Lennart Schussler And Anr vs Director Of Enforcement & Anr on 14 October, 1969

Equivalent citations: 1970 AIR 549, 1970 SCR (2) 760, AIR 1970 SUPREME COURT 549, 1970 SCD 738 1970 SC CRI R 369, 1970 SC CRI R 369, 1970 CRI. L. J. 707, (1970) 2 S C R 760

Author: P. Jaganmohan Reddy

Bench: P. Jaganmohan Reddy, S.M. Sikri, G.K. Mitter, K.S. Hegde, A.N. Ray

PETITIONER:
LENNART SCHUSSLER AND ANR.

Vs.

RESPONDENT:
DIRECTOR OF ENFORCEMENT & ANR.

DATE OF JUDGMENT:
14/10/1969

BENCH:
REDDY, P. JAGANMOHAN
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REDDY, P. JAGANMOHAN
SIKRI, S.M.
MITTER, G.K.
HEGDE, K.S.
RAY, A.N.

CITATION:
1970 AIR 549 1970 SCR (2) 760
1970 SCC (1) 152

ACT:
Foreign Exchange Regulation Act (7 of 1947), ss. 4 and 21 (1)--Indian Penal Code; s. 120-B-Illegal acquisition of foreign exchange and retention in foreign bank-Agreement to do so whether an offence under s. 21(1) of Act 7 of 1947--Whether applicability of s. 21(1) excludes applicability of s. 120-B I.P.C.--Retention of foreign exchange not an offence at the time-when agreement entered into-Subsequently made an offence--Acts in pursuance of agreement after creation of offence whether to be treated as acts in pursuance of conspiracy.

HEADNOTE:

The Rayala Corporation (P) Ltd. manufactured Halda typewriters in India with materials imported from Sweden. Initially it made purchases through a firm known as A.B. Atvidabergs (later known as Facit A.B.). In 1963 the Rayala Corporation decided to import certain materials through another firm called the Associated Swedish Steels A.B., Sweden (ASSAB). Appellant No. 1 a Swedish national, was at the relevant time export manager of A.B. Atvidabergs; in 1966 he also became a director of Rayala Corporation. In November 1968 appellant no. 1 was travelling by aircraft from Singapore to Karachi. The aircraft became grounded at Delhi. The Director of Enforcement, New Delhi, acting under the Foreign Exchange Regulation Act, 1947 took appellant no. 1 into custody and detained him. He was served with a notice of adjudication tinder the Act; the notice purported to be in continuation of one already given to Rayala Corporation under s. 23C of the Act. Appellant No. 1 challenged his detention by a petition under Art. 32 of the Constitution. In this Court a statement was made on behalf of the respondents that a complaint had already been filed against the appellants under s. 120-B of the Indian Penal Code read with certain sections of the Foreign Exchange Regulation Act. In the said complaint it was alleged that in 1963 when appellant no. 2 had gone to Sweden he told Appellant no. 1 of the decision taken by the Rayala Corporation to buy certain materials from ASSAB. He further informed Appellant no. J that arrangements had been made with ASSAB to over invoice to the goods by 40%, and that the said excess over the true value would be kept in a bank in the personal account of appellant no. 2. Appellant no. 1 agreed to help Appellant no. 2 in opening-. the said account and keeping it secret; he also agreed to keep a watch over the account and to bring copies of it Whenever he visited India. This according to the complaint amounted to a conspiracy between Appellants nos. 1 and 2 within the meaning of s. 120-B of the Indian Penal Code for the purpose of illegal acquisition of foreign exchange by appellant no. 2 and retaining the same abroad in contravention of ss. 4(3). 5(1)(e) and 9 of the Foreign Exchange Regulation Act and Rule 132-A of the Defence of India (Amendment) Rules, 1964. It was alleged that appellant no. 1 actually sent to appellant no. 2 from time to time statements of the illegal account opened in Sweden in pursuance of the conspiracy. It was further alleged that in November 1965 appellant no. 1 came to India and again agreed to continue helping appellant no. 2 in operating the foreign account. The appellants filed petitions in the Madras High

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Court asking it to quash the said complaint. These petitions having been dismissed the appellants appealed to this Court. it was contended on behalf of the appellants :

(i) that s. 120-B of the I.P.C. did not apply to the case because s. 21 (1) of the Foreign Exchange Regulation Act , covered the same grounds; (ii) that when the alleged agreement was made in 1963 the objects of it were not illegal because they became so only on the enactment of r. 132A of the Defence of India Rules in 1964 and the amendment of s. 4 of the Foreign Exchange Regulation Act in 1965. It was urged that, whatever appellant no. 1 did or agreed to do after the passing of these laws did not constitute any offence and therefore he could not be said to have taken part in a criminal conspiracy.

HELD: Per Sikri, Ray and Reddy, JJ.-The appeals must be dismissed.

(i) The combined effect of the several provisions of s. 21 does not support the view that sub-s. (1) covers a case of criminal conspiracy similar to s. 120-B. Section 21 does not in terms deal with an agreement to commit an offence or it legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or avoid the provisions of the Act. The agreement entered into between. ASSAB and appellant no. 2 would, if proved, come within the mischief of s. 21(1) but the agreement such is the one alleged to have been entered into between appellant no. 1 and appellant no. 2 does not itself evade or avoid any of the provisions of the Act, rules, or directions. The words directly or indirectly do not take in any agreement to be illegal acts in future. [769 H-770 B]

(ii) For the offence of conspiracy as defined in s. 120-A of the Indian Penal Code there must be a meeting of minds in the doing of an illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are induced to do an unlawful act without the knowledge of the conspiracy or the plot the cannot be held to be conspirators, though they may be guilty of an offence to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be do in act which it itself an offence, in which case no overt act need be established. An agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement. [770 D-F]

The contention that the acts of appellant no. 1 in watching the bank account in Sweden on behalf of appellant no. 2 and keeping him informed about it did not constitute any offence and therefore he was not guilty of the offence of conspiracy, could not be accepted. The several acts which constitute a conspiracy cannot be split up into parts and the liability of appellant, no. 1 could not be judged by the part that he played. The entire agreement must be viewed as a whole and it bad to be ascertained as to what in fact the conspirators intended to do or the object they

wanted to achieve-. [771 D-E]

In this case on the allegations appellant no. 2 asked appellant no. 1 to help him in acquiring foreign exchange illegally and appellant no. 1 agreed to help him. This agreement though initially may not have been an offence was none the less an offence subsequently, but appellant no. 1 did not withdraw from it and was said to have continued to carry out the agreement. The help of appellant no. 1 was necessary to the design of appellant no. 2 because otherwise he would not know whether ASSAB was in fact, crediting his, account in the bank with the amount of over

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invoice Appellant no. 1 kept appellant no. 2 supplied with necessary information from time to time and agreed while in Madras in 1965 to continue to help appellant no. 2. The several acts of appellant no. 1 were all acts- in consequence of the agreement which had its origin in Sweden. Appellant no. 2 also in pursuance of the conspiracy acquired foreign exchange in Sweden. Therefore on the allegations contained in the complaint appellant no. 1 and appellant no. 2 could be charged with an offence under s. 120-B. [771 H-772 E]

M/s. Rayala Corporation (P) Ltd. & Anr. v. Director of Enforcement, New Delhi [1970] 1 S.C.R. 639 and Denis Dowling Mulchv v. Queen L.R. 3 H.L. 305, 317, referred to.

Per Mitter and Hedge,]J. (dissenting).-The appeals must be allowed.

Per Mitter, J.-(i) An agreement by two persons whereby one agrees to help the other by 'facilitating transfer of foreign exchange from a foreign exporter into the banking account of that other is an agreement the object whereof is not only the acquisition of foreign exchange but the retention of it abroad. This is clearly an agreement to evade the operation of the provisions of the Foreign Exchange Regulation Act relating to the ill-gal acquisition and retention of 'foreign exchange within the meaning of s. 21 (1) of the Act. So far as the violation of the different provisions of the Act or rule or direction or order made thereunder are concerned the Act is a complete code including within its ambit by reason of s. 21(1) a criminal conspiracy to acquire foreign exchange abroad illicitly and retaining the same abroad. The offence alleged against the appellants in the present case therefore fell under s. 23(1A) read with s. 21(1) of the Act and no complaint lay under s. 120-B of the Indian Penal Code. [781 E-F, 782 B, 783 H]

(ii) In the Rayala Corporation's case this Court laid down that complaint under s. 23(1)(b) cannot be launched before the Director of Enforcement has taken up the adjudication proceedings and made some inquiry in these proceedings and formed the opinion that it was necessary to have resort to the more drastic provisions of conviction by a court as envisaged by s. 23(1)(b) In the present case no

proceedings had been started either against appellant no. 1 or appellant no. 2 in pursuance of the notice of adjudication issued against them. Therefore in respect of the substantive offences for contravention of the different sections of the Act the Director of Enforcement could not make a Complaint before first having followed the Procedure laid down in s. 23D of the Act. It would be absurd to allow him to file a complaint for violation of s. 21(1) by making a charge under s. 120-B I.P.C. when the overt acts alleged were contravention of different provisions of the Act punishable only under s. 23(1)(b) 'by following the procedure indicated in s. 23D To allow the prosecution to be proceeded with at this stage would in effect be stultifying in s. 23(1)(b). Accordingly the complaint filed under s. 120B of the I.P.C. against the appellants must be quashed. [782 C-F]

Per Hegde, J.-(i) The appeals must be allowed following the rule laid, down by this Court in the Rayala Corporation's case. It is a fundamental principle of law that what cannot be done directly should not be permitted to be done indirectly. [784 A-B]

(i) From the facts and circumstances of the case it was clear that the complaint was not a bona fide one. It had been filed with a collateral purpose viz. to justify the unlawful detention of appellant no. 1 in this country. [784 B-C]

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(iii) Even if all the facts stated in the complaint were accepted as correct the same did not amount to an offence under s. 120B of the Indian Penal Code. These allegations merely made out that appellant no. 1 was in accessory after the fact and not that he was a conspirator. If a person agreed with a robber to receive the stolen property to arrange for its safe keeping he does not become a co-conspirator with the robber in the commission of the offence of robbery. On the facts alleged it was clear that appellant no. 1 had nothing to do either with the acquisition of foreign exchange by appellant no. 2 or in the matter of the latter's failure to repatriate the same to this country. The allegation against him was that he provided facility for its retention in Sweden. [786 A-B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 113 and 163 of 1969.

Appeals from the judgment and order dated April 16, 1969 of Madras High Court in Criminal Misc. Petitions Nos. 469 and 621 of 1969.

A. K. Sen, N. C. Raghavachari, W. S. Setharaman and R. Gopalakrishnan, for the appellant (in Cr.A. No. 113 of 1969).

M. C. Setalvad, N. C. Raghavachari, W. S. Setharaman and R. Gopalakrishnan, for the appellant (in Cr. A. No. 163 of 1969).

Jagadish Swarup, Solicitor-General, R. H. Dhebar, B. D. Sharma and S. P. Nayar, for the respondents (in both the appeals).

The Judgment of SIKRI, RAY and JAGAN MOHAN REDDY, JJ. was delivered by REDDY J. MITTER and HEGDE, JJ. delivered dissenting Opinions.

Jagamohan Reddy, J. The Director of Enforcement, New Delhi, filed a complaint on February 16, 1969 before the Chief Presidency Magistrate, Madras against Lennart Schussler, accused 1, and M. R. Pratap, accused 2, Managing Director, The Rayala Corporation Ltd. hereinafter referred to as A.1 and A.2 respectively, under section 120-B I.P.C. and ss. 4(3), 5(1) (e) and 9 of the Foreign Exchange Regulation Act (VII) of 1947 (hereinafter called the Act). Two Criminal Miscellaneous Petitions, one filed by A.1 being No 469 of 1969 and the other filed by A.2 being No. 621 of 1969 for quashing the complaint were dismissed which by the Madras High Court by a common judgment against these two appeals by certificate have been filed.

The complaint which is in respect of the acquisition of 88913.09 Swiss Kronars in contravention of the Act states that on reliable information received by the Assistant Director of Enforcement, Madras that A 2 was utilising his position as Managing Director of the Rayala Corporation Ltd. in acquiring foreign exchange illicitly, on December 20, 1966, a search was conducted of the premises of the Said company in the presence of A-2, Jaga Rao and the legal advisor of the company one Sita Ram. During the search certain documents were recovered and seized, one of which was a letter dated the 25th March 1965 in Swedish language from the Associated Swedish Steels A.B. Sweden, as ASSAB to A with the enclosures. The Rayala Corporation Private Ltd. was a concern manufacturing Halda typewriters for which purpose certain materials were being imported from Sweden. The firm with which initially the transactions were being entered into was known as A.B. Atvidabergs, later known as Facit AB, of which A 1, a Swedish national, has been the export manager. It is alleged that in August 1963, A 2 Jaga Rao and A 1 met together at Stockholm and agreed to a plan regarding purchase of certain raw materials, namely, steel alloy sheets directly from ASSAB instead of purchasing them from Atvidabergs. At that meeting A 2 informed A 1 that henceforth he would buy material on behalf of his company from ASSAB instead of M/s Atvidabergs. A 2 further informed A 1 that the arrangement made between him and the ASSAB was to over in voice the value of goods by 40 per cent of the true value and that he should be paid the difference of 40 per cent on account of the aforesaid over-invoicing by crediting it to his personal account and that since under the laws of India this acquisition by him was unlawful and had to be kept secret, it should not be mentioned in the official correspondence of Messrs Rayala Corporation with the Swedish firm. He requested the first accused to help him in opening the account in Swenska Handles Banken, Sweden, in order not only to transfer the money lying to his credit in Atvidabergs but also to have further deposits to his personal account from ASSAB on account of the difference between the actual value and the

over-invoiced value. A 1 agreed to act is requested by A 2. A 2 made arrangement with ASSAB to intimate to A 1 the various amounts credited to A 2's account and asked A 1 to keep a watch over the correctness of the account and to further intimate to him the account position from time to time through unofficial channels and whenever A 1 came to India. A 1 is said to have agreed to comply with this request. Subsequently in November 1965 A 1 came to India when he is said to have brought the incriminating letter dated the 25th March 1965 which was seized. He is said to have also agreed at that time with A 2 to continue to help him to accumulate foreign exchange. illegally in the same manner. In September 1966 also A 1 arrived at Madras where he stayed for a month and at that time also he brought further details of the account. The gravamen of the charge is set out in paragraph 9 of the complaint as follows :"Thus it is clear that A 1 and A 2 agreed to commit illegal acts.. namely, acquisition by A 2 of foreign exchange illicitly and retaining the same abroad without surrendering the same to the Government of India and also to defraud the Government of India of foreign exchange thereby contravening Sections 4(3), 5 (1) (e) and 9 of the Foreign Exchange Regulation Act and Rule 132A of the Defence of India (Amendment) Rules, 1964 and further that between August 1963 and 1966 A 1 and A 2 in pursuance of the said agreement did commit acts in contravention of sections 4 (3) , 5 (1) (e) and 9 of the Foreign Exchange Regulating Act and Rule 132 A of the Defence of India (Amendment) Rules, 1964 and thereby committed offence punishable under sec. 120 B of the Indian Penal Code, read with sections 4(3), 5 (1) (e) and 9 of the F.E.R. Act and Rule 132 A of the Defence of India (Amendment) Rules, 1964".

The complaint also refers to the fact that C.C. No. 8736 of 1968 had already been filed against the Rayala Corporation Private Ltd. In view of this reference it is necessary, for a better appreciation of the issues involved in this petition, to give a brief account of the earlier proceedings taken by the Directorate of Enforcement in this regard. It appears that the earlier notice sent by the Enforcement Directorate dated the 25th August 1967 was for the contravention of the Act in respect of 244,713.70 Swiss Kronars alleged to have been deposited in A 2's bank account, which amount included 88,913.09 Kronars. This notice was followed by a further show cause notice under s. 23(3) of the Act dated the 4th November 1967 to A 2 as to why he should not be prosecuted in respect of 88,913.09 Swiss Kronars. A 2 in his reply of November 13, 1967 to the show cause notice of the 25th August 1967 denied the allegations. The Enforcement Director further issued another show cause notice dated the 15th November 1967 to the other directors of the Corporation and its General Manager, Jaga Rao in continuation of the notice dated the 25th August asking them to show cause why adjudication proceedings should not be instituted. On November 29, 1967, A 2 replied to the notice of the 4th November 1967 denying the allegations. Thereafter on January 20, 1968 the Director of Enforcement issued a notice to the Rayala Corporation to show cause why if should not be prosecuted for violation in respect of 88,913.09 Swiss Kronars. Two months later, namely, on March 16, 1968, a revised show cause notice was issued to the Corporation and A 2 superseding the notice of 25th August 1967 and intimating to them that they were prosecuting the Corporation and A 2 for the contravention of the Foreign Exchange Regulation Act in respect of 88.013.09 Kronars. Four days thereafter the Director of Enforcement filed a complaint against the Corporation and A 2 under r. 132-A of the Defence of India Rules and ss. 4 (1). 4 (3). and 5 (1) (e) of the Act.]Both the Corporation and A 2- filed Criminal Misc. Petitions, being respectively No, 978 and 980 of 1968. for quashing the complaint but the High Court of Madras dismissed these petitions in October 1968. Two appeals by certificate preferred against that order, being Criminal Appeals Nos. 18 and 19 of

1969, were allowed by this Court on July 23, 1969, setting aside the order of the High Court rejecting the applications under s. 561 A of the Code, of Criminal Procedure for quashing the proceedings against the appellants therein. While the above proceedings were pending, A 1 who happened to be a passenger travelling by an aircraft from Singapore to Karachi via Palam was detained on November 27, 1968 by the officers of the Office of the Enforcement Directorate when the aircraft which had landed at Palam on November 26, 1968 for refuelling had to be temporarily grounded due to engine trouble. On November 30, 1968, the Enforcement Directorate served a notice for adjudication on A 1 in his capacity as a director of the, Rayala Corporation which was purported to be in continuation of the previous adjudication notice dated August 25,'1967 issued to the company under s. 23 C of the Act. These allegations were also denied by A 1 on the 30th January 1969 and on 5th February 1969 A 1 filed a writ petition in this Court for the issue of a writ of habeas corpus. It is however unnecessary to narrate the various stages of this and the subsequent. petitions for directing A 1's release and for according him permission to leave this country for Sweden. The subsequent writ petition filed by him after the withdrawal of the first one filed on 5th Feb- ruary 1969, came up for hearing along with these criminal appeals and this Court on the 10th September 1969 while allowing the writ petition to be withdrawn passed a consent order permitting A 1 to depart from India provided he furnishes ban guarantee in the foreign exchange equivalent of Rs. 1,50,0001- in Swedish Kronars and on his undertaking to appear before the Chief Presidency Magistrate, Madras or any other Magistrate to whom the complaint case might be transferred at the time of the disposal thereof. The main question in these appeals is whether A 1 can be charged in respect of acts alleged against him in the complaint with an offence under s. 120B I.P.C. or with offences under the several provisions of the Act and r. 132 A of the Defence of India Rules, read with s. 120B I.P.C. Before considering this question it is necessary to mention that at the time of the alleged agreement between A 1 and A 2 at Stockholm neither the Defence of India Rules nor the Foreign Exchange Regulation Act contained any provision specifically making it an offence for a person resident in India to acquire foreign exchange abroad. Rule 132 A of the Defence of India Rules was added on 21st January 1964 by Defence of India (Amendment) Rules 1964 by which dealings in foreign exchange by persons other than an authorised person were prohibited. The provision remained in force till 31st March 1965 when it was repealed. Section 4 of the, Foreign Exchange Regulation Act was also amended as from 1st April 1965 so as to prohibit the buying or otherwise acquiring or borrowing or selling or otherwise transferring or lending to any person other than an authorised dealer any foreign exchange without the previous general or special permission of the Reserve Bank. It is therefore apparent that at the time when the alleged agreement between A 1, A 2 and Jaga Rao is said to have taken place in Stockholm in August 1963 it was neither an offence under the Defence of India Rules nor wider the Act to acquire foreign exchange in a foreign country. But it is contended by the learned Solicitor General that pursuant to that agreement A 1 continued to help and agreed to help even after it became an offence under the Defence of India Rules or under the Act and consequently no exception can be. taken to the complaint against A-1. At any rate,, s. 21(1) of the Act would cover such agreements which are offences and consequently the accused can be charged with s. 120B I.P.C. On the other hand, learned counsel for the appellants Shri Asoke Sen submits that firstly, there was no mention of any allegation against A 1 in the several show cause notices issued either to the Rayala Corporation or to the directors of that Corporation or to A 2 but it is an after thought brought about by the mechanisation of Jagga Rao who was hostile and inimical 'to A 2; secondly, as it appears on the enquiry made by A 2 at the instance of the Enforcement Directorate from Swenska

Handels Banken, Stockholm, that in fact there is no account is alleged either in the name of the Rayala Corporation or in the name of the Managing Director of the Rayala Corporation, that is, A 2. there would be no basis for the complaint; and thirdly, the agreement alleged does not either come under s. 120B I.P.C. or would amount to a contravention of any of the provisions of the Act including s. 21(1) thereof. It would not be necessary at this stage to go into these questions because what has to be seen is whether, assuming the facts as stated in the complaint to be true, A 1 and A 2 could be charged with the offences specified therein. The answer to this question must depend upon the nature of the part which A 1 agreed to play in the acquisition of the foreign exchange under which agreement he is said to have continued to participate in the conspiracy by rendering, help to A 2 in acquiring foreign exchange even after 21st of January 1964 and also till after the amendment of s. 4(1 of the Act. Under s. 120B there must be an agreement between two or more persons to commit an offence or where the agreement does not amount to an offence in the doing of an act which is legal, in an illegal way there should also be established an overt act. In so far as the offence under r, 132A of the Defence of India Rules is concerned, in 1963 what Pratap did was not an offence, nor was it an offence under the Act as s. 4 was amended with effect from 1st April 1965. In so far as any acts which may be considered to constitute an offence under r. 132A of the Defence of India Rules, it has been held by this Court in Criminal Appeals Nos. 18 and 19 of 1969, decided on 23rd July 1969 (Rayala Corporation etc. v. Director of Enforcement) that no prosecution can be launched for an offence under that provision subsequent to the repeal as there is no saving provision thereunder. It is then contended that the agreement entered into in 1963 continued to be effective even after the acquisition of foreign exchange became an offence after tile amendment of the Act on 1st April 1965, and at any rate after this amendment an agreement by A 1 to assist A 2 was again said to have been arrived at in Madras in 1965. It is, therefore, necessary to examine whether such an agreement would constitute an offence and if so under what provision of law. The agreement in Madras has a reference to the initial agreement in Sweden. This alleged agreement between A. 1 and A. 2, as set out in the complaint, can be briefly stated to consist of the following, namely, in August 1963 A 2 asked A 1 to help him (a) to open an account in Swenska Handels Banken, Stockholm, (b) to get the money lying to A 2's credit with Atvidaberge accumulated by him as a result of over-invoicing transferred to Pratap's account with the bank- and (c) to keep a watch on and check the correctness of the account of the acquisitions from time to time and not to mention anything in ,,he official correspondence but to give information otherwise. Even in Madras in 1965, A-1. is alleged to have agreed to keep a watch on the account and bring him statements of the account. The offence by A 2 under the Act would consist of setting the goods which the Rayala Corporation was purchasing over-invoiced by 40 per cent so that permission to remit foreign exchange from India to the extent of the amount of the over-invoice could be obtained from the Reserve Bank and after money is received in Sweden by the Swedish company that company was to credit Pratap's (A 2) account with 40 per cent of the over-invoice price. If these facts are established, they certainly amount to a contravention of cl. (1) and cl. (3) of s. 4 which provide that where any foreign exchange is acquired by any person other than by any authorised dealer for any particular purpose or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or as the case may be, fail to comply with any condition to which. the permission granted to him' is subject, and where any foreign' tax. change so acquired cannot be so used or. as the case may be the condition cannot be complied with, the said person shall without delay sell the foreign exchange to an authorised dealer. Now it is

alleged that A 2 Pratap has in breach of this condition on which foreign exchange was released to the Rayala Corporation to pay the actual cost of the goods has not only not complied with the conditions on which the permission was granted but has also committed default in not selling the foreign exchange so acquired by him without delay to an authorised dealer.

Before dealing with the question whether the agreement of A 1 to help A 2 amounts to criminal conspiracy punishable under s. 120B I.P.C., it will be convenient first to dispose of the submission that s. 120B I.P.C. does not apply because s. 21(1) covers the same ground. It would appear that the alleged agreement between A 1 and A 2 is not one which transgresses s. 21 (1) of the Act. What s. 21 (1) provides is that the provisions of the Act must be avoided or evaded by the agreement or contract itself. The contracts or agreements are those, which are entered into during the course of commercial transactions and it is the intention of the legislature to prohibit that such contracts or agreements ought not to provide for the evasion or avoidance of ,in any of the provisions of the Act either directly or indirectly. This assumption is made clear by the subsequent sub-section in which the legislature is anxious to preserve the integrity of these transactions by providing that any reference to any act being done without the permission of the Central Government or Reserve Bank shall not render the agreement invalid and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be clone by or under any of the pro- visions of this Act except with the permission of the Central Government or Reserve Bank shall not be done unless such permission is granted. Sub-sec. (3) provides that notwithstanding anything in the Act or any provision in the contract that anything for Article permission has to be obtained from the Central Government or Reserve Bank-shall not be done without that permission, no legal proceedings shall be prevented from being brought in India to recover any sum which apart from any of the said provisions and any such term would be due whether as a debt, damages or otherwise but subject to the certain condition-is provided in cls. (a) to (c) therein.. Similarly, sub-s. (4) states that nothing shall be deemed to prevent any instrument being a bill of exclaim ' or promissory note in spite of any inhibitions in. the Act and notwithstanding ' anything contained in the Negotiable Instruments Act. The combined effect of the several provisions of s.21 does not incline us to the view that sub-s. (1) covers a case of criminal conspiracy similar to s. 120B. Section 21 does not in terms deal with an agreement to commit in offence or a legal act in an illegal way but merely provides that an agreement or contract by itself ought not to evade or avoid the provisions of the Act. The agreement entered into between ASSAB and A 2 Pratap would, it proved, come within the mischief of S. 21 (1) but the agreement such as the one alleged to have been entered into between A 1 and A 2 does not itself evade or avoid any of the provisions of the Act, rules or directions. The words directly or indirectly do not take in any agreement to do illegal acts in future. It now remains to be seen whether the alleged agreement which A 1 and A 2 arrived at in Stockholm in 1963 and again in Madras in 1965, would, if established, amount to a criminal conspiracy. The first of the offences defined in S. 120A Penal Code which is itself punishable as a substantive offence is the very agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means subject however to the proviso that where the agreement is not an agreement to commit an offence the agreement does not amount to a conspiracy unless it is followed up by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds in the doing of the illegal act or the doing of a legal act by illegal means. If in the furtherance of the conspiracy certain persons are

induced to do an unlawful act without the knowledge of the conspiracy or the plot they cannot be held to be conspirators, though they may be guilty of an offence pertaining to the specific unlawful act. The offence of conspiracy is complete when two or more conspirators have agreed to do or cause to be done an act which is itself an offence, in which case no overt act need be established. It is also clear that an agreement to do an illegal act which amounts to a conspiracy will continue as long as the members of the conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement.

As has been noticed earlier at the time A 1 and A 2 entered into an agreement though A 2 thought it was an offence to acquire foreign exchange by the method he was employing it was not in fact an offence. It is none the less alleged that A 1 agreed to help in the belief that what he is doing would be to assist A 2 to acquire foreign exchange illegally. This agreement continued and A 1 was assisting A 2 even after the acquisition of foreign exchange became illegal and is said to have agreed even after he came to Madras in 1965 to continue to help in acquiring the foreign exchange. It is however contended that the agreement of A 1 with A 2 does not amount to a criminal conspiracy because all that A 1 has agreed to do was, to help A 2 to open an account in the Swedish Bank, have the amounts living to the credit of A with Atvidabergs to that account and to help A 2 by keeping a watch over the account. It is true that none of these acts amounts to an offence, because the opening of the account in the Bank and having the amounts transferred from Atvidabergs was not an offence in August 1963, and there is nothing to show that A 1 had not completed that part of the agreement relating to Atvidabergs and the opening of the account with the bank before January 1964 or that he had rendered the assistance after that date. If this part of the agreement does not amount to a conspiracy to do an unlawful act, then it is submitted that the subsequent watching over the account and sending or bringing a state- ment of the account of A 2 relating to the acquisition of the foreign exchange does not amount to an offence. The agreement which constitutes an offence, it is said is the one between A 2 and ASSAB. The subsequent act of A 1 was neither necessary to acquire nor does it further the acquisition of the foreign exchange in contravention of the provisions of the Act and is therefore not an offence under s. 120B of the Penal Code. This argument would postulate that the several acts which constitute it can be split up in parts and the criminal liability of A 1 must only be judged by the part he has played. It appears to us that this is not a justifiable contention, because what has to be seen is whether the agreement between A 1 and A 2 is a conspiracy to do or continue to do something which is illegal and if it is, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. As observed by Willis, J. in his 1 1 the answer given on behalf of the Judges when consulted by the Lord Chancellor in Denis Dowling Mulcahy v. Queen (1) "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in it&-

,If, and the act of each of the parties promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminals means."

In this case on the allegations A 2 asked A 1 to help him in acquiring foreign exchange illegally and A 1 agreed to, help him. This agreement though initially may not, have been an offence (1) L.R3H.L. 305,317 SLIP. CI/70-4 was none the, less an offence subsequently but A 1 did not withdraw from it and was said to have continue to carry out that agreement. A 1's help was necessary for A 2's design because otherwise he would not know whether ASSAB was in fact crediting his account in the bank, with the amount of over-invoice. Only when ASSAB credited A 2's account could he be said to have acquired the foreign exchange till then it was only an understanding or agreement under which it is enforceable a debt would be created in favour of A 2. The knowledge that the amount was being credited from time to time was an essential part of the agreement, between A 1 and A 2 and would be in furtherance of illegal and unlawful design to acquire foreign exchange contrary to the provisions of the Act. It consisted in, as has already been stated in A 1 keeping a watch over the accounts, his coming over to India on several occasions, his bringing a letter in reply to his letter, with a statement of account annexed in November 1965 from ASSAB to himself, in which the amount of foreign exchange credited by ASSAB to A 2's account with Swenska Handels Banken was mentioned, his statement at the time of handing it over that he brought the letter in person as he did not want to send it by post in view of the nature of the transactions and his further agreeing in Madras with A 2 that he will continue to help him. The several acts of A 1 are all acts in consequence of the agreement which had its origin in Sweden. A 2 Pratap one of the conspirators also in furtherance of that conspiracy obtained foreign exchange invoices which were over priced with a view to acquire the same in Sweden. It would, therefore, appear that on the allegations contained in the complaint A 1 and A 2 could be charged with an offence under s. 120B. These appeals are accordingly dismissed with a word of caution that nothing that has been stated here should be taken as establishing any of the facts required to constitute the offence which if the prosecution case has to be sustained must be proved at the trial in accordance with law.

Mitter, J. These two appeals by certificate arise out of a common judgment of the Madras High Court in Crl. M.P. 469/ 1969 and Crl. M.P. No. 621/1969, the object of both being to quash the complaint in C.C. No. 5438 of 1969 on the file of the Court of the Chief Presidency Magistrate, Egmore, Madras. Cr. M.P. 469 of 1969 was by Lennart Schussler while Cr. M.P. 621/ 1969 was by M. R. Pratap. The complaint before the Chief Presidency Magistrate was filed on February 16, 1969 by the' Director of Enforcement against Schussler and Pratap under s. 120-B of the Indian Penal Code read with various sections of the Foreign Exchange Regulation Act, 1947.

In order to appreciate how the complaint came to be made, it is necessary to note a few facts which preceded it. The Rayala Corporation Private Ltd., (hereinafter referred to as the 'Corporation') used to manufacture Halda typewriters and in that connection import materials through A. B. Atvidabergs, Sweden later known as Facit AB. M. R. Pratap was the Managing Director of the Corporation. Schussler, a Swedish national, has been export manager of Facit AB for many years. He became a director of the corporation in April 1956. On information received about violation of The Foreign Exchange Regulation Act (hereinafter referred to as the 'Act') the Enforcement Directorate raided the premises of the corporation at Madras on 20th and 21st December, 1966 and seized certain records. According to the information at the Directorate a plan had been hatched in August 1953 between Pratap, Schussler and one Jaggarao, General Manager of the Corporation, in Stockholm regarding purchase of raw materials by the corporation directly from a firm known as

ASSAB instead of Facit AB to give effect to an arrangement already made by Pratap with ASSAB to over-invoice the value of the goods imported by the corporation by 4O % of their true value thereof and the difference of 40 per cent to be paid to the personal account of Pratap. The part played by Schussler was to help Pratap in opening an account in Swenska Bandela Banken, Sweden (hereinafter referred to as the 'bank') and to transfer the moneys lying to his credit to Facit AB and to have further deposits made to his personal account on account of over-invoicing by Assab. It is the case of the Directorate that Pratap had been acquiring large amounts of foreign exchange abroad by the, above means from before 1963 and had retained the same abroad to put it beyond the reach of the Government of India. On August 25, 1967 the Enforcement Directorate sent a notice to the corporation and Pratap alleging violations of ss. 4 (1) and 9 of the Act calling upon them to show cause why adjudication proceedings under the Act should not be had. The notice was not only in respect of 88,913-09 Krs. but an additional sum making a total of 244,713-70 Sw. Krs. alleged to have been deposited in a bank account. This was followed by a further show cause notice dated November 4, 1967 from the Directorate to Pratap under s. 23(3) of the Act for prosecuting him under the Act in respect of 88,913- 09 Krs. On November 13, 1967 Pratap replied to the show cause notice dated August 25, 1967 denying the allegations. On November 15, 1967 the Directorate, sent show cause notices to the other Directors of the Corporation and its Manager in continuation of the notice dated 25th August asking them to show cause why adjudication proceedings should not be instituted. On 29th November 1967 Pratap denied the allegations in the notice dated 4th November. On 20th January 1968 notice was issued by the Director of En-

forcement to the Corporation to show cause why it should not be prosecuted for the violation of the Act in respect of 88,913-09 Sw. Krs. On March 16, 1968 a revised adjudication show cause notice was issued by the Director of Enforcement to the Corporation and Pratap superseding the notice dated August 25, 1967 and informing, them that they were prosecuting the Corporation and Pratap for 88,913-09 Sw. Krs. and adjudicating in respect of 155,801 Sw. Krs. On March 20, 1968 the Director of Enforcement filed a complaint against the Corporation and Pratap under rule 132A of the Defence of India Rules and ss. 4(1), 4(3) and 5(1)(e) of the Act. The Corporation and Pratap filed Cr. M. Ps. 978 and 980 of 1968 for quashing, the complaint. The High Court of Madras dismissed these petitions in October 1968. The appeals preferred to this Court on a certificate were disposed of in July 1969 quashing the complaint. Schussler happened to be a passenger travelling by an aircraft from Singapore to Karachi via Palam in November 1968. When the aircraft touched at Palam for a short space of time engine trouble was noticed and all the passengers including Schussler were asked to spend the rest of the night at a hotel until the aircraft became airworthy once more. Before Schussler could board the plane the next day i.e. 27th November 1968 he was taken to the Enforcement Directorate office and interrogated. His departure from India was prohibited at the instance of the Director of Enforcement under the Foreigners Order of 1948. On November 30, 1968 Schussler was served with an adjudication notice dated November 15, 1967 under s. 23-C of the Act in his capacity as Director of the Corporation and the notice was described as in continuation of the previous adjudication notice dated 25th August 1967 issued to the company. On 13th December 1968 Schussler replied to the show cause notice denying the allegations. On January 21, 1968 Schussler was served with another adjudication notice similar to the notice of 16th March 1968 in his capacity as Director of the Corporation under s. 23-C of the Act. On 30th January 1969 Schussler denied the allegations in the last adjudication notice. On February 5, 1969 Schussler filed a Writ

Petition in this Court for the issue of a writ of habeas corpus etc. On 17th February, 1969 when the said Writ Petition came up for hearing before this Court a statement was made on behalf of the respondents that a complaint C.C. No. 5438 of 1969 had already been filed in the Court of the Chief Presidency Magistrate Madras under s. 120B I.P.C. read with different sections of the Act. A suggestion was then made that Schussler might be permitted to leave India by giving security by way of a bank guarantee for Rs. 1,50,000. Ultimately on April 21, 1969 when the Writ Petition came up for hearing before this Court a consent order was made and the respondent agreed to withdraw the order dated November 30, 1968 under the Foreigners Act on condition that Schussler should move for bail before the Chief Presidency Magistrate and then apply for permission to the Foreigners Registration Officer to leave India. The Chief Presidency Magistrate granted ball to Schussler on two sureties but his application for permission to the Foreigners Registration Officer was rejected on the objection raised by the Additional Director, Enforcement. On April 30, 1969 Schussler filed Writ Petition No. 144 of 1969 for the issue of a writ of habeas corpus directing the respondents, the Foreigners Regional Registration Officer and others, to allow him to leave the territory of India and for other reliefs. This Writ Petition came up for hearing before this Court along with the above Criminal Appeals Nos. 113 and 163 of 1969 on 8th September. On 10th September the Court ordered that the Foreigners Regional Registration Officer would permit him to leave India on condition of his giving a bank guarantee for 155,800 Sw. Krs. and on his undertaking to appear before the Chief Presidency Magistrate Madras or any other Magistrate to whom the complaint case might be transferred at the time of disposal.

The complaint in this case filed on February 16, 1969 by the Director of Enforcement recites that to the knowledge of Schussler Pratap had before August 1963 acquired foreign ex- change amounting to 756,529 Sw. Krs. by getting Facit AB to over-invoice the goods imported by the Corporation by 40 per cent of their true value and that in August 1963 an agreement was arrived at in Stockholm between Pratap, Schussler and Jaggarao for the opening of an account in the name of Pratap in the bank with the help of Schussler not only to transfer the moneys lying to the credit of Pratap in Facit AB but also to cause further deposits to be made in the said account from Assab on account of similar over- invoicing by Assab of the value of the goods to be bought by the Corporation. Support for the case of the Directorate that Pratap had been acquiring foreign exchange illicitly by the above device of over-invoicing and retaining the same abroad in a Swedish bank was said to be received as a result of the search of the premises of the Corporation in December 1966 and in particular the seizure of the letter dated March 25, 1965 from Assab to Schussler in reply to Schussler's letter (not in the record) to the Assab. Reference is made in the complaint to several invoices and other documents seized during the course of search allegedly lending support to the case of the Directorate. According to the complaint such device had been adopted by the Corporation and Pratap in respect of 14 invoices involving 88,913-09 Krs. which had been released and secured for import of goods but was actually not utilised for the purpose and kept back abroad credited to the personal account of Pratap thus violating the order made by the Central Government by Notification dated 25th Sep-

tember 1958 No. F. 1(67)/E/57 under S. 9 of the Act. This amount of 88,913-09 Sw. Krs. was said to have been acquired surreptitiously in the year 1964-65 by Pratap without the previous or general permission of the Reserve Bank of India and Pratap had failed to offer the same to the Reserve Bank

or to any author raised dealer within one month from the date of the acquisition in terms of the notification mentioned. The complaint goes on to relate that the letter of 25th March, 1965 was brought by Schussler in person to India when he came here in November 1965. The complaint also alleges that in November 1965 Schussler agreed with Pratap "to continue to help him and accordingly did help him to accumulate foreign exchange illegally in the same manner. Thereafter even later when Schussler became Director of Rayala Corporation similar transactions were continued by him and Pratap." In September 1966 Schussler came to Madras bringing further details of the said account. The complaint winds up with the statement that Schussler and Pratap had agreed to commit illegal acts, namely, acquisition by Pratap of foreign exchange illicitly and retaining the same abroad without surrendering it to the Government of India and to defraud the Government of India of foreign exchange thereby contravening sections 4(3), 5(1)(e) and 9 of the Act and Rule 132A of the Defence of India Rules 1962 and further between August 1963 and 1966 Schussler and Pratap in pursuance of the said agreement did commit acts in contravention of the said sections of the Act and the said r. 132A and thereby committed an offence punishable under s. 120B of the Indian Penal,Code read with the said sections of the Act and the said rule.

The relevant provisions of the Act may now be noticed. Sub-s. (1) of s. 4 of the Act as originally provided that :

> "Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India. buy or borrow from, or sell or lend to, or ex- change with, any person not being an authorised dealer, any foreign exchange."

The above was considered to be sufficient to attract the ban on acquisition of foreign exchange by other means e.g. by over invoicing the price of goods imported as was alleged to have been done by the Corporation and Pratap The section as amended with effect from April 1, 1965 contains the words "or otherwise acquire" in between the words "by" and "or borrow from" and the words "or otherwise transfer" in between the words "sell" and "or lend to". Rule 132A of the Defence of India Rules was promulgated on January 21, 1964 cured the lacuna in s. 4(1) of the Act as from the said date. But this rule was omitted from the rules by a notification dated March 30, 1965 in view of the amendment of s. 4(1) which became effective from April 1, 1965.

S. 4(3) prohibits the use of any foreign exchange for a purpose other than for which it was given and, runs as follows :

> "Where any foreign exchange is acquired by any person other than an authorised dealer for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or as the case may be, fail to comply with any condition to which the permission ,,,-ranted to him is subject, and where any foreign exchange so acquired cannot be used or, as the case may be, the conditions cannot be complied with, the said person shall without delay sell the

foreign exchange to an authorised dealer."

Section 5 contains certain restrictions on payments. The Provisions, s. 5 (1) (e) reads :

"Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally by the Reserve Bank, no person in, or resident in, India shall-

(a) to (d)

(e) make any payment to or for the credit of any person as consideration for or in association with-

(i) the receipt by any person of a payment or the acquisition by any person of property outside India;

(ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside India;

Section 9 reads " The Central Government may, by notification in tile official Gazette, order every person in, or resident in, India-

(a) who owns or holds such foreign exchange as may be specified in the notification, to offer it, or cause it to be offered for sale to the Reserve Bank on behalf of the Central Government or to such person as the Reserve Bank may authorise for purpose, at such price as the Central Government may fix, being a price which is in the opinion of the Central Government not less than the market rate of the foreign exchange when it is offered for sale;

(b) who is entitled to assign any right to receive, such foreign exchange as may be specified in the notification to transfer that right to the Reserve Bank on behalf of the Central Government on payment of such consideration therefore as the Central Government may fix :

Provided that the Central Government may by the said notification or another order exempt any persons or class of persons from the operation of such order Provided further that nothing in this section shall apply to any foreign exchange acquired by a person from an authorised dealer and retained by him with the permission of the Reserve Bank for any purpose."

The other provisions which are necessary to note are "S. 21 (1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.

S. 23(1). If any person contravenes the provisions of section 4, section 5, section 9, section 10 or subsection (2) of section 12, section 17, section 18A or section 18B or of any rule, direction or order made thereunder, he shall-

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudicated by the Director of Enforcement in the manner hereinafter provided, or

(b) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1A)If any person contravenes any of the provisions of this Act or of any rule, direction or order made thereunder, for the contravention of which no penalty is expressly provided, he shall, upon conviction by a court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both,
(3) No court shall take cognizance-

(a) of any offence punishable under sub- section (1) except upon a complaint in writing made by the Director of Enforcement, or (aa)

(b) of any offence punishable under sub-

section (1A) of this section or section 23F, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the, offence has been given an opportunity of showing that he had such permission.

23C. (1) If the person committing a contravention is a company, every person who, at the time the contravention was committed, was in-charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub- section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

23D. (1) For the purpose of adjudicating under clause (a) of sub-section (1) of section 23 whether any person has committed a contravention, the Director of Enforcement shall hold an inquiry in the prescribed manner after giving that person a reasonable opportu- nity of being heard and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in

accordance with the provisions of the said section 23 :

> Provided that if, at any stage of the inquiry, the Director of Enforcement is of opinion that having regard to the circumstances of the case, the penalty which he is empowered to impose would not be adequate, he shall, instead of imposing any penalty himself, make a complaint in writing to the court. (2) While holding an inquiry under this section, the Director of Enforcement shall have power to summon and enforce the attendance of any person to give evidence or to produce a document or any other thing which, in the opinion of the Director of Enforcement, may be useful for, or relevant to, the subject-matter of the inquiry.

Of the two agreements mentioned in the complaint the one arrived at in August 1963 was not unlawful. S. 4(1) of the Act did not make it unlawful for anyone to acquire foreign exchange abroad. Any foreign exchange acquired by Pratap after January 21, 1964 when Rule 132-A of the Defence of India Rules was promulgated would be an unlawful acquisition but there could be no conspiracy under s. 120-A in respect of the agreement arrived at in August 1963. In paragraph 7 of the complaint it was only Pratap who was charged with contravention of s. 9 of the Act in respect of 88,913-09 Sw. Krs. but the agreement of November 1965 stands on a different footing. According to paragraph 8 of the complaint, Schussler agreed with Pratap at Madras in November 1965 to help him to accumulate foreign exchange as before by getting the same credited to his account in the bank. This agreement would be one in violation of s. 4(1) and 9 of the Act. However any violation of S. 4(1) or S. 9 or S-.4-(3) and s. 5 (1) (e) the last two provisions being hardly applicable to the facts of the case-would be offences under the Act, in respect whereof the Director of Enforcement was competent to levy penalty under s. 23(1)(a) of the Act after following the procedure for adjudication prescribed in s. 23D of the Act or alternatively by making a complaint in court under s. 23 (1) (b).

The recent judgment of this Court in M/s. Rayala Corpora- tion (P) Ltd. & another v. The Director of Enforcement, New Delhi(1) arising out of the complaint in Case No. 8736 of 1968 has laid down that before a complaint can be filed under s. 23 (1)(b) the Director of Enforcement must not only initiate proceedings under S. 23(1)(a) but proceed with the inquiry under s. 23-D(1) and form an opinion in course thereof that having regard to the circumstances of the case, the penalty which he was empowered to impose under s. 23 (1)

(a) would not be adequate and that it was necessary to make a complaint in writing to the court instead of levying a penalty himself.

1970] 1 S.C. R. 619.

Mr. Sen arguing the appeal of Schussler contended that the Act was a complete Code containing provisions not only for punishment of violation of different sections of the Act but also a conspiracy to commit acts prohibited under the Act which might otherwise have been amenable, to the jurisdiction under s. 120-A and 120-B of the Indian Penal Code. In this connection, he referred to the provisions in s. 21 (1) of the Act. Under s. 21 (1) any agreement which could directly or indirectly evade in any way the operation of the provisions of the Act or any rule direction or order made

thereon was forbidden. The contravention of s. 21 (1) does not find a place in s. 23 (1) of the Act but it would be an offence covered by s. 23(1A) and any contravention of s. 21 (1) would be punishable upon conviction by a court with imprisonment for a term which may extend to two years or with fine or with both. The punishment is the same as the one prescribed under s. 23 (1) (b) and is greater than that laid down in s. 120-B(2) of the Indian Penal Code. The learned Solicitor-General arguing the case of the respondents contended that s. 21 (1) did not touch a criminal conspiracy which is covered by s. 120-A of the Penal Code. I find myself unable to accept this argument. An agreement which can form the basis of a criminal conspiracy under s. 120-A may. inter alia be one to do or cause to be done an illegal act or at offence. Under s. 21 (1) of the Act any agreement which directly or indirectly evades in any way the operation of the Act etc. is forbidden. An agreement by two persons whereby one agrees to help the other by facilitating transfer of foreign exchange from a foreign exporter into the banking account of that other is an agreement the object whereof is not only the acquisition of foreign reign exchange but the retention of it abroad. This is clearly an agreement to evade the operation of the provisions of the Act relating to the illegal acquisition and retention of foreign exchange. In my view, the Act is a complete Code with regard to the offences specified by it though it is not a self-sufficient Code with regard to the procedure to be followed irrespective of the provisions of the Criminal Procedure Code. It is true that there are different sections in the Act regarding the power to search. persons believed to have secreted any documents which will be useful or relevant to any proceeding under the Act (s. 9-A), to arrest any person believed to be guilty of an offence punishable under the Act (19-B), to stop and search conveyances (19-C), to search premises (19-D), to examine persons during the course of any enquiry in connection with any offence (19-E), to summon persons to give evidence and produce documents in connection with enquiries (19-F), to retain custody of documents (19-G) which are not in consonance with the provisions of the Procedure Code.

S. 24A contains a very special rule of evidence regarding the proof of documents seized and the evidentiary value thereof at complete variance with the Indian Evidence Act. Some of these powers are more drastic and are in addition to similar powers contained in the Code of Criminal Procedure. But so far as the violation of the different provisions of the Act, or rule or direction or order made thereunder are concerned, the Act is a complete Code including in its ambit a criminal conspiracy to acquire foreign exchange abroad illicitly and retaining the same abroad by reason of the provision of s. 21 (1).

The judgment of this Court in Cr. As. 18 and 19 of 1969 lays down that a complaint under s. 23 (1) (b) cannot be launched before the Director of Enforcement has taken up the adjudication proceedings and made some inquiry in those proceedings and formed the opinion that it was necessary to have resort to the more drastic provision of conviction by a court as envisaged by S. 23 (1)(b).

No proceedings have been started either against Schussler or Pratap in pursuance of the notices dated 30th November 1963 and 21st January 1969. It would therefore appear that in respect of the substantive offences for contravention of the different sections of the Act, the Director of Enforcement cannot at present make a complaint as he has not followed the procedure laid down in s. 23-D of the Act. It would be absurd to allow him to file a complaint for violation of S. 21 (1) by

making a charge under s. 120-B I.P.C. when the overt acts alleged are contravention of different provisions of the Act, punishable only under s. 23 (1) (b) by following the procedure indicated in s. 23-D. To allow the prosecution to be proceeded with at this stage would in effect be stultifying s. 23 (1) (b) by allowing the establishment of commission of offences punishable only by following a procedure not yet adopted by the Director of Enforcement.

Mr. Sen relied on the decision in Rex v. Barnett(1) in aid of his contention that when a statute makes unlawful that which was lawful before and appoints a specific remedy that remedy and no other must be pursued. In that case a number of persons alleged to be dealers in scrap metal were charged on a count of an indictment to the effect that they conspired together and with other persons unknown to contravene the provisions of S. 1 of the Auctions (Building Agreements) Act, 1927, by being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction. What in effect had happened there was that the prosecution alleged that a (1) [1951] 2 K.B. 425.

number of persons had agreed to form a ring and in pursuance of that agreement they attended at auction sales where cable and other Ministry of Supply commodities were being sold and that after some representatives of the ring bid for and acquired goods on behalf of the ring they were-re-auctioned and the profits shared by the ring in an agreed proportion. The forming of a ring in order to bid at an auction in the way indicated was not an, offence at law up to the passing of the Act of 1927 and it was therefore submitted on behalf of the persons who had been convicted on a count of indictment at the Central Criminal Court before the Court of Criminal Appeal that as the agreement was not an offence under the common law and only became one under the Act of 1927 the procedure laid down by the Act should be, followed. The submission on behalf of the prosecution was that the indictment alleged was a conspiracy which was something different from the offences which the, Act created. It was pointed out by the Court of Appeal that although it was possible to frame a charge alleging conspiracy to contravene this Act in any given set of circumstances, the court must ascertain what in fact was alleged. According to the court :

> "In alleging the conspiracy to contravene the Act particulars are given, and those particulars are 'by, being dealers, agreeing to, offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction.' This Court is of opinion that those particulars of this particular conspiracy describe in terms offences which the Act creates, or are substantially the same."

The same can be said on the facts of this case. The particulars of conspiracy alleged in this case are offences which the Act has created. In my view the Director of Enforcement must first take up the adjudication proceedings, it being open to him in the course thereof to form an opinion that the penalty which he may impose will not be adequate having regard to the circumstances of the case, whereupon he can make a complaint in writing to the Court. He can at the same time make a complaint about the agreement to evade the operation of the provisions of the Act calling for punishment under s. 23(1A) of the Act. The agreement with overt acts alleged for proving a conspiracy under s. 120-B I.P.C. is in reality an offence under s. 23(1A) read with s. 21 (1). The complaint does not lie at this stage and must be quashed.

In the result I would allow the appeals and quash the com- plaint made on 16th February 1967.

Hegde, J. I have gone through the judgment just,, now read out by my esteemed colleague Mitter J. I agree with him that these appeals should be allowed following the rule laid down by this Court in M/s. Rayala Corporation (P) Ltd. and anr. v. The Director of Enforcement, New Delhi(1). In my opinion it is a fundamental principle of law that what cannot be done directly should not be permitted to be done indirectly. From the facts and circumstances of the case I am satisfied that the complaint with which we are concerned is not a bona fide one. It has been filed with a collateral purpose viz. to justify the unlawful detention of Schussler, in this country. It may be noted that in the first complaint filed by the Director of Enforcement, the allegation was that the Rayala Corporation and its Managing Agent, Pratap had contravened the provision of the Foreign Exchange Regulations Act. When that complaint was pending trial Schussler came to deplane in this country due to some engine trouble in the plane in which lie was travelling. That occasion was availed-to detain him illegally in-this country. I am convinced that Schussler's detention in this country was unjustified.

Even if we accept all the facts stated in the complaint as correct, the same do not amount to an offence under s. 120-B of the Indian Penal Code. According to the complaint Pratap and Schussler "agreed to commit illegal acts namely acquisition by A-2 (Pratap) foreign exchange illicitly and retaining the same abroad without surrendering,the same to the Government of India and also to defraud the Government of India of foreign exchange thereby contravening Sections 4(3), 5(1)(e) and 9 of the Foreign Exchange Regulations Act and Rule 132-A of the Defence of India (Amendment) Rules, 1964 and further that between August, 1963 and August 1966 A-1 (Schussler) and A-2 (Pratap) in pursuance of the said agreement did commit acts in contravention of sections 4(3), 5 (1) (e) and 9 of the Foreign Exchange Regulations Act and Rule 132-A of the Defence of India (Amendment) Rules, 1964 and thereby committed offence punishable under s. 120 (b) of the Indian Penal Code read with ss. 4 (3), 5 (1) (e) and 9 of the F.E.R. Act and Rule 132-A of the Defence of India (Amendment) Rules, 1964."

The material allegations made in the complaint read as fol- lows :

> "The Rayala Corporation Private Limited is a Private Limited Company with headquarters at Madras, (1) [1970] 1 S.C.R. 639.

manufacturing 'HALDA' typewriters out of materials imported from aboard. Originally they were importing raw materials through one A. B. Atvidabergs , Sweden, now known as Facit AB. The first accused has been working as the Export Manager of that concern. The raw material supplied by Atvidabergs was over- invoiced at the instance of the 'And accused and thereby foreign exchange was illicitly acquired in Swedish Kronara to the tune of 7,56,529/- by the 2nd accused Pratap before August 1963 with the full knowledge of the 1st accused.

Later in August 1963 the 2nd accused and the General Manager of Rayala Corporation Mr. Jagga Rao went to Sweden. There Jagga Rao, 2nd accused and the first accused met to-ether at Stockholm and agreed to a plan regarding purchase of certain raw materials viz., steel alloy sheet directly from

M/s. Associated Swedish Steels AB, Sweden, also known as ASSAB, instead of purchasing the same from M/s. Atvidabergs. The 2nd accused told the first accused that henceforth he would buy on behalf of his company raw materials from ASSAB. He in found him of the arrangements made with ASSAB people to over-invoice the value of the goods by 40% of the true value and that he should be paid the difference of 40% on account of aforesaid over-invoicing to his personal account. He also told the 1st accused that since under the laws of India this acquisition by him was unlawful, it had got to be kept a secret, without any mention in the official correspondence of M/s. Rayala Corporation with the Swedish firm. He requested the first accused to help him in opening an account in Swenska Handels Banken, Sweden in order not only to transfer the money lying to his credit in Atvidabergs but also to have further deposits to his personal account from ASSAB on account of the difference between the actual value and the overinvest value. A-1 agreed to act as requested by the second accused. A-2 also made arrangements with ASSAB to intimate to A-1 the various amounts credited to A-2's account and asked A-1 to keep a watch over the correctness of the account, which A-1 agreed to do so. A-2 also asked A-1 to intimate to him the account position from time to time through unofficial channels or whenever A-1 comes to India periodically. In fact A-1 was coming to India periodically once in six months, since he was also a Director of a company called Facit Asia Ltd., in Madras. In pursuance of this conspiracy between the two accused the 2nd accused arranged with ASSAB to have the difference between the over-invoiced price and the actual price credited to the personal account of the second accused in Ovenska Handels Banken and the statement of account sent to A-1".

These allegations merely make out that Schussler was an accessory after the fact and not that he was a conspirator. If a person agreed with a robber to receive the stolen property and arrange for its safe keeping, he does not become. a co-conspirator with the robber in the commission of the offence of robbery-. On the facts alleged it is clear that Schussler had nothing to do either with the acquisition of foreign exchange by Pratap or in the matter of Pratap's failure to repatriate the same to this country. The accusation against him is that he provided facility for its retention in Sweden.

In the result I allow these appeals and acquit the appellants ORDER In accordance with the opinion of the majority, these appeals are dismissed.

G.C.