

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 630 of 2008

Reserved on: September 15, 2014

Decision on: September 24, 2014

RAKESH JAIN

..... Appellant

Through: Mr. Abhinav Vasisht, Senior
Advocate with Mr. Abhishek Vikram,
Advocate.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Vineet Malhotra, Advocate
for ED.

WITH

CRL.A. No. 756 of 2008

RAVINDER JAIN

..... Appellant

Through: Mr. Gaurav Duggal with
Mr. Shekhar Kumar, Advocates.

versus

ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Vineet Malhotra, Advocate
for ED.

AND

CRL.A. No. 818 of 2008

SOM CHAI CHAI SRICHAWLA

..... Appellant

Through: Mr. Gaurav Duggal with
Mr. Shekhar Kumar, Advocates.

versus

ENFORCEMENT DIRECTORATE

..... Respondent

Through: Ms. Rajdipa Behura, Advocate

for ED.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

24.09.2014

1. These three appeals are directed against the judgment dated 3rd June 2008 passed by the Appellate Tribunal for Foreign Exchange ('AT') in Revision Petition Nos. 376, 377 and 378 of 2000. By the said impugned judgment, the AT allowed the aforementioned Revision Petitions filed by the Enforcement Directorate ('ED') and set aside the two adjudication orders ('AOs') dated 6th January 2000 passed by the Special Director ('SD'), ED exonerating the Appellants herein from the charges of contravention of Sections 9 (1) (b), 9 (1) (c) and 9 (1) (d) read with Section 64 (2) of the Foreign Exchange Regulations Act, 1973 ('FERA').

Background facts

2. The background facts are that Oki Estates (P) Ltd. ('OEPL') purchased a farm house and land situated at Mehrauli in New Delhi by 12 registered sale deeds dated 2nd March 1995 from Apaar Construction Private Limited ('ACPL') whose director Mr. Rakesh Jain is the Appellant in Criminal Appeal No. 630 of 2008. The sale consideration of Rs.23,76,000 was paid by 12 pay orders of Rs.1.98 lakhs each and the balance Rs.1,51,24,000 was paid in cash to Mr. Rakesh Jain by some unknown persons on behalf of Mr. Som Chai Chai Sri Chawla (the Appellant in Criminal Appeal No. 818 of 2008) who is a resident of Bangkok, Thailand. Mr. Ravinder Jain and Mr. Sri Chawla (Appellants in Criminal Appeal Nos. 756 and 818 of 2008 respectively) were Directors of OEPL.

3. On 24th June 1995 in response to summons issued to him under Section 40 FERA, Mr. Rakesh Jain made a statement purportedly admitting to having received the 12 pay orders for Rs. 23,76,000 and cash of Rs.1,51,24,000 from unknown persons on behalf of Mr. Sri Chawla. He claimed to have been introduced to Mr. Sri Chawla by one Mr. L.R. Madan. The statement of Mr. Madan under Section 40 FERA was recorded on 26th June 1995. Mr. Sri Chawla gave a declaration on 1st March 1997 at the Embassy of India in Bangkok stating that he had paid to two persons, who came on the instructions of Mr. Rakesh Jain, Thai Bahts in the sum of 1,09,50,000. The statement of Mr. Ravinder Jain was recorded on 13th February 1997. The residential premises of Mr. Ravinder Jain and business premises of OEPL were searched on 19th February 1997. The statement of one Mr. Sunil Kapoor was recorded on 29th October 1996.

4. On the basis of the above evidence gathered, a Memorandum/ Show Cause Notice ('SCN') dated 11th February 1998 was issued to the three Appellants stating *inter alia*, that by remitting an amount equivalent to Rs. 1,51,24,000 from abroad, Mr. Sri Chawla appeared to have contravened Section 9 (3), Mr. Rakesh Jain had contravened Section 9 (1) (b) and Mr. Ravinder Jain had contravened Section 9 (1) (d) read with Section 64 (2) of FERA. They were asked to show cause as to why proceedings should not be initiated against them under Section 50 FERA and as to why the farm house and land should not be confiscated under Section 63 of the FERA.

5. In a reply dated 30th August 1999 counsel on behalf of Rakesh Jain pointed out to the ED that he had been assessed by the income tax authorities and in an order passed by the Commissioner of

Income Tax ('CIT') on 20th August 1998 the sale price of Rs.23,76,000 shown on the 12 sale deeds was accepted as correct. The sale deeds of 99 other transactions of sale of lands in the adjoining areas for approximately the same price were also enclosed with the said reply. It was also pointed out that Mr. Rakesh Jain had been forced to make the statement under Section 40 FERA There were also inconsistencies in the statements of Mr. Rakesh Jain and Mr. Sri Chawla in as much as Mr. Rakesh Jain has stated that he was paid the money at his residence in Delhi whereas Mr. Sri Chawla stated that he had paid it in Bangkok. It may also be mentioned that on 30th June 1995 itself Mr. Rakesh Jain through a representation to the Finance Minister retracted in writing the statement made by him on 24th June 1995 alleging that he had been beaten up and coerced by the officials of the ED. On 25th June 1995 he sent a telegram to that effect to the ED.

6. As far as Ravinder Jain is concerned he pointed out that he came to know of the purchase of land by Mr. Sri Chawla much after the event and he was nowhere involved in any of the transactions. He also was not an active Director in OEPL.

7. The stand of Mr. Sri Chawla was that there were inconsistencies in the two statements of Mr. Rakesh Jain and himself. Their statements were also contradicted by the statement of Mr. L.R. Madan who stated that Rs.3 crores had been given by Mr. Sri Chawla to Mr. Rakesh Jain in March 1995.

The Adjudication Order

8. The SD passed the AO on 6th January 2000 exonerating the three Appellants for the following reasons:

(a) In his statement dated 24th June 1995, Mr. Rakesh Jain had claimed that Rs.1,51,24,000 had been received by him in cash in two to four instalments in the last week of February 1995 at his residence through some unknown persons on behalf of Mr. Sri Chawla. This was done without any receipt being issued to the persons who gave him the cash. On 7th August 1999 he stated that he had nothing further to add. Mr. Madan, the property broker in his statement dated 26th June 1995 stated that one Dr. Seth had approached him in February 1995 to find a farm house for Mr. Sri Chawla and that he had introduced Dr. Seth to Rakesh Jain. According to him, the property was purchased by Mr. Sri Chawla in the name of OEPL and apart from the sale consideration of Rs.23,76,000 against the 12 registered sale deeds, Rs.3 crores were paid in cash.

(b) Mr. Sri Chawla stated that he had paid Thai Baht to the tune of 1,09,50,000 to two persons on 16th and 30th January 1995 in Bangkok.

(c) The above statements were contradictory to each other. If indeed payment had been made in Thai Baht in Bangkok, it appears that Rakesh Jain had acquired them in violation of Section 8(1) of the FERA. However, there was no such allegation in the impugned memorandum. It accordingly showed that the ED itself did not give much credence to the statement of Mr. Sri Chawla.

(d) Secondly, although Mr. Madan states that three crores were paid in cash to Mr. Rakesh Jain on payment of 1%

commission, Mr. Rakesh Jain retracted his statement and statement of Dr. Seth was not recorded.

(e) Thirdly, the CIT had also upheld the sale consideration showed in the sale deed as being fair price. Since there was no reliable evidence to support the allegation in the SCN, the proceedings were dropped.

Filing of Revision Petitions before the AT

9. In terms of the Section 52 FERA, if ED was aggrieved by the order of the AO, it could have filed an appeal. Under Section 52 (3) FERA, the appeal should have been filed within 45 days and if ED was unable to file it within that period, it could still file it within 90 days from the date of the order provided that the Appellate Board constituted under Section 52(1) FERA was satisfied with the reasons for the delay. In terms of the first proviso to Section 52 (2) ERA, no appeal could have been filed after the expiry of 90 days from the date of the AO.

10. Admittedly, no appeal was filed by the ED within a period of 90 days from the date of the AO. This period expired on 6th April 2000.

11. FERA was repealed by the Foreign Exchange Management Act, 1999 ('FEMA') with effect from 1st June 2000. Realising that the deadline for filing the appeal had been missed and FERA itself had been repealed with effect from 1st June 2000, the ED on 30th May 2000 filed four revision petitions being Revision Petitions Nos. 376, 377, 378 and 379 of 2000 before the AT. Under Section 52(4) of FERA, a revision petition was maintainable before the Appellate Board and there was no period of limitation for filing such revision

petition.

Decision of the AT

12. When the revision petitions were taken up for hearing before the AT, one of the first questions to be considered was whether the revision petitions were at all maintainable. This was the first objection taken by the Appellants herein in the revision petitions. It was pointed out that under Section 49(5) FERA, a revision petition which was filed when FERA was in force would not automatically continue under the FEMA.

13. The AT rejected the above contention by referring to Section 49(6) FEMA which brings in the application of Section 6 of the General Clauses Act, 1897 ('GC Act') and held that although under Section 49 (5) (b) it is not expressly stated that the revision petitions would continue, the continuation of such a petition was implicit on a reading of the provisions of FEMA as a whole.

14. It was further held by the AT that since the revision petitions were filed within a reasonable time, with there being no limitation as such prescribed, they were not barred by laches. On facts it was held that when the rates payable for agricultural land falling under the present boundary of the municipality of Dwarka was taken into consideration then it was above Rs.45 per sq. yard even in 1994 and in the vicinity of Gurgaon which is the adjacent area, it should be more than Rs.200 per sq. yard in 1995. In the retraction statement of Mr. Rakesh Jain there was an admission that an extra amount of Rs.1,51,24,000 had been paid and this was corroborated by the statement of Mr. Madan and the declaration given by Mr. Sri Chawla. It was further held that the above transactions involving

Mr. Rakesh Jain and Mr. Sri Chawla could not have been done without the wilful acquiescence of Respondent No.3 Mr. Ravinder Jain who had not come out with the full truth. Therefore, he was equally to be blamed. Accordingly, the AOs were reversed and a penalty of Rs.45,372,000 was imposed by the AT on each of the Respondents.

Maintainability of the Revision Petitions

15. The first question that arises concerns the maintainability of the revision petitions before the AT. It was submitted on behalf of the Appellants by Mr. Abhinav Vashisht, learned Senior counsel and Mr. Gaurav Duggal, learned counsel, that when Section 49 (5) (b) did not save revision petitions filed under Section 52 (4) FERA but only the appeals filed under Section 52 (2) FERA, the revision petitions could not have been continued before the AT. Reliance was placed on the decisions in *Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers (2003) 6 SCC 659*, *Hari Shankar v. Rao Girdhari Lal AIR 1963 SC 698*. It was further submitted that the revision petitions were in any event filed beyond the maximum period of limitation. Reliance was placed on the decision in *Ketan V. Parekh v. Special Director, Directorate of Enforcement AIR 2012 SC 683*. Thirdly, they were filed with the affidavit of an Assistant Director who was not authorised to file such revision petitions. Reliance was placed on the decision in *Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate (2007) 8 SCC 254*.

16. In reply it was pointed out by Mr. Vineet Malhotra and Ms. Rajdipa Behura, learned counsel for the ED, that by virtue of Section 6 (e) of the GC Act read with Section 49 (6) FEMA, the

revision petition filed under Section 52 (4) FERA was saved and could continue before the AT under FEMA. Reliance was placed on the decisions in *M/s. P.V. Mohammad Barnay Sons v. Director of Enforcement AIR 1993 SC 1188* and *Abid Malik v. Union of India [2009] 93 SCL 177 (Delhi)*.

17. The Court finds that the wording of Section 49 (6) FEMA read with Section 6 (e) of the GC Act reflects the legislative intent that even the revision petition which was filed prior to the effective repeal of the FERA would continue before the AT functioning under the FEMA. In *Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers* (supra), the Supreme Court referred to the earlier decision in *Kolhapur Canesugar Works Ltd. v. Union of India (2000) 2 SCC 536* and held as under (SCC @ p.674):

“.....if a provision of statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, there is no scope for granting it afterwards. There is modification of this position by application of Section 6 of the General Clauses Act or by making special provisions. Operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in the statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall continue but a fresh proceeding for the same purpose may be initiated under the new provision.”

18. In the present case, it cannot be said that there is no saving clause *qua* the revision petitions filed under Section 52 (4) FERA. Anticipating such a contingency, Section 49 (6) FEMA was

introduced. This explains the expression “the mention of particular matters in sub-Sections (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897”. What was clearly intended therefore was if within the sunset period under Section 49 (3) FEMA, a revision petition was filed under Section 52 (4) FEMA, such revision petition would continue before the AT even after the repeal of FERA.

Companies not issued notice

19. The Court next proposes to deal with the issue whether in terms of Section 68 FERA, proceedings under FERA could be maintained against the Appellants notwithstanding that the companies themselves have not been proceeded against.

20. It must be recalled that the genesis of the present proceedings are the 12 registered sale deeds dated 2nd March 1995. Under the said sale deeds, the seller was ACPL and the buyer was OEPL. Admittedly no notices were ever issued to ACPL. Proceeding against only Mr. Rakesh Jain in his individual capacity and not in his capacity as Director, ACPL was clearly a mistake. In fact the third paragraph in the Memorandum states that the OEPL had purchased the property from Mr. Rakesh Jain when in fact the registered sale deeds make it abundantly clear that it purchased from ACPL. The fourth paragraph of the Memorandum also states that consideration was paid to Rakesh Jain when clearly in terms of the sale deeds it was paid to ACPL. Therefore, there was a fundamental error in the entire proceedings.

21. Even from the point of view of other noticees, i.e., Mr. Ravinder Jain and Mr. Somchai Chai Sri Chawla, both of whom were

Directors of OEPL, they were sought to be proceeded against in their individual capacity and not as Directors of OEPL which was in fact the purchaser of the property.

22. A doubt arose whether the OEPL was issued the Memorandum. The name of OEPL appears at the foot of the Memorandum as one of the addressees. However, a perusal of the memorandum dated 11th February 1998 shows that there was not a single allegation against OEPL. In fact the operative portion of the Memorandum reads as under:

“Now, therefore, S/Shri Rakesh Jain, Ravinder Jain and Somchai Chai Sri Chawl are required to show cause in writing within 30 days of the receipt of this Memorandum as to why Adjudication Proceedings as contemplated in Section 51 of the FERA, 1973 should not be held against them for the aforesaid contraventions.”

23. Thus it is clear that the Memorandum did not intend that the OPEL should show cause. This was pointed out by Mr. Kanwal Nain, who sent a reply on behalf of the OEPL and Mr. Rakesh Jain to the ED on 18th October 1998. He pointed out that there was nothing in the Memorandum against OEPL. It appears that the ED also accepted the position since no further show cause notice or Memorandum making any specific allegation against OPEL was ever issued thereafter.

24. The net result is that for the purposes of Section 68 FERA although the contravention if at all was by OEPL, there were no proceedings initiated against it. Proceedings were initiated only against its Directors in their individual capacities.

25. The wording of Section 68 FERA is identical to the wording of Section 141 of the Negotiable Instruments Act, 1881 ('NI Act') with the only difference being that the above provision in the NI Act is penal in nature whereas Section 68 FERA, although its titled 'Offences by Companies' talks of contravention by companies. It was explained by the Supreme Court in *Aneeta Hada v. Godfather Travels & Tours (P) Ltd. (2012) 5 SCC 661*, in the context of Section 141 NI Act that in the absence of making the company, which issued the dishonoured cheque, an accused, vicarious liability cannot be fastened under that provision on the directors of the company. On the same analogy it can be concluded that for the purposes of Section 68 FERA, where the contravention is by a company, liability cannot be fastened on its directors if the company itself is not proceeded against.

26. Neither the AO nor the AT appeared to have noticed this fundamental legal flaw in the entire proceedings that neither the seller nor the buyer, i.e., the two companies ACPL and OEPL, were proceeded against for contravention of the provisions of FERA.

27. On this ground, the Court finds that the entire proceedings commencing with the Memorandum dated 11th February 1998 are unsustainable in law.

On merits

28. It was submitted by Mr. Abhinav Vashisht, learned Senior counsel and Mr. Duggal, learned counsel for the Appellants, that even on merits, there was no reliable evidence to sustain the impugned order of the AT. It is submitted that the statements of the noticees and others examined by the ED contradict each other.

According to Mr. Madan, Rs. 3,00,00,000 was paid in cash to Mr. Rakesh Jain and on the said sum, Mr. Madan received 1% commission. In his statement, Mr. Rakesh Jain stated that he received Rs. 1,51,24,000 in two instalments at his residence through some unknown persons in the last week of February 1995. A third version has come from Mr. Sri Chawla that he paid Thai Bahts 1,09,50,000 to two persons under the instructions of Mr. Rakesh Jain on 16th and 30th January 1995. It was submitted that none of these statements could be relied upon and that in any event, Mr. Rakesh Jain has retracted his statement at the first available opportunity. It was further submitted that the Commissioner of Income Tax in his order dated 20th August 1998 has, while allowing the appeal of ACPL, accepted the valuation of the property as reflected in the registered sale deeds and this was binding on the ED as well. It was submitted that by discarding the said judicial order of the CIT, as well as the copies of the sale deeds of the adjoining properties which had been placed on record, the AT went far beyond the scope of its revisional jurisdiction and entered into the question of facts, thereby committing a grave error.

29. In response to the above submissions, it is pointed out by Mr. Vineet Malhotra and Ms. Rajdipa Behura, learned counsel appearing for the ED, that Mr. Sri Chawla made a voluntary statement in Bangkok in the presence of the ED officials about paying Thai Bahts of 1,09,50,000 in cash to Mr. Rakesh Jain. Although the payment was made in Bangkok, his declaration was to the effect that it was paid to two persons who came to him on behalf of Mr. Rakesh Jain. His declaration also mentions the property in question. The said declaration was never retracted by Mr. Sri

Chawla. This declaration by itself was sufficient, according to learned counsel, to fasten the liability on the noticees for contravention of Section 8(1) FERA. It was submitted that the retracted confessional statements of Mr. Rakesh Jain could still be relied upon as long as it was corroborated in broad particulars. Mr. Rakesh Jain admitted to receiving Rs. 1,51,24,000 in cash and this coupled with the amount stated in the sale deeds, more or less, corresponded to the sum stated by Mr. Sri Chawla in his declaration to have been paid at Bangkok.

30. In the first place, it must be observed that the ED itself is not clear whether the declaration made by Mr. Sri Chawla in Bangkok could be termed as a statement under Section 40 FERA. It is not shown that the procedure envisaged under FERA was followed while recording the said declaration. In any event, Mr. Sri Chawla only talks of payment being made to two persons who met him on behalf of Mr. Rakesh Jain. The payment is purportedly made for the purchase of land. The sale deeds show that the purchaser was OEPL and the seller was ACPL. The said statement, therefore, does not help in proceeding only against Mr. Rakesh Jain, if no proceedings had been initiated against ACPL, which is the true beneficiary. While the declaration of Mr. Sri Chawla may, more or less, corroborate the statement of Mr. Rakesh Jain as regards the total amount paid, the statement of Mr. Madan does not corroborate either statement.

31. On the scope of revisional jurisdiction, the Court finds that the AT has relied on material that was not part of the record of the case. In particular, while the AO correctly notes that the Investigation

Officer had not conducted any inquiry to ascertain the fair price and has also taken note of the order of the CIT and on that basis held that the SCN is not supported by proper evidence, the AT appears to have not referred to the proceedings under the Income Tax Act, 1961 at all. The conclusion of the AT that there was payment over and above the sale consideration shown in the sale deed, appears to be based on the AT taking 'judicial notice' of the price of agricultural land in the vicinity of Gurgaon on the basis that it is an 'adjacent area'. No such plea was advanced by any of the parties before the AT. The Appellants are, therefore, justified in their criticism of the impugned order of the AT for travelling well beyond the scope of its revisional jurisdiction and adjudicating upon factual matters for which there was no basis in the record.

Conclusion

32. For all the aforementioned reasons, the Court is unable to sustain the impugned order dated 3rd June 2008 of the AT and restores the AO dated 6th January 2000. The appeals are accordingly allowed, but in the circumstances, with no order as to costs. The amounts deposited by the Appellants shall be refunded to them within a period of eight weeks in accordance with law. The bank guarantees furnished by the Appellants will stand discharged and be returned to them.

S. MURALIDHAR, J.

SEPTEMBER 24, 2014

dn/akg/tp