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REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL No.975 OF 2007

UNION OF INDIA .. Appellant

Versus

ABN AMRO BANK AND OTHERS .. Respondents

WITH

CRIMINAL APPEAL No.976 OF 2007

J U D G M E N T

K. S. Radhakrishnan, J

Crl. M.P. No.11274 of 2013 is allowed.

2. The Special Director of Enforcement, Enforcement Directorate, Government of India, New Delhi, exercising powers under Section 51 of the Foreign Exchange Regulation Act, 1973 (for short "FERA"), later repealed, initiated proceedings vide order dated 22.9.2000 against M/s Maple Leaf Trading International Pvt. Ltd. (for short 'the Company') for violation of the provisions of Section 19(1)(a) and (d), 29(1)(b), 47(1) and 49(i)(a) read with Section 68 of FERA. Proceedings were also initiated against the other respondents, including 1st respondent, ABN AMRO Bank NV (now called "Royal Bank of Scotland NV") and 4th respondent - M/s Piccadily Invest AG, Zurich, Switzerland (for short "Piccadily"). Respondents, aggrieved by the above mentioned order, preferred four appeals before the Appellate Tribunal for Foreign Exchange, New Delhi and the Tribunal allowed those appeals vide its order dated 10.3.2003 and set aside the order of confiscation and the penalty imposed.

3. Union of India, aggrieved by the said order, preferred Criminal Appeal No. 380 of 2003 before the Delhi High Court under Section 54 of FERA read with Section 35 of the Foreign Exchange Management Act, 1999 which was, however, dismissed, stating that neither any question of law nor any legal infirmity had been found in the impugned order passed by the Tribunal. Aggrieved by the same, Criminal Appeal No. 975 of 2007 has been filed by the Union of India, which is treated as the main appeal and being heard along with Criminal Appeal No. 976 of 2007, which was also filed by the Union of India and another against the order of the High Court dated 12.9.2003 setting aside the order confiscating the drafts deposited by few investors in the 2nd company.

FACTS:

4. M/s Maple Leaf Trading International Pvt. Ltd., the 2nd respondent, was formed with the assistance of M/s J. C. Bhalla and Company, a Chartered

Accountant firm having its office at New Delhi, in the following circumstances. One Lambert Kroger, Stefen Mayer and Cliff Roy, all foreign nationals, had met Anil Bhalla of the above mentioned firm and expressed their desire for establishing a company for trading in Maple Leaf Gold Coins in India, which they were doing in Netherlands and Germany. Anil Bhalla was informed that necessary approvals would be obtained through M/s. Abascus Legal Group, New Delhi. Anil Bhalla and Rajesh Sethi, Chartered Accountants of that firm, became subscribers of the newly formed company. Cliff Roy, a foreign national and power of attorney holder of 4th respondent - Piccadily informed him that from Abascus, one Vikrant Singh Jafa and Rahul Krishna would be the Directors of the company and ten shares of the company each in the name of Anil Bhalla and in the name of Rajesh Sethi were issued, which were transferred on 19.5.1998 in the name of Vikram Singh Jafa and a sum of Rs.2,000/- was received in cash from Cliff Roy. In the above background, the company was incorporated on 5.4.1998 and, on the same date, Cliff Roy, a foreigner, was appointed as the Director of the Company and on 17.4.1998 he became the Managing Director of the company. Anil Bhalla, Rajesh Sethi (Chartered Accountants) and Rahul Krishnan, then, resigned as Directors of the company on 19.5.1998. Jafa resigned as Director on 11.1.1999. Jafa was holding 49% shares of the company and on 16.4.1999 a Share Transfer Agreement was entered into by him with one A.R. Khan and Lambert Kroger, the Managing Director of the company to transfer 9780 shares of the company to A.R. Khan. The Adjudicating Officer says, ultimately, the Indian company came under the control of Cliff Roy, Paul Singh Clare, Lambert Kroger, all foreign nationals. For deciding the various legal issues at this stage, a detailed analysis of the facts are unnecessary and we do not want to burden our judgment with further factual details, which are all part of the record.

5. We may, for the purpose of deciding these appeals, start from the stage at which Cliff Roy, a foreign national and power of attorney holder of 4th respondent company, had submitted an application in Form FC (RBI) on 21.5.1998 before the Reserve Bank of India (for short "RBI") for approval of not exceeding 51% foreign investment for Service Sector in Annexure III from the 4th respondent. Permission was sought for, for the foreign collaboration for "Business Management Consultancy for Trading, Marketing and Selling of Goods and Services" with specific reference to NIC Code 893. Details of foreign investment resulting in foreign exchange inflow were also given in para VI of the application. Para VIII (iii) called for the description of products in the case of trading companies primarily engaged in exports, to which the Company replied stating that the same is not applicable. RBI, with reference to that application, allotted Registration No. FC-98 NDR 1005 vide letter dated 29.6.1998 and vide letter dated 29.6.1998 informed the company that it would advise the foreign collaborator that they would obey the laws of the land and there should be no compromise or excuse for the ignorance of the Indian Legal System.

6. The Enforcement Directorate got information that the company had started trading activity in gold coins on 27.5.1998 and signed the first contract for trading in Maple Leaf Gold Coins, which it was noticed, was contrary to the declaration made by the company in its application Form FC (RBI) dated 21.5.1998 under NIC Code 893. RBI also got information from the Economic Offences Wing of the Crime Branch, Delhi that the Company was collecting money from the public on the pretext of distributing Maple Leaf gold coins misleading the public that it had got RBI permission for such an activity. RBI also got information from the Ministry of Industry, Government of India, that the company had also applied for FIPB approval for foreign equity induction beyond 51% claiming that they had been given approval by RBI for equity induction under the Automotive Approval Route for trading in gold coins. In the application dated 24.8.1998 submitted by the Company for FIRB approval, it was specifically stated that the existing activity of the Company was Business Management Consultancy (NIC No. 893)" and, therefore, not indulged in any trading activity.

7. RBI vide its letter dated 8.6.1999 informed the Directorate of

Enforcement that the company had filed documents with RBI on 21.5.1998 for entering into a foreign collaboration with M/s Piccadily under the general permission, in terms of FERA Notification no. 180/98-RB dated 13.1.1998 under NIC Code 893 i.e. Business management, consultancy for trading, marketing and selling of goods and services and not for trading in gold coins. RBI, it was pointed out, issued the registration number FC 98 NDR 1005 dated 29.6.1988 based on that request. It was pointed out that, under the General Permission, when a company gives a declaration in form FC (RBI) stating that it is engaged in an eligible activity and later the company is found doing a different activity, the company is deemed to have violated the provisions of the notification issued under FERA.

8. RBI also vide letter dated 8.6.1999 also informed the Government of India, Ministry of Industry stating that it had granted registration number for a foreign collaboration agreement in terms of notification NO. 180 dated 13.1.1998 and that the foreign collaboration covered activities under NIC Code Group 893, published in Annexure III to the Press Note No. 2, 1997 series dated 17.1.1997. RBI pointed out that the claim of the company that it had been given approval by RBI for 51% foreign equity induction under automatic approval route for trading in gold coins, was incorrect.

9. The Special Director, Enforcement Directorate, on getting various information of the violation of the provisions of FERA, along with other officers, searched the business premises of the company on 2.7.1999, which resulted in the recovery and seizure of various documents and articles and a panchnama dated 2.7.1999 was prepared. The search at the office premises of Group-A Securities at National Highway No. 8, Mahipalpur, New Delhi also resulted in the recovery and seizure of articles as per panchnama dated 3.7.1999.

10. Lambert Kroger, the third respondent herein, in his statements under Section 40 of FERA dated 2/3.7.1999, 5.7.1999, 6.7.1999, 7.7.1999, 8.7.1999 and 24.8.1999, stated that he is a German National and he came to India on 16.12.1997 to give suggestions to Cliff Roy, the power of attorney holder of 4th respondent, as well as the then Director of Maple, who applied to RBI on 21.5.1998 for approval of 51% foreign financial collaboration under the automatic route. Further, it was also stated that A.R. Khan was in possession of 49% of the shares of the company and the seller of those 49% shares V.S. Jafa had entered into with an understanding with 4th respondent to transfer the share of 49% under the direction of the Swiss company and he had also signed on that agreement. Anil Bhalla also gave statements under Section 40 of FERA on 12.7.1999, 13.7.1999 and 14.7.1999, stating that he had explained the procedure for applying for setting up 100% trading company through FIPB to Cliff Roy and Lambert Kroger and the 2nd respondent company was formed at their instance. He was informed that necessary approvals would be obtained by M/s Abascus Legal Group. Jafa also gave statements on 16.8.1999, 31.8.1999 and 30.9.1999, explaining the circumstances under which he had entered into the Share Transfer Agreement with A.R. Khan and Lambert Kroger as the confirming party. Statement of the Vice President of the erstwhile ABN Amro Bank was also recorded on 18.10.1999. . Bank stated that it is an authorized agency for import of gold and that gold is sold to customers of the Bank as a practice, after necessary documents are obtained and after getting purchase orders from the customers. The Bank places orders on the supplier and the price is fixed on the basis of the invoice sent by the suppliers. Bank has followed the said procedure in respect of the 2nd respondent company as well.

11. The Special Director, Directorate of Enforcement, after recording the statements and examining various documents, issued a show-cause-notice dated 29.12.1999 to the company, Lambert Kroger, Cliff Roy - Directors of

the company, 4th respondent - Piccadily, Paul Abraham - Director of the 2nd respondent company, for contravention of Sections 6(4) and (5), 9(1)(e), 47(1), 19(1)(a) and (e), 29(1)(a) and (b), 30(1), 49, 63 and 68 of FERA and to show cause why the amounts blocked in the accounts of noticee no 1 (bank) to the tune of 12.5 Crores approximately, seized 466 drafts, totalling 2.14 crores and seized yellow metal coins appearing to be gold, should not be confiscated in terms of Section 63 of FERA and Cliff Roy and Paul Clare were issued notice to show cause why they should not be directed to bring back the foreign exchange remitted outside India into India in terms of Section 63 of the Act. Following are the brief details of the show-cause-notice:

"CHARGE

On the basis of the above investigations, a Show Cause Notice No. T-$/9-D/99 dated 29.12.99 was issued to:

Maple Leaf Trading International (P) Ltd. S-485, GK-II, New Delhi-42 said noticee No. 1, its directors the said noticee No. 2,3 & 6.	For failure to comply with the provisions and declarations subject to which approval under automatic route was granted by the RBI and by engaging themselves in the trading activities of imported Maple Leaf Gold Coins in contravention of the provisions of sec. 19(1)(1) & (d), 29(1)(b) read with sec. 49 & 68(1) & (2) of FERA, 1973 and by entering into contracts/agreements in violation of provisions of section 47(1) of FERA, 1973 and by collecting a sum of Rs.25 Crore approx. and placing this amount without any general or special exemption of RBI to the credit of persons resident outside India in contravention of section 9(1)(e) of FERA, 1973 read with section 68(1) & (2) of the said Act.
M/s. Picadily Invest AG, Post FAch 284, 8034, Zurich, Switzerland, Mr. Cliff Roy, Mr. Lambert Kroger & Mr. Paul Singh Clare the said notices No. 4, 3, 2 & 6.	By their carrying out the business of imported Maple Leaf Gold Coins in India in name & style of notice No. 1 without any general or special permission of RBI in contravention of the provisions of section 29(1)(a) of FERA, 1973 and by the unlawful trading collected a sum of Rs.25 crores approximately in the account of M/s. Mapl Leaf Trading International (P) Ltd.
Mr.Cliff Roy, Lamber Kroger & Mr. Paul Singh Clare the said notices No. 2, 3 & 6.	By opening bank accounts with repatriation facility without prior permission of RBI and engaging in the trading of imported Maple leaf gold coins without any ground of special permission of RBI in contravention of section 30(1) of FERA, 1973.

They were also asked as to why the amounts blocked in the accounts of the Noticee No. 1 to the tune of Rs.12.5 crores approx., seized 466 drafts totalling to Rs.2.14 crores approx. And seized yellow metal coins appearing to be gold should not be confiscated in terms of section 63 of the said Act and Mr. Cliff Roy and Mr.Paul Singh Clare

are also required to show cause as to why they should not be directed to bring back foreign exchange remitted outside India into India in terms of section 63 of the said Act."

12. Detailed reply was submitted by all the parties and the Adjudicating Officer passed the final order on 22.2.2000 recording the finding that Lambert Kroger, Cliff Roy and Piccadily had established business activities in India and, therefore, would fall within the ambit of Section 29(1)(a) of FERA, 1973, for which they required a general or special permission from RBI, which they had not obtained and, therefore, liable to penalty under Section 50 of the Act. Further, it was also pointed out that the facts of the case had clearly indicated that, virtually, it is they who had established the company in India and that instead of following the route of Section 29(1)(a), they followed the route of Section 29(1)(b), by incorporating Maples, but indicated that foreign investment would be up to 51% for service sector in Annexure III. The Adjudicating Officer also recorded a finding that the 2nd respondent company had faulted the provisions of Section 29(1)(b) of FERA read with Notification No. 180/98 RB dated 13.1.1988. Findings have also been recorded as against the 1st respondent bank for not ascertaining the genuineness of the 2nd respondent company and as to whether the Company had the requisite permission from RBI for trading in gold and that the Bank has violated the provisions of Sections 6(4) and 6(t) of FERA and is liable to penalty under Section 50 of the Act. After holding so, the Adjudicating Officer passed the following order:

"In view of my findings that Noticee No. 1 has contravened the provisions of Section 19(1)(d) and 29(1)(b) read with Section 49(1)(a) and Section 47(1) of FERA, 1973 and Noticee NO. 2, 3 and 4 have contravened the provisions of Section 19(1)(a) of FERA, 1973,In am inclined to confiscate these gold coins seized under Panchnama dated 02.07.99 and 03.07.99 because these were acquired/specifically imported against foreign exchange by Noticee No. 1 for an activity which was contrary to the automatic approval route allowed by RBI under Notification No. 180/98-RB dated 13.01.1998 issued under Section 9(1)(d) and Section 29(1)(b) of FERA, 1973, out of funds generated in violation of Section 29(1)(a) of the said Act and gold coins being also liable to confiscation under Section 63 of FERA, 1973. The route adopted by them was to protect themselves from action as is evident from FAX dated 04.02.98 referred on page 66.

The SCN also proposed the confiscation of blocked amounts in bank accounts of Noticee No. 1 and fixed deposits maintained with following banks:-

1) ABN AMRO BANK : DLF Centre, Sansad Marg, New Delhi.

2) HDFC BANK LTD; Greater Kailash, Part II, New Delhi.

3) BANK OF AMERICA: Barakhamba Road, New Delhi.

The evidence on record reveals that Noticee No. 1 collected amounts from various individuals known as business partners in accordance with the contracts executed with them for purchase of Maple Leaf gold coins in accordance with terms of such contracts. Since the activity under the contracts has been held by me illegitimate under the provisions of Section 29(1)(a) and 29(1)(b) read with Section 49(i)(a) and Section 47(1) of FERA, 1973, so I hold these amounts and fixed deposits liable to confiscation under Section 63 of FERA, 1973 as their collection and usage was for financing activities which were contrary to the said provisions of the FERA, 1973.

The SCN also proposes to confiscate 466 bank drafts seized under Panchnama dated 02.07.99. these drafts are given by the said business partners in terms of the said contracts for aforesaid activity which has been held by me in violation of the provisions of Section 29(1)(a)

and 29(1)(b) read with Section 47(1) and 49(i)(a) and, therefore, for the same reasons, I hold these drafts also liable to confiscation under the provisions of Section 63 of the said Act.

Further, I also hold that all these Noticees, except No. 5, are liable to penalty under Section 50 of the FERA, 1973 for the reasons and observations recorded hereinabove. In view of the aforesaid, I pass order as under:-

"O R D E R

1. I order confiscation of 35 gold coins seized from the business premises of Noticee No. 1 under Panchnama dated 02.07.99 and 630 gold coins seized from M/s. Group 4 Securities, Mahipalpur, New Delhi, under Panchanama dated 03.07.99 under Section 63 of FERA, 1973, on the grounds mentioned hereinabove.

2. I also order confiscation of amounts blocked in following accounts including the fixed deposits along with the interest accrued thereon:-

Sl. No.	Name of the Banks	Account No. (A) Fixed Deposits (B)	Amount (Rs.)
A.	Bank of America, Barakhamba Road New Delhi.	261157(A)	3,88,089.22
		317177(A)	78,043.00
B.	ABN Amro Bank DLF Centre Sansad Marg, New Delhi	6362400(A)	6,19,17,244.88
		6362559(A)	41,89,460.66
		6414389(A)	2,44,98,474.00
		6372694 (A)	14,73,340.00
		312330040115(B)	77,10,103.80
		312330045196(B)	1,00,00,000.00
		312330045729(B)	2,65,444.97
		31233045778(B)	1,00,00,000.00
C.	HDFC Bank	0272000005409(A)	10,000.00

3. I order confiscation of the sale proceeds of the 466 bank drafts/pay orders seized from the business premises of Noticee No. 1 under Panchanama dated 02.07.99 under Section 63 of FERA. However, for 3 drafts/pay orders bearing no. 326191, 326192 and 326193, the order is subject to the outcome of Writ Petition pending before the Hon'ble High Court of Delhi in repaired to these.

4. I also order confiscation of following amounts lying in the following accounts of Noticee No. 3 and 6 with ABN Amro Bank, New Delhi:-

NAME	ACCOUNT NO.	AMOUNTS IN RS.
Cliff Roy	000006368697	1,99,666.13
Pau Singh	000006467689	60,104.32

Clare

Under Section 63 of the FERA, 1973 on the grounds referred hereinabove.

5. I impose penalty of Rs.15,00,000/- (Rs. Fifteen lakhs only) on M/s. Maple Leaf International Pvt. Ltd., Greater Kailash, Part-II, New Delhi, under Section 50 of FERA, 1973 for the reasons mentioned hereinabove.

6. I also impose penalty of RS.5,00,000 (Rs. Five lakhs only) on M/s. Picadily Invest AG, Switzerland under Section 50 of FERA, 1973 for the reasons mentioned hereinabove.

7. I also impose personal penalty on Noticees No. 2, 3 and 6 under Section 50 of FERA, 1973, as per details below:

SL.NO.	NAME	AMOUNT (IN RS.)
1.	Cliff Roy	10,00,000/- (Rs. Ten lakh only)
2.	Lambert Kroger	10,00,000/- (Rs. Ten lakh only)
3.	Paul Singh Clare	5,00,000/- (Rs. Five lakh only)

I also direct Mr. Cliff Roy and Mr. Paul Singh Clare to bring back to India the foreign exchange indicated below which was remitted from their personal bank accounts with notice No. 7 under Section 63 of the FERA, 1973 as these amounts were earned by them on account of the activities undertaken by them in violation of the abovesaid provisions of FERA, 1973:-

NAME	AMOUNT REMITED (IN RS.)
Cliff Roy	8,84,449.00
Paul Singh Clare	18,85,000.00

8. I also impose personal penalty of Rs.1,00,000 (Rs. One Lakh only) on ABN Amro Bank, Sansad Marg, New Delhi under Section 50 of FERA, 1973 on the grounds mentioned hereinabove.

9. In view of my observations hereinabove, I drop the charges alleged against Mr. Paul Abraham, Noticee no. 5.

The Penalty imposed should be deposited in the office of Deputy Director, Enforcement Directorate, Hqrs. Office, 6th Floor, Lok Nayak Bhawan, Khan Market, New Delhi- 110 003, in the form of Demand Draft

to be drawn in favour of the Pay & Accountants Officer, Department of Revenue, New Delhi, within 45 days of the receipt of order.

SEALED SIGNED AT NEW DELHI ON THIS 22ND DAY OF SEPTEMBER TWO THOUSAND."

ARGUMENTS

13. Shri P.P. Malhotra, Additional Solicitor General of India, submitted that the High Court has committed an error in rejecting the appeal filed by the Union of India holding that no questions of law arose for its consideration and that there was no illegality in the order passed by the Tribunal. Shri Malhotra also submitted that the High Court has not properly appreciated or understood the scope of Sections 19(1)(a) and (d), 29(1)(a) and (b) of FERA. Shri Malhotra also submitted that no permission was either granted or sought for by Lambert Kroger or Cliff Roy - 4th respondent under Section 29(1)(a) of FERA for establishing, carrying on or opening any branch in India from RBI. Adjudicating authority, it was pointed out, clearly found on facts that the 4th respondent and the above mentioned persons who are foreign nationals had established a place of business in India in the name of Maple and for reaching that conclusion, the Adjudicating Officer has rightly lifted the corporate veil and examined as to who were all in fact controlling the Maple.

14. Mr. Malhotra submitted that the High Court has also not examined the scope of Section 29(1)(b) of the Act read with notifications dated 13.1.1998 and 20.1.1998 issued by the RBI. Learned counsel submitted that from the reading of the above mentioned notifications, it is clear that any company whose activities fell within the ambit of the notification dated 13.1.1998 and which claims the benefit of the notification, was required to submit a declaration in Form FC(RBI). Learned Additional Solicitor General also referred to the statement on the Industrial Policy, 1991 with reference to paragraph 39(B) dealing with Foreign Investment and also to the Press Note no. 11 dated 20.8.1991 dealing with changes in procedures for foreign investment approvals and also to paras 3(A), 4, 6 etc.. Reference was also made to the Press Notes dated 13.12.1991 and also 31.12.1991 and stated that, according to the Press Notes, there is no concept of automatic approval for the companies engaged primarily in trading and such companies fulfilling certain conditions have to apply to the RBI for permission. Referring to the judgment of this Court in Hindustan Lever (Infra), it was submitted that this Court had no occasion to consider the scope of various clauses of Section 29 and hence the observations made in that judgment are only obiter. Shri Malhotra also submitted that the grant of permission under the automatic route is an "activity specific" and under the policy only those trading companies primarily "engaged in exports", have been given the benefit of automatic route. On the other hand, the respondent company, it was pointed out, has indicated in the application that the company’s activities are the activities indicated in NIC Code 893.

15. Shri Malhotra also submitted that 1st respondent bank was not discharging its functions as an authorized dealer in gold and ought to have ensured that 2nd respondent was a trading company primarily engaged in exports and had the requisite permission from RBI for the same. It was pointed out that the Bank had acted contrary to the provisions of the notifications dated 13.1.1998 and 20.1.1998 and was also a party to the fraudulent transaction and hence clearly violated the mandate of the second proviso to Section 6(5) of FERA.

16. Shri Amit Sibal, learned counsel appearing for respondents 2 to 4, submitted that they had not violated the provisions of Section 29(1)(a) of

FERA and that the 2nd respondent is an Indian company consisting of Indian shareholders as well as Directors. Learned counsel submitted that an Indian company incorporated under the Indian Companies Act, 1956, with foreign shareholding, does not need the permission from RBI to carry on business or establish a place of business in India. Learned counsel also submitted that merely because Picadily, a Swiss company, held 51% shares in the 2nd respondent company and initiated its incorporation, does not lead to the conclusion that the Swiss company sought to circumvent Section 29(1)(a) of FERA and indirectly tried to establish a place of business in India. Learned counsel referred to the Foreign Exchange Regulation Amendment Act no. 29 of 1993 and submitted that the words "or in which non-resident interest is more than 40%" were omitted from Section 29(1) with effect from 8.1.1993, which would indicate the Legislative intention was to encourage foreign initiative in investment in India and in Indian companies without obtaining permission from RBI. In support of his contention, reference was made to the judgment of this Court in Hindustan Lever Employees Union v. Hindustan Lever Ltd., 1995 Suppl (1) SCC 499. Learned counsel submitted that respondents 2 to 4 could not be said to have violated the provisions of FERA merely because they sought to arrange the affairs of Maple so as to not to fall foul of Section 29(1)(a) so long as they did not violate any other law. Reliance was also placed on the judgment of this Court in Ghatge and Patil Concerns' Employees' Union v. Ghatge and Patil (Transports) Private Ltd. And another AIR 1968 SC 503 and Landon and Country Commercial Investment Properties Ltd. v. Attorney-General 1953 1 AER 436.

17. Learned counsel submitted that respondents 2 to 4 have not violated the provisions under Section 19(1)(a) and (d), 29(1)(b) and Section 49(i) of FERA. Referring to the notification no. 180/98, learned counsel submitted that the company had issued 51% of its share to 4th respondent in accordance with the general permission granted vide second proviso to paragraph 1 of the notification No. FERA 180/98. Learned counsel also submitted that the notification itself has given general permission to "newly set up trading company primarily engaged in export" and, therefore, no further permission was required by a company before issuing shares to a foreign investor. Learned counsel submitted that 2nd respondent squarely falls within the category of "primarily engaged in export" and its business plan had all along been to export various products made in India, attain export stock/trading/star trading house and only then pay dividends to shareholders, including foreign investor. Reference was made to the various documents in support of this contention. Learned counsel also submitted that in any view the second proviso to the notification FERA 180/98 does not require a newly set up trading company to be engaged in exports, at the time of issue of shares and all that can be said is that the issuer cannot remit dividend to the foreign investor until it has achieved the status of export trading/star trading house.

18. Learned counsel referring to the judgment of this Court in Life Insurance Corporation of India v. Escorts Ltd. And Others (1986) 1 SCC 264 submitted that the primary policy or purpose of FERA is to permit inflow of foreign exchange and maintain a balance between inflow and outflow of foreign exchange and such a balance would be lost if the stand of the appellant - Union of India - is accepted. Learned counsel, therefore, submitted that, even if the company had not been primarily engaged in exports, at the time its business was shut down by the Enforcement Directorate, it was still not in violation of any provision of the Notification No. FERA 180/98 since it had not remitted any dividends to the 4th respondent. The learned counsel, therefore, submitted that the company is covered by the general permission granted under the automatic route and that the respondents 2, 3 and 4 have not acted in contravention of Section 19(1)(a) and (d), 29(1)(b) or 49(i)(a) of FERA.

19. We vide our order dated 30.4.2013, directed RBI to file an affidavit to explain as to how they understood the scope of Sections 19 and

29(1)(b) of the Act and also the notification dated 13.1.1998 issued by RBI. RBI, in response to our direction, filed an affidavit to that effect on 7.7.2013. Shri Jaideep Gupta, learned senior counsel appearing on behalf of RBI, submitted that the RBI had come to know that the company after obtaining the registration for carrying on activities under NIC Code 893, had started trading in gold coins in the name of Maple, an activity which was not permitted by RBI. Learned senior counsel submitted that the company was misleading the public that it had got RBI permission to carry on the above mentioned activity. Referring to Form FC (RBI), learned senior counsel submitted that the company had specifically sought for permission for foreign investment with regard to NIC Code 893 and with regard to the items mentioned in para IX(iii). The company stated that it was not applicable, therefore, it was not seeking the automatic route, as a trading company primarily engaged in export.

20. Shri V. Giri, learned senior counsel appearing for 1st respondent, submitted that the Bank had imported the gold on its own behalf and sold the same to the company and that the bank was engaged in that activity as an authorized dealer, for which it had obtained permission from RBI. Learned senior counsel submitted that in order to attract Section 6(5) of FERA, 1973, it is necessary that an authorized dealer must have conducted a transaction in foreign exchange and it had only imported gold and sold the same to the company incorporated in India against Indian currency, consequently, there is no violation of Section 6(5). Learned senior counsel submitted that "reasonable satisfaction" contemplated under Section 6(5) does not impose an obligation on the authorized dealer to require a person on whose behalf the authorized dealer is entering into the said transaction to furnish information and declarations to satisfy itself that the transaction will not contravene the provisions of FERA. Further, in the instant case, it was pointed out that the Bank did not enter into any transaction "on behalf" of the company and therefore the Tribunal and the High Court have rightly found that the Bank had not committed any illegality in selling the gold coins to the company.

INDUSTRIAL POLICY 1991

Foreign Investment Initiative

21. The Government of India had decided to take up series of initiatives in respect of policies relating to the areas of Industrial Licencing, Foreign Investment, Foreign Technology Agreements, Public Sector Policy, MRTP etc. in the Industrial Policy of July 24, 1991. For achieving social and economic justice to end poverty and unemployment and to build a modern, democratic, socialist, prosperous forward looking India, it was felt necessary that India should also grow as part of the world economy and not in isolation. Paragraph 24 of that policy stated that the Government would welcome foreign investment in high priority industries requiring large investments and advance technology for which approval for direct foreign investment upto 51% foreign equity was permitted. Paragraph 26 of that policy noted that promotion of exports of Indian products called for a systematic explorations of world markets through intensive and highly professional marketing activities, for which it was found necessary that the Government would encourage foreign trading companies to assist us in export activities. Paragraph 39B of that Policy dealt with "Foreign Investment", the portions which are relevant for the purpose are given below:

"39B. Foreign Investment

i) Approval will be given for direct foreign investment upto 51% foreign equity in high priority industries (Annex III). There shall be no bottlenecks of any kind in this process. Such clearance will be available, if foreign equity covers the foreign exchange requirement for imported capital goods. Consequential

amendments to the Foreign Exchange Regulation Act (1973) shall be carried out.

ii) While the import of components, raw materials and intermediate goods, and payment of knowhow fees and royalties will be governed by the general policy applicable to other domestic units, the payment of dividends would be monitored through the Reserve Bank of India so as to ensure that outflows on account of dividend payments are balanced by export earnings over a period of time.

iii) Other foreign equity proposals, including proposals involving 51% foreign equity which do not meet the criteria under (i) above, will continue to need prior clearance. Foreign equity proposals need not necessarily be accompanied by foreign technology agreements.

iv) To provide access to international markets, majority foreign equity holding upto 51% equity will be allowed for trading companies primarily engaged in export activities. While the thrust would be on export activities, such trading houses shall be at par with domestic trading and export houses in accordance with Import-Export Policy.

v) A Special Empowered Board would be constituted to negotiate with a number of large international firms and approve direct foreign investment in select areas. This would be a special programme to attract substantial investment that would provide access to high technology and world markets. The investment programmes of such firms would be considered in totality, free from pre-determined parameters or procedures."

22. Policy referred above would show that it was focusing on foreign equity on high priority industries as per para 39B(i) and for other foreign equity proposals including proposals involving 51% foreign equity as per para 39B(iii), prior clearance from FIPB was required to be obtained as in the past. In other words, there was no change in the industrial policy for other items except for the items covered under para 39B(i).

23. Press Note No.11 dated 20.08.1991 dealt with some changes in the Procedures for Foreign Investment Approvals. Paragraph 3 of the Press Note dealt with approvals for foreign investments upto 51% foreign equity in high priority industries (Annexure III - List of Industries for Automatic Approval Technology Agreement and for 51% Foreign Equity Approvals). Press Note stated that applications for approval under provisions in para 39B(i) and 39B(ii) of the Statement on Industrial Policy would be filed with the RBI. Para 3(A) of the Press Note is of some relevance, hence noted below:

"Procedures for Approvals

Applications for approval under the provisions in paras 39B(i) and 39B(ii) of the Statement on Industrial Policy will be filed with Reserve Bank of India. The application shall state clearly the description of the article to be manufactured in ITC (HS classification). The proposal shall be a composite one including detailed information on the capital goods to be imported for the project. Under the provisions of the policy the proposed foreign equity must cover the import of capital goods required for the project.

The Reserve Bank of India will issue the necessary permission for the foreign equity investment under the Foreign Exchange Regulation Act, 1973 (FERA). This permission will include exemption from the operation of Sections 26(7), 28, 29 and 31 of FERA. Simultaneously the Reserve Bank of India will confirm that the import of capital goods is covered by the foreign equity. Based on this confirmation the Chief Controller of Imports & Exports shall issue the relevant

import licence for capital goods imports.

Under the procedure outlined above the plant and machinery proposed to be imported must be new and not second hand. There will be no indigenous clearance of these capital goods."

24. RBI was, therefore, permitted to issue necessary permission for equity investment under FERA and that permission would include exemption from the operation of Sections 26(7), 28, 29 and 31 of FERA, 1973.

Trading Companies primarily engaged in Export

25. Paragraph 4 of the above mentioned Press Note dealt with 'Foreign Investment in Trading Companies' which provided that foreign investment in trading companies upto 51%, primarily engaged in export activities, were required to file applications with the RBI in the prescribed form. Para 6 of Press Note dealt with Other Foreign Investment Proposals, those paragraphs are relevant for the purpose, hence given below:

"4. FOREIGN INVESTMENT IN TRADING COMPANIES

Under the provisions of para 39B(iv) foreign equity holdings upto 51% equity will be allowed in trading companies primarily engaged in export activities. Applications for foreign investment under this clause will be filed with the Reserve Bank of India in the form to be prescribed by the RBI. Such trading houses shall be at par with the domestic trading and export houses and shall operate in accordance with the Import Export Policy.

6. OTHER FOREIGN INVESTMENT PROPOSALS

All other foreign investment proposals will be subject to the existing procedures. Applications will be made to the Secretariat of industrial Approvals in the Department of Industrial Development in the prescribed form. These proposals will be considered according to usual procedures. This will include proposals involving 51% foreign equity which do not meet any or all of the criteria under paras 39 B(i) and (ii) of the Policy. Proposals of foreign investment, foreign technology agreements not covered by the automatic facility, and import of capital goods may, if desired, continue to be made on a composite basis."

26. Above mentioned paragraphs of Press Note indicate that the trading companies covered under 39B(iv) were required to make an application for foreign investment to the RBI in the prescribed form meaning thereby even after the Press Note, filing of applications with RBI for trading houses primarily engaged in export was essential even for 51% foreign equity.

27. In this connection, it is useful to refer to para 9 of the Press Note No.17 dated 19.11.1991 dealing with procedure for increase in foreign equity up to 51% in existing companies as well as to para 10 and 13. On reading of those paragraphs, it is clear that all other foreign proposals for raising of foreign equity levels in existing companies would be subject to usual procedures and applications and would be made to the Secretariat of Industrial Approvals in the Department for Industrial Development in the

prescribed form which would include proposal involving increase in foreign equity upto 51% which did not meet any or all the criteria outlined above.

28. Government of India also issued a Press Note No. 20 dated 13.12.1991 revising the form for Foreign Investment / Technology Investments. Para 3 of the Note refers to FC(RBI) with reference to permission under para 39B(i), 39B(iv), 39C(i) and 39C(ii).

29. Press Note No. 23 dated 31.12.1991 dealing with the procedure for foreign investment in trading companies is also of considerable relevance and the same is given below for easy reference:

Procedure for Foreign Investment in Trading Companies

"1. Government tabled a Statement on Industrial Policy in both the Houses of Parliament on July 24, 1991. The Statement has substantially liberalised the provisions and simplified the procedures governing foreign investment and foreign technology proposals.

2. Para 39B(iv) of the Statement on Industrial Policy lays down that "majority foreign equity holding upto 51% equity will be allowed for trading companies primarily engaged in export activities. While the thrust would be on export activities, such trading houses shall be at par with domestic trading and export houses in accordance with the Import Export Policy".

3. This Press Note sets out the principles and procedures for approval of foreign equity holding upto 51 per cent in trading companies primarily engaged in export activities.

4. The criteria for grant of Export House, Trading House or Star Trading House certificates are laid down in paragraphs 218 and 226 of the Import Export Policy, 1990-93. As amended by the Ministry of Commerce, Import Trade Control Public Notice No. 242-ITC(PN)/90-93 dated November 8, 1991, effective from April 1, 1992, the average net foreign exchange earnings in the three preceding licensing years should not be less than Rs.6crore for Export House Certification; Rs.30 crore for Trading House Certification; Rs.125 crore for Star Trading House certification. Further, such certification will also be granted if the minimum net foreign exchange earning in the immediate preceding licensing year is not less than Rs.12crore for Export House; Rs.60 crore for Trading House and Rs.150 crore for Star Trading House.

5. Provisions for approval

(i) New Companies

In the case of a new company, the Reserve Bank of India will give automatic approval for foreign investment upto 51 per cent foreign equity on the following basis

a) Such a company will register itself with the Ministry of Commerce (Office of CCI&E) as a registered exporter/importer.

b) The repatriation of dividend will be permissible only after the company has registered itself with the Ministry of Commerce (office of CCI&E) as an Export House/Trading House/Star Trading House under the provisions of the prevailing Import Export Policy.

(ii) Existing Companies

In the case of existing companies already registered as Export Trading/Star Trading House, the Reserve Bank will give automatic approval on an application for foreign investment upto 51% foreign equity. The approval will be subject to the following requirements:

a) On receipt of RBI approval the company must pass a special resolution under Section 81(1A) of the Companies Act proposing preferential allocation of the required volume of fresh equity to the foreign investor.

b) The CCI will allow preferential allocation of equity in favour of the foreign investor on the basis of the RBI approval for expansion of foreign equity and the adoption of the special resolution by the company. For such cases, the price of new equity will be fixed by the CCI on the basis of market prices, computed on the basis of the average price for the six months period preceding the date on which the application is received in the CCI, with a discount of upto 10% if requested by the shareholders resolution. The market price will take into account any bonus issue which may have been declared in this period and adjust for the same. For companies undertaking such equity expansion disinvestment, if it occurs in future will also be at market price computed on the same basis.

6. Application Procedure

Applications for approval under the provisions of para 5 above will be filed with the Reserve Bank of India in the prescribed form. The Reserve Bank of India will issue the necessary permission for the foreign equity investment under the Foreign Exchange Regulation Act, 1973(FERA). Inter alia, this permission will include exemption from the operation of sections 26(7), 28, 29 and 31 of FERA.

7. Dividend Balancing:

The outflow of foreign exchange on account of dividend payments are to be balanced by export earning over a period of time in respect ;of all approvals given under the provisions outlined in para 5 above. Monitoring will be done by the Reserve Bank of India. The balancing will be done on the following basis:

i) The balancing of dividend would be over a period of 7 years reckoned from the date of recognition as Export House/Trading House/Star Trading House for new companies, and from the date of allotment of the shares raising the level of foreign equity to the approved level in the case of existing companies.

ii) The amount of dividend payment should be covered by export earnings recorded in years prior to the payment of dividend in years prior to the payment of dividend or in the year of payment of dividend.

The Reserve Bank of India will issue appropriate instructions to give effect to these provisions."

30. Press Note mentioned above has, therefore, dealt with para 39B(iv) and stated that majority of foreign equity holding upto 51% equity would be allowed for trading companies primarily engaged in export activities while the thrust would be on export activities. Such trading houses, it was also stated, should be at par with domestic trading and export houses in accordance with the Import-Export Policy.

31. Press Note also indicated that no general permission for investment under automatic route would be given and, on the other hand, an application for permission will have to be filed before the RBI as per para 6 which

takes in both new and existing companies. Clause 6, therefore, clearly indicates that the application for approval by RBI is mandatory for the new as well as existing companies. Therefore, if a new trading company indulging in export primarily also will have to make an application to the RBI for automatic approval for foreign investment upto 51% foreign equity and the thrust would be on export activities. Registration of the company as an exporter / importer with the Ministry of Commerce and registration of an export house is also a pre-requisite. In other words, according to the Notification then in existence and the Press Note upto 31.12.1991, the companies engaged primarily in trading activities whether new or existing will have to fulfill certain conditions by applying to the RBI for permission for foreign investment up to 51%.

32. We may now examine the scope of the Notification No. FERA 180/98 dated 13.01.1998 (as amended upto 14.07.1998) and Notification dated 20.01.1998 in the above-mentioned factual background.

33. Notifications referred above have laid down certain conditions and parameters to be complied with by the companies registered in India for automatic approval and those notifications have to be read along with Section 19(1)(a) and (d), Section 29(1) (b) of FERA, the Industrial Policy and the Press Notes. Before examining the scope of Sections 19(1)(a), 19(1)(b) and Section 29(1)(b), let us examine the arguments advanced by the Union of India as to whether respondent Nos. 2 to 4 had violated Section 29(1)(a) of the Act. It was contended that Maple was in reality a foreign company set up by 4th respondent, Lambert Kroger as well as Cliff Roy in violation of Section 29(1)(a). Admittedly, neither permission was sought for nor any permission had been granted by the RBI with regard to Section 29(1)(a) of the FERA. But arguments were addressed by the learned counsel on either side with regard to the scope of the above mentioned provisions and also on the principle of lifting the corporate veil.

34. Mr. Amit Sibal, as already indicated, submitted that by the Foreign Exchange Regulation Amendment Act 29 of 1993 the bar to having more than 40% shares in an Indian Company by a non-resident has been removed with a view to invite foreign persons to invest in India and / or Indian Companies and allow them to do business in India and to deal with assets in India with greater freedom and therefore by virtue of the amendment, Indian company in which non-resident interest is more than 40% can carry on business in India without any permission from RBI. Learned counsel also laid considerable stress on paragraphs 74 to 76 of the judgment of this Court in Hindustan Lever (supra).

35. Shri P.P. Malhotra, on the other hand, submitted that section 29(1)(a) puts an injunction on the foreign companies and foreign nationals from establishing or carrying on any business in India or opening any branch in India without obtaining the permission of the RBI. Learned senior counsel also submitted that by virtue of the amendment restrictions were removed only with regard to FERA companies, however, with regard to the foreigners and foreign companies restrictions remained to exist even after the amendment made in the year 1993 and they also required prior approval of the RBI for the purpose of establishing place of business in India.

36. We may examine whether the judgment in Hindustan Lever concludes the issue as to the interpretation of Section 29(1)(a) of the Act and also the question whether a company in which non-resident interest is more than 40% can carry on business without permission from the RBI. For easy reference, we may extract the above-mentioned paragraphs of that judgment

which are as follows:

> "74. Under Section 29 of the Foreign Exchange Regulation Act (as it stood originally), a person resident outside India or a company (other than banking company) which was not incorporated in India or in which the non-resident interest was more than 40%, could not carry on business in India or establish in India a branch office or other place of business. Nor could such a person or company acquire the whole or any part of any undertaking in India of any company carrying on any trade, commerce, or industry or purchase the shares in India of any such company. The object of Section 29, inter alia, was to ensure that a company (other than banking company) in which the non resident interest was more than 40% must reduce it to a level not exceeding 40%. (Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.) But, now this restriction of 40% has been removed by an amendment by Act 29 of 1993. A company in which non-resident interest is more than 40% can carry on business without having to obtain permission from the Reserve Bank of India. The underlying idea of this liberalisation is clear. Non-resident persons were being invited to invest in India and / or in Indian companies. If any non-resident invests in an India company, it is but natural that dividends payable by an Indian company will be enjoyed by the non-resident. All other rights that a shareholder enjoys by virtue of the shareholding will be enjoyed by the non-resident. Merely because a foreign shareholder acquires 51% shares in an Indian company, it cannot be said that this is against public interest of public policy.
>
> 76. In view of all these, it is difficult for us to uphold the contention that the Scheme of Amalgamation is against public interest. Merely because 51% of the shares of HLL are being given to a foreign company, the Scheme cannot be said to be against public interest. The foreign Exchange Regulation Act has been amended specifically to encourage foreign participation in business in India. The bar to having more than 40% shares in an Indian company by a non resident has been lifted. The Amending Act 29 of 1973 is not under challenge. In order to give greater freedom to the companies for doing business in India, the MRTP Act has been amended. Prior approval of Government of India is not necessary for amalgamation of companies any more. In fact, it is in public interest that TOMCO with its 60,000 shareholders and also a very large workforce does not deteriorate into a sick company."

37. Above mentioned paragraphs cannot be read out of context. Hindustan Lever was a case dealing with disputes between the employees of Hindustan Lever and the company. The question was with regard to the amalgamation of two companies namely Hindustan Lever Ltd. and Tata Oil Mills Company Ltd. giving specific reference to the scheme of amalgamation of a company with a subsidiary of a multiple level company. Observation referred to in paragraphs 74 and 76 have to be seen in that context and this Court has not ruled that no permission whatsoever is required from RBI by an Indian Company where non-resident interest is more than 40%. The language used in Section 29(1)(a) in our view is unambiguous and plain and calls for no interpretation or explanation. Section 29(1)(a) puts a specific bar on the foreign companies and foreign nationals mentioned in Section 29(1) from establishing or carrying on any business in India or opening any branch in India without obtaining permission of the RBI. Heading of Section can be regarded as a key to the interpretation of the operative portion of the Section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthen that meaning. Heading of Section 29 indicates restrictions and the expression "shall not" "except with" general or special permission of the Reserve Bank make the requirements mandatory and the negative words used by the legislature shows its intention that if any act is done in

breach thereof will be illegal. Reading the Press Note referred to earlier and the Cabinet Note for the amendment under Section 29, apart from the fact that the language used in Section 29(1)(a) is unambiguous clearly indicates that restrictions have only been liberalized, instead of 40% of the limit, it was increased to 51% and 74% subject to fulfilment of certain conditions as set out in the industrial policy and the various Press Notes. Restrictions imposed under Section 29(1)(a) is not applicable to an Indian company to establish a place of business in India but, on the other hand, restriction has been statutory fixed in respect of foreign company which wants to establish a place of business in India. Section 29(1)(a) deals with following categories of foreign entities:

i) A person resident outside India; whether a citizen of India or not.
ii) A person who is not a citizen of India but is a resident of India or
iii) A company, (other than a banking company) which is not incorporated under any law enforced in India or
iv) Any branch of such company.

38. Restrictions have therefore been cast on the above mentioned entities and they cannot establish a place of business in India except with the general or special permission of the RBI. Subsection (b) of Section 29(1) also puts further restrictions on foreign citizens and foreign companies from acquiring the whole or any part of undertaking in India of any person or company, trade or industry or purchase of shares in India of any such company except with the general or special permission of RBI. Even after the amendment under Section 29, the restrictions continued to apply post amendment to foreign companies and foreign nationals as set out in Section 29(1)(a).

39. We, therefore, find no error in the views expressed by the adjudicating authority on the interpretation of Section 29(1)(a) and the observation made in Hindustan Lever is of no assistance to the company and made on different facts/ situations and not to be understood in the way that company sought to interpret.

Lifting of Corporate Veil

40. Shri P.P. Malhotra submitted that the adjudicating authority was justified in reaching the conclusion that Noticees No. 2, 3 and 4 i.e. Lambert Kroger, Cliff Roy and Picadly Invest AG had established a place of business in India in the name and style of Maple Leaf to carry on business activities in India and they fell within the ambit of Section 29(1)(a) for which they required general or special permission from the RBI. Reference was made to the various correspondence and statements exchanged between the parties which according to the learned senior counsel would indicate that they had established the place for business in India without obtaining permission from the RBI. Shri Malhotra also submitted that the second respondent company is virtually a foreign company and a clock of foreigners Cliff Roy, Lambart Kroger and 4th respondent and through the Maple Leaf Trading International Pvt. Ltd., they have in fact established a company in India by adopting a dubious route knowing fully well that this route was not permissible by the law of this country and hence the adjudicating authority was justified in lifting the corporate veil so as to examine whether they had indulged in any dubious methods so as to overcome statutory provision i.e. Section 29(1)(a) of the Act. In support of his contention, reference was made to the judgments of this court in New Horizons Limited and Anr. v. Union of India (UOI) and Ors. 1995(1) SCC 478, Delhi Development Authority v. Skiper Construction Company (P) Ltd. and another 1996(4) SCC 622 and Vodafone International Holdings B . V . vs . Union of India (UOI) and Anr .2012 (6) SCC 613.

41. Shri Amit Sibal, learned counsel appearing for the respondents on the other hand contended that Indian courts had consistently held that when interpreting a statute, courts would lift the corporate veil more restrictively and that too only if the statute explicitly requires or the purpose of statute necessitates it. Learned counsel also submitted that

FERA used to lift the veil under Section 29(1)(a) before the amendment but was not expected to do so after the amendment especially in the light of the judgment in Hindustan Lever. Learned counsel also pointed out that lifting the corporate veil in order to apply Section 29(1)(a) to an Indian company militates against the purpose of the amendment of Section 29(1)(a). Reference was also made to the judgments of this Court in Life Insurance Corporation of India v. Escorts Ltd. And Others (1986) 1 SCC 264, Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1 and also to the judgment of the English Court in Re. H. PC. Produce Ltd. (1962) 1 All ER 37.

42. We are of the view that in a given situation the authorities functioning under FERA find that there are attempts to over-reach the provision of Section 29(1)(a), the authority can always lift the veil and examine whether the parties have entered into any fraudulent, sham, circuitous or a devise so as to overcome statutory provisions like Section 29(1)(a). It is trite law that any approval/permission obtained by non-disclosure of all necessary information or making a false representation tantamount to approval/permission obtained by practicing fraud and hence a nullity. Reference may be made to the judgment of this Court in Union of India and Others v. Ramesh Gandhi (2012) 1 SCC 476.

43. Even in Escorts case (supra), this court has taken the view that it is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depends on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc. In Escorts case (supra), this Court held as follows:

> "Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil or fraud or improper conduct is intended to be prevented or a taxing statute or a beneficent state is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern."

44. In Vodafone judgment (supra), this court has taken the view that once the transaction is shown to be fraudulent, sham circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction. This court further held lifting the corporate veil doctrine can be applied in tax matters even in the absence of any statutory authorization to that effect. FERA Amendment Act 29 of 1993 has no effect on the principle of lifting the corporate veil and the question as to whether it was established so as to circumvent the provision of Section 29(1)(a) can always be examined.

45. Learned counsel appearing for respondent Nos. 2 to 4 also contended that even if the corporate veil is lifted, it would only reveal that 51% of Maple Leaf issued share capital, is only held by the foreign company, Picadily and such a share holding will not render Maple Leaf a branch, office or place of business of a foreign company within the meaning of Section 29(1)(a). We find it unnecessary to express any opinion on the alternative argument raised by the learned counsel, since the High Court has rejected the appeals mainly on the ground that no question of law arose for its consideration.

46. The main allegation against the company Maple Leaf was that it had violated the provisions of Section 19(1)(a) and (d) and Section 29(1)(b) read with Sections 9(1)(e), 49 and 68(1) and (2) of FERA leading to penal consequences.

47. We will now examine whether the second respondent company has obtained general permission under Section 29(1)(b) through the automatic

route as per Notification dated 13.01.1998 read with Press Notes dated 20.08.1991 and 31.12.1991. For answering the above question, it is necessary to examine the scope of Section 19(1)(a) and (d), Section 29(1)(b) of FERA along with Notification dated 13.01.1998 and the various Press Notes referred to earlier. For easy reference, those provisions are given below:-

"Section 19. Regulation of export and transfer of securities

19. (1) Notwithstanding anything contained in section 81 of the Companies Act, 1956, no person shall, except with the general or special permission of the Reserve Bank,

a. take or send any security to any place outside India;

d. issue, whether in India or elsewhere, any security which is registered or to be registered in India, to a person resident outside India;"

Restrictions on establishment of place of business in India

29. (1) Without prejudice to the provisions of section 28 and section 47 and notwithstanding anything contained in any other provisions of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank, -

(a)----------

(b) acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such company.

48. Section 19(1)(a) was intended to regulate export and transfer of securities. Section 19 states that no person shall except with the general or special permission of the Reserve Bank take or send any security to any place outside India or to issue whether in India or elsewhere any security which is registered or to be registered in India to a person resident outside India. Section 19 while intending to regulate export and transfer of securities, Section 29 placed restrictions on establishment of place of business in India. It is in pursuance of clause (a) and clause (d) of sub-section (1) of Section 19 read with clause (b) of sub-section (1) of Section 29 of FERA Notification No. 180/98 dated 13.01.1998 was issued by the RBI.

49. Much of the arguments on either side related to the question as to whether the company has obtained any general permission under Section 29(1)(b) read with Notification dated 13.01.1998 and if so in what activity? With regard to the question whether the company was a trading company and also whether it was primarily engaged in export for availing of the automatic route, the Union of India’s stand was that the company did not obtain any general permission from the RBI vide Notification NO. FERA 180/98 dated 13.01.1998 and that no declaration stating that the company was a trading company or was primarily engaged in exports was indicated in the above mentioned statutory form, assuming, it was a new trading company. Further, it was also stated that there was neither an application for approval nor any form FC[RBI] filled up or filed with RBI by the company for approval for undertaking trading activities for export, a condition precedent for automatic approval for any business specified in the Notification dated 13.01.1998 for an existing and new company. Consequently, the company was not entitled to get the benefit of a trading company primarily engaged in export either new or existing. On the other hand, the company has specifically referred to NIC code 893 which stipulated business and management consultancy, and that the company has not obtained the benefit of automatic route in trading in gold coins in the domestic market.

50. Learned counsel for respondent Nos. 2 to 4 submitted that RBI vide notification No. FERA 180/98 gave general permission inter alia for a "newly set up trading company primarily engaged in export" incorporated in India to issue 51% of its equity capital to a company incorporated abroad and that the second respondent company has issued 51% of its shares to

respondent No.4 in accordance with the said notification. Further, it is also pointed out by the learned counsel that the UOI has failed to consider the second proviso to the notification which related to a third category companies namely newly setup trading companies which might acquire export/trading house/star trading house status before they could remit dividends to the foreign investors.

51. Learned counsel pointed out until January 1998, an application for prior clearance from RBI was required for issuance of shares by companies like the second respondent to the foreign investor and the above mentioned notification had further simplified the procedure by stating that prior clearance was no longer required instead within thirty days of the issuance of shares, the issuer was required to file certain documents listed in para 3(viii) of the above mentioned notification.

52. Shri Sibal submitted that the company fell squarely within the category of "newly setup trading company primarily engaged in export" which fell within the purview of the general permission granted by RBI under the automatic route hence there was no contravention under Sections 19(1)(a) and (d), 29(1)(b) or 49(i)(a) of FERA.

53. Learned counsel also submitted that there was no mistake or omission in Form FC [RBI] and submitted that the notification only required companies that conduct activities covered under Annexure III to fill in Form FC [RBI] which did not require trading companies to fill out Form FC [RBI]. Reference was also made to para 3(viii)(a) of the notification and submitted which required the issuer company to file not later than thirty days from the date of issue of one copy of form FC [RBI] duly completed containing NIC code and description of activity in accordance with the said Annexure III. Learned counsel further pointed out that the second respondent had made reference to Notification code 893 since it also provided business consultancy services for a fee to its customers who wished to become partners in his business by promoting the sale of gold coins. In short, contention of the counsel was that the company fell within the notification NO.180/98 as it was a newly trading company primarily engaged in export and the permission was a general permission therefore respondents 2 to 4 could not be held to have contraverted any provision of the FERA in that respect in Form FC[RBI].

54. We have examined in detail the historical background of the Industrial Policy dated July 24, 1991, Press Note No.11 dated 20.8.1991 dealing with the changes in procedures for foreign investment approvals, Press Note No.23 dated 31.12.1991 dealing with the procedure for foreign investment in trading companies and also Appendix III of Press Note No.10 dealing with Industries for 51% foreign equity approvals, Press Note No.14 dealing with the revised consolidated list for automatic approval for foreign equity upto 50% / 51% / 74% etc. so as to understand the scope of Section 19(1), (d) and Section 29(1)(b) read with Notification dated 13.1.1998 and 20.1.1998.

55. The Automatic Permission Route was found open by the Notifications dated 13.1.1998 and 20.1.1998 and those notifications have laid down certain conditions and parameters for automatic approval which were to be complied with by the issuer company along with the filling of declaration in Form FC [RBI]. Notification had given relaxation to the provisions of Section 19 and Section 29(i)(b) to invest not exceeding 51% to two categories namely all industries mentioned in Annexure III to the Statement of Industrial Policy 1991 or to a trading company primarily engaged in export and is registered as an Export/Trading/Star Trading House with the Ministry of Commerce, Government of India. To claim the benefit of the above-mentioned notifications, it was essential that a true declaration in Form FC [RBI] was required to be filed and benefit of the general permission through automatic route could be obtained only for the activity specified in Form FC [RBI] and there was no automatic approval for any

activity not specified in the above-mentioned form. Reading Section 19(1)(a), (b) and 29(1)(b) read with the notifications and the Press Notes show that the intention of the Legislature was to permit company incorporated in India which is engaged or proposing to engage in an activity specified in Annexure III or an Indian Company which is a trading company, primarily engaged in export and is registered as an export/trading/star trading house with the Ministry of Commerce, Government of India to issue equity shares, subject to the conditions mentioned in paragraph 3 of the Notification dated 13.1.1998. The first proviso to Notification states that a company existing on the date of the notification, which was not engaged in Annexure III activity would be eligible to issue shares if it had embarked upon expansion programme, predominantly in Annexure III activities, subject to the condition that foreign equity raised by issue of equity shares to the foreign investors was utilized for such expansion. The first proviso goes along with clause (a) of the Notification. The second proviso states that in the case of a newly set-up "trading company", primarily engaged in export, issue of shares shall be subject to the conditions that registration as an export/trading/star trading house was obtained before the dividend is declared to the foreign investors. These provisos go along with clause (b) of the Notification. The Notification, it is clear, was intended to give relaxation to the provisions of Section 19(1)(a), (b) and 29(b) of the Act to the investments not exceeding 51% of the aforesaid two categories, namely, (1) Industries in Annexure III to the statement of Industrial Policy, 1991 or (2) a trading company primarily engaged in export and was registered as an export/trading/star trading house with the Ministry of Commerce, Government of India. Companies which do not fulfill the conditions of the Notification dated 13.01.1998 and 20.01.1998 and all other companies which do not fulfill the conditions mentioned in those Notifications are required to obtain prior permission from FIBP for foreign equity investment.

56. We cannot read the notifications dated 13.01.1998 and 20.01.1998 in isolation, but have to be read along with Section 19(1)(a),(d), Section 29(1)(b), the Industrial Policy of July 1991 especially para 39B(iv), Press Notes dated 20.08.1991, 13.12.1991, 31.12.1991 with specific reference to the trading companies primarily engaged in export activities whether new or existing. We have extensively dealt with the same in the earlier part of this judgment and hence not repeated. Para 39B(iv) of the Policy read with paras 5 and 6 of the Press Note dated 31.12.1991 which indicate that a newly setup trading company primarily engaged in the export will have to file application in prescribed form for approval of foreign equity upto 51% equity.

57. Newly set-up trading company primarily engaged in export has therefore also to satisfy the conditions laid down in clause (b) of paragraph 1 of the Notification dated 13.01.1998 and the contention that a trading company is primarily engaged in export be determined only when it remits dividend cannot be accepted. The expression "further" used in the second proviso makes it more explicit. "Further" as means "additional" meaning thereby a newly set up trading company is not a third category as such but it goes along with second category i.e. "a trading company primarily engaged in export". To get the benefit of the general permission in the automatic route a trading company should be primarily engaged in export, even if it is a newly set up company. A newly set up company also could demonstrate the same by specifying the same in Form FC[RBI] that it is a trading company, whether new or old, and is at least intended to be engaged primarily in export. A reference to the Form FC (RBI) duly submitted by the 2nd respondent is useful.

58. FC[RBI] form specifically directs the applicants to "carefully tick" the "appropriate" box. In the box dealing with the application for approval for foreign investment not to exceed 51% for "service sector in

Annexure III", the company has put a tick mark which would indicate that it sought to avail of the automatic route for service sector only as indicated in Annexure III. Noticeably no tick mark was put in the next box referring to "not exceeding 51% of the trading companies engaged in exports. Para VII deals with the "existing activities" which the 2nd respondent indicated as "not applicable" and no supplementary sheet was also attached explaining as to whether it was a newly set up trading company proposing to engage in export activities. Para VIII referring to Item Code ITC (HS) the company has indicated "893", which as per the Code deals with "Business and Management Consultancy Activities". The company stated in the application as "Business Management Consultancy for Trading, Marketing and Selling of Goods and Services". Even there also, there is no indication whatsoever that the company was set up for trading, but only indicated "consultancy for trading". Further Para IX (iii) called for the description of the products for export trading wherein the company has stated as "not applicable". Resultantly, it is clear that the purpose for which the company had sought for foreign collaboration was not for trading in gold coins either for export or domestic purpose, but for the activities mentioned in the NIC Code 893.

59. We are of the view that the company cannot go back from the information already furnished by it in the application, form which are declared as 'true and correct'. Based on that application RBI vide its communication dated 29.6.1998 granted registration No.FC98NDR1005. Registration, in our view, pertains only to NIC code '893'. No permission was obtained by the second respondent company from the RBI for 51% foreign equity induction, for trading, by way of export. RBI, on the other hand, granted general permission only for dealing with the activities mentioned in NIC Code 893 and not for any trading activities leading to import or export.

60. The High Court, in our view, has committed an error in holding that no questions of law arose for its consideration under Section 54 of FERA and has completely misread and misinterpreted the Industrial Policy, Press Notes and Section 19(1)(a) and (b), Section 29(1)(a) and (b) etc. and issues raised in appeals, which are clearly questions of law which fell within the ambit of Section 56 of FERA and the High Court committed a serious error in rejecting the same holding no questions of law arose for its consideration.

ABN Amro Bank NV (Royal Bank of Scotland NV)

61. We will now examine whether the above Bank has contravened Section 6(5) of FERA and misused the permission granted to it by RBI for importing gold coins. Proceedings were initiated against the company and others as per directions given by RBI dated 8.6.1999 and it was noticed that the bank had also sold gold coins to the company without being reasonably satisfied about the nature of the business of the company. The adjudicating authority took the view that the Bank as an authorized dealer, should have ascertained whether the company had got necessary permission from the RBI in dealing with the gold coins. The Bank, it is seen, had imported the gold on its own behalf and sold the same to the company and if the Bank was acting as an agent of the company, it would not have sold the gold to the company, but would have charged the commission for acting as an agent. No materials have been placed before us to show that the Bank was acting as an agent of the company. On facts, the Tribunal as well as the High Court took the view that the Bank had not misused the permission granted by the RBI for importing gold coins. We do not find any reason to interfere with those finding of facts.

62. In such circumstances, we find no error in the view taken by the Tribunal as well as the High Court that the proceedings initiated against

the Bank that it had violated Sections 6(4) and (5) of FERA was illegal. The appeal filed by the Union of India, so far as the Bank is concerned, stands dismissed.

63. We notice trading in gold is not an activity covered under Notification dated 13.01.1998 and 20.01.1998; perhaps for that reason, fourth respondent also took some steps to establish its 100% subsidiary in India and an application to that effect was filed on 24.08.1998 to FIPB by the company but it was not pursued further, but sought to achieve the same as if RBI had granted automatic permission which cannot be sustained in the eye of law.

64. The appeals are accordingly allowed as above and the order of the tribunal, affirmed by the High Court, is set aside and the Adjudicating Authority is free to proceed in accordance with law.

.....J.
(K.S. Radhakrishnan)

.....J.
(Dipak Misra)

New Delhi,
July 12, 2013

ITEM NO.1A COURT NO.9 SECTION II
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 975 OF 2007

UNION OF INDIA Appellant (s)

VERSUS

ABN AMRO BANK & ORS. Respondent(s)

WITH CRL.A. No.976/2007

Date: 12/07/2013 These appeals were called on for pronouncement of judgment.

For Appellant(s) Mr. Yasir Rauf,Adv.
Mr. B. Krishna Prasad,Adv.

Mr. P. Parmeswaran,Adv.

For Respondent(s) Mr. Amit Sibal,Adv.
Mr. Jafar Alam,Adv.
Mr. S. Udaya Kumar Sagar,Adv.
Ms. Bina Madhavan,Adv.
Ms. Praseena E. Joseph,Adv.
Mr. Shivendra Singh,Adv.
For M/s. Lawyer'S Knit & Co.

Mr. Subramonium Prasad,Adv.

Mr. Ravindra Kumar,Adv

Mrs. Anil Katiyar,Adv.

Respondent-in-person

Hon’ble Mr. Justice K.S. Radhakrishnan pronounced the judgment of the Bench comprising His Lordship and Hon’ble Mr. Justice Dipak Misra.

The appeals are allowed in terms of the signed judgment.

|(NARENDRA PRASAD) | |(RENUKA SADANA) |
|COURT MASTER | |COURT MASTER |

(Signed "Reportable" judgment is placed on the file)