
(2012) 03 BOM CK 0229
In the Bombay High Court
Case No : Fera Appeal No. 8 of 2012

Vinod M. Chitalia

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Customs Act, 1962 — Section 108, 127H, 127J
Foreign Exchange Management Act, 1999 — Section 3, 35
Penal Code, 1860 (IPC) — Section 193, 228

Citation : (2012) 114 BOMLR 2112

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

Bench : Division Bench

Advocate : B. Sheshgopalan with Mr. Girish Agrawal, for the Appellant; R.V. Desai with Mr. M.S. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—This appeal u/s 35 of the Foreign Exchange Management Act, 1999 ("the FEMA"), is directed against an order of the Appellate Tribunal for Foreign Exchange, dated 27 April 2010. By the impugned order, the Tribunal has sustained the findings of the Special Director in the Enforcement Directorate, holding that the Appellant violated the provisions of Section 3(b) and Section 3(d) of the Act. The penalty which was imposed on the Appellant by the Adjudicating Officer in the amount of Rs. 2 crores under the first notice to show cause and in the amount of Rs. 3 lakhs under the second notice has been sustained. The Special Director in the Directorate of Enforcement issued two notices to show cause on 5 August 2008. The Appellant was the Fifth Noticee in respect of both the notices to show cause. The show cause notices were also addressed inter alia to a Company by the name of Arch Pharmed Labs Ltd. and to its Chairman and Managing Director, Deputy Managing Director and Executive Director among other persons. In both the notices, it is alleged inter alia that there was a violation of the provisions of Sections 3(b) and 3(d) of the FEMA. The violation in respect of the first notice was to the extent of Rs. 75.39

crores while in the case of the second, of Rs. 3.84 crores.

2. Information was received by the Directorate of Revenue Intelligence that Arch Pharmalabs Ltd. (APL) was involved in bogus exports in which, the export documents showed that the drug Azithromycin was being exported while in actuality paracetamol which was of a negligible value was substituted. Three export consignments presented by APL for export under the DEPB Scheme under Shipping bills all dated 29 March 2005 in which goods were declared to be Azithromycin were intercepted. Though the FOB value declared was Rs. 1.06 crores, on examination the consignment was found to contain Paracetamol of an actual value of Rs. 3.25 lakhs. APL was alleged to have received remittances to the extent of Rs. 75 crores in respect of a large number of transactions against fabricated export documents. The first show cause notice related to 261 transactions where no goods were actually exported. APL was alleged to have received an amount of Rs. 75.39 crores by way of inward remittances though no export had taken place. The second show cause notice related to a charge in respect of 14 transactions where the violation was to the tune of Rs. 3.84 crores.

3. The Special Director in the Enforcement Directorate by his order dated 12 May 2009 held that the Appellant was guilty of a violation of the provisions of Section 3(b) and Section 3(d) for which a penalty of Rs. 2 crores was imposed. As regards the second show cause notice, the Appellant was held to be in violation of the same provisions resulting in a penalty of Rs. 3 lakhs.

4. The Appellate Tribunal for Foreign Exchange by its order dated 27 April 2010 confirmed the findings of the Adjudicating Officer and the penalty which was imposed on the Appellant.

5. In this appeal, the Appellant has raised several questions of law. During the course of the hearing, the appeal has been pressed by Counsel on questions (c), (d) and (g) which are as follows :

(c) Whether in the facts and circumstances of the case, the Tribunal is right in law in dismissing the appeal of the Appellant when the previous division bench of the Tribunal on the same set of identical facts of the case allowed the appeals filed by the main notices and beneficiaries;

(d) Whether in the facts and circumstances of the case, whether the earlier order of the Tribunal on the same set of identical facts is binding precedent on the subsequent coordinate bench; and

(g) Whether in the facts and circumstances of the case the order of the Tribunal is non application of mind when neither the Appellant nor any one named the Appellant as the person who dealt with any financial transaction against the alleged exports and the same is condition precedent statutorily to dismiss the appeal.

6. The submissions which have been urged on behalf of the Appellant are that (i) The order passed by the Adjudicating Officer was questioned in appeal before the

Tribunal by the co-notice, APL, and inter alia by its Chairman and Managing Director (Ajit Kamath), Deputy Managing Director (Manoj Jain) and Executive Director (Rajendra Kaimal). By a decision dated 31 August 2009, the Tribunal allowed the appeal, coming to the conclusion that the retracted statement of Manoj Jain could not be relied upon; the statements relied upon by the Enforcement Directorate were required to be corroborated after proving that the admissional statements were made without threat or coercion which evidence was not available; that though the Appellant had moved the Settlement Commission constituted under the provisions of the Customs Act, the order of the Settlement Commission dated 7 June 2006 was in the nature of a compromise or compounding; that APL had received the entire export proceeds through proper banking channels and the finding that the Appellant received payments through hawala transactions, was not based on evidence. The Tribunal held that the transaction of Foreign Exchange which is against bogus exports could not be held to amount to the acquisition, creation or transfer of assets outside India and the charge u/s 3(d) could not survive. Counsel submitted that these findings of the Appellate Tribunal would be binding on the Tribunal when it heard the appeal filed by the present Appellant. The Tribunal, it is submitted, erroneously formed the view that APL, its Chairman and Directors were not persons entitled to be exonerated of the charges by the Tribunal; (ii) There is no evidence before the Tribunal to indicate that the Appellant was involved in any transaction of the nature that would violate the provisions of Sections 3(b) and 3(d) of the FEMA; (iii) There is nothing to indicate that the Appellant had either made any payment to or for the credit of any person resident outside India or that he has entered into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire any asset outside India by any person.

7. On the other hand, Counsel appearing on behalf of the Respondent has submitted that (i) The finding in the earlier order of the Appellate Tribunal in regard to a co-notice would not operate as *res judicata* or as a binding precedent in so far as the culpability of the Appellant is concerned. The Tribunal was entitled to determine on the basis of the evidence on the record as to whether on a preponderance of probabilities the charge against the Appellant stood established. In an adjudicating proceeding, the adjudicating authority is not bound by strict proof beyond reasonable doubt as in the case of a criminal trial. It is well settled, as the Tribunal held, that even a retracted statement can be relied upon. So long as the Tribunal comes to the conclusion that the statement is voluntary and true, the Tribunal would be within its jurisdiction in relying upon the statement; (ii) The Tribunal has elaborately considered the entirety of the material on the record and has come to the conclusion that the charge against the Appellant has been established. The appeal before this Court u/s 35 is on questions of law and the Court would not be justified in reappreciating the evidence; (iii) The adjudicating authority has indicated sufficient reasons for establishing both the violations of Sections 3(b) and 3(d) of

the FEMA.

8. We have heard Counsel and with their assistance have perused the record.

9. The Tribunal in the present case was called upon to decide the appeal filed by the Appellant holding him in breach of the provisions of Sections 3(b) and 3(d) of the FEMA and subjecting him to the award of a penalty. In an earlier proceeding before the Tribunal which culminated in an order dated 31 August 2009, APL and among others, its Managing Director, Deputy Managing Director and Executive Director were held not to be guilty of a breach. In the earlier order of the Tribunal, it is noted that the statement which was made by Manoj Jain and recorded under the FEMA was in virtual retraction of the statement recorded before the DRI and for that reason alone, it is held that the statement cannot be termed as voluntary in the absence of corroboration in material particulars. In its earlier order, the Tribunal proceeded on the basis that an admissional statement made before the Customs authorities, if so sought to be relied upon by the Enforcement Directorate, is required to be corroborated after proving that the admissional statement was without threat and coercion. No such evidence, according to the Tribunal, was available.

10. In the present case, the Tribunal has come to the conclusion that in so far as the Appellant is concerned, he has been unable to establish that a case of threat or coercion was used against him. The Tribunal noted that the retraction of the statement is only an afterthought. The statements made by the Appellant, according to the Tribunal, contained minutest details of which the Appellant would have exclusive knowledge and which could not be the result of tutoring or compulsion. The Tribunal has relied upon several judgments of the Supreme Court, including in *K.T.M.S. Mohd. vs. Union of India*, (1992) 3 SCC 178 during 200305 where it has been held that the core of all the decisions of the Supreme Court is to the effect that once the voluntary nature of any statement made under the relevant provisions of the respective Acts is established, the statement can be relied upon. Once the Court is satisfied that it is voluntary and true a finding of breach can be sustained. It is for the maker of the statement who alleges inducement, threat or promise to establish it. Even a retracted statement can be accepted as reliable evidence of a violation alleged so long as it reflects the truth and is otherwise made voluntarily.

11. In the present case, several important circumstances have a bearing on the complicity of the Appellant. The documentary material on the record revealed that APL submitted 261 shipping bills to authorised dealers of the total value of Rs. 75.39 crores where no export had taken place. All the 261 shipping bills were found to be fictitious. Among the circumstances which were relied upon by the Tribunal are the following:

(i) Enquiries were made in regard to the genuineness of the Bills with the Customs Department which confirmed that the shipping bills of APL were not found in the system and no export had taken place with the approval of the

Customs Department. These transactions came to light when the Customs authorities detained certain consignments of APL where goods of a negligible value were sought to be exported against a declaration of high value drugs;

(ii) The Shipping Lines which were mentioned in the shipping bills denied during the course of the adjudication to have worked as shipping and forwarding agents of APL;

(iii) The Clearing Agents named in the shipping bills have similarly denied that the bills of APL were processed by them;

(iv) The Appellant, Vinod Chitalia, provided APL with fictitious purchase bills in the name of a Company by the name of Nikita Pharma Chem Pvt. Ltd. The aforesaid Company was under the control of the Appellant. Naresh Solanki, who was a Director of the Company in fact, stated that he was merely drawing a salary of Rs. 8,000/per month; that he was a Director only on paper and was an employee of the Appellant. He would obey orders of the Appellant by signing of blank cheques, blank papers, bills, challans and other documents on his instructions. He admitted during his statement that he had signed a number of blank bills as directed by the Appellant and forwarded them to APL. The total purchases from Nikita Pharma Chem Ltd and two other Companies were of the value of Rs. 76.14 crores. The Company of the Appellant had issued bogus purchase bills to APL;

(v) The fact that no goods were actually purchased against those fictitious purchase bills was admitted by Manoj Jain, Director of APL in his statement dated 5 May 2005; and

(vi) Payments were made by APL inter alia to Nikita Pharma Chem Pvt. Ltd. against fictitious purchase bills which were used to obtain remittances against fictitious exports.

12. In so far as the role attributed to the Appellant is concerned, the Appellant in his statement dated 21 November 2005 stated that he was a Commission agent since 2001 and that he knew APL and its officers. The Appellant stated that his business had been closed due to bad debts from his debtors. He came into contact with APL and its Directors who had discounted his bills during the said period and he owed them between Rs. 70 to 75 lakhs. After his business had closed, he had requested Manoj Jain, Director, APL to give him work. According to the Appellant, his work was to carry documents and hand over them to CHAs for which he was getting a commission of Rs. 5,000/to Rs. 6,000/per document. Among the statements which were recorded were those of Manoj Gore, who stated that it was the Appellant who had entrusted him the export clearance work of APL; that the export documents of APL were handed over to him by the Appellant and that he was being paid by the Appellant in cash or in cheque for his service. The Adjudicating Officer has adverted in great detail to the other statements recorded during the course of the investigation which implicated the Appellant and the detailed role played by him. The Tribunal has on the basis of

the evidence on the record come to the conclusion that the complicity of the Appellant has been duly established. The Tribunal has observed, after adverting to the judgment of the Supreme Court in Collector of Customs Madras vs. D.Bhoormal, 2 AIR 1974 SC 859 that when clandestine activities are carried on, it may be impossible for the preventive department to unravel every link of the process. In the present case, it has been duly established that in respect of 261 shipping bills, no export took place at all whereas in the case of 14 shipping bills, export had taken place, but by substitution of the goods declared for goods of a much lower value. The Customs authorities confirmed that the shipping bills were not filed with them. The clearing agents and the shipping lines confirmed that they have not acted for APL. Fictitious purchase bills were issued in the name of Nikita Pharma Chem Pvt. Ltd., a dummy Company which was wholly under the control of the Appellant. Payments amounting to Rs. 75.39 crores were received in respect of fictitious export transactions.

A. Observation made in the order of Settlement Commission dated 7 June 2006 in respect of an application for settlement made by the Appellant in respect of breach of the Customs Act, 1962:

13. In respect of the same series of actions as in the present case, the Customs Department had issued show cause notices to APL, its Directors and the Appellant herein. Notices were issued under the Customs Act, 1962 demanding customs duty from APL, while penalty was proposed to be imposed upon the Directors of APL and the Appellant herein. APL, its directors and the Appellant approached the Settlement Commission under Chapter XIVA under the Customs Act, 1962 seeking to settle the dispute/issues raised in the show cause notices issued under the Customs Act, 1962. The Application for settlement under Chapter XIVA of the Customs Act, 1962 requires an applicant to make a full and true disclosure with regard to its liability under the Customs Act, 1962 for having the case settled. The Settlement Commission by its order dated 7 June 2006 settled the dispute between the Customs Department on the one hand and APL, its Directors and the Appellant herein on the other. Consequent to the above order dated 7 June 2006, APL was required to pay duty of Rs. 61,57,740/while a penalty of Rs. 10,000/was also imposed on the Appellant herein. The Settlement Commission in its order dated 7 June 2006 inter alia observed with regard to the Appellant thus:3

Vinod Chitalia is the key person in the scheme of fraudulent exports for taking illegally DEPB benefits by different firms including the applicant's company. He offered his expertise in providing the manipulated documents for the substituted exports and also fabricated export documents enabling the applicant to procure foreign exchange to the tune of Rs. 75 crores as remittances without effecting any physical exports.

He also introduced the directors of the applicant with Singapore based consignee M/s. Global Pharma as a foreign buyer under the control of one Manish Atmaramani. He also collected export documents and passed on to Manoj Gore

for arranging the clearance of substitute goods as costly bulk drugs. Vinod Chitalia has been found instrumental in the fraudulent export of some other companies, namely M/s. Prominent Exim Pvt. Ltd., M/s. Park Organics and M/s. Basgsons.

14. The Settlement Commission in its order dated 7 June 2006 also observes as under:4

S/Shri. Ajit Kamath, Rajendra Kaimal and Manoj Jain (the co-applicants No. 1, 2 and 3)

These are the three Directors of the applicant's company having substantial shares in the company and stood to gain directly from the illegal profits sought to be made by the applicant by substitution of the export goods and thereby claiming export benefits not legally due. As per the documents and statements, all the three Directors worked as a team and had knowingly engaged Shri. Vinod Chitalia (Co-applicant No. 6) for undertaking fraudulent export transactions who was under obligation to pay a loan of Rs. 75 lacs which he could not pay and instead sought to offset the same from duty evasion and illegal availment of export benefits by fabricating documents etc. Shri. Vinod Chitalia provided them contacts with a Singapore based consignee M/s. Global Pharma under the control of one Shri. Manish Atmaramani. He also arranged for freight forwarding and customs clearance work through Shri. Manoj Gore who was earlier engaged by Shri 3 (see page 267 of appeal memo) 4 (See pages 62 and 65 of the Appeal memo - Compliant filed by Enforcement Department) Vinod Chitalia for imports by his own firm M/s. Vintage Pharmaceuticals and in the recent past for export of substituted goods of M/s. Prominent Exim Pvt. Ltd. and some other exporting firms. The drug paracetamol was carefully chosen as in case the consignment was checked, a plea of mix up of wrong drugs could be made...

Penalty :The Bench observes that the applicant and the co-applicants had sought to smuggle out of the country low value useless goods in place of high valued drugs and thereby take DEPB and other export benefits not otherwise legally due besides soiling the reputation of the Republic. This act was sought to be done not once, not twice but repeatedly over a period of time involving eleven shipping bills. Hence, it is apparent that the applicant and the co-applicants in this case are habitual offenders. The offences are extremely serious having several dimension, namely, (a) diversion of expensive goods (bulk drugs) with useless goods like soft stone powder, chalk powder etc. (c) obtaining huge payments of foreign exchange remittances in such fraudulent exports through Hawala transactions and (d) seeking to obtain benefits under various export benefit schemes like DEPB for duty free imports without being entitled to the same. Thus at each stage, the Revenue has stood to loose substantially. By resorting to the fraudulent export transactions in a planned manner with a view to seeking undue export benefits and also obtained foreign exchange remittances illegally the applicants do not deserve sympathy. The involvement of the parties has been adumbrated in the foregoing paras and looking to the same, the applicant and

the co-applicants Nos. 1,2 3 are to be held directly responsible and their involvement in the fraudulent exports makes them liable to penal action.

15. The aforesaid observations/findings in the Order dated 6 June 2006 of the Settlement Commission have been accepted by the Appellant herein as they have not been challenged. The aforesaid finding of fact by the Settlement Commission supports the finding that the Appellant is guilty of the breach of the provisions of Section 3(b) and (d) of the FEMA. However, the finding against the Appellant can even otherwise independently be sustained. Further the Settlement Commission can only grant immunity from penalty under the Customs Act, 1962 and not in respect of penalty under the FEMA. In fact the impugned Order⁵ relies upon the finding as recorded in the order dated 7 June 2006 of the Settlement Commission to uphold the penalty imposed upon the Appellant by the Adjudicating authority amongst other evidence.

16. The Settlement Commission u/s 127H of the Customs Act, 1962 has power to grant immunity to any person who has made an application to it for settlement. The immunity is from prosecution under the Customs Act, 1962 and also either wholly or in part from the imposition of a penalty or fine under the Customs Act. Therefore the immunity is only from penalty under the Customs Act and not in respect of any other Act including the FEMA. Further Section 127J of the Customs Act 1962 states that an order of the Settlement Commission shall be conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any proceeding under this Act or any other law for the time being in force. Therefore the orders of the Settlement Commission are considered to be conclusive of the matters stated therein and cannot be challenged in any other proceeding under any other law including FEMA. In the light of the aforesaid provision the order of the Settlement Commission dated 7 June 2006 in respect of the findings of fact recorded therein is conclusive.

17. In any event, the Appellant herein is barred from raising the issue 5 at Para 13 of his involvement in manipulating documents to enable foreign exchange procurement to the tune of Rs. 75 crores as remittances without effecting physical export. This is for the reason that the Appellant would be bound by the principle of issue estoppel. The principle of resjudicata bars a Court from exercising its jurisdiction to determine a lis, if it has attained finality between the parties. On the other hand the doctrine of issue estoppel is invoked against a party from raising an issue in a subsequent proceeding, if the same has been decided in an earlier lis by a competent court (See Bhanu Kumar Jain).⁶ Similarly in Ishwar Datta,⁷ the Supreme Court held that issue of estoppel would arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided. Then in a subsequent proceeding involving a different cause of action to which the same issue is relevant it cannot be reopened. On the basis of the above decision, it is clear that even on the principle of issue estoppel, the impugned Order was correct in relying upon a finding in the order of the Settlement Commission dated 7 June 2006 which has been accepted by

the Appellant and has the necessary ingredient for imposition of penalty under the FEMA.

B. Reliance in the impugned Order on Retracted Statement:

18. Before the Tribunal it was urged on behalf of the Appellant that the statement of Manoj Jain- Director of APL Ltd. has been retracted and therefore, the earlier statement cannot be considered to be voluntary and 6 (2005) 1 SCC 787 7 (2005) 7 SCC 190 true⁸. It is pertinent to note that the retraction which was urged by the Appellant before the Tribunal was on the basis that different statements were given to the Enforcement Directorate on 23 and 25 November 2005 and 25 December 2005, from that given to DRI(Customs dept.) on 25 April 2005, as recorded in the order of the Tribunal in the matter of APL.⁹ Therefore there is in fact no retraction of any particular statement by Manoj Jain. It is pertinent to note that the Appellant in his grounds of appeal before the Tribunal had not taken any specific ground with regard to retraction of statement by Manoj Jain.¹⁰ In the circumstances, in the present case, there is no question of retraction of the statement made by Manoj Jain Director of APL Limited to the DRI. Consequently, the question of the original statement being made to the DRI under threat cannot arise. In any event it is to be noted that in the impugned Order,¹¹ it is recorded that the changed statement was made only four months after the earlier statement made by Manoj Jain to DRI and in any event the same is corroborated by other evidence. The Tribunal has also recorded a finding of fact that there is nothing on record to indicate that any force was used to record the statements of the Appellant or Manoj Jain Director of APL Limited or other persons.

19. The statements made to DRI can be used in the present proceeding as they pertain to the same transaction. It must be borne in mind 8 (Paragraph 20 page 269 of the Appeal Memo) 9 (See para 16 at page 240 of the Appeal Memo) 10 (Page 208 of the Appeal Memo) 11(at para 21 at page 270 of the Appeal Memo) that u/s 108 of the Customs Act, 1962 the statements recorded before the DRI are deemed to be in a judicial proceeding within the meaning of Section 193 and 228 of the Indian Penal Code, 1860. The solemnity and sanctity attached to the statement made in a judicial proceeding therefore attaches to the statement made under the Customs Act to the DRI. Therefore there is no prohibition in relying upon statements made under the Customs Act 1962 for the purposes of the adjudication proceeding under the FEMA, more so when reliance is placed upon documents to the complaint made to the Adjudicating Authority.

20. Section 3(b) provides that no person shall make any payment to or for the credit of any person resident outside India in any manner. In the present case, there is a complete absence of any legitimate consideration, such as the supply of goods against which an inward remittance as high as Rs. 75.39 crores was received. Hence, the only possible inference that would arise is that the inward remittance of Rs. 75.39 crores was matched by a hawala transaction involving transactions through a person resident outside India. Similarly, u/s 3(d), no

person shall enter into any financial transaction in India as consideration for or in association with the acquisition or creation or transfer of a right to acquire any asset outside India. Money is a form of assets. The acquisition of money outside India is the acquisition of an asset. This acquisition would be subject to the FEMA and has to be in accordance with law. The Appellant was a party to financial transactions in India which constituted a consideration for the receipt of inward remittances amounting to Rs. 75.39 crores from abroad which were not backed by any lawful consideration involving a genuine export of goods. The adjudicating authority has found that the amount which was received by APL through banking channels was not actually due to them against any goods exported. This amount as held by the adjudicating authority, represented an amount transmitted from India through unauthorised channels to show a legitimate inward remittance. In assessing these findings, the Court cannot be oblivious of the fact that clandestine transactions of the nature involved in the present case, are within the peculiar knowledge of persons such as the Appellant, who are parties to those transactions. The burden which is cast upon the adjudicating authority to establish a violation must be assessed from a robust and common sense perspective. Clandestine violations take place under the cloak of secrecy. To impose a burden of establishing in an adjudication proceeding, every conceivable link of an unlawful transaction would result in a manifest failure of justice and would defeat the underlying purpose of the Act. The standard of proof in an adjudication proceeding cannot be equated with the rigorous standard in a criminal trial. The proof required in an adjudication proceeding is on a preponderance of possibilities. The Department has discharged the burden cast upon it of proving the breach of Sections 3(b) and 3(d).

21. Before concluding, it is necessary for us to refer to the fact that the Tribunal, in a passing reference to the earlier decision has observed that APL, its Chairman and Directors were not persons entitled to be exonerated of the charges by the Tribunal. The issue as to the complicity of APL, its Chairman and Directors stands governed by the earlier decision of the Tribunal. Surprisingly, no appeal has been filed by the Union of India or by the Enforcement Directorate against the earlier decision of the Tribunal dated 31 August 2009 and the limitation for filing such an appeal u/s 35 may perhaps have expired by now. Counsel for the Respondents also has no explanation as to why no appeal was filed in the earlier case. Be that as it may, those observations of the Tribunal cannot be construed as affecting the rights of any third parties who were not before the Court, since the Tribunal was and this Court is concerned only with the involvement of those who are parties to the appeal proceedings. Independently, the evidence against the Appellant is sufficient to sustain the finding of breach of Sections 3(b) and 3(d). The penalty is not disproportionate, but is commensurate with the gravity of the charge, the nature of the misconduct and the role attributed to the Appellant. For the aforesaid reasons, we are of the view that no question of law would arise in the appeal. The appeal is dismissed. No order as to costs.