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

Reserved on: 17th May, 2017

Pronounced on: 3rd July, 2017

+ CRL. A 620/2009

M/S. MADHAV MAGANLAL & CO

AND ANR.

... APPELLANTS

Through: Mr. R.K. Sinha and Mr.
Prabhat Kumar, Advocates

Versus

UNION OF INDIA AND ANR.

.... RESPONDENTS

Through: Mr. Kunal Dutt, Advocates

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

1. This criminal appeal invoking Section 54 of the Foreign Exchange Regulation Act, 1973 (FERA) read with Section 35 of Foreign Exchange Management Act, 1999 (FEMA) was preferred to assail order dated 13.05.2009 passed by Foreign Exchange Regulation Appellate Board (Appellate Tribunal) under Section 52 of FERA read with Section 28 of FEMA dismissing the appeals (Appeals numbers 177-178/2007) of the first and second appellant herein which had been taken out against adjudication order no.ADJ/62-B/SDE/KNR/2007 dated 30.10.2007 of Special Director, Enforcement Directorate, Mumbai imposing penalties on

account of violation of Sections 9(1)(b) and (d), Section 68(1), Section 64(2) and 63 of FERA.

2. The Foreign Exchange Regulation Act, 1973 (FERA) was repealed and the appellate board constituted under Section 52 of the said Act was dissolved by Section 49 of the Foreign Exchange Management Act, 1999 (FEMA), it having come into force with effect from 01.06.2000. However, notwithstanding such repeal, by virtue of Section 49(5), all action taken or purported to have been taken under the repealed enactment (FERA) is envisaged to be deemed to have been taken under the corresponding provisions of the new law (FEMA) in so far as it is not inconsistent with the provisions of the latter. Further, the appeal preferred to the appellate board under Section 52(2) of erstwhile law (FERA) but not disposed of before the commencement of the new law (FEMA) was to stand transferred to the appellate tribunal constituted under FEMA for adjudication by it and every appeal from any decision or order of the appellate board under Section 52 of the repealed Act, if not filed before the commencement of new law (FEMA), could still be filed before this court within the period specified. For such purposes, and by a saving clause, Section 49(3) of FEMA, however, puts a restriction against notice of any contravention if taken under Section 51 of FERA by any adjudicating officer under that law “after the expiry of a period of two years from the date of the commencement of the new law (FEMA)”. Pertinent to add here, that appeal to this court against the order of the appellate tribunal under Section 54 of FERA or Section 35 of FEMA would lie only on “questions of law”.

3. The background facts, as may be culled out from the material on record, would show that the premises of the first appellant were searched by the officers of Customs Department on 26.04.1991 resulting in seizure of diamonds worth Rs.8 Lakhs with unaccounted Indian currency of Rs.5,42,660/- besides certain incriminating documents. The investigation revealed that the second appellant and one Amrit Bhai Nathu Bhai Patel (who were partners in the first appellant firm) with one employee (Jayantibhai Tribhuvandas Patel) had indulged in *hawala* payments. During the pendency of the adjudication proceedings that were initiated, the other partner (Amrit Bhai Nathu Bhai Patel) and the employee (Jayantibhai Tribhuvandas Patel) died and the action against them thus abated.

4. The proceedings before the Collector of Customs, Mumbai under the Customs Act resulted in confiscation of the diamonds and Indian currency by order dated 03.10.1994 which, however, was set aside by (erstwhile) Customs Excise and Gold Control Appellate Tribunal (CEGAT) by order dated 03.10.2000, though referring the matter to the Enforcement Directorate for further investigation from the point of view of the provisions contained in FERA. It is against this backdrop that the Special Director of the Enforcement Directorate in the Ministry of Finance, Government of India, in exercise of its jurisdiction under the said law issued a show cause notice on 31.05.2002 to the appellants for considering imposition of penalty for violation of its provisions. The said proceedings resulted in adjudication order dated 30.10.2007 which was

challenged unsuccessfully before the appellate tribunal leading to the present appeal being preferred.

5. The appellants have pressed the following questions of law for consideration :-

- A. Whether the show cause notice is void being received by appellant after the sun set period?
- B. Whether separate penalties can be imposed on the company and its partners / directors by the special director under FERA?
- C. Whether the statements given under section 108 of the Customs Act can be used as evidence against the accused?
- D. Whether the impugned order could be passed against the backdrop wherein the appellants have been acquitted in the proceedings under Customs Act by the CEGAT on the basis of same evidence?

6. It has been argued that the show cause notice dated 31.05.2002 was communicated to the appellants in July-August 2003 which was beyond the sunset period provided in Section 49(3) and (4) of FEMA and further that, even otherwise, there was inordinate delay in action in the wake of order dated 03.10.2000 of CEGAT. These submissions, however, need only to be mentioned and rejected with reference to the observations of the Supreme Court in *S.K. Sinha Vs. Videocon International Ltd.* 2008 (2) SCC 492 to the effect that “taking cognizance of offence” is “entirely different from initiating proceedings”. Section 49(3) and (4) of FEMA reads as under :-

“49. Repeal and saving.—

(1) x x x

(2) x x x

(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3), all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.”

7. It is clear from a bare reading of the above noted provisions that the new law (FEMA) continues to govern action vis-à-vis all offences under the repealed law (FERA) in accordance with the provisions of the latter, the only restriction being that notice of contravention under Section 51 of FERA had to be taken by the adjudicating officer before the expiry of two years from the date of commencement of FEMA – that is to say, by 31.05.2002. Since the show cause notice in the present case was issued by the adjudicating authority on 31.05.2002 which would be within the sunset clause under FEMA, its validity cannot be questioned, the fact that such show cause notice was served only in 2003 being inconsequential. Since the action was initiated within the period provided in law, delay (if any) in relation to the directions in the order of CEGAT would not render it bad.

8. The appellants rely on *Commissioner of Customs Vs. Jupiter Exports, 2007 (213) ELT 641 (Bom.)*, a decision rendered by a

division bench of the High Court of Judicature at Bombay. Noticeably, the matter before the High Court had arisen out of the proceedings under Section 112 of the Customs Act, 1962. The Bombay High Court held in that context that penalty having been imposed against a partnership firm, separate penalties could not have been imposed on its partners. This argument cannot hold good in the context of adjudication proceedings under FERA.

9. In above context, Section 68 of FERA only needs to be referred to. It reads as under :-

68. Offences by companies —

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of 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:

Provided that nothing contained in this sub-section 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.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder 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 to be

guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation — for the purposes of this section—

(i) “company” means anybody corporate and includes a firm or other association of individuals; and

(ii) “director”, in relation to a firm, means a partner in the firm.

(emphasis supplied)

10. Noticeably, Section 68(1) permits a company “as well as” every person who is in charge of or responsible to it for conduct of its business (if his complicity is proved) to be held guilty and liable and to be punished accordingly. The explanation appended to Section 68 makes it further clear that the said provision is to be read *mutatis mutandis* in relation to a firm or other association of individuals and the expression “director” also connotes in relation to a firm, its partner(s).

11. It is the grievance of the appellants that the Special Director in the adjudication proceedings did not carry out independent investigation and has instead gone by the statements which were recorded under Section 108 of the Customs Act which, having been retracted, in the submission of the appellants, were not admissible in the adjudication proceedings under FERA. Reliance is placed on a decision of a learned single judge of this court reported as *Enforcement Directorate Vs. Ravi Sharma, 2003 (156) ELT 180 (Del.)* and the ruling of the Supreme Court in *Shanti Prasad Jain Vs. Director of Enforcement, AIR 1962 SC 1764*.

12. While there can be no dispute about the fact, as was held by a Constitution Bench of the Supreme Court in *Shanti Prasad Jain* (supra) that the proceedings under FERA being *quasi* criminal in nature, the prosecuting agency has to make out a case of violation of law beyond all reasonable doubts, the submission that in the adjudication proceedings reliance cannot be placed on statements recorded under Section 108 of the Customs Act must be rejected on the view taken by a bench of three Hon'ble Judges of the Supreme Court in *Poolpandi etc. etc. Vs. Superintendent, Central Excise and Others etc. etc.*, (1992) 3 SCC 259. In *Naresh J. Sukhawani Vs. Union of India*, 1995 Suppl. 4 SCR 778, the Supreme Court upheld the imposition of penalty on the basis of statement under Section 108 of the Customs Act treating it as material piece of evidence.

13. In the present case, noticeably, the statements under Section 108 of the Customs Act have been taken note of by the authorities below for recording re-assurance on the ground the same corroborated the main incriminating circumstances, the same being seizure of unaccounted money and incriminating documents showing the infringing activity.

14. The submissions that the order of the Customs authorities has been set aside by CEGAT takes the appellants nowhere. The said order only brought to an end the proceedings taken out under the Customs Act. The said result can have no effect on proceedings taken out under FERA, its provisions being distinct from those of the Customs Act.

15. The questions of law raised in this appeal, thus, are answered against the appellants.

16. In the result, the appeal must fail. It is dismissed.

(R.K. GAUBA)
JUDGE

JULY 3, 2017

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