

(1990) 09 CAL CK 0014
In the Calcutta High Court

Case No : Foreign Exchange Appeal No. 6 of 1988 and Appeal No. 497 of 1986

Union of India and another

APPELLANT

Vs

Bata India Ltd. and another

RESPONDENT

Date of Decision : 12-09-1990

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 47, 68, 68(1), 9(1), 9(1)

Citation : AIR 1991 Cal 365 : (1992) 62 TAXMAN 68

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : R.N. Das and Mukul Lahiri, for the Appellant; R.N. Bajoria, for the Respondent

Judgement

1. This appeal is directed against the order dt. 8th August 1988 passed by Foreign Exchange Regulation Appellate Board allowing the appeal preferred, inter alia, by Bata India Limited (hereinafter referred to also the "respondent company").

2. Shortly stated the facts giving rise to this appeal are as under:

Acting on information that the respondent company and its Directors are suspected to indulge in unauthorised transactions in foreign exchange, the officers of the Enforcement Directors, Calcutta, searched the head office, the sales office and the factory of the respondent company situated at Batanagar and the residences of O.P. Bhutani, Director (Finance) of the respondent company resulting in the recovery and seizure of certain documents. The statements of certain officers of the respondent company were also recorded by the officers. On the basis therefore, seven show cause notices were issued to the respondent company and its Directors.

3. The charges under show cause notices being SCN I, IV, VI, VII had been dropped by the Adjudicating Officer.

4. The charge under SCN II is based on certain documents appearing in file

marked A-18 seized from the head office of the respondent company. It shows that Bata Shoe Organisation (BSO) is an apex body for all Bata Companies all over the world and the same agreed to entrust the publicity of Bata Products in "Intersoccer-4" to M/s. ROFA-Sport Management A. C. Switzerland who had a programme of comprehensive worldwide promotional, advertising and marketing rights and opportunities associated with certain football matches, tournaments, events and championships. "Intersoccer 4" comprised of several soccer competitions starting from the Toyota Cup to be held in December 1983 till the FIFA World Cup Finals scheduled to be held in June-July 1986. BSO wrote to all Bata Companies including the respondent company, Bata India Limited on 11th Nov, 1988 that BSO had signed an agreement for and on behalf of all the operating companies of Bata in different countries for the rights under Intersoccer-4. It was decided that all the Bata companies should also sign agreements with ROFA on the general lines of the said agreement entered into by BSO, in accordance with the rules and regulations pertaining to various countries. The format of the general agreement was also forwarded to the respondent company. There is a noting at page 32 of the seized file reading "this is latest version start tapping contacts and I will bring official agreement with me for further action". A draft agreement by and between Bata India Limited, Calcutta (respondent company) and ROFA-Sport Management, A.G. Switzerland, incorporating the terms of the aforesaid publicity entrusted on ROFA was also forced. However, the same does not contain the signature of any person on behalf of the Bata India Limited and was in a draft form.

5. As per Schedule "A" to the said draft agreement, the respondent company was to pay to ROFA SFr. 2,000,000 in instalments, the first instalment of SFr. 3,50,000 being due on 15th Dec. 1983. A copy of the letter dt. 24th Aug. 1984 was found which was addressed to the State Bank of India, Calcutta submitting certain documents to be forwarded to the RBI for seeking permission to remit SFr. 680,000 to ROFA-Sport Management Switzerland, in terms of the said draft agreement.

6. On the basis of these materials, the respondent company was issued seven show cause notices out of which only three survived for consideration by the Appellate Board. The same are as under:

(i) SCN II was issued for alleged contravention of Section 9(1)(c) of the Foreign Exchange Regulation Act, 1978 for short (the "Act") on the ground that it had agreed to pay SFr. 2,000,000 to ROFA-Sport's Management A.G. Switzerland in six instalments starting from Dec. 1983 without the permission of the R.B.I. In addition to the respondent-company various other directors and officers of the respondent company were also required to show cause as to why they should not be held liable for the said contravention in terms of S. 68 of the Act because they were either in charge of and responsible for the affairs of the respondent company in terms of sub-section (1) of Section 68 or otherwise were in know of the matter and either actually approved of or agreed to, such amount being paid

by the respondent company, to ROFA.

(ii) SCN No. III was issued to the respondent company for alleged contravention of Section 9(1)(c) on the ground that the company had made a payment of Rs. 22,472 to Shri F.H.R. Mawjee, Bombay on behalf of Messrs Fabrics International, Djibouti, without the special or general permission of the RBI. In respect of the said alleged violation also, the other appellants were required to show cause as to why they should not be held responsible for the same in terms of S. 68 of the Act.

(iii) SCN IV was issued to the respondent company and its directors for alleged contravention of Section 9(1)(ca) on the ground that during the period between 1983 and 30th July 1986 various sums totalling Rs. 2,99,957,41 were made to various hotels towards the expenditure incurred for accommodation and other expenses of foreign nationals on behalf of persons resident outside India without the general or special permission of the R.B.I.

7. The Special Director of Enforcement held that Bata India Ltd. had contravened the provisions of Section 9(1)(c) of Foreign Exchange Regulation Act, 1973. He, therefore, imposed fine in respect of the proceedings arising under SCN II, SCN III and SCN V.

8. The respondent company and the Directors preferred appeals before the Appellate Board allowed the appeal in respect of the penalty imposed in regard to SCN II and SCN V and upheld the imposition of penalty in regard to SCN III.

9. This appeal although directed against the order passed by the Foreign Exchange Regulation Appellate Board allowing the appeals of the Bata India Limited but at the hearing Mr. R.N. Das, learned counsel for the Union of India confined his argument only in respect of the finding and determination made by the Appellate Board in respect of Show Cause Notice II.

10. At the hearing before us it has been contended by Mr. Das, learned counsel for the appellant that in the light of several correspondence that passed by and between Bata India Limited and Swiss company entrusted with the publicity regarding tournament as well as the draft agreement it would be manifest that the respondent company acknowledged the debt in favour of the foreign company without the permission of Reserve Bank of India and thus violated the provisions of S. 9(1)(c) of the Act. It is his contention that the respondent company, as a matter of fact, agreed to share the publicity expenses in connection with the concerned tournament which would be apparent from the correspondence and the Draft Agreement.

11. On the other hand, the contention of Mr. Bajoria, the learned counsel for the respondent company is that there was no enforceable agreement and as such the question of acknowledging any debt or creating any right in favour of a person resident outside India to receive any payment from Bata India Limited did not and could not arise at all.

12. It is not disputed that an "internal" memorandum dt. 11th Nov, 1983 executed between BSO, Canada and ROFA Sport Management was entered into whereunder the various Bata Companies in different countries were to pay certain specified amounts to ROFA towards publicity of Bata Products in "Intersoccer-4". The said memorandum was signed by BSO and sent to the Bata India Limited with the request that a separate agreement between ROFA and Bata India Limited be drawn on the general lines of the aforesaid agreement, clearly specifying the liability of the Bata India Limited to the extent of SFr. 2,000,000 towards its share of the overall amount to be paid to ROFA for such publicity. It is apparent that the liability of the Bata India Limited could not arise on the basis of the agreement entered into by and between BSO and ROFA but only on the basis of the formal agreement to be executed between the respondent company and the ROFA on the general pattern of the agreement between BSO and ROFA, Switzerland known as Master Agreement in the impugned order. The said Master Agreement was between ROFA and BSO only the execution of individual agreement by Bata India Limited is not a mere formality. The Bata India Limited even if it happened to be one of the members of the Bata Organisations operating in India and governed by the rules and regulations of this country is not a part of subsidiary of BSO and, as such, not identical with BSO. There is nothing to suggest that the agreement entered into by BSO with ROFA automatically became binding on the Bata India Limited. Had it been so, there was hardly any necessity for BSO to insist that the Bata India Limited should enter into a similar agreement with ROFA subject to the rules and regulations applicable in this country. In fact, the BSO, Canada is the apex organisation incorporated in Canada which by and large had been looking after and trying to promote the activities of the various Bata companies in different countries. However, such an organisation cannot be equated with any Bata company which is a separate legal entity governed by the laws and regulations of the country in which it operates. Presumably for this reason BSO had sent the Master Agreement to various Bata companies operating in 12 different countries for entering into separate agreement with BSO on the pattern of the Master Agreement arrived at by and between BSO and ROFA.

13. In our view, the attempt of the learned counsel to equate BSO with the Bata India Limited is to ignore the realities of the situation. No liability arising out of the Agreement entered by and between ROFA and BSO would be, as a matter of course, be binding on Bata India Limited inasmuch as Bata India Limited was not a party to the Master Agreement. Admittedly no separate agreement was entered into by and between Bata India Limited and ROFA. The further developments in the matter would make the position clear.

14. It appears that pursuant to the receipt of the Internal Memorandum it was tentatively decided to enter into an agreement with ROFA and thereby creating a liability of payment on the Bata India Limited under the overall scheme of the Master Agreement in accordance with the rules and regulations governing such contracts. A draft agreement as between the Bata India Limited and ROFA

appears to have been drawn without any signature which was dt. 15th Sept. 1983 and a copy thereof was sent to the RBI along with their letter dt. 20th August, 1984. Admittedly, the draft agreement was not signed by or on behalf of the Bata India Limited. Two copies of the fair draft agreement were sent on 27th Dec. 1983 by Westhold A.G. Zurich with the request that the same may be signed by the Bata India Limited. The performance under the Master Agreement did not depend on the separate agreement being entered into by and between the respondent company and BSO. Whether the respondent company shared the publicity expenses or not, the publicity had to be undertaken by the Swiss company pursuant to the agreement between ROFA and BSO, Canada. It was not for the respondent company to say that unless the permission of the Reserve Bank of India was obtained no advertisement should appear in terms of the Master Agreement by and between BSO and ROFA in respect of Bata India Limited. The execution of the agreement between ROFA and BSO could not expressly or by implication intend to create any liability of the respondent company without their signing a separate agreement with ROFA. The letters which have been relied on in this connection would also unmistakably point out that Bata India Limited could not enter into any agreement as the permission of the Reserve Bank of India was not obtained. By the letter dt. 7th March, 1984 the Swiss company informed the Bata India Limited that the copy of the contract signed by Bata India Limited was not received, nor was the payment due on January 1, 1984. In reply to the said letter, Bata India Limited informed as follows:--

"According to the Government of India's rules governing foreign exchange transactions, no remittance can be made without the approval in writing, of the Reserve Bank of India. We have already applied to them for their permission and on receipt of their approval, we shall arrange to remit the first instalment. For the same reason, we are unable to sign the contract with ROFA-Sport Management A Gas, under the Indian Laws, no such contract involving foreign exchange remittance can be signed without the Reserve Bank of India's approval.

We take this opportunity of assuring you that we are following up the matter with the authorities concerned with a view to expediting their approval and would inform you by telex immediately on receipt of such permission."

15. Further, from the draft agreement, it appears that ROFA Sports, Switzerland sent an agreement for Bata India's participation and contribution to the advertising and promotional campaign in connection with "Intersoccer-4", a major World Soccer event leading to World Cup in Mexico in 1986. The signing of the said draft agreement was dependant on the following conditions which have been mentioned in the note dt. 16th February, 1984 made by the respondent company:--

"2. Applying to Reserve Bank of India for remittance of funds, Bata India will try its best to have maximum funds remitted as soon as possible. It may be mentioned here that Government of India is very reluctant to allow remittances

of foreign exchange for such purposes.

4. The agreement sent by ROFA, Sports can be signed by Bata India only when Reserve Bank of India's permission is obtained for remittance of funds. We might write to ROFA Sports that we would be applying for Reserve Bank of India's necessary permission and on obtaining the permission we will sign the agreement."

16. In our view, on the facts and in the, circumstances of this case, the provisions of Section 9(1)(c) of the Foreign Exchange Regulation Act, 1973 cannot be pressed into service. This section provides that no person in, or resident in India shall "draw, issue or negotiate any Bill of Exchange or Promissory Note to acknowledge any debt so that a right to receive payment is created or transferred in favour of any person resident outside India." Unless the conditions as enumerated in Section 9(1)(c) of the Act co-exist, no liability can be fastened on the respondent company. Section 9(1)(c) of the Act stipulates that there should be a debt as such; secondly, there should be an acknowledgment of the debt, and lastly such acknowledgment must give right to the foreign company to claim the amount so that it can be recovered.

17. According to Black's Law Dictionary, 5th Edition, "debt" means "a sum of money due by certain express agreement; a specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment". Thus there must be an actionable claim on the basis of which either party cannot only lay its claim but also withdraw the amount. Debt is therefore a sum payable in respect of a liquidated money demand recoverable by action. In our view, since there was no agreement enforceable in law by and between Bata India Ltd. and ROFA, the question of acknowledging a debt did not and could not arise at all. A debt must flow from an enforceable agreement and not de hors the agreement. If there was no agreement by and between ROFA and Bata India Limited or BSO and Bata India Limited, neither BSO nor ROFA could compel Bata India Limited to make any payment towards the publicity expenses incurred on behalf of Bata companies, including Bata India Limited. The fixed and certain obligations can only arise on the basis of agreement. The facts as narrated hereinbefore would clearly demonstrate that Bata India Limited made it quite clear that unless the permission of the Reserve Bank of India was obtained, the question of entering into an agreement for sharing the liability towards the advertisement expenses would not arise and only when such permission would be obtained, the agreement would be signed. That contingency did never occur. The clear stipulation in the draft agreement -- wipes off the concept of debt inasmuch as it cannot be an actionable claim so long as the permission of the Reserve Bank of India was not obtained.

18. In the instant case, the formal agreement having not been signed in absence of the permission of the Reserve Bank of India there was no existing debt which could have been acknowledged by the Bata India Limited and far less to give any

right to BSO or ROFA to claim any amount from Bata India Limited. As a matter of fact, it has been stated in course of the argument which has not been disputed, that no amount has been paid by Bata India Limited as yet towards the alleged liability sought to be fastened on them without there being any legally enforceable agreement. Unless a right is created in favour of the foreign company there could not be any contravention of Section 9(1)(c) of the Act. There is no foundation for the foreign company to lay their claim on any part of the amount unless the Reserve Bank of India accorded permission to Bata India Limited. Bata India Limited, therefore, rightly did not enter into any agreement which would have created a liability and a corresponding right on the foreign company. No right, therefore, can be said to have been created in favour of the foreign company in respect of any amount mentioned in the draft agreement. We are, therefore, of the view that there is no merit in the contention raised by the learned counsel for the appellant.

19. It is then contended that Section 47 of the Act supports the finding of the adjudicating officer. Section 47 deals with "Contracts in Evasion of the Act." It is specifically provided in sub-sec. (2) as under:

".....and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of the Act except with the permission of the Central Government or the Reserve Bank, shall not be done unless such permission, is granted."

Sub-section (3) of Section 47 no doubt states that notwithstanding "any provision of the Act nor any term contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise....."

It is thus clear from sub-clause (2) of Section 47, whenever a payment is dependent on the permission from the Reserve Bank of India and when it is provided in the Act itself that the same cannot be done without such a permission, it is contemplated that it will not be allowed to be done unless such a permission is granted and the implied condition of the said agreement shall be presumed that the said payment shall not be made unless there is a permission from the Reserve Bank. The provisions of Section 47 enable a party to the contract to enforce the same if it is otherwise enforceable in spite of such a provision being contrary to law. However, in the instant case, as we already said, that there was no executed contract at all and, therefore, Section 47 does not advance the case of the appellant. Unless there was a duly executed agreement between the respondent company and ROFA, ROFA could not enforce any provision contemplated in the draft agreement, even though the respondent company was inclined to enter into the agreement subject to and after the

requisite permission being granted by Reserve Bank of India in this behalf. Taking the entirety of the facts into consideration there was no promise to pay and even (if?) there was any promise to pay, it could not be performed until permission of the Reserve Bank of India had been obtained and there could accordingly be no liability in respect of such promise. Even if there was an agreement, such agreement could be performed only after the permission was accorded by the Reserve Bank of India. In that sense there was no unconditional and unfettered acknowledgment of any debt. That apart the historical events as narrated hereinbefore will unmistakably point out that even if there was any contravention, there was no mens rea as the respondent company acted bona fide taking the consistent stand that even if there was obligation to pay to ROFA, such obligation would not and could not be discharged until the permission of the Reserve Bank of India was obtained.

20. For the reasons aforesaid, we are of the view that there is no substance in the contentions made on behalf of the appellant. The appeal is dismissed, without any order as to costs.

21. Three several bank guarantees aggregating to Rs. 11 lakhs furnished to the satisfaction of the Deputy Director, Enforcement Directorate, Foreign Exchange Regulation, will stand discharged and be returned to the respondent company.

22. Prayer made by Mr. Lahiri for leave to appeal to Supreme Court is rejected inasmuch as we do not find any substantial question of law being involved in this case.

23. All parties to act on the signed copy of the operative part of the judgment.

Bhagabati Prasad Banerjee, J.

24. I agree.

25. Appeal dismissed.