

(2008) 09 CAL CK 0041

In the Calcutta High Court

Case No : GA No. 3139 of 2007 and FEA No. 17 of 2007

Suborno Bose

APPELLANT

Vs

Appellate Tribunal for Foreign Exchange and Others

RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 — Regulation 4(1), 6(1)

Foreign Exchange Management Act, 1999 — Section 10(1), 10(5), 10(6), 16(3), 17(4)

Citation : (2009) 150 CompCas 113 : (2009) 1 ILR (Cal) 77 : (2008) 88 SCL 23

Hon'ble Judges : Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Siddhartha Mitra and Mousumi Chatterjee, for the Appellant; Souvik Nandy, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This appeal is against an Order and/or judgment dated 6th July, 2007 passed by the Learned Appellate Tribunal.

2. The facts of this case briefly are as follows:

An order was passed by the Special Director (Appeals) Foreign Exchange Management Act forming a common adjudication order dated 30th December, 2004 where the adjudicating authority imposed penalty of Rs. 10 lacs against the appellant company and Rs. 10 lacs against the appellant Managing Director for contravention of Section 10(6) of Foreign Exchange Management Act, 1999 (hereinafter referred to as "the said Act") on the ground that the appellants after taking remittances of foreign exchange of US Dollars 35766 and FRF 374000 on 18th April, 2000 and 19th June, 2000 respectively for import of refrigeration machinery so as to use the same in Hotel Industry in fact failed to do so and also failed to file the proofs thereof.

3. It further appears that the appellant company filed an appeal before the Learned Tribunal and was allowed to make a pre-deposit of 25% of the said penalty and the Appellant Managing Director was also allowed to make pre-

deposit of 15% of the amount of such penalty by an Order dated 23rd September, 2005 passed by the Learned Tribunal and it further appears from the fact that the appellants duly complied with the said order.

4. It is the case of the appellant/petitioner that one Mr. Aniruddha Roy Chowdhury and his associates, being the original promoters, with the objective of setting up of a 3-star category hotel in the Salt Lake Electronics Complex, promoted the appellant company M/s. Zoom Enterprises Ltd. in the year 1995. The appellant imported refrigeration machinery from Carrier SA, France in the year 2000. Upon import of the first consignment on 15th March, 2000, the goods were assessed by the Customs Authority in Calcutta but before the goods could be cleared by paying up the necessary duties, the erstwhile promoters ran into severe financial problems, as a result whereof the goods were warehoused under the provisions of the Customs Act, 1962.

5. The second consignment was imported on 15th May, 2000 and was directly warehoused due to which the Exchange Control Copy of the Bill of Entry could not be submitted. The Managing Director of the appellant company, Mr. Suborno Bose took over the Management of the Company in June 2002 and was unaware of the terms of the EPCG License relating to the import of the goods in question. According to the Appellant Managing Director, the previous promoter did not disclose the said fact and/or the liabilities to the appellant.

6. It further appears from the fact that the said import had been done against the EPGC License and had thereby incurred an obligation to earn foreign exchange upto four times the CIF value of the license and that a sum of Rs. 36 lacs was payable other than interest for delayed payment and warehousing rent amounting to Rs. 10 lacs.

7. Thereafter, the adjudicating authority issued a show cause notice on 19th May, 2004 to the appellant and on the ground that the foreign exchange taken had not been utilized for the purpose for which it was realised, as the Bill of Entry was not submitted. On 30th December, 2004, an order was passed by the adjudicating authority for contravention of provisions of Section 10(6) of the said Act read with Sections 46 and 47 of the said Act. On the basis that the appellant had failed to take delivery and had failed to take machinery imported and had failed to submit the Bill of Entry relating to the said import as the import formalities end with the submission of the Bill of Entry.

8. An appeal was filed from the said order which was dismissed on 13th June, 2005 and the appellant was asked to pay penalty of Rs. 10 lacs and thereafter an appeal was preferred before the Learned Tribunal which was also dismissed.

9. According to the appellant/petitioner, the appellant did not contravene the requirement of Section 10(6) of the said Act since the foreign exchange remitted was used for import of refrigerating machinery and, therefore, the foreign exchange was used for the declared purpose only and not for any other purpose. The appellant was unable to take delivery of the goods and submitted the Bill of

Entry as the Appellant and Managing Director, who had taken over charge of the Appellant Company in 2002, were not aware of the terms of the EPCG License relating to the import of goods in the year 2000.

10. The attention of this Court was drawn to Section 42(1) of the said Act and it was submitted that a person shall not be liable to punish if he proves that the contravention took place without the knowledge and where due diligence has been challenged to prevent such contravention. Sections 10(6) and 42(1) of the said Act are reproduced hereunder:

Section 10(6) - Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under Sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provisions of the Act for the purpose of this Section.

Section 42(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 the contravention was committed, was in charge of, and was responsible to, the company for 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 that 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.

11. On the contrary, it was submitted on behalf of the respondents that on 5th May, 2004, the Assistant Director, Enforcement Directorate, Kolkata had filed one complaint against Mr. Suborno Bose, Managing Director of the Company, the appellant herein u/s 16(3) of the said Act. It further appears from the fact that by a letter dated 23rd November, 2001, the Reserve Bank of India, Kolkata duly informed this Directorate that M/s. Zoom Enterprises made the following remittances for the import and failed to submit the documentary evidence in respect of the same:

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Description of	Date of	Amount in F.C.	Rupee equivalent	Goods remittance
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Machine Tools	18.04.2000	- 15,67,266	2. Machinery	19.06.2000 - 24,72,140

12. On the basis of the same, enquiries were initiated and the directives were

issued to the importer and the authorised dealer, Canara Bank, Foreign Exchange Department, 2/1, Russel Street, Kolkata.

13. The Canara Bank thereafter informed by their letter dated 03.01.2001 that the Exchange Control copy of the Bill of Entry was not submitted by the importer in respect of the remittances US Dollars 35766 dated 18.04.2000 and FRF 374000 dated 19.06.2000 respectively. Subsequently, upon enquiry it was revealed that two nos. of Refrigerating machinery for FF 374000 were imported by the party from M/s. Carrier Corporation NY, U.S.A. but the consignment was not cleared and goods were then shifted to Bengal bonded warehouse.

14. In the meantime, the Management of the Company alongwith all assets and liabilities shifted from Shri Anuruddha Roy Chowdhury, s/o. Late J.N. Roy Chowdhury to Shri Suborno Bose, s/o. Late Subal Chandra Bose through a Memorandum Of Understanding (hereinafter referred to as MOU) dated 22nd October, 2001.

15. It further appears from the fact that though the order was placed by the earlier Management and the goods also arrived at the time of earlier management yet as per the terms of the MOU, the duties and warehouse charges were to be paid by the new Management, which however, failed to take delivery of the goods and as such could not file the exchange control copy of the Bill of Entry as per the provision of Section 10(6) of the said Act read with Sections 46 and 47 of the said Act, with para A-10 and para A-11 of the Foreign Exchange Manual, 2003-04.

16. It is further submitted that the company failed to comply with all these provisions. Then, the complainant sought permission from the adjudicating authority to issue show cause notice which was granted and subsequently, the steps were taken by the Authorities in accordance with the provisions of law. Reply was also given to the show-cause notice which was duly considered by the Department. A corrigendum was also issued to the show-cause notice dated 19th May, 2004 by making three amendments to the said show-cause notice. By the said amendment the present respondent have added Section 42(1) of the said Act since it was found that there is also violation of the said Section.

17. The case of the appellant that since goods have been duly imported for which the remittances have been effected the charge u/s 10(6) of the said Act does not sustain and the present proceedings should be dropped.

18. The appellate authority, Special Director (Appeals) FEMA duly passed an order dated 13th June, 2005 u/s 17(4) of the said Act and held that the appellants were under the obligation to submit the Original Bill of Entry to the authorized dealer and as per the provisions of Section 10(6) of the said Act the foreign exchange acquired from the authorized dealer which has to be utilized for the purpose it was released or otherwise it should have been surrendered to the authorized dealer. The Regulation 6(1) of the Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulations, 2000

issued by R.B.I. on 3rd May, 2000 prescribed that the transaction should be completed within a period of 60 days from the date of acquisition or purchase of foreign exchange.

19. The said Regulation is set out hereunder:

The Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000:

In exercise of the powers conferred by Section 8, Sub-section 10, Clause c of Sub-section 2 of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Reserve Bank makes the following regulations relating to the manner of, and the period

1. Short title and commencement - (I) These regulations may be called the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000. (II) They shall come into effect on 1st day of June, 2000.

2. Definitions -In these regulations, unless the context requires otherwise,-

(a) "Act" means the Foreign Exchange Management Act, 1999 (42 of 1999);

(b) "authorised dealer" means a person authorised as an authorised dealer under Sub-section 1 of Section 10 of the Act;

(c) "foreign exchange due" means the amount which a person has a right to receive or claim in foreign exchange;

(d) "surrender" means the selling of foreign exchange to an authorised person in India in exchange of rupees;

(e) the words and expressions used but not defined in these regulations shall have the same meanings respectively assigned to them in the Act.

3. Duty of persons to realise foreign exchange due - A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing-

(a) that the receipt by him of the whole or part of that foreign exchange is delayed; or

(b) that the foreign exchange ceases in whole or in part to be receivable by him.

4. Manner of Repatriation - (1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -

(a) sell it to an authorised person in India in exchange for rupees: or

(b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or

(c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

(2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

5. Period for surrender of realised Foreign Exchange - A person shall sell the realised foreign exchange to an authorised person under Clause a of Sub-regulation 1 of Regulation 4 within the period specified below:

(a) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

(b) in all other cases within a period of ninety days from the date of its receipt.

6. Period for surrender in certain cases - (1) Any person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under Sub-section 5 of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused

(2) Notwithstanding anything contained in Sub-regulation 1, where the Foreign Exchange acquired or purchased by any person from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person -

(i) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins: and

(ii) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

7. Exemption - Nothing in these regulations shall apply to foreign exchange in the form of currency of Nepal or Bhutan.

20. Hence, if the appellant is unable to comply with these requirements under FEMA and R.B.I. authorised dealer, approval is necessary. It is further pointed out that the Management although changed in the year 2001, but the Chairman, Sri Aniruddha Roy Chowdhury remained Director to the Company till 2004.

21. It is further pointed out that the appellate authority has found that from the

MOU dated 22nd October, 2001, the Appellate Company was transferred from old management to the new management after the shares were transferred for about six crores of rupees. In respect of the availability of fund the appellate company did not take any steps to take delivery of the said imported goods which was lying in the warehouse since 2000.

It is further submitted that the appellate company and its Managing Director were responsible for the running of the Company and did not take reasonable steps for delivery of the imported goods.

22. It is submitted that the violation of the provisions of Section 10(6) of the said Act is a continuing offence. After initial committal, which is a violation, continue till the time, compliance is made. Thus, though the appellant has taken over the charge of the appellant company in the year 2002 who still hold in guilty on the face of the continuation of the offence cannot be termed as bad in law. Therefore, it is submitted that the appellant company cannot be escaped by the proviso of Section 42(1) of the said Act. It is further submitted that the violation of the provisions of the Act cannot be taken slightly and any violation of these Acts is nothing but an economic offence and reliance was placed upon a decision reported in JT 2006 (11) SC 164 [The Chairman, SEBI v. Sri Ram Mutual Fund and Anr.] in this respect.

23. After hearing the Learned Counsel for the parties and after going through the materials on record placed before us, we are of the opinion that the violation which has been done by the appellant/petitioner, cannot be stated to be a technical violation and it is well-settled law that contravention of the said Act or Foreign Exchange Regulation Act, 1973 has created a strict liability. The violation of these two Acts would come within the meaning of economic offence and cannot be treated as technical offence.

24. Hence, in our considered opinion, after initial committal and/or contravention of Section 10(6) of the said Act, the violation continues till the time, compliance is made. Therefore, we hold that taking over the charge of the appellate company in the year 2002.

25. Hence, we are of the considered opinion that the Learned Tribunal correctly came to the conclusion and we do not find that there is any reason whatsoever to interfere with the order so passed by the Learned Tribunal. Accordingly, both the appeals are dismissed.

26. For the reasons stated hereinabove, both the appeals are disposed of.

Sankar Prasad Mitra, J.

27. I agree.