(2014) 01 DEL CK 0076

In the Delhi High Court

Case No : Criminal A. 44 of 2008

Kavita Dogra APPELLANT

Vs

Director of Enforcement, Enforcement Directorate RESPONDENT

Date of Decision : 15-01-2014

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 18(2) 68
Negotiable Instruments Act, 1881 (NI) — Section 138 141

Citation : (2014) 182 CompCas 376 : (2014) 4 CoMPLJ 189

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Kaanan Kapur, for the Appellant; Vineet Malhotra and Ms. Manmeet Sethi, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This appeal by the Appellant, Ms. Kavita Dogra, is directed against the impugned order dated 9th October 2007 of the Appellate Tribunal for Foreign Exchange (''AT'') dismissing Order-in-Appeal No. 54 of 2004 against the adjudication order (Original) dated 28th October 2003 passed by the Deputy Director, Directorate of Enforcement, New Delhi alleging contravention, during the period 1994-95, of Section 18(2) of the Foreign Exchange Regulation Act, 1973 (''FERA'') for non-realization of export proceeds by M/s. Kwality Jewellers (India) Pvt. Ltd. (hereinafter referred to ''the company'') of which the Appellant was a Director till 31st May 1995. The Directorate of Enforcement (''DoE'') initiated the proceedings under FERA by issuing a memorandum dated 28th September 2000 to the company and its Directors/Managing Directors, i.e., Mr. L.R. Sridhar, Managing Director, Mr. Dinkar Dogra, Ex-Managing Director, Mrs. Kavita Dogra, Ex-Director (Appellant herein), Mr. Ashish Dogra, NRI Director and Mr. Kiran Chimalwar, Ex-Director.

2. The case of the Appellant was that she was not an active director of the company and was not involved in any manner with the day-to-day affairs of the

company.

3. The Deputy Director, DoE, passed an adjudication order on 28th October 2003 referring to the replies of the company and its directors including the reply of the Appellant.

4. A perusal of the said adjudication order shows that there was no separate consideration of the individual cases of each of the directors. There is an omnibus finding to the effect that "export had taken place when S/Shri Dinkar Dogra, Ashish Dogra, Kiran Chimalwar and Smt. Kavita Dogra were responsible against whom the show cause notice was issued, to realize the money.......... " There was no application of mind to the precise role and responsibility of the Appellant in the day-to-day affairs of the company.

5. Even in the impugned appellate order dated 9th October 2007 the discussion is about the roles of Mr. Dinkar Dogra and Mr. Kiran Chimalwar, the other Directors. Although the appeal of the Appellant, Mrs. Kavita Dogra, was also dealt with by the impugned appellate order, there is no discussion of the facts relating to her.

6. Learned counsel for the Appellant submitted that the facts of the present appeal were very different from those of Mr. Dinkar Dogra whose Criminal Appeal No. 43 of 2008 against the same impugned order dated 9th October 2007 of the AT was dismissed by this Court by an order dated 4th June 2008. Relying on the decisions in Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, and Satish Kumar Bhalla v. Union of India (decision dated 26th February 2009 in Crl.M.C. No. 5062 of 2006) it is submitted that in the absence of any specific role attributable to Smt. Kavita Dogra in the memorandum, there could be no finding of contravention of the provision of FERA as far as she is concerned.

7. On the other hand Mr. Vineet Malhotra, learned counsel for the Respondent submitted that the present case was covered squarely by the decision dated 4th June 2008 in Criminal Appeal No. 43 of 2008. Since the Appellant was admittedly a director of the company for the period during which the contravention took place, the statutory presumption u/s 68 of FERA stood attracted.

8. To begin with, the Court would like to observe that although Section 68 FERA is in the nature of a deeming provision, the proviso thereto contemplates rebuttal of such presumption by a person who is able to show that the contravention took place without his or her knowledge.

9. Section 68 FERA reads as under:

68. Offences by companies-(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and

punished accordingly.

Provided that nothing contained in this sub-section render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

10. The above provision is pari materia with Section 141 of the Negotiable Instruments Act, 1881 (''NI Act''). In S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, it was emphasized by the Supreme Court that where a company is the accused in a complaint u/s 138 NI Act, then in order to rope in any other person with the aid of Section 141 NI Act, an averment must be made in the complaint to the effect that such person was in charge of and responsible for the conduct of the business of the company "at the relevant time" when the offence was committed, and not on the basis of merely holding a designation or office in a company.

11. In Saroj Kumar Poddar v. State the Supreme Court explained that it is not sufficient to mechanically reproduce the language of the statutory provision to say that all the directors of the company were incharge of the day-to-day affairs and therefore, would be deemed to be guilty of the offence. In particular it was pointed out in that case that "there was no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning."

12. In the present case the memorandum is a cyclostyled form and the averments as regards all the directors is identical. There is no specific mention of the precise role of the Appellant in managing the day-to-day affairs of the company. The case of the Appellant is different from that of Mr. Dinkar Dogra. Prior to Mr. L.R. Sridhar taking over the management of the company, Mr. Dinkar Dogra was the managing director. The order dated 4th June 2008 passed by this Court dismissing Mr. Dinkar Dogra''s Criminal Appeal No. 43 of 2008 discusses in detail the evidence showing Mr. Dogra to be incharge of the day-to-day affairs of the company. There is no evidence to show in what manner the present Appellant, Mrs. Kavita Dogra was responsible to the company for the conduct of its business. As already noticed, neither the adjudication order nor the impugned order of the AT discusses the facts peculiar to the Appellant.

13. The Court is, therefore, satisfied that the DoE failed to make out a case of contravention of Section 18(2) FERA as far as the Appellant was concerned. Neither the adjudication order nor the order of the AT in her case are sustainable in law.

14. Accordingly, the adjudication order dated 28th October 2003 and the impugned order dated 9th October 2007 of the AT are hereby set aside.

15. The appeal is allowed in the above terms. The money, if any, deposited by the Appellant in this Court will now be refunded to her in accordance with law

within a period of four weeks from today upon proper identification, together with the interest, if any, accrued therein.

