(2014) 04 DEL CK 0003

In the Delhi High Court

Case No : Crl. A. No. 207 of 2008

Negolice India Ltd. APPELLANT

Vs

Director of Enforcement RESPONDENT

Date of Decision : 16-04-2014

Acts Referred:

Evidence Act, 1872 — Section 106
Foreign Exchange Regulation Act, 1973 — Section 40, 8(1)

Citation : (2014) 305 ELT 278

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Sanjeev Sindhwani, Senior Advocate, Somnath Shukla and Uday Joshi, Advocate for the Appellant; Jatan Singh, CGSC, Advocate for the Respondent

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J.—This appeal is directed against the impugned order dated 5th December, 2007 passed by the Appellate Tribunal for Foreign Exchange (''AT''), allowing the Revision Petition No. 279 of 2005 filed by the Respondent, Directorate of Enforcement (''DoE'') and setting aside the adjudication order (''AO'') dated 12th October, 2004 passed by the Additional Director General(''ADG''), Enforcement Directorate (''ED'') exonerating the Appellants of violation of Section 8(1) of the Foreign Exchange Regulation Act, 1973 (''FERA''). Appellant No. 1, Negolice India Limited (''NIL''), received an export order from M/s. Ace Plast Limited (''APL''), Sharjah, United Arab of Emirates (''UAE'') for 1,54,000 pieces of C-90 pre-recorded audio cassettes of the value of Rs. 35,92,512/- [equivalent to US Dollar (''USD'') 83,160]. The said consignment was dispatched by NIL to APL under shipping bill dated 23rd December, 1999. Admittedly, NIL received the full remittance for the consignment. For some reason, however, APL did not lift the consignment which had reached the Dubai Port. The abandoned consignment was subsequently auctioned by the Dubai Port authorities for Rs. 1,20,000/-.

2. On 24th July, 2000, a letter was written by the Consulate General of India (''CGI''), Dubai to the Directorate of Revenue Intelligence (''DRT) drawing attention to the fact that a consignment of audio cassettes exported by NIL, which was lying unclaimed at the Dubai Port, had subsequently been auctioned. The letter stated that it was suspected that the exporters of the said consignment ''have indulged in some sort of export fraud''. Meanwhile, consequent to the completion of the export transaction, a transferable advance licence (''TAL'') for import of 1,54,000 C-90 audio cassettes was issued to NIL. The said TAL was sold by NIL to M/s. R.K. Global (''RKG''), a sister concern. RKG then imported 1,54,000 blank cassettes of Sony-make from an entity in Thailand by placing an order on M/s. Nishant Import and Export Company (''NIEC''), Sharjah. The import was effected under bill of entry dated 26th April, 2000.

3. By a subsequent letter dated 24th June, 2001, written by CGI to DRI, it was stated that ''The fact that payment has been made in spite of non-clearance of the goods proves that the transaction is not genuine. However, there is no evidence to prove the allegations.''

4. Admittedly, no further investigation was undertaken by the Intelligence/ Investigation Wing of the CGI in Dubai to ascertain the reasons for the APL not lifting the consignment of the audio cassettes exported to it by NIL.

5. However, on the basis of the above letters, a Memorandum/Show Cause Notice (''SCN'') dated 16th May, 2002 was issued to Appellant No. 1 and to Appellants 2 to 5, being the Directors of Appellant No. 1, asking them to show cause why they should not be proceeded against for violation of Section 8(1) FERA. The principle allegation in the SCN was that NIL had exported the goods ''only for availing export benefits'' and the alleged problems expressed by APL with regard to the copyright of the cassettes ''were only excuses'' made by NIL ''to escape from the clutches of law.'' The other major allegation was that NIL had ''otherwise transferred an amount of Rs. 35,92,512/-'', equivalent to USD 83,160 to APL ''through means other than the banking channels and then cleared the said foreign exchange of USD 83,160'' from APL ''under the garb of remittance towards the export.''

6. It must be noted at this stage that the statements were made before the DOE by Mr. S.K. Dhancholia, Appellant No. 2 on 1st and 5th March, 2002 u/s 40 FERA. However, there was nothing in the said statement amounting to any admission that a sum of Rs. 35,92,512 had been transferred by NIL to APL through means other than the banking channels or that NIL had acquired USD 83,160 under the garb of remittance towards export. Even in the statement of Mr. M.K. Rajput of NIL, there was no such admission.

7. It may be mentioned in this regard that a letter dated 16th May, 2001 was also written by CGI, Dubai to DRI pointing to the fact that there were a large number of importers of pre-recorded audio cassettes in the U.A.E. who could clear their import consignments without any hassle ''in spite of strict rules on

copyright etc.'' It was, therefore, surmised that ''The problems such as copyright and continuous objection raised by authorised music distributors etc. are only excuses of the party made to escape from the clutches of law.'' It is interesting that these very words used in the aforementioned letter were repeated in the SCN issued to the Appellants without there being any additional evidence in that regard.

8. The AO dated 12th October, 2004 found that the SCN was vague and incomplete and did not discuss any evidence in support of the allegations in the SCN. The Additional Director General, who was the Adjudicating Officer, observed as under:

It is not in dispute that the payment for the exported goods has been received through banking channels. As stated by the notices in the reply, the payment was to be made on receipt of the export documents by M/s. Ace Plast Sharjah and this has been duly done. No evidence has been given in the SCN as to when and how the amount was transferred to M/s. ACE Plast other than through banking channels. The two transactions appear to be independent and no evidence has been provided in the SCN to show that they are not genuine. The SCN itself is not clear on this point. Apparently the relied upon documents are relevant but the SCN does not explain how the documents are relevant and what is the content of the documents that are being relied upon. Thus this SCN can be considered to be vague and incomplete. It is a requirement of the principles of natural justice that the evidence relied upon should be explained in the SCN so that it is clearly understood. This has not been done in the present case which is therefore a violation of the principles of natural justice.

9. The Adjudication Officer also concluded that the proceedings under FERA were time-barred. This was because no adjudication officer had dealt with the case within two years from 1st June, 2000 when the FERA, 1973 stood repealed and the Foreign Exchange Management Act, 1999 (''FEMA'') came into effect.

10. Aggrieved by the above order, the DoE filed a Revision Petition No. 279 of 2005 before the AT. In the impugned order dated 5th December, 2007, the AT first held that it was permissible to file a revision petition u/s 52(4) FEMA despite the repeal of FERA, 1973. It was held that the facts as regards the APL not lifting the consignment from the Dubai Port was ''within the special knowledge'' of the Appellants herein ''who were required to prove them u/s 106 of the Evidence Act, 1872'' and that where such burden was not discharged ''the adverse presumption is to be taken as a natural consequence.'' On the above basis, it was concluded that ''the payment of the subject amount was made unauthorisedly in contravention of Section 8(1).'' The AT proceeded to set aside the AO and levied a penalty of Rs. 15,00,000 on Appellant No. 1 and Rs. 5,00,000 each on Appellants 2 to 5 u/s 8(1) FERA.

11. This Court has heard the submissions of Mr. Sanjeev Sindhwani, learned Senior counsel for the Appellants and of Mr. Jatan Singh, Central Government

Standing Counsel.

12. It is significant, as pointed out by the CGI Dubai in its letter dated 24th June, 2001 to the DRI, that ''there is no evidence to prove the allegations'' that the transaction of export of pre-recorded cassettes by NIL to APL was not genuine. Yet, the entire case appears to have been built on suspicion arising from the fact that APL failed to collect the consignment delivered at the Dubai Port.

13. APL was not shown to be a fictitious entity. From the inquiries purportedly made by CGI, Dubai, as reflected in the correspondence between it and the DRI, the consignment was probably not cleared by APL since there were legal problems regarding the copyright raised by the Dubai Customs. Interestingly, in the ''brief investigation report'', enclosed with the letter dated 12th April, 2002 written by DRI to the ED, it was admitted that in order to establish that money laundering was the main motive behind the whole exercise of export ''it is necessary to have on hand the export products, i.e., the cassettes.'' The report noted that ''we do not have any representative sample of the export product and it is also not possible to get a representative sample of the export that is more than one and half year old.'' It was, therefore, stated that it may not be possible to establish a case of export of sub-standard goods and/or goods not matching the exact description. The report concluded that the non-clearance of goods ''gives rise to doubts that the transaction may not be genuine and this indicates that there may be violations of provisions of FERA/FEMA.''

14. What is, therefore, clear from the above document is that there were only doubts being expressed and there was no evidence as such to back the suspicion.

15. The AT misdirected itself in shifting the burden of proof of suspicion to the Appellants by invoking Section 106 of the Evidence Act. The reasons for APL not lifting the consignment can, by no stretch of imagination, be said to be within the ''exclusive knowledge'' of the Appellants. APL was a different legal entity based in Sharjah, UAE. Inquiries could have easily been made with APL itself as to why it did not lift the consignment.

16. The major premise of the entire proceedings was that through non banking channels NIL paid a sum of Rs. 35,92,512/- to APL. There was absolutely no evidence of any kind to back this allegation. In the absence of proof of the above alleged transaction, it could not have been concluded by the AT that NIL had improperly received USD 83,160 and thereby contravened Section 8(1) FERA. Suspicion in this case was allowed to replace proof and this resulted in an erroneous order being passed by the AT.

17. The Court is satisfied that there is no legal infirmity as far as the AO dated 12th October, 2004 is concerned. Indeed, this was a case where there was no evidence produced by the Respondent to back the allegations against the Appellants in the SCN.

18. For the aforementioned reasons, this Court sets aside the impugned order

dated 5th December, 2007 passed by the AT and restores the AO dated 12th December, 2004 passed by the ADG. The appeal is allowed in the above terms. Any amount deposited by the Appellants pursuant to the order of the AT shall be refunded to the Appellants in accordance with law within a period of eight weeks from today. The record of the AT be sent back forthwith.