

REPORTABLEIN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTIONCRIMINAL APPEAL NO.2463 OF 2014

SHAILENDRA SWARUP

... APPELLANT

VERSUS

THE DEPUTY DIRECTOR,
ENFORCEMENT DIRECTORATE

... RESPONDENT

J U D G M E N TASHOK BHUSHAN, J.

This appeal has been filed against the judgment of Delhi High Court dated 18.11.2009 dismissing the Criminal Appeal filed by the appellant by which appeal the judgment dated 26.03.2008 of the Appellate Tribunal for Foreign Exchange in Appeal No.622 of 2004 filed by the appellant was challenged.

2. Brief facts of the case giving rise to this appeal are:

2.1 Modi Xerox Ltd.(MXL) was a Company registered under the Companies Act 1956 in the year 1983. Between the period 12.06.1985-21.11.1985, 20

remittances were made by the Company-MXL through its banker Standard Chartered Bank. The Reserve Bank of India issued a letter stating that despite reminder issued by the Authorised Dealer, MXL had not submitted the Exchange Control copy of the custom bills of Entry/Postal Wrappers as evidence of import of goods into India. Enforcement Directorate wrote to MXL in the year 1991-1993 for supplying invoices as well as purchase orders. MXL on 09.07.1993 provided for four transactions and Chartered Accountant's Certificates for balance 16 amounts for which MXL's Bankers were unable to trace old records dating back to 1985. MXL amalgamated and merged into Xerox Modicorp Ltd. (hereinafter referred to as "XMC") on 10.01.2000. A show cause notice dated 19.02.2001 was issued by the Deputy Director, Enforcement Directorate to MXL and its Directors, including the appellant. The show cause notice required to show cause in writing as to why adjudication proceedings as contemplated in Section 51 of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA, 1973") should not be held

for contravention. Xerox Modi Corporation Ltd. (successor of MXL) replied the show cause notice dated 19.02.2001 vide its letter dated 26.03.2001. The Directorate of Enforcement decided to hold proceedings as contemplated in Section 51 of the FERA, 1973 read with Section 3 and 4 of Section 49 of FEMA and fixed 22.10.2003 for personal hearing. Notice dated 08.10.2003 was sent to MXL and its Directors. Notice dated 08.10.2003 was replied by the appellant vide its detailed reply dated 29.10.2003. In the reply the appellant stated that he is a practicing Advocate of the Supreme Court and was only a part-time, non-executive Director of MXL and he was never in the employment of the Company nor had executive role in the functions of the Company. It was further stated that the appellant was never in charge of nor ever responsible for the conduct of business of the Company. Along with the reply an affidavit of the Company Secretary dated 04.07.2003 that the appellant who was the Director of erstwhile Company-XML was only a part-time, Director of the said Company and never in charge of day to day

business of the Company was also filed. The MXL has also submitted a reply dated 29.10.2003. The Deputy Director, Enforcement Directorate after hearing the appellant, other Directors of the Company passed an order dated 31.03.2004 imposing a penalty of Rs.1,00,000/- on the appellant for contravention of Section 8(3) read with 8(4) and Section 68 of FERA, 1973.

2.2 Aggrieved by the order dated 31.03.2004 imposing penalty of Rs.1,00,000/- on the appellant, Appeal No.622 of 2004 was filed by the appellant before the Appellate Tribunal for Foreign Exchange which appeal came to be dismissed by the Appellate Tribunal on 26.03.2008. Against the order of the Appellate Tribunal dated 26.03.2008, Criminal Appeal No.575 of 2008 was filed by the appellant in Delhi High. The Delhi High Court by the impugned judgment dated 18.11.2009 has dismissed the appeal of the appellant, questioning which judgment this appeal has been filed.

3. The High Court, in Criminal Appeal, during pendency of the appeal has stayed the order of penalty. This Court while issuing notice on 19.02.2010 in the present appeal had also stayed the order of penalty imposed on the appellant.

4. We have heard Shri C.A. Sundaram, learned senior counsel for the appellant and Shri K.M. Nataraj, learned Additional Solicitor General for the respondent.

5. Shri C.A. Sundaram, learned senior counsel for the appellant submits that the High Court dismissed the appeal of the appellant holding that reply dated 29.10.2003 of the appellant taking the plea that he was only a part-time Director was only an afterthought. The High Court further held that the affidavit dated 04.07.2003 of the Company Secretary relied by the appellant does not appear to have been filed either before the Adjudicating Authority or the Appellate Tribunal and no such plea had been taken in the earlier communications. Shri Sundaram submits that the High Court committed error in dismissing the appeal of the appellant whereas neither there was any material nor any specific case of the Department that the appellant was in

charge of and responsible for the conduct of business of the Company. The mere fact of Company-MXL in its reply to the notice dated 19.02.2001 having given the names of the 13 persons as Directors of MXL does not amount to stating that all the Directors were responsible for the conduct of business of the Company. The appellant could have been prosecuted and punished for the contravention of the provisions of FERA, 1973 only after returning a finding that it was the appellant who was responsible for the conduct of business during the relevant period when remittances in question were made by MXL. The Appellate Tribunal without recording any finding that appellant was in charge of the affairs of the Company held the appellant liable, observing that there is nothing on record to show that any restriction was placed on the powers of the appellants as Directors of the Company with reference to subject transactions. The Adjudicating Authority although noticed the detailed reply given by the appellant dated 29.10.2003 but without returning any finding that the appellant was Director who was responsible for working of MXL at the relevant time imposed the penalty only relying on the letter of the Company Secretary where names of the persons who were in the Board of Directors were mentioned.

6. Shri Sundaram further submits that with regard to a subsequent transaction, proceedings were initiated against the appellant in respect to transaction of MXL where the plea of the appellant that he was only a part-time, non-executive Director and had no executive role or function in the Company was accepted and proceedings were dropped insofar as the appellant is concerned by order dated 13.02.2004 which order clearly noticed the status and role of the appellant.

7. Learned Additional Solicitor General refuting the submissions of the counsel for the appellant contends that penalty has rightly been imposed on the appellant. He submits that admittedly the appellant was Director during the relevant period which fact was admitted too in the reply given to the show cause notice. The show cause notice was issued against all the Directors including the appellant and no effort has been made by the appellant to disprove the allegations made against him. Learned Additional Solicitor General submits that there needs no specific complaint in proceedings of FERA, 1973 as opposed to complaint under Negotiable Instruments Act. When the proceedings have been initiated under Section 51 of the

FERA, 1973, the burden is on the appellant to prove that he had no role to play on behalf of the Company.

8. Learned counsel for the parties have placed reliance on few decisions of this Court which shall be referred to while considering the submissions of the parties in detail.

9. From the submissions made by the parties and materials on records following points arise for determination in this appeal:

(1) Whether the plea taken by the appellant in its reply dated 29.10.2003 that he was only a part-time, non-executive Director and was never in charge of nor even responsible for the conduct of business of the Company at the relevant time was an afterthought, since, in the reply given by the Company Secretary dated 26.03.2001 no such plea was taken?

(2) Whether the appellant has not brought any material on record either before the Adjudicating Authority or the Appellate

Tribunal to prove that he was only a part-time, non-executive Director not responsible for the conduct of business of the Company at the time of commission of the offence?

- (3) Whether the Adjudicating Authority, Appellate Tribunal and the High Court erred in holding contravention of provisions of Section 8(3), 8(4) and Section 68 of FERA, 1973 by the appellant without their being any material that the appellant was responsible for the conduct of business of the Company at the time of commission of the offence and without recording any specific findings to that effect?

POINT NO.1

10. As noted above, the High Court has rejected the plea of the appellant that he was part-time, non-executive Director not responsible for the conduct of business of the Company at the relevant period on the ground that the above plea is an afterthought since in reply given by the

Company Secretary to show cause notice dated 19.02.2001 no such plea was taken.

11. We may first notice the show cause notice dated 19.02.2001. The show cause notice dated 19.02.2001 was given to the MXL and all Directors of MXL and along with show cause notice Annexure 'B' was a list of Directors of MXL where the name of the appellant was also included at Serial No.12. It is relevant to notice following portion of the show cause notice:

"AND WHEREAS it further appears that S/Shri - As per Annexure B Proprietor, Partner(s)/Manager/Secretary of the said company/firm has been responsible/supervisor/incharge of the said company/firm for the conduct of business of the company/firm at the relevant time when the aforesaid import was made as such he/she/they has/have rendered himself/herself/themselves liable also to be proceeded against under Section 50 of the Foreign Exchange Regulation Act, 1973 (46 of 1973).

NOW THEREFORE, the said M/s Modi Xerox Ltd. as well as its Directors of the above address are hereby required to show cause in writing (in duplicate) within thirty days from the date of receipt of this Memorandum as to why adjudication proceedings as contemplated in Section 51 of the Foreign Exchange Regulation Act, 1973 (46 of 1973) should not be held against them for the aforesaid contravention."

12. The show cause notice, thus, asked the Directors to show cause as to why adjudication proceedings as contemplated in Section 51 of the FERA, 1973 should not be held against them. The reply to the said notice was sent only by the Company through Acting Company Secretary dated 26.03.2001. The Deputy Director, Enforcement Directorate after considering the reply to show cause by XMC's vide letter dated 26.03.2001 decided to hold adjudication proceedings as contemplated in Section 51 of FERA, 1973. Adjudication notice dated 08.10.2003 was issued by Deputy Director, Enforcement asking the Directors to appear for personal hearing on 22.10.2003. It is relevant to reproduce the contents of the notice dated 08.10.2003 which are to the following effect:

"DIRECTORATE OF ENFORCEMENT
FOREIGN EXCHANGE MANZMENTNT
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
GOVERNMENT OF NDIA

HEAD QUARTERS OFFICE,
6TH FLOOR LOK NAYAK BHAWAN,
KHAN MARKET NEW DELHI -110 003.

F.NO.T4.20/DZ/2001/DD (AV) VM/4571 DATE 8/10/2003

From

The Deputy Director of Enforcement

To
M/s Modi Xerox Ltd.
Ground Floor, Hemkunt Tower,
98 Nehru Place,
N. Delhi -19

And its Directors [As per fist attached].

Dear Sir /Madam,

Subject: Adjudication proceedings in respect of
Memo No. T-4/20/D2/2001 (SCN.) Dated 19/2/2001

This is to inform you that after considering the cause shown by you in/as you have failed to reply to the above mentioned memorandum the Deputy Director of Enforcement is of the opinion the Adjudication proceeding as contemplated in Section 51 of FERA, 1973 read with Section 3 & 4 of section 49 of FEMA, 1999 should be held against you in accordance with the procedure laid shown in Rules of the Adjudication Proceedings & Appeal Rules, 1974 and has accordingly fixed this case for personal hearing before him on 22 Oct. 2003 [22nd OCT. 2003] at 12:30 pm in the office of this Directorate at the above mentioned address.

Now, therefore, you are hereby given an opportunity to present yourself either personally or through your lawyer or other authorised representative before the Deputy Director of Enforcement for personal hearing on the aforesaid date, time and place.

You may please note that in case you fail to appear before the Adjudication Authority on the aforesaid date he may proceed with the enquiry in your absence and pass Adjudication Order on the basis of material and evidence available to him.

Your attention in this connection is invited to

the provisions to Rule 3 of the Adjudication Proceedings & Appeal Rules, 1974 read with section 3 & 4 of section 49 of FEMA ,1999 whereby in case it is decided to hold Adjudication Proceedings personal hearing of the case could be waived at your request. In case you prefer to waive personal hearing you may intimate accordingly so that the case may be decided without your personal attendance on the basis of available evidence.

Yours faithfully,
Sd/-
For Deputy Director"

13. We may also notice the provisions of Section 51 of FERA, 1973, which is to the following effect:-

"Section 51. Power to adjudicate.—For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section."

14. The provisions of Section 51 as noted above oblige the adjudicating officer to hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter.

15. When notice dated 08.10.2003 was given for adjudication proceedings it was obligatory for the adjudicating officer to give opportunity for making representation. In response to the notice dated 08.10.2003 the appellant has submitted a detailed reply dated 29.10.2003. In his reply the appellant apart from other facts stated following:

"1. The undersigned is a practicing Advocate of the Hon'ble Supreme Court of India and was only a part-time, non-executive Director of erstwhile Modi Xerox Limited and was never in its employment nor ever had any executive role or function in the said Company. Further the undersigned was never in charge of nor ever responsible for the conduct of the business of the Company MXL nor did the Noticee ever had any executive role or function in the company.

2. The undersigned Noticee had not at any stage been involved in any discussions or decisions relating to the import by the said Company and never issued any instructions to any banker or any other functionary of MXL to get any remittance affected out of India for any import.

3. The Notices was neither in charge of nor ever responsible for conduct of the day to day business of MXL."

16. The representation dated 29.10.2003 was, thus, first representation submitted by the appellant in response to adjudication notice and the plea taken by the appellant that he was only a part-time, non-executive Director of

erstwhile MXL and was never in charge of nor even responsible for the conduct of business of the Company was the plea taken first time by the appellant and could not have been termed either as afterthought or denied consideration. The High Court committed error in observing that plea taken by the appellant in its reply dated 29.10.2003 was afterthought, since, no such plea was taken in reply to the show cause notice dated 19.02.2001. As noted above the notice dated 19.02.2001 although was addressed to the Company and all its Directors, the reply was given only by the Company Secretary and none of the Directors has given any reply. The notice dated 19.02.2001 was issued by the Deputy Director, Enforcement Directorate to decide as to whether the adjudication proceedings as contemplated in Section 51 should be held against the Directors for contravention. When the Deputy Director decided to hold the adjudication proceedings under Section 51 reply given in response to the notice dated 08.10.2003 was statutorily required to be considered under Section 51 and the said reply could not have been ignored or knocked down by an erroneous assumption that it was an afterthought as has been done by the High Court. 29.10.2003 was the date fixed by the adjudicating officer for personal hearing of

the Directors. The appellant had not submitted any reply to show cause notice dated 19.02.2001 which though was addressed to the Company and all Directors and the reply was sent only by the Company Secretary on 26.03.2001. The representation dated 29.10.2003 was the first representation submitted by the appellant before the adjudicating officer during course of personal hearing. What is said by a person who is called for personal hearing even though given in the form of written representation dated 29.10.2003 required to be considered by the adjudicating officer otherwise the personal hearing shall become an empty formality and meaningless, specially when what was said by the appellant in his representation dated 29.10.2003 in no manner contradicted the reply 26.03.2001 sent by the Company Secretary. We, thus, are of the considered opinion that written representation dated 29.10.2003 submitted by appellant required due consideration and the High Court erred in discarding it as an afterthought.

POINT NO.2

17. We may further note that the High Court in its judgment has observed that affidavit relied upon by the appellant

dated 04.07.2003 of the Company Secretary had not been filed either before the Adjudicating Authority or the Appellate Tribunal nor any such plea was taken in the earlier communications. This has been observed in paragraph 17 of the impugned judgment, which is to the following effect:

"17. It was only as an afterthought and later on that the petitioner in his subsequent reply dated 29.10.2003 took up a plea that he was only a part time director and relied upon an affidavit dated 4.7.2003 of the Company Secretary Mukesh Dugar which even otherwise does not appear to have been filed either before the Adjudicating Authority or the Appellate Tribunal. No such plea had been taken in any of the earlier communications."

18. The above view of the High Court is neither correct nor based on materials on the record.

19. The adjudicating officer in its order dated 31.03.2004 has noted the reply dated 29.10.2003 on behalf of the appellant. The reply dated 29.10.2003 has been brought on the record of the paper book as Annexure P-4. In paragraph 10(1) of the reply dated 29.10.2003, the affidavit filed by the Company Secretary has been relied which was also enclosed with the reply as Annexure "C". Affidavit of the

Company Secretary dated 04.07.2003 which was enclosed with the reply was to the following effect:

"AFFIDAVIT

I, Mukesh Dugar son of Sh. S.R. Dugar and presently the Company Secretary & Head - Legal of Xerox Modicorp Limited having its registered office at 109, Shivalik Apartments, Sector 3, Noida, Distt. Gautam Budh Nagar, Uttar Pradesh do hereby solemnly affirm and state as follows:

1. That Modi Xerox Limited has since been merged into Xerox Modicorp Limited vide orders dated 10.01.2000 and 21.01.2000 of Hon'ble Allahabad High Court.
2. That Mr. Shailendra Swarup, who was a Director of the erstwhile Modi Xerox Limited was only a part time Director of the said Company and was never in charge of the day to day business of the Company.

Place Gurgaon
Date 4/7/2003

Sd/-
DEPONENT

VERIFICATION

Verified that the contents of this affidavit are true to the best of my knowledge and no part of it is false and nothing material has been concealed therein.

Signed and verified at Gurgaon on this 4th day of July, 2003.

DEPONENT"

20. Thus, the affidavit of Company Secretary dated 04.07.2003 clearly stating that the appellant who was

Director of the erstwhile MXL was only a part time Director of the said Company and was never in charge of the day to day business of the Company was very much on the record of the adjudicating officer and the High Court erred in holding that the said material was not filed before the Adjudging Authority or the Appellate Tribunal.

21. The High Court, thus, discarded the plea of the appellant that he was part-time, non-executive Director as afterthought and did not consider the same on the ground that the affidavit dated 04.07.2003 relied by the appellant was not filed which, as noted above, is not correct. There was nothing on record brought on behalf of the Department that the above plea of the appellant was incorrect and it was the appellant who was responsible for the conduct of business of the Company at the relevant time.

22. We, thus, are of the view that the material was brought by the appellant on the record that he was a part-time, non-executive Director not in charge of the affairs of the Company at the relevant time, which was erroneously refused to be considered.

POINT NO. 3

23. The Adjudicating Authority has in its order dated 31.03.2004 noted the reply dated 29.10.2003 filed on behalf of the appellant and Adjudicating Authority has extracted several paragraphs of the reply of the appellant. Paragraph 10 of the reply has been extensively quoted by the Adjudicating Authority specially sub-paragraph (1), (2) and (3) which are to the following effect:

"10 It is prayed that the proceedings initiated may kindly be dropped on the following amongst other main grounds, which are set out hereinafter without prejudice to one another and are in addition to the facts and submission set forth hereinabove

- (1) That the Notice was a decorative part time non-executive Director and the Board Meetings attended by him have only been in his capacity as a part-time non-executive Director and not in any other capacity. The Noticee was never in the employment of the company and never ever had nay executive role or function in the Company. A copy of the Affidavit filed by the noticee with his reply to Show Cause Notice No.T-4/337/DZ/2002 dated 28.05.2002 of the Company Secretary of XMC at the time to its swearing confirming that the Noticee was only a part-time Director of MXL and was never in charge of the day to day business of MXL is enclosed herewith and marked as Annexure - 'C'. This Notice has been never engaged in day to day conduct of the business of MXL. He has never entered into any import

agreement. He has never issued any instructions to any person or the bank for causing any remittance abroad and as such he is not responsible for liable at all in any manner.

- (2) It is respectfully submitted that the documents enclosed with MXL's reply of 04.12.1991, 25.12.1991, 25.12.1991 and 09.07.1993 and XMC's reply dated 26.03.2001 will establish that goods have been imported against the remittances mentioned in the Annexure and they had been duly reported to Reserve Bank of India and there is no evidence of goods not having been imported.
- (3) This Noticee was never in charge of the day to day business of MXL and had no knowledge of the transactions in respect of which the above referred Show Cause Notice dated 08.10.2003 had been issued much less any intent or knowledge of alleged contraventions as set forth therein. The certificates of compliances given by MXL management to the Board prove and establish that the contraventions alleged in the above referred Notice and the subject Memorandum, in any view of the matter if occurred, were without the knowledge and had nothing to do with the transactions in question, the question of this Noticee committing consciously or deliberately any contravention of the FERA or any other law or regulations does not arise and no penalty can in law be imposed on this Noticee. The adjudication proceedings are otherwise not maintainable in law."

24. After noticing the above plea of the appellant, the

Adjudicating Authority has noticed that letter dated 26.03.2001 of the Company Secretary where he has given the names of 13 Directors and after noticing the aforesaid 13 Directors the Adjudicating Authority has recorded its conclusion in following words:

"I have also gone through the replies received from other directors and found that they were not responsible for day to day activities of the company and were not the Directors during the relevant period which was between 12.06.1985 to 21.11.1985 and they were the nominees of IFCI, GIC, ICICI, UTI and IDBI respectively, hence, I drop the charges against the Directors except S/Sh. Bhupinder Kumar Modi, Umesh Kumar Modi, John Rodger Miligan, James Campbell White and Shailendra Swarup who were Directors at relevant time and responsible for working of the M/s Modi Xerox Ltd., I hereby find them guilty and impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) each on S/Sh. Bhupinder Kumar Modi, Umesh Kumar Modi, John Rodger Miligan, James Campbell White and Shailendra Swarup and Rs.5,00,000/- (Rupees Five Lakhs only) on M/s Modi Xerox Ltd. for contravention of Section 8(3) read with Section 8(4) and Section 68 of FERA, 1973, I also find the other directors were not joined the company at relevant time when the transaction had taken place and were not responsible for the conduct of the company, hence I drop the charges against S/Sh. Laurence Lyndon Haddon, Stephen Lawrence Tiemey, Bernard Fournier, R.S. Lodha, R.P. Goel, Jan Williams Van Erde, Chaman Lal Turki Dhar, Ramesh C. Vash, S.K. Jain, K.P. Narasimhan, Sunil Mitra, Sundershan Lal, R.K. Mahajan, C.G. Parekh, Kari Kumar and Usha Ranjan Saha."

25. There is no consideration of pleas of the appellant as

has been extracted by the adjudicating officer himself as noted above specially in paragraph 10(1), 10(2) and 10(3) of the reply. The adjudicating officer has not even held that the pleas taken by the appellant were untenable. The adjudicating officer, thus, has imposed the penalty without returning a finding that it was the appellant who was liable for contravention of the provisions of Section 8(3), 8(4) and Section 68 of the FERA, 1973. The order of the adjudicating officer, thus, is unsustainable on the above ground also.

26. The Appellate Tribunal has also not considered the above plea of the appellant and by making general observation that management of the Company is to be handled by the Board of Directors, hence, the appellant being Director is held guilty. No finding has been returned by the Appellate Tribunal that the appellant was not a part-time, non-executive Director and was responsible for the conduct of business of the Company at the relevant time.

27. We may also notice few judgments of this Court some of which have also been referred to by the learned counsel for the parties. A three-Judge Bench judgment in **S.M.S.**

Pharmaceuticals Ltd. Vs. Neeta Bhalla and another, (2005)

8 SCC 89, had occasion to consider the provisions of Section 141 of the Negotiable Instruments Act, 1981 which provisions are *pari materia* to Section 68 of the FERA, 1973. Section 68 of the FERA, 1973 deals with Offences by Companies and is to the following effect:

"68. Offences by companies.-

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

(2) Notwithstanding anything contained in subsection (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(I) "company" means any body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm."

28. In the Negotiable Instruments Act, 1881 initially there was no provision regarding offences by Companies and by Act 66 of 1988 Section 141 was inserted in the Negotiable Instruments Act, 1881 which provision is to the following effect:

"Section 141. Offences by companies.—(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, —

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

29. A bare reading of Section 141 of Negotiable Instruments Act, 1881 indicates that sub-section (1) and sub-section (2) of Section 141 are *pari materia* to Section 68 of FERA, 1973 which was already in the statute. This Court in **S.M.S. Pharmaceuticals (supra)** had occasion to consider the requirements of Section 141. In paragraph 4 this Court lays down following:

"4.....The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific

provision which in case an offence under Section 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who. at the time the offence was committed, was incharge of and was responsible to the Company for the conduct of business of the Company, the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence. "

30. This Court held that the criminal liability arises from being in charge of and responsible for the conduct of the Company at the relevant time. Elaborating the requirement for a person to be made liable under Section 141 this Court laid down following in paragraphs 10 and 12:

"10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it

is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable. "

31. The ratio of the above judgment has been reiterated by this Court in **N.K. Wahi vs. Shekhar Singh and others, (2007) 9 SCC 481, National Small Industries Corporation Limited vs. Harmeet Singh Paintal and another, (2010) 3 SCC 330 and Pooja Ravinder Devidasani vs. State of Maharashtra and another, (2014) 16 SCC 1.**

32. Learned Additional Solicitor General placed reliance on the judgment of this Court reported in **N. Rangachari vs. Bharat Sanchar Nigam Ltd., (2007) 5 SCC 108.** This Court in **Rangachari** was again considering the provisions of Section 141 of the Negotiable Instruments Act, 1881. Learned Additional Solicitor General relied on paragraphs 17 to 22. In **N. Rangachari** this Court has noticed the earlier three-Judge judgment in **S.M.S. Pharmaceuticals**

Ltd. (supra) and clearly held that the said judgment is binding. In paragraph 20 of **N. Rangachari**, this Court laid down following:

"20. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company Under Section 141 of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company."

33. Thus, what was held in **S.M.S. Pharmaceuticals Ltd. (supra)** has been reiterated by **N. Rangachari**. We may also refer to paragraph 23 of the **N. Rangachari** judgment where following has been laid down:

"23. In the light of the ratio in **S.M.S. Pharmaceuticals Ltd. (2005) 8 SCC 89**, what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the Directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in **Saroj Kumar Poddar case (2007) 3 SCC 693**, this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonoured, the persons named in the complaint were in charge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in **S.M.S. Pharmaceuticals Ltd.** and in view of the position of the Directors in a company as explained above."

34. In the facts of the above case this Court held that allegations were clearly made out in the complaint. Judgment of this Court in **N. Rangachari**, thus, does not help the respondent nor it, in any manner, dilute the ratio of three-Bench judgment in **S.M.S. Pharmaceuticals Ltd. (supra)** .

35. We may notice one more judgment of this Court, **National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Another**, (2010) 3 SCC 330, interpreting Section 141 of the Negotiable Instruments Act, 1881. After extracting Section 141 of the Negotiable Instruments Act dealing with offences by companies, this Court in paragraph 12 and 13 laid down:-

"12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact that if a Director of a Company who was not in-charge of and was not responsible for the conduct of the business of

the company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in-charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.

13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No. 1 was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability."

36. In the above case, this Court held that Directors can be prosecuted only if they were in-charge and responsible for the conduct of the business of the company. In paragraph 36, following has been laid down:-

"36. Section 291 of the Companies Act provides that

"291. General powers of Board.—(1) Subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorized to exercise and do.

A company, though a legal entity, can act only through its Board of Directors. The settled

position is that a Managing Director is prima facie in-charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other Directors are concerned, they can be prosecuted only if they were in-charge of and responsible for the conduct of the business of the company."

37. Section 68 of FERA, 1973 deals with "Offences by companies". Section 68(1) provides that ".....every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention....."

Section 68(1) creates a legal fiction, i.e., "shall be deemed to be guilty". The legal fiction triggers on fulfilment of conditions as contained in the section. The words "every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business" has to be given some meaning and purpose. The provision cannot be read to mean that whosoever was a Director of a company at the relevant time when contravention took place, shall be deemed to be guilty of the contravention. Had the legislature intended that all the Directors irrespective of their role and responsibilities shall be deemed to be

guilty of contravention, the section could have been worded in different manner. When a person is proceeded with for committing an offence and is to be punished, necessary ingredients of the offence as required by Section 68 should be present.

38. We may notice that Section 141 of the Negotiable Instruments Act, which was inserted in Negotiable Instruments Act by amendment in the year 1988 contains the same conditions for a person to be proceeded with and punished for offence as contained in Section 68 of FERA, 1973. Section 141(1) of Negotiable Instruments Act uses the same expression "every person, who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence". Section 68 of FERA, 1973 as well as Section 141 of the Negotiable Instruments Act deals with the offences by the companies in the same manner. The ratio of the judgments of this Court on Section 141 of Negotiable Instruments Act as noted above are also clearly relevant while interpreting Section 68 of FERA Act. We, thus, hold that for proceeding against a Director of a company for

contravention of provisions of FERA, 1973, the necessary ingredient for proceeding shall be that at the time offence was committed, the Director was in charge of and was responsible to the company for the conduct of the business of the company. The liability to be proceeded with for offence under Section 68 of FERA, 1973 depends on the role one plays in the affairs of the company and not on mere designation or status. This Court in **S.M.S. Pharmaceuticals Ltd. (supra)** while elaborating the ambit and scope of Section 141 of Negotiable Instruments Act has already laid down above in paragraph 10 of the judgment as extracted above.

39. It is true that with regard to any offence punishable under Section 138 of Negotiable Instruments Act with respect to offences by companies, a complaint in writing has to be filed as required by Section 142 of the Negotiable Instruments Act. A complaint as contemplated for offence under Section 138 needs to be necessarily contain all allegations constituting offence. In FERA, 1973 for imposing a penalty under Section 50, the adjudicating officer is required to hold an enquiry after giving the person a reasonable opportunity for making a representation

in the matter. Even though, FERA, 1973 does not contemplate filing of a written complaint but in proceedings as contemplated by Section 51, the person, who has to be proceeded with has to be informed of the contravention for which penalty proceedings are initiated. The expression "**after giving that person a reasonable opportunity for making a representation in the matter**" as occurring in Section 51 itself contemplate due communication of the allegations of contravention and unless allegations contains complete ingredients of offence within the meaning of Section 68, it cannot be said that a reasonable opportunity for making a representation in the matter has been given to the person, who is to be proceeded with.

40. Learned ASG is right in his submission that FERA, 1973 does not contemplate any complaint but the Scheme of the Act indicate that a person, who is to be proceeded with has to be made aware of the necessary allegations, which may constitute an offence on his part. This Court in **N. Rangachari (supra)** has observed that a person in the commercial world having a transaction with company is entitled to presume that the Directors of the company are in charge of the affairs of the company. The presumption

of a person in the commercial world is a rebuttable presumption and when adjudicating authority proceeds to impose a penalty for a contravention of FERA, 1973, essential ingredients constituting an offence under the FERA read with Section 68 has to be communicated to the person proceeded with to enable him to make effective representation in the matter.

41. Learned Additional Solicitor General also submitted that all the three Courts have held and found contravention proved by the appellant, this Court may not interfere with such conclusion. We have already noticed above that the plea of the appellant that he was part-time, non-executive Director not in charge of the conduct of business of the Company at the relevant time was erroneously discarded by the authorities and the High Court and there is no finding by any of the authorities after considering the material that it was the appellant who was responsible for the conduct of business of the Company at the relevant time. Thus, present is a case where the liability has been fastened on the appellant without there being necessary basis for any such conclusion.

42. It is also relevant to notice that an order which was passed on 13.02.2004 by the Deputy Director in adjudication proceedings although with regard to different period, the plea of the appellant that he was only a part-time, non-executive Director and not responsible of the conduct of business of the Company was accepted and notice was discharged against the appellant. The order dated 13.02.2004 although related to different period but has categorically noticed the status of the appellant as part-time non-executive Director. There being decision of Adjudicating Authority, in the recent past, passed on 13.02.2004, that the appellant was only a part-time non-executive Director of MXL, there has to be some reasons for taking a contrary view by the adjudicating officer in order dated 31.03.2004 with regard to affairs of the same company, i.e., MXL.

43. In view of the foregoing discussions, we are of the view that the adjudicating officer has erroneously imposed penalty on the appellant for the alleged offence under Section 8(3), 8(4) and 68 of the FERA, 1973 which order was erroneously affirmed both by the Appellate Tribunal and the High Court.

44. In view of the aforesaid, this appeal deserves to be allowed, the judgments of the High Court as well as those of the adjudicating officer and the Appellate Tribunal are set aside. The appeal is allowed and the penalty imposed on the appellant is set aside.

.....J.
(ASHOK BHUSHAN)

.....J.
(R. SUBHASH REDDY)

NEW DELHI,
JULY 27, 2020.

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