

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 744 OF 2005

1. First Global Stockbroking P Ltd.)
Indian Company, having its address at)
4th Floor, Crescent Chambers, Tamarind)
Lane, Fort, Mumbai – 400 001.)
2. Shankar Sharma, of Mumbai)
Indian Inhabitant, having his address at)
4th Floor, Crescent Chambers, Tamarind)
Lane, Fort, Mumbai – 400 001.)
3. Devina Mehra, of Mumbai)
Indian Inhabitant, having her address at)
4th Floor, Crescent Chambers, Tamarind)
Lane, Fort, Mumbai – 400 001.)
- ...Petitioners

Vs.

1. R. M. Ramchandani)
Adjudicating Officer,)
Office of the Adjudicating Authority for)
Directorate of Enforcement, Govt. of)
India, Office of the Addnl. Director)
General (Audit), Customs and Central)
Excise, Mumbai Zonal Unit,)
Room No. 111 & 112, 1st Floor, Old)
Customs House, Mumbai – 400 021.)
2. A.K. Bal)
Special Director, FEMA, Enforcement)
Directorate,)
Janma Bhoomi Chambers, 1st Floor,)
W.H. Marg, Mumbai – 400 001.)
3. Enforcement Directorate)
2nd Floor, Mittal Chambers,)
Nariman Point, Mumbai – 400 021.)
4. Union of India)
Through Ministry of Finance,)
Aayekar Bhavan, M.K. Road, Mumbai.)

5. John Deere Pension Trust,)
 A trust settled under the laws)
 of the United States of America)
 and having its principle place of)
 business at One John Deere Place)
 of Moline, Illinois 61265,)
 United States of America.)

...Respondents

**ALONGWITH
 WRIT PETITION NO. 3157 OF 2006**

1. Auduth Timblo of Goa Indian Inhabitant)
 having his Office at Sociedade De Fomento)
 Industrial Pvt. Ltd., Villa Flores Da Silva,)
 Erasmo Carvalho Street, Post Box No.31,)
 Margao, Goa – 403 601.)

2. Anju Timblo of Goa Indian Inhabitant)
 having her Office at Fomento Resorts)
 and Hotels Ltd., Cidade De Goa,)
 Vainguinim Beach, Goa – 403 004.)

3. Sociedade De Fomento Industrial)
 Pvt. Ltd., a Company incorporated)
 under the Companies Act, 1956 and)
 having its Registered Office at)
 Villa Flores Da Silva, Erasmo Carvalho)
 Street, Post Box No.31, Margao,)
 Goa – 403 601.)

4. Fomento Resorts and Hotels Ltd.,)
 a Company incorporated under the)
 provisions of the Companies Act, 1956)
 and having its Registered Office at)
 Cidade De Goa, Vainguinim Beach,)
 Goa – 403 004.)

...Petitioners

Vs.

1. Union of India)
 through Director Ministry of Finance,)
 Department of Revenue, Government)
 of India, having its office at Lok)
 Nayak Bhawan, 6th Floor, Khan Market,)

New Delhi – 110 003.)
 2. Special Director of Enforcement)
 having his office at Janmabhoomi)
 Chambers, Walchand Hirachand)
 Marg, Mumbai – 400 001.)
 3. Mr. A.K. Bal,)
 The Previous Special Director,)
 Enforcement Directorate having)
 his office at 1st Floor, Janmabhoomi)
 Chambers, Walchand Hirachand)
 Marg, Mumbai – 400 001.) ...Respondents

**ALONGWITH
 WRIT PETITION NO. 2298 OF 2005**

1(a). Raman Maroo)
 C/o SET India Private Limited, Plot No.23)
 Shah Industrial Estate, Off. Veera Desai Road)
 Andheri (West), Mumbai – 400 053.)
 1(b). Michael Grindon)
 C/o SET India Private Limited,)
 Plot No.23 Shah Industrial Estate,)
 Off. Veera Desai Road, Andheri (West),)
 Mumbai – 400 053.)
 2. SET India Private Limited)
 (Formerly known as “SET India Limited))
 a company incorporated under the)
 Indian Companies Act, 1956 having its)
 Office at Plot No.23 Shah Industrial Estate,)
 Off. Veera Desai Road, Andheri (West),)
 Mumbai – 400 053.) ...Petitioners

Vs.

1. Union of India)
 through Director, Ministry of Finance,)
 Department of Revenue, Government of)
 India, having its office at Lok Nayak)
 Bhawan, 6th Floor, Khan Market,)
 New Delhi – 110 003.)
 2. Special Director of Enforcement)

having his office at Janmabhoomi)
 Chambers, Walchand Hirachand)
 Marg, Mumbai – 400 001.)

3. The Additional Commissioner of)
 the Income Tax Range (1) having his)
 office at 4th Floor, Room No.445,)
 Aayakar Bhavan, Maharshi Karve)
 Road, Mumbai – 400 020.)

4. The Appellate Tribunal for)
 Foreign Exchange, Janpath Bhawan,)
 4th Floor, B Wing, Janpath,)
 New Delhi – 110 001.)

...Respondents

Mr. Shiraz Rustomji, Senior Advocate a/w Mr. Vishal S. Khanavkar, Mr.Kedar B. Dighe and Ms. Shreya Parikh, Advocates for Petitioners in Writ Petition No.744 of 2005.

Mr. Kevic Setalvad, Senior Advocate a/w Mr. Ameya Kulkarni, Mr. Nishant Thakkar and Mr. Rajesh Poojary, Advocates i/b Mulla and Mulla and CBC for Petitioners in Writ Petition No. 3157 of 2006.

Mr. Prakash Shah a/w Mr. Jas Sanghavi and Mr. Yash Prakash, Advocates i/b PDS Legal for Petitioners in Writ Petition No. 2298 of 2005.

Mr. Sameer Pandit a/w Ms. Krina Gandhi and Mr. Anmol Menon, Advocates i/b Wadia Ghandy & Co. for Respondent No.5 in Writ Petition NO. 744 of 2005.

Mr. Parag A. Vyas a/w Ms. Karuna Yadav, Advocates for all the other Respondents.

CORAM : K.R. SHRIRAM &
 ARIF S. DOCTOR, JJ
RESERVED ON :7th OCTOBER 2022
PRONOUNCED ON : 18th NOVEMBER 2022

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1 In these petitions the grounds taken are almost identical. According to petitioners, the show cause notices were issued by a person who was not

so empowered as per law. Hence, the show cause notices issued are ex-facie without jurisdiction and illegal. Consequently, the order passed against petitioner/s could not have been passed as the adjudicating authority was not legally empowered to perform such acts under the repealed Foreign Exchange Regulations Act, 1973 (FERA). Moreover, as provided in Section 49(3) of the repealing act, Foreign Exchange Management Act, 1999 (FEMA) no adjudication under the repealed act can now start after the expiry of the limitation of two years since the repeal of FERA. FERA was repealed on 31st May 2000. Some petitioners have approached this court on receipt of the show cause notice itself.

2 For convenience, we are taking up Writ Petition No. 744 of 2005 as the lead petition and the facts narrated herein are from the said petition.

3 Since the issue in the petition is purely legal, we will not go deep into the facts of the matter. At the same time, we would note few dates and events as under :

	Dates	Events
(a)	31 st May 2000	FERA was repealed subject to some saving provisions.
(b)	1 st June 2000	FEMA came into force.
(c)	1 st June 2000	Notification was issued by Government of India appointing certain officers as Adjudicating Authorities under FEMA.
(d)	Post 13 th March 2001	Various proceedings initiated against petitioner.

(e)	10 th July 2001	Notification issued by Government of India appointing Respondent No.2, Mr. A.K. Bal, on deputation as a Special Director in the Enforcement Directorate under FEMA.
(f)	30 th May 2002	Petitioners received from Respondent No.2, two show cause notices.
(g)	31 st May 2002	Petitioners received third show cause notice. Petitioners were called upon to show cause as to why adjudication proceedings as contemplated in Section 50 of FERA read with Section 49(3) and (4) of FEMA should not be held against them for contravention mentioned in the show cause notices.
(h)	31 st May 2002	Two years sunset period to take notice of contravention under Section 51 of FERA expired.
(i)	7 th January 2003	Response from Respondent No.3 after repeated communications from petitioner, stating that Respondent No.2 as “Special Director” of Enforcement, Mumbai has exercised jurisdiction as an Adjudicating Officer under FERA while issuing the show cause notices.
(j)	25 th August 2003	Notification issued by the Government of India, Ministry of Finance, Department of Revenue

		appointing certain officers as officers of enforcement, including Respondent No.2, under Section 50 read with Section 4(1) of FERA and Section 49(3) and (4) of FEMA.
(k)	23 rd July 2004	Petitioners received notice for a hearing on 24 th and 25 th August 2004 before Respondent No.1 in respect of the impugned Show Cause Notices. In the notices issued for personal hearing, Respondent No.1 stated that he derived his authority from the Notification dated 25 th August 2003 and was appointed to adjudicate violations under FERA.
(l)	16 th August 2004	Petitioners received a notice for a hearing on 7 th September 2004 before Respondent No.1 in respect of the impugned Show Cause Notices.
(m)	19 th August 2004	Petitioners wrote to respondent no.1, inter alia, challenging his jurisdiction to carry out the functions of an Adjudicating Officer under the provisions of FERA and also requested additional time for hearing.
(n)	20 th August 2004	Respondent no.1 rejected the request for adjournment made by petitioners and stated that the hearing would be held as scheduled on 24 th and 25 th August 2004.

(o)	21 st August 2004	Petitioners once again wrote to respondent no.1 requesting for additional time for hearing, without prejudice to their legal objections to his authority for conducting the proceedings.
(p)	9 th September 2004	Petitioners filed in this court Writ Petition (L) No. 2482 of 2004, inter alia, challenging the authority and jurisdiction of respondent no.2 to issue the Show Cause Notices and of respondent no.1 to act as an Adjudicating Authority.
(q)	18 th October 2004	The said Writ Petition (L) No.2482 of 2004 was disposed by directing petitioners to appear before respondent no.1 who would be at liberty to hear the preliminary objection regarding jurisdiction.
(r)	25 th October 2004	Petitioners through their advocates, attended the hearing before respondent no.1. During the hearing, petitioners were also asked to address respondent no.1 on the merits of the matter.
(s)	27 th October 2004	Petitioners moved this Court requesting a clarification of the order dated 18 th October 2004. It was directed that under the Order dated 18 th October 2004, petitioners were only required to address respondent no.1 on

		preliminary issues and that the order dated October 18, 2004 did not require clarification.
(t)	11 th November 2004	Petitioners, through their advocates, appeared before respondent no.1 and addressed him on the preliminary issue of jurisdiction.
(u)	25 th November 2004	Respondent no.1 passed the impugned order, inter alia, upholding his jurisdiction to act as the Adjudicating Authority and the jurisdiction of the 2 nd Respondent to issue Show Cause Notices.

4 This petition seeks to challenge; (a) the issuance of the three show cause notices dated 30th / 31st May 2002 issued by Respondent No.2 under various sections of FERA, the repealed Act. FERA as noted earlier, was repealed on 31st May 2000; (b) Notification allegedly appointing “the adjudication officer” u/s 50 of FERA and (c) order dated 25th November 2004 passed by Respondent no.1.

5 The issues that are required to be answered are :

- (a) Whether Mr. A.K.Bal (Respondent No.2) was specially empowered under Section 50 of FERA to be the Adjudicating Officer?
- (b) If no, whether the order passed by Mr. A. K. Bal (Respondent No.2) or his successor Mr. R. M. Ramchandani (Respondent No.1), was a valid order?
- (c) What order? What relief?

6 It would be useful to reproduce, before we proceed further, the following, viz., Sections 3, 4(1), 50 and 51 of FERA, Sections 2(a), 16(1) and (2) and Section 49 of FEMA and Section 6 of General Clauses Act, 1897 :

SECTIONS 3, 50, 51 of FERA

*“3. **Classes of officers of Enforcement:**- There shall be the following classes of officers of Enforcement, namely:-*

- (a) Directors of Enforcement;*
- (b) Additional Directors of Enforcement;*
- (c) Deputy Directors of Enforcement;*
- (d) Assistant Directors of Enforcement; and*
- (e) Such other class of officers of Enforcement as may be appointed for the purposes of this Act.*

4. Appointment and powers of officers of enforcement.—

- (1) The Central Government may appoint such persons as it thinks fit to be officers of Enforcement.*

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

*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.”*

SECTIONS 2(a), 16 and 49 of FEMA

2. Definitions.—In this Act, unless the context otherwise requires, — —In this Act, unless the context otherwise requires,—”

(a) “Adjudicating Authority” means an officer authorised under sub-section (1) of section 16;

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16. Appointment of Adjudicating Authority.— (1) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit.

(2) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.

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

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

(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,—

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

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

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

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

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

SECTION 6 of GENERAL CLAUSES ACT

6 Effect of repeal — *Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not —*

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

7 **Mr. Rustomjee submitted as under :**

7.1 Section 51 of FERA [referred to in Section 49(3) of FEMA] confers the power to adjudicate contraventions of FERA on an “Adjudicating Officer” as defined in section 50. This is also evident from multiple other provisions of FERA which refer to the “Adjudicating Officer”.

7.2 Section 49(3) of FEMA provides for a ‘sunset period’ of two years (i.e. from 1 June 2000 to 31 May 2002) within which an Adjudicating Officer could, notwithstanding the repeal of FERA, take notice of any contravention under Section 51 of FERA.

A proceeding validly initiated by an Adjudicating Officer within the sunset period would therefore be valid and would, under section 49(5)(a), be deemed to have been done under the corresponding provisions of FEMA.

7.3 The officer empowered to adjudicate contraventions under FEMA is an “Adjudicating Authority” as defined in Section 2(a) read with Section 16(1) of FEMA. Section 16(1) of FEMA restricts the power of an Adjudicating Authority to hold adjudicatory proceedings under Section 13 of FEMA, which only deals with contraventions of FEMA. Further, Section 16(2) of FEMA provides that while appointing an Adjudicating Authority under Section 16(1) of FEMA, the Central Government shall specify its respective jurisdiction by an order in the Official Gazette. An Adjudicating Authority has no powers outside the scope of the jurisdiction mentioned in the Order published in the Official Gazette under FEMA, leave alone under FERA.

7.4 There is nothing in FEMA (including the detailed provisions of section 49) that indicates that an Adjudicating Authority appointed under the provisions of FEMA is deemed to be an Adjudicating Officer under FERA. In fact, section 49(3) of FEMA makes it clear that it is only an Adjudicating Officer (and not an Adjudicating Authority) that can take notice of a contravention of FERA within the sunset period.

7.5 Respondents have sought to place reliance on section 49(5)(a) of FEMA to contend that an Adjudicating Authority appointed under FEMA is somehow deemed to hold the powers of an Adjudicating Officer under FERA. This is erroneous. Section 49(5)(a) of FEMA is, in fact, the other way around – actions validly done under FERA are deemed to have taken place under the corresponding provisions of FEMA and not *vice versa*. In other words, Section 49(5)(a) of FEMA can only apply where an action has been validly initiated under FERA by an officer authorized to do so. There is no provision in FEMA which supports the view that officers appointed under FEMA have any inherent power to issue Show Cause Notices under FERA.

7.6 The reliance by Respondents on Section 49(4) of FEMA is also misplaced. Section 49(4) of FEMA only provides that offences committed under FERA shall continue to be governed by the provisions of FERA as if it had not been repealed. Section 49(4) of FEMA begins with the words “*Subject to the provisions of sub-section (3)*”. In order for even an offence to continue to be governed by FERA, cognizance of the same would have to validly be taken within the sunset period. It is both illogical and

impermissible to read section 49(4) of FEMA in isolation with no regard to section 49(3) of FEMA.

7.7 It was open to the Government to appoint persons as Adjudicating Officers within the sunset period, notwithstanding the repeal of FERA. In fact, in the present case, the Government has issued a notification for appointment of Adjudicating Officers under FERA on 25 August 2003 (Petitioner does not accept the validity of this notification, inter alia, as it was issued beyond the sunset period). The notification of 25 August 2003 specifically and explicitly provides that the officers are appointed under FERA.

7.8 In the present case, Mr. A. K. Bal (Respondent No. 2), who has purported to take notice of the alleged contraventions of FERA on the last day of the sunset period, has been appointed as an Adjudicating Authority under the provisions of FEMA. He has not, at any stage, been appointed as an Adjudicating Officer under FERA. Mr. A. K. Bal therefore had no power or authority to issue the Show Cause Notices. The proceedings impugned in the present proceedings are therefore invalid and entirely without jurisdiction.

8 **Mr. Kevic Setalvad submitted as under :**

8.1 The facts in Writ Petition No. 3157 of 2006 relate to purported violations committed in respect of Sections 8 and 9 of FERA. Whilst the present petition is restricted to the issue of jurisdiction - what is relevant is that: the search proceedings pursuant to which the purported FERA

violations were unearthed were carried out only in September 2000. FERA had already been repealed on 1st June 2000. During the subsistence of FERA no action had been taken under FERA.

8.2 Six Show Cause Notices – all dated 30th May 2002 – came to be issued in respect of purported violations of FERA. There is intrinsic material in the Show Cause Notices themselves that – on the date of the Show Causes Notices, i.e., on 30th May 2002, adjudication proceedings had not commenced. All the Show Cause Notices were served upon Petitioners after 1st June 2002. All the Show Cause Notices were issued under Rule 3(1) of the Adjudication Proceedings and Appeal Rules 1974 (the Rules).

8.3 It is also relevant that the authority issuing the impugned show cause notices is an adjudicating authority, appointed under Section 16 of FEMA and not an adjudicating officer as required under Section 4 of FERA and Section 49(3) of FEMA. Under Section 16 of FEMA and pursuant to Notification bearing No. S.O 535(E) dated 1st June 2000, the Special Director of Enforcement III at Mumbai was appointed as ‘adjudicating authority’ having jurisdiction of cases involving an amount of Rs. One Crore falling under Ahmedabad and Mumbai zones of the Directorate of Enforcement.

8.4 No proceedings initiated under FERA prior to repeal on 31st May 2000:-

(i) Investigation in each of the cases has commenced in September 2000, i.e., after the repeal of FERA and the alleged violation thereof is prior to the

repeal of FERA.

(ii) Section 49(5)(a) of FEMA – the saving clause - *inter alia*, states that “anything done or any action taken” under the repealed Act (FERA) shall, so far as it is not inconsistent with FEMA, be deemed to have been done or taken under the corresponding provisions of FEMA. Therefore, if nothing had been done nor any action taken under FERA (prior to its repeal on 1st June 2000), there is no saving and no question would arise of Section 49(5) coming into play. Action not taken or which could have been taken under FERA, is not saved.

(iii) Section 24 of the General Clauses Act, 1897 preserves and instils continuity to appointment, notifications, orders, schemes, rules, bye-laws etc. made or issued under the repealed Act unless they are inconsistent with the provisions of the re-enacted statute. Only such actions which are validly made or issued under the old Act are preserved and continued. If actions under the old act are invalid or unconstitutional, such actions are deemed to have never existed in the eyes of law.

(iv) Section 6 (a) of the General Clauses Act, 1897 sets out that the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect.

(v) In the absence of “anything done” or “action taken” under the repealed act when it was in force, no right will accrue under the repealing enactment. The right must be accrued and not merely an inchoate one. What is unaffected by the repeal is a right “acquired” or accrued” under the

repealed statute and not “a mere hope or expectation” of acquiring a right or liberty to acquire for a right.

(vi) In the present case, as nothing was done and no action was taken during the subsistence of FERA; no show cause notice could have been issued under Rule 3(1) of the Rules. Such action was not saved.

8.5 “No contravention” under Section 49(3) of FEMA and Section 51 of FERA :

(i) Section 49(3) of FEMA provides for the sunset clause and states that no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years, i.e., after 31st May 2002.

(ii) Section 51 of FERA states, for the purposes of adjudging under Section 50 of FERA whether any person has committed any contravention of the provisions of FERA, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity. The words “in the prescribed manner” referred to in Section 51 of FERA, refer to the procedure laid down in Rule 3 of the Rules.

(iii) Rule 3(1) of the said Rules states that the Adjudicating Officer shall, in the first instance issue a show cause notice to such person requiring him to show cause as to why adjudication proceedings should not be held against him. Rule 3(3) of the said Rules states that after considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that the adjudication proceedings should be held, he shall issue a

notice fixing the date for appearance of that person. Rule 3(7) of the said Rules states that if, upon consideration of evidence, the adjudicating officer is satisfied that the person has committed the contravention, he may impose such penalty in accordance with the provisions of Section 50 of FERA.

(iv) It would be evident that a “contravention” is committed only when the adjudicating officer, upon consideration of evidence, is satisfied that the person has committed a contravention, i.e., at the stage of Rule 3(7) of the said Rules. No contravention takes place when the show-cause notice is issued (under Rule 3(1) of the said Rules) or a when the notice is issued for fixing the date of appearance (under Rule 3(3) of the said Rules).

(v) On a reading of Section 49(3) of FEMA and Section 51 of FERA, it would be clear that all the stages as stipulated from Rule 3(1) to Rule 3(7) of the said Rules must be completed before 31st May 2000, for there to be any “contravention” under Section 51 of FERA, so as to attract Section 49(3) of FEMA. Alternatively at the very least, the stage of Rule 3(3) must have been reached on or before 31st May 2000, i.e., before FERA was repealed.

(vi) Under Section 49(3) of FEMA, the authority cannot consider whether to adjudge that a contravention has taken place under FERA – under Rule 3(1) of the Rules. Under Section 49(3) of FEMA, the authority can only taken notice of a contravention which has already taken place or which has already been adjudged to have taken place under Section 51 of FERA. Notably, Section 49(3) of FEMA does not extend FERA for 2 years. It only

keeps alive the ability to take action for a contravention – which has already occurred – under Section 51 of FERA.

(vii) In the present case, Show- Cause Notices dated 30th May 2002 were issued under the provisions of Rule 3(1) of the said Rules, as to whether adjudication proceedings should commence. Clearly, at that time there was no contravention under FERA and the show-cause notices issued on 30th May 2002, are not saved by Section 49(3) of FEMA.

(viii) Section 49(6) of FEMA excludes the general saving under Section 6 of the General Clauses Act, with respect to Section 49(3) of FEMA. The provisions of Section 49(3) of FEMA must be strictly construed and applied.

8.6 No authority under FEMA to retrospectively vest power to adjudicate cases of contravention under FERA:

(i) Section 16 of FEMA contemplates the appointment of Adjudicating Authority, which is defined in Section 2(a) of FEMA. In the absence of any specific language in FEMA which vests power to Adjudicating Authority to adjudicate cases of contravention under FERA with retrospective effect, the impugned notification F. No. 4/5/2000-Ad 1-C dated 20th November 2002 deserves to be quashed and set aside.

(ii) Government of India cannot invest Mr.A.K. Bal (who is an Adjudicating Authority) with the powers of an Adjudicating Officer retrospectively. The courts will not ascribe retrospectivity to new laws affecting the rights unless by express words or necessary implication, it

appears that such was the intention of the legislature.

(iii) It is also trite law that the authority which has the power to make subordinate legislation cannot make retrospective legislation unless authorized by the legislature.

(iv) The impugned Show Cause Notices are all dated 30th May 2002, admittedly when Mr. A. K. Bal had no power to issue them. The power to adjudicate cases for contravention of FERA was given to Mr. A.K. Bal by the impugned notification only on 20th November 2002 with retrospective effect, which is not contemplated under FEMA and in any event is impermissible in law. Therefore, the impugned notification and the impugned show cause notices deserve to be set aside.

8.7 No appointment of Mr. A. K. Bal as “Adjudicating Officer”:

(i) Section 49(3) of FEMA empowers only the adjudicating officer to take notice of any contravention under Section 51 of FERA. The Adjudicating Officer defined in Rule 2(b) of the said Rules means the Director of Enforcement or any other officer of Enforcement empowered to adjudicate cases under Section 50 of FERA. Section 4 of FERA, *inter alia*, prescribes for appointment and powers of officers of Enforcement. Section 50 of FERA, *inter alia*, states that contravention of any of the provisions of FERA may be adjudged by adjudicating officer “specially empowered” in this behalf by the order of the Central Government.

(ii) The appointment of Mr. A.K. Bal was as “Adjudicating Authority” under Section 16 of FEMA pursuant to Notification dated 10th July 2001 and not as “Adjudication Officer” under the provisions of FERA.

(iii) Even in the impugned notification dated 20th November 2002 Mr. A.K. Bal, is not appointed as an adjudicating officer but was “deemed to have been empowered to adjudicate cases of contravention” under FERA. Unless it is shown that Mr. A.K. Bal, is validly appointed as an adjudicating officer by the Central Government before 30th May 2002 (being the date of show cause notices), Mr. A.K. Bal, would not have any power to issue the impugned show cause notices.

(iv) Section 50 FERA refers to an officer of enforcement “specially empowered” in this behalf by order of the Central Government. The Impugned Notification states that the Adjudicating Officer was deemed to have been empowered. A plain reading of Section 50 of FERA shows that there must be a specific empowerment. A deemed empowerment is impermissible in law.

(v) The Impugned Notification is issued in continuation of earlier notification dated 10th July 2001 (appointing Mr. A. K. Bal as the Adjudicating Authority) and also bears reference to Section 49(5)(a) of FEMA. It would be pertinent to point out that Section 49(5)(a) seeks to continue the actions under FERA (and not inconsistent with FEMA) under the corresponding provisions of FEMA and not vice versa. Besides this, there

is nothing in FEMA authorizing Adjudicating Authority to issue notice for violations under any provision of FERA.

(vi) It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner. For the purpose of Section 49(3) of FEMA, there has to be a proper authorization of the 'Adjudicating Officer' who issues the notice of contravention under the provisions of FERA. Only because an officer has been appointed for the purpose of acting in terms of the provisions of an act, the same would not by itself entitle an officer to discharge all or any of the functions of the Central Government, unless specifically authorized.

8.8 Gross delay on part of Respondents in initiating proceedings:

(i) Show cause notices issued after gross delay from the date of alleged transaction are not tenable in law.

(ii) In the facts of the present case, 5 notices are issued by Mr. A. K. Bal and there is gross delay in issuing them, which can be evident from the following :

No.	Show Cause Notice Reference	Date of alleged transaction	Date of Show Cause Notice	Delay in issuing Show Cause Notice
1.	Exhibit A-1, Page 46	1994	30/5/2002	8 years
2.	Exhibit A-2, Page 50	1994	30/5/2002	8 years
3.	Exhibit A-3, Page 53	1987-1992	30/5/2002	10-15 years

4.	Exhibit A-4 Page 58	1993-1999	30/5/2002	3-9 years
5.	Exhibit A-5. Page 63	1987-1992	30/5/2002	10-15 years

(iii) Where no period for initiation of proceedings has been provided in the Statute, the authorities are required to initiate the said proceeding within a reasonable period. In the present case, there has been a delay of upto 15 years in issuing the show cause notice and therefore the show cause notices are liable to be quashed and set aside.

8.9 No Notice 'issued' to Petitioners before 31st May 2002 as is required under FERA:

(i) Alternatively, Section 49(3) of FEMA, *inter alia*, states that the adjudicating officer can take notice for any violation under the provisions of FERA prior to 31st May 2002. After 'taking' notice under Section 49(3) of FEMA, a show cause notice under Rule 3(1) of the said Rules has to be 'issued'. Such 'issuance' of notice has to be before 31st May 2002.

(ii) There is no power to issue show cause notices under Section 49(3) of FEMA.

(iii) Therefore, a show-cause notice 'issued' under Rule 3(1) of the said Rules 'shall be served' on such person, as is required under Rule 3(10) of the said Rules. The words 'issue notice' must include "service" of show cause notice. Therefore, notice of contravention has to be taken; and show-cause notice has to be issued and served before 31st May 2002. The show cause

notices dated 30th May 2002 were served upon Petitioner after 31st May 2002. Therefore, not valid.

9 **Mr. Prakash Shah submitted as under :**

9.1 Petitioners, who he was representing, were issued five Show Cause Notices (SCNs) for the alleged contravention of provisions of FERA, calling upon them to show cause why adjudication proceedings as contemplated under section 51 of FERA read with Section 49(3) and (4) of FEMA should not be held against them for aiding and abetting an Indian advertiser for advertising product of other exporters in contravention of Section 8 (1) of FERA read with paragraphs 14.D1, 14.D4 and 6E.1 of Exchange Manual of RBI.

9.2 There was no power to issue notification to appoint officers of Enforcement under Section 4 of FERA or to entrust the function of director or other officer of Enforcement under Section 5 of FERA with effect from 1st June 2000.

9.3 The Union of India cannot and does not have any authority to appoint Adjudicating Authorities with retrospective effect.

9.4 After FERA was repealed, there was no power to issue any Notification or make any appointment under FERA after its repeal. FERA admittedly stood repealed on 31.5.2000.

The effect of the repeal is to obliterate the statute repealed completely as if it had never been passed, and it must be considered as a

law which never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law. [*Tata Communication Transformation Services Ltd Vs. Assistant Commissioner of Income Tax*¹].

9.5 If the subordinate legislature is to survive the repeal of its parent statute, the repealing statute must say so in so many words and by mentioning the title of the subordinate legislation. Once the parent statute is repealed, the consequence is that the subordinate legislation made under the statute ceases to have effect after the repeal of the parent statute except saved by saving clause. [*Air India Versus UOI and others*²].

9.6 Clause (a) of sub-section (5) of Section 49 seeks to save anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

Clause (a) of sub-section (5) of Section 49 of FEMA is replica of Section 24 of the General Clauses Act. It only saves past action pending on the date of repeal. It saves, amongst other things, any notification issued, or any appointment made under the repealed FERA prior to its repeal.

1. 2022 SCC Online Bom 664

2. (1995) 4 SCC 734

The period of 2 years provided in section 49(3) of FEMA is to enable the Adjudicating officer to take notice of contravention provisions of FERA and on the expiry of two years, no notice can be taken. The notice of contravention can be taken by an adjudicating officer appointed under FERA and his appointment is being saved by virtue of Section 49(5)(a) of FEMA and not by an officer appointed under section 36 of FEMA.

Section 49(3) or (4) or (5) do not empower the Government to issue any notification or make any appointment under FERA after its repeal. There is no jurisdiction or authority for issuing a Notification after the repeal of FERA on 31st May 2000. Thus, Notification dated 10th July 2001, appointing Mr. A. K. Bal as Special Director in the Enforcement Directorate was under section 36 of FEMA and not under FERA.

9.7 Mr. A. K. Bal could not have been appointed a Special Director under Section 5 of FERA on 10th July 2001 since as on that date FERA stood repealed and was not in existence. The office order dated 20th November 2002, purports to clarify the notification dated 10th July 2001. It is not appointing Mr. A.K. Bal as Special Director. The purported clarification vide office order dated 20th November 2002 is *ex-facie* beyond the notification dated 10th July 2001.

In any event, the office order purported to have been issued under sub-section (4) of Section 49 of FEMA cannot empower Mr. A. K. Bal to adjudicate cases of contravention of provisions of FERA under Sections 50 and 51 of FERA, when notification dated 10th July 2001 does not empower

Mr. A. K. Bal to adjudicate cases under Section 50 of FERA. The said office order is claimed to have been issued in purported exercise of powers under sub-section (4) of Section 49 of FEMA. No adjudicating Authority could have been appointed pursuant to such a Notification to adjudicate the alleged contravention of FERA.

9.8 Sub-section (4) of Section 49, “Subject to the provisions of sub-section (3)”, only provides that all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if repealed Act had not been repealed. This means, by virtue of sub-section (4) of Section 49 of FEMA, all the offences committed under the repealed FERA will be governed by FERA and for that limited purpose FERA shall be considered as if it had not been repealed.

Later part of the provisions of sub-section (4) of Section 49 of FEMA are deeming provisions for the limited purpose that contravention under FERA shall be governed by FERA. It is trite law that a deeming provision cannot be extended beyond the purpose for which it is intended. Sub-section (4) of Section 49 of FEMA does not empower Union of India to appoint a special director under Section 5 of FERA for adjudication of contravention under FERA, post its repeal.

9.9 The power to appoint any officer of customs or any Central Excise Officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of

the duties of the Director of Enforcement or any other officer of Enforcement under FERA as may be specified in the order under Section 5 FERA cannot be exercised after repeal of FERA on 31st May 2000. In the absence of any power to appoint Mr. A.K. Bal, as an officer of enforcement post the repeal of FERA, the impugned SCN issued by him under Section 51 of FERA is ex-facie without jurisdiction and liable to set aside.

9.10 In any event, Union of India does not have power to appoint the officers of enforcement under section 4 of FERA or directorate of enforcement under section 5 of FERA with retrospective effect.

In *Vice-Chancellor, M.D. University, Rohtak v. Jahan Singh*³, the Hon'ble Supreme Court of India considered the resolution of the Executive Council of M.D. University, Rohtak, purporting to amend the Regulations with retrospective effect. The Hon'ble Supreme Court held as under:-

“19. The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retroactive operation as it is now well settled that in absence of any provision contained in the legislative Act, a delegate cannot make a delegated legislation with retrospective effect.”

In this regard reliance was also placed on Hon'ble Supreme Court's Judgement in *MRF Ltd. Kottayam v. Assistant Commissioner (Assessment) Sales Tax and Ors*⁴ and the Hon'ble Kerela High Court's Judgment in *Ramalingam Nadar Sons v. State of Kerala*⁵. In FERA or FEMA, no power is conferred on the Union of India to issue any notification with retrospective

3. (2007) 5 SCC 77

4. 2006 (8) SCC 702

5. 1993 (91) STC 61

effect. Thus, neither the notification nor the office order can have retrospective effect. The entire exercise is *ex-facie invalid and devoid of jurisdiction, power and authority*.

9.11 Once the show cause notices are without jurisdiction, the consequential order is liable to be set aside as being devoid of jurisdiction.

10 **Mr. Parag Vyas submitted as under :**

10.1 Mr. A. K. Bal, who had issued the said show cause notices was appointed as Special Director under FEMA vide Notification dated 10th July 2001 and by virtue of the said notification, Mr. A. K. Bal was empowered to discharge functions in his capacity as Special Director under FEMA including adjudication of the cases within his competence / jurisdiction. The Government of India issued an order dated 20th November 2002 which is clarificatory in nature and was to be read in conjunction with Notification dated 10th July 2001. While Notification dated 10th July 2001 appointed Mr. A. K. Bal as Special Director of Enforcement under FEMA, the order dated 20th November 2002 clarifies that Mr. A. K. Bal is empowered to adjudicate cases of contravention under FERA by virtue of sub Section (4) of Section 49 of FEMA. The order dated 20th November 2002 is not a Notification but only a clarification.

The authority to proceed under FERA is provided under the Savings Clause namely Section 49(3) and Section 49(4) of FEMA and, therefore, all offences committed under FERA shall continue to be governed by the

provisions of FERA as if FERA has not been repealed. In view of this statutory provision in FEMA, it follows that the officer notified to act as adjudicating authority as far as the matters pertaining to provisions of FEMA are concerned, derive their authority to adjudicate the cases pertaining to the contravention of provisions of FERA by virtue of the provisions of Section 49(4) of FEMA in relation to cognizance of offences within time limit specified under Section 49(3) of FEMA. Since Savings clauses are explicit, these Savings Clauses enable the designated adjudicating authority to take notice of any contravention under Section 51 of FERA within the stipulated period of two years from the date of commencement of FEMA. It is thus evident that the legal authority to perform duty as Special Director of Enforcement was conferred on Mr. A. K. Bal vide Notification dated 10th July 2001. The order dated 20th November 2002 merely clarifies this position. Therefore, by virtue of Section 49(4) of FEMA, all offences committed under FERA, subject to limitation under Section 49(3) of FEMA, are to be governed by the provisions of FERA as if FERA has not been repealed.

10.2 The adjudicating authority had taken notice of the contravention by petitioners within the period specified in Section 49(3) of FEMA and issued the show cause notices on 30th / 31st May 2002. Section 49(4) of FEMA empowers the continuance of all proceedings initiated against the offence committed under FERA. The proceedings, therefore, were initiated against petitioners within the frame work of the statutory provisions of Section 49(3) and (4) of FEMA.

10.3 Section 2(a) of FEMA defines the term ‘adjudicating authority as an officer authorized under sub-section (1) of section 16 of FEMA.

10.4 The Supreme Court of India in the case of *PVMohammad Barmay Sons vs Director of Enforcement*⁶ has, in a case of repeal of Foreign Exchange Regulation Act 1947 and the savings clause of FERA, observed that “Section 81(2) of the Act empowers to effectuate the liabilities, penalties etc. as if they have been in existence and amenable to be pursued under the Act or under the repealed act by operation of section 6 of the General Clauses Act. What is unaffected by the repeal of the Act 7 of 47 is a right accrued etc. There is a distinction between a legal proceeding for enforcing a right acquired or accrued liability, penalty forfeiture punishment incurred and the legal proceedings for acquisition of a right, the former is saved whereas the later is not. In spite of the repeal the right to investigation or to take legal proceedings remain unaffected as if old act continues to be operative.”

The term adjudicating officer as used in section 49(3) of FEMA therefore would also include an officer appointed under section 16(1) of FEMA.

10.5 Notices were issued on 30th/31st May 2002 u/s 51 of FERA read with section 49(3) and (4) of FEMA. At the time of issue of notice Special Directors under FEMA were already appointed as Adjudicating Officers vide Notification No.11/2000 SO 535(E). Therefore at the time of issue of

6. 1992(61) ELT 337(SC)

notices dated 30th/31st of May 2002 Mr. A.K.Bal had jurisdiction.

10.6 In the case of Income-Tax Officer, *Alleppey vs M.C. Ponnose & Ors.* (supra), the facts were that the definition of the term Tax Recovery Officer U/s. 2 (44) of the Income Tax Act, 1961 (the Act) as existing when Act came into force on 1st April 1962 was substituted by the Finance Act 1963, w.e.f. 1st April 1962 to include any such officer empowered to effect recovery of arrears of land revenue or other public demand under any law relating to land revenue or other public demand for the time being in force in the State as may be authorised by the State Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Officer. The notification dated 14th August 1963 by the Kerala Government referred to the powers granted under section 2(44) of the Act and notified certain revenue officials with retrospective effect from 1st April 1962. The Tehsildar had effected attachment subsequent to 1st April 1962 but before 14th August 1963. It was held that the amendment to section 2(44) of the Act did not grant the State Authority the power to invest the authority with powers with retrospective effect.

As compared to the above, in the present case, as stated earlier, since Special Directors were already empowered vide General Order dated 1st June 2000 it cannot be said that at the time of issue of notice there was no power.

10.7 Under Section 50 of FERA 'If any person contravenes any of the

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

Although the offences/contraventions under FERA continue to be governed by FERA, the procedure to be followed is governed by FEMA. In the case of *Tirumalai Chemicals Ltd V/s. Union of India*⁷ it was held that Section 19 of FEMA was applicable for the purpose of determining limitation in an Appeal against adjudication Order under FERA.

Since there is already an order authorizing Special Directors to act as Adjudicating Authority since 1st June 2000 there is no requirement of any separate specific order.

10.8 On a combined reading of sections 2(a), 16 and 49 of FEMA alongwith Section 50 of FERA and the notifications no 11 of 2000 (ENO.1/2/2000-Ad.I.C), 5/2001(F.N.4/5/2000-Ad.IC) dated 10th July 2001 and order dated 20th November 2002 Mr. A.K.Bal was competent to

⁷ AIR 2011 SC 1725

adjudicate in respect of contraventions under FERA from 2nd July 2001.

10.9 In the alternative, Section 50 of FERA, for the power to be effective does not use the words “prior order” of Central Government. Whenever legislature intended to that any power granted requires prior approval the same is specifically provided for in the statute like for example in Section 153D of Income Tax Act, where it says “*No order of assessment or reassessment shall be passed except with the prior approval of the Joint Commissioner*” or in the proviso that was inserted in section 153D of the Income Tax Act by the Finance Act, 2013, w.e.f., 1-4-2016 where it said “*Provided that nothing contained in this section shall apply with the prior approval of the [Principal Commissioner or] Commissioner under sub-section (12) of Section 144BA, or Section 124 in the Customs Act, 1962 which provides “..... no order confiscating any goods or imposing any penalty on any person shall be made under this Chapter with the prior approval of the officer of customs*”

Therefore, where prior approval or sanction was required then the statute would say so.

10.10 A statute would not be considered in such a manner so as to encourage defaulters and discourage those who abide by the law ***Corporation Bank vs Saraswati Abharansala***.⁸

In a case involving issue of notice under section 148 of the Income

8. (2009) 233 ELT 3 (SC)

Tax Act 1961 the Hon'ble Supreme Court of India had invoked its powers under Article 142 of the Constitution of India to hold that notices issued under section 148 of the Act would be deemed to have been issued under section 148A of the Act (which required prior approval) ***Union of India and Ors vs Ashish Agrawal*** .

Hence, even if on an interpretation of the relevant provisions of FEMA and FERA alongwith the notifications no 11 of 2000 (F.NO.1/2/2000-Ad.I.C), 5/2001(F.N.4/5/2000-Ad.IC) dated 10th July 2001 and order dated 20th November 2002, it is concluded that Mr.A.K.Bal did not have jurisdiction due to retrospective appointment, the notification No. 11/2000/ (F. No. 1/2/2000 - Ad. I-C) dated 1st June 2000 may, in the interest of justice, be construed to empower the officers to also adjudicate in respect of contraventions under FERA.

10.11 The term “take notice”as used in section 49(3) of FEMA would only mean to note whether a contravention under FERA is likely to have been committed and does not require that the actual notice has to be issued within two years of commencement of FEMA.

10.12 As held by the Allahabad High Court in the case of ***Fiserv India Pvt. Ltd. vs. Assistant Director and Ors***¹⁰ reasonable period for issue of notice commences from the date of receipt of information. The adjudication proceedings commenced upon the adjudicating authority taking notice of any contravention. Rule 3(1) of the Adjudication Proceedings and Appeal

9. 444 ITR 1(SC)

10. Manu/UP/0273 /2021

Rules 1974 (Rules) notified in exercise of the powers conferred by Section 79 of FERA upon Central Government to make Rules under Rule 3(1), the issuance of notice to show cause under Rule 3(1) is first step for commencement of the adjudication proceedings and not when a notice of hearing issued under Rule 3(3) of the Rules.

In fact, Mr. Rustomjee in fairness, submitted that a Division Bench of this Court in *Star India Private Ltd. & Ors. Vs. Union of India & Ors*¹¹ has also confirmed the same that adjudication proceedings commenced with issuance of show cause notice by the adjudicating officer under Rule 3(1) of the Rules.

Findings :

11 At the outset let us deal with *P.V. Mohammad Barmay Sons versus Director of Enforcement*¹² relied upon by Respondents in support of the contention that an officer appointed under Section 16(1) of FEMA would be an ‘*adjudicating officer*’ under FERA for the purposes of Section 49(3) of FEMA.

12 *P.V. Mohammad Barmay Sons* (supra), in our view, does not deal with the issue - Whether an officer appointed under FEMA, (i.e., an adjudicating authority) has the authority and jurisdiction to adjudicate on contraventions of FERA. This issue of the competence of a particular officer or authority to take notice of a contravention was not raised or considered in the judgment. In fact, Section 81 of FERA, 1947 does not even contain a provision

11. 2011 (264) ELT 353 (Bom.)

12. (1992) (61) ELT (SC)

analogous to Section 49(3) of FEMA, (which makes a specific reference to an “adjudicating officer”). It is well settled law that a decision can only be considered an authority for what it actually decides and not what may appear to logically follow from the observations it contains.

13 In *P.V. Mohammad Barmay Sons* (supra), the Hon’ble Supreme Court was dealing with the question as to whether action could be initiated in respect of a contravention under the erstwhile FERA, 1947 post its repeal and upon the coming into force of FERA, 1973. The Court answered this question in affirmative on a reading and application of Section 81 of FERA, 1947 and Section 6 of the General Clauses Act, 1897.

14 A comparison of the repealing provisions under FERA, 1973, (i.e., Section 81) and FEMA, 2000, (i.e., Section 49), shows that the two are not *pari materia*, and that key provisions in section 49 were, in fact, absent in section 81. The relevant excerpts of Section 81 of FERA, 1973 read as follows:

“(1) The Foreign Exchange Regulation Act, 1947 (7 of 1947), is hereby repealed.

(2) Notwithstanding such repeal –

(a) anything done ... under the Act hereby repealed shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

....

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

Section 6 of the General Clauses Act, 1897 provides the effect of repeal thus:

“6. Effect of repeal.—Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

...

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

15 On the other hand, Section 49 of FEMA, which is in issue in the present matter, is differently worded with respect to: (i) the effect of repeal; (ii) the period during which an adjudicating officer may take notice of a contravention under FERA and (iii) the application of Section 6 of the General Clauses Act, 1897, as further explained below.

16 The relevant excerpts of Section 49 of FEMA, 2000, read as follows:

“49. Repeal and saving.

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

XXXXX

(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an

offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,—

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

XXXXX

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

(Emphasis supplied)

17 A comparison of the above provisions show that:

(A) The sunset period of two years from the date of repeal of FERA contained in Section 49(3) of FEMA is missing in Section 81 of FERA. This is a fundamental distinction between the two enactments;

(B) Under Section 81(3) of FERA, 1947, the application of section 6 of the General Clauses Act is not restricted with respect to the effect of repeal of

FERA, 1947. However, under Section 49(6) of FEMA, the application of section 6 of the General Clauses Act is restricted with respect to the effect of the repeal of FERA in the following manner:

(i) the phrase '*Save as otherwise provided in sub-section (3)*' contained in section 49(6) of FEMA, by which the application of the General Clauses Act is made subject to the sunset period mentioned in section 49(3); and

(ii) by the non-obstante clause contained in section 49(3) of FEMA, 2000, the language of which supersedes '*any other law for the time being in force,*' thus including the provisions of the General Clauses Act.

(C) The language of the provisions makes it clear that both Section 49(4) as well as Section 49(5) are subject to Section 49(3) of FEMA.

18 In the light of the above, the two enactments and their repealing provisions are distinct and the reasoning in *P.V. Mohammad Barmay Sons* (supra), is inapplicable to the present facts of the matter.

19 It may be noted that *P.V. Mohammad Barmay Sons* (supra), itself contains a caveat against an unrestricted application of Section 6 of the General Clauses Act in other fact situations. Paragraph 7 thereof, inter alia, holds as follows:

*“7.Even in case of bare repeal accompanied by a fresh legislation on the same subject, **the provisions of the new Act will have to be looked into to find where and how far the***

new Act envisages a contrary affecting the operation of Section 6 of the General Clauses Act. Unless such contrary intention is manifested, liabilities, penalties, forfeiture or punishment under the Repealed Act will continue to exist and remain in force by operation of Section 6 of the General Clauses Act”.

(emphasis supplied)

20 Having said that, let us examine the provisions of FERA and FEMA in the background of the matters at hand.

21 Before we proceed further we shall dispose certain submissions of Mr. Setalvad with which we disagree. On Mr. Setalvad’s submissions that no proceedings were initiated under FERA in the absence of anything done prior to 31st May 2000 and as Section 49(5)(a) of FEMA states “anything done or action taken” under the repealed Act when it was in force, no right will accrue under the repealing enactment, we do not agree with Mr. Setalvad. In our view, if such a stand is taken then Sub Section (3) of Section 49 of FEMA, which is the sunset clause, will be rendered redundant. Theoretically, there could be situations where an offence may have come to light only on 31st May 2000 or after 31st May 2000. If we adopt the submissions made by Mr. Setalvad, it would amount to letting off all those persons who have committed offence under FERA only because the offence came to light on or immediately after 31st May 2000. To cover such situation or eventualities, Sub Section (3) of Section 49 is provided. In our view by virtue of Section 49(3) of FEMA, if any contravention comes to light between 1st June 2000 and 31st May 2002 the Adjudicating Officer can take notice of such contravention under Section 51 of the repealed Act.

For the same reason we do not agree with Mr. Setalvad that all the stages as stipulated under Rule 3(1) to Rule 3(7) of the said Rules must be completed before 31st May 2000 for there to be any contravention under Section 51 of FERA so as to attract Section 49(3) of FEMA.

For the same reasons we also disagree with Mr. Setalvad's submissions that (a) at the very least the stage of Rule 3(3) must have been reached on or before 31st May 2000, i.e., before FERA was repealed and (b) Show Cause Notices under Rule 3(1) of the said Rules had to be issued before 31st May 2002.

22 Under Section 50 of FERA, if any person contravenes any of the provisions of the Act other than those referred to in that Section, he shall be liable to such penalty as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of Assistant Director of Enforcement "specially empowered in this behalf" by order of the Central Government. Therefore, the person to adjudge whether any person who has contravened any of the provisions is liable to penalty, is the Director of Enforcement or any officer from the rank of Assistant Director of Enforcement or above, who is "specially empowered in this behalf". Therefore, the officer has to be specially empowered to adjudge.

23 Where any person has committed contravention of any of the provisions of the Act, to adjudge under Section 50 of FERA, the adjudicating officer, i.e., the Director of Enforcement or any other officer of Enforcement from the rank of Assistant Director Enforcement or above, who is "specially

empowered in that behalf” shall; under Section 51 of FERA 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, if the adjudicating officer is satisfied that the person has committed the contravention, he may impose such penalty as he deems fit in accordance with the provisions of Section 50 of FERA. How to hold the adjudicating proceedings, is provided for in Rule 3 of the said Rules, which read as under:

“Rule (3) Adjudication Proceedings :

(1) In holding an inquiry under section 51 for the purpose of adjudging under section 50 whether any person has committed contravention as specified in section 50, the Adjudicating Officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why adjudication proceedings should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.

(3) If after considering the cause, if any, shown by such person, the Adjudicating Officer is of the opinion that adjudication proceedings should be held, he shall issue, a notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative.

(4) On the date fixed, the Adjudicating Officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act or of the Rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place.

(5) The Adjudicating Officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and, if necessary, the hearing may be adjourned to a future date; and in taking such evidence the Adjudicating Officer shall not be bound to observe the provisions of the Evidence Act, 1872.

(6) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Officer, the Adjudicating Officer may proceed with the inquiry in the absence of such person after

recording the reasons for doing so.

(7) If, upon consideration of the evidence produced before the Adjudicating Officer, the Adjudicating Officer is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of section 50:

Provided that the notice referred to in sub-rule (1), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.”

This was the position till 31st May 2000 when FERA was repealed subject to certain Savings provisions.

24 To get over the difficulty of contraventions under FERA coming to light after FEMA came into force on 1st June 2000, Section 49(3) read with Section 49(4) and Section 49(5)(a) of FEMA took into account such situations. Under Sub Section (3) of Section 49 of FEMA, starting with a non-obstante clause, an adjudicating officer could take notice of any contravention under Section 51 of the repealed Act (FERA) before the expiry of a period of two years from the date of commencement of FEMA. Therefore, as FERA was repealed with effect from 31st May 2000 the Adjudicating Officer can take notice of any contravention under Section 51 of FERA upto 31st May 2002 and not later. If the Adjudicating Officer takes notice of any contravention under Section 51 of FERA on or before 31st May 2002, then as provided under sub Section (4) of Section 49 of FEMA all offences committed under FERA shall continue to be governed by the provisions of FERA as if FERA had not been repealed.

25 Now let us examine whether A.K.Bal, took notice of any contravention under Section 51 of FERA before 31st May 2002. But, before he takes

notice, he should first be validly appointed under Section 50 of FERA as an “Adjudicating Officer”. Was Mr. A.K. Bal validly “specially empowered in that behalf” by an order of the Central Government under Section 50 of FERA? is the moot question.

When FERA was repealed on 31st May 2000 Mr. A. K. Bal was not Director of Enforcement. Pursuant to the Notification dated 10th July 2001, Mr. A. K. Bal was appointed as Special Director in Enforcement Directorate under FEMA (not FERA) on deputation basis, only w.e.f. 2nd July 2001 (more than one year after FERA was repealed) for a period of 5 years or until further orders, which ever is earlier in the Mumbai Zone Office of Enforcement Directorate. Therefore, by this Notification, Mr. A. K. Bal was appointed as Special Director in the Enforcement Directorate under FEMA and not FERA. This is very relevant because as provided in Section 50 of FERA, Mr. A. K. Bal should have been “specially empowered” by order of Central Government to adjudge a person who has contravened any of the provisions of FERA. This Notification does not appoint him to be the Adjudicating Officer specially empowered under Section 50 of FERA. If, Mr. A. K. Bal has not been specially empowered under Section 50 of FERA, he would not have the power to adjudicate under Section 51 of FERA. When this came to the notice of Respondents in an attempt to get over the situation Respondents issued an order dated 20th November 2002, which reads as under:

“In continuation of this Ministry’s Notification No.5/2001 (F No.4/5/2000-Ad 1-C) dated 10th July 2001 and with reference to

clause (a) of sub-section 5 of section 49 of the Foreign Exchange Management Act, 1999 (42 of 1999), Shri A. K. Bal, Special Director of Enforcement is deemed to have been empowered to adjudicate cases of contravention of any of the provisions thereof (other than section 13 clause (a) of sub section (1) of section 18, section 18A and clause (a) of sub-section (1) of section 19) or any rule, direction or order made thereunder in exercise of his powers under sections 50 and 51 of the repealed Act by virtue of sub-section (4) of section 49 of the said Foreign Exchange Management Act, from the date of the said notification.

(Emphasis supplied)

26 In our opinion, this would not save the situation for respondents because “deem”, as per Black’s Law Dictionary means to Treat (something) as if it were really something else or it has qualities that it does not have. It was submitted that it was actually a clarification and not fresh Notification because if it was to be taken as fresh Notification, it being issued after 31st May 2002 will be invalid as beyond the sunset period provided. In our view, even such a clarification cannot be issued because Section 50 of FERA requires the officer of Enforcement Directorate not below the rank of Assistant Director Enforcement to be “specially empowered in this behalf” to take steps under Section 50 of FERA. There is no Notification issued by the Central Government specially empowering Mr. A.K. Bal to be an Adjudicating Officer under Section 50 of FERA.

27 Admittedly, FERA was repealed on 31st May 2000. As held by this court in *Tata Communications Transformation Services Limited* (supra) the effect of the repeal is to obliterate the statute repealed as completely as if it had never been passed and it must be considered as a law that never existed except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Consequently, once

the parent statute is repealed, as held by the Hon'ble Apex Court in *Air India* (Supra), the subordinate legislation made under the statute ceases to have effect after the repeal of the parent statute except to the extent saved by saving clause.

28 Clause (a) of sub-section (5) of Section 49 seeks to save anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act. Clause (a) of sub-section (5) of Section 49 is similar to Section 24 of the General Clauses Act. It only saves past action pending on the date of repeal.

29 It saves, amongst other things, any notification issued, or any appointment made under the repealed FERA prior to its repeal. The period of 2 years provided in section 49(3) of the FEMA is to enable the Adjudicating officer to take notice of contravention provisions of FERA and on the expiry of two years, no notice can be taken.

30 The notice of contravention can be taken by an adjudicating officer appointed under FERA and his appointment is being saved by virtue of Section 49(5)(a) of the Act and not by an officer appointed under section 36 of FEMA. Section 49(3) or (4) or (5) do not empower the Government to

issue any notification or make any appointment under FERA after its repeal. There is no jurisdiction or authority for issuing a Notification after the repeal of FERA on 31st May 2000. Thus, Notification dated 10th July 2001, appointing Mr. A. K. Bal as Special Director in the Enforcement Directorate was under section 36 of FEMA and not under FERA. Mr. A. K. Bal could not have been appointed a Special Director under section 5 of FERA on 10th July 2001 since as on that date FERA stood repealed and was not in existence. The office order dated 20th November 2002, purports to clarify the notification dated 10th July 2001. It is not appointing Mr. A. K. Bal as Special Director. The purported clarification vide office order dated 20th November 2002 is *ex-facie* beyond the notification dated 10th July 2001. In any event, the office order purported to have been issued under sub-section (4) of Section 49 of FEMA cannot empower Mr. A. K. Bal to adjudicate cases of contravention of provisions of FERA under Sections 50 and 51 of FERA, when notification dated 10th July 2001 does not empower Mr. A. K. Bal to adjudicate cases under Section 50 of FERA. The said office order is claimed to have been issued in purported exercise of powers under sub-section (4) of Section 49 of FEMA. No adjudicating Authority could have been appointed pursuant to such a Notification to adjudicate the alleged contravention of FERA.

31 Sub-section (4) of Section 49, subject to the provisions of sub-section (3), only provides that all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if repealed

Act had not been repealed. By virtue of sub-section (4) of Section 49, all the offences committed under the repealed FERA will be governed by FERA and for that limited purpose FERA shall be considered as if it had not been repealed. Later part of the provisions of sub-section (4) of Section 49 are deeming provisions for the limited purpose that contravention under FERA shall be governed by FERA.

32 It is trite law that a deeming provision cannot be extended beyond the purpose for which it is intended. Sub-section (4) of Section 49 does not empower Union of India to appoint a special director under Section 5 of FERA for adjudication of contravention under FERA, post its repeal. The power to appoint any officer of customs or any Central Excise Officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under FERA as may be specified in the order under Section 5 of FERA cannot be exercised after repeal of FERA on 31st May 2000. In absence of any power to appoint Mr. A. K. Bal, as an officer of enforcement post the repeal of FERA, the impugned Show Cause Notice issued by him under Section 51 of FERA is ex-facie without jurisdiction and liable to set aside.

33 Therefore, in view of Sub Section (3) of Section 49 no Adjudicating Officer could take notice of any contravention under section 51 of FERA for a period of two years from the date of the commencement of FEMA. This would mean between 1st June 2000 and 31st May 2002. An Adjudicating

Officer can be appointed only under FERA. After 31st May 2000 when FERA is repealed no Adjudicating Officer can be appointed under FERA. So when we read Sub Section (3) and Sub Section (5) of Section 49 of FEMA what it means is where the Adjudicating Officer under Section 50 of the repealed Act has been appointed before the Act was repealed, such person can take notice of contravention under his powers to adjudicate provided under Section 49 of the repealed Act for a period of upto two years. In such a situation, all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed. Anything done or any action taken or purported to have been taken or done under repealed Act shall, in so far as it is not inconsistent with the provisions of FEMA, be deemed to have been done or taken under the corresponding provisions of FEMA. When an Adjudicating Officer had been appointed before the repeal of FERA but, as could be seen from the Notification dated 1st June 2000 read with Office Order dated 20th November 2002, Mr. A. K. Bal had not been appointed before the repeal of FERA but has been appointed under the provisions of FEMA, therefore, this appointment in our view is not valid in any event to be appointed as an Adjudicating Officer under Section 50 of FERA.

34 Notably, Section 50 FERA refers to an officer of enforcement specifically empowered in this behalf by order of the Central Government. The Impugned Notification states that the Adjudicating Officer was deemed to have been empowered. A plain reading of Section 50 FERA shows that

there must be a specific empowerment. A deemed empowerment is impermissible in law.

The Impugned Notification is issued in continuation of earlier notification dated 10th July 2001 (appointing Mr. A.K. Bal as the Adjudicating Authority) and also bears reference to Section 49(5)(a) FEMA. It would be pertinent to point out that Section 49(5)(a) seeks to continue the actions under FERA (and not inconsistent with FEMA) under the corresponding provisions of FEMA and not vice versa. Besides this, there is nothing in FEMA authorizing Adjudicating Authority to issue notice for violations under any provision of FERA.

It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner. For the purpose of Section 49(3) FEMA, there has to be a proper authorization of the 'Adjudicating Officer' who issues the notice of contravention under the provisions of FERA. Only because an officer has been appointed for the purpose of acting in terms of the provisions of an act, the same would not by itself entitle an officer to discharge all or any of the functions of the Central Government, unless specifically authorized.

35 In the circumstances, we will have to hold that Mr. A. K. Bal had no authority to issue the show cause notices and consequently no order based on the show cause notices could have been passed. The issues framed in paragraph no.6 are as under :

For Issue (a) : As "Negative".

Consequently, Issue (b) is answered also as “Negative”.

For issue (c) : Accordingly all petitions are allowed. All show cause notices are hereby quashed and set aside. Consequently, orders passed by respondents are also quashed and set aside.

36 Whichever party has deposited any penalty or any amount pursuant to the show cause notices issued or the impugned order, the amounts to be refunded together with interest, if any, within 8 weeks from today.

37 Petitions accordingly disposed. All interim applications also disposed.

(A. S. DOCTOR, J.)

(K.R. SHRIRAM, J.)