CASE NO.:
Appeal (civil) 1748 of 1999

PETITIONER:
STANDARD CHARTERED BANK AND OTHERS

RESPONDENT:
DIRECTORATE OF ENFORCEMENT AND OTHERS

DATE OF JUDGMENT: 24/02/2006

BENCH:
CJI Y.K. SABHARWAL, C.K. THAKKER & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
WITH

CIVIL APPEAL NO.1749 OF 1999, 1750/1999,
1751/1999 & 1944/1999,
WRIT PETITION (CRIMINAL) NO.165 OF 2004
CRIMINAL APPEAL NOS.684/2005, 847/2004 AND
848/2004
AND
CRIMINAL APPEAL NO. 246 OF 2006 @
SPECIAL LAVE PETITION (Crl.) NO.5892 OF 2004

P.K. BALASUBRAMANYAN, J.

Leave granted in SLP(Crl.) No.5892/2004.

1. On receipt of notices under the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the FERA) for showing cause why adjudication proceedings for imposition of penalty under Sections 50 and 51 of the FERA be not initiated against the appellant bank and some of its officers and further notices under Section 61 of the FERA giving an opportunity to the first appellant bank and its officers of showing that they had the necessary permission from the concerned authority for the transaction involved, the appellant bank filed Writ Petition No.1972 of 1994, seeking a declaration that the relevant sections of the FERA are unconstitutional, being violative of Articles 14 and 21 of the Constitution of India and for writs of prohibition restraining the authorities under the FERA from proceeding with the proposed adjudication and the proposed prosecution, in terms of the Act. Yet another writ petition was filed by the officers of the bank as CWP No.2377 of 1996 challenging the individual notices. The High Court of Bombay rejected the challenge to the constitutional validity of Sections 50, 51, 56 and 68 of the FERA, but clarified that Section 68(1) of the FERA was not applicable to an adjudication proceeding and that it was confined to a prosecution for penal offences under the Act. Being aggrieved, the appellant bank and its officers have filed Civil Appeal Nos.1748/99 and 1749/99. The Union of India, in its turn has filed C.A. Nos.1751 and 1944 of 1999 challenging the very decision, to the extent the High Court restricted the application of Section 68(1) of the FERA.

2. Civil Appeal No.1750/1999 is filed by the Standard Chartered Bank to which also notices have been

issued under the Act. That challenges the dismissal of the Writ Petition No.509/1994 filed by the appellant therein, which was disposed of along with Writ Petition No.1972 of 1994, by a common judgment.

3. These appeals which came up before a Bench of two learned Judges, were referred to a Bench of three Judges by order dated 20.04.2004. When the matters came up before a three Judge Bench, the three Judge Bench doubted the correctness of a decision relied upon by the bank and its officers in Assistant Commissioner, Assessment-II, Bangalore & Ors. vs. Valliappa Textiles Ltd. and Another (2003 (11) SCC 405) which was a Judgment of a Bench of three Judges and by order dated 16.07.2004 referred the question to a Constitution Bench. The matters, thus, came up before a Constitution Bench, which, by Judgment dated 5.5.05, [reported in 2005 (4) SCC 530] overruled the decision in Assistant Commissioner, Assessment-II, Bangalore & Ors. vs. Valliappa Textiles Ltd. and Another (2003 (11) SCC 405) and sent down these appeals for being heard on merits by a Division Bench. The question that was decided was whether in a case where an offence was punishable with a mandatory sentence of imprisonment, a company incorporated under the Companies Act, can be prosecuted, as the sentence of imprisonment cannot be imposed on the company. The majority in the Constitution Bench, held that there could be no objection to a company being prosecuted for penal offences under the FERA and the fact that a sentence of imprisonment and fine has to be imposed and no imprisonment can be imposed on a company or an incorporated body, would not make Section 56 of the FERA inapplicable and that a company did not enjoy any immunity from prosecution in respect of offences for which a mandatory punishment of imprisonment is prescribed. In the light of the said decision of the Constitution Bench, the controversy before us has narrowed down and we have to proceed on the basis that the appellant banks are liable to be prosecuted for offences under the FERA.

4. In this context, it is necessary to refer to the scope of the writ petitions filed by the appellant bank and its officers in the High Court of Bombay. The prayers in the said writ petition are for a declaration that provisions of Sections 50, 51, 56 and 68 of the FERA are unconstitutional, invalid and void being violative of Articles 14 and 21 of the Constitution of India and for a writ of prohibition directing the authorities under the Act from proceeding further, based on the notices issued to the bank and its officers. It may be seen that the challenge to the constitutional validity is based on the alleged violation of Articles 14 and 21 of the Constitution of India. It is admitted that the Act has been included in the Ninth Schedule to the Constitution of India, as Item No.100. Therefore, in terms of Article 31B of the Constitution of India, none of the provisions of the FERA can be deemed to be void or ever to have become void on the ground that the FERA or any of the provisions thereof, are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. Obviously, the rights conferred by Articles 14 and 21 of the Constitution are rights flowing from Part III of the Constitution and, therefore, it is clear that no challenge based on violation of Articles 14 or 21, even if it has substance, can enable the appellants to get

the relevant provisions of the Act struck down as prayed for by them in prayer (a) of the writ petition. Now that the Constitution Bench has already ruled that penal proceedings under the Act can be initiated against a company or a corporation, that avenue of challenge is also closed to the appellants. Probably, it is in that context that learned senior counsel appearing in C.A.No.1750/99 argued that the submission was that a penal proceeding cannot be initiated simultaneously with an adjudication under the Act and that the adjudication must precede and only after its conclusion, penal action could be initiated.

5. Before proceeding further, we must notice that though on behalf of the appellants, in the written submissions, a contention was taken that the inclusion of the FERA in the Ninth Schedule was violative of the basic structure of the Constitution, at the time of hearing, Mr. K.K. Venugopal, learned senior counsel, submitted that that contention was not being pursued. Once that contention is not pursued, the appellants are confronted with Article 31B of the Constitution in view of the inclusion of the Act in the Ninth Schedule and there will be no necessity for this Court to undertake the exercise of considering whether the provisions of the Act violate Article 14 of the Constitution, an argument which was sought to be pursued at considerable length based on the interpretation to be placed on Section 68 of FERA.

6. It appears from the judgment of the High Court, especially from paragraph 2 thereof, that the argument before that court was on the basis that the violation of Articles 14 and 21 amounted to a violation of the basic structure of the Constitution, namely, the rule of law, and the court had to quash the legislative provisions. If the contention founded on the basic structure theory is not pursued, it is not very clear how far it would be open to the appellants to urge and necessary for this Court to consider the validity of the relevant provisions on the ground that they are violative of Articles 14 and 21 of the Constitution. The High Court found no reason to accept the argument based on the violation of rights under Articles 14 and 21 of the Constitution or based on the alleged impact of the provisions on rule of law and rejected the contention, though it upheld the plea that Section 68 of the FERA had no application for imposition of a penalty based on an adjudication under Sections 50 and 51 of FERA. The question is whether there is any reason to interfere with the decision of the High Court on either of these aspects.

7. Mr. K.K. Venugopal, learned senior counsel, advanced considerable arguments on the interpretation and scope of Section 68 of the FERA. Considering the prayers in the writ petitions filed in the High Court of Bombay by the appellants, it is possible to say that all that is required is to decide whether the appellants can successfully challenge the constitutional validity of the relevant provisions of the FERA as being violative of Articles 14 and 21 of the Constitution and whether the statutory authority has to be restrained by the issue of a writ of prohibition from proceeding further on the basis of the notices it had issued for adjudication as well as for penal action. It is not a case where any successful challenge could be mounted on the provisions providing both for adjudication and imposition of penalty and for penal action in the context of the objectives sought to be achieved by the

Act and the serious repercussions of transgression of the provisions of the Act on the economy of the country. Therefore, the argument based on violation of Article 14 relying on the decision in State of West Bengal vs. Anwar Ali Sarkar (1952 SCR 284) and those following it, are of no avail to the appellants. No merit can also be found in the argument that Section 68 of the FERA confers an unfettered power on the investigating officer to pick and choose at his will, those whom he desires to prosecute and omit those whom he does not want to prosecute, in a case to which Section 68 of the FERA is attracted.

8. In view of the immunity from challenge enjoyed by the provisions of the Act, there arises no necessity to read down the provisions of the Act so as to ensure that they do not violate the rights conferred by Article 14 of the Constitution. The provisions therefore call for a natural interpretation and, if necessary, a purposive interpretation, keeping in view the object sought to be achieved by the Act. In the guise of interpretation, there is no occasion to whittle down the ambit of the provisions to save them from the charge of arbitrariness, hit by Article 14 of the Constitution.

9. Before proceeding further it is necessary to point out that the notices issued under Section 61 of the FERA are merely notices of enquiry, giving an opportunity to the appellants of showing that they had the necessary permission from the concerned authority under the FERA in respect of the particular transaction. These notices, therefore, do not in any manner decide anything against the appellants and they merely set out the grounds based on which the appellants allegedly violated the provisions of the FERA and since one of the ingredients of the offence is absence of permission from the concerned authority, they are intended only to give an opportunity to the appellants to show that they had the necessary permission and hence, there was no violation of the relevant provision or provisions of the FERA as sought to be made out in the notice. As pointed out by the learned Additional Solicitor General, on the failure of the appellants to show that they had the requisite permission, a complaint will have to be lodged before the concerned magistrate \026 here it has been launched with the permission of this Court pending these appeals \026 and the magistrate will consider whether the process should issue on the basis of the complaint made before him. In view of the fact that sufficient opportunities will be available to the appellants to put forward their contentions before the concerned criminal court, it cannot be said that there is any merit in the challenge to the notices issued under Section 61 of the FERA. The said notices are really in terms of Section 61 of the FERA and their scope and ambit is also controlled by Section 61 of the FERA and on receipt of those notices, it was open to the appellants to show that they had the necessary permission from the concerned authority under the Act. Of course, if they do not have such permission, apparently, in the case on hand, there was no such permission, they have necessarily to put forward their defences before the criminal court in the prosecutions that have been launched in that behalf.

10. It is argued that the issue of a notice under Section 61 is not a mere formality and that it is a real right given to a person accused of an offence to establish that the

proceedings are being initiated without jurisdiction or wholly in violation of the provisions of FERA. Article 20(3) of the Constitution is referred to and it is submitted that many rights including the right against self incrimination is available to a person accused of an offence. Section 61(2) of FERA makes it clear that no court can take cognizance of an offence except upon a complaint by the officer referred to therein. The proviso to Section 61(2) of the Act provides that no complaint regarding the offences referred to in that Section shall be made unless an opportunity is given to the concerned person to show that he had the requisite permission where the offence charged is an act which requires permission under the Act. We think that if the notice sets out the alleged contravention, (an act which could have been done with permission) and calls upon the person accused of the offence whether he had the requisite permission for the transaction, that will satisfy the requirement of the Section.

11. Learned counsel relied on East India Commercial Co. Ltd., Calcutta and another vs. The Collector of Customs, Calcutta (1963(3) SCR 338) to emphasise that the notice is not a mere formality and should contain the relevant materials based on which the prosecution was being initiated. The following passage was relied on:

Assuming that a notice could be laconic, in the present case it was a speaking one clearly specifying the alleged act of contravention. If on a reading of the said notice, it is manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified sections was contravened, the respondent would have no jurisdiction to initiate proceedings pursuant to that notice. To state it differently, if on a true construction of the provisions of the said two sections the respondent has no jurisdiction to initiate proceedings or make an inquiry under the said sections in respect of certain acts alleged to have been done by the appellants, the respondent can certainly be prohibited from proceedings with the same."

On a reading of the notices issued under Section 61 of the Act, we are of the view that they are in terms of that Section and there is no reason to interfere with them in these writ petitions and that it would be appropriate to leave the appellants to their available defences in the prosecutions that have been initiated. Suffice it to say that it is not possible to issue the writ of prohibition as sought for by the appellants on the ground that these notices do not satisfy the jurisdictional requirement under Section 61 of the Act.

12. At this stage, we cannot ignore the argument on behalf of the respondents that if the appellants are not able to show any permission, complaints have to be filed before the concerned magistrate and that magistrate will issue process only on being satisfied that a case has been made

out for such issue and that the attempt of the appellants to block the prosecution should not be countenanced. The object of the present notice, submitted counsel, is limited and the arguments attempted on behalf of the appellants can be raised before the criminal court when the occasion arises. We find merit in this submission. Obviously, it is open to the appellants to put forward all their defences to the prosecution at the appropriate stage.

13. The other set of notices are in respect of the adjudication under Section 50 of the FERA. Again, it is for the appellants to put forward their objections thereto before the concerned authority and it is for that authority to decide the relevant aspects while deciding to impose or not to impose any penalty on the appellants. The appellants have a right of appeal under Section 52 of the FERA to the Appellate Board and a further right of appeal to the High Court under Section 54 of the FERA. We see no justification for the issue of a writ of prohibition restraining the authority under the FERA from proceeding further with the adjudication. It is for the appellants to put forward their defences, if any available, before the adjudicating authority and pursue it in accordance with law.

14. Considerable arguments were put forward by learned counsel for the appellants in Civil Appeal No.1749 of 1999 in attempting to establish that Section 68(1) of FERA is violative of Article 14 of the Constitution. It was contended that the provisions empowered an investigating officer to pick and choose at his will, in the absence of any definition, all those whom he desires to proceed against and omit those he does not want to subject to prosecution. This, it was said, was arbitrary. The prejudice that may be caused to a person sought to be roped in under Section 68 of FERA was highlighted. It was submitted that the proviso to sub-section (1) would not be a mitigating factor in view of the serious damage done to the reputation of the person alleged to be an offender under FERA. It was contended that the section also offended Article 14 of the Constitution as it permitted a whole class of persons to be prosecuted irrespective of their culpability. Vast and arbitrary powers were conferred on the department to prosecute the same person, a director of the company either under sub section (1) where inevitably the accused carried the burden to prove his absence of knowledge or under sub-section (2) where the prosecution takes on itself the burden of proving the wrong doing, with a potential to pick and choose between sub-section (1) and sub-section (2). This also violated Article 21 of the Constitution. The fiction involved in Section 68(1) would equally violate Article 21 where the presumption of knowledge attaches to the officers of the company against whom no wrong doing whatsoever is alleged except by indicating his status in the company. Learned Additional Solicitor General met these contentions by pointing out that in view of the inclusion of the Act in the Ninth Schedule to the Constitution, these arguments even if found tenable, cannot carry the appellants far. He also submitted that Section 68(1) was consistent with similar provisions under other laws and it applied only to a person who was in charge of and who was responsible to the company for the conduct of the business of the company as well as the company at the relevant time. This was a clear identification of the person who was to be roped in, in terms of Section 68(1) of FERA, and there

was nothing arbitrary, unclear or unreasonable in the provision. He also pointed that under Section 68(1) what was needed to be proved was an offence against the company and when that was done, the person in charge of the affairs of the company at the relevant time, still had an opportunity to prove that the alleged contravention took place without his knowledge or that he exercised all due diligence to prevent such a contravention and that this availability of opportunity, adequately safeguarded the rights of any person who was sought to be roped in under Section 68(1) of the FERA. Counsel also pointed out that under Section 68(2), if any other officer of the company had to be roped in, the burden was on the prosecution and this clearly showed that there was nothing arbitrary in Section 68(2) of the Act or on the placing of the burden of proof differently under the two sub-sections. In answer, learned counsel for the appellant further submitted that the reversal of burden of proof under Section 68 of FERA was violative of Article 14 of the Constitution of India and relied on Collector of Customs vs. Nathella Sampathu Chetty (1962 (3) SCR 786) in support.

15. As we have indicated earlier, in view of the fact that the FERA has been included in the Ninth Schedule to the Constitution, the challenge based on Articles 14 and 21 cannot prevail even assuming that the arguments have any substance. But on the scheme of the Act, with particular regard to Sections 56, 59, 61 and 68 of FERA, we find that the provisions cannot be successfully challenged as either being arbitrary or discriminatory. All that Section 68(1) says is that if the commission of an offence by the company is proved, the person who was in charge and was responsible to the company for the conduct of the business of the company at the time the contravention was committed, was to be deemed to be guilty of the contravention and was liable to be proceeded against and punished. He is being punished in view of his status in the company and because it is proved that the company is guilty of contravention of any of the provisions of FERA. There is nothing unreasonable in this, since a company normally acts through a person who is in charge of its affairs and even in that case, the person in charge and responsible to the company for the conduct of its business, is given an opportunity to show that the alleged contravention by the company took place without his knowledge or in spite of the exercise of all due diligence by him to prevent such contravention. Section 68(2) is attracted in a case where a company has contravened the provisions of the Act or any rule, direction or order made thereunder and that particular contravention is proved to have taken place with the consent or connivance or is attributable to any neglect on the part of any Director, Manager, Secretary or other officer of the company. In other words, the prosecution, in addition to prosecuting the company, can also prosecute any particular officer whose action or inaction or negligence resulted in the commission of the particular offence by the company. This only means that a person who is instrumental in the commission of an act by the company that is in contravention of FERA or the rules or directions issued thereunder, also lays himself open to prosecution. Having done something or omitted to do something leading to the company contravening the provisions of the Act, the officer concerned cannot say that it is unreasonable to prosecute him also, along with the company and the person in charge of and responsible to

the company for the conduct of its business.

16. The argument that the section violates Article 14 of the Constitution cannot thus be accepted. The same is the position regarding the argument based on Article 21 of the Constitution. The object of the Act is clearly to protect the economic interests of the country and to deal with any violation that causes economic loss to the country. In the context of that object, any contravention of the provisions of the Act have to be viewed seriously and any one directly responsible or conniving at the offence is liable to be punished. This appears to be the legislative intent in enacting FERA 1973 replacing the Foreign Exchange Regulation Act, 1947 and also including it in the Ninth Schedule to the Constitution.

17. Considerable amount of argument was raised as to who is the person who is liable to be prosecuted under Section 68(1) as in charge of or responsible for the affairs of the company. The question whether a particular person who is sought to be prosecuted under Section 68(1) of the Act, is the person who is liable to be prosecuted under Section 68(1), is a question that has to be raised at the trial. We have already noticed the scope of the writ petitions giving rise to these appeals. The question sought to be raised on this aspect based on the various decisions of the English Courts and the decision of this Court in Valliappa Textiles Ltd. and Another (supra) depends upon the facts of the case proved before the Court dealing with the prosecution and it is not necessary for us to pronounce on those aspects in these appeals. Suffice it to say, that the arguments on this score are of no avail while considering the constitutional challenge to Section 68 of the Act as being violative of Articles 14 and 21 of the Constitution. We reject the contention, leaving it to the concerned appellant to raise that plea before the appropriate forum regarding his culpability under Section 68(1) of FERA.

18. Learned senior counsel for the appellants in Civil Appeal No.1750 of 1999, in addition to adopting the arguments of learned senior counsel already adverted to, also contended that on the scheme of the Act, it was incumbent on the Directorate of Enforcement to first adjudicate in terms of Section 51 of FERA and only if satisfied, proceed with the prosecution under Section 56 of the Act. According to counsel, under the scheme of FERA, the adjudication proceedings must first be commenced and only after they are completed, the directorate of enforcement can, in the light of the findings in the adjudication for penalty, decide to initiate a prosecution and seek to impose or not to impose a further punishment under Section 56 of the Act. It is submitted that the adjudication proceedings would give an idea to the authorities under the Act as to the gravity of the violation and the opportunity to decide whether the contravention deserved also a punishment by way of prosecution. They would decide whether the penalty imposed under Section 50 of the Act is adequate or not. If in the adjudication proceedings it is found that the alleged offender has not infringed any of the provisions of the Act, there will be no occasion for the Directorate of Enforcement to prosecute the concerned person. It would then be incongruous and unreasonable for the Directorate of Enforcement to prosecute a person for violating FERA, when in the

adjudication proceedings against him, it had been found that the person had not violated any of the provisions of FERA. It was in this context that the scheme of the FERA should be understood as indicating that there should first be an adjudication and thereafter, if the Directorate of Enforcement feels that the penalty is inadequate, to consider the launching of a prosecution.

19. Learned Additional Solicitor General contended that under FERA, adjudication and prosecution are two separate and distinct procedures with distinct purposes. There was no bar either in FERA or in any other law, to an adjudication and prosecution being launched in respect of an alleged contravention of FERA. Counsel submitted that the law has permitted it by providing two separate modes for dealing with the person who contravenes the law in relation to foreign exchange. While the primary purpose of imposing of the penalty is the interests of revenue and the preservation of foreign exchange, the primary purpose of prosecution is to serve as a strong deterrent to persons or companies contravening the provisions of the Act and to send a message to the society at large. Counsel pointed out that Section 56 of FERA which deals with offences and prosecutions, commences with the words "without prejudice to any award of penalty by the adjudicating officer under this Act". A person contravening any of the provisions shall upon conviction by a court will be punished, even if a penalty has been imposed on him. There was no warrant for reading the words "without prejudice to" as restricting the right of the authorities under the Act to proceed with the adjudication first and to commence the prosecution only at its conclusion. Counsel also emphasized that the two proceedings are independently dealt with. Counsel pointed out that even in respect of the FERA Act of 1947, in Shanti Prasad Jain vs. Director of Enforcement (1963 (2) SCR 297), this Court had upheld a special procedure under the statute holding that it was not violative of Article 14 of the Constitution. It is submitted that the purpose of the Act is to bring the accused to book, more so in case of a serious offence and it could not have been the intention of the legislature to await a long time for an adjudication to be completed by way of an appeal and a second appeal and then only to commence the prosecution.

20. The Act was enacted, as indicated by its preamble, for the conservation of foreign exchange resources of the country and the proper utilization thereof in the economic development of the country. When interpreting such a law, in the absence of any provision in that regard in the Act itself, we see no reason to restrict the scope of any of the provisions of the Act, especially in the context of the presence of the "without prejudice" clause in Section 56 of the Act dealing with offences and prosecutions. We find substance in the contention of the learned Additional Solicitor General that the Act subserves a twin purpose. One, to ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after an adjudication under Section 51 of the Act and two, to ensure that the tendency to violate is curbed by imposing an appropriate punishment after a due prosecution in terms of Section 56 of the Act. The contention that as a matter of construction --\026 since the provisions could not be attacked as violative of the rights under Part III of the Constitution ---- we should interpret

the provisions of the Act and hold that an adjudication has to precede a prosecution cannot be accepted as we see nothing in the provisions of the Act justifying such a construction. On the scheme of the Act, the two proceedings are seen to be independent and the launching of the one or the other or both is seen to be controlled by the respective provisions themselves. In the context of the inclusion of this Act in the Ninth Schedule, the reliance placed on the decision in Rayala Corporation (P) Ltd. & Ors. Vs. Director of Enforcement, New Delhi (1969 (2) SCC 412) cannot enable this Court to deem the provisions as arbitrary and to read them down or understood them in the manner suggested by the learned senior counsel. The very purpose of the Act and the very object of inclusion of the Act in the Ninth Schedule justifies an interpretation of the provisions as they stand on the basis that there is nothing arbitrary or unreasonable in the provisions and in the scheme as enacted. We may also notice that Section 23D of the Foreign Exchange Regulation Act, 1947, which was considered in Rayala Corporation (P) Ltd. & Ors. had a proviso, which indicated that the adjudication for the imposition of penalty should precede the making of a complaint in writing to the concerned court for prosecuting the offender. The absence of a similar proviso to Section 56 or to Section 51 of the present Act, is also a clear indication that the legislature intended to treat the two proceedings as independent of each other. Obviously, the legislature must be taken to have been conscious of the interpretation placed on the corresponding provisions by this Court in the decisions above referred to when the 1973 Act was enacted and it was also included in the Ninth Schedule to ward off any challenge on the ground that it would be violative of Article 14 of the Constitution, unless understood or read in a particular fashion.

21. Learned senior counsel appearing for the appellant in criminal appeal arising out of SLP(Crl) No.5892 of 2004 in which the Full Bench decision of the Calcutta High Court is challenged, supported the arguments raised by learned senior counsel in Civil Appeal No.1750 of 1999. The Full Bench of the Calcutta High Court in the judgment under appeal has, on a consideration of the relevant aspects, answered the reference made to it by holding that a complaint under Section 56 of FERA can never be said to be premature if it is instituted before the awarding of penalty under Section 50 of the Act and such criminal proceeding being an independent proceeding, can be initiated during the pendency of an adjudication proceeding under Section 51 of FERA, 1973. Therein, the Full Bench has referred to the decision of the Madras High Court in A.S.G. Jothimani Nodar vs. The Deputy Director, Enforcement Directorate (1984 Excise and Customs Cases 319) and that of the Andhra Pradesh High Court in Anil Kumar Agarwal vs. K.C. Basu (2003 Criminal Law Journal 2197) which also take the same view as the one taken by the Full Bench in the judgment under challenge. The court has also derived support for its view from the decisions of this Court in Assistant Collector of Customs, Bombay vs. L.R. Melwani and another (AIR 1970 SC 962) and in P. Jayappan vs. S.K. Perumal (AIR 1984 SC 1693 = 1984 Suppl. SCC 437). We see no reason not to approve the answer given by the Full Bench to the question referred to it for decision. On the whole, we are satisfied that there is no justification in accepting the argument that unless an adjudication proceeding under Section 51 of the

Act is completed, a prosecution under Section 56 of FERA cannot be initiated. Both proceedings can simultaneously be launched and can simultaneously be pursued.

22. Counsel submitted that the devising of a special machinery for adjudication, the limiting of the "without prejudice" clause in Section 56 to any award of penalty and not the initiation of proceedings under Section 51 of the Act, the making of a contravention of any of the provisions of this Act as the key to both proceedings, would all indicate that an adjudication should precede a prosecution under Section 56 of the Act. There is nothing in the Act to indicate that a finding in an adjudication, is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned senior counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act. The decision in K.C. Builders and another vs. Assistant Commissioner of Income Tax (2004 (2) SCC 731) is clearly distinguishable. The Court proceeded as if under the Income Tax Act, the prosecution is dependent on the imposition of penalty. That was a case where the prosecution was based on a finding of concealment of income and the imposition of penalty. When the Tribunal held that there was no concealment, and the order levying penalty was cancelled, according to this Court, the very foundation for the prosecution itself disappeared. This Court held that it was settled law that levy of penalties and prosecution under Section 276-C of the Income Tax Act are simultaneous and hence, once the penalties are cancelled on the ground that there was concealment, the quashing of the prosecution under Section 276-C of the Income Tax Act was automatic. We have held already that on the scheme of FERA, the adjudication and the prosecution are distinct and separate. Hence, the ratio of the above decision is not applicable. That apart, there is merit in the submission of the learned Additional Solicitor General that the correctness of the view taken in K.C. Builders (supra) may require reconsideration as the reasoning appears to run counter to the one adopted by the Constitution Bench in Assistant Collector of Customs, Bombay vs. L.R. Melwani and another (supra) and in other decisions not referred to therein. For the purpose of these cases, we do not think it necessary to pursue this aspect further. Suffice it to say, that the ratio of that decision has no application here.

23. The prayer for the issue of a writ of prohibition restraining the authorities under the Act from proceeding with the adjudication and the prosecution is essentially based on the constitutional challenge to the relevant provisions of the Act on the ground that they violate Articles 14 and 21 of the Constitution of India. Once we have held, as the High Court did, that the provisions are constitutional, the basis on which the writ of prohibition is sought for by the appellants disappears. It is settled by the decisions of this Court that a writ of prohibition will issue to prevent a Tribunal or Authority from proceeding further when the Authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of

natural justice; or proceeds to act under a law which is itself ultra vires or unconstitutional. Since the basis of the claim for the relief is found not to exist, the High Court rightly refused the prayer for the issue of a writ of prohibition restraining the Authorities from continuing the proceedings pursuant to the notices issued. As indicated by this Court in State of Uttar Pradesh Vs. Brahm Datt Sharma [(1987) 2 SCC 179] when a show cause notice is issued under statutory provision calling upon the person concerned to show cause, ordinarily that person must place his case before the Authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. On the facts of this case, it cannot be said that these notices are palpably without authority of law. In that situation, the appellants cannot successfully challenge the refusal by the High Court of the writs of prohibition prayed for by them.

24. Thus, on the whole, in the context of the answer given by the Constitution Bench on one of the important aspects raised in these cases and in the light of the prayers made in the writ petitions giving rise to these appeals, we see no reason at the instance of the appellants in these four appeals either to interfere with the decisions of the High Court of Bombay or with the answer given by the Full Bench of the High Court of Calcutta to the first question referred to it for decision. In that view, all these appeals are liable to be dismissed.

CIVIL APPEAL NOS. 1751 and 1944 OF 1999

25. These appeals are by the Union of India and the Authorities under the FERA challenging the decision of the High Court of Bombay to the extent that court held that Section 68 of the Act is inapplicable to proceedings for adjudication under Section 51 of the Act and its operation is confined only to prosecutions under the Act. The High Court reasoned that the argument that having regard to the placement of Section 68 under the Legislative Scheme of FERA, the same is equally applicable to penalty, could not be accepted since the very caption of Section 68 indicates that it deals with offences by a company and as such Section 68 cannot be invoked for the levy of penalty on the persons indicated therein. According to the High Court, apart from the caption, sub-Sections (1) and (2) of Section 68 speak of the officers referred to therein being liable to be proceeded against and punished and this indicates that it is intended to apply only in respect of prosecutions against a company and only in such a prosecution for an offence by the company, the persons indicated therein are liable to be proceeded against and punished. The Section does not indicate that it could be extended to penalty. Since the penalty could be imposed on a company, as distinct from the punishment of imprisonment, if the company contravenes any of the provisions of the Act, it would be proper to understand Section 68 as being confined only to criminal prosecutions. The High Court stated that Section 50 of the Act dealing with liability for penalty, does not refer to the persons referred to by Section 68 of the Act. As such, Section 68 of the Act could not be availed of to impose a penalty on the officials of the company in terms of Sections 50 and 51 of the Act simultaneously with the company, which is the person guilty of contravention. In view of the fact that Section 50 also prescribes an outer limit for the penalty to be imposed and the said penalty can

be imposed on the company itself, it would be incongruous to hold that the same quantum of penalty could be recovered from the officials of the company all over again. That would lead to an anomalous position of the penalty exceeding the outer limit prescribed in Section 50 in respect of a particular offence committed by the company. The High Court gave liberty to the Writ Petitioners to raise this aspect before the Adjudicating Authority based on its finding.

26. The learned Additional Solicitor General in support of the appeals by the Union of India, urged that the expression 'offence' used in Section 68 is all comprehensive and would include every contravention in respect of which an adjudication under Section 50 of the Act can also be made against a company and the object of the Act being to prevent the evasion of the law relating to foreign exchange, the expression 'offence' need not be confined to a criminal offence and Section 68 should be understood as being applicable even in respect of adjudications of penalty under Sections 50 and 51 of the Act. Learned counsel submitted that the legislation being in the interests of society, it must be construed in that context. Learned counsel also referred to Section 64 of the Act and pointed out that whereas sub-Section (1) specifies Section 56, sub-section (2) ropes in a proceeding for adjudication of penalty as well and in Section 68 of the Act there was no such specification as found in Section 64 (1) of the Act and that was a pointer to understand Section 68 as being applicable to an adjudication of penalty as well, especially in the context of Section 64(2). It is submitted on behalf of the respondents in these appeals that a reference to Section 56 of the Act shows that it deals with offences and prosecutions. In the absence of a definition in the Act, the term 'offence' should be understood in the context of Section 40 of the Indian Penal Code as an act that is criminally punishable and Section 3(38) of the General Clauses Act as an act made punishable by any law and the essential ingredient is that it should be a criminal act as understood. Whereas under Section 50 of FERA, in the matter of adjudication of penalty there was an outer limit of five times of the amount or value involved in any contravention, under Section 56 of the Act, as regards the fine to be imposed, there was no limit. It was submitted that in the case of contravention by a company, the adjudication is against the company and the penalty is imposable on the company itself within the limits prescribed by Section 50 of the Act, and in the light of this position, the High Court was justified in holding that Section 68 could not be applied in the matter of adjudication of penalty and the imposition of penalty can only be on the company when the company is the person who contravenes any of the provisions of the Act coming within Section 50 of the Act.

27. Both, Section 50 providing for imposition of penalty and Section 56 providing for prosecution, speak of contravention of the provisions of the Act. Contravention is the basic element. The contravention makes a person liable both for penalty and for prosecution. Even though the heading to Section 56 refers to offences and prosecutions, what is made punishable by the Section is the contravention of the provisions of the Act and the prosecution is without prejudice to any award of penalty. The award of penalty is also based on the same contravention. Section 63 is the power of confiscation of

currency, security or any other money or property in respect of which a contravention of the provisions of the Act has taken place conferred equally on the Adjudicating Authority and the Court, whether it be during an adjudication of the penalty or during a prosecution. Whereas Section 64 (1) relating to preparation or attempt at contravention is confined to Section 56, the provision for prosecution, sub-Section (2) of Section 64 makes the attempt to contravene or abetment of contravention, itself a contravention, for the purposes of the Act including an adjudication of penalty under the Act. Section 68 relating to offences by companies, by sub-Section (1) introduces a deeming provision that the person who was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty along with the company of the contravention of the provisions of the Act and liable to be proceeded against and punished accordingly. The proviso, no doubt, indicates that a person liable to punishment could prove that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Sub-Section (2) again speaks only of a contravention of the provisions of the Act and the persons referred to in that sub-section are also to be deemed to be guilty of the contravention liable to be proceeded against and punished accordingly. The word 'offence' is not defined in the Act. According to Concise Oxford English Dictionary, it means, 'an act or instance of offending'. Offend means, 'commit an illegal act' and illegal means, 'contrary to or forbidden by law'. According to New Shorter Oxford English Dictionary, an offence is "a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault." Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands (see P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn, 2005 page 3302). This Court in Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya [(1997) 2 SCC 699] stated that the word 'offence' generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In Brown v. Allweather Mechanical co. [(1954) 2 QB 443], it was described as "a failure to do something prescribed by a statute may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt." The expression 'offence' as defined in Section 3(38) of the General Clauses Act means an act or omission made punishable by any law for the time being in force. 'Punishable' as noticed by this Court in Sube Singh & Ors. Vs. State of Haryana & Ors. [(1989) 1 SCC 235] is ordinarily defined as deserving of, or capable or liable to punishment. According to Concise Oxford English Dictionary, 'punish' means, 'inflict a penalty on as retribution for an offence, inflict a penalty on someone for (an offence)'. In the New Shorter Oxford English Dictionary (Vol. 2, 3rd ed., reprint 1993), the meaning of punishment is given as, "infliction of a penalty in retribution for an

offence; penalty imposed to ensure application and enforcement of a law." Going by Black's Law Dictionary (8th ed.) it is, "a sanction-such as a fine, penalty, confinement, or loss of property, right or privilege-assessed against a person who has violated the law." According to Jowitts Dictionary of English Law Vol. 2 (2nd ed. By John Burke), punishment is the penalty for transgressing the law. It is significant to notice that Section 68, both in sub-Section (1) and in sub-Section (2) uses the expression, shall be liable to be proceeded against and punished accordingly. There does not appear to be any reason to confine the operation of Section 68 only to a prosecution and to exclude its operation from a penalty proceeding under Section 50 of the Act, since the essential ingredient of both is the contravention of the provisions of the Act. A company is liable to be proceeded against under both the provisions. Section 68 is only a provision indicating who all in addition can be proceeded against when the contravention is by a company or who all should or can be roped in, in a contravention by a company. Section 68 only clarifies the nature and mode of proceeding when the contravention of any of the provisions of the Act is by a company, whether it be by way of adjudication to impose a penalty or by way of prosecution leading to imprisonment and a fine.

28. The High Court rested its decision mainly on the use of the expression in sub-Sections (1) and (2) of Section 68 that the officer or officers concerned shall be 'liable to be proceeded against and punished accordingly'. According to the High Court, the use of the expression "punished" makes it apparent that Section 68 can be availed of only when there is a criminal prosecution for an offence by a company, where the person or persons indicted are liable to be punished. Hence, its application cannot be extended to penalty proceedings. The other reason mentioned by the High Court is that the provision under Section 68 had a special task and it dealt with offences and prosecutions against any person which includes a company and on conviction such a person is liable to be imprisoned and company being a juristic person, it cannot suffer imprisonment. Then, section 68 springs into the operation to identify every person who is liable to be punished with imprisonment for the contravention by the company. However, penalty can be saddled on the company if it has contravened any of the provisions of the Act. Section 50 does not refer to every person as envisaged by Section 68. As such, Section 68 cannot be availed of to indict the officials of the company for the purposes of penalty. Section 50 also lays down an outer limit of penalty. Since the penalty can be imposed on the company itself as a person contravening the provisions of the Act, if the operation of Section 68 is extended to penalty proceedings also, the penalty would become leviable against each person who comes within the purview of Section 68 of the Act and that will create a serious anomaly.

29. There does not appear to be any reason to confine the operation of Section 68 of the Act as was done by the High Court. Merely because the expression 'punished' is used, it does not mean that it is confined to a prosecution under Section 56 of the Act, since the element that attracts the imposition of penalty and the prosecution is the same, namely, the contravention of any of the provisions of the Act. Moreover, there is nothing in the Act

which confines the expression 'punished' only to a punishment for a criminal prosecution. An imposition of a penalty can also be a punishment. The second part of the reasoning appears to be self-contradictory. If a person includes a company, there is no reason to confine Section 68 to a prosecution only, because the company as a person is liable to be proceeded against under Section 50 and Section 56 of the Act, though in a criminal prosecution the punishment by way of imprisonment can be imposed only on the officer or officers of the company referred to in Section 68 of the Act. Section 68 only indicates the manner in which a contravention by a company can be dealt with and it does not show that it is confined in its operation only to prosecutions against a company. It is a general provision relating to a contravening company, which is to be proceeded against whether it be under Section 50 or under Section 56 of the Act. The fact that a fine alone can be imposed on a company in a prosecution under Section 56 of the Act, cannot enable us to confine the operation of Section 68 to criminal prosecutions alone under the Act. We see no reason to whittle down the scope of Section 68 of the Act.

30. It is true that the entire penalty that may be imposed on adjudication, is capable of being recovered from the company itself. But that does not mean that it cannot be recovered from the officer incharge of the company or those who connived at or were instrumental in the contravention of the provisions of the Act by the company. Once the ingredient of the offence is contravention of the provisions of the Act and the consequences flowing from the contravention is to make that person including a company liable for penalty as well as for prosecution, there does not appear to be any justification in confining the scope of the Section 68 only to prosecutions under Section 56 of the Act. We have earlier indicated that use of the expression 'offence' in the marginal heading of Section 68 is not indicative of the expression 'being confined to a criminal offence alone' because an offence in the context of the Act is really a contravention of any of the provisions of the Act referred to in Section 50 and in Section 56 of the Act.

31. Hence, the decision of the High Court calls for modification as regards the scope and applicability of Section 68 of the Act. The appeals filed by the Union of India are liable to be allowed to that extent.

WRIT PETITION NO. 165 OF 2004

32. The challenge in this Writ Petition to the prosecution launched against the Writ Petitioner is on the same basis as the one contained in the Writ Petitions giving rise to the Civil Appeal Nos. 1748, 1749 and 1750 of 1999. For the reasons set out by us in the earlier paragraphs, this Writ Petition has only to be dismissed. Obviously, it would be open to the Writ Petitioner to raise all available defences before the concerned Criminal Court.

CRIMINAL APPEAL NO. 684 OF 2005

33. This appeal challenges the decision of the High Court of Andhra Pradesh refusing to interfere with an order of the Special Judge of Economic Offences at Hyderabad refusing to discharge the appellant. The argument before the High Court was that the prosecution contemplated by Section 56 of the Act could take place only if an adverse

finding is recorded by the Adjudicating Officer in the proceedings under Section 51 of the Act and that no crime or offence can be said to have been committed by the appellant unless the proceedings under Section 51 of the Act culminates in a finding adverse to him. The High Court rejected this contention. In view of our conclusions recorded earlier, the said argument which is reiterated before us in support of this appeal, has only to be rejected. The order of the High Court does not call for interference and this appeal deserves to be dismissed.

CRIMINAL APPEAL NOS. 847 AND 848 OF 2004

34. The accused has filed these appeals challenging the orders of the High Court of Delhi. Criminal Appeal No. 847 of 2004 is filed by the accused challenging the decision dismissing an application filed by the appellant under Section 482 of the Code of Criminal Procedure, by following the decision of this Court in Santram Paper Mills Vs. Collector of Central Excise, Ahmedabad [(1998) 8 SCC 335] and taking the view that an adjudication proceeding is independent of the criminal liability under the Act. The contention of the appellant was that since in the adjudication proceedings no penalty was imposed and there was no finding of personal involvement of the appellant, the prosecution had also to be quashed. We have held that the two proceedings are independent of each other and the finding on the adjudication is not conclusive on a prosecution under the Act. Hence, the High Court was fully justified in refusing to quash the proceedings on the ground put forward by the appellant. There is no merit in Criminal Appeal No. 847 of 2004.

35. The appellant, after the petition under Section 482 of the Code of Criminal Procedure was dismissed, purported to file another Writ Petition challenging the vires of Section 140 (1) of the Customs Act. He also sought a stay of further proceedings before the Additional Chief Metropolitan Magistrate, New Delhi based on the complaint filed by the Enforcement Officer. The Division Bench after taking note of the earlier proceedings declined to stay the proceedings. That order is challenged in this appeal.

36. We see no reason to interfere with the interim order passed by the High Court in view of our conclusions as above. Even otherwise, the High Court has exercised its discretion properly in refusing to grant a stay of further proceedings and there is no reason to interfere with that order. Criminal proceedings of this nature cannot be allowed to be delayed unduly. This appeal also is liable to be dismissed.

37. In the result, W.P.(Crl.) 165 of 2004 and all appeals other than Civil Appeal Nos. 1751 and 1944 of 1999 are dismissed. Civil Appeal Nos. 1751 and 1944 of 1999 are allowed by vacating the finding of the High Court of Bombay that Section 68 of FERA is confined in its operation only to prosecutions under Section 56 of the Act. The parties are directed to suffer their costs in all the appeals.