance of law or the party is guilty of

contumacious conduct or dishonest conduct or has acted in conscious disregard of its obligation.

290. The Supreme Court in *Hindustan Steel v. State of Orissa*, (AIR 1970 SC 253) held as follows:

> "*7. Under the Act penalty may be imposed for failure to register as a dealer Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out.*"

291. This judgment has been followed by several judgments including the Supreme Court and the said judgment is also applicable to an adjudication proceeding and has been followed by various boards including the FERA Board.

292. The High Court of Bombay in *Dodsal (P) Ltd., v. Foreign Exchange Regulation, Appellate Board* (MANU/MH/1088/2002) held as follows:

> *"8. Assuming that the authorities could have proceeded with the enquiry regarding the charge of "lending" of foreign exchange, even then, to my mind,*

applying the dictum of the Apex Court in Hindustan Steel Ltd.'s case (supra). I have no hesitation in concluding that this is not a case where the breach can be said to be mala fide or was intended to cause loss of foreign exchange or that it was an intentional act to defeat the mandate of law. On the other hand, what is seen from the record is that the Appellants have paid only sum of KD 670 to its employees abroad for their pressing requirements. That amount cannot be said to be of such nature that the authorities would presume that it was paid with a view to defeat the provisions of law or to get undue benefit or it was dishonest attempt on the part of the Appellants. Assuming that the breach has been established, the same being of technical or venial breach of the provisions of Act and since it was under a bona fide belief that the Appellants were not liable to get permission of the Reserve Bank of India for the said transaction, there would be no question of imposing the penalty. Accordingly, the appeal would succeed in so far as Show Cause Notice No. 29 is concerned."

293. The High Court of Delhi in *Nestle India Limited v. State,* (2000 (101) Comp Cas 263) held as follows:

"20. In M/s. Hindustan Steel Ltd. Vs. The State of Orissa MANU/SC/0418/1969, there was failure to register as a dealer under the Sales Tax Act which could entail penalty. However, it was held that the imposition of penalty will not be always necessary. Penalty will also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of, the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act. In the facts and circumstances, it seems, it would be a futile exercise to pursue the proceedings."

294. a) The Show Cause Notices Nos. 2 and 7 relate to a charge of abatement punishable under Section 64(2) of FERA, 1973. FERA does not define

abatement. However, the meaning of abatement may be derived from Section 107 of the Indian Penal Code. Section 107 is set out below:

> *"107. Abetment of a thing. – A person abets the doing of a thing, who – First.—Instigates any person to do that thing; or*
>
> *Secondly. – Engages with one or more other person or persons inn any racy for the doing of that thing, if an act or illegal omission lakes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> *Thirdly—intentionally aids, by any act or illegal omission, the doing of that thing.*
>
> *Explanation 1.-A person who by illful misrepresentation, or by illful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to procure, a thing to be done, is said to instigate the doing of that ting.*
>
> *Illustration: A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.*
>
> *Explanation 2. – Whoever, either prior to of at the time of the commission of an act. Does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."*

b) The Supreme Court in *Shri Ram v. State of U.P.,* (AIR 1975 SC 175) has explained the meaning of abatement as under:

> *"6… Section 107 of the Penal Code which defines abetment provides to the extent material that a person, abets the doing of a thing who "intentionally aides, by any act or illegal omission, the doing of that thing." Explanation 2 to the section says that "whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission there is said to and the doing of that act.' Thus, in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged*

abettor is not enough compliance with the requirements of Section 107……."

c) In *Faguna Kana Nath vs. State of Assam,* (AIR 1959 SC 673) observed as under:

"5…. Abetment is defined in S.107 and a person abets the doing of a thing when (1) he instigates any person to do that thing or (2) engages with one or more other person or persons in any conspiracy for the doing of that thing….or (3) intentionally aids, by any act or illegal omission, the doing of that thing…."

295. It is stated on behalf of appellants that in the entire show cause notice, there is no material to suggest even remotely that the Noticee allowed the debit to the BFEA Bank Account with an intention to contravene the provisions of the act or the Manual as alleged. The Bank Official who processed the transaction for debit to the account of BFEA merely carried out the instructions of the constituent viz. BFEA as reflected in the cheque issued by and drawn on its account with the Noticee Bank. These instruments were received in the ordinary course of clearance of cheque and in the normal routine course of its banking business, the Officials debited the account of BFEA. There was nothing on the face of the instruments to even remotely suggest that the cheque was being credited into an account of a non-resident. The BFEA being a reputed State Bank of Russia, the Bank Officials had no reason to doubt that the State Bank of the Soviet Union like BFEA would issue its own Banker's cheques in an attempt to contravene the provisions of the Act or the Manual. The Bank Officials acted in good faith and the element of mens rea required for a charge of abetment is completely lacking. It is submitted that no penalty could be imposed in respect of the said charge.

296. It is evident that the various propositions of law that have been raised above have been well settled by the Foreign Exchange Regulation board/ High

Court of various states/Supreme Court have not been dealt with or distinguished, if not agreeable. The Adjudicating officer is bound to follow the said decisions.

(a) In *Wimco Ltd. V. Director of Enforcement,* [1997 [94] Taxman 542], the FERA Board observed:

> *"… it is unfortunate that the authority below has not allowed himself to be guided by the legal position as stated by this Board.* ***We must observe that it is not permissible for the authority below, while adjudicating upon the case before him and making adjudication order, to ignore the position of law as stated by the Board****. If the legal position as stated by the Board has been corrected by the High Court or the Supreme Court or is found to be otherwise not tenable in view of the authoritative judicial pronouncement of the Courts, it is the duty of the authority below to refer to such judicial pronouncements and given reasons for not following the view taken by this Board in respect of the provisions of the Act…"*

(b) Further, in the case *of Union of India v. Kamalakshi Finance Corporation Ltd.* (1992 Supp (1) SCC 648), it was stated:

> *"…. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any actual mala fides but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other the Tribunal. The High Court has, in our view, rightly criticized the conduct of the Assistance Collections and the harassment to the assesse caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost important that, in disposing of quasi-judicial issues before hem, revenue officers are bound by the decisions of the appellate authorities… the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect*

to the orders of the higher appellate authorities which are binding on them."

297. The Respondent has also relied upon the judgments to state that a Show Cause Notice need not be exhaustive in nature, it may be correct but at least, the allegations contained in the show cause notice against the concerned officers must be specific and may not be exhaustive in nature.

298. Before filing the said Appeals Standard Chartered Grindlays Ltd. had deposited penalty amounts of Rs. 6,65,30,000/- and Rs. 59,77,000/- on behalf of the Bank and its Officers respectively, imposed in the above-mentioned 4 Adjudication Orders.

299. The contravention in the present case has happened but after hearing gone through the provisions of Section 6(2), it is apparent that the Reserve Bank of India has the power to hold an authorised dealer liable in the event of a contravention of the act, rule, direction or order made under it. Section 51 empowers the adjudicating authority to impose penalty for a contravention of the "provisions of the Act, ….rule, direction or order made thereunder". However, an authorised dealer may be dealt with by the Reserve Bank of India u/s 6 (2) for a contravention of the "provisions of the Act, …..rule, direction or order made thereunder." Ir is not possible to conclude that an authorised dealer cannot be punished again by an Adjudicating Authority. There can only be one civil penal remedy available for the contravention of any Act, Rule, Direction, as the Authorised Dealer being the delegate of RBI ought to be dealt with by the RBI under section 6 read with section 73A of FERA. In this context, it is important to bear in mind.

It is settled legal maxim *"Nemo debet bis vexari pro una eteademc ausa"* i.e. no man shall be vexed twice for the same act. This maxim has been

recognized in Article 20 of the Constitution as well as Section 26 of the General Clauses Act. Section 6(3)(ii) allows to RBI to impose penalty to cancel the licence of foreign exchange and under Section 73A, an additional penalty can also be imposed by the RBI if failed to file return. The Legislature could not have intended that an authorised dealer should be penalized twice for a contravention of the provisions of the act, rule, direction or order.

300. During the hearing of the said appeals, counsel have taken the instructions and had submitted and also filed a letter on behalf of bank stating that in the event that the above-mentioned Appeals of the Appellant Bank and its Officers being Appeal Nos. 91-97 of 2007, 105-110 of 2007, 112-114 of 2007 and 121-122 of 2007 are allowed and the above-mentioned Adjudication Orders are set aside and the Appellant Bank and its Officers are exonerated as a consequence of which the above-mentioned deposited penalty amounts become refundable to the Appellants, the Appellants will not apply for a refund of the said penalty amounts. The statement was madde without prejudice to the rights and contentions of the Appellants, but it should not be considered as admission of any violation of any provision of FERA by the Appellants.

301. There is no disputes that contravention in the above said case have happened. From the entire gamut of the case, no material is found to establish that the banks and its official are involved in any conspiracy directly or indirectly, intentionally or deliberately for the said lapse. No doubt it is serious matter and it should not have happened. It did happen 1991 when communication and technology was not so equipped. Even staff or banks officials may not be experts at that point of time. From the conduct of

the bank and pleading of all the appellants, it appears that they are feeling their mistakes.

302. In nutshell, the case of the appellants are that being a bank it was only for RBI to impose the penalty if any thought alternative submissions are also made. The money in question has also brought back by the bank before issuance of show cause noticed. Country has not lost any revenue. After 1991 the bank has conducted thousand of transactions without any default. RBI has not cancelled its licence of the appelalnt for foreign exchange.

303. It is matter of fact that entire penalty amount has been deposited by the Bank. It appears that after realising lapse on their part, in order to show their bona-fide, the statement was made during hearings of appeals that without prejudice, the said penalty amount shall not be pressed by the appellants for refund. The same may be deposited with the Prime Minister Relief Fund, if so advised by the respondent.

304. As far as merit of the appeals are concerned, the impugned orders are not sustainable in law and facts. The same are set-aside.

305. No costs.

(Justice Manmohan Singh)
Chairman

New Delhi,
20th September, 2019
'skb'