(2014) 06 BOM CK 0029

In the Bombay High Court

Case No : FERA Appeal Nos. 11 and 16 of 2011

Abu Moosa and Co.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 30-06-2014

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 19, 35, 49(3), 49(4)
Foreign Exchange Regulation Act, 1973 — Section 50, 51, 6(4), 6(4), 6(5)

Citation : (2014) 310 ELT 288

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : L.S. Shetty, Sachin Gade and Namita Shetty i/b L.S. Shetty and Associates, Advocate for the Appellant; R.V. Desai, Senior Advocate and A.S. Rao, Advocate for the Respondent

Judgement

1. Admit. Respondents waive service. By consent, the appeals are heard finally. These appeals challenge the orders, dated 13th March 2009 and 23rd April 2010 passed by the Appellate Tribunal for Foreign Exchange, New Delhi. The appeals are filed by the Appellants before us under Section 35 of the Foreign Exchange Management Act, 1999. ("FEMA" for short).

2. The Tribunal dismissed the main appeals and Review Petition Nos. 117 and 118 of 2009 in Appeal Nos. 177 and 178 of 2005. All these were instituted by the appellants before us.

3. The case of the appellant is that it is a partnership firm constituted under the partnership deed, dated 1st December 1984 as amended by subsequent deed executed on 1st April 1992. Mrs. Mehmooda Moosa, Mrs. Sharifa Haji Ebrahim and Mrs. Asma Aboobakar are the partners. Mrs. Sharifa Haji Ebrahim expired on or about 29th July 1997 and in view of the desire of Mrs. Asma Aboobakar to retire from the partnership firm with effect from 1st September 1997, a deed of admission-cum-retirement was executed on or about 1st September 1997. That is how the appellants'' partnership firm consists of Mrs. Mehmooda Moosa, Mr.

Aboobakar Haji Ebrahim and Mr. Haji Ebrahim Suleman.

4. It is the case of the appellants that the Special Director Enforcement Directorate, Mumbai issued a show cause notice, dated 29th April 2002 calling upon the appellants to show cause as to why adjudication proceedings under Section 51 of the Foreign Exchange Regulation Act, 1973 ("FERA" for short) read with Sections 49(3) and (4) of the FEMA should not be held in respect of the alleged contravention of the provisions of Sections 8(1), Section 6(4) and Section 6(5) read with Section 7 of Foreign Exchange Regulation Act, 1973 and paragraph 3 of the Memorandum of Instructions to full fledged money changers issued by the Reserve Bank of India. The allegations were in relation to foreign exchange of Rs. 20,86,005/- sold by the appellants to Foreign Exchange Money Changers M/s. Hotel Zam Zam at Mumbai. A reply was filed to this show cause notice. An order came to be passed on 28th October 2004 pursuant to this show cause notice holding that the appellants have violated and contravened the provisions of Foreign Exchange Regulation Act (FERA) and a penalty was imposed in a sum of Rs. 50,000/- each on both the appellants.

5. It is alleged that in identical circumstances, one M/s. LKP Merchant Financing Ltd. and its Executive Director Shri Parag Mehta and Shri Chitrang Ashok Mehta were also charged with similar violation and contraventions. That was also a transaction with M/s. Hotel Zam Zam. The adjudication proceedings against M/s. LKP Merchant Financing Ltd. ended in their exoneration. There are identical violations and contraventions alleged and yet these persons were held not guilty. The appellants therefore, were, surprised with the adjudication order against them, and therefore, preferred appeals under Section 19 of the FEMA before the Appellate Tribunal for Foreign Exchange, New Delhi. The said Tribunal, having dismissed the Appellants'' appeal by the original order on 13th March 2009 that the appellants decided to seek a review thereof. They sought review thereof by filing two review applications styled as Miscellaneous Applications. These have been also dismissed by the impugned order, and therefore, the present appeals.

6. Mr. Shetty appearing in support of these appeals submitted that the violation and breaches alleged against the present appellants will not stand legal scrutiny at all. He submits that the appellants could not have been held guilty of any violation inasmuch as they are given the status of full fledged money changers. The transactions undertaken by them are fully authorized by law. Mr. Shetty submits that Mr. A.K. Bal, the then Special Director, passed the adjudication order exonerating and dropping the proceedings against M/s. LKP Merchant Financing Ltd. and its Executive Director namely one Shri Mehta. Mr. Shetty submits that Mr. K. Nageshwar Rao, Special Director should have followed the order passed by Mr. A.K. Bal. In these circumstances, passing a contrary order in the case of the appellants before this Court on identical allegation is enough to quash and set aside the order under challenge. Further, the Appellate Tribunal completely missed the issue inasmuch as when the monies or exchange left those licensed full fledged money changers and were in the hands of the third

person, then, act and deeds of the third person would not face the present appellants with any violation or breaches of law. The foundation of this show cause notice and adjudication proceeding itself is erroneous and untenable in law. For all these reasons, the appeal be allowed.

7. Mr. Shetty has rested his pleas on the judgment of the Hon''ble Supreme Court in the case of Tulip Stars v. Enforcement Directorate, Civil Appeal No. 680 of 2014 together with 681 of 2014 decided on 16th January 2014. Mr. Shetty submits that the matters stand fully covered by the judgment of the Hon''ble Supreme Court and in that regard he has taken us extensively through this judgment which is reported in Tulip Star Hotels Ltd. Vs. Special Director of Enforcement, .

8. On the other hand, Mr. Desai, learned Senior Counsel appearing on behalf of the respondent submitted that there is a distinction on facts of the present case and in the Supreme Court judgment. Therefore, would not cover the issue raised in this appeal. It is submitted by Shri Desai that insofar as authorized dealers are concerned, their acts are held to be fully within the four corners of law. However, those authorized dealers have allowed the money to reach the unauthorized and illegal person. The persons who had gone to collect foreign exchange were not deputed. As such they were not authorized and hence judgment of the Hon''ble Supreme Court in the backdrop of Section 73(3) of the FERA and clear statutory prescription, therefore, cannot be said to be binding on us. It does not cover the controversy raised before us. In any event, it is submitted that all such persons who have been referred to by the Hon''ble Supreme Court are also before this Court. It is submitted by Shri Desai that the allegations in the show cause notice would reveal that Hotel Zam Zam may be a full fledged money changer licensed by the Reserve Bank of India and the show cause notice against it was misconceived, does not mean that paragraph No. 3 of the Memorandum of Instructions contains several procedural instructions requiring them to forward the list giving full names and designation of the representatives who are authorized to buy and sell foreign exchange, currency notes etc. They have sold the foreign exchange to unauthorized persons and such persons were not authorized by Hotel Zam Zam. Their names had not been filed with the Reserve Bank of India. The hotel deputed their own employees and who used to come to their office with pay order drawn on Bank of America, deposit advice of the bank and also with bulk purchase memos and buy the foreign currency from them. It is in these circumstances that there is a distinction and which was not the position in the judgment rendered by the Hon''ble Supreme Court. The instructions, the statutory provisions pertaining thereto had not been thus referred. For all these reasons Mr. Desai would submit that the controversy is not covered by the Supreme Court judgment.

9. With the assistance of the learned counsel appearing for the parties, we have perused the memo of appeal, all its Annexures including the allegations in the show cause notice and impugned orders. We have also perused carefully the

judgment of the Hon''ble Supreme Court in the case of Tulip Stars (supra).

10. Pertinently, in the case of Tulip Stars (supra), the Hon''ble Supreme Court was dealing with issuance of show cause notice against Tulip Star. It was alleged that Tulip sold foreign currency of the value of 147,000 US $ and 1,000 Sterling of UK between 29th April 1997 to 5th June 1997 through unauthorized person deputed by Hotel Zam Zam in violation of Sections 6(4), 6(5), 7 and 8 of the FERA. They had also violated paragraph 3 of the Memorandum of Instructions to full fledged foreign exchange money changers issued by the Reserve Bank of India, New Delhi. The appellants before the Supreme Court were called upon to show cause why the penalty should not be imposed against them under Section 50 of FERA read with Sections 49(3) and 49(4) of Foreign Exchange Management Act (FEMA). The penalty was imposed of Rs. 50,000/- against each of these appellants. Their appeals before the Appellate Tribunal for foreign exchange failed. That resulted into filing FEMA Appeals in this Court. A Division Bench of this Court having confirmed the orders under challenge, the appellants M/s. Tulip and Mr. Peter Kerkar had to approach the Hon''ble Supreme Court. The arguments of the appellants'' Senior Counsel and that of the Additional Solicitor General were noted.

11. We find that the show cause notices that have been issued in the present case to the appellants alleged violation of identical provisions of FERA, identical Memorandum and the allegations referred to search operation of M/s. LKP Merchant Financing Ltd., two persons of this entity were intercepted. Two persons identified themselves as Hanif and Rajesh Mhatre of Hotel Zam Zam. Mhatre was carrying briefcase along with him. A search revealed that one Suleman Patel with the help of Ms. Pinky Jaisinghani and Sanjay Jadhwani were operating two FFMCs. As a result of the search documents, the authorities recovered and seized the articles under a Panchanama. The identical allegations pertaining to Hanif and Mhatre tendering two pay orders along with the advice letter on the cash counter of M/s. LKP Merchant Financing Ltd. are to be found in the present show cause notice. The statements of all these persons were recorded by the officers of D.R.I. The partner of the present appellants stated that the appellant''s firm has obtained FMC license, dated 28th September 1996 issued by the Reserve Bank of India for dealing with purchase of foreign currency, that he was the person responsible for day to day operation of foreign currency dealing. The foreign currency was sold to Hotel Zam zam, which was admittedly the licensed full fledged foreign money changer. It is in these circumstances that we are of the opinion that some of the allegations on page No. 55 of the paper book pertaining to lack of authorization should not be seen in isolation. The Hon''ble Supreme Court was dealing with the identical controversy as would be clear from the judgment cited by Shri Shetty. The undisputed facts were noted by the Hon''ble Supreme Court together with legal provisions and it came to the conclusion that the only violation or contravention related to the stipulations contained in paragraph 3 read with Sections 6(4) and 6(5) of FERA. The manual has been referred. The Hon''ble Supreme Court in that context in

paragraph Nos. 13 to 18 observes and holds as under:-

"13. The above impugned orders disclose that the only violation or contravention related to the stipulations contained in Para 3 read with Sections 6(4) and 6(5) of FERA. It will be relevant to note that the variation in the rates of purchase value of the foreign currency was not the basis for the ultimate conclusion about the contravention held against the appellants. Therefore, keeping aside the said aspect, when we examine the contravention held proved against the appellants, we feel it appropriate to make a reference to Para 9 in the forefront.

14. Under Para 9 of FLM as between the money changers, a free hand has been given for purchase and sale of any foreign currency notes, etc. in rupee value. The only restriction imposed therein is that the Indian rupee value of the foreign currency should not be paid by way of cash, but should always be paid in the form of an instrument such as banker''s cheque/pay order/demand draft, etc. or by debiting to the purchasers'' bank account. Therefore, if under Para 9 such a free hand has been given to the money changers, namely, FFMCs in the matter of purchase of foreign currency, etc. by making payments in the form of negotiable instruments under the relevant statutes, the question that would arise for consideration would be whether in a case of this nature where such a transaction had taken place in between two licensed FFMCs and the said transaction was carried on by exchange of foreign currency by way of payment in the form of pay orders and that the sale effected by the appellants and the purchase made by the other FFMC, namely, M/s. Hotel Zam Zam was not disputed, can it still be held that there was any violation at all in order to proceed against the appellants for imposing a penalty? When we examine the said issue, we are unable to accede or countenance the stand of the respondent that the foreign currencies to the values mentioned in the earlier paragraphs were handed over to the representative of M/s. Hotel Zam Zam by one Mr. Rakesh Mahatre and, therefore, the whole transaction was in contravention of Sections 6(4) and 6(5) of FERA and Para 3 of FLM.

15. When we examine Para 3 of FLM, we find that the caption of the said paragraph is "Authorised officials". The purport of the said paragraph was to ensure that any licensed money changer should allow transaction of its money-changing business in its premises only through such persons who are the listed authorised officials as certified by the office of Reserve Bank under whose jurisdiction such money changers operate their business. The last part of Para 3 makes the position a little more clear which states that "no person other than the authorised representative should be allowed to transact money-changing business on behalf of the money changer". Apparently, when a money changer operates its business from its premises, any transaction by way of sale or purchase as part of its money-changing business should be carried out only through an authorised representative.

16. When we extend the application of the said stipulation of Para 3 of FLM to the case of present nature, it can only be said that if such transaction had taken

place as between the appellants and the purchaser M/s. Hotel Zam Zam, it should have been carried on only through their respective authorised representatives. The statement of Mr. Peter Kerkar, the appellant in SLP (C) No. 7657 of 2011, discloses that on each occasion the transaction was negotiated by the Branch Manager of the appellant with one Ms. Pinky of M/s. Hotel Zam Zam. It is not the case of the respondent that neither of these two persons who indulged in the transaction of money-changing business were not the authorised officials of their respective establishments. If the said factum relating to the business transactions, which had taken place as between the appellants and M/s. Hotel Zam Zam is not in controversy, we fail to see how a violation of Para 3 can be alleged as against the appellants.

17. It is stated that after the transaction as between the appellants and M/s. Hotel Zam Zam concluded, M/s. Hotel Zam Zam is stated to have indulged in some transaction, which was in violation of the provisions of FERA with which the appellants were not in any way concerned. It can also be safely held that for any violation or contravention of the provisions of FERA or FEMA at the instance of M/ s. Hotel Zam Zam after the money-changing transaction as between the appellants and the said concern had come to an end, the appellants cannot in any way be held responsible or proceeded against.

18. In our considered opinion in the peculiar facts of this case and having regard to the nature of transactions which had taken place as between the appellants and M/s. Hotel Zam Zam in the manner in which it has been narrated in the impugned order of the original authority as noted by the Tribunal, as well as the Division Bench of the High Court, we are convinced that there was no scope to allege a violation of Para 3 of ELM or for that matter Sections 6(4) and 6(5) of FERA, 1973. Based on the interpretation of Sections 6(4), 6(5) of FERA, 1973 and Paras 3 and 9 of ELM, we have held that the original authority, the Appellate Tribunal as well as the Division Bench of the High Court failed to appreciate the issue in the proper perspective while holding the appellant guilty of the violation alleged. Therefore, none of the judgments relied upon by the respondents for the proposition that concurrent findings of fact should not be interfered with does not apply to the facts of this case."

12. We are unable to accept the argument of Mr. Desai that the money or the foreign exchange leaving the authorized persons and reaching or being passed off to the unauthorized person was not the matter which was dealt with by the Hon''ble Supreme Court. Further, violation and contravention emphasized by him was not the subject matter of the Supreme Court judgment and proceedings. Once the Supreme Court was dealing with an identical allegation, identical breach and of similar legal provision and manual, then, we are unable to accept Shri Desai''s argument. The Hon''ble Supreme Court''s judgment is binding upon us. It is too well settled to require any reiteration that the judgment of the Hon''ble Supreme Court continues to bind us and will not lose its binding value merely because some argument which was canvassed before us was not raised

or certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. When we find that the judgment of the Hon''ble Supreme Court is dealing with the identical controversy, similar legal provision and even the allegations in the show cause notices are common, then, it would cover the matter fully. As a result of the above discussion, we are of the opinion that the adjudication order and the order passed by the Appellate Tribunal and impugned in these appeals cannot be sustained. The same are quashed and set aside. Once the original order of the Appellate Tribunal is quashed and set aside, then, needless to clarify that the review order also would not survive. The sum of penalty deposited by the appellants shall be refunded to the appellants along with simple interest at the rate of 6% p.a. from the date of deposit till payment, within a period of two months from the date of receipt of copy of this order. The appeals are allowed accordingly but without any costs.

