IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.01.2025

PRONOUNCED ON :29.01.2025

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

W.P.Nos.18630, 18682, 24511, 24517, 23019, 23013,
23231, 23237, 23235, 23236, 20721 of 2021
and WMP.Nos.25826, 24206, 24208, 24210, 24213,
24214, 24525, 24527, 24530, 24534, 25824, 19869, 19935, 25830
21974, 21984, 19871 and 25829 of 2021

Sachin Bansal ... Petitioner

Vs.

1.The Directorate of Enforcement,
Government of India, Ministry of Finance,
Department of Revenue.

2.The Special Director,
Adjudicating Authority,
Directorate of Enforcement, Government of India,
Ministry of Finance, Department of Revenue,
Southern Regional Office, Shastri Bhavan, HI Floor,
III Block, 26, Haddows Road, Chennai – 600 006.

3.The Deputy Director of Enforcement,
Directorate of Enforcement, Government of India,
Ministry of Finance, Department of Revenue,
3rd Floor, “B” Block, BMTC, Shanthinagar TTMC,
K.H.Road, Shanthinagar, Bengaluru – 560 027.

... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to call for the records of the 2nd respondent relating to impugned notice dated July 1, 2021 bearing reference No.F.No.T-4/SRO/SDE/BGZO/07/2021 in so far as the petitioner herein is concerned and to quash the same as illegal and arbitrary.

For Petitioners in W.P.No.18630 of 2021	: Mr.Arvind Datar Senior Advocate for M/s.Edward Jamesh
W.P.No.18682 of 2021	:Mr.P.H.Arvind Pandian Senior Advocate
W.P.No.24511 of 2021	:Mr.P.S.Raman, Senior Advocate
W.P.No.24517 of 2021	:Mr.Srinath Sridevan, Senior Advocate for M/s.P.J.Rishikesh
W.P.Nos.23019 &23013 of 2021	:Mr.Vijay Narayan Senior Advocate for M/s.N.C.Ashok Kumar
W.P.Nos.23231, 23237, 23235 and 23236 of 2021	:Mr.Sajan Poovaya Senior Advocate for M/s.Manu Kulkarni
W.P.No.20721 of 2021	:Mr.Harish Narasappa Senior Advocate for M/s.P.Giridharan
For Respondents	: Mr.S.V.Raju Additional Solicitor General Assisted by Mr.N.Ramesh Special Public Prosecutor for all Wps.

COMMON ORDER

These writ petitions are filed challenging the complaint made by the 3rd respondent against the petitioners complaining violation of Foreign Exchange Management Act (herein after called FEMA) and Transfer or Issue of Security by a Person Resident Outside India, Regulations 2000 (herein after called as TISPRO Regulations) and the show cause notice issued by the second respondent dated 01.07.2021 against the petitioners based on the complaint of the 3rd respondent. The writ petitions in W.P.Nos.18682, 24517, 23237, 23235, 23013 of 2021 are filed challenging the complaint of the 3rd respondent by noticees 2, 3, 6, 7 and 10 respectively. The writ petitions in W.P.Nos.18630, 24511, 23231, 23236, 20721 and 23019 of 2021 are filed by noticees 2, 3, 6, 7, 9 and 10 respectively challenging the show cause notice issued by the second respondent based on the complaint of the 3rd respondent.

2. The main allegation against the petitioners is that they have contravened the provisions of Section 6 (3) (b) r/w Section 47 of the Foreign Exchange Management Act, 1999 r/w Regulations 3, 4 and 5 and

para-3 and para 9(1) (B) (i) of Schedule 1 of TISPRO Regulations 2000 and annexure – B to para 2 of schedule – 1 of TISPRO Regulations 2000 r/w consolidated FDI Policies dated 01.04.2010 and 01.10.2010.

3. The noticee No.1 M/s.Flipkart Online Services Private Limited was incorporated by noticee Nos. 2 and 3 namely Shri Sachin Bansal and Shri Binny Bansal. It is not in dispute that they were its first Directors and shareholders. The noticee No.10, M/s.WS Retail Services Limited was incorporated by very same persons namely noticee Nos.2 and 3 and they were its first Directors and shareholders. The main complaint of the 3rd respondent against the noticees was that noticee No.1 was engaged in the business of wholesale cash and carry and received Foreign Director Investment (FDI) from Foreign Investors namely noticees Nos.6 and 8 equivalent to Rs.142,40,38,518/- and issued equity shares without prior approval of Government of India.

4. Similarly, noticee No.4 received FDI of Rs.6353,76,36,033/- from noticee No.5 and issued equity shares without prior approval of

competent authority. The noticee No.5 also purchased equity shares to the above mentioned value without prior approval of competent authority and thereby contravened the above mentioned provisions of FEMA r/w TISPRO Regulations. Likewise, noticee No.8 and 6 by acquiring equity shares from noticee No.1 as mentioned above violated the relevant provisions. It is also stated that noticee No.10 was only a dummy company established by Shri Sachin Bansal and Shri Binny Bansal, Directors of noticee No.1 holding 100% equity shares of the said company. It was also stated that noticee No.1 sold goods exclusively to noticee No.10, who in turn sold the goods in retail to the ultimate customer. The noticee Nos.1 and 10 belonged to the same group of companies and controlled by same persons. It is also stated that noticee No.10 was created and continued as a corporate entity to bifurcate the business to customer transactions (of noticee No.1 to retail customers) into business to business (of noticee No.1 to noticee No.10) transactions and business to customer (of noticee No.10 to retail customers) transactions. Thus the noticees were said to have contravened the above mentioned provisions of FEMA, 1999 r/w Regulations 3, 4 and 5 and para-3 and para 9(1) (B) (i) of Schedule 1 of TISPRO Regulations 2000.

5. The complaint of the 3rd respondent was preferred to the second respondent on 28.06.2021 and pursuant to the same, the second respondent issued impugned show cause notice dated 01.07.2021 to the petitioners and other noticees directing them to show cause as to why an adjudication proceedings as contemplated under Section 16 of FEMA should not be initiated against them in the manner as provided under Rule 4 of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000 for the above mentioned contravention. The notice further read that in case the second respondent decides to hold adjudication proceedings, the noticees would be required to appear either in person or through the legal practitioner/Chartered Accountant during enquiry. Challenging the complaint of the third respondent and the consequential show cause notice issued by the second respondent, the petitioners have come before this Court.

6. Heard the arguments of the learned senior counsel appearing for the petitioners viz., Mr.Arvind Datar, Senior Advocate, for M/s.Edward Jamesh in W.P.No.18682 of 2021, Mr.P.H.Arvind Pandian, Senior Advocate in W.P.No.18630 of 2021, Mr.P.S.Raman, Senior Advocate, in

W.P.No.24511 of 2021, Mr.Srinath Sridevan, Senior Advocate, for M/s.P.J.Rishikesh in W.P.No.24517 of 2021, Mr.Vijay Narayan, Senior Advocate, for M/s.N.C.Ashok Kumar, in W.P.Nos.23019 & 23013 of 2021, Mr.Sajan Poovaya, Senior Advocate, for M/s.Manu Kulkarni, in W.P.Nos.23231, 23237, 23235 and 23236 of 2021, Mr.Harish Narasappa, Senior Advocate, for M/s.P.Giridharan in W.P.No.20721 of 2021 and the learned Senior counsel appearing for the respondent viz., Mr.S.V.Raju, Additional Solicitor General, Assisted by Mr.N.Ramesh, Special Public Prosecutor.

7. The learned Senior Counsel appearing for the petitioners raised the following points:

I. The impugned notice was issued by the second respondent on 01.07.2021 for initiating proceedings against the petitioners/noticees for alleged contravention of above mentioned provisions of FEMA that had taken place during the period from 2009-2011 and hence there is an unreasonable delay of nearly 10 years in initiating proceedings and therefore, the impugned complaint of the 3rd respondent and the impugned show cause notice issued by

the second respondent are liable to be quashed on the ground of unreasonable delay.

In support of the said contention, the learned senior counsel appearing for the petitioners relied on the following judgments:

(i) **Union of India and another Vs. Citi Bank** reported in **2022 SCC OnLine SC 1073**;

(ii) **Government of India Vs. Citedal Fine Pharmaceuticals** reported in **(1989) 3 SCC 483**;

(iii) **State of Punjab and others Vs. Bhatinda District Co-operative Milk Producers Union Limited** reported in **(2007) 11 SCC 363**;

(iv) The judgment passed in W.A.No.1517 of 2021 and batch cases by Division Bench of this Court in **Commissioner of Income Tax and others Vs. Roca Bathroom Products Limited and others**.

II. The impugned communication was made without authority of law as the relevant provision of FEMA namely, Section 6(3) of said Act was

omitted by Section 139 of Finance Act of 2015, w.e.f 15.10.2019 and hence on the date of complaint as well as impugned show cause notice, Section 6 (3) (b) of FEMA was not available in Statute Book and hence the impugned notice issued by second respondent alleging contravention of Section 6(3) (b) is untenable in law. It is submitted by the learned counsel appearing for the petitioners that omission of a provision in Statute Book would completely obliterate the effect of the omitted provision even during its existence in the Statute Book. In other words, he would submit that Section 6 of General Clauses Act is not applicable to provisions which are omitted by the legislation and the same is applicable only to the provisions which are repealed by the legislation. Therefore, it is submitted that no proceedings can be initiated against the petitioners/noticees in respect of the Act done in the year 2009-2011 even though the above said provision was very much available in the Statute Book.

In support of the said contention, the learned Senior Counsel appearing for the petitioners relied on the following judgments:

(i) ***Rayala Corporation. (P) Ltd. and another v. Director of***

Enforcement *reported in* ***(1969) 2 SCC 412****;*

(ii) ***Kolhapur Cane Sugar Works Limited and another Vs Union of India and others*** *reported in* ***(2000) 2 SCC 536.***

It is further submitted by the learned counsel appearing for the petitioners that since there was no saving clause in Finance Act of 2015 which omitted Section 6(3) of FEMA, the impugned communication issued by the second respondent has no sanctity of law.

III. It is submitted by the counsel for the petitioners that the common counter filed by the 3rd respondent on behalf of the respondents 1 and 2 would make it clear that the second respondent/adjudicating authority already made up his mind against the petitioners and hence no purpose will be served by filing an explanation to the show cause notice before the adjudicating authority. In other words, it is the specific submission of the learned senior counsel appearing for the petitioner that in view of the specific stand that had been taken by the respondents in the counter affidavit filed before this Court, the adjudication under Section 16 of FEMA by the second

respondent is hit by rule against bias and therefore the writ petition against show cause notice is very well maintainable.

IV. It is submitted by the learned counsel appearing for the petitioners that relegating the petitioners to go before the adjudicating authority, who had made up his mind already by taking a definite stand in the counter affidavit, is violation of principles of natural justice. Further it is submitted that the impugned notice issued by the second respondent after omission of Section 6(3) of FEMA has no authority of law and hence the same is issued without jurisdiction. In view of the same, the writ petition filed by the petitioners before this Court without offering their explanation to the show cause notice and availing alternative remedy available under the Act is very well maintainable.

8. Per contra, the learned Additional Solicitor General appearing for the Enforcement Directorate raised preliminary objection as regards the maintainability of writ petitions by contending that no writ petition is maintainable against mere show cause notice when the petitioners are having

the option of submitting their explanation to the show cause notice and participating in the adjudicatory process as contemplated under Section 16 of FEMA. The learned Additional Solicitor General further submitted that against the order passed by the adjudicating authority under Section 16 of FEMA, an appeal shall lie before the Appellate Tribunal under Section 19 of said Act. Against the order passed by the Appellate Tribunal, a further appeal will lie before this Court under Section 35 of FEMA. In view of the effective alternative remedy available to the petitioners including the remedy of appeal before this Court under Section 35 of FEMA, the writ petitions filed by the petitioners without exhausting alternative remedy are not maintainable.

9. The learned Additional Solicitor General by taking this Court to the counter affidavit filed by the 3rd respondent in W.P.Nos.18630 and 18682 of 2021 submitted that the common counter affidavit was sworn by the 3rd respondent and the same is filed only on behalf of the first and third respondent. He emphasised that the common counter affidavit was not filed on behalf of the second respondent and the expression common counter was used to denote the counter was common in two writ petitions in

W.P.Nos.18630 and 18682 of 2021. Therefore, he submitted that the allegation made by the petitioners that the second respondent is biased by taking a definite stand in the counter affidavit is without any substance. The learned Additional Solicitor General further submitted that under the provisions of FEMA, no time limit is prescribed for initiating action under Section 13 of said Act, though he conceded that even in the absence of time prescribed under the Act, the proceedings shall be initiated within reasonable time. However, he added that what is reasonable time is a question of fact and the same shall be left to the decision of the adjudicating authority and the said question cannot be considered by this Court, while exercising the writ jurisdiction.

10. The learned Additional Solicitor General appearing for the Enforcement Directorate by drawing the attention of this Court to judgment of the Apex Court in ***Fibre Boards Private Limited Vs. Commissioner of Income Tax*** reported in (***2015) 10 SCC 333*** submitted that there is no difference between the expression “repeal” and “Omission”. The decision of the Apex Court in ***Fibre Board case*** rendered the earlier

decisions in ***Rayala Corporation case*** and ***Kolhapur Cane Sugar case*** as *per incuriam* as the effect of Section 6 (A) of General Clauses Act had not been discussed in those two judgments.

11. The learned Additional Solicitor General further submitted that Finance Act 20 of 2015 which deleted Section 6 (3) (b) of FEMA re-enacted the same by introducing Section 6(2) (A) by empowering the Central Government to issue Regulations regarding capital account transactions. He has also drawn the attention of this Court to Section 47 (3) of FEMA introduced by Finance Act 20 of 2015 which saves the Regulations made by Reserve Bank of India under Sections 6 and 47 of FEMA on capital account transactions. Therefore, he submitted that Section 47(3) newly introduced by Finance Act 20 of 2015 is a saving clause which saves the earlier TISPRO Regulations issued by Reserve Bank of India by exercising the power under omitted provisions. Therefore, it is the submission of the learned Additional Solicitor General that TISPRO provisions were saved by Section 47(3) of FEMA introduced by Finance Act 20 of 2015.

12. Discussion on Preliminary Objection raised by the respondents:

Since the learned Additional Solicitor General raised preliminary objection with regard to the maintainability of the writ petitions by pointing out the effective alternative remedy available under FEMA, the learned counsel appearing for the petitioners advanced arguments on the preliminary objection raised by the Additional Solicitor General. The learned Additional Solicitor General by taking this Court to Section 19 and 35 of FEMA submitted that any person aggrieved by the order passed by the adjudicatory authority under Section 16 of FEMA can file an appeal before Appellate Tribunal under Section 19 of the said Act. Any person further aggrieved by the order passed by the Appellate Tribunal may file an appeal before High Court under Section 35 of FEMA. Therefore, the learned Additional Solicitor General submitted that the Act provides for effective remedy including appeal remedy before this Court and hence the petitioners are not entitled to invoke the extraordinary remedy of writ.

13. The learned Senior Counsel appearing for the petitioners submitted that in view of violation of natural justice principles and also the fact that impugned show cause notice having been issued without jurisdiction, the petitioners need not be relegated to the alternative remedy of statutory appeal provided under the Act.

14. It is settled law that existence of alternative remedy is not a bar for invoking Article 226 of Constitution of India especially in following cases:

(i) Violation of fundamental rights;

(ii) Violation of natural justice principles;

(iii) Impugned order passed without authority of law or jurisdiction;

In this regard, reference may be had to ***Whirlpool Corporation Vs. Registrar of Trade Marks,*** reported in ***(1998) 8 SCC 1,*** wherein the Hon'ble Apex Court held as follows:

> "***15.*** *Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."*

15. It is submitted by the learned counsel appearing for the petitioners that Section 6(3) of FEMA was omitted by Act 20 of 2015 w.e.f 15.10.2019 and hence impugned show cause notice issued by the second respondent for alleged violation of Section 6 (3) (b) of FEMA was issued without authority of law by relying on the ***Rayala Corporation Vs. Director of Enforcement Directorate*** *case and* ***Kolhapur Cane Sugar Works Limited Vs Union of India case***.

16. The learned counsel appearing for the petitioners submitted that whenever a provision is omitted, it obliterates the same from the Statute Book and it cannot be equated with repealed provision. Therefore, it is submitted by the petitioners that Section 6 of General Clauses Act cannot be resorted to by the respondents for issuing impugned notice on the ground that at the relevant point of time Section 6 (3) (b) was available. In ***Rayala Corporation*** case while discussing the difference between repeal and omission, the Apex Court observed as follows:

> *"17. Reference was next made to a decision of the Madhya Pradesh High Court in State of M.P. v. Hiralal Sutwala but, there again, the accused was sought to be prosecuted for an offence punishable under an Act on the repeal of which Section 6 of the General Clauses Act had been made applicable. In the case before us, Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the DIRs for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a rule. If Section 6 of the General Clauses Act had been applied, no doubt this complaint against the two accused for the offence punishable under Rule 132-A of the DIRs could have been instituted even after the repeal of that rule."*

17. The above said decision was reiterated by the subsequent decision of the Apex Court in ***Kolhapur Cane Sugar Works Limited and another Vs Union of India*** *reported in* ***(2000) 2 SCC 536,*** wherein, it was held as follows:

> *"37.The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that*

the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision.

38. In the present case, as noted earlier, Section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceedings. Therefore action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."

18. The above two decisions were considered and the contrary view has been taken by the Apex Court in a subsequent decision in ***Fibre Boards Private Limited Vs. Commissioner of Income tax*** reported in **(2015)** 10 SCC 333. The relevant observation of the Apex Court reads as follows:

32. Secondly, we find no reference to Section 6-A of the General Clauses Act in either of these Constitution Bench judgments. Section 6-A reads as follows:

"6-A.Repeal of Act making textual amendment in Act or Regulation.—Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which

the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

33. A reading of this Section would show that a repeal by an amending Act can be by way of an express omission. This being the case, obviously the word "repeal" in both Section 6 and Section 24 would, therefore, include repeals by express omission. The absence of any reference to Section 6-A, therefore, again undoes the binding effect of these two judgments on an application of the per incuriam principle. (emphasis supplied)

34.Thirdly, an earlier Constitution Bench judgment referred to earlier in this judgment, namely, State of Orissa v. M.A. Tulloch & Co. has also been missed. The Court there stated: (SCR pp. 483-84 : AIR pp. 1294-95, para 21)

"... Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is

one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance. A repeal may be brought about by repugnant legislation, without even any reference to the Act intended to be repealed, for once legislative competence to effect a repeal is posited, it matters little whether this is done expressly or inferentially or by the enactment of repugnant legislation. If such is the basis upon which repeals and implied repeals are brought about it appears to us to be both logical as well as in accordance with the principles upon which the rule as to implied repeal rests to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would, in our opinion, attract the incident of the saving found in Section 6 for the rules of construction embodied in the General Clauses Act are, so to speak, the basic assumptions on which statutes are drafted."

35. The two later Constitution Bench judgments, also did not have the benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression

"repeal" in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in M.A. Tulloch Co. that only the form of repeal differs but there is no difference in intent or substance. If even an implied repeal is covered by the expression "repeal", it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act."

19. Thus the Apex Court in ***Fibre Board case*** cited supra by referring to Section 6(A) of General Clauses Act came to the conclusion that the expression 'repeal' would include 'omission'. In ***Fibre Board case***, the Apex Court has gone to the extent of saying that the earlier two judgments in ***Royala Corporation*** *and* ***Kolhapur Cane Sugar Vs Union of India*** were rendered without considering the effect of Section 6(A) of General Clauses Act and therefore, those two judgments shall be treated as *per incuriam*.

20. The law laid down by the Apex Court in ***Fibre Board*** was reiterated in subsequent judgment of Apex Court in ***Shree Bhagwati Steel Rolling Mills Vs Commissioner of Central*** excise ***and another reported in***

(2016) 3 SCC 643.

21. The relevant observation of the Apex Court reads as follows:

> *"15. It is clear, therefore, that when this Court referred to Section 6-A of the General Clauses Act in Fibre Board case and held that Section 6-A shows that a repeal can be by way of an express omission, obviously what was meant was that an amendment which repealed a provision could do so by way of an express omission. This being the case, it is clear that Section 6-A undisputedly leads to the conclusion that a repeal would include a repeal by way of an express omission. (emphasis supplied)*
>
> *.....23.Fibre Board case is a recent judgment which, as has correctly been argued by Shri Radhakrishnan, learned Senior Counsel on behalf of the Revenue, clarifies the law in holding that an omission would amount to a repeal. The converse view of the law has led to an omitted provision being treated as if it never existed, as Section 6 of the General Clauses Act would not then apply to allow the previous operation of the provision so omitted or anything duly done or suffered thereunder. Nor may a legal proceeding in respect of any right or liability be instituted, continued or enforced in*

respect of rights and liabilities acquired or incurred under the enactment so omitted. In the vast majority of cases, this would cause great public mischief, and the decision of Fibre Board case is therefore clearly delivered by this Court for the public good, being, at the very least a reasonably possible view. Also, no aspect of the question at hand has remained unnoticed. For this reason also we decline to accept Shri Aggarwal's persuasive plea to reconsider the judgment in Fibre Board case. This being the case, it is clear that on point one the present appeal would have to be dismissed as being concluded by the decision in Fibre Board case."

22. A Division Bench of this Court after referring to all the above mentioned judgments of the Apex Court came to the conclusion that really there is no difference between the word 'repeal' and 'omission' by taking into consideration the effect of Section 6 (A) of General Clauses Act in ***The South Indian Sugar Mills Association Vs. The Union of India and others in W.A.1850 of 2019***. The relevant observation of the Division Bench reads as follows:

"16. One of the earliest authorities which brought up the question of interpretation between 'repeal' and 'omission' is the five-Judge Bench judgment of the Supreme Court in Rayala

Corporation (P) Ltd. v. Director of Enforcement, New Delhi [(1969) 2 SCC 412]. The Apex Court brought to the fore Section 6 of the General Clauses Act, 1897 (the GC Act) for the purpose of distinguishing between the terms 'repeal' and 'omission' since Section 6 saves the power of prosecution and punishment for acts committed in a repealed legislation. The Court while differentiating the two terms held that:

> *"Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the DI Rules for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule."*

In the above judgment, the Hon'ble Supreme Court did not discuss the two terms 'repeal' and 'omission' before coming to the said conclusion. There is no discussion on how the two terms are separate and whether they can be used interchangeably. (emphasis supplied)

17. Rayala Corporation case (cited supra) came for consideration before the five-Judge Bench of Supreme Court in Kolhapur Canesugar Works Ltd. v. Union of India (2000) 2 SCC 536. wherein

the Apex Court dealt with the definitions of 'Central Act', 'enactment', 'regulation', 'rule' as defined in Sections 3(7), 3(19), 3(50) and 3(51) respectively in the General Clauses Act and held that Section 6 only applies to Central Act and regulations. The Apex Court further stated that:

> *"When the Legislature by clear and unambiguous language has extended the provision of Section 6 to cases of repeal of a 'Central Act' or 'regulation', it is not possible to apply the provision to a case of repeal of a 'rule' .... Section 6 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment. It is not applicable in the case of omission of a "rule".''*

The aforesaid judgment neither deals with the distinction between the terms omission and repeal, nor were any arguments regarding the same were raised before the Bench. It simply dealt with the applicability of Section 6 of the General Clauses Act in context of the rules and upholds Rayala Corporation judgment. But reading between the lines of Kolhapur Cane sugar judgment, it can be said that it makes no distinction between repeal and omission. In para 37

of the judgment, the Apex Court states that:

> *"37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favor of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable." (emphasis supplied)*

From the emphasised lines above, it can be seen that the Court uses the term repeal, omission and deletion interchangeably (emphasis supplied). This is also inferable that in case a provision is omitted, Section 6 may change the position which is contrary to Rayala Corporation judgment. Rayala Corporation supra clearly states that Section 6 of GCA is only applicable to

the matters of repeal. So even though it upheld Rayala Corporation judgment, it did not distinctly lay out the distinction between the two terms. Further, both the cases (Kohlapur Canesugar and Rayala Corporation) have not considered Section 6-A of the General Clauses Act, which has been reproduced hereinafter (emphasis supplied):

"6-A. Repeal of Act making textual amendment in Act or Regulation.— Where any [Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

18. In General Finance Co. v. Assistant Commissioner of Income Tax, Punjab [(2002) 7 SCC 1], an argument was raised stating that the earlier two judgments neither discussed the distinction between the two terms, nor they considered Section 6-A of the General Clauses Act. It was further argued that the "use of the

words 'repeals by express omission, insertion or substitution' will cover different aspects of repeal; that this is a further legislative indication that 'omission' also amounts to a 'repeal' of an enactment." However, the Court rejected the argument in light of the above two five-Judge Bench judgments of the Supreme Court and also refused to refer the matter to a larger Bench.

19. The matter was however finally dealt in length by a two-Judge Bench judgment of the Hon'ble Apex Court in Fibre Boards (P) Ltd., Bangalore v. Commissioner of Income Tax, Bangalore,[(2015) 10SCC 333] where the view was that Rayala Corporation supra needs a reconsideration for omission of a provision results in abrogation or obliteration of that provision in the same way as it happens in repeal. The Court discussed the two terms and concluded that "it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act." The Apex Court then went ahead and nullified the effect of the above five-Judge Bench judgment with respect to difference between repeal and omission. The Apex Court held that:

> *"31... once it is found that Section 6 itself would not apply, it would be wholly superfluous to further state that on an interpretation of the word "repeal", an "omission"*

would not be included. We are, therefore, of the view that the second so-called ratio of the Constitution Bench in Rayala Corporation (P) Ltd. cannot be said to be a ratio decidendi at all and is really in the nature of obiter dicta."(emphasis supplied)

The Apex Court even declared that the above two five-Judge Bench decisions in Rayala Corporation case and Kolhapur Canesugar case were per incuriam (emphasis supplied), as they did not consider Section 6-A of the General Clauses Act. The Apex Court with this effect held that:

"33. A reading of this section would show that a repeal by an amending Act can be by way of an express omission. This being the case, obviously the word "repeal" in both Section 6 and Section 24 would, therefore, include repeals by express omission. The absence of any reference to Section 6-A, therefore, again undoes the binding effect of these two judgments on an application of the 'per incuriam' principle."

20. The same two-Judge Bench of the Hon'ble Supreme Court in Fibre Boards case, once again decided the issue in detail in Shree Bhagwati Steel Rolling v. Commissioner of Central Excise and held

that delete and omit are used interchangeably, so that when the expression repeal refers to delete, it would necessarily take within its ken an omission as well. The Court further observed that all these expressions only go to form and not to substance.(emphasis supplied). It also reiterated its stand in Fibre Boards case and held that "This again does not take us further as this statement of the law in Rayala Corporation is no longer the law declared by the Supreme Court after the decision in the Fibre Boards case."

21. The decision in Fibre Boards and Shri Bhagwati Mills though rendered by two-Judge Benches of the Hon'ble Supreme Court, nullified the earlier Constitution Bench judgments by routing through the principle of per incuriam. (emphasis supplied). It is a welcoming judgment as it finally clarifies that practically there exist no difference between the two terms. A plain reading of these words repeal, omission and substitute will convey more or less the same meaning - that it is a form of 'amendment'.

23. A close scrutiny of the above mentioned judgments would make it clear that there is no real difference between the word 'repeal' and 'omission' especially in the light of Section 6 (A) of General Clauses Act. Therefore, this Court has no difficulty in coming to the conclusion that the word repeal includes the word omission. Therefore, omission of Section 6 (3)

of FEMA by Finance Act 20 of 2015 can be treated as a repeal and as a necessary consequence Section 6 of General Clauses Act comes into play. Once we have come to the conclusion that Section 6 of General Clauses Act is applicable in case of omission of Section 6(3) of FEMA, the second respondent is entitled to issue notice for alleged contravention of Section 6(3) (b) that existed at the relevant point of FDI transactions in the years 2009-2011. Hence, I hold omission of Section 6 (3) by Finance Act 20 of 2015 will not make the impugned show cause notice issued by the second respondent as the one without sanctity of law. Therefore, the said submission made by the learned counsel appearing for the petitioners is rejected.

24. It is also vehemently contended by the learned counsel appearing for the petitioners that the 3rd respondent filed a counter taking a definite stand against the petitioner and hence no purpose will be served by relegating the petitioner to approach the adjudicating authority namely the second respondent who had already made up his mind by filing a counter.

25. A reading of the counter affidavit filed by the 3rd respondent

would suggest that he raised a preliminary objection with regard to the maintainability of the writ petition due to the availability of appeal remedy under Section 19 (1) and Section 35 of FEMA. The 3rd respondent in his counter has only stated that the delay in issuing show cause notice is a factual issue and the same cannot be agitated in this writ petition. It is further stated by him that FEMA is a self contained code providing efficacious remedy and it also prescribed limitation for certain actions. It is further submitted that in the absence of any limitation prescribed under FEMA for initiation of action for contravention of the above mentioned provisions of the TISPRO Regulations, the reasonableness of delay in initiating proceedings can also be agitated before the concerned authority. Any reference in the counter with regard to contravention of Section 6(3) (b) of FEMA r/w Section 47 of FEMA and TISPRO Regulations cannot be equated with pre-determination of mind by the second respondent. First of all, the counter has not been signed by the second respondent and it is being signed by the 3rd respondent.

26. In W.P.Nos.18630, 18682, 23231 and 20721 of 2021, the counter affidavit has been sworn by the 3rd respondent and filed on behalf of

the respondents 1 and 3. Therefore, counter affidavit has not been filed on behalf of the second respondent in those cases. In W.P.Nos.23236, 23235, 24511, 24517, 23013 and 23019 of 2021, the counter affidavit has been sworn by the Subordinate Officer of the 3rd respondent Office (Assistant Director) and in the first paragraph, it is stated that counter affidavit has been filed on behalf of all the respondents. Merely, because a Subordinate Officer of 3rd respondent has sworn affidavit and filed it on behalf of the second respondent also in some of the writ petitions, we cannot come to a conclusion that the second respondent has made up his mind. Further under the scheme of the Act, the order passed by the second respondent is not final and the same is subject to the appeal before the Appellate Tribunal under Section 19(1) and also subject to further appeal before this Court under Section 35 of FEMA.

27. In view of the appellate remedy available before Tribunal as well as before this Court, we cannot say that relegating the party to submit his explanation before the second respondent would violate natural justice principles. First of all, the second respondent has not signed the counter affidavit and in some of the cases, counter affidavit was filed only for

respondents 1 and 3 and no counter affidavit was filed on behalf of the second respondent. In some of the writ petitions, the counter affidavit was sworn by one of the Subordinate Officers in the Cadre of Assistant Director working in the office of the third respondent and the same is not binding on the Superior Officer namely the second respondent. Therefore, I am not impressed by the arguments advanced on behalf of the petitioners that the second respondent has already made up his mind regarding the delay in issuing show cause notice and the contravention of provisions of FEMA and accordingly, the arguments regarding violation of natural justice principles is also rejected.

28. As mentioned earlier, the impugned show cause notice has been issued to petitioners by directing them to offer an explanation why adjudicatory proceedings shall not be initiated against them. After considering the explanation offered by the petitioner, the second respondent will decide whether to initiate the adjudicatory proceedings under Section 16 or not. In case he decides to go ahead with adjudication process, the petitioner shall be given reasonable opportunity to put forth his case. Any

final order passed by the adjudicating authority under Section 16 is liable to be questioned by filing an appeal under Section 19 of FEMA. Any order passed in appeal by the Tribunal can be questioned by aggrieved party by filing a further appeal before this Court under Section 35 of FEMA. Therefore, the petitioners are not only entitled to file one appeal, the petitioners are also entitled to file further appeal or second appeal before this Court under Section 35 of FEMA , if the petitioners are able to make out a question of law out of the order passed by the Appellate Tribunal.

29. An appeal remedy available before this Court on question of law cannot be termed as an in-effective remedy by no stretch of imagination. In fact, the Apex Court in ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai & Ors. Vs. Tuticorin Educational Society & Ors. reported in (2019) 9 SCC 538)*** held that existence of alternative remedy before the regular Civil Court is near total bar for invoking remedy under Article 227 of Constitution of India. The ratio in the said decision can be equally applicable to remedy under Art 226 of Constitution of India also in view of following reason. Under the scheme of FEMA, remedy is not just

available before the regular Civil Court and the same is available before the Constitutional Court, namely High Court under Section 35 of said Act. Therefore, any order passed by adjudicatory authority/second respondent in a proceeding initiated under Section 16 is liable to be scrutinized by this Court in a second appeal filed by the aggrieved party. The remedy before this Court by way of appeal on question of law cannot be treated as in-effective remedy by no stretch of imagination. Hence, I am not inclined to exercise my discretionary jurisdiction under Article 226 of Constitution of India especially when the petitioners failed to make out a case that they come under one of the exceptions to the General rule regarding availability of alternative remedy as held in ***Whirlpool Corporation Vs. Registrar of Trade Marks,*** cited supra.

30. In view of the discussions made earlier, I uphold the preliminary objection raised by the learned Additional Solicitor General regarding maintainability of the writ petitions.

31. The learned counsel appearing for the petitioners vehemently contended that when there is no limitation prescribed under the Act for

initiating proceedings under Section 16, the show cause notice should have been issued within reasonable time as held in ***Union of India and others v. Citi Bank,*** *reported in* ***2022 SCC OnLine SC 1073*** and ***State of Punjab and others v. Bhatinda District Coop. Milk Producers Union Ltd.***, reported in ***(2007) 11 SCC 363***.

32. A close scrutiny of ***Citi Bank case*** would suggest in the said case, the petitioners submitted a reply to the show cause notice and not satisfied with the same, the adjudicatory authority proceeded with the adjudicatory process and challenging the same, writ petitions were filed. In the case on hand, the petitioners have not even submitted their explanation to the adjudicatory authority and rushed to this Court immediately on receipt of the show cause notice. Therefore, the ratio laid down in ***Citi Bank case*** cannot be made applicable to the facts of the present case.

33. A reading of **Bhatinda case** cited supra would indicate that the same arises out of revisional proceedings initiated for re-opening the assessment order under Punjab General Sales Tax Act, 1948. Section 11(3)

of said Act prescribed three years limitation for completing the assessment from the last date of filing return. Section 11(6) prescribed a limitation of five years. In the light of the said provisions, the Apex Court observed as follows:

> *"17. A bare reading of Section 21 of the Act would reveal that although no period of limitation has been prescribed therefor, the same would not mean that the suo motu power can be exercised at any time.*
>
> *18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors."*

34. Therefore, the maximum period of five years of limitation for the revisional authority to exercise its jurisdiction was fixed by taking into consideration the scheme of the said Act. Therefore, the maximum period of five years fixed as a reasonable period in the said case law cannot be made applicable as a general rule to all the cases.

35. As discussed earlier, the reasonable necessary delay in issuing show cause notice depends on facts and circumstances of the case and the said factual aspect can also be raised by the petitioners before the second respondent.

36. In case, the second respondent holds against the petitioner, they are entitled to avail remedy of appeal before the Appellate Tribunal as well as this Court as mentioned earlier. In view of the fact that any decision by the second respondent on the question of delay is liable to be scrutinized by this Court under regular statutory appeal, this Court is not inclined to go into the question at this stage.

37. The learned counsel appearing for the petitioner in W.P.No.23231 and 23237 of 2021 submitted that the petitioner is a company incorporated in Mauritius and as per the law governing the companies in that country, the records of the company need to be preserved only for a period of seven years. Since the show cause notice being issued beyond the said period, the petitioners find it difficult to offer the explanation to the show

cause notice.

38. It is not in dispute that noticee No.6, the petitioner in W.P.No.23231 and 23237 of 2021 acquired shares of noticee No.1. When the fact of acquisition of shares by petitioner in W.P.No.23231 and 23237 of 2021 is not disputed, the alleged prejudice argued by the counsel for the petitioner is not appealable to this Court. In any event, this Court is not inclined to give any categorical finding on that aspect and it is open to the petitioner to raise objections and give its explanation before the adjudicatory authority and whose order is liable to be scrutinized by this Court in a regular appeal under Section 35 of FEMA.

39. In view of the discussions made earlier, all the writ petitions are dismissed with liberty to the petitioners to file their explanation/objections before the second respondent within 30 days from the date of receipt of copy of this order. If any such objection is received by the second respondent, the same shall be considered by him in accordance with law. No costs. Consequently, connected miscellaneous petitions are closed.

29.01.2025

Index : Yes / No
Speaking order : Yes / No
Neutral Citation : Yes / No
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To

1.The Directorate of Enforcement,
Government of India, Ministry of Finance,
Department of Revenue.
2.The Special Director,
Adjudicating Authority,
Directorate of Enforcement, Government of India,
Ministry of Finance, Department of Revenue,
Southern Regional Office, Shastri Bhavan, HI Floor,
III Block, 26, Haddows Road, Chennai – 600 006.
3.The Deputy Director of Enforcement,
Directorate of Enforcement, Government of India,
Ministry of Finance, Department of Revenue,
3rd Floor, "B" Block, BMTC, Shanthinagar TTMC,
K.H.Road, Shanthinagar, Bengaluru – 560 027.

S.SOUNTHAR, J.

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Pre-Delivery Order made in

W.P.Nos.18630, 18682, 24511, 24517, 23019, 23013,
23231, 23237, 23235, 23236, 20721 of 2021

29.01.2025