
(2010) 03 DEL CK 0276

In the Delhi High Court

Case No : Writ Petition (C) No. 19881 of 2004

Bhupendra V.Shah

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 — Regulation 13(1)(2), 9
Foreign Exchange Management Act, 1999 — Section 8
Foreign Exchange Regulation Act, 1973 — Section 12
General Clauses Act, 1897 — Section 6
Negotiable Instruments Act, 1881 (NI) — Section 141

Citation : (2010) 03 DEL CK 0276

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : V. Sridharan, Prakash Shah, Sarla and T. Sunder Ramanathan, for the Appellant; A.S. Chandhiok, ASG and Rajdipa Behura, Ritesh and C.S. Chandan, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The challenge in these petitions is to the legality of proceedings initiated u/s 16(3) the Foreign Exchange Management, 1999 (FEMA) against the Petitioners by the Respondent Enforcement Directorate (ED) by issuance of a show cause notice dated 10th August 2004 to them for contravention of Sections 7 and 8 FEMA read with Regulations 9 and 13 (i) and (ii) of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 [FEM EGS Regulations 2000] and Section 42 FEMA for non-receipt of export proceeds of hard disk drives exported during 1997-98 during which period the Foreign Exchange Regulation Act, 1973 (FERA) and the Rules framed there under were in force.

2. Admittedly the exports for which the proceeds were allegedly not realised were made in 1997-98 by JTS Technology Ltd. (JTS). The case of the ED is that

Bhupendra V. Shah the Petitioner in WP (C) No. 19881 of 2004 and Manohar Lal Tandon [the Petitioner in WP(C) No. 26 of 2005] were Directors of JTS and Krishan Kumar Batta [the Petitioner in WP(C) No. 1038/2005] was its Managing Director at the time the contravention took place.

3. The first submission of Mr. V. Sridharan, learned Counsel for the Petitioners, is that the show cause notice is untenable in law inasmuch as the alleged contravention took place in 1997-98 when the FERA was in force. Section 49(3) FEMA provides that notwithstanding anything contained in any other law for the time being in force, no adjudicating officer shall take notice of the contravention u/s 51 of the FERA after the expiry of the period of two years from 1st June 2000. In view of the above "sunset" clause, Section 6 of the General Clauses Act, 1897 (hereinafter the "GC Act") stands excluded. The savings clause u/s 49(5) FEMA applies only if any action is taken or any notification is issued under FERA during the time the FERA was in force. The impugned show cause notice dated 10th August 2004 by which the Special Director, ED purportedly took note of the contravention of Sections 7 and 8 FEMA, in fact related to a period prior to the coming into force of the FEMA. No notice of the contravention of any of the provisions of FERA could have been taken by the Special Director, ED after 31st May 2002.

4. The alternative submission is that in any event, the ED could not have invoked either Section 7 or Section 8 FEMA against the Petitioners. It is submitted that the Section 7 FEMA alone deals with non-realisation of proceeds of exports of goods and services. This has to be read together with the FEM EGS Regulations 2000. Regulation 9 thereof requires the full export value of the goods to be realized within six months from the date of export. Regulation 13 (ii) read with the proviso thereto stipulates that for the failure to realise the export proceeds within the time limit prescribed, proceedings for contravention shall not be instituted till the specified period has expired. It is pointed out that since no export was made after the coming into force of the FEMA, Section 7 and Regulations 9 and 13 (ii) of the FEM EGS Regulations do not apply. Section 8 FEMA is a general provision that deals with the realisation and repatriation of foreign exchange. This excludes realisation of proceeds of exports of goods and services which are covered exclusively by Section 7 FEMA. A separate set of regulations titled Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 ("FEM RRS Regulations") have been framed. Regulation 3 thereof casts an obligation on the Indian resident to realise foreign exchange. Regulation 4 provides for the manner of repatriation of foreign exchange. It is submitted that inasmuch as the exports in question took place in 1997-98 and in any event Section 7 FEMA exclusively applied to the non-realisation of export proceeds, Section 8 FEMA could not be invoked.

5. An analogy is drawn by the Petitioners with similar provisions of the Foreign Exchange Regulation Act, 1947 (FERA 1947). It is pointed out that Section 12 FERA 1947 is pari materia with Section 7 FEMA and Section 10 FERA 1947 is pari

materia with Section 8 of FEMA. As far as FERA 1973 is concerned, Section 18 thereof corresponds to Section 7 FEMA and Section 16 FERA to Section 8 FEMA. The above comparisons are drawn to emphasise that there have always been separate provisions dealing with realisation of proceeds of exports and foreign exchange earned or brought into the country (other than by way of exports). Reliance is placed on the judgment of the Supreme Court in *M.G. Wagh and Others Vs. Jay Engineering Works Ltd.*, where it was held that Section 10 FERA 1947 had no application in respect of foreign exchange earnings related to export of goods. It was held that "the entire matter pertaining to payments for exported goods and foreign exchange earnings arising there from has been dealt with in Section 12 FERA 1947 which is a complete Code in itself". It is accordingly submitted that Section 8 FEMA would have no application in the instant case.

6. Lastly it is submitted that Manohar Lal Tandon and Bhupendra V. Shah were directors only till 1997. Krishan Kumar Batta was a Managing Director during 1997-98 but resigned in August 1998. Therefore, at the time when the alleged contravention took place, these persons were not in charge of the affairs of the company and responsible to it for the conduct of its business as required by Section 42 FEMA. Relying on the decision in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, where the Supreme Court interpreted a similar provision, i.e Section 141 of the Negotiable Instruments Act, 1881 (NI Act) it is submitted that the proceedings against each of the Petitioners was not sustainable in law.

7. Appearing on behalf of the Respondents, Mr. A.S. Chandhiok, the learned Additional Solicitor General of India submitted that the complaint made u/s 16(3) FEMA by the ED before the Special Director stated that the ICICI Bank by its letter dated 26th June 2002 informed the Reserve Bank of India (RBI) that the total dues to it from JTS was Rs. 1073 million. As per the XOX Statement for the half-year ended 30th June 2002 the JTS had export outstanding of Rs. 261,69,37,180/- comprising of 226 G Rs. According to him, therefore, even as on that date, the full value of the export proceeds were yet to be recovered and the contravention which perhaps began when the FERA was in force "continued" even after the FEMA was enacted. It was akin to a continuing offence.

8. While issuing notice in these petitions, this Court stayed the operation of the show cause notice dated 10th August 2004. That interim order has continued till date. It must be mentioned here that the Petitioners were permitted by an amendment to the writ petition, to challenge the notification dated 23rd March 2005 whereby the Special Director, ED was empowered to adjudicate cases of contravention of any of the provisions of the FERA 1973 or of any rule, direction or order made there under in exercise of his powers under Sections 50 and 51 of the FERA 1973 by virtue of Section 49(4) of the FEMA from the date of the said notification. The Petitioners were also permitted to challenge another notification dated 26th August 2005 issued in continuation of notification dated 13th August

2003 whereby the Special Director, ED was permitted to adjudicate the cases of contravention of any of the provisions of the FERA 1973 or of any rule, direction or order made there under in exercise of his powers under Sections 50 and 51 of the FERA 1973 by virtue of Section 49(4) of the FEMA from the date of his appointment i.e. 17th August 2003.

9. On 20th February 2007, the following two issues were identified by this Court for being adjudicated upon:

1. Whether the Petitioner, on the basis of the admitted facts, can be said to have violated the provisions of Section 8 of the Foreign Exchange Management Act, 1999 in respect of which the show cause notice in question has been issued?

2. Whether Mr S.K. Panda, Special Director of Enforcement - I in the Head Quarters of Delhi had the power to issue the show cause notice in question in view of the provisions of Section 16 of FEMA read with the Notification dated 1.6.2000 issued by the Central Government u/s 16(1) of FEMA?

However, during arguments, learned Counsel for the Petitioners confined his submissions to the first question.

10. The facts on the basis of which the ED has proceeded are set out in detail in the complaint enclosed with the show cause notice dated 10th August 2004. The complaint itself acknowledges that JTS was a 100% export-oriented unit (EOU) located at the Madras Export Processing Zone, Tambaram, Chennai and had been exporting the computer hard disk drives to the US. JTS was a wholly owned subsidiary of M/s JTS Corporation, USA. The complaint states that as per the statement of the half yearly ended as on 30th June 2002, JTS had an export outstanding of Rs. 261.69 crores comprising of 226 G Rs. JTS is shown to have had five bankers. Of these, the Exim Bank informed the RBI that JTS had only availed a term loan and had no export outstanding with them. The ICICI Bank informed the RBI that Rs. 1073 million was owed to it by JTS "towards loans extended". The State Bank of Travancore informed the RBI that "JTS was defunct", and that the letters addressed to the company had been returned undelivered by the postal authorities. Indian Bank too by a letter dated 11th September 2000 informed the RBI that "JTS had closed down their operations since 1998-99" and that the company was evicted in 1999. Even the RBI informed the ED that letters sent to JTS at its Mumbai address were returned undelivered. By letter dated 7th December 2003 the State Bank of Travancore informed that the export outstanding of JTS was Rs. 152.95 crores in respect of 175 G Rs. By the letter dated 10th December 2002 the SBI, Overseas Branch, Chennai informed that there were 8 outstanding bills aggregating Rs. 8.57 crores. However, both of them maintained that the letters sent to JTS were returned undelivered with the remarks "company closed". The further letter of 10th January 2003 of the State Bank of India, Overseas Branch, Chennai also confirmed that the eight bills for a total amount of Rs. 8.57 crores pending realization in respect of exports made by JTS were during the year 1997-98.

11. Although the letters from the banks pursuant to the clarification sought by the ED are dated later than 31st May 2002, the said letters mention export outstanding in the account of JTS for the period 1997-98. The mere fact that the statement of accounts for the half yearly ended as on 30th June 2002 showed export out standings does not extend the limitation for proceeding against the JTS and its directors for contravention of Section 18 FERA 1973 beyond the sunset period as set out in Section 49(3) FEMA. The complaint itself refers to the letters of the various banks which state that JTS had ceased its operations in 1999 itself. The above details unmistakably show that the exports in question were during the period 1997-98 and the contravention of Section 18 FERA due to the non-realisation of the export proceeds also pertained to the same period. Even according to the ED the non-realisation of the export proceeds did not pertain to any export later than 1997-98. At the given time, FEMA was not yet in force. There was therefore no question of the contravention of any provision of FEMA. The contravention if any was only of the provisions of FERA. However, the show cause notice dated 10th August 2004 and the complaint preceding it invoke only the provisions of Sections 7 and 8 FEMA read with Section 42 thereof and not the provisions of the FERA.

12. Even if the submission of the ED that the mere non-mention of a relevant statutory provision need not vitiate the show cause notice is accepted, the ED has one more hurdle to cross. It will have to show that the contravention of the provision of FERA "continued" even after FEMA came into force and in any event even beyond the "sunset" period. Section 49 FEMA which is the relevant provision as far as the present case is concerned reads thus:

49. Repeal and saving. (1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under Sub-section (1) of Section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of Sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal, -

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or "any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) any appeal preferred to the Appellate Board under Sub-section (2) of Section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

(c) every appeal from any decision or order of the Appellate Board under Sub-section (3) or Sub-section (4) of Section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in Sub-section (3), the mention of particular matters in Sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeal.

13. u/s 49(3) FEMA, no notice of the contravention of any provision of the FERA can be taken by the Special Director beyond the sunset period, i.e. beyond 31st May 2002. Consequently, unless the ED is able to show that the failure to realise the proceeds of exports for the period 1997-98, which was a contravention of the FERA provisions, "continued" even beyond the "sunset" period u/s 49(3) FEMA, the show cause notice issued would be unsustainable in law. The legislative intention appears to be that under the FEMA, there is only a limited continuation for a period of two years after coming into force of the FEMA of a contravention of a provision of FERA 1973. This can be contrasted with the FERA 1947 which was repealed by FERA 1973. FERA 1973 did not contain any sunset clause. That permitted the ED to prosecute a contravention of FERA 1947 even after its repeal. This was explained in the decision of the Supreme Court in P.V. Mohd. Barmay Sons v. Director of Enforcement 1993 [3] SCR 960.

14. Section 49(4) FEMA makes it abundantly clear that subject to the provisions of Section 49(3) "all offences committed under the repealed Act" shall continue to be governed by the provisions of the repealed Act, i.e., the FERA 1973 as if that Act, i.e., FERA 1973 was not repealed. Section 49(3) is the sunset clause and states that no court shall take cognizance of any offence and "no

adjudication officer shall take notice of any contravention u/s 51 FERA 1973" after the expiry of the period of two years from the date of the commencement of the FEMA. There is no dispute that the sunset period ended on 31st May 2002. Section 49(3) and (4) FEMA were interpreted by the Supreme Court in *Standard Chartered Bank v. Directorate of Enforcement* (2006) 4 SCC 278. It was explained in para 32 that the word "offence" occurring in Section 49(3) includes criminal prosecution as well as adjudication proceedings. A combined reading of Sections 49(3) and 49(4) FEMA and Section 6 GC Act show that unless proceedings had already commenced against the Petitioners under the FERA for contravention of Section 18 thereof before 31st May 2002, there was no question of such contravention continuing even after the expiry of the sunset period in terms of Section 49(3) FEMA. Therefore, even if the impugned show cause notice dated 10th August 2004 were to be read as pertaining to contraventions of FERA, it is unsustainable in law.

15. It was sought to be contended by Mr. Chandhiok that there were no pleadings to counter the facts stated in the show cause notice and the complaint and that unless some factual foundation is laid by the Petitioners, no interference is called for by the court. In particular, he referred to paras 4 and 5 of the writ petition.

16. The above submission of the learned ASG does not account for the fact that in para 4 of the writ petition it is stated that the parent US company had been supplying all the raw material to JTS for the manufacture and export of hard disk drives. The US Corporation was unable to withstand the intense competition from 1997 onwards and its business collapsed. Bankruptcy proceedings were filed against it and were pending since 17th November 1998. On 11th November 1997 itself on an application made by JTS, the RBI allowed the request of JTS for setting off the export receivables of the value of Rs. 513.2 crores against the import payable for the value of Rs. 534.3 crores covered by various GR/bills of entry as on 4th May 1997.

17. Further, the complaint itself notices that Bhupendra Shah had informed the ED that he had resigned from Board of Directors of JTS in November 1997. He had furnished a copy of the Form 32 filed by him with the Registrar of Companies (ROC). He had not participated in the day-to-day affairs of the company even during the time he was Director. The writ petition narrates how JTS was evicted from the MEPZ Special Economic Zone on 15th June 1999 and that "the evicted company"s moveable assets were charged to Banks and Financial Institutions, who moved the Court (Mumbai High Court/DRT) and disposed the assets to realize the dues, to the extent possible". These details are in fact not countered by the ED. In the above circumstances, it is difficult to accept the case of the ED that JTS somehow continued its operations even after 1997-98.

18. As regards the alternative submission, it has already been held that there could be no contravention of any provision of the FEMA in the instant case since the contravention if any on account of non-realisation of export proceeds was

complete even while the FERA was in force. Therefore the attempt by the ED to proceed against the Petitioners for the contravention of Sections 7 and 8 FEMA must fail. Further neither provision can actually be invoked by the ED.

19. Sections 7 and 8 FEMA read as under:

7. Export of goods and services. (1) Every exporter of goods shall -

(a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India;

(b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realisation of the export proceeds by such exporter.

(2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.

(3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

8. Realisation and repatriation of foreign exchange. Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

20. The Petitioners are right in pointing out that the Section 7 of the FEMA corresponds to Section 12 of the FERA 1947 whereas Section 8 FEMA corresponds to Section 10 FERA 1947. In *M.G. Wagh v. Jay Engineering Works Ltd.*, the Supreme Court held that Section 10 FERA 1947 (which corresponds to Section 8 FEMA) has only to do with receipt of foreign exchange other than realization of export proceeds. The realization of export proceeds is exclusively covered by Section 12 FERA 1947 (which corresponds to Section 7 FEMA). Consequently in the instant case Section 8 FEMA is not applicable.

21. In order to invoke Section 7 FEMA, the ED will have to show that the Petitioners breached the time limits specified in the FEM EGS Regulations. That it simply cannot since the exports were complete, and so was the contravention of non-realisation of the corresponding proceeds, in 1997-98 itself.

22. As regards the last submission, Section 42(1) FEMA extends the liability, by a deeming fiction, only to such Directors who were at the relevant point in time in charge of, and were responsible to the company for the conduct of its business. As regards two of the Petitioners, Bhupendra V. Shah and Manohar Lal Tandon, the complaint itself refers to the Form 32 filed by each of them with the ROC showing that they ceased to be Directors of JTS from 14th November 1997 onwards. If the export proceeds were to be realized by JTS for the year ending 31st March 1998, the contravention would be only thereafter, by which time these two Petitioners ceased to be Directors of JTS. Moreover, there is nothing in the complaint to explain how they could said to be in charge of the affairs of JTS and responsible to it for conduct of its business at the time of the contravention. Therefore, even on this ground, these two Petitioners are entitled to succeed.

23. For all of the above reasons, the impugned show cause notice No. T-4/8-M/2004 dated 10th August 2004 issued by the Special Director ED to each of the Petitioners is hereby quashed.

24. The writ petitions are allowed with costs of Rs. 10,000/- each which will be paid by the Respondents to each of the Petitioners within a period of four weeks from today.