
(2012) 02 BOM CK 0200
In the Bombay High Court
Case No : Fera Appeal No. 4 of 2011

V.S. Ubhayakar

APPELLANT

Vs

Special Director, Directorate of Enforcement and another

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 49, 6(4), 6(5), 68, 68(1)

Citation : (2012) 3 ALLMR 672 : (2012) 173 CompCas 406 : (2012) 282 ELT 209

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

Bench : Division Bench

Advocate : Ashok Singh with Mr. Atman Mehta and Ms. Sharandeep Garcha instructed by Haresh Mehta and Co, for the Appellant; A.S. Rao with Ms. Pratibha Borade, for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—This batch of appeals arises from an order dated 30 July 2008 of the Appellate Tribunal for Foreign Exchange in appeal against an order dated 16 August 2002 of the Special Director in the Enforcement Directorate.

2. Two notices to show cause were issued on 25 September 1998 to nine notices .The Appellants in these proceedings are the company, its managing director and its director who are respectively notices 1, 2 and 3. The allegation in the first notice to show cause was that during June to November 1995 the company which was a Full Fledged Money Changer (FFMC) authorized by the Reserve Bank released foreign exchange in the names of various persons contrary to the directions issued by the Reserve Bank of India. The foreign exchange was released allegedly without due verification of passports/ air tickets; without the presence of the travelers and without obtaining their signatures on the travelers " cheque; without making endorsement on the relevant passports and as a result foreign exchange was released to persons other than the applicants. The allegation was that both the travelers" cheques as

well as currency notes in U.S. Dollars were released against the Business Travel Quota (BTQ). The BTQ scheme contained various conditions including the requirement that the passport of the traveler should be verified by the FFMC to ensure eligibility for release of the exchange; that the traveler should be in possession of an air ticket for travel to the country for which exchange was applied for; the passport should be endorsed with the amount of the exchange sold and the sale of foreign exchange should be made only on the personal application and upon identification of the traveler. Moreover, the traveler should invariably be required to sign the travelers " cheques in the presence of an authorized official. It was found that there was a breach of the special conditions attached to the BTQ scheme and that as a result there was a violation of the provisions inter alia of Section 7(4) read with Sections 6(4) and 6(5) of the Foreign Exchange Regulation Act 1973 (FERA 1973) read with Sections 49 and 68(1); paragraphs 4, 11 and 12 of the memorandum of instructions issued by the Reserve Bank to FFMCs and Section 73(3).

3. In the second notice to show cause it was alleged that between the period 1995 to 1997 the company which is an FFMC authorized by the Reserve Bank to release foreign exchange, released foreign exchange amounting to U.S. \$ 15,25,805/to various persons on the basis of bogus documents without complying with the conditions prescribed by the Reserve Bank. It was accordingly alleged that there was a breach of the provisions of Section 7(4) read with Sections 6(4), 6(5) and 49 of the FERA, paragraphs 4, 11 and 12 of the memorandum of instructions of the Reserve Bank of India to FFMCs and Section 73(3).

4. An adjudication took place before the Special Director of Enforcement and resulted in an order dated 16 August 2002. Insofar as the first show cause notice is concerned, the adjudicating officer came to the conclusion that foreign exchange under the BTQ scheme was released to certain agents from Trichy who were purporting to act for certain passengers. Certain passengers stated that they had not purchased foreign exchange and their passports had been misused for the purpose of obtaining foreign exchange. The adjudicating officer relied upon special conditions prescribed by the Reserve Bank at the relevant time in the Exchange Control Manual for the sale of foreign exchange under the BTQ scheme. Special Condition (4) required that the sale of foreign exchange should be made only on a personal application and identification of the traveler. Moreover, while issuing travelers cheques, the traveler should " invariably be required to sign the cheque in the presence of an authorized official and the purchaser"s acknowledgment for receipt should be obtained in a receipt book. The adjudicating officer came to the conclusion that there was a violation of the applicable special conditions by the unauthorized release of foreign exchange. Noticee No. 4 was an officer of the FFMC, Mr. S. Mygandan who was in charge of the Bangalore office of the company. The Special Director found on the basis of the evidence that special condition No. 4 was meant for the company as an FFMC and appropriate instructions and guidelines should have been issued through the

Managing Director and Director to all branches in advance to ensure proper compliance. Since such steps had not been taken and adequate evidence was not brought on the record to establish that due steps were taken, the company as well as its Managing Director and Director were held guilty of violation and came to be penalized. A personal penalty of Rs. 2.50 lacs was imposed on the company, while a penalty of Rs. 50,000/each was imposed on the Managing Director and the Director who are in appeal.

5. As regards the second notice to show cause the Special Director found that the charge was duly established and that foreign exchange to the extent of Rs. 15,25,805/- was released for business visits of employees of nonexistent companies without verification of identities. In this, reliance was placed on the statement of noticee No. 4 that he had released foreign exchange to certain companies on whose behalf applications were submitted by one Mr. Murali Krishna. The statement of noticee No. 4 was corroborated by the statement of Mr. Murali Krishna. The Special Director held that foreign exchange could be released only on the identification of the traveler in terms of the conditions imposed in a memorandum of instructions to FFCs issued u/s 73(3) by the Reserve Bank. No record was kept of any evidence to establish the identity of the traveler. The Special Director came to the conclusion that while there was no evidence to establish that Noticee Nos.1, 2 and " 3 were party to the dirty game of Noticee No. 4 and were getting some monetary benefit out of the illegal games of Noticee No. 4", the aforesaid notices failed to discharge their responsibility properly and would be held guilty in respect of the contraventions. Accordingly under the second notice to show cause a personal penalty of Rs. 1 lac was imposed on the company and of Rs. 25,000/- each on the Director and the Managing Director.

6. The order of the Special Director has been confirmed as against the Appellants by the Appellate Tribunal for Foreign Exchange by its judgment dated 30 July 2008. The Tribunal has noted that the show cause notices to the Appellants were issued on the basis of their vicarious liability. The Managing Director and the Director, it was noted, were in charge of and were responsible to the company for the conduct of its business. The Tribunal noted that none of the Appellants proved that they had exercised due diligence and that the contravention took place without their knowledge. Consequently, the Tribunal held that they could not be exonerated for failure to discharge the legal duty cast upon them. The Tribunal observed that the Appellants ought to have made a proper disclosure of the internal management of the company which was not on the record. Consequently, the Tribunal held that the Appellants could not get the benefit of the exception carved out, as a result of their failure to disclose the internal arrangement in regard to the management of the company. Hence, it was held that the proviso to Section 68 could not be availed of.

7. Though several questions of law have been urged in the memo of appeal, counsel appearing on behalf of the Appellants during the course of the hearing

has placed reliance only on the finding which was arrived at in the order of the adjudicating officer to the effect that there was no connivance of notices 2 and 3 (the Managing Director and the Director) with the officer in charge of the Bangalore office and that they had not received any illegal monetary benefits from the alleged transaction. Similarly, in regard to the second notice to show cause reliance was placed on the finding to the effect that there was no evidence to establish that the company and its Managing Director and Director were party to what is described as the dirty game of noticee 4 or that they were " " getting a monetary benefit out of the illegal conduct of the officer. In other words, it was submitted that the only allegation against the Appellants is a failure to discharge their responsibilities under the law and to ensure legal compliance. Learned counsel submitted that it was their specific defense in the course of the adjudication proceedings that the violation took place without their knowledge; the audit by the Reserve Bank of India had not found any untoward transaction and that an internal audit which had been conducted after the appointment of an auditor in 1996 had not reported anything adverse about the functioning of the Bangalore branch. Consequently it was urged that the Managing Director and the Director who were officers based in Mumbai, had no knowledge of the wrong doing and ought not to be held liable particularly in view of the fact that there is a finding that they had not connived with the officer in charge at Bangalore and had not received any unlawful consideration. No submission has been urged at the hearing on the merits of the finding of fact on the basis of which a violation of the provisions of the FERA, 1973 is found to be established. The submission only is that the Appellants have established a defense under the proviso to Section 68(1).

8. On the other hand, counsel appearing for the Respondents submitted that u/s 68(1) the person who at the time when the contravention was committed was in charge of and was responsible to the company for the conduct of the business as well as the company, shall be deemed to be guilty of the contravention. The proviso, however, provides an exception if the person proceeded against proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention. In the present case, it was urged that the liability would stand fastened under subsection (1) of Section 68 and apart from a vague denial, none of the Appellants discharged the burden which is cast by the proviso to subsection (1) of Section 68.

9. Having regard to the nature of the submissions which have been urged in the appeal, the only issue which falls for determination is as to whether any substantial question of law would arise from the decision of the Tribunal which holds that the Appellants had not established a defense within the meaning of the proviso to subsection (1) of Section 68. The fact that a violation of the provisions of the FERA 1973 had taken place is not in dispute and is not challenged during the course of the oral submissions. In the case of the first show cause notice, there is a finding of fact by the adjudicating officer that foreign exchange under the BTQ scheme was released in violation of the special

conditions imposed by the Reserve Bank of India which require an application and the personal presence of the traveler in order to ensure that exchange is released upon proper verification of identity. In the case of the second show cause notice, the violation arises out of the issuance of foreign exchange to nonexistent and bogus companies, again in violation of the conditions imposed by the Reserve Bank of India to ensure that foreign exchange under the Business Visit Scheme which is availed of is not misused. In respect of both the show cause notices, it has been found that there was a release of foreign exchange in violation of the instructions of the Reserve Bank of India resulting in a violation of the relevant provisions of the FERA 1973 upon which the charge was founded.

10. Now subsection (1) of Section 68 provides that where a person committing a contravention of any of the provisions of the Act or of any rule, direction or order made thereunder is a company, every person who, at the time when 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. The proviso to subsection (1), however, lays down that nothing contained in the subsection 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. Under the substantive part of subsection (1) of Section 68, when a breach is committed by a company both the company and every person who is in charge of or responsible to the company for the conduct of the business is deemed to be guilty. However, under the proviso, such a person is furnished with an opportunity to prove that the contravention took place without his knowledge or despite the exercise of due diligence to prevent such contravention. Under the proviso, the burden lies on the person against whom a contravention is established by the deeming provisions of subsection (1).

11. Both the adjudicating authority and the Tribunal have held concurrently that the burden that was cast upon the Appellants has not been discharged. During the course of the hearing of the Appeals, counsel appearing for the Appellants adverted to the statement of Shri Kirti Shah, (a Director of the company) that the officer in charge of the Bangalore office had been appointed based on his previous experience in foreign exchange operations with Thomas Cook; that he was instructed to adhere to the guidelines of the Reserve Bank and that after the appointment of an internal auditor in 1996, the Bangalore branch had been inspected twice and nothing adverse had been reported. The Managing Director also made the same statement. Moreover, reliance was further placed on the defense stated in the reply dated 12 March 1999 to the effect that the Reserve Bank had inspected the books of account of the company on more than three occasions and that the company expected its officer at Bangalore to comply with the terms and conditions of the Reserve Bank while selling foreign exchange to bonafide travelers. In our view, a mere averment that the company had exercised due diligence or that the contravention took place without the

knowledge of the company or the officers responsible for the conduct of the business would not be suffice to establish a defense under the proviso to subsection (1) of Section 68. The burden of establishing a defense in terms of the proviso to subsection (1) of Section 68 lies upon the person against whom the contravention is established under the substantive part of the provision. The Tribunal was, in our view, justified in holding that a proper disclosure ought to have been made in regard to the internal arrangements made by the company for the proper conduct of the business in accordance with the guidelines of the Reserve Bank. That has not been explained. Perusing the statements and the reply upon which reliance has been placed on behalf of the Appellants at the hearing, it is evident that apart from a few vague averments, nothing has been established that would have enabled the adjudicating authority to hold that the defense was proved. As a Full Fledged Money Changer, the company is vested with custody of foreign exchange which has to be disbursed to bonafide travelers. The contravention in the present case is of a serious nature since it is evident that foreign exchange was disbursed to persons who were not bonafide travelers as in the case of the first notice to show cause under the BTQ scheme and to bogus entities as in the case of the second notice to show cause under the Business Visit Scheme. The contravention is therefore of a serious nature and it was for the Appellants to establish by leading cogent evidence a defense within the meaning of the proviso to subsection (1) of Section 68. That has not been done. The quantum of the penalty which has been imposed is not disproportionate. The company has been subjected to a penalty of Rs. 2.50 lacs and Rs. 1 lac respectively under the two notices to show cause; a personal penalty of Rs. 50,000/- and Rs. 25,000/- has been imposed on the Managing Director, while a penalty of Rs. 50,000/- and Rs. 25,000/- has been imposed on the Director. The quantum of the penalty imposed cannot be regarded as disproportionate to the nature of the contravention which is shown.

12. The issue as to whether there was any connivance between the officials is relevant to subsection (2) of Section 68. Subsection (2) of Section 68 provides that notwithstanding anything contained in sub section (1), where the contravention of the Act or of a rule, direction or order has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed guilty of the contravention. The ambit of subsection (1) of Section 68 is hence distinct from the ambit of subsection (2). Under subsection (1) every person who was in charge of and was responsible to the company for the conduct of the business of the company at the time when the contravention was committed, as well as the company, are deemed to be guilty of the contravention. Under subsection (2) the persons who are brought within the framework of the provision are those with whose consent or connivance the contravention has taken place or upon whose neglect the contravention has arisen. Consequently, the point which has been

stressed by counsel for the Appellants to the effect that the Special Director had observed that there was no connivance on the part of the Managing Director would not be material in determining their liability under subsection (1) of Section 68. Under subsection (1) of Section 68 as persons who were in charge of and were responsible to the company for the conduct of its business, both the Appellants are deemed guilty of the contravention and the burden would then lie upon them to establish the defense within the purview of the proviso to subsection (1). In the circumstances, having failed to establish their burden, the absence of connivance cannot come to the aid of the Appellants. The fact that the Appellants are found not to have obtained an unlawful monetary benefit may at the highest be relevant to the quantum of the penalty which we have found in any event not to be disproportionate. The appeal has been argued on the basis that the contravention is of Section 68(1) and that is why the proviso was pressed in aid.

13. In view of the aforesaid position, no substantial question of law would arise in these appeals. The Appeals are accordingly dismissed.

There shall be no order as to costs.