
(2016) 05 SC CK 0037

In the Supreme Court Of India

Case No : Civil Appeal No. 11127 of 2011

Jatin C. Jhaveri

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-05-2016

Acts Referred:

Customs Act, 1962 — Section 113(d), 113(e), 113(i)
Foreign Exchange Regulation Act, 1973 — Section 8(1)

Citation : (2016) 163 AIC 220 : (2016) AIR(SCW) 2573 : (2016) 4 AIRBomR 392 : (2016) AIRSC 2573 : (2016) 4 ALLMR 957 : (2016) 117 ALR 494 : (2016) 122 CutLT 210 : (2016) 336 ELT 3 : (2016) 3 RCRCriminal 161 : (2016) 3 RecentApexJudgments(RAJ) 451 : (2016) 5 Scale 58

Hon'ble Judges : T.S. Thakur, CJI;Uday Umesh Lalit, J.

Bench : Division Bench

Advocate : Bhargava V. Desai, Advocate, for the Appellant; B. Krishna Prasad, Advocate, for the Respondent

Final Decision : Disposed Of

Judgement

Uday U. Lalit, J. - These appeals arise out of common judgment and order dated 19.10.2010 passed by the High Court of Judicature at Bombay in FERA Appeal Nos.64-66 of 2006 and in Writ Petition No.2976 of 2004. The challenge in Civil Appeal Nos.11128-11131 of 2011 at the instance of Union of India is to the decision of the High Court dismissing FERA Appeal Nos.64-66 of 2006 while Civil Appeal No.11127 of 2011 filed by one Jatin Jhaveri challenges the dismissal of his Writ Petition No.2976 of 2004.

2. The facts leading to these appeals are as under:-

A. On the night intervening 27th and 28th July, 1993, one Ajit Dodia intending to board a flight to Hongkong from Mumbai, had checked in a grey suitcase and a black briefcase. On suspicion, the Custom Officers searched the baggage and found the suitcase to be containing US \$ 289,250 while the brief case contained US \$ 114,300. The currency was seized and Ajit Dodia was questioned. He

disclosed that he was to accompany Jatin Jhaveri, a diamond trader, that his brother Jitendra Dodia was working with Jatin Jhaveri as a sorter, that his trip was finalized and arranged by Jatin Jhaveri who had driven him to the Airport. In his statement Jitendra Dodia confirmed that he was working with Jatin Jhaveri and that he and Jatin Jhaveri had packed US dollars in bundles in the evening. However Jatin Jhaveri was not available for next two months i.e. till 27.09.1993.

B. In his statement dated 12.10.1993, Jatin Jhaveri confirmed that he was to accompany Ajit Dodia to Hongkong on the relevant date and that he had handed over his suitcase to Ajit Dodia who in turn was to hand it over to the brother of Jatin Jhaveri at Hongkong. He however denied ownership of the currency in question and also stated that he had nothing to do with the briefcase. He repeated in writing to stress the point saying "It does not belong to me". This incident led to initiation of proceedings under Clauses (d), (e) and (i) of Section 113 of the Customs Act, 1962 proposing penalty as well as confiscation of the currency.

C. In defence, Jatin Jhaveri now contended that he had been to USA in June 1993 and had entered into contract for supply of polished diamonds and that in pursuance of the contract he had received US \$ 289,250. According to him, his baggage that arrived along with him on 25.06.1993 had contained US \$ 254,000 while other bag which arrived three days later on 28.06.1993 contained remainder namely US \$ 35,250. In support of his claim, reliance was placed on Currency Declaration Form No.100250 dated 25.06.1993 in respect of US \$ 254,000 and Currency Declaration Form No.10763 dated 28.06.1993 in respect of US \$ 35,250. According to him the currency was obtained and imported by him as advance payment towards supply of diamonds, that he could not deposit the currency in the bank as the bank had refused to accept the same and therefore he was proposing to take it along with him to Hongkong on 27.07.1993. It was his further case that while he was going towards the Airport he had received a message that his mother was ill and that Ajit Dodia was intercepted with currency and therefore he did not go to the Airport.

D. Commissioner of Customs by his order dated 30.08.1995 concluded that the currency was being taken by Ajit Dodia illegally. He found that Jatin Jhaveri had played a major role and made available the currency in question and had also packed and concealed the same in the baggage of Ajit Dodia. As regards Currency Declaration Forms, it was observed:

"Shri Jatin C. Jhaveri has come forward with two Currency, Declaration Forms dated 25.6.93 and 28.6.93 to substantiate his claim that this currency was legally imported into India, when he had come from USA on 25.6.93 with US \$ 2,59,250/- and made this declaration before the Customs on his arrival. Had these currency declaration forms been with Shri Jatin Jhaveri then in the normal course, they should have been found along with the foreign currency only and these receipts should have been recovered during the search of the office/residential premises of Shri Jatin Jhaveri. He ought to have come forward before

the Customs Officers on the night of 27th/28th July, 1993 after it was seized at the time of its smuggling out. He did not do so. He was also specifically questioned in the statement on 12.10.93 and he had made a statement claiming that the seized foreign currency, did not belong to him. Thus, he had disowned the currency seized from the baggage of Shri Ajit Dodia. Further no plausible explanation or reason has been offered by him as to what prevented him from going abroad on 27th /28th July 1993. Had these currency been legally brought into India, Shri Jatin Jhaveri would have perhaps himself checked the baggage through Customs, but the fact that he left to be checked and cleared through Customs by Shri Ajit Dodia itself indicate that he did not have any honest design of flying abroad on that night and that he did not have any legal documents for possession of these currency".

In the premises, he ordered confiscation of foreign currency of US \$ 403,550 (US \$ 289,250 recovered from the suitcase and US \$ 143,300 from the Brief case). He also imposed penalty of RS. 10 Lacs on Jatin Jhaveri and of RS. 3 lacs on Ajit Dodia and of RS. 2 lacs on Jitendra Dodia.

E. A Show Cause Notice dated 21.11.1997 was thereafter issued by Directorate of Enforcement, Mumbai for contravention of provisions of Section 8(1) read with 64(2) of Foreign Exchange Regulation Act, 1973 (herein after referred to as FERA).

F. On 27.11.1998 Appeal Nos.C/537/95-Bom, C/576/95-Bom and C/577/95-Bom preferred by Jatin Jhaveri, Ajit Dodia and Jitendra Dodia against the order of the Commissioner of Customs were disposed by the Customs Excise and Gold Control Appellate Tribunal (CEGAT, for short), West Regional Bench, Mumbai. It held that though Jatin Jhaveri had disowned the currency in his statement dated 12.10.1993, it did not mean that he had forfeited the ownership and could not make a claim in respect thereof at a later stage. The concerned Currency Declaration Forms according to CEGAT sufficiently proved that the currency was brought in by said Jatin Jhaveri. It however held that the currency amounting to US \$ 289,250 was sought to be unauthorisedly exported, and was liable to confiscation but imposed fine of RS. 9 lacs in lieu of confiscation of US \$ 289,250. The personal penalty imposed on Jatin Jhaveri was also reduced from RS. 10 lacs to 7 lacs. In so far as currency amounting to US \$ 143,300 was concerned, since no one made any claim in respect thereof, the confiscation was confirmed but the personal penalty imposed on Ajit Dodia was reduced to RS. 1 lac. As regards Jitendra Dodia, it was observed that he had dissociated himself and the role attributed to him was also limited to packing the bag. This decision rendered by CEGAT was not challenged and attained finality in respect of proceedings under the Customs Act.

G. Thereafter an addendum dated 06.08.1999 was issued by the Directorate of Enforcement, Mumbai to the earlier Show Cause Notice dated 21.11.1997 as to why the currency in question be not confiscated under the provisions of FERA.

H. The proceedings so initiated under FERA culminated in an order dated 04.10.1999 passed by the Special Director of Enforcement, Mumbai. He observed that in his statement dated 12.10.1993 Jatin Jhaveri had emphatically denied having any connection with the seized currency and there was no whisper in the statement that any part of that currency was brought by him from USA which represented advance payment towards export or that he was in possession of relevant Currency Declaration Form in support of his claim. He found that the Immigration/Embarkation Card of Ajit Dodia was admittedly filled in by Jatin Jhaveri which indicated that he was physically present at the Airport along with Ajit Dodia. As regards genuineness of the Currency Declaration Forms, he relied upon the observations made by Commissioner of Customs, Mumbai in adjudication order dated 30.08.1995 as quoted above. The Special Director concluded as under:-

"From the evidence discussed above, only irresistible conclusion forthcoming is that the entire foreign exchange of US \$ 403, 550 seized from Shri Ajit Dodia by the Air Customs, Mumbai was in fact illegally acquired by the said Shri Jatin Jhaveri, as indicated in the impugned SCN and then transferred to Shri Ajit K. Dodia for its onward transfer to his (Shri Jatin's) brother in Hongkong. Similarly, the notice, Shri Ajit Dodia has in fact otherwise acquired the said foreign exchange of US \$ 403,550 from Shri Jatin Jhaveri, a person other than an Authorised Dealer in Foreign exchange in India, which was later on seized by the Air Customs Officers from Shri Ajit Dodia on 28.07.1993 under the panchanama. It is equally abundantly crystal clear that Shri Jitendra Dodia has in fact aided and abetted said Shri Jatin Jhaveri in transferring and his brother Shri Ajit K. Dodia in acquiring the aforesaid foreign exchange of US \$ 403,550 from said Shri Jatin Jhaveri. All the three notices viz. Shri Jatin Jhaveri, Ajit Dodia and Jitendra K. Dodia have failed to produce any permission of the RBI as required under Sec. 8(1) of the FERA 1973 for acquiring/transferring foreign exchange as indicated in acquiring/transferring foreign exchange as indicated in the impugned Show Cause Notice. Thus the charges of contravention of Sec. 8(1) of the FERA 1973 against Shri Jatin Jhaveri and Shri Ajit Dodia and of Sec. 8(1) r/w Sec. 64(2) of the FERA 1973 against Shri Jitendra K. Dodia are proved beyond any doubt. Accordingly, I hold them guilty of these respective contraventions against them.

Concluding thus, the Special Director imposed penalty of RS. 30 lacs each on Jatin Jhaveri and Ajit Dodia and of RS. 7.5 lacs on Jitendra Dodia. It was held that the currency in question was liable to confiscation under Section 63 of FERA and it was so ordered.

I. This order of the Special Director was challenged in Appeal Nos.454, 462 and 463 of 1999 by Jatin Jhaveri, Jitendra Dodia and Ajit Dodia respectively before the Appellate Tribunal for Foreign Exchange, which disposed of those appeals by its order dated 10.03.2004. It accepted the appeal preferred by Jitendra Dodia and held that he could not be held guilty of the charge of abetment in acquiring and transferring of Foreign Exchange unlawfully. In appeal preferred by Ajit

Dodia, the confiscation of currency amounting to US \$ 114,300 was affirmed but the penalty was reduced to RS. 1 lac. As regards, appeal preferred by Jatin Jhaveri, the Currency Declaration Forms furnished by him were taken to be strong pieces of evidence. It was observed as under:-

"Simply because of the fact that the custom authorities are not able to trace out office copies of these forms, it will not render these forms as not being authentic and therefore inadmissible. It is for the respondent to prove that these forms were not genuine. As regards the confirmatory evidence of overseas buyers, the respondents could have called them for cross examination, if they have any doubt the authenticity of their version."

Allowing the appeal preferred by Jatin Jhaveri, the order of confiscation in respect of US \$ 289,250 was quashed on the ground that the acquisition was duly explained.

J. The aforesaid order of the Appellate Tribunal was challenged by Union of India represented by Director of Enforcement in the High Court of Bombay. Writ Petition No.2976 of 2004 was also preferred by Jatin Jhaveri in the High Court contending that he was entitled to the release of US \$ 289,250 along with interest @ 18%. The High Court affirmed the view taken by the Appellate Tribunal and dismissed FERA Appeal No.64-66 of 2006 by its judgment and order dated 19.10.2010. It was observed that the order of CEGAT having attained finality, that order had definite bearing on the controversy in question and though the findings recorded in the Customs proceedings may not be binding on FERA proceedings, it was not possible for the High Court to take a different view in the matter. By the same judgment the High Court allowed Writ Petition No.2976 of 2004 holding that Jatin Jhaveri was entitled to the currency amounting to US \$ 289,250 but would not be entitled to any interest thereon.

3. Jatin Jhaveri, being aggrieved in so far as rejection of prayer for grant of interest was concerned, preferred SLP (C) No.5788 of 2011. On the other hand, Union of India preferred SLP (C) Nos.26671-26674 of 2011 challenging the dismissal of FERA Appeal Nos.64-66 of 2006. Special Leave to Appeal in all the matters was granted by this Court vide order dated 09.12.2011. During the pendency of these appeals, by order dated 14.02.2014 passed in Notice of Motion No.225 of 2012 in Writ Petition No. 2976 of 2004 preferred by Jatin Jhaveri, the Customs Department was permitted by the High Court to refund the amount of US \$ 289,250 in Indian Rupees. Accordingly amount of RS. 1,83,09,525 was refunded and credited to the account of Jatin Jhaveri subject to the undertaking to return the said sum with interest in case this Court were to accept the appeals preferred by Union of India.

4. Mr. R.P. Bhatt, learned Senior Advocate, who appeared for Jatin Jhaveri submitted that the currency declaration forms were accepted and relied upon in Customs proceedings and thus the aspect of "bringing into India" of the currency in question, was rightly held in his favour. The ownership of the currency having

been established, in his submission, Jatin Jhaveri was entitled to the same. On the other hand, Mr. K. Radha Krishnan, learned Senior Advocate, appearing for Union of India submitted that the initial statement of Jatin Jhaveri recorded on 12.10.1993, which itself was more than two months after the seizure, did not even whisper about currency declaration forms and no ownership in respect of currency was claimed. In his submission, Currency Declaration Forms were rightly observed to be suspicious and not relied upon by the Special Director. It was further submitted that the scope of proceedings under FERA was distinct and different and exoneration in Customs proceedings would not enure to the advantage of the person concerned in proceedings under FERA and in any case the crucial question which the High Court failed to appreciate was the absence of requisite permission of Reserve Bank of India.

5. Before we deal with rival submissions, it would be necessary to set out relevant provisions. The violation alleged in Customs proceedings pertained to Clauses (d) (e) and (i) of Section 113 of the Customs Act, 1962. The relevant provisions of Section 113 with relevant clauses is as under:

"Section 113: Confiscation of goods attempted to be improperly exported, etc:-

The following export goods shall be liable to confiscation

.....

.....

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

.....

(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77;"

Section 8(1) of FERA is as under:

"8. (1) 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, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange: Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

6. The emphasis in the relevant clauses of Section 113 of the Customs Act is on an attempt to export goods contrary to any prohibition imposed by or under said

Act or any other law in force for the time being in force. On the other hand, what constitutes a violation under Section 8(1) of FERA is when a person, except with the previous special or general permission of the Reserve Bank, purchases or otherwise "acquires" any foreign exchange. The emphasis in proceedings under FERA is, therefore, on such acquisition of foreign exchange without the previous general or special permission of the Reserve Bank. Any failure in that behalf would lead to incidents including confiscation under Section 63 of the FERA.

7. We have gone through the currency declaration forms in question. It is relevant that in his first statement dated 12.10.1993, Jatin Jhaveri had clearly dissociated himself and disowned the currency in question. This statement itself was more than two months after the seizure. The subsequent reliance on currency declaration forms was, therefore, rightly found suspicious by Special Director in his order dated 04.10.1999. Mr. Bhatt, learned Senior Advocate placed before us letters dated 14.06.1993 and 23.06.1993 in support of the contention that contracts were entered into pursuant to which currency amounting to US \$ 289,250 was received by Jatin Jhaveri while he was in USA. These letters are bereft of any details and in our view are quite self-serving. At the same time, as found by the Special Director, the original passport of Jatin Jhaveri was never produced from which it could be established that he was in USA on the dates alleged.

8. However, what is of greater significance and import is the absence of any special or general permission as contemplated under Section 8(1) of FERA. No such permission is produced or relied upon. In fact, that is not even the case that Jatin Jhaveri had applied for and got such permission. For the purpose of Section 8(1) of FERA, "acquisition" of foreign exchange must be with general or special permission of the Reserve Bank of India. Even if the matter of 'bringing into India' of the currency in question, as submitted by Mr. R.P. Bhatt, learned Senior Advocate, is taken to have been established, though that part of the matter itself is not free from doubt, the question regarding 'acquisition' of currency must be independently established in the light of requirements under said Section 8(1). The assessment in that behalf by the Appellate Authority under FERA and the High Court is completely incorrect.

9. Mr. Bhatt, learned Senior Advocate attempted to rely on Notification No.FERA-81/89-RB dated 09.08.1989 as amended upto 09.03.1999, to submit that by said Notification the Reserve Bank of India was pleased to permit any person to bring into India from any place outside India foreign exchange without any limit, provided a declaration in such form as may be specified by the Reserve Bank of India is made on arrival in India to the Customs Authorities. First, said notification is in relation to Section 13 of FERA and not in relation to Section 8(1) thereof. Secondly, this notification was not adverted or referred to at any stage and in any case does not deal with acquisition as contemplated under Section 8(1) of FERA.

10. We, therefore, set aside the orders passed by the Appellate Tribunal, FERA

and by the High Court while accepting the view taken by the Special Director. Consequently, Civil Appeal Nos.11128-11131/2011 preferred by Union of India are allowed and the order dated 04.10.1999 passed by Special Director of Enforcement, Mumbai, stands restored. As we have upheld the order of confiscation, the challenge preferred by Jatin Jhaveri in the form of his writ petition and consequential Civil Appeal No.11127/2011 must fail and said appeal is dismissed.

11. Since the amount of RS. 1,83,09,525/- was refunded and credited to the account of Jatin Jhaveri during the pendency of the proceedings subject to his undertaking to return the same with interest, he is directed to refund the amount with interest @ 10% per annum within six weeks from the date of this judgment.

12. The appeals are disposed of in the aforesaid terms.

13. No order as to costs.