* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 11.02.2014
% Date of Decision: 17.02.2014

+ CRL.A. 352 of 2010

DIRECTORATE OF ENFORCEMENT ..... Appellant
Through: Mr. Subhash Bansal, Adv.

versus

A.K. MITTAL ..... Respondent
Through: Mr. Vivek Sibal & Mr. Jitender Ratta, Advs.

+ CRL.A. 353 of 2010

DIRECTORATE OF ENFORCEMENT ..... Appellant
Through: Mr. Subhash Bansal, Adv.

versus

RAJASTHAN PETRO SYNTHETICS LTD. ..... Respondent
Through: Mr. Vivek Sibal & Mr. Jitender Ratta, Advs.

+ CRL.A. 354 of 2010

DIRECTORATE OF ENFORCEMENT ..... Appellant
Through: Mr. Subhash Bansal, Adv.

Versus

G.P. PODDAR ..... Respondent
Through: Mr. Vivek Sibal & Mr. Jitender Ratta, Advs.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGEMENT

V.K.JAIN, J.

A memorandum dated 22.3.2002, was issued by the Special Director, Enforcement Directorate, to the reskpondents, Rajasthan Petro

Synthetics Ltd. (hereinafter referred to as 'the Company'), Mr. G.P. Poddar, Managing Director of the Company, Mr. A.K. Mittal, Executive Director of the Company and Mr. B.B. Verma, Manager of the Company, alleging therein that during 1985-1988 they had imported pigment preparations and not PP Dyed Chips which was the import item declared by the Company and the price for the said import were negotiated by Mr. G.P. Poddar and Mr. A.K. Mittal. Reference in this regard was made to the statement made by Mr. B.B. Verma on several dates under Section 40 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'the Act'). Alleging contravention of Section 8(3)(4) of the Act and also alleging that S/Shri G.P. Poddar, A.K. Mittal and B.B. Verma were the persons responsible/supervisor/in-charge of the Company for conduct of its business at the relevant time when the import was made, they were required to show cause as to why adjudication proceedings as contemplated in Section 51 of the Act should not be held against them, for the aforesaid contravention.

2. Vide order dated 26.10.2006, the Special Director of Enforcement, holding them guilty of contravention of Section 8(3) & 8(4) read with Section 68(1)&(2) of the Act, imposed penalty of Rs.8.00

lakh upon the Company, Rs.2.00 lakh each on Mr. G.P. Poddar and Mr. A.K. Mittal and Rs.50,000/- on Mr. B.B. Verma.

3. While imposing penalty, the Special Director *inter alia* took note of the fact that Mr. G.P. Poddar, Managing Director of the Company in his statement dated 18.11.1993 had stated that they had placed order for import of P.P. Dyed Chips during the period Mr. A.K. Mittal was the General Manager and Mr. B.B. Verma was the Manager (Imports) and as per the procedure Mr. Mittal was the person to approve the purchase bill though wherever required he used to consult his superiors such as another Director, Mr. Kedia or the Managing Director, Mr. G.P. Poddar. In the said statement, Mr. Poddar had also stated that P.P. Dyed Chips were virgin P.P. Polymers (major component) and pigment (minor component). It was further stated by Mr. Poddar in the aforesaid statement that the prices of pigment preparation could be higher than that of P.P. Dyed Chips though and in the opinion of Mr. Poddar P.P. Dyed Chips and PP Chips should be classified under same tariff, though he had no idea of pigment preparation.

4. The Special Director also took note of the statement of Mr. B.B. Verma who *inter alia* stated that when imported goods were examined by the Customs Authorities, the contents of the consignment were found

to be pigment preparations instead of P.P. Dyed Chips. In the opinion of Mr. Verma, the rates of pigment preparations and P.P. Dyed Chips could be different. Mr. Verma further stated that as far as his memory goes the material imported by the Company was pigment preparation whereas as per the order B/Es is the material imported had been shown as P.P. Dyed Chips.

5. The Special Director of Enforcement also noted that the Customs Authorities had found that the consignment contained pigment preparations instead of P.P. Dyed Chips as declared by the importer and that the cost of P.P. Dyed Chips was less than that of the pigment preparation. He also noted that the order passed by the Customs Authorities was confirmed by CEGAT and the Special Leave Petition against this order was dismissed by the Hon'ble Supreme Court vide its order dated 31.10.2001.

6. The order passed by the Special Director of Enforcement was challenged before the Appellate Tribunal for Foreign Exchange (hereinafter referred to as 'the Tribunal'). Initially the appeal was heard by a Bench consisting of the Chairperson Shri O.P. Nahar and Member Kumari Vijayalakshmi. Shri O.P. Nahar vide his order dated 11.7.2007 quashed the order passed by the Special Directorate of Enforcement

whereas Kumari Vijayalakshmi upheld the said order. As a result the matter was referred to another Member Shri R.N. Poddar, for his decision on the following points of disagreement between Shri O.P. Nahar and Kumari Vijayalakshmi:

"i. Whether the appellants did not use the foreign exchange for the declared purpose of importing P.P. Dyed Chips as required under Section 8(3) and 8(4) of the Foreign Exchange Regulation Act and that goods imported were of kind and quality etc. different from that specified by them at the time of acquisition of foreign exchange?

ii. Whether the appellants had misdeclared the goods and imported pigment preparation/organic master batches as against P.P. Dyed Chips. If so, its effects?

iii. The order of the Customs Authority dated January 24, 1991 holding the appellant guilty was confirmed by CEGAT holding that the manufacturers literature and other relevant information regarding the nature and composition of imported goods were suppressed deliberately and suppliers were asked by the importer not to indicate the correct description and classification of the goods. Whether these which was ultimately confirmed by the Supreme Court which finding are binding on the appellants as well as on this Tribunal. If so, its effects?

iv. Whether the appellants have rightly been held guilty by the Adjudicating Officer and impugned order is liable to be confirmed?"

Vide order dated 8.6.2009, Shri R.N. Poddar decided against the appellant and in favour of the respondents. Being aggrieved, the Directorate of Enforcement is before this Court by way of this statutory appeal.

7. Sub-sections (3) & (4) of Section 8 of the Act read as under:

> "**8. Restrictions on dealing in foreign exchange.**
>
> (3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money- changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money- changer.
>
> (4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time, or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to

> have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired."

8. It is an admitted case that the respondent-Company had acquired foreign exchange for importing P.P. Dyed Chips. This was expressly admitted by Mr. B.B. Verma in his statement recorded under Section 40 of the Act. Mr. G.P. Poddar also admitted this fact, in his statement. The order dated 8.6.2009, passed by Mr. R.N. Poddar, *inter alia,* reads as under:

> "2. The admitted facts without any controversy are that appellant company imported 39 consignments of goods in the years 1985-88 from Italy and France after obtaining few remittances of foreign exchange equivalent to Rs.87,58,617/- of pigment preparation which otherwise were declared as PP Dyed Chips...."

It would, thus, be seen that the respondents never disputed the fact that the foreign exchange was obtained for import of PP Dyed Chips and the same was the declaration made by them while importing the goods. In other words this was not the case of the respondents before the Tribunal nor is it their case before this Court that they had obtained foreign exchange for import of pigment preparation or that in the declaration submitted by the Company the goods being imported by it were declared to be pigment preparation.

9. A perusal of the order passed by the Special Director of Enforcement would show that Mr. B.B. Verma had expressly admitted in his statement that the goods imported by the Company were pigment preparations. He had also admitted that the price of pigment preparation could be higher than the price of PP Dyed Chips. Even Mr. G.P. Poddar, in his statement had admitted that the price of pigment preparations could be higher than that of PP Dyed Chips. This was not the case pleaded by Mr. B.B. Verma in his statement, that pigment preparations and PP Dyed Chips were one and the same product. When the appeal was argued before Shri R.N. Poddar, it was admitted by the respondents that the goods imported by them were pigment preparations. Thus, there can be no dispute that the product imported by the respondents was pigment preparation which they had declared as PP Dyed Chips.

10. During the course of hearing before the Special Director of Enforcement, the respondents did not place any material on record which would show that PP Dyed Chips and pigment preparation are one and the same product. No such material was placed before the Tribunal during the course of several hearings before it. Even before this Court no material has been placed on record which would show that pigment preparation and PP Dyed Chips are one and the same product.

11. It was contended by the learned counsel for the respondents that the onus was upon the appellants to prove that the foreign exchange was used by the respondents for a purpose other than that for which it was acquired and also that the goods imported by them were of a kind different from that specified at the time of acquisition of foreign exchange, but, no evidence was gathered by the Special Director of Enforcement which would show that the goods imported by the respondents were different from the goods for which foreign exchange was acquired or the imported goods were of a different kind from what was declared at the time of acquisition of foreign exchange. It was also pointed out that even the declaration submitted by the respondents at the time of acquiring foreign exchange was not placed on record.

12. There can be no quarrel with the legal proposition that it is for the Enforcement Directorate, to gather evidence which would show that the foreign exchange was used for a purpose other than for which it was acquired and/or that the goods actually imported were of a kind different from that was specified at the time of acquisition. But, in the present case, such material is available on record in the form of the statement made by Mr. B.B. Verma who clearly admitted that the goods declared

by them at the time of import were PP Dyed Chips, whereas the goods actually imported by them were pigment preparation.

In Naresh J. Sukhawani Vs. Union of India 1996 SCC (Crl.) 76, the Additional Collector of Customs imposed the penalty of Rs.1.00 lakh upon the appellant relying upon the statement made under Section 108 of the Customs Act by his accomplice Mr. Subhash Dudani. The order of penalty having been upheld by the High Court, the appellant approached the Apex Court and contended that the statement of the co-accused could be used only to corroborate other evidence as one of the circumstances under Section 30 of the Evidence Act but cannot be used as substantive evidence without corroboration from other independent evidence. It was also submitted that except the statement of Mr. Dudani there was no other independent evidence against the appellant. Rejecting the contention, the Apex Court *inter alia* held as under:

> "It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that

> there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine."

As noted earlier when the matter was heard before Shri R.N. Poddar, it was an admitted position of the parties that the goods imported by the respondents were pigment preparations whereas they were declared to be PP Dyed Chips. In these circumstances when the description given at the time of acquiring foreign exchange as well as in the import documents did not match the description of the goods actually imported by the respondents, the onus would be upon the importer to satisfy the Directorate of Enforcement that despite difference in the description of goods, in fact they are one and the same goods. No such material, however, was placed by the respondents either before the Enforcement Directorate or before the Tribunal.

13. PP Dyed Chips are nothing but Polypropylene chips which have been died, whereas pigment preparations from the name of the product appear to be pigments which can be used for dyeing certain goods including polypropylene chips. The Collector of Customs also had noted that as per the manufacturers literatures the pigment preparations are to be used to impart colour and is mixed with normal propylene in certain ratios before the polypropylene yarn is drawn. Even Mr. G.P. Poddar

stated that PP Dyed Chips are virgin PP Polymers (major component) and pigments (minor component). When the polypropylene chips are treated with dyes they become Dyed PP Chips. A perusal of the order passed by the Collector of Customs on 24.1.1991 which was later upheld by CEGAT as well as by the Hon'ble Supreme Court would show that the price of PP Dyed Chips is about three times the normal price of polypropylene and it varies according to the colour. In other words, the price is dependent on the colourant rather than the base material, i.e., polypropylene chips. Therefore, it would be difficult to dispute that pigment preparations are a product altogether different from PP Dyed Chips. Pigment preparations, it appears to me are the colouring substance whereas PP Dyed Chips are polypropylene chips which have been subjected to dyeing using a colouring substance for the purpose. Had PP Dyed Chips and pigment preparation being one and the same product there could be no reason for the respondents to place order for PP Dyed Chips instead of pigment preparations.

14. Section 68 of the Act to the extent it is relevant provides that where a person committing a contravention of the provisions of the Act is a Company, every person who at the time the contravention was committed was in-charge of and 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. Admittedly, Mr. G.P. Poddar was the Managing Director of the Company. Therefore, it can hardly be disputed that being the Managing Director he was a person in-charge of and responsible to the Company. In *K.K. Ahuja* vs. *V.K. Vora* [2009 (3) JCC (NI) 194], the Hon'ble Supreme Court, *inter alia,* held as under:

> "(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix `Managing' to the word `Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

15. As far as the appellant Mr. A.K. Mittal is concerned, I find that none other than Mr. G.P. Poddar stated that the deal for import of goods in question was finalised by Mr. Mittal who was the person to approve the purchase deals, though he would consult him or another Director Mr. O.P. Kedia subject to their availability. Mr. B.B. Verma clearly stated that the prices of goods in question were mainly negotiated by Mr.

Poddar and Mr. Mittal across the table usually in Europe. He further stated that in 1988 the price of PP Dyed Chips were negotiated by Mr. G.P. Poddar and Mr. A.K. Mittal with the foreign suppliers mostly in West Europe. It is, therefore, evident from their statement that Mr. A.K. Mittal was also the person in-charge of and responsible to the Company for conduct of its business as far as import of goods in question was concerned. Therefore, the penalty has rightly been imposed upon Mr. G.P. Poddar and Mr. A.K. Mittal.

16. The foreign exchange utilised by the respondents for importing PP Dyed Chips was to the extent of Rs.87,58,617/-. Considering the value of the goods imported by them, neither penalty imposed upon the Company nor the penalty imposed on its Managing Director, Mr. G.P. Poddar and the Executive Director Mr. A.K. MIttal can be said to be excessive. If at all, the penalty imposed upon them was on the lower side. Therefore, there is no scope for reducing the penalty.

For the reasons stated hereinabove, the appeals are hereby allowed and the impugned orders, passed by the Tribunal, are set aside.

LCR be sent back, with a copy of this order.

FEBRUARY 17, 2014 V.K. JAIN, J.
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