(2014) 04 DEL CK 0208

In the Delhi High Court

Case No : Crl. A. Nos. 838 and 844 of 2008

V.K. Chawla APPELLANT

Vs

Special Director of Enforcement,Enforcement Directorate RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Customs Act, 1962 — Section 108
Evidence Act, 1872 — Section 114
Foreign Exchange Regulation Act, 1973 — Section 40, 72, 8(1), 8(3), 8(4)

Citation : (2014) 2 JCC 1289

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Pawan Narang, K.R. Dogra, Shivam Takiar and Vasundhara Chauhan, Advocate for the Appellant; Vikram Aditya Narayan for Sachin Datta, Advocate for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—Appeal No. 838 of 2008 is directed against the impugned order dated 9th June 2008 passed by the Appellate Tribunal for Foreign Exchange (''A'') dismissing Appeal No. 346 of 2004 preferred by the Appellant herein, thereby affirming the adjudication order (''AO'') dated 30th January 2004 passed by the Special Director (''SD''), Enforcement Directorate (''ED''), holding the Appellant to be in contravention of Sections 8(3) read with 8(4) of the Foreign Exchange Regulations Act (''FERA''), 1973 and imposing a penalty of Rs. 1,00,00,000 on the Appellant. Appeal No. 844 of 2008 is directed against the impugned judgment dated 9th June 2008 passed by the AT dismissing Appeal No. 344 of 2004, which was directed against the AO dated 30th January 2004 passed by the SD, ED finding the Appellant to be in violation of Sections 8(1) read with 9(1)(a) and 9(1)(c) FERA and imposing a penalty of Rs. 1,50,00,000 on the Appellant. The AT found that the charge for contravention of Sections 8(1) read with 9(1)(a) FERA was established but the one u/s 9(1)(c) was not. However, the penalty amount, as levied by the SD in the AO, was maintained.

2. The common facts related to both the appeals are that between 10th and 12th December 1996, the Directorate of Revenue Intelligence (''DRI'') conducted searches at the residential/business factory premises of M/.s. Connectronics & Cables (P) Ltd. (''M/s. CCPL''), M/s Wings Electronics of Mr. Aneesh Chawla, Mr. V.K. Chawla and the premises of M/s. Vinay Electronic Corporation (''M/s. VEC'') at Delhi and Noida and seized certain documents. Following up on the seizures, the statement of Mr. Kanwal Mohan Puri, an employee of M/s. Pearl Industrial Company Hong Kong (''Pearl'') was recorded u/s 108 of the Customs Act 1962 (''CA'') on 9th November 1997. The statements of Mr. N.R. Handa, a partner of (''M/s. VEC'') on 20th October 2001 and of Mr. V.K. Chawla on 26th February 2001 and 18th January 2002 were recorded u/s 40 FERA.

3. Two Memorandums/Show Cause Notices (''SCNs'') dated 9th May 2002 were issued. In the first SCN, the allegation was that from the documents seized, it had appeared that M/s. Wings Electronics had, during 1993-96 and January 1997, made remittances totalling Hong Kong Dollar (''HKD'') 19,23,178 to M/s. Pearl against 36 import consignments and remittances of US Dollar (''USD'') 86,689.46 to M/s. Pearl and M/s. Kiule Enterprises, Hong Kong. It further appeared from the documents seized that amounts of HKD 19,23,178 and USD 86,689.94 declared in the import invoices and remitted through bank did not represent the actual value of imported material. It was accordingly alleged that the aforementioned foreign exchange had been failed to be utilised by M/s. Wings Electronics for the purposes for which the sum was acquired and therefore, there was violation of Sections 8(3) and 8(4) FERA.

4. In the second SCN, it was stated that from the documents, it was revealed that one consignment of USD 3,198 (equivalent to HKD 24695) was imported by M/s. VEC from M/s. Pearl in 1996 and that the actual value of the 42 consignments declared before the Hong Kong Customs authorities was HKD 55,81,246 as against HKD 23,40,024, the value declared in the invoices and that the difference in value worked out to USD 4,18,222. It was further alleged that the Appellant had made payment of 2,79,000 to M/s. Pearl towards the differential value without any general or special permission of the Reserve Bank of India (''RBI'') and the remaining amount of USD 1,39,222 was acknowledged as a debt creating a right in favour of M/s. Pearl to receive the said payment, thereby contravening Sections 8(1), 9(1)(a) and 9(1)(c) FERA.

5. In both the SCNs, the stand taken by the Appellant was that he did not, in his statement u/s 40 FERA, admit to any under-invoicing of the imports or violation of the provisions of FERA. He contended that there was no loss of foreign exchange involved. The invoice value did represent the foreign exchange acquired and the goods imported were also of the kind, quality and quantity specified at the time of acquiring foreign exchange from the bank. The foreign exchange acquired was utilised for importing the goods, as stipulated by the RBI.

6. As far as the first SCN is concerned, by the AO dated 30th January 2004, the SD held, from an analysis of the documents, that there was an under-invoicing of

the imports and this was corroborated by the statement of Mr. Kanwal Mohan Puri made on 9th November 1997 u/s 108 of the CA. As regards the second SCN, the SD by another AO of the same date likewise held that the details found in the documents seized, as corroborated by the statement of Mr. Puri and the statement of Mr. Handa u/s 40 FERA proved under-invoicing of the imports. By the two separate AOs dated 30th January 2004, the SD imposed penalties on the Appellants, as noticed hereinbefore.

7. The two appeals, i.e., Appeal Nos. 344 and 346 of 2004, of the Appellants were dismissed by the impugned common order dated 9th June 2008 of the AT. It was specifically contended before the AT that the invoices of M/s. Lucent Technologies Singapore could not be used to determine the value of the goods imported from Hong Kong without proof of contemporaneous value of imports. It was further submitted that the ED itself did not conduct any independent investigation but simply used the documents received from the DRI. It was pointed out that the AOs were based on the photocopies of letters of the Consulate General and Hong Kong Customs which were not admissible in evidence.

8. The AT, in its impugned order, placed reliance on the statement of Mr. Puri and held that it proved that there had been under-invoicing of the imports. It was held that a presumption could be drawn against the Appellant u/s 114 of the Evidence Act, 1872 since no seller would part with goods without receiving the proper consideration. It was held that the burden was on the Appellant to discharge an adverse inference arising from such presumption.

9. This Court has heard the submissions of Mr. Pawan Narang, learned counsel for the Appellants and Mr. Vikram Aditya Narayan, learned counsel for the Respondent. The replies filed to the appeals and the written submissions of the Respondent have also been considered.

10. At the outset, it requires to be noticed that there is nothing incriminating in the statements made by the Appellant u/s 40 FERA, admitting to under-invoicing of the imports. As far as the statement of Mr. Puri is concerned, it is seen that it was made u/s 108 of the CA and not Section 40 FERA and could not, ipso facto, be used for the proceedings under FERA. In Noor Aga Vs. State of Punjab and Another, , the Supreme Court held that a statement recorded u/s 108 of the CA cannot be used as a confession or an incriminating statement as far as the proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 (''NDPS'') were concerned. It was held that "The enquiry contemplated u/s 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provision of the Act".

11. The reliance by Respondent on the decision in Krishan Vs. R.K. Virmani, Air Customs Officer, is misplaced since that case dealt with proceedings under the CA. It was not a case where a statement made u/s 108 of the CA was used as substantive evidence in proceedings under the FERA. Consequently, in the

present case the AT erred in holding that the statement of Mr. Puri u/s 108 of the CA corroborated the documents seized by the ED.

12. As far as the statement of Mr. Handa u/s 40 FERA is concerned, it seen that he did not inculpate either himself or the Appellant. He did not admit that either he or Mr. Chawla were actually responsible for under-invoicing. A careful perusal of the statement shows that he surmised that the differential amount "might have been paid by Shri V.K. Chawla" and that he himself was not aware of such payment being made. Therefore, there is no credible evidence to show that the Appellant was responsible for under-invoicing, if any, of the imports.

13. The AO passed by the SD as well as the impugned order of the AT failed to address the submission made on behalf of the Appellant that the documents seized were not proved in accordance with law. It appears that there was no independent investigation undertaken by the ED. In order to prove under-invoicing, the value of contemporaneous import made from Hong Kong, and not from Singapore, had to be looked into. Moreover, these documents were not authenticated, as required by Section 72 FERA read with Foreign Exchange Regulations (Authentication of Documents). This Court in M/s. Jain Engineering v. ED (decision dated 12th March 2014 in Criminal Appeal Nos. 142-144 of 2008) held that documents received from abroad cannot be relied upon without authentication. The failure of the ED to comply with the above legal requirements rendered the seized documents inadmissible in evidence. Without the ED discharging the initial burden of proving that the documents seized constitute credible evidence and were corroborated by other independent evidence, the question of drawing an adverse inference against the Appellant and shifting the burden to him to rebut the statutory presumption would not arise.

14. For the aforementioned reasons, this Court finds that both the impugned AOs dated 30th January 2004 passed by the SD and the common impugned order dated 9th June 2008 passed by the AT dismissing Appeal Nos. 344 and 346 of 2004 are unsustainable in law. They are accordingly set aside. The appeals are allowed, but, in the circumstances, without any order as to costs. It is further directed that the amount if any that may have been deposited by the Appellant pursuant to the impugned orders shall be refunded to him in accordance with law within eight weeks.