

(2014) 03 DEL CK 0291
In the Delhi High Court
Case No : Criminal A. No. 142 of 2008

Jain Engineering Co.

APPELLANT

Vs

Enforcement Directorate

RESPONDENT

Date of Decision : 12-03-2014

Acts Referred:

Customs Act, 1962 — Section 108 111(m) 112 114A 127-H
Foreign Exchange Regulation Act, 1973 — Section 40 68(1) 68(2) 72 72(ii)

Citation : (2014) 142 DRJ 42

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : R.K. Handoo and Mr. Yoginder Handoo, Mr. Manish Shukla, Mr. Aditya Chaudhary and Mr. Yogesh Sharma, for the Appellant; Sachin Datta, CGSC and Mr. Vikram Aditya Narayan, for the Respondent

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J.—These three appeals are directed against the common judgment dated 19th November 2007 passed by the Appellate Tribunal for Foreign Exchange ("AT") dismissing the Appellants' Appeal Nos. 352 of 2004, 353 of 2004 and 355 of 2004 respectively. Thereby, the AT confirmed the adjudication orders ("AOs") dated 13th February 2004 and 16th February 2004 passed by the Commissioner, Directorate of Enforcement, New Delhi holding the Appellants guilty of contravention of Sections 8(1) read with Sections 68(1) and 68(2) of the Foreign Exchange Regulation Act, 1973 ("FERA") and imposing penalties of Rs. 75 lakhs, Rs. 15 lakhs and Rs. 50 lakhs on each of the Appellants respectively.

Background Facts

M/s. Jain Engineering Co. ("JEC"), M/s. Munni Export House ("MEH") and M/s. International Auto Suppliers ("TAS"), are three firms in which Mr. Sital Prasad Jain along with his three sons were partners. The case against them was that they were importing tractor parts at highly under-invoiced values from the suppliers in

the United Kingdom ("UK") and Italy. It was stated that the main suppliers in the UK, M/s. Gen Diesel, UK and M/s. Mayphil Limited, were arranging low value invoices for the purposes of transactions through the bank. However, the balance amount of the true value invoice was later paid by the importing firm to the importer over a period of time in cash by the representative of the aforementioned firms when they visited the UK. The Italian suppliers also followed dual invoicing with the balance payments made to them by the importers through their foreign banks in other countries.

2. By a letter dated 31st July 1997 written by H.M. Customs and Excise, London to the First Secretary, High Commission of India, London it was stated that the priced quoted by M/s. Mayphil Limited in its invoice No. 902586 dated 28th February 1997 of the supply of tractor parts to M/s. IAS was not correct; the actual value of the goods was much higher than that given in the import invoice; that the supplier had stated that this under invoicing was done for foreign exchange reasons to keep their value below the licensing restrictions imposed on them by the Indian authorities.

3. The case of the Enforcement Directorate ("ED") further was that the First Secretary, High Commission of India by its letter dated 6th August 1997 informing the Director General, Directorate of Revenue Intelligence ("DRI") that the enquiries regarding imports by Ms. MEH from Gen Diesel Products Limited, UK revealed that the unit prices quoted on invoice 1561 dated 20th February 1997 were not correct. The said letter disclosed the true value of the goods invoiced. It was further stated that MEH had made payment to Gen Diesel of the low value invoice totalling ₹6840.40, by bank transfer and that the payment of the balance was made over a period time. The true value invoice was sent directly to MEH by Gen Diesel. It was further disclosed that Gen Diesel also supplied to the associated companies of MEH, i.e., JEC and IAS. The summary of sales made to these three companies since 1994 was enclosed as an Annexure to the report. The invoices pertaining to the transactions were also enclosed. It was further stated that the report pertaining to export made by M/s. Mayphil, UK to M/s. IAS would be sent on completion of the investigation. Meanwhile, it appears that the customs authorities had also started investigating into the import of tractor parts by MEH from Gen Diesel Products Limited and by IAS from M/s. Mayphil, UK. The DRI by its letter dated 3rd February 1998 wrote to the Additional Commissioner of Customs, New Delhi enclosing a copy of the letter dated 6th August 1997 received from the First Secretary (Trade) to the High Commission of India, London.

Proceedings under the Customs Act

4. The Customs Authorities recorded the statement of Mr. Ravinder Kumar Jain u/s 108 of the Customs Act, 1962 ("CA") on 11th February 1998 and 27th March 1998. It also recorded the statement of Mr. Sital Prasad Jain on 27th March 1998 and the statement of Mr. Virender Kumar Jain on 11th February 1998. In his statement Mr. Sital Prasad Jain denied that M/s. Gen Diesel had sent two

invoices. He maintained that "they have sending us only one invoice which we have submitted to the Customs at the time of clearance of goods". On his part, Mr. Ravinder Kumar Jain made his statement on 27th March 1998 and stated that "it is wrong to say that M/s. Gen Diesel Products Ltd., England was sending us two invoices. He was only sending us one invoice, which we submitted you at the time of clearance of goods." It appears that both set of invoices were nevertheless shown to Mr. Ravinder Kumar Jain and in his answer he stated that "I am signing on the invoices as a token of having seen them today only." He then proceeded to confirm that there was a substantial difference in the prices and that they pertained to the goods of identical description.

5. Likewise, when two invoices were shown to Mr. Sital Prasad Jain he stated that he was signing on these invoices as a token of having seen them "today." He too confirmed that the values in the two invoices were different although the description of the goods was identical.

6. Meanwhile on 21st December 2000 the DRI wrote to the Deputy Commissioner of Customs (Prev.) stating that enquiries were conducted with the Italian companies with regard to the imports made by MEH and that comparison of the invoices obtained from the Italian Companies with the documents received from DRI revealed that the importers in India had grossly undervalued the goods in order to evade customs duty. It was stated that regarding the matter concerning dual invoicing the Italian suppliers had explained that the Indian companies had taken blank forms of invoices from them and prepared their own invoices for presenting them to Banks and Customs in India. The report received from Italian customs through High Commission of India, London along with the copies of invoices, payment documents and other relevant documents were enclosed with the said letter. The Deputy Director (C.I.) of DRI further pointed out that a request was made to UK Customs through High Commission of India, London for attestation of copies of invoices obtained from UK companies and for permission to use the documents in official proceeding in India. The HM Customs inter alia reported as under:

As I have previously made clear unless the material is obtained through a "Commission Rogateire" or "Letter of Request" we are unable to consent to its use in legal proceedings and are bound by the voluntary terms under which the material was originally acquired. To do other than this would contravene the provisions of the Criminal Justice (International Cooperation) Act, 1990.

7. Show cause notice ("SCNs") were issued on 11th October 2000, 11th December 2000 and 5th January 2001 to the three firms regarding the undervalued invoices of the importer to clear the goods from UK and Italy. This was followed by another SCN dated 20th April 2001 to M/s. MEH referred as "Importer A", M/s. IAS referred as "Importer B" and M/s. JEC referred as "Importer C u/s 28 read with Section 28AB of CA asking them to show cause why the differential duties together with interest should not be recovered; Importer B was required to show cause as to why the goods should not be

confiscated u/s 111(m) of CA; and why penalty u/s 112, sub section 112(a) read with sub section 112(v) and Section 114A should not be imposed on M/s. IAS and its partners Mr. Devender Kumar Jain, Mr. Virender Kumar Jain and Mr. Ravinder Kumar Jain. The show cause notice acknowledged that Mr. Sital Prasad Jain has passed away on 28th October 1998.

Settlement Commission proceedings

8. It appears that three firms and the three partners filed forty eight applications dated 4th December 2001 before the Settlement Commission ("SA"), Customs and Central Excise. These applications were considered by the SA which passed the final order on 20th June 2002. In the said final order it was noted in para 5 as under:

5. In the applications filed by the Applicant they have accepted the allegations made in the show cause notice and also accepted the additional duty liability as demanded by the Revenue in the show cause notices in question. In column No. 12 of their application, it is stated by the Applicant that the Settlement Commission may kindly determine the additional amount of duty payable on the basis of the evidence on record and the Applicant undertake to pay the amount of duty so determined. During the hearing for admission on 7th February 2002, when the position of disclosure of duty liability required to be made by the Applicant in his application was explained to the advocate for the Applicant, he readily submitted that they accept the full differential duty liability as demanded in the show cause notices issued in Annexure "A" to this order and also accepted that they have misdeclared the value of the goods while effecting the imports.

9. The submissions filed by the Appellants before the SA on 30th April 2002 have been noticed in para 7 of the said final order. Inter alia it was stated that the transactions relating to the three firms were done by late Mr. Sital Prasad Jain who was the active partner and who was managing the affairs including imports made by the three firms. The other three partners, i.e., Mr. Devender Kumar Jain, Mr. Virender Kumar Jain and Mr. Ravinder Kumar Jain, had no personal knowledge about the correctness of the invoice value. The order stated that "nevertheless as a measure of cooperation and with a view to settle the matter and to avoid protracted legal proceedings, the Appellants applied for settlement of the matter and agreed to discharge the differential duty liability in terms of the SCNs." It was again stated that the Appellants "were not in a position to make any confession or admission of under valuation and yet with a view to settle the matter and not to enter into any legal dispute they had accepted the duty liability."

10. The SA held, in para 10 of the final order, as under:

10. We have carefully gone through the facts of the case and the submissions made before us. So far as the show cause notice dated 27th November 2001 referred to in para 9 above, this show cause notice is not a part of the case before us. The Applicant is free to file an application for this show cause notice in

accordance with law. We are satisfied that the Applicant have made full and true disclosure of their duty liability as demanded in the show cause notices mentioned in Annexure "A" to this order. The Applicants have discharged the entire duty liability within the time required under the Admission Order. We are also satisfied that they have fully cooperated in the proceedings before the Commission. They are accordingly entitled to grant of immunities u/s 127-H of the Act. We accordingly grant them immunity from prosecution for offences under the Customs Act, 1962 and under the IPC with respect to the case covered by the applications and the show cause notices in question as mentioned in Annexure "A" to this order. As regards the request for grant of immunity under the Foreign Exchange Regulation Act, we are of the view that no disclosure has been made in the applications before us with a view to show that there has been any contravention of the provisions of the said Act or that any payment was settled for the imports in question through illegal channels. We have also noted that the Directorate of Enforcement have issued an Opportunity Notice and therefore, considering the facts of the case, it would not be in the interest of justice to grant any immunity for offences, if any, which may have been committed under FERA.

11. Thereafter in para 11, the deliberate contrivance adopted by the Appellants was noticed and it was held that "such deliberate contrivance adopted by the Applicant resulting into undue financial accommodation to them should not be allowed to be settled without inflicting a reasonable amount of interest. We are, therefore, inclined to grant only a partial waiver of the interest liability and order that the Applicant shall pay interest at the rate of 10% per annum on the amount of duty which became payable after the enactment of Finance (No. 2) Act, 1996. The Applicant shall calculate the interest amount from such date to the date of actual payment and have it certified by the Jurisdictional Customs authorities and make payment thereof within 30 days from the receipt of this order."

12. It will be seen from the above order that the entire focus has been on the differential duty payable by the Appellants under the CA. The SA took note of the fact that the ED had issued an Opportunity Notice for the criminal proceedings and therefore, it would not be in the interest of justice to grant any immunity for offences committed under FERA." The Court is informed that as far as the Opportunity Notice is concerned, no criminal proceedings have been instituted against the Appellants under FERA.

13. The above order of the SA cannot, as was urged by Mr. Sachin Datta, learned Standing counsel for the ED, be taken to be an admission by the Appellants of violation of Section 8(1) FERA. That was a separate liability which was not covered by the final order of the SA. Only because the SCNs issued under the CA formed the basis of the proceedings under FERA, the closure proceedings under the CA by the passing of the final order of the SA did not mean that the ED was relieved of the burden of proving the allegations noticed in the SCNs.

14. It must be noticed at this stage that the SCNs issued under the CA have been verbatim reproduced not only in the SCNs under FERA but also large parts of it figured in the AO. It appears that there was no independent investigation undertaken by the ED of the allegations contained in the SCNs issued under the CA. Merely because the SCNs issued under the CA ended in a final order passed by the SA would not ipso facto mean that those allegations were proved for the purposes of the violation of Section 8(1) FERA as well.

Applicability of FERA

15. As far as the FERA proceedings are concerned, the submission of Mr. R.K. Handoo, learned counsel for the Appellants, is that since the SCNs were issued under FERA on 16th May 2002 after the repeal of FERA and enactment of the Foreign Exchange Management Act ("FEMA") and further since the Adjudicating Officer was himself authorised to act as such only by a notification dated 28th August 2003, the entire proceedings under FERA was bad in law. Mr. Handoo sought to distinguish the decision of the Division Bench of this Court in Dr. S. Ramakrishna Vs. Enforcement Directorate, He also sought to distinguish the decisions in Ranjit Raj and Others Vs. Sanjay Mishra and Another, and Krishan Vs. R.K. Virmani, Air Customs Officer,

16. In the considered view of the Court, there is no merit in the above contention of the Appellants. From the documents placed on record, it appears that simultaneous with the initiation of proceedings under the CA for recovery of the differential duty, the DRI was seeking documents from abroad for the purposes of examining whether the transactions involved money laundering activities. The FERA was in force at the time when the imports in question were made, i.e. in 1997 and 1998. The SCNs issued under the CA formed the basis for the SCNs under FERA. It is not possible on the facts of the present case to hold that the cause of action that formed the basis of the proceedings under FERA arose only after its repeal in 2000. The SCNs issued under FERA during the sunset period i.e. prior to 31st May 2002 were a continuation of the proceedings in relation to alleged contravention of Section 8(1) FERA arising out of the imports of tractor parts by the Appellants in 1997-98.

Documents collected from abroad not authenticated

17. It was next submitted that there was no valid evidence to prove the allegations in the SCNs. Although the allegations were based on documents obtained from the exporters in U.K. and Italy, admittedly no effort was made by the ED to authenticate the said documents u/s 72 FERA. The said provision reads as under:

72. Presumption as to documents in certain cases. Where any document-

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or

(ii) has been received from any place outside India (duly authenticated by such

authority or person and in such manner as may be prescribed) in the course of investigation of any offence under this Act alleged to have been committed by any person, and such documents is tendered in any proceedings under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the adjudicating officer, as the case may be, shall-

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.

18. It was incumbent u/s 72(ii) FERA read with Clause (a) thereof for each of the documents gathered from outside India to be authenticated by the concerned officers of the Indian High Commission in both the UK and Italy. In the present case admittedly documents were simply forwarded by the office without any authentication as such. The procedure for authentication is set out in the Foreign Exchange Regulations (Authentication of Documents) Rules 1976. Clearly the said procedure was not followed in the present case. What appears to have happened is that the ED applied to the ACMM for issuance of Letters Rogatory for obtaining the said documents through the official channel. Mr. Datta very candidly stated that pursuant to the orders passed by the learned ACMM, no documents were in fact received. Surprisingly in the AO it is noted by the Commissioner:

Further I observe that the documents from the overseas suppliers have been obtained in terms of the Letter of Rogatory dated 5th January 2001 issued by Additional Chief Metropolitan Magistrate, New Delhi in terms of this Letter of Rogatory, the documents to be collected pursuant to this letter have to be true copies of the corresponding entries or of documents. This Letter of Rogatory does not stipulate that original documents be supplied and accordingly the documents supplied in consonance with the terms set out under the Letter of Rogatory are an admissible piece of evidence.

19. The above observations were factually erroneous and contrary to the record. The AO next proceeded on the basis that the statement recorded u/s 40 FERA and Section 108CA are judicial proceedings and therefore admissible in evidence. What the AO failed to note that in both statements there is no admission by the Appellants of the fact that the invoices were sent by the importers to them, one

reflecting the transaction value and the other true value. As noticed hereinbefore, the statements u/s 40 FERA cannot, therefore, be ipso facto said to constitute evidence of contravention of Section 8(1) FERA by the Appellants. Thirdly, the AO accepted the overseas enquiry report. The overseas report is again an unauthenticated document and could not have been used as substantive evidence for the purpose of adjudication proceedings under FERA unless the requirement of Section 72 FERA was met. In the absence of authentication of the documents obtained from outside India in terms of the Rules prescribed for that purpose it was not open to the Commissioner to straightway rely on the said report as substantive admissible evidence for the purpose of holding the Appellants to be in violation of Section 8 FERA.

20. A perusal of the AO shows that it was based entirely on what was stated in the SCNs issued under the CA and there was no investigation to verify the particulars set out in the said documents. It was unsafe for the AO to proceed on the basis of the above documents to hold the Appellants guilty of contravention u/s 8(1) FERA. The Commissioner has in the impugned AO simply set out the contents of the SCNs issued under the CA as findings under the FERA without realising that the documents on which the SCNs were drawn up were not authenticated in accordance with law.

Conclusion

21. For all the aforementioned reasons, the Court finds that the AOs dated 13th and 16th February 2004 and the impugned order dated 19th November 2007 of the AT are unsustainable in law. Both orders are set aside. The appeals are allowed in the above terms. The amount, if any, paid by the Appellants pursuant to the impugned AOs or order of the AT shall be refunded to them in accordance with law within eight weeks.