* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 14th OCTOBER, 2025

IN THE MATTER OF:

\+ **CRL.A. 407/2007**

ARJUN PATIL .....Appellant

Through: Mr. Jaspreet Singh Kapur, Mr. Wasim Ansari and Ms. Shweta, Advocates.

versus

UOI & ORS .....Respondents

Through: Ms. Bharathi Raju, (SPC) with Miss. Divyangi, Advocates for UoI.
Mr. Vivek Gurnani, Panel Counsel with Mr. Kanishk Maurya, Advocate for ED.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD
HON'BLE MR. JUSTICE VIMAL KUMAR YADAV

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The present Appeal has been filed by the Appellant under Section 35 of the Foreign Exchange Management Act, 1999 (*hereinafter referred to as* 'FEMA') assailing the order dated 19.12.2003 passed by the Deputy Director, Directorate of Enforcement (*hereinafter referred to as* "**Adjudicating Authority**"), and the order dated 10.08.2006 passed by the Appellate Tribunal for Foreign Exchange (*hereinafter referred to as* "**Appellate Tribunal**") confirming the Order of the Adjudicating Authority confiscating Indian currency amounting to Rs. 12,31,000/- lying with the Appellant under Section 63 of the Foreign Exchange Regulation Act, 1973

(*hereinafter referred to as* 'FERA') on the ground that the Appellant had attempted to purchase foreign exchange and gold, and imposed a penalty of Rs.40,000/- on the Appellant.

2. Shorn of unnecessary details, the facts leading to the instant appeal are as follows:-

i. On 16.02.1997, after receipt of specific information that an illegal foreign exchange business was being conducted by the Appellant, Respondent No. 2 i.e. the Enforcement Directorate (*hereinafter referred to as* "**Respondent Agency**"), conducted a search of the residential premises of one Bhagwan Das, situated at 3757, Gali No. 3, Regherpura, Karol Bagh, New Delhi and the business premises of the Appellant, situated at 59/2141, Naiwala, Karol Bagh, New Delhi.

ii. Consequently, Indian currency worth Rs.12,31,000/-, USD 6371/-, four gold biscuits, two pieces of gold along with certain documents were recovered from the business premises of the Appellant.

iii. During the course of the search operation at the business premises of the Appellant, two Nepalese Nationals, namely, Dukal Bhattarai @ Arjun Bhattarai and Ram Nath Dhukal entered the premises where the search operation was underway. These individuals were also subjected to search.

iv. Upon search, a sum of USD $ 9,700/- along with Nepali Currency amounting to Rs.13/- and certain documents were recovered from Dukal Bhattarai @ Arjun Bhattarai. From Ram

Nath Dhukal USD $ 9,250 /- and Nepali Currency amounting to Rs.108/- were also recovered.

v. Subsequently, one Pramod Kumar entered the business premises of the Appellant. He was also subjected to search whereafter 01 kg. gold bar bearing foreign marking and certain documents were recovered.

vi. The statements of the Appellant and all the aforementioned individuals were recorded under Section 40 of FERA on 16.02.1997 and 17.02.1997.

vii. It is the case of the prosecution that, in these statements, the Appellant admitted that he was purchasing gold brought from Nepal against payments made in foreign exchange. It has further been averred that in the said statements the Appellant admitted that he was engaged in illegal purchase and sale of foreign exchange in contravention of Section 8(1), 8(2), 63 and 64(2) of FERA.

viii. On 13.02.1998, a memorandum bearing No.T-4/9/DZ/98-DD/45 was issued against the Appellant whereafter the case was fixed for adjudication and proceedings were held before the Adjudicating Officer.

ix. The Adjudicating Officer *vide* Order dated 19.12.2003, held the Appellant liable under Section 8(1) and 8(2) of FERA and imposed a penalty of Rs.40,000/- on the Appellant.

x. Thereafter, the Appellant preferred an appeal to the Appellate Tribunal. V*ide* Order dated 06.09.2006 the Appellate Tribunal

dismissed the appeal and re-affirmed the Order of the Adjudicating Officer.

xi. The Appellant thereafter approached this Court by filing W.P. (Crl.) No. 468/2007. The said writ petition was withdrawn by the Appellant on 04.04.2007, with liberty to file the present appeal.

xii. The Appellant has accordingly filed the present appeal seeking to assail Order dated 19.12.2003, passed by the Adjudicating Officer and the Order dated 06.09.2006, passed by the Appellate Tribunal.

3. While challenging the notice before the Adjudicating Authority, the Appellant's principal contention was that his statement had been obtained under duress and torture, and that he had retracted the statement at the very first available opportunity. He also argued that the version recorded in the statements, that the foreign currencies recovered from the two Nepalese Nationals i.e. Ram Nath Dhakal and Dukal Bhattarai, had been sold to them by the Appellant in for seized gold, was improbable since the value of the foreign exchange allegedly given to them would have far exceed the prevailing price of gold at that time. The Appellant also contended that the Indian currency seized from him was not liable to confiscation. While rejecting the arguments of the Appellant, the Adjudicating Authority held as under:-

> *"I have gone through the full facts of the case including panchanamas in respect of search of the business-cum-residential premises of Shri Arjun Patil and recoveries made under Section 37 and 34 of FERA, 1973, respectively. I have gone through the statement of Shri*

Arjun Patil Which was recorded under Section 40 of FERA, 1973 in which he admitted that he alongwith his brother-in-law Shri Bhagwan Dass Jadhav and Shri Pandurang Tukaram, were indulging in illegal sale/ purchase of foreign exchange and gold. He also confirmed the statement tendered by Shri Bhagwan Dass Jadhav. He admitted that the foreign currency of US $ 6371 was given to him by Shri Pandurang Tukaram and he had paid US $ 9700 and US $ 9250 to Shri Dukal Bhattarai and Shri Ram Nath Dhakal, respectively on the instructions of one Shri Ramesh Adhikari of Nepal.

S/Shri Ram Nath Dhakal and Dukal Bhattarai also admitted the recovery of the foreign exchange and also stated that they have acquired US $ 9700 and US $ 9250, respectively.

In view of the above I find Shri Arjun Patil guilty for contravention of Section 8(1) 8(2) and 64 (2) of FERA, 1973 for otherwise acquiring US $ 6371 and selling US $ 9250 to Shri Ram Nath Dhakal and US $ 9700 to Shri Dukal Bhattarai, residents of Nepal and also making attempt for purchasing foreign exchange and gold in respect of seizure of Rs.12,31,000/- I therefore, impose a penalty of Rs.40,000/- (Rupees Forty Thousand only) on Shri Arjun Patil.

I also find guilty S/Shri Ram Nath Dhakal and Dukal Bhattarai for contravention of Section 8(1) of FERA, 1973 for otherwise acquiring US $ 9250 and US $ 9700, respectively and I impose a penalty of Rs.30,000/-(Rupees Thirty Thousand Only) each on S/Shri Ram Nath Dhakal and Dukal Bhattarai.

I also pass the order for confiscation of US $ 6371, US $ 9250, US $ 9700 and Rs. 12,31, 000/- in terms of Section 63 of FERA, 1973.

> *I am not passing any order in respect of seized gold biscuits as no contravention has been defined in the show cause notice.*"

4. While assailing the order of the Adjudicating Officer before the Appellate Tribunal, the Appellant limited his argument to confiscation of Indian currency amounting to Rs. 12,31,000/- from his possession. The Appellant's primary contention before the Tribunal was that no reason had been given by the Adjudicating Officer for confiscation of the Indian currency, and there was nothing on record to indicate that the Appellant was making an attempt to illegally purchase foreign exchange and gold from the seized Indian currency.

5. The Appellate Tribunal, while affirming the order of the Adjudicating Officer held that the burden of proving that the seized Indian currency was not involved in the contravention of the provisions of FERA was on the Appellant and he had been unable to discharge the same. The Tribunal also held that the Appellant had intended to use the seized Indian currency in a manner that was in contravention to FERA. Finally, the Tribunal held that the Appellant had been unable to establish that he had not gone beyond the stage of preparation and his conduct was not an attempt to contravene the provisions of FERA. The relevant excerpt of the order of the Appellate Tribunal dated 06.09.2006 reads as under :-

> *"6. From the facts, evidence and circumstances of the case it was quite clear that the appellant was indulged in illegal sale and purchase of foreign exchange and gold where the confessional statement of the appellant has been fully corroborated by the statements of the visitors visiting the shop of the appellant for the*

purpose of sale and purchase of foreign exchange and also the statement of brother in law of the appellant, as well as by the recovery of the substantial amount of gold, foreign exchange and Indian currency. The appellant has not been able to explain the source of Indian currency which has nowhere been accounted for the appellant. It is not the case of the appellant that the daily turnover of his business was to the tune of about Rs.12,00,000/- and no explanation has been given by the appellant for recovery of such a huge amount of Indian currency which otherwise would not have been possible in the ordinary course of business. Under the circumstances of the case the burden of proving this fact that he seized Indian currency was not involved in the contravention of the provisions of FER Act, 1973 was on the appellant which the appellant has not been able to prove. The seized Indian currency is found to be involved in violation of provisions of FER Act, 1973 where I find no force in argument of the appellant that there was no act on the part of the appellant which constituted acts of criminal attempt. The appellant has not been able to bring his case within the purview of the judgment of the Supreme Cour I Narayan Bhagwan Das Vs. State, AIR 1959 SC 1118 by stating that the act of the appellant had not gone beyond the stage of preparation and was not an attempt to contravene the provisions of FER Act. Having considered the facts, evidence and circumstances of the case, I am of the view that the appellant is not entitled to the benefit of the ruling cited by him because of non-applicability of the rulings in the present case. There does not appear any flaw in the conclusion arrived at by the adjudicating authority against the appellant. The impugned order withstands judicial scrutiny which is liable to be confirmed and upheld."

6. Learned Counsel for the Appellant, while assailing the order of the Adjudicating Officer dated 19.12.2003 and the order of the Appellate Tribunal dated 06.09.2006, has advanced three broad grounds. **Firstly**, he has contended that the retracted confessional statement of the Appellant could not have been relied upon. **Secondly**, he has contended that there is no legal basis for the Respondent to confiscate Indian currency. **Thirdly**, he has contended that the allegations levelled against the Appellant do not constitute as an '*attempt*' under Section 64(2) of FERA.

7. Learned Counsel for the Appellant, with regard to the contention that the retracted confessional statement of the Appellant could not have been relied upon by the Respondent, has advanced the following arguments:-

i. The Deputy Director and the Appellate Tribunal have placed heavy reliance on the retracted confessional statements of the Appellant and has failed to appreciate that the Appellant and other co-accused had retracted from their confessional statement.

ii. It has been averred that the confessional statement of the Appellant was obtained under duress, coercion and torture. The Appellant and his co-accused had requested that they be medically examined and it was revealed that they had received injuries on their person.

iii. The request of the Appellant for cross-examination of witnesses was rejected. It has been averred that in terms of the Judgment of the Apex in KTMS Mohamd v. Union of India, **(1992) 3 SCC 178**, the Deputy Director and the Appellate Tribunal should have examined whether the Appellant and the co-

accused were coerced into making confessional statement and this Court should examine whether the impugned Order are vitiated for non-consideration of the same.

iv. The Appellate Tribunal failed to appreciate that the burden of establishing that the statements relied upon by the prosecution were made voluntarily rests squarely on the prosecution. The Court while examining the voluntariness of the statement must consider the attending circumstances and all relevant factors surrounding the statement. Reliance has been placed on the Judgment of the Apex Court in Telestar Travels Private Limited v. Enforcement Directorate, **(2013) 9 SCC 549**.

v. As far as the request of cross-examination is concerned, it has been averred that the credibility of a person who has testified or given a statement is in doubt or the statement is disputed the right of cross-examination would be inevitable.

vi. The impugned Orders, dated 19.12.2003 and 10.08.2006, fail to discuss the issue of voluntariness of the confessional statements. Even though, this point was specifically pleaded and it was argued that the statements had been given under coercion and torture and were subsequently retracted, neither the Deputy Director nor the Appellate Tribunal have addressed this issue or the question that the Appellant should have been permitted to cross-examine the officers of Respondent Agency who recorded their statements and the denial of Appellant's request for cross-examination, on the ground of delay, has caused severe prejudice to the Appellant as heavy reliance has

been placed on the confessional statements given by them has also not been considered.

vii. It is contended that a retracted confessional statement can be relied upon only as long as it is corroborated by other evidence. However, in the present case, there is no such corroborated evidence on record that can establish that the seized Indian currency had been kept by the Appellant with the intent of illegal purchase of foreign exchange or that the Appellant was making an attempt for purchasing foreign exchange and gold.

8. Learned Counsel for the Appellant, in relation to the contention that Respondent No. 2 had no legal basis to confiscate Indian currency advanced the following submissions.

i. If the retracted confessional statement is removed there is no basis to confiscate the Indian Currency. There is also no specific allegation in the memorandum of appeal that the Appellant was making an attempt to purchase foreign exchange by using Indian Currency.

ii. Order for confiscation of Indian Currency could not be passed as the only statement made with regard to Indian Currency that the said seized Indian Currency was kept for purchase of foreign exchange and gold at market rates. The fact that Indian Currency was kept for purchase of foreign exchange and gold at market rates is not a contravention of the Act.

iii. The order dated 19.12.2003 passed by the Deputy Director is unreasoned and there is no justification as to why the Appellant is guilty for contravention of Section 64(2) of FERA for making

an attempt for purchase of foreign exchange and gold in respect of seizure of Rs. 12,31,000/-.

iv. It is stated that the Appellate Tribunal in its order dated 10.08.2006 has come to a conclusion that the confessional statement of the Appellant has been corroborated by the statements of the visitors visiting the shop of the Appellant for the purpose of sale and purchase of foreign exchange. The Appellate Tribunal has also held that the Appellant has not been able to explain the source of Indian Currency and the same has not been accounted for by the Appellant. It is contended that the visitors i.e., Ram Nath Dhakkal and Dukal Bhattarai have not stated anywhere that they were selling gold or foreign exchange in exchange for Indian Currency. It is contended that the Ram Nath Dhakkal and Dukal Bhattarai have specifically stated that they were giving gold to the Appellant in exchange of Indian Currency. There is no mention of Indian Currency of Rs.12,31,000/- and the brother-in-law of the Appellant has stated that the Indian Currency was kept for purchase of gold. This in itself does not amount to a contravention under the FERA Act.

9. Learned Counsel for the Appellant, in relation to the contention that the allegations against the Appellant do not constitute "attempt" under Section 64(2) of the Act, has further submitted that :-

i. "Attempt" has not been defined under FERA and has been defined under Section 511 of the IPC. It is settled that an attempt to commit the offence is a direct movement towards the

commission after preparations are made and in order for a person to be convicted of an attempt to commit a crime it must be shown that he had an intention to commit the offence and he had done the act which constitutes the *actus reus* of the criminal attempt. In the present case, the Respondents have not been able to prove that the Indian Currency was used in an attempt to illegally purchase foreign exchange. There is no *actus reus* as has been alleged to establish that the Appellant attempted to do any unlawful act using the Indian Currency and purchasing foreign exchange at market rate itself would not be a contravention under FERA.

10. Per contra, has the learned Counsel for the Union of India, while refuting the arguments advanced by the learned Counsel for the Appellant, has advanced the following arguments:-

i. The case against the Appellant is based on concrete evidence and the Appellant has clearly violated Section 8(1), 8(2) and 63 of FERA. He was duly issued a Show Cause Notice whereby he was asked to explain the seizure of currencies and gold, since he was found to be involved in illegal sale and purchase of foreign currency. The Appellant admitted to having committing acts which would constitute contravention of FEMA in his statements made to the Authority who are not police officials. He also admitted that the amount of 12,31,000/- which had been seized from his premises was for purchase of gold and foreign currency. Had the seizure of the cash not taken place the Appellant would have purchased the foreign currency and gold

without possessing the requisite license and viewed form this angle, the same would be sufficient to establish *mens rea*.

ii. The two Nepalese Nationals Ram Nath Dhakal and Dukkal Bhattarai and Pramod Kumar, admitted in their statements that they had come to the Appellant in order to sell foreign currency and gold. Recoveries had been effectuated from these individuals after they arrived at the Appellant's premises while the raid was being conducted.

iii. The statements made by the Appellant have been corroborated by the documentary evidence which has been seized from the office premises of the Appellant. These documents contain the accounts and calculations of illegal currency transactions and constitute legal evidence in terms of Section 40 of FERA. A perusal of the documents clearly demonstrates that the Appellant was rotating money in illegal foreign exchange transactions and generating black money, and the recovered foreign currency and gold formed part of that illegal transactions carried out by the Appellant.

iv. The Appeal is not maintainable and there is no violation of fundamental rights of the Appellant. Furthermore, the Appellant has not furnished any evidence in order to demonstrate that the money that had been seized was legal and could be accounted for. On the contrary, documents which have been seized and the statements of the Appellant and co-accused clearly establish that there was a contravention of FERA.

v. There is adequate corroboration of the statements of the accused persons, and the guilt of the Appellant is not founded exclusively upon the retracted confessional statement. Reliance has been placed on the judgment of this Court in Brij Trading Co. v. Enforcement Directorate, **2014 SCC OnLine Del 498.**

11. Learned Counsel for the Respondent Agency has supplemented the submissions of learned Counsel for the of Union of India, and has contended as follows:-

i. The contention of the Appellant that there was lack of evidence in relation to the penalty imposed and the confiscation of foreign currency lacks merit and is without substance. The statements of the Appellant dated 16.02.1997 and 17.02.1997, and his fellow accused persons, namely Bhagwan Das, Pandurang Tukaram, Ram Nath Dhakal and Dukkal Bhattarai were recorded under Section 40(3) of FERA, and clearly demonstrate the contravention of FERA by the Appellant.

ii. The standard of proof of in civil cases, such as the present one, is based on preponderance of probabilities.

iii. The Adjudicating Authority is vested with the power to confiscate the currency on the basis of evidence gathered by it. This power is rooted in Section 63 of FERA and therefore the argument of the Appellant that Respondent No. 2 did not have authority to confiscate the Indian currency is misconceived and devoid of substance.

12. Heard learned Counsels for the parties and perused the material on record.

13. It is trite law that a right to appeal is a creature of statute and is neither an absolute right nor an ingredient of natural justice. The legislature in its wisdom can impose conditions regulating the exercise of the right of appeal so that the same is not abused by a recalcitrant party. Furthermore, it is open to the legislature to impose an accompanying liability upon a party on whom the right of appeal is conferred or to prescribe certain qualifying conditions before the right can be exercised.

14. The FERA, 1947, was succeeded by the FERA, 1973 and was enacted to regulate the inflow and outflow of foreign exchange in India, and to prevent hoarding of foreign currency. The 1973 Act also contained certain special restrictions with regard to foreign investment and the activities of individuals and concerns in India having non-residential interests. It is in this backdrop that it would be apposite to refer to Section 54 of FERA:

"Section 54 of FERA

> ***54. Appeal to High Court.****—An appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of Section 52:*
>
> *Provided that the High Court shall not entertain any appeal under this section if it is filed after the expiry of sixty days of the date of communication of the decision or order of the Appellate Board, unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.*
>
> *Explanation.—In this section and in Section 55, "High Court" means—*

(i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents ordinarily resides or carries on business or personally works for gain."

15. Section 35 of FEMA, which is the successor legislation to FERA 1973, under which the present Appeal has been filed is *ipsissima verba* to Section 54 and reads as under:

"35. Appeal to High Court.—Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him ***on any question of law arising out of such order:***

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Explanation.—In this section "High Court" means—

(a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than

one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain. "

(emphasis supplied)

16. A perusal of Section 54 of FEMA makes it evident that the Act provided for a right of appeal to the High Court, albeit circumscribed to questions of law. The finding of facts is exclusively within the domain of Adjudicatory Authority and Appellate Tribunal, and this Court cannot go behind or interfere with the findings on fact arrived at by them. The FERA Appellate Tribunal is the final Court of facts. This circumscribed right to appeal has been retained under FEMA, the successor legislation to FERA. Section 35 of FEMA, under which the present appeal has been filed, restricts the jurisdiction of a High Court to only questions of law.

17. The Apex Court in Raj Kumar Shivhare v. Directorate of Enforcement, **(2010) 4 SCC 772** has delineated the scope of an appeal filed under Section 35 of FEMA. The relevant excerpt reads as under:

> ***"17.*** *A reading of Section 35 makes it clear that jurisdiction has been clearly conferred on the High Court to entertain an appeal within 60 days from "any decision or order of the appellate authority". But such appeal has to be on a question of law. The proviso empowers the High Court to entertain such an appeal after 60 days provided the High Court is satisfied that the appellant was prevented by sufficient cause from appealing earlier."*

18. A perusal of the above Sections and the Judgement of the Apex Court in Raj Kumar Shivhare (Supra), makes it apparent that a reference to this

Court is maintainable only on a question of law under sub-section (3) and (4) of Section 54 of FERA and Section 35 of FEMA.

19. The term "question of law" has not been defined under the Act, however the meaning of the term can be gathered and understood from a review of case law on the subject found under analogous statutes. The Apex Court has repeatedly re-affirmed that there is no hard and fast rule that can be used as a uniform metric to draw a line between a question of law and a question of fact. However, over time, there are some general principles have been evolved by the Apex Court, which have been used by the Courts below as a yardstick to assess whether a particular issues is a question of law or question of fact.

20. The Apex Court in Commr. of Agricultural Income Tax v. M.N. Moni, **(2007) 10 SCC 584** while dealing with a challenge to order passed by a Division Bench of the Kerala High Court answering the reference made to it under the Kerala Agricultural Income Tax Act, 1950, elucidated the distinction between a question of law and question of fact and held as under:

> ***"14.*** *In cases of reference, only a question of law can be answered. Where the determination of an issue depends upon the appreciation of evidence or materials resulting in ascertainment of basic facts without application of law, the issue raises a mere question of fact. An inference from certain facts is also a question of fact. A conclusion based on appreciation of facts does not give rise to any question of law. If a finding of fact is arrived at by the Tribunal after improperly rejecting evidence, a question of law arises. Where the Tribunal acts on materials partly relevant and partly irrelevant, a question of law arises because it is impossible to say to what extent the mind of the*

Tribunal was affected by the irrelevant material used by it in arriving at the finding."

21. In Oriental Investment Co. Ltd. v. CIT, **(1957) 32 ITR 664**, the Apex Court after examining a number of authorities and the general jurisprudence around the distinction between a question of law and question of fact observed as under:

> ***"24.*** *A review of these authorities shows that though the English decisions began with a broad definition of what are questions of law, ultimately the House of Lords decided that a "matter of degree" is a question of fact and it has also been decided that a finding by the Commissioners of a fact under a misapprehension of law or want of evidence to support a finding are both questions of law.*
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> ***25.*** *The Privy Council in CIT v. Laxminarain Badridas [(1937) 5 ITR 170, 179] said:*
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> *"No question of law was involved; nor is it possible to turn a mere question of fact into a question of law by asking whether as a matter of law the officer came to a correct conclusion upon a matter of fact."*
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> ***26.*** *Bose, J., in Seth Suwalal Chhogalal v. CIT [(1949) 17 ITR 269, 277] stated the test as follows:*
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> *"A fact is a fact irrespective of the evidence by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient material."*

Sufficiency of evidence was explained to mean whether the Income Tax Authority considered its existence so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it exists.

27. *The question for decision in Dhirajlal Girdharilal v. CIT [(1954) 26 ITR 736] was whether a Hindu Undivided Family was carrying on business in shares and it was held that this was a question of fact but if the Appellate Tribunal decided the question by taking into consideration materials which are irrelevant to the enquiry or partly relevant and partly irrelevant or based its decision partly on conjectures then in such a situation an issue of law arises, which would be subject to review by the Court and the finding given by the Tribunal would be vitiated.*

28. *The result of the authorities is that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a mixed question of law and fact and that a finding of fact without evidence to support it or if based on relevant and irrelevant matters is not unassailable.*

29. *The limits of the boundary dividing questions of fact and questions of law were laid down by this court in Meenakshi Mills, Madurai v. CIT [(1956) SCR 691] where the question for decision was whether certain profits made and shown in the name of certain intermediaries were in fact profits actually earned by the assessee or the intermediaries. Taking the course of dealings and the extent of the transaction and the position of the intermediaries and all the evidence into consideration the Tribunal came to the conclusion that the intermediaries were dummies brought into existence by the appellant for concealing the true*

amount of profits and that the sales in their name were sham and fictitious and profits were actually earned by the assessee. The test laid down by this court is to be found in the various passages in that judgment. At p. 701 Venkatarama Ayyar, J., pointed out that questions of fact are not open to review by the Court unless they are unsupported by any evidence or are perverse. At p. 706 it was observed:

"In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained."

The law was thus summed up at p. 726:

(1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court under Section 66(1).

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those findings is a question of law which can be reviewed by the court.

(3) A finding on a question of fact is open to attack under Section 66(1) as erroneous in law if there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

(emphasis supplied)

22. Applying the principals enunciated by the Apex Court to the facts of this case, this Court is of the view that none of the three contentions advanced by the Appellant is a question of law.

23. The first limb of the argument advanced by the learned Counsel for the Appellant is that the orders of the Adjudicating Authority and the Appellate Tribunal are bad in law for non-consideration of the voluntariness of the confessional statement of the Appellant and his co-accused. He has contended that the confessional statement had been retracted by the Appellant at the first instance and the same had been obtained under duress and coercion by the Respondent Agency. The question as to whether the statement of the Appellant and his co-accused was obtained under duress and coercion is essentially a matter of appreciation of evidence.

24. The Adjudicating Authority and the Appellate Tribunal have given clear and categorical findings on this issue after examining the facts, medical report of the Appellant (or lack thereof), documents recovered during the search and the arguments advanced by the parties. Both the Adjudicating Authority and the Appellate Tribunal were of the view that the Appellant has not been able to demonstrate that his statement was obtained under duress or coercion. Further, before this Court, the learned Counsel for the Appellant been unable to demonstrate any perversity or inadequacy of evidence in the reasoning arrived at by the Adjudicating Authority or the Appellate Tribunal. Thus, as far as the first limb of the argument advanced

by the learned Counsel for the Appellant is concerned, this Court is of the view that no question of law has been raised.

25. The second limb of the argument advanced by the learned Counsel for the Appellant is that the Respondent Agency has no legal basis to confiscate the Indian currency. This Court is of the view that this is a facile and untenable argument and certainly not a question of law. Section 63 empowers the Court or Adjudicating Authority to confiscate "any currency, security or any other money or property in respect of which the contravention has taken place". The wordings of the Section are wide enough to cover Indian currency within its ambit. Therefore, the argument of the Appellant, that the Respondent Agency has no legal basis to confiscate Indian currency recovered from the premises of the Appellant is devoid of any substance. The nub of the contention advanced by the Appellant is essentially whether the seizure of Rs. 12,31,000/-, from his premises was connected with a contravention of the provisions of FERA. This issue involves factual determination and not statutory interpretation. The Adjudicating Authority and the Appellate Tribunal, after perusing the material on record and appreciating the facts of the case, concluded that the Appellant had been unable to explain the source of the Indian currency and it was apparent that the Indian currency was intended to be utilized for the illegal purchase of foreign exchange. Accordingly, no question of law arises for the consideration of this Court as far as the second limb of the Appellant's argument is concerned.

26. The final limb of the argument advanced by the learned Counsel for the Appellant is that that the conduct of the Appellant did not amount to an "attempt" in terms of Section 64(2) of FERA, is in substance a question of

fact astutely couched as a question of law. The distinction between preparation and attempt is not *res integra*. At the heart of this contention lies the question as to whether the possession of Indian currency by the Appellant in conjunction with the statements of the Appellant and co-accused, documents, foreign currency and gold seized from the Appellant's premises amount to the "attempt" of an act which was in contravention of the provisions of FERA. This at best would amount to a mixed question of law and fact.

27. The Apex Court in G. Venkataswami Naidu & Co. v. CIT, **(1959) 35 ITR 594**, laid down the approach that the High Court ought to adopt while dealing with a mixed question of fact and law. The Apex Court has held as under :

> "*8. There is no doubt that the jurisdiction conferred on the High Court by Section 66(1) is limited to entertaining references involving questions of law. If the point raised on reference relates to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it is a pure question of law; and in dealing with it, though the High Court may have due regard for the view taken by the Tribunal, its decision would not be fettered by the said view. It is free to adopt such construction of the document or the statute as appears to it reasonable. In some cases, the point sought to be raised on reference may turn out to be a pure question of fact; and if that be so, the finding of fact recorded by the tribunal must be regarded as conclusive in proceedings under Section 66(1). If, however, such a finding of fact is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or the revenue can contend*

that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence; and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion. It may also be open to the party to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence; or that the impugned conclusion drawn from the relevant facts is not rationally possible; and if such a plea is established, the court may consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is within these narrow limits that the conclusions of fact recorded by the tribunal can be challenged under Section 66(1). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence. There is yet a third class of cases in which the assessee or the revenue may seek to challenge the correctness of the conclusion reached by the Tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the Tribunal on the primary questions of fact; but it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly or not; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law.

9. This question has been exhaustively considered by this Court in Meenakshi Mills, Madurai v. CIT, Madras [(1956) SCR 691] . In this case the Appellate Tribunal had come to the conclusion that certain sales entered in the books of the appellant company in the names of certain intermediaries, firms and companies, were fictitious and the profits ostensibly earned by them were in fact earned by the appellant which had itself sold the goods to the real purchasers and received the prices. On this finding the tribunal had ordered that the profits received from such sales should be added to the amount shown as profits in the appellant's books and should be taxed. The appellant applied for a reference to the Tribunal under Section 66(1) and the High Court of Madras under Section 66(2), but his application was rejected. Then it came to this Court by special leave under Article 136 and it was urged on its behalf that the Tribunal had erred in law in holding that the firms and companies described as the intermediaries were its benamidars and that its application for reference should have been allowed. This plea was rejected by this Court because it was held that the question of benami is purely a question of fact and not a mixed question of law and fact as it does not involve the application of any legal principles for its determination. In dealing with the argument urged by the appellant, this Court has fully considered the true legal position in regard to the limitation of the High Court's jurisdiction in entertaining references under Section 66(1) in the light of several judicial decisions bearing on the point. The ultimate decision of the Court on this part of the case was that "on principles established by authorities only such questions as relate to one or the other of the following matters can be questions of law under Section 66(1) : (1) the construction of a statute or a document of title (2) the legal effect of the facts found where the point

> *for determination is a mixed question of law and fact; and (3) a finding of fact unsupported by evidence or unreasonable and perverse in nature". Having regard to this legal position this Court held that the question of benami was a pure question of fact and it could not be agitated under Section 66(1)."*

28. In the opinion of this Court once basic facts have been established and recorded, the Adjudicating Authority is entitled to draw an inference based on those facts. The Appellant has been unable to demonstrate that the inference drawn by the Adjudicating Authority or the Appellate Tribunal is perverse or unsubstantiated, in absence thereof, it cannot be said that the conclusion arrived at by the Adjudicating Authority and the Appellate Tribunal warrants any interference.

29. However, to ensure that no aspect of this Appeal is left unaddressed and to assuage the conscience of this Court we deem it appropriate to deal with each of these grounds on merits as well.

30. As far as the first contention of the Appellant is concerned, the learned Counsel for the Appellant has contended that during the Appellant's detention, from 16.02.1997 to 19.02.1997, members of the Respondent Agency tortured him. The Appellant and his co-accused Bhagwan Das Pandurang further contended that they had filed a complaint before the Court of Additional Chief Metropolitan Magistrate (*hereinafter referred to as* "**Ld. ACMM**") on 19.02.1997, stating that they were tortured during their detention. It is further averred taking note of the same, the Ld. ACMM directed their medical examination and the said medical examination indicated injuries on the person of the Appellant.

31. In furtherance of this contention the learned Counsel for the Appellant has further contended that the Appellant's request for cross-examination of the witnesses was rejected and this Court must assess whether the orders of the Adjudicating Authority and the Appellate Tribunal are bad in law for not considering whether the confessional statements of the Appellant and his co-accused were obtained under coercion and duress.

32. This Court is unable to accept the contention advanced by the learned Counsel for the Appellant.

33. The Apex Court in Pyare Lal Bhargava v. State of Rajasthan, **1962 SCC OnLine SC 25** has observed that a retracted statement can be used to convict a person, provided the Court is satisfied that the statement was true and was voluntarily made. However, as a rule of prudence the Courts do not generally base conviction exclusively on an uncorroborated statement. Yet, it cannot be set in stone that under no circumstances can a conviction be made without corroboration. The relevant paras of the said Judgment reads as under **:**

> *"7. The second argument also has no merits. A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a*

retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars. The High Court having regard to the said principles looked for corroboration and found it in the evidence of Bishan Swaroop, PW 7, and the entry in the Dak Book, Ex. PA-4, and accepted the confession in view of the said pieces of corroboration. The finding is one of fact and there is no permissible ground for disturbing it in this appeal."

34. While relying on Pyare Lal Bhargava (Supra), the Apex Court in Parmananda Pegu v. State of Assam, **(2004) 7 SCC 779**, has further clarified the position and held as under :

"19. In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true. The law on the subject of retracted confession has been succinctly laid down by a three-Judge Bench of this Court in Subramania Goundan v. State of Madras [1958 SCR 428 : 1958 Cri LJ 238] which lays down: (SCR pp. 440-41)

"The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if

believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being Kesava Pillai, In re [ILR (1930) 53 Mad 160 : AIR 1929 Mad 837] that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being Balbir Singh v. State of Punjab [AIR 1957 SC 216 : 1957 Cri LJ 481] , but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession."

The learned Judges then highlighted the difference between retracted confession and the evidence of an approver or an accomplice: (SCR p. 441)

"Though under Section 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, Illustration (b) to Section 114 lays down that a court may presume

that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own showing he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in error in equating a retracted confession with the evidence of an accomplice and, therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition, the court must feel that the reasons given for the retraction in the case of a confession are untrue.'"

35. In context of FERA cases, the Apex Court in K.T.M.S. Mohd. v. Union of India, **(1992) 3 SCC 178,** has categorically noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is for the maker of that statement to establish that the statement had been obtained using illicit means. The relevant portion of the said Judgment reads as under :

"34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is

to the effect that the voluntary nature of any statement made either before the Custom authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated. Reference may be made to a decision of the Full Bench of the Madras High Court in Roshan Beevi v. Joint Secretary to the Government of T.N., Public Deptt. [1983 LW (Cri) 289 : (1984) 15 ELT 289 (Mad HC)] to which one of us (S. Ratnavel Pandian, J.) was a party."

36. The broad picture that emanates from the aforementioned Judgements of the Apex Court is that even if a statement is retracted it can be relied upon as long as it is voluntary and corroborated. Additionally, if a statement has been redacted by the maker on the grounds that the statement was obtained by illegal means it is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means were adopted.

37. If we were to apply the dictum of the aforementioned pronouncements of the Apex Court to the facts of this case, it is apparent that there is sufficient corroboration. There has been seizure of unaccounted Indian currency, gold and foreign exchange from the office premises of the Appellant. Even if the statement of the Appellant is not considered, the statement of the two Nepalese Nationals and documentary evidence recovered from the premises of the Appellant clearly establishes the case of the prosecution. Therefore, in the present case the confession of the Appellant is not being uses in isolation, but as a link in the chain of evidence.

38. As far as the averment of the Appellant that he was not allowed to cross examine witnesses is concerned, it would be apposite to refer to a Judgement given by a co-ordinate bench of this Court in Shahid Balwa v. Directorate of Enforcement, **2013 SCC OnLine Del 2208,** the relevant paras read as under**:**

> "*29. The legal position that would follow is that normally if the credibility of a person who has testified or given some information is in doubt or if the version or the statement of the person who has testified is in dispute normally right to cross-examination would be*

> *inevitable. If some real prejudice is caused to the complainant, the right to cross-examine witnesses may be denied. No doubt, it is not possible to lay down any rigid rules as to when in compliance of principles of natural justice opportunity to cross-examine should be given. Everything depends on the subject matter. In the application of the concept of fair play there has to be flexibility. The application of the principles of natural justice depends on the facts and circumstances of each case."*

39. A perusal of the order dated 19.12.2003 passed by the Adjudicating Authority demonstrates that several adjournments had been sought by the Appellant. A perusal of the impugned order also demonstrates that irrespective of seeking repeated adjournments, no witnesses were examined for nearly two and half years. Similarly, with respect to the contention advanced by the learned Counsel for the Appellant that Appellant's statement had been obtained under coercion and duress is concerned, the Adjudicating Authority has made categorical observations that the medical examination report of the Appellant has not been furnished. The relevant portion of the Order of the Adjudicating Authority reads as under:

> *"In response to the show cause notice, a letter was received from Shri Harbans Singh, Advocate in which he requested for supply of relied upon documents and subsequently all the copies of relied upon documents have been handed over to Shri I.S. Kapoor, Advocate on 13.03.2001 and case was fixed up for adjudication proceedings on 20.03.2001 and case was further adjourned for 27.03.2001 furnishing the names of witnesses to whom they would like to cross-examination during the course of personal hearing. On 27.03.2001, a letter was received from Shri Inderjit Singh Kapoor, Advocate for adjournment on medical*

grounds. The case was further adjourned for 17.04.2001 and 11.05.2001. Further a letter dated nil was received from Shri I.S. Kapoor, Advocate in which he furnished the names of the witnesses to whom he wanted for cross-examination. A case was again fixed up for personal hearing on 09.10.03 and on the same date Smt. Kammi Arora, Advocate has appeared on behalf of Shri Arjun Patil and requested for another date, which is 14.11.03. On 14.11.03 Shri Y.S. Arora, Advocate appeared without any vakalatnama and requested for adjournment for 27.11.03 and case was further adjourned for 27.11.03. On 27.11.03 Shri I.S. Kapoor, Advocate and Smt. Kammi Arora, Advocate present for noticee Shri Arjun Patil and requested for cross-examination of the witnesses and the same request was declined at this stage. The case was further adjourned for 16.12.03. On 16.12.03 Shri I.S. Kapoor, Advocate with Smt. Kammi Arora, Advocate have appeared for noticee Shri Arjun Patil and argued that statement of the accused was taken by torturing him which was retracted at the first opportunity. Shri Arjun Patil also made complaint before the Hon'ble ACMM on 19.02.97 that he had been tortured during their detention from 16.02.97 to 19.02.97 and the Ld. ACMM took note of the complaint and directed for his medical examination and medical examination reports are available in court file also and he will furnish the same in due course, however, the same has not been furnished, till date."

40. In view of the above, it cannot be said in any manner whatsoever that the case of the prosecution is uncorroborated and the impugned orders are unreasoned.

41. The second ground advanced by the Appellant is that the Respondent Agency lacked the legal authority to confiscate Indian currency. As stated earlier, in the opinion of this Court this contention of the Appellant is

without merit. However, before adverting to a discussion on this ground it would be apposite to refer to the wordings of Section 63 of FERA.

42. Section 63 of FEMA reads as under:

> *"**Section 63.** Any court trying a contravention under Section 56 and the adjudicating officer adjudging any contravention under Section 51 may, if it or he thinks fit and in addition to any sentence or penalty which it or he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.*
>
> *Explanation.—For the purposes of this section, property in respect of which contravention has taken place shall include—*
>
> *(a) deposits in a bank, where the said property is converted into such deposits;*
>
> *(b) Indian currency, where the said property is converted into that currency;*
>
> *(c) any other property which has resulted out of the conversion of that property.*

43. The breath and scope of Section 63 has been explained by the Apex Court in LIC v. Escorts Ltd., **(1986) 1 SCC 264**. The Apex Court has held as under:

> *"18. Section 50 prescribes the levy of a penalty if any person contravenes any of the provisions of the Act*

except certain enumerated provisions; the adjudication is to be made by the Director of Enforcement or an Officer not below the rank of an Assistant Director of Enforcement, specially empowered in that behalf. Section 51 provides for the enquiry and the power to adjudicate. Section 52 provides for an appeal to the Appellate Board and Section 54 for a further appeal to the High Court on questions of law. Section 56 provides for prosecutions, for contraventions of the provisions of the Act and the rules, directions or orders made thereunder. Section 57 makes the failure to pay the penalty imposed by the adjudicating officer or the Appellate Board or the High Court or the failure to comply with any directions issued by those authorities, an offence punishable with imprisonment. Section 59 prescribes a presumption of mens rea in prosecutions under the Act and throws upon the accused, the burden of proving that he had no culpable mental state with respect to the act charged in the prosecution. Section 61 provides for cognizance of offences. Section 61(1)(ii) obliges the court not to take cognizance of any offence punishable under Section 56 or 57 except on a complaint made in writing by— (a) the Director of Enforcement; or (b) any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government; or (c) any officer of Reserve Bank authorised by Reserve Bank by a general or special order. The proviso to this provision enjoins that no complaint shall be made for the contravention of any of the provisions of the Act, rule, direction or order made thereunder which prohibits the doing of the act without permission, unless the person accused of the offence has been given an opportunity of showing that he had such permission. Section 63 empowers the adjudicating officer adjudging any contravention under Section 51 and any court trying a contravention under Section 56, if he or it thinks fit to direct the confiscation of any currency, security or any other

money or property in respect of which the contravention has taken place."

44. It is well settled that the meaning of an enactment which was intended by the legislator i.e. the legal meaning is to be understood as corresponds to its literal meaning. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est* (when there is no ambiguity in the words, then no exposition contrary to the expressed words is to be made) [See Bennion on Statutory Interpretation, VIth Edition, pp. 780]. Our view draws strength from the decision of the Apex Court in CCE, Customs & Service Tax v. Shapoorji Pallonji & Co. (P) Ltd., **(2024) 3 SCC 358**. The relevant paras read as under:

"*27. In State of W.B. v. Calcutta Municipal Corpn. [State of W.B. v. Calcutta Municipal Corpn., 1966 SCC OnLine SC 42 : (1967) 2 SCR 170] , a nine-Judge Bench of this Court, relying upon Craies' On Statute Law (6th Edn.), stated that where the language of a statute is clear, the words are in themselves precise and unambiguous, and a literal reading does not lead to absurd construction, the necessity for employing rules of interpretation disappears and reaches its vanishing point.*

28. This Court in Union of India v. Ind-Swift Laboratories Ltd. [Union of India v. Ind-Swift Laboratories Ltd., (2011) 4 SCC 635] , held that harmonious construction is required to be given to a provision only when it is shrouded in ambiguity and lacks clarity, rather than when it is unequivocally clear and unambiguous."

45. A perusal of Section 63 of FERA makes it manifestly clear that the Court or Adjudicating Authority is empowered to confiscate "any currency,

security or other money or property in respect of which the contravention has taken place." Contravention of Section 56 of FEMA operates as the trigger that activates and justifies the exercise of power under Section 63 and the only qualifying, in-built threshold for exercise of the power of confiscation by the Court or the Adjudicating Officer is the application of mind, which is indicative from the use of the words "if it or he thinks fit". The language of this Section is wide enough to include Indian currency and unambiguous, clear, and precise in its object. Nowhere does the Section disqualify or prohibit either the Court or Adjudicating Authority from confiscating Indian Currency. In fact, a perusal of clause (b) of the Explanation to Section 63 makes it abundantly clear that property with respect to which contravention has taken place includes Indian currency, where the said property is converted into that currency.

46. A perusal of the material on record demonstrates that the Appellant has been unable to provide any proper explanation as to how the Indian currency and contraband which has been seized from his premises were unconnected and the Indian currency had been obtained lawfully. It cannot be said in any manner whatsoever that the Adjudicating Authority incorrectly exercised its jurisdiction in ordering confiscation of Indian currency. Thus, as far as the second contention of the Appellant is concerned this Court cannot evade the legislative intent or give an absurd construction of the enactment to the Section, especially where no interpretation is required. Accordingly, the contention of the learned Counsel for the Appellant that the Respondent Agency did not have any legal basis to confiscate Indian currency, cannot be accepted.

47. As far as the final contention of the Appellant is concerned, the learned Counsel for the Appellant has contended that the allegations against the Appellant do not constitute "attempt" under Section 64(2) of the Act. He has contended that “attempt” has not been defined under FERA. in the present case, the Respondents have not been able to prove that the Indian Currency was used in an attempt to illegally purchase foreign exchange. Therefore, in sum and substance no *actus reus* as has been alleged to establish that the Appellant attempted to do any unlawful act using the Indian Currency and purchasing foreign exchange at market rate itself would not be a contravention under FERA. Before addressing this contention, it would be pertinent to refer to the text of Section 64 of FERA. Section 64 of FERA reads as under:

> **64(1).** *Whoever makes preparation to contravene any of the provisions of this Act [other than Section 13, clause (a) of sub-section (1) of [Section 18, Section 18-A], clause (a) of sub-section (1) of Section 19, sub-section (2) of Section 44 and Sections 57 and 58] or of any rule, direction or order made thereunder and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, the contravention as aforesaid would have taken place, shall, for the purposes of Section 56, be deemed to have contravened that provision, rule, direction or order, as the case may be.*
>
> ***64(2).*** *Whoever attempts to contravene, or abets any contravention of, any of the provisions of this Act [other than Section 13, clause (a) of sub-section (1) of [67][Section 18, Section 18-A], clause (a) of sub-section (1) of Section 19, sub-section (2) of Section 44 and Sections 57 and 58] or of any rule, direction or*

order made thereunder, shall, for the purposes of this Act, be deemed to have contravened that provision, rule, direction or order, as the case may be."

48. The Apex Court in Koppula Venkat Rao v. State of A.P., **(2004) 3 SCC 602**, has held as under:

"8. .... In every crime, there is first, intention to commit, secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The

word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission

> *or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt."*

49. Therefore, the moment the Appellant commences to do an act with the necessary intention, he commences his attempt to commit the offence. The Appellant's conduct, as well as the surrounding facts and circumstances of this case establish that the Appellant had taken steps for the commission of the offence and had crossed the threshold for "attempt". Therefore, his claim that seizure does not amount to attempt is a facile argument that is in negation of the factual matrix of this case. The recovery, coupled with absence of any lawful explanation and the conduct of the Appellant is a clear attempt for an act that would have amounted to contravention of the provisions of FEMA.

50. It would also be apposite to address another aspect of this contention. It is trite law that once certain foundational facts are established by the prosecution the burden of disproving the same shifts to the accused. The expression "burden of proof" in context of criminal cases is the burden of establishing the bundle of facts constituting the guilt of an accused. The position has been explained in State of Maharashtra v. Wasudeo Ram Chandra Kaidalwar, **(1981) 3 SCC 199**, wherein the Apex Court has held as under:

> "*13. That takes us to the difficult question as to the nature and extent of the burden of proof under Section 5(1)(e) of the Act. The expression "burden of proof" has two distinct meanings (1) the legal burden i.e. the*

burden of establishing the guilt, and (2) the evidential burden i.e. the burden of leading evidence. In a criminal trial, the burden of proving everything essential to establish the charge against the accused lies upon the prosecution, and that burden never shifts. Notwithstanding the general rule that the burden of proof lies exclusively upon the prosecution, in the case of certain offences, the burden of proving a particular fact in issue may be laid by law upon the accused. The burden resting on the accused in such cases is, however, not so onerous as that which lies on the prosecution and is discharged by proof of a balance of probabilities. The ingredients of the offence of criminal misconduct under Section 5(2) read with Section 5(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can bring a case under Section 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution, and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able to account for such resources or property. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under Section 5(1)(e) cannot be higher than the test laid by the Court in Jhingan case [AIR 1966 SC 1762 : (1966)

3 SCR 736 : 1966 Cri LJ 1357] i.e. to establish his case by a preponderance of probability. That test was laid down by the court following the dictum of Viscount Sankey, L.C., in Woolmington v. Director of Public Prosecutions [1935 AC 462] . The High Court has placed an impossible burden on the prosecution to disprove all possible sources of income which were within the special knowledge of the accused. As laid down in Swamy case [AIR 1960 SC 7 : (1960) 1 SCR 461 : 1960 Cri LJ 131] , the prosecution cannot, in the very nature of things, be expected to know the affairs of a public servant found in possession of resources or property disproportionate to his known sources of income i.e. his salary. Those will be matters specially within the knowledge of the public servant within the meaning of Section 106 of the Evidence Act, 1872. Section 106 reads:

> *"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

In this connection, the phrase "burden of proof" is clearly used in the secondary sense, namely, the duty of introducing evidence. The nature and extent of the burden cast on the accused is well-settled. The accused is not bound to prove his innocence beyond all reasonable doubt. All that he need do is to bring out a preponderance of probability.

14. Such being the law, the question whether or not the respondent had established a preponderance of probability is a matter relating to appreciation of evidence. On a consideration of the evidence adduced by the respondent, the High Court has taken the view that it is not possible to exclude the possibility that the property found in possession of the respondent belonged to his father-in-law, Hanumanthu. We have

been taken through the evidence and we cannot say that the finding reached by the High Court is either manifestly wrong or perverse. Maybe, this Court, on a reappraisal of the evidence, could have come to a contrary conclusion. That, however, is hardly a ground for interference with an order of acquittal. There are no compelling reasons to interfere with the order of acquittal, particularly when there is overwhelming evidence led by the respondent showing that his father-in-law, Hanumanthu, was a man of affluent circumstances. There is no denying the fact that Hanumanthu was the pairokar of Raja Dharmarao, Zamindar of Aheri Estate and by his close association with the Zamindar, had amassed considerable wealth. More so, because two of his sisters were the kept mistresses of the Zamindar and amply provided for."

51. In the present case it is not disputed that after receipt of specific information by the Respondent Agency, the premises of the Appellant were raided and Rs. 12,31,000/-, along with USD 6,371/-, 4 gold biscuits, two pieces of gold and certain documents were recovered from the Appellant. Similarly, it is not disputed that similar recoveries were made from the two Nepalese Nationals and Pramod Kumar, who had entered the Appellant's business premises. The seizure of illegal foreign exchange is not disputed by the Appellant in any manner whatsoever. In this context Section 106 of the Indian Evidence Act comes into play. Once the Respondent Agency has established the factum of recovery of illegal foreign exchange from the Appellant's premises the onus shifts to the Appellant to demonstrate that the Indian currency recovered from his premises was not intended for illegal purchase of purchase of foreign exchange. After perusing the material on record, orders of the Adjudicating Authority and the Appellate Tribunal as

well as having considered the arguments advanced by the parties, this Court is of the view that the Appellant has not been able to offer any satisfactory explanation to explain the source of Indian currency. In the absence of any such explanation, and in view of the recoveries made from the business premises of the Appellant and the evidence on record, this Court is of the view that the inference of the Adjudicating Authority, that the Indian currency was intended for contravention, stands confirmed.

52. Resultantly, the present Appeal is dismissed and pending applications (if any) stand disposed-off.

SUBRAMONIUM PRASAD, J

VIMAL KUMAR YADAV

OCTOBER 14, 2025
hsk/VR