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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl.A. 617/2016**

M/S LORD CHLORO ALKALIAppellant
Through: Mr. R. K. Handoo and Mr. Aditya
Chaudhary, Advocates
Versus
SPECIAL DIRECTOR ENFORCEMENT DIRECTORATE Respondent
Through: Mr. Amit Mahajan, CGSC with
Mr.Kunal, Advocate

CORAM:
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL
ORDER
21.08.2017

1. The present appeal has been instituted under Section 54 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA') read with Section 49(3) of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'FEMA') against the impugned order dated 04.04.2016 passed by the Appellate Tribunal for Foreign Exchange (hereinafter referred to as 'Appellate Tribunal'), whereby a penalty of Rs.5 Lakhs was imposed on the appellant for contravention of Section 8(3) and Section 8(4) of FERA.
2. Brief facts of the case are that based upon information received from the Reserve Bank of India (hereinafter referred to as 'RBI'), about non-submission of relevant proof of import in relation to the remittance of foreign exchange for seven imports made by the appellant company, the respondent department issued two letters to the appellant company dated 08.06.2001 and 24.04.2002 to explain

their position. When no reply was received from the appellant company, a Show Cause Notice (hereinafter referred to as 'SCN') dated 30.05.2002, was issued to the appellant company. It was alleged by the respondent department that seven imports were made by the appellant company and foreign exchange was remitted for the said imports, however, the appellant failed to furnish a certificate from the dealer in support of submission of Exchange Control copy of Bill of Entry, thus violating Section 8 (3) and Section 8(4) of the FERA read with Chapter 7A.20 (i) of the Exchange Control Manual, 1995. A reply to which, dated 28.06.2002, was accordingly filed by the appellant company.

3. Based on the reply of the appellant company, the respondent department then started adjudication proceedings against the appellant company.
4. The adjudicating authority vide order dated 07.01.2004 imposed a penalty of Rs.1.5 crores on the appellant company and held that Exchange Control copy Bill of Entries were still pending for the seven imports. The seven remittances in respect whereof the penalty was imposed were as follows:
 - i. JPY 9600000 dated 13.10.1992
 - ii. DEM 16000 dated 04.06.1993
 - iii. FRF 102194 dated 01.10.1993
 - iv. CHF 54383 dated 09.11.1993
 - v. FRF 204388 dated 02.03.1994
 - vi. JPY 6120400 dated 05.12.1996
 - vii. JPY 6120400 dated 05.12.1996

5. The appellant thereafter preferred an appeal before the Appellate Tribunal where under, as per statute a pre-deposit of 10% of the penalty amount was asked to be deposited, by the appellant company for preferring an appeal. This order was assailed in Writ Petition No. 11852/2004. The appellant company was allowed to deposit Rs.1.5 Lac instead of statutory pre-deposit amount. Thereafter, the Appellate Tribunal heard the matter and vide order dated 17.06.2007 set aside the order of the adjudicating authority and remanded the matter for afresh adjudication.
6. The Adjudicating Authority in the second round of adjudication vide order dated 31.03.2010 held that the appellant had failed to show the Exchange Control copies of Bill of Entries against the remittance of DM 16000 and JPY 9600000 and imposed a penalty of Rs.35Lakhs and dropped proceedings with respect to the other five remittances.
7. The order dated 31.03.10, was assailed before the Appellate Tribunal and vide order 22.08.2014, the Chief Manager of the Punjab National Bank (hereinafter referred to as 'PNB') was directed to produce the records of the impugned remittances assailed in the said appeal. The PNB sent a communication that since the records were only retained for a period of 10 years and the impugned remittances dated back to more than 10 years, their records were not available.
8. The Appellate Tribunal vide order dated 04.04.2016, while observing that the particulars of the remittances as given in the SCN were vague, held that it was incumbent upon the appellant

company to prove that the entry did not relate to them, as the remittance figured in the account of the appellant company maintained by the respondent department and confirmed by PNB. The Appellant Tribunal held that it was for the appellant company to approach the dealer to get the entry deleted but no such effort was made. Thereafter, the Appellate Tribunal partly allowed the appeal by, imposing a penalty of Rs.5Lakhs for contravention of Section 8(3) and Section 8(4) of FERA, 1973 with respect to the remittance of DM16000 and setting aside the findings of the Adjudication Authority with respect to the remittance of JPY 9600000.

9. Mr. R.K. Handoo, the learned counsel for the appellant contends that the details of the contentious remittance, that is of DM 16000, dated 04.06.1993 are imprecise and the appellant has not been supplied with any document by the respondent department, in order to link the said amount to the appellant; that Appellate Tribunal also made an observation in the impugned order that the particulars in relation to the amount of DM 16000, as mentioned in the annexure to the SCN are vague; that before the appellant could reply to the letter dated 24.04.2002, the ED issued SCN to them to which they duly replied; that the impugned order relies upon reverse burden of proof thus breaching the principles of natural justice.
10. The learned counsel for the appellant further submits that the appellant has throughout maintained the position that the said remittance does not relate to the appellant company and has since

asked the respondent department to provide them with details in respect to the contentious remittance for the appellant to trace the details of the transaction. It was further contended by the learned counsel that the appellant on previous occasions tried to approach the RBI and PNB to seek further details which they failed to provide. The learned counsel further submits that the letter received by the RBI from the bank, alleging that the contentious remittance of DM 16000 was made by the appellant, at the most got issued, due to a clerical error.

11. The learned counsel for the appellant in support of his case places reliance upon the case of **Sunil Engg. Corp. & Ors. Vs. Union of India & Ors** reported in **2005 (99) ECC 546 (Del)** and **Innovative Tech Pack Ltd. Vs. Special Director of Enforcement (Crl. A. 952/2012)** and **Shanti Prasad Jain Vs. Director of Enforcement, FERA (1963)** reported in **2 SCR 297**.
12. Mr. Amit Mahajan, learned counsel for the respondent, contends that the grounds taken in the instant appeal by the appellant are a product of an after-thought as the appellant company never approached the authorised dealer to clarify the contentious entry of remittance of DM 16000 nor did they approach the RBI so as to get contentious remittance deleted from their record; that even after sending repeated letters to the appellant, no reply was received from the appellant until the SCN was issued. Thus, the Ld. Counsel submits that this conduct on the part of the appellant reeks of malice.

13. I have heard the learned counsels for both the parties and perused the available material on record.
14. At the outset, it is relevant to peruse the relevant provision under the Act; Section 8 (3) and Section 8 (4) of FERA reads as under:

“8 (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.

8 (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.”

15. The law on SCN is settled as has been observed by the Supreme Court in **Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd and Others** reported in (2007) **5SCC388**, as follows:

“The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. In the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted.”

16. Further, it is a settled principal of law that “Affirmati Non Neganti Incumbit Probatio”, that is, “the burden of proof is upon him who affirms - not on him who denies”. Similar view has been expressed by the Supreme Court in the case of **Bhagwan Jagannath Markad and Ors Vs. State of Maharashtra** reported in (2016) **10SCC537**, holding,

“18. It is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt.”

17. In **Shanti Prasad Jain Vs. Director of Enforcement, FERA (1963)** reported in **2 SCR 297**, the Supreme Court observed that the proceedings under FERA are quasi-criminal in nature and that it is the duty of the respondents as prosecutor to make out beyond all reasonable doubt, that a violation of law has occurred.
18. Upon perusal of the documents on the record, it falls that the appellant company failed to supply any information to the ED with respect to the contentious remittance, in light of the fact that they were never supplied with adequate information in the first place, so as to enable them to find the contentious transaction of DM16000 in their books.
19. From the perusal of the SCN, it is clear that the, details furnished by the respondent department in the SCN, were vague and sketchy at best, for the appellant to trace back the contentious transaction of DM16000, which happened eight years back with respect to the time when the first letter was sent to the appellant Company by the respondent Department. Furthermore, during the course of adjudication proceedings, it was observed that out of the seven contentious remittances, two were repetition. Strong inference can be drawn from there, to show that there was a lot of laxity on part of the respondent department to even ascertain, prima facie, the authenticity of the contentious remittances, in relation to which they started the adjudication proceedings. Considerable doubt is thus, cast upon the claims of the respondent with respect to the remittance in question (DM16000) also, as there can be a

likelihood situation that the appellant company never made such a remittance as has been claimed by their learned counsel since the time the appellant company established their first communication with the respondent department, in relation to the allegations against them with respect to the then seven contentious remittances, vide letter dated 28.06.2002, wherein it was mentioned as under,

“In respect of this amount of DM16,000 dated 4-6-93 my clients have not been able to lay hands on any documents to show any remittance of this amount in account of any import by my client. It appears that Bankers have inadvertently mentioned this amount of DM16000 in regard to my client. My client would be too glad to put in more efforts if some tangible details are provided by the department for collecting and retrieving the documents as it has been done in respect of the above remittances.”

20. The contention of the respondent that since the appellant company has been able to justify six remittances, then they should have been able to justify the one in question also, is superfluous and without merit.
21. In view of the facts discussed above and the relevant case laws, it is evident that the respondent department has failed to establish the violation beyond reasonable doubt, on the account of the appellant. For the reasons abovementioned, the impugned order dated 04.04.2016 is quashed and set aside. The appeal is allowed.

22. The amount, if any, deposited by the appellant will be refunded to the appellant in accordance with law.

SANGITA DHINGRA SEHGAL, J

AUGUST 21, 2017

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