

(2014) 07 AHC CK 0117

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 13627 of 2014

JVL Agro Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 31-07-2014

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 13, 13(1), 15

Citation : (2014) 7 ADJ 343 : (2014) 87 ALLCC 413 : (2014) 5 AWC 5346

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Manu Ghildyal and R.P. Agarwal, Advocate for the Appellant; Ashok Bhatnagar and Manish Trivedi, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

1. In these proceedings, the petitioner has called into question the legality of an order dated 23 December 2013 passed by the Chief General Manager of the Reserve Bank of India on an application moved by the petitioner u/s 15 of the Foreign Exchange Management Act, 1999, FEMA, for compounding a contravention. By the order impugned, the application for compounding of an admitted contravention of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004, 2004 Regulations, was allowed subject to the payment of an amount of Rs. 57.74 lac which was to be deposited with the Reserve Bank within fifteen days. An application filed by the petitioner for review of the order has been dismissed on 23 January 2014 on the ground that there is no such power that vests in the Reserve Bank. Finally, the petitioner has called into question a summons which has been issued by the Assistant Director in the Directorate of Enforcement on 22 May 2014 and an order of the Reserve Bank dated 9 April 2014 requiring the petitioner to approach the Reserve Bank for prior approval for any ODI transactions in respect of its wholly owned subsidiary in Singapore. In 2007, the petitioner incorporated a wholly owned subsidiary in Singapore. The subject-matter of the contraventions which took

place, consists of two remittances. The first remittance of USD 15,000/- took place on 14 August 2007 which was reported to the Reserve Bank on 9 March 2012. The second remittance of USD 5,00,000/- took place on 16 August 2007 which was reported to the Reserve Bank after a delay of over four and a half years on 9 March 2012. The petitioner also issued on 30 December 2011 a corporate guarantee of USD 10 million (equivalent to Rs. 53.01 crore), which was reported to the Reserve Bank on 28 September 2013. The wholly owned subsidiary of the petitioner was allotted a Unique Identification Number, UIN on 8 February 2013. When the first and the second remittances were made, admittedly the petitioner had not obtained a UIN. Moreover, the petitioner did not submit Annual Performance Reports for 2008 to 2010 within the prescribed period. These reports were submitted on 14 June 2013, on-line, with a delay between three and five years.

2. On 10 April 2012, a letter was addressed by the Reserve Bank to the petitioner following the submission of ODI forms on 9 March 2012 through the authorised dealer, Punjab National Bank. By its letter, the Reserve Bank informed the petitioner that it appeared that there was a violation of the 2004 Regulations notified on 7 July 2004. The violation, as stated in the letter, was that the petitioner had effected a remittance on 14 August 2007 for USD 15,000/- towards equity and a remittance of USD 5,00,000/- on 16 August 2007 which had been reported to the Reserve Bank after an inordinate delay, on 9 March 2012. The petitioner was, therefore, called upon to furnish the reason for reporting the transactions after a lapse of four years. The petitioner was, however, informed that it had an option of moving the Reserve Bank for compounding the contraventions in terms of the prevailing guidelines.

3. On 16 May 2012, the petitioner moved the Reserve Bank for compounding of the contraventions. While admitting the contraventions, the petitioner stated as follows:

?We may submit that the delay in reporting transaction to Reserve Bank of India is not willful, unintentional, without having mala fide and fraudulent intentions and occurred out of ignorance and non availability of competent person in Varanasi. We most humbly request you, kindly compound the contravention as requested in the application.?

4. On 27 September 2012, the Reserve Bank, while referring to the application for compounding, drew to the attention of the petitioner that its authorised dealer, Punjab National Bank had also reported another transaction involving a guarantee of USD 10 million issued by the petitioner to Standard Chartered Bank which did not form a part of the compounding application, though it was a financial commitment made to a wholly owned subsidiary. The petitioner was, thereupon, directed to reconcile the position and complete all the formalities for the allotment of a UIN to the subsidiary, only upon which the application for compounding could be considered.

5. In response, the petitioner by its letter dated 4 December 2012 submitted an ODI form for reporting an investment of USD 10 million in the form of a corporate guarantee in favour of the Standard Chartered Bank of Singapore which was stated to be filed on 9 March 2012 through the authorised dealer. The petitioner, accordingly, re-submitted an application for compounding the contravention of the 2004 Regulations once again claiming that the delay in reporting the transaction was not willful or mala fide but had occurred out of ignorance and on account of the non availability of a competent person.

6. On 3 May 2013, the Reserve Bank in a further communication to the petitioner stated that the petitioner had not yet reported all the remittances on-line through its authorised dealer and had not completed other administrative compliances in the absence of which the application for compounding could not be considered. On 25 June 2013, the petitioner re-submitted its compounding application with all necessary documents. The plea for compounding was sought to be justified on the following grounds:

?We may submit that the delay in reporting transaction to Reserve Bank of India is not willful, unintentional, without having mala fide and fraudulent intentions and occurred out of ignorance and non availability of competent person in Varanasi. We most humbly request you, kindly compound the contravention as requested in the application.?

7. The Chief General Manager of the Reserve Bank decided upon the application for compounding by an order dated 23 December 2013. The petitioner was represented at the personal hearing through its Chartered Accountant. The order of the Chief General Manager specifically records that the petitioner had admitted to the contraventions in respect of which compounding was sought. The relevant extract from the order reads as follows:

?... During the personal hearing, the representative of the applicant admitted the contraventions committed by the applicant for which they have sought the compounding. The representative of the applicant submitted that contraventions occurred as the applicant was not aware of the procedures and the lapse was unintentional and requested to take a lenient view.?

8. The order of compounding held the petitioner guilty of having contravened Regulations 6(2)(vi), 10 and 15(iii) of the 2004 Regulations. The amount involved in the contravention was found to be USD 10.515 million equivalent to Rs. 55.12 crores. The order notes that u/s 13 of the FEMA, any person contravening any provision of the Act is liable to a penalty up to thrice the sum involved in the contravention upon adjudication. However, a lenient view was taken having due regard to the rationale underlying the compounding provisions, the submissions which were urged and the facts and circumstances of the case. The admitted contraventions were, accordingly, compounded subject to the payment of an amount of Rs. 57.74 lacs which was directed to be deposited within a period of fifteen, days.

9. The petitioner filed an application seeking a review of the compounding order. On that application, the Chief General Manager, while passing an order on 24 January 2014, noted, again that the authorised representative of the petitioner, its Chartered Accountant who appeared at the personal hearing, admitted to the contraventions and pleaded for leniency:

?... Shri Shishir Bajpai (FCA) had appeared for personal hearing as authorised representative of the company and admitted the contraventions committed by the applicant and pleaded that a lenient view may be taken in the matter....?

10. The application for review was rejected on the ground that the Foreign Exchange (Compounding Proceedings) Rules, 2000, Compounding Rules,, do not confer right of review. The petitioner was also; placed on notice that under Rule 10, in the event a person fails to pay the sum compounded within the time specified in Rule 9, he shall be deemed to have never made an application for compounding of any contravention under the rules. The petitioner was also placed on notice that in case the contravention is not compounded, the other provisions of the FEMA would apply.

11. The first submission which has been urged on behalf of the petitioner is that u/s 13 of the FEMA, a penalty for the contravention of the provisions of the Act is provided upto three times the sum involved in the contravention where the amount is quantifiable or upto Rs. 2 lac where the amount is not quantifiable. In the present case, it was submitted that the amount involved in the contravention is not quantifiable and, hence, only a penalty up to Rs. 2 lac could have been imposed.

12. There is no merit in the submission. Section 13(1) of the FEMA provides as follows:

13. Penalties.--(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues--"

13. In the present case, the order of compounding specifically notes that the amount which was involved in the contravention of the provisions of the FEMA was Rs. 55.12 crore equivalent to USD 10.515 million. In the circumstances, there is absolutely no merit in the contention that the amount involved in the contravention is not quantifiable or that consequently, the cap of Rs. 2 lacs on the maximum penalty imposable would be attracted. The cap of Rs. 2 lacs applies only where the amount which is involved in the contravention is not quantifiable. In the present case, the amount involved in (sic) contravention is

quantifiable and has been quantified. Moreover, it must be noted that the proviso to Rule 4(1) of the Compounding Rules specifically provides that no contravention shall be compounded unless the amount involved in such contravention is quantifiable. When the pensioner filed the application for compounding the contravention, that was obviously on the basis that the amount involved in the contravention was quantifiable. Having filed the application for compounding, the petitioner cannot now be heard to turn around and argue to the contrary.

14. The second submission which has been urged, is that no reasons have been furnished in the impugned order of compounding for coming to the conclusion that the petitioner had contravened the provisions of the 2004 Regulations or for imposing a penalty of Rs. 57.74 lac. Hence, it has been urged that it would be appropriate for this Court to set aside the impugned order and to remand the proceedings to the Chief General Manager for a decision afresh.

15. Section 15 of the FEMA relates to the power to compound a contravention. Section 15 provides as follows:

15. Power to compound contravention.--(1) Any contravention u/s 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

(2) Where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

16. Section 15 provides for an application by a person committing a contravention under the provisions of Section 13. Any such contravention u/s 13 can be compounded, on an application made by the person committing the contravention, by the competent officer of the Directorate of Enforcement or of the Reserve Bank, as authorised by the Central Government. The Compounding Rules regulate the procedure to be followed in regard to the compounding of contraventions. Rule 4 deals with the power of the Reserve Bank to compound a contravention and vests jurisdiction at different levels in a hierarchy of officers depending upon the amount involved in the contravention under Rule 8, the compounding authority is entitled to call for information, records or other documents relevant to the compounding proceedings, whereupon the compounding authority has to pass an order of compounding after furnishing an opportunity of being heard to all concerned. Under Rule 9, the sum for which the contravention is compounded as specified in the order of compounding under

Rule 8(2) is required to be paid by a demand draft in favour of the compounding authority within fifteen days from the date of the order of compounding. Rule 10 provides as follows:

¶10. In case a person fails to pay the sum compounded in accordance with rule 9 within the time specified in that rule, he shall be deemed to have never made an application for compounding of any contravention under these rules and the provisions of the Act for contravention shall apply to him.?

Under Rule 12, every order of compounding has to specify the provisions of the Act and, inter alia, of the Rules in respect of which a contravention has taken place alongwith the details of the alleged contravention.

17. In the present case, the contravention of the provisions of the FEMA arose out of several transactions. The first two were the remittances which the petitioner made on 14 August 2007 of USD 15,000/- and on 16 August 2008 of USD 5,00,000/- to its wholly owned subsidiary in Singapore. These remittances were reported only on 9 March 2012. The petitioner also issued a corporate guarantee of USD 10 million (equivalent to Rupees 53.01 crore) on 30 December 2011 which was reported to the Reserve Bank on 28 September 2013. The petitioner failed to obtain a UIN and was found to have made two remittances amounting to Rs. 2.05 crore without a UIN. The Annual Performance Reports for 2008-2010 were not submitted within the prescribed period. Moreover, as was urged before this Court by teamed counsel for the Reserve Bank, the petitioner did not until a lapse of several years submit either the ODA or the ODI forms. This submission has also been supported on behalf of the authorised dealer, by counsel.

18. Now, it is in this background that the petitioner moved an application for compounding. The record before the Court indicates that when the petitioner moved the initial application for compounding, it did not disclose the issuance of a corporate guarantee, in the compounding application. Consequently, it was on 27 September 2012 that the Reserve Bank informed the petitioner that the authorised dealer, Punjab National Bank had reported a corporate guarantee of USD 10 million issued by the petitioner to Standard Chartered Bank. Since there was no reference to the corporate guarantee in the compounding application, the application was returned for fresh submission. It was thereafter that the petitioner re-submitted a compounding application for dealing with the contraventions both in relation to the remittances and the corporate guarantee. In the compounding application, the petitioner pleaded ignorance and the unavailability of a competent person to advise it in Varanasi. During the course of the personal hearing, both at the hearing of the compounding application and the review application, the petitioner was represented by its Chartered Accountant and admitted the contraventions but pleaded leniency. Though the amount involved in the contravention was Rs. 55.12 crore, a total penalty of Rs. 57.74 lac has been imposed. This order cannot be regarded as being disproportionate or as being based on any extraneous or non-relevant material. The compounding

authority has duly applied its mind to all relevant circumstances which appear in the order itself. Hence, no case for accepting the submissions which have been urged has been made out. An order of compounding is not an adjudication of the violation of the statutory provision. A person committing a contravention may apply for compounding the contravention. Compounding procedure provides an opportunity to the person who contravenes to apply for compounding so that the other consequences emanating from a violation are obviated. Having applied for compounding on the basis that there was a contravention, the petitioner is precluded from now denying that there was a contravention. An order of compounding cannot be regarded as an order of adjudication of a violation. That is because compounding is premised on an acceptance of the contravention.

19. At this stage, we may note that after the submissions had been concluded and during the course of the judgment, learned Senior Counsel appearing on behalf of the petitioner has fairly stated, on taking instructions, that the petitioner is ready and willing to deposit the entire amount of Rs. 57.74 lac as directed by the compounding authority in its order dated 23 December 2013. However, it has been submitted that the petitioner may be relieved of the consequence that would emanate from the provisions of Rule 10 of the Compounding Rules. Moreover, it has been stated in the petition, as amended, that on 22 May 2014, a summons has been issued to the petitioner by the Directorate of Enforcement. Prior thereto, on 9 April 2014, the Reserve Bank informed the petitioner that since it has failed to deposit the amount under the compounding order,, the matter has been forwarded to the Directorate of Enforcement. Since the contravention of the FEMA does not stand compounded, the petitioner was informed that it would be under the approval route as opposed to the automatic route with effect from 24 February 2014. These are consequential orders

20. Rule 9 of the Compounding Rules specifically contemplates that the amount as directed in the compounding order has to be paid by a demand draft in favour of the compounding authority within fifteen days from the date of the order. The failure to do so results in the consequence as provided in Rule 10, that the applicant shall be deemed to have never made an application for compounding of any contravention under the Rules, and the provisions of the Act for contravention shall apply to him. The order of compounding was passed on 23 December 2013. The petitioner failed to deposit the amount directed in the compounding order within fifteen days. The petitioner moved a review application which was also dismissed on 24 January 2014. Even thereafter, the amount was not deposited as required. The petition was filed before this Court on 1 March 2014. The petition has been pending on the file of this Court since then until the date of the passing of this order. The communication of the Reserve Bank dated 9 April 2014 is in terms of the provisions of Rule 10 which provides the consequence of a failure to comply with the order of compounding within 15 days. The Enforcement Directorate only issued a summons on 22 May 2014. No exception can be taken by the Court to either of these communications.

21. Since the petitioner has, through its learned Senior Counsel, indicated an unconditional readiness and willingness to comply with the compounding order, we are of the view that the ends of justice would be met if the compounding authority considers the request of the petitioner. However, we are of the view that it is necessary, before we direct a consideration of its request, that the petitioner should forward a demand draft to the compounding authority no later than within a period of two weeks from the receipt of a certified copy of this order, of the entire amount as directed to be paid in the order dated 23 December 2013, together with interest at the rate of 12 percent per annum from the expiry of a period of fifteen days from the date of the order dated 23 December 2013 until the date of payment. Subject to the petitioner forwarding a demand draft in these terms to the compounding authority, we permit the petitioner to make a formal request in that regard for the unconditional payment of the aforesaid amount. The compounding authority may, having due regard to the object and purpose of the compounding provisions and to the pendency of these proceedings before this Court since March 2014, take an appropriate view on the application, in accordance with law.

22. The demand draft which is to be forwarded by the petitioner to the compounding authority shall abide by the final decision of the compounding authority on the application of the petitioner.

23. We clarify that we have not interfered with the order of compounding. The orders passed by the Chief General Manager of the Reserve Bank and the communications dated 9 April 2014 and 22 May 2014 are lawful and do not suffer from any illegality. The petition shall stand disposed of in these terms. There shall be no orders as to costs.