
(1996) 03 MAD CK 0147

In the Madras High Court

Case No : Appeal Against Order No. 173 of 1989

R.S. Srikantha Rao

APPELLANT

Vs

Special Director, Enforcement Directorate foreign Exchange,
Regulation Act, Government of India, Lok Nayak Bhavan. 6th
Floor. Kahn Market, New Delhi

RESPONDENT

Date of Decision : 21-03-1996

Acts Referred:

Customs Act, 1962 — Section 112, 140, 140(1), 140(2)
Foreign Exchange Regulation Act, 1973 — Section 50, 54, 55, 68, 68(1)

Citation : (1996) 03 MAD CK 0147

Hon'ble Judges : Sathasivam, J;Abdul Hadi, J

Bench : Division Bench

Advocate : K.C. Rajappa, for the Appellant; S. Veeraraghavan, for the Respondent

Final Decision : Dismissed

Judgement

Abdul Hadi, J.—This Appeal under S. 54 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as Act) is by one R.S. Srikantha Rao, a Director of Bharat Travels Services Private Limited. He failed before both the authorities below. A penalty of Rs. 50,000/- has been concurrently levied on him by them on the footing that he has contravened S. 8(1) and (2) of the Act read with S. 68(1) and (2) of the Act. The impugned order of the first appellate Board dated 30.1.1989 is a common order in three appeals before it which are connected as will be seen presently. The said appeals are Appeal Nos. 213, 214 and 280 of 1986 preferred respectively by the abovesaid company Bharat Travel Services Private Limited, yet another Director of the said company by name K. Sriram and the appellant herein. In the abovesaid common order of the first appellant Board, actually speaking, the penalties levied by the first authority to the extent of Rs. Two Lakhs on the abovesaid Company, to the extent of another sum of Rs. 50,000/- on the abovesaid Director Sriram and the above referred to sum of Rs. 50,000/- on the appellant herein, were confirmed. But it appears, the said

common order in so far as it levied penalties on the abovesaid company and the Director Sriram has become final, since even according to the learned counsel for respondent, there seems to be no further appeal under the abovesaid S. 54 of the Act by them. Thus, there is only this appeal by the appellant, that is, is so far as the levy of the above referred to Rs. 50,000/- on him. Before actually seeing the relevant facts, we may first mention the material portions of the said Ss. 8 and 68 of the Act. According to S. 8(1) except with the permission of the Reserve Bank, "no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from any person not being an authorised dealer, any foreign exchange." The material portion of S. 8(2) says that except with the permission of the Reserve Bank, "no person shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency, at rates of exchange other than the rates for the time being authorised by the Reserve Bank." The material portion of S. 68(1) of the Act says, "where a person committing contravention of any of the provisions of this Act.... is a company, every person who, at the time the contravention was committed, was in charge of and was responsible to, the company in the conduct of the 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 nothing contained in this sub section shall 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". The material portion of S. 68(2) says.

"notwithstanding anything contained in Sub-section (1) where contravention of any of the provisions of this Act has been committed by a company and it is proved that the contravention has taken place with consented connivance of, or is attributable to any neglect on the part of any Director of the Company, such Director..... shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."

2. Now, we shall see the relevant facts to see how actually charge is made against the appellant under the abovesaid section. The abovesaid company in which the said Sriram and appellant are also Directors, is doing business of travel agent. The office premises of the said company and the residential premises of the said two Directors were searched by the officers of the Enforcement Directorate, resulting in recovery and seizure of incriminating documents.

2-A) The Statement of the abovesaid Sriram was recorded on 11.10.1983 wherein he has stated that the said company had conducted a tour inclusive tour (GIT) to Europe and U.S.A. during July, 1983 with 33 passengers including himself that the Reserve Bank of India had allowed US \$ 300 as M.C.C. and permission to utilise US \$ 300 from out of FTS Quota of each passenger, that the passengers did not agree to part with their FTS allowance of US \$ 300 and were not agreeable to the tour unless some arrangement is made in this behalf, that therefore, the said Sriram discussed the matter with the appellant who contacted

with one of his friends in Singapore named Mr. Nizam to send the foreign exchange from Singapore to Chartered Bank, London, that the said Sriram left, with other passengers, for the proposed tour but that after reaching London, he could not get necessary amount in foreign exchange from the Chartered Bank, that therefore he had a telephonic at with the appellant who was at Madras and learned that whether the requisite amount was sent to Swiss Bank, London, that thereafter he contacted the Swiss Bank, London and received US \$ 13000 and that he also contacted one of his other friends Devandra in London for some financial assistance and borrowed Stg. \$ 3000 from him with a view to conduct and complete the said foreign tour without financial difficulties. The said Sriram on examination referred to the entries made by him of his diary which had been seized from the effect premises of the abovesaid company.

3. Further, the appellant herein in his any statement dated 12.10.1983 given before the Enforcement Directorate officials confirmed about the talks he had with the abovesaid Sriram on told phone and also further stated that he discussed the problem with one Siddik who was in the office on the Company and that the said Siddique agreed to transfer the funds from Singapore to London to help the conduct of the said tour. The appellant statement further says that he handed over a sum of Rs. 1,28,000/- to the abovesaid Siddik and after getting confirmation that the foreign exchange had been collected by the said Siddique at London, the appellant herein also paid the further amount of Rs. 28,000/- to the said Siddique So that said Sriram had thus collected foreign exchange worth US \$ 13,000 and in exchange for the payment of Rs. 1,56,000/- in all. by the appellant and note to that effect was seized by the Enforcement Directorate as a result of the abovesaid search conducted at the appellant's premises. The note reads thus:-

"paid Rs. 1,28,000/- and to be paid Rs. 28,000/-".

4. The said Sriram made further statement dated 21.10.1983 explaining the documents seized from the official premises of the abovesaid company.

5. A statement dated 12.10.1983 was also recorded from K.M.S. Bashoor, an employee of the abovesaid company. A further statement dated 24.9.1983 was also recorded from one Sardar Singh Bethra, one of the abovesaid passengers who went on tour.

6. The above referred to statement dated 12.10.1983 given by the appellant herein was retracted, the very next day, 13.10.1983, by another statement wherein it was stated that the earlier statement dated 12.10.1983 was made under threat and was not voluntary. Subsequently on 21.10.1983, the abovesaid Sriram also retracted his earlier statement on the same ground.

7. A show cause notices dated 15.3.1984 was issued against the abovesaid company as well as both the Directors including the appellant herein. In the said show cause notice, initially it was alleged that the abovesaid company resident in India and not an authorised dealer in foreign exchange purchased foreign

Exchange of US \$ 13,000 for Rs. 1,56,000/- from a person other than an authorised dealer in foreign exchange, and at rates of exchange other than the rate for time being authorised by the Reserve Bank, without the permission of the Reserve Bank of India. Further the show cause notice alleged that the said company borrowed the abovesaid 3000 \$ from the abovesaid Devendra of London, not an authorised dealer in Foreign exchange, without the permission of the Reserve Bank of India. Thus it is said that the abovesaid company has contravened the abovesaid Ss. 8(1) and (2) of the Act.

7A) Thereafter, the said show cause notice alleged against the abovesaid two Directors including the appellant that they were in charge of and responsible to the abovesaid company for the conduct of the business of the said company and further, the aforesaid contraventions have taken place with their consent and connivance. Therefore, according to the said show cause notice, the said Directors including the appellant have also contravened S. 8(1) and (2) read with S. 68 of the Act. The said show cause notice also stated that for issuing the said show cause notice, reliance was placed on the abovesaid (1) documents seized and (2) the statements of the abovesaid Sriram dated 11.10.83 and 21.10.83 and of the appellant dated 12.10.83 and of the abovesaid Basheer dated 12.10.83 and of the abovesaid Bathra dated 24.9.83. In the show cause notice, it is also stated that the inspection of the abovesaid documents could be had at the office of the Deputy Director of the Enforcement Directorate after fixing the appointment with him.

8. To this show cause notice, a reply was given by the abovesaid Sriram on 21.7.1984, by the appellant herein on 30.7.84 and by the abovesaid company on 31.7.1984. In the reply by the appellant, he denied the abovesaid allegation of contraventions. He also mentioned about the abovesaid retraction statement dated 13.10.83 by him. Inter alia he also requested that he should be allowed to cross-examine the abovesaid Basheer and Bothra.

8A) While so, when this appeal was taken up even before knowing the facts of the case, we noticed the following passage in paragraph 4 of the order of the first appellate Board which runs as follows:-

"The Counsel appearing for appellant No. 3 (Appellant herein) in this appeal did not contest the findings of facts but strangely contended that penalty having been imposed on the Company as such, appellant No. 3 who was only a Director could not be held liable for the same, in terms of S. 68 of the Act, His main contention is that S. 68 is not at all attracted in the matter of adjudication proceedings and is confined only to Criminal Proceedings in regard to the offence under the Act. He, therefore, contended that the imposition of Penalty on his client is not legally warranted."

8-B) On seeing this, we asked the learned counsel for the appellant whether it would be correct to say that he could argue only on the question of interpretation of S. 68 as to whether it would apply to adjudication proceedings also. But

learned counsel contended that the above statement made by the appellate Board that the appellant's Counsel before the Board "did not contest the findings of facts", factually was not correct. Despite this contention, we were reluctant to allow the said counsel to argue on the findings of facts since we felt that as to what happened before the appellate Board, in other words, as to whether counsel for the appellant before the appellate Board did not contest the findings of facts before the Boards, he cannot agitate before as in this appeal and if really the Board has factually made any untrue statement as to what happened before it at the time of hearing of the appeal, the appellant should have only gone before the same Board and corrected it. When admittedly the appellant has not chosen to do, so, we felt that the said question cannot be raised in this subsequent appeal before us. However, the learned counsel sought to point out then, that the abovesaid observation of the appellate Board that the abovesaid counsel did not contest the findings of facts before it, cannot be true, because the Board itself says subsequently in its order thus"-

"It was also contended that since the two witnesses Shri Basheer and Bethra are not cross-examined, their testimony cannot be considered."

At that time, without knowing the full facts about the aforesaid request for cross-examination of the said Bashcer and Bothra, we allowed the counsel to argue on the merits of the case also apart from on the interpretation to be put on S. 68 of the Act as stated above.

9. But now, after knowing the full facts and particularly with reference to the abovesaid request for cross-examination of the abovesaid Basheer and Bothra, we came to the conclusion that it is not open to the learned counsel for the appellant to argue in this appeal in relation to the "findings of facts" on which there was no contest even before the first appellate Board as mentioned in the impugned order of the first appellate Board itself. We give reasons for coming to the abovesaid conclusion.

10. In State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, the significant observations of the Supreme Court in this regard are as follows:-

"We are bound to accept the statement of the Judges recorded in their Judgment, as to what inspired to Court. We cannot allow the statement of the Judges to be contradicted by statement at the paragraph affidavit and other evidence. If the judges say in the Judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts settled and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happening in Court have been wrongly recorded in a Judgment is incumbent upon the party, while the matters of a fresh in the minds of the Judges, to call the attention the very Judges who have made the record to the facts that the statement made with regard to his conduct a statement that had

been made in error. That is the on way to have the record corrected. If no such step taken, the matter must necessarily end there of course a party may resale and an appellate Court may perform him in rare and appropriate cases to resale from possession on the ground that the concession was made a wrong appreciation of the law and bad led to gross justice; but, he may not call in question the very fact making the concession as recorded in the Judgment.

10-A) Admittedly, in the present case the appellant did not choose to go before the Appellate Board for correcting the above referred to alleged mis-statement of fact by the Board. Therefore, it cannot be also concluded that there was any such misstatement of fact as alleged to the learned counsel for the appellant In fact in abovesaid para 4 of the first Appellate Board Judgment, itself it is mentioned thus, with reference to the abovesaid company, which is appellant No. 1 before the Board, and the abovesaid Sriram who is appellant No. 2 before the Board.

"In these appeals, the counsel appearing for Appellant Nos. 1 and 2 did not dispute the fact of allegations transaction as such but pleaded that in fact that responsibility for obtaining the aforesaid foreign exchange was primarily that of appellant No. 2, that appellant No. 1 which is a company could not be held responsible for the individual act of the two directors. Hence the in position of penalty on appellant No. 1 was challenged of this behalf.

It must also be noted that both the abovesaid company and the said Sriram were represented by the same counsel, while the appellant herein was represented by another counsel. According to the abovesaid observation, the said counsel for the company as well as Sriram, also did not dispute the facts found by the first authority. Further, it must also be noted that as against the concurrent common order of the first Appellate Board, the said company and Sriram did not appear to have filed any appeal to this Court. In the above circumstances it would also be safe to conclude, in so far as the appellant herein, that his counsel "did not contest the findings of facts" before the Board but only contended that "penalty having been imposed on the company, the appellant herein who was only a Director of the Company, could not be held liable for the same in terms of S. 68 of the Act, "and that, "S. 68 is not at all attracted in the matter of adjudication proceedings and is confined only to Criminal proceedings in regard to the offences under the Act."

11. The above referred to observation of the Appellate Board in the former part of para-4 of its Judgment, in relation to the appellant herein, (extracted in paragraph 9-A above), is also not inconsistent with the last sentence appearing in the said paragraph-4, namely, "it was also contended that since the two witnesses Shri Basheer and Bothra are not cross-examined their testimony cannot be considered." Though earlier, without noting the full facts we thought that there was some inconsistency, we now find after a deeper probe that there is no inconsistency. The reason is as follows:-

Though originally, in the show cause notice, the statements given by the

abovesaid Basheer and Bothra were stated to have been relied on in relation to the charge leveled against the appellant herein, subsequently at the time of hearing, even before the first authority, those statements were actually not relied on by the Enforcement Directorate, since the appellant herein as well as the abovesaid Company and the other Director expressed that they do not want to cross-examine the said Basheer and Bothra, if no reliance is sought to be placed on their statements. This fact is referred to in the order of the first authority itself. That is why, the contention before the Appellate Board was also that since the said Basheer and Bothra were not allowed to be cross-examined, their testimony could not be considered. Even now, it is not the contention of the learned Counsel for the respondent that the said statements by the said Basheer and Bothra are also necessary for coming to the conclusion that the concurrent orders of both the authorities below are to be confirmed.

12. We shall now first consider whether S. 68 would apply not only to Criminal proceedings under the Act but also to the abovesaid adjudication proceedings. If the said question is answered in the affirmative, we shall deal with the other question whether necessary ingredients of S. 68 are satisfied for levying the abovesaid penalty on the appellant. We have already extracted the relevant portions of Ss. 68(1) and 68(2) of the Act. But, relying on the marginal note to the said section namely, "offences by companies" and the term "punished" used in both the Ss. 68(1) and (2), learned counsel for the appellant argues that the said section could only apply to criminal proceedings initiated under the Act and not to adjudication proceedings.

13. But, we are unable to accept this contention. The Supreme Court has observed in many cases that marginal notes cannot be referred to for the purpose of construing the statute, (*vide Commissioner of Income Tax, Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay, Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, (Kalawathi v. Soirya Bi) AIR 1991 S.C. 1581*). Further in *Joshibhai Chunibhai Patel Vs. Anwar Beg A. Mirza*, also it has been held that marginal note to a Section cannot be invoked for the construction of the section where the meaning of the section is clear. In the present case, either on reading S. 68(1) or S. 68(2), it cannot be said that either of them could be applied only to Criminal proceedings under the Act and not to adjudication proceedings thereon.

13-A) In this connection. S. 68(1) and (2) could also be contrasted with Ss. 140(1) and 140(2) of the Customs Act, 1962 which are in some respects, though not in all respects, similar to the abovesaid Ss. 68(1) and 68(2) respectively, S. 140 is also having the same marginal note "offences by companies. "Sub-Section (1) thereof runs as follows:-

"If the person committing an offence under this Chapter is a company, every person who, at the time the offence 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 offence and shall be liable to

be proceeded against and punished accordingly."

(Emphasis supplied)

Thereafter, a similar proviso as found in S. 68(1) of the Act is also found in S. 140(1) of the Customs Act, 1962. Then Sub-section (2) of S. 140 says:-

"Notwithstanding anything contained in sub-section (1), where an offence under this Chapter has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of any director, such director shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly

(Emphasis supplied).

Thus, we find that while S. 68 throughout uses the word "contravention" at the appropriate places in both the sub-sections thereof, S. 140 uses the word "offence" at the appropriate places, in both the subsections to the said section. This departure by the legislature in using a different phraseology in S. 68 of the later enactment of 1973, Act), contrasting with the phraseology used in the earlier enactment of 1962 (Customs Act), is significant, and therefore it could only be held that the said departure by the same Central Legislature which enacted both the Acts was deliberate. Therefore, the scope of S. 68 of the Act is definitely wider than that of S. 140 of the Customs Act. Therefore, on reading S. 68(1) and (2), it is clear to us that it would apply even to adjudication proceedings under the Act. Simply because the word "punished" is used in S. 68(1) and (2) also, it cannot be concluded that S. 68 would only apply to criminal proceedings. Even levying penalty in an adjudication proceeding is also one form of punishment on the person contravening any of the provisions of the Act. Proceedings under Ss. 50 and 55 provide for separate punishments and do not amount to double jeopardy. In the light of the above discussion, it is clear to us that the decisions *Cement Distributors Private Ltd. Vs. Inspecting Assistant Commissioner (Central) Range II and Another*, 135 I.T.R 653 (*Vishwakasha Industries v. Commissioner of income tax Amritsar-I*) and *Prakash Roadlines (Pvt.) Ltd. Vs. Union of India (UOI) and Another*, , relied on by the learned counsel for the appellant have no application to the present case.

14. Now we shall see whether the appellant satisfies the necessary ingredients under S. 68 of the Act. Already we have seen that as against the finding of the appellate Board that the abovesaid company has contravened S. 8(1) and (2) of the Act, there was no appeal by it and hence in so far as the Company is concerned, the order of the appellate Board has become final

15. As we had seen already. S. 68(1) deals with any "person" as spoken to therein. S. 68(2) deals with "Director" or other specified officers of a company. While in the former case, the "person" must be in charge of the business of the company at the time of contravention by the company of the letter case, the

contravention by the Company must have taken place with the consent or connivance of the said Director or other specified officials as the case may be. So, if the appellant come either under S. 68 (1) or under S. 68(2) of the Act the levy of penalty on him, could be confirmed.

16. We shall now see whether the appellant is the person who, at the time the contravention by the company was committed, was in charge of the business of the company, as per the orders of the both the authorities below. The contravention under S. 8(1) and 8(2) of the Act, by the abovesaid company, was in August, 1983. when the abovesaid US \$ 13000 was purchased, outside India be the abovesaid Sriram on behalf of the said company in lieu of Rs. 1,56,000/- given in India as stated above and when the 3000 was borrowed by the said Sriram on behalf of the said company outside India, from the abovesaid Devendra at that time, certainly the appellant herein was in charge of the business of the abovesaid company and in fact, he was even the Director of the said company. Further, the fact that he was in charge of the abovesaid company at the abovesaid relevant time, is also clear even from the above referred to statement dated 13.10.1983 which purported to retract his earlier statement dated 12.10.83. In the said statement dated 13.10.83 itself, he initially says thus:-

"I am one of the Directors of M/s. Bharat Travel Service (P) Ltd. Madras, and I have been connected with this Travel Agents for the last 28 years During the course of my service in these years, I have conducted and handled number of tour arrangements without any adverse mark and without any complaint from any quarters towards me".

(Emphasis supplied)

This statement made in October, 1983 would clearly show that he was a Director off the said company looking after the business of the company during the relevant point of time, namely August, 1983 and for a long period earlier also. So, even from the abovesaid statement which purports to retract the earlier statement, the relevant nexus between the appellant and the abovesaid company, in relation to S. 68(1) of the Act is clearly established and the contention contra by the learned counsel for the appellant is absolutely ill-founded. What is necessary under S. 68(1) of the Act, is that the appellant must be in charge of and was responsible to the abovesaid company for the conduct of the business of the company generally and need not necessarily for the conduct of the abovesaid tour in question which led to the contravention or in which the contravention took place. Even in the above statement dated 13.10.1983, though the appellant later states that "I have nothing to do with the tour", yet even assuming it to be so- S. 68(1) would get attracted as against him in view of what he has admitted initially in the abovesaid statement itself.

16-A. In the light of the abovesaid admission, and even otherwise, the contention that the show-cause notice does not give out the basic facts of

charge, has no merit at all. The decision relied on by learned counsel for the appellant, viz., H. Lakshmidhar v. Government of India (1983 E.L.T. 322 (Mad)) turned on its own facts and it has no application to the present facts. There, in the show cause notice under the Customs Act, 1962, there is only bare quoting of S. 112 of the said Act and there is neither reference either to clause (a) or clause (b) both of S. 112, nor the essential ingredients of the said clauses have been specifically set out at all. Only in that context, it was held thus:-

"There should be precision in the application of the provisions of the Act and it cannot be done in a camouflaged manner. There should be specific allegations even in the show-cause notice, as to which of the clauses are attracted... As in the absence of such specific allegations it is not possible to sustain the proceedings"

But, the present case is not only where S. 68 is quoted in the show-cause notice, but the necessary ingredients found in S. 68 have also been stated in the show-cause notice itself. Further, the relevant sub Sections (1) and (2) of S. 68 are also specifically extracted in the show cause notice. Therefore, there is absolutely no ambiguity at all and nothing is done in a camouflaged manner.

16-B. In the light of the abovesaid discussion, there is no scope at all in the present case for the application of the decisions in State of Karnataka Vs. Pratap Chand and Others, and Girdhari Lal Gupta Vs. D.H. Mehta and Another, , relied on by the learned Counsel for the appellant.

17. We must also point out that after so stating "I have nothing to do with the tour" as stated above, the appellant also says in the said statement dated 13.10.1983 thus:-

"Normally, it is our practice, we do not interfere with each other in respect of the undertaking taken by us".

This statement cannot also be believed at all. How can the business of a company be run if the practice is that one Director of the company does not interfere with the action of any of the other Directors? Incidentally, we may also point out that this totally unbelievable statement also would show that the alleged retraction of the earlier statement dated 12.10.1983 cannot be legally sustained. We may also point out incidentally that the first authority also finds thus:-

There are number of other evidences on record seized, to establish the charges:

(i) In the diary seized from the business premises of M/s. Bharat Travel Service Pvt. Ltd., Shri K. Sriram has written in his own hand about the foreign exchange purchased and borrowed by him. The evidence has not been disputed in any stage."

Thus, there is corroborative documentary evidence in the form of the abovesaid diary; Further it is also once again significant to note that here again, it is

observed by the first authority that the abovesaid evidence" has not been disputed in any stage", Likewise, the first authority's order also points out in relation to the documents seized (particularly the abovesaid sheet Nos. 13 and 14) from the residential premises of the appellant on 12.10.1983, that the appellant stated, while explaining the said document, that the abovesaid Shriram had informed him about the requirements of the amounts and that when they were discussing about the problem, the abovesaid Siddique who was in the office agreed to transfer the funds from Singapore to London and that accordingly a sum of Rs. 1,28,000/- was handed over by the appellant to the said Siddique. The first authority also observes that the appellant has stated that he made a note on the abovesaid sheet Nos. 13 and 14 as follows:-

"Paid Rs. 1,28,000/- and to be paid for Rs. 28,000/-"

In this connection, learned counsel for the appellant sought to point out that what is stated in the said sheet is not paid to Siddique, but it only says - "paid Rs. 1,28,000/-" But, in the light of the abovesaid entire features of the case, there is no difficulty in concluding that even from what has been stated in the said sheets it could be inferred that the said payment was made to the abovesaid Siddique. Even in the statement of Shriram, dt. 21.10.1983, which has not been retracted, he did not positively assert denying the abovesaid borrowal as well as purchase and consequent payment to Siddique. He only said "I do not remember."

17-A. The further contention that the said Siddique has also not been proceeded against by the Department but let off and that therefore the appellant's case must be accepted, cannot be accepted at all. Even assuming that the said Siddique has been let off as contended by the said counsel, that does not bar the Enforcement Directorate from proceeding against the appellant if the charge against him could be established.

18. We may also point out that the appellate Board has held thus:

"it is not disputed that at the time of the said contravention both the Directors were in charge of the said company and were in know of this transaction, said"

(Emphasis supplied)

It is significant to note that here again the appellant Board used the expression "it is not disputed". If the said aspect was not thus dispute before the appellate Board, it is not open to the learned counsel for the appellant to contend before us that the said aspect was disputed before the appellate Board.

18-A) In the above background, it is not even necessary to see whether the ingredients of S. 68(2) are also satisfied as against the appellant However, in the light of what we have held above the alleged retraction of the appellant's statement dated 12.10.1983 cannot be legally sustained and it is also clear that the appellant as a Director of the Company was a consenting or conniving part to the abovesaid contravention by the company Therefore, S. 68(2) also gets

attracted. The net result is the appeal is dismissed. No costs.