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**(2002) 07 BOM CK 0123**  
**In the Bombay High Court**  
**Case No : First Appeal No. 252 of 1988**

Dodsal (P.) Ltd.

APPELLANT

Vs

Foreign Exchange Regulation, Appellate Board

RESPONDENT

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**Date of Decision :** 22-07-2002

**Acts Referred:**

Adjudication Proceedings and Appeal Rules, 1974 — Rule 3  
Criminal Procedure Code, 1973 (CrPC) — Section 216  
Foreign Exchange Regulation Act, 1947 — Section 4, 4(1), 5(1), 5(5)

**Citation :** (2004) 52 SCL 466

**Hon'ble Judges :** A.M. Khanwilkar, J

**Bench :** Single Bench

**Advocate :** Shyam Diwan, for the Appellant; Geeta Mulekar, for the Respondent

**Final Decision :** Allowed

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## Judgement

A.M. Khanwilkar, J.—This appeal u/s 54 of the Foreign Exchange Regulation Act, 1993 (hereinafter referred to FERA) takes exception to the judgment and order dated 2-4-1987 in Appeal No. 72 of 1980 passed by the Foreign Exchange Regulation Appellate Board against the Order No. SDF (S) 1/ 61/72/79 dated 29-12-1979 of the Special Director of Enforcement against the penalty of Rs. 40,000. This first appeal raises the following substantial questions of law.

1. What is the true and correct interpretation of the provisions of Sections 4(1), 5(1)(a), 5(1)(b), 5(1)(c) and 5(1)(d) of the FERA 1947 ?
2. Whether the permission of the Reserve Bank of India to execute contracts would include the permission to spend such money in executing such contracts as was necessary ?
3. Whether a person is entitled to adjust and/or deduct and/or set off the amount due to him against the amount payable by him to a nonresident without the general or special permission of the Reserve Bank of India ?
4. Whether a penalty can be imposed on a person for a mere technical or venial

breach of the provisions of Act for where the breach flows from a bona fide belief that the offender is not liable to act in a manner prescribed by the Statute ?.

5. Whether the Adjudicating Authority can alter the charge originally levelled against a person without giving an opportunity to the person to meet the same as provided under the Adjudication Proceedings and Appeal Rules, 1959 made under the Act resulting in the breach of the principles of natural justice ?

6. Whether the Respondents have violated all the settled principles of law in adjudicating the matter and in disposing the appeal ?

2. Briefly stated, the Appellants were carrying on business of Engineering Contractors, particularly business of constructions of long distance cross country pipe line for crude oil, gas products etc. and for fabrication and erection of various main and inter connecting utility piping system for various industries like petroleum, refinery fertilizer, chemical plant and steel plant etc. in India and abroad. Initially the Appellants main business was of imports. It is stated that the Appellants had obtained certain agencies from foreign manufacturers such as A.E.G. Mannesmann Group of Companies and M/s. Walther and Cie etc. It is further stated that the Appellants were also dealing in export of handicrafts and novelties etc. and have received an award for outstanding performance of non traditional items in the year 1971 from the President of India. The Appellants further assert that they have earned foreign exchange amounting to over Rs. 15 crores during the period 1970-80. Be that as it may, it is not in dispute that the office premises of the Appellants were raided by the Directorate of Enforcement on 9th/ 10th May, 1968 and various files and other papers were seized from the premises. Thereafter directives were received from the Deputy Director of Enforcement Directorate to which the Appellants by their Solicitors' letter gave full details and exhaustive reply. Originally show-cause notice Nos. 29 to 39 were issued to the Appellants in respect of various charges. On considering the exhaustive replies given by the Appellants, the Appellants came to be acquitted of all charges in show-cause notice Nos. 30, 31 and 33 and with regard to the show-cause notice No. 34 the Appellants were held technically guilty but no penalty was levied on them. In other words, the Appellants have been found guilty and penalty has been imposed only with regard to show-cause notice Nos. 29, 32, 35, 36, 37, 38 and 39. Against the said order of the Special Director dated 29th December, 1979 the Appellants carried the matter in Appeal before the Foreign Exchange Regulation Appellate Board being Appeal No. 72 of 1980. The Appellate Authority however, more or less affirmed the view taken by the Special Director, but reduced the penalty in respect of some of the charges. In Other words, the Appeal preferred by the Appellants was rejected on merits. Against this decision the present Appeal u/s 54 of FERA has been filed. Since more than one show-cause notice is involved and in every show-cause notice charge against the Appellant is separate, for sake of convenience, I would examine the rival contentions with reference to the individual show-cause notice.

Re Show Cause Notice No. 29

3. Reverting to the show-cause notice No. 29 the charge against the Appellant was that they had indulged in selling of foreign exchange amounting to KD 670 to various members of the staff in Kuwait which contravened the provisions of Section 4(1) of the Act of 1947 and rendered themselves liable to be prosecuted u/s 23(1) of the said Act. In response to the said show-cause notice, the Appellants filed explanation pointing out that amounts were paid to various officials of Dudsal in Kuwait to execute contract taken by the Appellants and the amounts so paid to them were later on recovered either by deduction from their salaries or otherwise. According to the Appellants, therefore, it is not a case of selling of foreign exchange - which was the charge framed in the subject show-cause notice. The Special Director in his order has held that though it cannot be said that the foreign exchange has been sold by the Appellants but the record clearly indicated that the amounts were "lent" by the Appellants to its employees and later the amounts were settled in India which transaction also contravened the provisions of Section 4(1) of the Act. This view was challenged before the Appellate authority and the Appellate Authority has rejected that challenge. Even the Appellate authority opined that the materials on record clearly established that amounts KD 670 were paid by the Appellants to its employees and which was in the nature of "lending" the said amount which was impermissible by virtue of Section 4(1) of the Act in absence of previous general or special permission of the R.B.I. in that behalf. The Appellants had made serious grievance before the Appellate authority that it was not permissible for the authority to alter the charge from one of "selling" to one of "lending" and that too without giving any notice to the Appellants in that behalf. The Appellate authority, however, rejected that grievance by observing that no prejudice has been caused to the Appellants. In this back drop, the grievance made before this Court is that, the charge as framed in the show-cause notice No. 29 was of "selling" of foreign exchange, whereas the Appellants have been found guilty of "lending" of foreign exchange, which charge is materially different from the one originally pressed into service against the Appellants. According to the Appellants, it is impressible to alter the charge midstream, that too without giving any notice in writing to the Appellants in that behalf. For this purpose reliance is placed on the Adjudication and Appeal Rules, and more particular Rule 3 to demonstrate as to how the enquiry has to proceed. Indubitably, the procedure for enquiry such as the present one is governed by the provisions of the Adjudication Proceedings and Appeal Rules, 1974. It will be apposite to advert Rule 3 which reads thus :

"3. Adjudication proceedings.--(1) In holding an inquiry u/s 51 for the purpose of adjudging u/s 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 authorized representative.

(4) On the date fixed, the Adjudicating Officer shall explain to the person proceeded against or his lawyer or authorized 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 Indian Evidence Act, 1872 (1 of 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".

Rule 3 posits that, the authority in the first instance has to issue notice to the concerned person requiring him to show-cause within the specified time as to why adjudication proceedings should not be held against him. Indeed, merely, because notice has been issued in respect of one charge that would not empower the authority to proceed to take action against that person with regard to some other charge which has not been notified to him. This view is reinforced from the purport Sub-rule (2) of Rule 3, which provides that every notice under Sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him. In other words, no adjudication proceedings can be initiated against any person in absence of a formal notice in writing indicating the nature of the offence alleged against him. What is relevant to note is that Sub-rule (5) mandates that the Authority shall give an opportunity to the noticee to produce such documents or evidence as he considers relevant to the inquiry and the Authority is obliged to consider the said material, if produced. This clearly indicates that not only the concerned person should be given notice in writing but further should be provided ample opportunity to effectively defend himself. The learned Counsel for the Respondents has placed reliance on Section 216 of Criminal Procedure Code, 1973 to contend that the Court may alter the charge at

any time before judgment is pronounced. The learned Counsel as also placed reliance on the judgment of the Apex Court reported in - Srinivas Ram Kumar Vs. Mahabir Prasad and Others, . However, to my mind, the provisions of Code of Criminal Procedure cannot be pressed into service in the present case. Neither the Act nor the relevant rules have made similar express provision authorising the Authority with such power to alter the charge at any stage before the judgment. That power cannot be inherent in the Authority. In the absence of express provision in that behalf the Adjudicating Authority cannot or even for that matter the Appellate Authority cannot alter the charge. The fact that no prejudice was likely to be caused to the noticee if the charge was to be altered cannot validate such an action which is without authority of law. The Appellants therefore, contend that if particular procedure is prescribed by law then the proceedings will have to be conducted in that manner alone and the authority cannot arrogate to itself power which is not so provided under the Act or the rules framed thereunder so as to alter the charge midstream of the enquiry. To buttress this contention it is further urged that the present proceedings are undoubtedly quasi criminal proceedings and even for this reason it was not open to the authority to alter the charge midstream. In support of this contention reliance has been placed on the decision of the Apex Court in Collector of Central Excise, Patna and Others Vs. I.T.C. Limited and Another, - Collector of Central Excise where the Apex Court has observed that if any action is taken without giving any opportunity to the other side to meet the grounds then that person cannot be made liable of that ground. The next decision relied is in Lubri-Chem Industries Ltd. Vs. Collector of Central Excise, Bombay, . In this decision the Apex Court has observed that if the Appellants therein were not intimated by the Respondents that they were being asked to pay excise duty on the liquid paraffin at two stages, first, when it was manufactured and then when it was packed and labelled, then entire demand upon the Appellants, as imposed by the Collector and upheld by the Tribunal at the second stage under T.I.E. must, therefore, fail. The next decision relied is in the case of Wimco Ltd. Vs. Union of India and others, . This is the decision of the Single Judge of our High Court. In para 18 of this decision, the Court has accepted the contention advanced by the Petitioners in that case that, violation of principle of natural justice was inevitable when the relevant aspects of the matter had neither been alluded to in the show-cause notice nor was any opportunity given to the Petitioner to meet the same. Relying on these observations it is contended that in the present case no opportunity in writing was given, much less, no oral intimation to the Appellants was given that the authority proposes to alter the charge as aforesaid. The next decision relied in support of this contention in Shanti Prasad Jain Vs. The Director of Enforcement, . In para 35 of the said decision the Apex Court has observed that "the proceedings under the FERA Act are quasi criminal in character and it is the duty of the Respondents as prosecutor to make out beyond all reasonable doubt that there has been a violation of law." Relying on this decision it is contended that if the proceedings are quasi criminal, then it is imperative to observe the principles of natural justice in its letter and spirit besides which the authorities

will be required to establish the charge beyond reasonable doubt.

3A. To my mind, there is substance in the grievance made by the Appellants. Indeed, there is perceptible difference in the charge of "selling of foreign exchange" and one of "Lending of foreign exchange". It is common ground that there was no specific charge of "Lending" against the Appellants. In such a case the Authority could not have arrogated to itself power to alter the charge, which exercise of power is not ascribable to any provision in the Act or the Rules and more so without giving notice in that behalf to the Appellants. Obviously, the latter would result in plain infraction of principles of natural justice which cannot be countenanced and especially when the proceedings are of quasi criminal in nature. On this reasoning the subject show-cause notice will have to be discharged.

4. It is then contended that in the present case Section 4(1) has no application because, the Appellants had obtained permission from the Reserve Bank of India to undertake contracts and which permission included spending on employees of their necessities abroad to facilitate the execution of the contract. The arguments proceeds on the premise that although the Appellants have paid amount KD 670 to its employees that payment has been made to its staff and employees in relation to the execution of contract for which the Appellants have already obtained permission from the Reserve Bank of India and that the payments have been made in regular course of business. It was therefore, not necessary to obtain special or general permission as such before making such payments to the employees. It is also contended that if the purport of Section 4(1) was to be given narrow construction as contended by the Respondent then, it would make impossible for any businessman to transact business and to spend amount which would be necessary for the execution of the contract abroad. It is then contended that in any case it is common ground that the amounts paid by the Appellants being sum of KD 670 was essentially to its employees and amount being very meagre amount and spent by the employees for their basic and essential necessities abroad, coupled with the fact that the Appellants were under bona fide impression that it would not be necessary to obtain permission of the Reserve Bank of India for making such payment, the breach if any was wholly unintentional and in any case there was no intention to cause loss of foreign exchange or to defeat the provisions of law. It is contended that all these factors if taken into account then, no penalty ought to be imposed, even if technically the Appellants have been found to have committed some breach. In support of this contention reliance has been placed on the decision of the Apex Court in Hindustan Steel Ltd. Vs. State of Orissa, . Reliance has been placed on the following observations of the Apex Court :

"Under the Act penalty may be imposed for failure to register as a dealer Section 9(1), read with Section 25(3 )(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a

quasi criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct Contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out." (p. 29)

5. The next decision relied in Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay, . This decision follows the principle enunciated by the Apex Court in Hindustan Steel Ltd. (supra) and other decisions on the point. In para 59 of this decision the Apex Court has made reference to the said principle which has already been extracted above and opined that even if it is assumed for arguments sake that the stone slabs imported for home consumption are marble still in view of the finding arrived at by the Appellate Tribunal that the said product was imported on a bona fide belief that it was not marble, the imposition of such a heavy fine is not at all warranted and justifiable.

6. It is therefore contended that applying the above principle to the fact situation of the present case the penalty levied by the authorities below for the nature of default committed by the Appellants cannot be sustained. It is further contended that even the appellate authority has conceded the position that penalty as imposed by the Special Director being Rs. 5,000 was on the higher side having regard to the nature of charge and therefore reduced the same to Rs. 1,000 only. It is, therefore, contended that in such a situation, applying the principle enunciated by the Apex Court in Hindustan Steel Ltd.'s case (supra) there would be no question of imposing any penalty at all. On the other hand the learned Counsel for the Respondents contends that no fault can be found with the view taken by the two authorities below and since it is a consistent view, the same does not merit any interference. It is further contended that contention raised on behalf of the Appellants cannot be accepted as it will have far reaching consequences inasmuch as the permission granted for execution of the contract cannot be pressed into service for contending that there was permission also for spending foreign exchange or selling or lending foreign exchange to any person abroad. It is further contended that since the appellate authority has already reduced the amount of penalty no further indulgence was required.

7. Having considered the rival submission to my mind, it will not be necessary to go into the wider question raised on behalf of the Appellant that, permission

granted by the Reserve Bank of India in respect of the contracts would include the permission to spend such money in executing such contracts as was necessary and to make payment to its employees abroad in foreign exchange for their immediate and pressing necessity. Inasmuch as I have already observed that the show-cause notice No. 29 should necessarily fail because the charge therein was one of "Selling" of foreign exchange which has remained unsubstantiated. And that the Authority could not have proceeded to hold the Appellants guilty of an entirely different charge, namely, of "Lending" of the foreign exchange.

8. Assuming that the authorities could have proceeded with the enquiry regarding the charge of "lending" of foreign exchange, even then, to my mind, applying the dictum of the Apex Court in Hindustan Steel Ltd. 's case (supra). I have no hesitation in concluding that this is not a case where the breach can be said to be mala fide or was intended to cause loss of foreign exchange or that it was an intentional act to defeat the mandate of law. On the other hand, what is seen from the record is that the Appellants have paid only sum of KD 670 to its employees abroad for their pressing requirements. That amount cannot be said to be of such nature that the authorities would presume that it was paid with a view to defeat the provisions of law or to get undue benefit or it was dishonest attempt on the part of the Appellants. Assuming that the breach has been established, the same being of technical or venial breach of the provisions of Act and since it was under a bona fide belief that the Appellants were not liable to get permission of the Reserve Bank of India for the said transaction, there would be no question of imposing the penalty. Accordingly, the appeal would succeed in so far as Show Cause Notice No. 29 is concerned.

Re : Show-Cause Notice No. 32

9. Relating to the next show-cause notice No. 32, the charge in this notice was of "receiving" Rs. 2596-80 from Manipal Engg. College and "placing" the same to the credit of M/s. Karl Kolb Scientific Technical Supplies, Frankfurt, West Germany, a company reside outside India, without the general or special exemption of the Reserve Bank of India. The show-cause notice further proceeds to allege that it appears that in or about April 1961 the Appellants paid to Mr. E. Findeisen, Managing Partner of the said M/s. Karl Kolb through M/s. Hans Dieter Herter, New Delhi. Accordingly the charge was one of contravention of the provisions of Section 5(1)(d) and 5(1)(a) of the Act. The adjudicating authority has held that the charge in so far as the payment of Rs. 500 to Mr. Findeisen is concerned, the same has not been established and, therefore, the same was dropped. Accordingly, what remains is the charge of the Appellants having "received" sum of Rs. 2596-80 from Manipal Engg. College and "placing" the same to the credit of M/s. Karl Kolb, Frankfurt as aforesaid. What is relevant to note is that even the appellate authority after examining the records has held that no loss of foreign exchange has been caused on account of the said transaction. It has observed that that the transaction was only, for making some

adjustments between the two companies and was a technical breach. Once this finding was reached by the appellate authority, then, there was no occasion for the appellate authority to sustain the penalty against the Appellants for such a breach. No doubt the penalty imposed is nominal amount of Rs. 2500 but that is besides the point. The question is : whether the authorities ought to have levied such penalty at all. This question stands answered by the principle deduced from the decision of the Apex Court in the case of Hindustan Steel Ltd. (supra). Inasmuch as once it is held that the alleged breach is only of technical or venial breach and bona fide one, then it is not a case for imposing penalty. It will, therefore not be necessary to go into the other contentions raised before this Court on behalf of the Appellants. Nevertheless, I shall place the other contentions raised in respect of this show-cause notice very briefly. According to the Appellants, the charge as pressed into service against them cannot proceed because there is no evidence whatsoever that amount of Rs. 2596-80 received from Manipal Engg. College was in fact placed to the credit of M/s. Karl Kolb. Reliance was placed on the meaning of expression "Place" as quoted in the Black's Law dictionary. It was also contended that charge as originally framed against the Appellants was one for having "received" the amount on behalf of the person who was resident of New York, outside India; but when the alleged transaction took place the provisions of Section 5(1)(aa) were not in operation and charge of "receiving" could not be framed. What is contended is that, the allegations, even if accepted as it is, would only mean that the Appellants had "received" the amount. In which case it cannot be breach of Sub-clause (a) of Section 5(1) of the Act, as there is no evidence of making payment to or for the credit of any person resident outside India, for the Appellants have relied on cash books which do not even remotely suggest that position. It is argued that merely because some correspondence was exchanged between the parties that would not be sufficient to establish the requirement of payment to or for the credit of any person resident outside India or of having placed any sum to the credit of any person resident outside India, as is required for Section 5(1)(d). As observed earlier, it will not be necessary to go into this wider questions in view of the conclusion already reached and as recorded by the appellate authority that the appellate authority that the breach was only a technical or venial one. On that reasoning and by applying the principle deduced from Hindustan Steel Ltd. "s case (supra), there will be no occasion to impose any penalty with regard to the charge under the show-cause notice No. 32.

Re : Show Cause Notice Nos. 35 and 36

10. Now reverting to the show-cause notice Nos. 35 and 36, it is seen that show-cause notice No. 35 was in respect of payments made by the Appellants totalling only Rs. 827-70 on behalf of resident outside India to M/s. A.B. Turitz and Co. Coteborg, Sweden, ali company resident outside India without the general or special exemption of the Reserve Bank of India, thus contravened the provisions of Section 5(1)(c) of the Act; whereas show-cause notice No. 36 alleges Appellants having acknowledged a debt of only Rs. 3,000 to M/s. A.B. Turitz and

Co. Gotebbogrg, Sweeden a company resident outside India in respect of a claim for faulty goods as per the Swedish Co.'s Debit Note No. 72218 of 7-8-66. The Appellate Authority has found that the amount paid, by the Appellants being sum of Rs. 790 was included in sum of Rs. 3,000. What is relevant to note is that the said amount of Rs. 3,000 or for that matter Rs. 827-70 is concerned, was relating to the transaction effected in usual course of business between the parties and, after making certain adjustments with regard to the respective claims, the liability of the Appellants was only Rs. 1,000. This is the finding reached by the Adjudicating Authority. The Appellate authority has found that in so far as the amount of Rs. 3,000 is involved, the contravention was of Section 5(1)(c). It has been noticed that the amount of Rs. 3,000 also included other amounts and adjustments. Nevertheless the adjudicating authority has imposed penalty of Rs. 1,000, which has been confirmed by the appellate authority. The Appellate Authority however, has not doubted the stand taken by the Appellants that goods supplied were found defective on account of which the said claim had arisen. In this view of the matter, to my mind, the breach was nothing but a technical one or venial breach committed by the Appellants. It is held that the Appellants have failed in obtaining prior permission. However, the question is whether the adjudicating authority and for that matter the appellate authority could have imposed penalty in such a situation. As observed earlier, the Apex Court in Hindustan Steel Ltd.'s case (supra) has taken the view that in such a situation there would be no case for imposing penalty. Understood thus, even the conclusion reached by the authorities below on this show-cause notices would fail and the appeal would therefore succeed. No doubt the Counsel for the Respondents contends that merely because the amount involved in the show-cause notice is paltry sum of Rs. 1,000 that cannot be the basis for absolving the Appellants. As observed earlier, assuming that the Appellants are found to be amiss in not obtaining prior permission of the Reserve Bank of India, the fact remains that nature of transaction being one effected in the usual course of business and the amount involved being very small and the breach being technical or venial breach, as observed by the Apex Court, it would not be a case for imposing penalty. Accordingly, this appeal would succeed even in respect of show-cause notice Nos. 35 and 36.

Re : Show Cause Notice No. 37

11. That takes me to show-cause notice No. 37. The charge in this show-cause notice was that the Appellants have received a payment of Rs. 4500 from M/s. Flexicons Ltd. Bombay and credited the same to the account of M/s. Mannesmann Pulvermetal GmbH, West Germany, a company resident outside India, without the general or special exemption from the Reserve Bank of India thus contravening the provisions of Section 5(1)(d) of the Act. The Adjudicating authority, however, on examining the relevant materials on record took the view that charge u/s 5(1)(d) of the Act as originally framed cannot be said to have been proved against the Appellants, but then proceeded to adjudicate as if it was covered by any payment by order or on behalf of any person resident outside

India contravening Section 5(1)(aa) of the Act. What is noticed from the order of the adjudicating authority is that, during the course of arguments it was suggested to the Advocate appearing for the appellants that charge u/s 5(1)(aa) was inescapable. In deference to the said observation of the Authority, the Advocate appearing for the Appellants appears to have replied that, the authority, if it is so convinced, may proceed to take action against the Appellants in accordance with law. Instead of following the procedure established by law, the authority has observed in the order that the learned Advocate stated that he will not defend the charge of Section 5(1)(aa) of the Act. This observation appearing in the order has been seriously disputed by the Appellants. Serious grievance in this behalf was made even before the Appellate Court. The Appellate Court, however, proceeded to examine the matter on the footing that no prejudice can be said to have been caused to the Appellants as the Appellants Advocate was put to notice and that was sufficient compliance and, not a case of breach of principles of natural justice. I have dealt with the requirement of law while considering the case with regard to show-cause Notice No. 29. I have taken the view that it is not open to the adjudicating authority or for that matter the appellate authority to alter the charge midstream that too without giving notice in writing indicating the nature of offence alleged to have been committed by the noticee and affording him opportunity to produce such document or evidence as he may consider relevant to the enquiry. To my mind, giving notice during the course of argument to the Advocate, assuming it was a notice, that does not fulfil the statutory requirements referred to earlier. Assuming that the authority could have proceeded to take action for breach u/s 5(1)(aa) of the Act, it was obliged to follow the procedure prescribed under the Rules, 1952. That has not been done in the present case. The fact that no prejudice has been caused to the Appellants is of no consequence. The question is whether the authority had jurisdiction or power to alter the charge in absence of any express provision in that behalf such as Section 216 of the Criminal Procedure Code. Understood thus, both the authorities below have committed material irregularity in proceeding with the matter with reference to the subject show-cause notice. In this view of the matter, the appeal would succeed also with regard to the show cause notice No. 37.

Re : Show Cause Notice Nos. 38 and 39

12. That takes me to the show-cause notice Nos. 38 and 39. Show-cause notice No. 38 concerned, it is alleged that the Appellants have "made payment" of Rs. 28,582-83 on behalf of M/s. Telefunken, 79 Ulm (Danau) Elishetenstrasse, West Germany, resident outside India, without the general or special exemption from the Reserve Bank of India thereby controverting the provisions of Section 5(1)(c) of the Act; whereas in show-cause notice No. 39 it is alleged that the Appellants "acknowledged a debt" of DM 22,719-25 repaid as bank charges by M/s. Telefunken 79 Ulm (Donau) Elishetenstrasse 3, West Germany, vide letter dated 2-10-1964 from the said M/s. Telefunken, and file note dated 1-4-1966 found page 29 of File marked TI forming part of document seized from the said

company thereby contravening of the provisions of Section 5(1)(b) of the Act. What is relevant to note is that the adjudicating authority while examining the relevant materials on record has unequivocally opined that the Appellants have made best efforts to recover the said amounts. Having recorded this opinion there is no reason why the authority proceeded to impose penalty for the said transaction. The authority has clearly understood the transaction being one entered by the parties in usual course of business of the subject contract. The defence of the Appellants was that they had no option but to concede to certain demands for full and final settlement of the bills between the parties and, in such situation, it cannot be suggested that the Appellants have done that act to cause loss of Foreign Exchange or to defy the provisions of law. Besides, the stand of the Appellants is that since the Reserve Bank of India had granted permission in respect of the subject contract to be executed by the Appellants, it also included all such expenses that would be necessary to be made to facilitate the execution of the contract.

13. Be that as it may, the Appellate authority has observed that in so far as the charge of breach of Section 5(1)(c) of the Act (referable to show-cause notice No. 38) is concerned, the same was not challenged. This observation of the appellate Court has been seriously resisted by the Appellants as being wrong on the face of the record. My attention was drawn to the specific ground taken by the Appellants in the appeal memo, which reads thus :

"The Board further erred in not appreciating that making deductions from amounts due by one party to the other does not amount to payment within the meaning of Section 5(1)(c) of the said Act."

I find force in the contention that the appellants had specifically challenged the finding with regard to charge u/s 5(1)(c) and in spite of that the appellate Authority has proceeded on the premise that same was not challenged.

14. It is seen that the Adjudicating Authority itself had acquitted the appellants - company in respect of charge as per show-cause notice No. 33 on the ground that it was a case of adjustment and there is no right in any party to receive the money when there is corresponding liability to pay. It is contended that the Authority below have taken inconsistent position in its order. For the adjudicating authority while examining the claim in the context of show-cause No. 33 has observed that :

"There, unless proved to the contrary it will be presumed that the adjustments and deductions made by Mennesmann are in pursuance of this agreement. The learned advocate has stressed this point further by referring to the note at page 130 which is the annexure to the Show-cause notice. That note itself records that Mannesmann should be asked to send debit note for the two amounts viz. Rs. 4,113-03 and Rs. 6,076-24 in the last lines of the note. It is submitted that if the adjustment was something which was not in the Ordinary Course of business the debit notes would not have been asked for. This appears to be correct. Unless

they were in terms of the business agreements the debit notes which have to be recorded in the books would not been called for. Therefore, giving the benefit of doubt to the party which is due to them in these Criminal Proceedings, it will have to be presume, that the adjustments are in pursuance of the agreement with Mannesmann and they are in the course of the business".

It is, therefore, contended that same reasoning would apply with all force even while considering the charge under show-cause notice Nos. 38 and 39. There can be no doubt that the approach adopted by the authorities while considering the show-cause notice No. 33 is concerned, was the correct approach. The learned Counsel for the Respondents, however, relied on Section 24 of the Act relating to the burden of proof in certain cases. The said section reads thus :--

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

(2) Where any person is prosecuted or proceeded against for contravening the provisions of Sub-section (3) of Section 4, the burden of proving that the foreign exchange acquired by such person has been used for the purpose for which permission to acquire it was granted shall be on him."

The fact situation of the present case has no relevance to Sub-section (2) of Section 24. Even assuming that Sub-section (1) can be pressed into service against the Appellants, what is required by that provision is that whether any person is prosecuted or proceeded against for contravening any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits him from doing an act without permission, the burden of proving that he had the requisite permission shall be on him. The argument on the other hand, is that the Appellants contend that the permission granted in respect of the subject contract would enure in respect of the transaction in question and would enable the parties to adjust their respective claims. In other words, it is seen that contract has concluded between the parties. In usual course of business, there can be no reason to doubt that the transactions were not bona fide or intended with a view to cause loss of foreign exchange or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligations. Thus, applying the principle enunciated by the Apex Court in Hindustan Steel Ltd. 's case (supra), to my mind, there would be no cause for imposing penalty in respect of such technical or venial breaches. Besides, the adjustments in question are mainly in respect of bank charges paid by the parties.

15. Be that as it may, what is relevant to note is that the appellate authority proceeded to examine the matter on the premise that agency agreement between the parties was not filed before the authority or power and the letter of credit was not in accord with the agreement as is seen from the correspondence

between the parties, whereby the Appellants were requested to carry out the necessary amendment which was not done. The appellate authority has also adverted to the fact that no permission from the Reserve Bank of India was produced. In the circumstances the appellate authority has imposed penalty of Rs. 16,000.

16. The Counsel for the Appellants however, contends that the appellate authority has only made reference to some of the correspondence selectively, whereas whole set of documents which were relied by the Appellants in support of their claim have not even been adverted to. The learned Counsel has drawn my attention to the various letters which form part of the paper book and undoubtedly were produced before the authority below. The correspondence being letter dated 14-3-1963 between the Appellant and said M/s. Dodsai Gmbh, 2nd letters dated 2-9-1964 addressed by M/s. Dodsai Pvt. Ltd. to the Appellants, settlement between both the companies dated 10-2-1965, letters dated 6-8-1962 and letter received dated 27-7-1962. After relying on these documents the learned Counsel contends that, if the same are considered as a whole, it would necessarily follow that the parties were negotiating and ultimately reached at some final decision to settle the dispute. According to the Appellants, the amounts pertain to bank charges which were payable as per the agreement and the parties virtually conceded their claim and made adjustments in the context of the terms of agreement. The learned Counsel has also drawn my attention to the permission granted by the Reserve Bank of India dated 24-7-1968 (page 57) where the Officer of the Reserve Bank of India has said that it has no objection. According to the Appellant, therefore, on perusal of these documents, it would clearly go to show that the transaction in question was a genuine transaction between the parties and referable to the contract.

17. Accordingly, in the first place, the appellate authority has not considered the entire materials which it was obliged to consider, whereas on considering the entire materials with reference to the charges in the said show-cause notices, it is possible to take the view that the breach is a technical breach and has occasioned due to circumstances beyond the control of the Appellants. In which case, there would be no case for imposing any penalty. In this view of the matter, the appeal should succeed even with regard to show-cause notice Nos. 38 and 39.

18. Accordingly, for the reasons mentioned above, this appeal succeeds. The impugned judgment and orders passed by the authorities below are set aside and the action against the appellants in the subject Show Cause Notices is set aside. No costs.