
(2012) 02 BOM CK 0090

In the Bombay High Court

Case No : Fera Appeal No. 47 of 2010 With Civil Application No. 43 of 2010

Union of India

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 14-02-2012

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 19

Foreign Exchange Regulation Act, 1973 — Section 64(2), 68(1), 8(3), 8(4)

Penal Code, 1860 (IPC) — Section 107

Citation : (2012) 283 ELT 5

Hon'ble Judges : M.S. Sanklecha, J; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : R.V. Desai, with Mr. Rui A. Rodrigues and Mr. M.S. Bhardwaj in all Appeals, for the Appellant; Kunal Vajani instructed by . M/s. Wadia Ghandy and Co. for Respondent, In Fera Appeal Nos. 54, 60, 62, 64, 67, 70, 77, 79, 80 and 82 of 2010, Mr. Rajeev Pandey with Ms. Prachi Mhatre instructed by . M.S. Bodhanwalla and Co. for Respondent, In Fera Appeal No. 81 of 2010, Mr. Rajeev Pandey with Mr. Sanjiv Punalekar instructed by . PRS Legal for Respondent, In Fera Appeal Nos. 68 and 69 of 2010, Ms. Dohita Lewis with Ms. Sneha Mhatre instructed by . Vigil Juris for Respondent, In Fera Appeal No. 83 of 2010, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—These Appeals by the Union of India arise out of an order passed by the Appellate Tribunal for Foreign Exchange on 12 October 2009. The Tribunal initially heard a batch of Appeals which arose out of an order of adjudication passed by the Special Director in the Enforcement Directorate. The Adjudicating Officer held that there was a violation of the provisions of Sections 8(3) and 8(4) of the Foreign Exchange Regulation Act, 1973 by four companies. The Adjudicating Officer imposed penalties on the companies and also on their concerned officers who were held to be guilty of the contravention u/s 68(1). The order of adjudication held seven Banks guilty of having contravened the provisions of the FERA, 1973 upon whom penalties were imposed together with their concerned officials who had been proceeded against. In a batch of Appeals

which arose before the Tribunal, there was a difference of opinion recorded between two Members constituting the Bench. The difference of opinion related to whether the concerned Banks and their officials could be held to have abetted the contravention of the provisions of the Act within the meaning of Section 64v. The Appeals were thereupon placed before a third Member who by his Judgment dated 7 October 2009 held that the Banks and their officials had not abetted the contravention of the provisions of Sections 8(3) and 8(4) of the Act and that the remittance of foreign exchange against Letters of Credit did not amount to either intentionally aiding, instigating or engaging in conspiracy. Following the decision of the third Member, the Appeals have been allowed by the Tribunal by its order dated 12 October 2009. The order of the Adjudicating Officer has been set aside.

2. Several questions of law have been formulated in the Appeals filed by the Union of India. By consent the Appeals are admitted on the following substantial question, which shall be sufficient to dispose of the Appeals:

Whether in the facts and circumstances of the case and in law the Tribunal was justified in holding that there was no abetment on the part of the employees and the Banks in the violation of the provisions of Section 8(3) of the Foreign Exchange Regulation Act, 1973 by the Hamco Group of Companies?

With the consent of the counsel appearing for both sides, the Appeals are taken up for hearing and final disposal. We have heard learned Counsel for the Union of India and for the respective Banks. Counsel for the Union of India states that Canara bank has been served.

3. The Special Director in the Enforcement Directorate issued four notices to show cause on 28 March 2000. The primary contravention was alleged to have been committed by four companies :

- (1) Hamco Mining and Smelting Ltd.
- (2) Dravya Industrial Chemicals Ltd.
- (3) Nariman Point Chemical Industries Ltd.
- (4) Hindustan Industrial Chemicals Ltd.

4. The allegation was that the Hamco Group of Companies had opened a large number of Letters of Credit in eight banks for the purpose of importing goods, following which foreign exchange had been remitted abroad through the collecting bankers without genuine documents of title and though the goods did not arrive in India. In the first notice to show cause it was alleged that during the period between 1995-1998 Hamco Mining and Smelting Ltd. made a total remittance of US \$ 11.80 Crores and D.M. 20,036 and received back a total amount of US \$ 5.69 Crores as purported insurance claims and that the company had fabricated documentary evidence showing Merchanting Trade, remitting foreign exchange worth US \$ 7.56 Crores without the actual shipment of goods. In the second show cause notice it was alleged that Dravya Industrial Chemicals

Ltd. obtained a remittance of US \$ 3.48 crores for the import of goods but failed to make any import. Instead of importing the goods a purported insurance claim of US \$ 1.29 crores was received. It was alleged that the company had fabricated documentary evidence showing Merchanting Trade and that it remitted foreign exchange worth US \$ 21.58 lacs without actual shipment of goods. In the third notice to show cause dated 29 March 2000 it was alleged that Nariman Point Chemical Industries Ltd. obtained foreign exchange of US \$ 54.80 lacs for the import of goods but failed to make any import. A purported insurance claim of US \$ 17.32 lacs was received. In the fourth notice to show cause it was alleged that Hindustan Industrial Chemicals Ltd. obtained a remittance of US \$ 33.83 lacs for the import of goods but failed to make any imports.

5. A violation of the provisions of Sections 8(3) and 8(4) read with Section 68 of the FERA was alleged. The banks together with their employees were alleged to have abetted the Hamco Group of Companies in contravention of the provisions of the Act. In so far as the Banks and their employees are concerned an Addendum was issued to each of the four show cause notices on 20 November 2000 alleging, inter alia, that by their acts of gross negligence the banks and their employees had abetted the Hamco Group of Companies in contravening the provisions of the Act.

6. The Special Director in the Enforcement Directorate by his order of adjudication dated 18 September 2003 held that the violation of the provisions of the FERA, 1973 by the four notices belonging to the Hamco Group of Companies was established. Penalties were imposed on the four noticee companies and upon their officers who were in charge of and responsible for the business within the meaning of Section 68(1). The findings which were recorded against the banks and their officers were that (1) In a large number of cases the Bills of Lading furnished by the Hamco Group of Companies did not have the container numbers which was necessary to ensure the correctness of each bill, as a document of title; (2) Despite the obvious discrepancies in the Bills of Lading, the Banks remitted the amounts abroad under the Letters of Credit; (3) Though in a large number of cases the Bills of Entry remained to be submitted by the remitter of funds abroad, the Banks continued to open fresh Letters of Credit and kept on remitting further amounts abroad without verifying the veracity of the claims made by the remitter of funds; (4) The Banks had repeatedly received remittances from abroad in the guise of insurance claims without such claims being processed through them. The Adjudicating Officer held that while on the one hand between 1995-98 the banks were effecting remittances against LCs to the overseas parties, they continued to do so even though the noticee companies failed to submit relevant Bills of Entry indicating the import of goods into India. This continued to take place repeatedly until the "bubble burst" in 1998. On the other hand, the very same banks had received large amounts from the same overseas parties to whom remittances were made against alleged imports either under the guise of insurance claims or otherwise. The Adjudicating Officer held that the suspicion of the officials should have been aroused and they ought to

have exercised care and caution while dealing with the noticee companies. Had the documents been carefully scrutinised before making remittances, the bankers would have noticed the fact that the Bills of Lading did not contain the container numbers. By omitting to scrutinise the documents submitted and by allowing the noticee companies to make huge remittances overseas, the noticee banks and their officers were alleged to have aided and abetted contravention of the provisions of the FERA. The Bank officials, it was found, ignored the failure on the part of the notices to file Bills of Entry for which remittances had been effected while at the same time allowing them to open fresh Letters of Credit in favour of the very same parties to whom remittances were made under earlier Letters of Credit for which Bills of Entry had not been filed. In other words, it was evident that the officials of the banks who authorised the opening of the LCs ought to have exercised proper care and vigilance in the opening of fresh LCs, especially when the noticee companies who had opened the LCs had failed to submit proof of import evidencing the import of goods into India. Letters of Credit were opened despite the fact that noticee companies had failed to file Bills of Entry for prior imports. Remittances were made abroad by the banks, though careful scrutiny would have revealed that the import documents were deficient. On this ground, the banks and their officials were held guilty and were penalised.

7. Appeals were filed before the Appellate Tribunal amongst others, by the banks and their concerned officials. On 11 February 2009 two separate differing judgments were delivered by the Two Members of the Appellate Tribunal. Shri O.P. Nahar, Chairperson of the Tribunal came to the conclusion that the Appeals filed by the banks and by their employees would have to be allowed. The other Member constituting the Bench, Kum. Vijay Laxmi held on the other hand, that the banks and their officials had been correctly held guilty of contravention under the provisions of Section 64(2) read with Sections 8(3) and 8(4) of the FERA, 1973 read with the Exchange Control Manual. Following the two judgments, the following points of difference were placed before a Third Member of the Tribunal:

(1) Whether in the facts and circumstances of these appeals, the appellant banks and their respective employees have abetted Hamco Group of Companies for contravention of Section 8(3) read with 8(4) of FER Act, 1973 by remitting different but substantial amounts of foreign exchange against large number of confirmed L/Cs opened by purchaser, M/s. Hamco Group of Companies who had not imported the goods:

(a) by omitting to detect material irregularity (not identified in impugned order) which otherwise is fabricated by importer or;

(b) by depositing remitted foreign currency as received in the guise of insurance claim which were not processed through appellant banks or;

(c) by omitting to detect that received foreign currency of insurance claims is of claims never filed before nor processed through insurance companies.

(2) Whether any act or omission of the appellants amounts to abetment by

intentional aid or instigation or engaging in conspiracy.

8. By his order dated 7 October 2009 the Third Member has come to the conclusion that the banks and their officers had not abetted the contravention of the provisions of Section 8(3) read with Section 8(4) of the FERA, 1973. Following this, the Appeals have been allowed by the Tribunal by its decision dated 12 October 2009.

9. Counsel appearing on behalf of the Union of India submits that,

(1) The Charge against the respondents to this batch of appeals was of abetting the contravention of the provisions of Section 8(3) and 8(4) within the meaning of Section 64(2) of the FERA, 1973; (2) The Special Director in the Enforcement Directorate had held the banks and their officials guilty of an act of abetment within the meaning of Section 64(2) on the basis of a detailed consideration of the facts and circumstances; (3) On a difference of opinion arising between the two Members of the Appellate tribunal, a Third Member was called upon to decide the points of difference; (4) Ex facie, the order of the third Member dated 7 October 2009 would indicate that the material on record has not been considered. The third Member has erroneously proceeded on the basis as if a criminal offence had to be established on a charge of abetting the commission of an offence within the meaning of Section 107 of the Penal Code. Moreover, it has been submitted that both the reasons which have been indicated in the order of the third Member are ex facie specious. The third Member has held that the receipt of a Bill of Entry could only happen after the remittance of foreign exchange, which was an act which had happened after the commission of contravention and not before. Similarly the purported insurance claims were received after the remittances and not earlier. On this basis it has been concluded that these later acts cannot result in a finding of abetment since the abetment of a contravention cannot take place after the contravention is complete. It was urged that the order of the Tribunal completely fails to consider the relevant material on record and since the decision has been rendered without taking into account the entirety of evidence and against the preponderating weight of the evidence, the order deserves to be quashed and set aside and the proceedings remitted back to the Tribunal.

10. On the other hand, it was urged on behalf of the banks by their respective counsel that (1) When a confirmed Letter of Credit is opened, a bank is bound to pay under the terms of the document, save and except in the case of established fraud; (2) The notice to show cause proceeded on the basis that there was a gross negligence on the part of the banks concerned and their officers which was the foundation of the allegation of abetment. The mere fact that the banks and their concerned officers were alleged to have not scrutinised the documents and to have made remittances notwithstanding the fact that the Bills of Entry in respect of the earlier remittances had not been received, cannot by itself be suggestive of abatement of the contravention. On behalf of Oman International Bank it was urged that it was not a bank which had opened a Letter of Credit but

was only a collecting bank.

11. An appeal against the decision of the Special Director in the Enforcement Directorate lies u/s 19 of the Foreign Exchange Management Act, 1999 to the Appellate Tribunal. The appeal before the Tribunal is an appeal on facts and on law. The Special Director in the Enforcement Directorate relied upon several circumstances in holding that the Banks and their concerned officials were guilty of an abetment of the contravention of the provisions of Section 8(3) and 8(4) of the FERA. These circumstances were as follows:

(1) Between 1995 and 1998 the Banks had opened and effected remittances against Letters of Credit for transactions involving the import of goods in favour of overseas parties, even though the noticee companies failed to submit relevant Bills of Entry indicating import of goods into India;

(2) Even when the noticee companies did not submit the Bills of Entry in respect of the remittances which were made in the year 1995, some of the banks continued to approve of remittances to the same overseas parties again and again until the fraud was investigated into in 1998;

(3) Had the Bankers carefully scrutinised the documents submitted by the noticee companies for making the remittances, they would have noticed the fact that the Bills of Lading did not contain the container numbers as required. A Bill of Lading is a receipt for cargo and unless the cargo can be sufficiently and precisely identified, the bill as a document of title would be without consequence;

(4) Though in a large number of cases the Bills of Entry remained to be submitted by the remitter of funds, the banks continued to open fresh LCs and kept on remitting further amounts abroad without checking the veracity of the claims made by the remitter;

(5) The Banks were receiving large amounts from the same overseas parties to whom remittances were made against alleged imports either under the guise of insurance claims or otherwise.

12. When the matter was carried in appeal before the Appellate Tribunal, the Chairperson of the Tribunal took the view that the circumstances which were relied upon by the Adjudicating Officer were remote and were not closely connected with the act of confirmation of the LCs against whom payment of foreign currency was made. The Chairperson was of the view that payment could not have been avoided without inviting a breach of a binding contract in international trade. The Chairperson was of the view that the discrepancies in the Bill of Lading could hardly invite the attention of anyone except at a later stage when things became absolutely clear. The Bankers, according to the Chairperson, were bound to take a reasonable care, but nothing more. No intentional omission was, in this view, made out. The second Member of the Tribunal, who took a different view of the matter, inter alia, relied upon the provisions of Article 23 of the Uniform Customs & Practice for Documentary Credits (UCPDC) under which a

banker is required to accept a document, if a credit calls for a bill of lading covering a port to port shipment which appears on its face to indicate the name of the carrier and which indicates that goods have been loaded on board on a named vessel. In the present case, it was found from the record that in a number of transactions the Bills of Lading did not show the name of the vessel as required under Article 23 and there were major discrepancies in the documents. In a large number of cases the Bills of Lading did not have the container numbers. A Bill of Lading being a receipt for cargo, it would be useless unless the cargo can be precisely identified. In the present case the lack of container numbers indicated that the cargo described in the Bill of Lading did not, in fact, exist, which proved the non existence of the goods. Moreover, in a number of cases the Bills of Entry continued to remain pending to be submitted by the remitter, despite which the banks continued to open fresh Letters of Credit and kept on remitting funds abroad. Remittances were effected during 1995-1998 though the noticee companies had failed to submit relevant Bills of Entry indicating the import of goods into India. Further foreign exchange was received in the guise of insurance claims which were credited to the accounts of the noticee companies. The claims were dealt with directly by the group of companies and the correspondence was not routed through the authorised dealer. The Second Member held that while the banks were bound to honour the Letters of Credit, this obligation did not extend to a situation where the documents contained material misstatements or omissions.

13. The third Member of the Tribunal before whom the difference of opinion between the two Members was placed for hearing, was required to consider the material and evidence on record in its entirety before proceeding to decide the question referred. The principal difference of opinion was whether the charge against the banks and their officials of abetment under the provisions of the FERA, 1973 had been established. The third Member has held that, (1) The receipt of a Bill of Entry can only happen after the remittance of foreign currency and not before; (2) The insurance claims were received after the remittances took place and not earlier. Since both the acts allegedly took place after the contravention had taken place, the Member was of the view that the charge of abetment could not be established. In our view, there is a considerable amount of merit in the submission which has been urged on behalf of the Union of India that the third Member before whom the matter was placed for resolving the points of difference has completely failed to consider in its entirety the material on record and the charges that were levelled against the banks and their officers. The order passed by the third Member, besides being cryptic, does not take note of all the materials which were on the record of the adjudication proceedings and from which the Appeals were filed before the Tribunal. Each of the circumstances which weighed with the Adjudicating Officer have already been noted earlier. While according to the Chairperson those circumstances were of a remote nature, the other Member who differed held that there was a serious and consistent violation on the part of the banks and their concerned officials in the

discharge of their duties as prudent bankers. With respect, the third Member has failed to apply his mind to the entirety of the material on record. In this view of the matter, we are of the view that the ends of justice would require that the impugned order of the Tribunal dated 12 October 2009, which is based on the decision rendered by the third Member on the points of difference, should be set aside and the appeals be remanded back for hearing afresh. As a matter of fact, the submissions which have been urged before this Court even on the part of the banks would indicate that none of those submissions has been taken into account by the Appellate Tribunal.

14. For these reasons, we set aside the impugned order of the Appellate Tribunal dated 12 October 2009 and remit the Appeals back to the Tribunal for consideration afresh. We clarify that this Judgment would not be regarded as an expression of any conclusive opinion on the merits of the allegations levelled against the respondents, the correctness whereof shall form the subject matter of the determination to be made by the Appellate Tribunal on the restoration of the Appeals. In this view of the matter, it is not necessary for this Court to answer the substantial question of law as framed. The Appeals shall stand disposed of. There shall be no order as to costs.

15. During the pendency of the Appeals before the Appellate Tribunal, the orders in regard to the waiver of deposit and stay which held the field earlier, shall continue to operate.

16. In view of the disposal of the Appeals, the Civil Applications do not survive and shall accordingly stand disposed of.