

Devender Raina Vs. Special Director, Directorate of Enforcement

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Aug-01-2008

Judge : R. N. Poddar, Member

Appeal No. : Appeal No. 482 of 2004

Appellant : Devender Raina

Respondent : Special Director, Directorate of Enforcement

Advocate for Pet/Ap. : Amit Prasad for the Appellant. Dr. Shamsuddin for the Respondent.

Judgement :

1. The following order of the Appellate Tribunal for Foreign Exchange is delivered by Sh. R.N. Poddarm, Member.

2. This appeal is directed against adjudication Order No.SDE(SKP)III 66. 2004 dated 9.3.2004 passed by Special Director, Enforcement Directorate imposing penalty of Rs. 1 lakh on the appellant besides separate penalty imposed on noticee company and other co noticee director of said company for the reason of failure to realize and repatriate outstanding export products in contravention of section 18(2) and 18(3) r/w section 68 of FER Act, 1973. This tribunal vide order dated 29.7.04 after hearing argument directed the appellant to deposit the penalty amount within 60 days. It is stated (Sic) the Bar that the said order has been complied with though belatedly. Heard Shri Amit Prasad, Ld. advocate appearing

for appellant and Dr. Shamsuddin, DLA for the respondent.

3. The main crux of argument of Shri Amit Prasad, Ld. advocate is that at the relevant time, the appellant was neither director nor in charge of affairs of noticee company relating to export of garments. Referring to the provisions of section 5 of Companies Act Shri Amit Prasad contended that the expression "officer who is in default" means the managing director, whole time director, the manager, the Secretary, or any or any other person charged by the Board with the responsibility. Further referring to the decision of Hon'ble Supreme Court in SMS Pharmaceuticals Ltd. v. Neeta Bhalla JT 2005 (8) SC 450 it was contended that the SCN has not disclosed as to why and how the appellant was responsible to the affairs of the notice company. Hence the impugned order cannot stand on its legs and is liable to be set aside and quashed.

4. Per contra Dr. Shamsudin DLA contended that during the year 1995 to 1996 goods in question were exported by the noticee company in which the appellant was executive director and vice president of International Trading Division at the relevant time. According to Dr. Shamsuddin letter dated 2.4.88 of noticee company, placed at page 85 of appeal record, clearly shows that the appellant being an Executive Director (International Trade Division) of the company was entrusted to look after the export of various products to European market. According to him the said letter further shows that he was part of decision making regarding the export of consignment by the noticee company who supplied silk garments to its wholly owned subsidiary in UK. Further it is contended that the SCN dated 7.5.2002 issued to the appellant clearly spell out that appellant amongst others was in charge of and responsible to the noticee for day to day business of the noticee company at the relevant period. It is contended that the said position has been upheld in the impugned order where after the contention of the appellant cannot sustain.

5. In the instant case the appellant is charge with vicarious liability for failure of noticee company to realize and repatriate the export proceeds to the tune of Rs. 3,70,96,026.28 during the year 1995 to 1996. It is the contention of appellant that he was appointed as an additional director on 1.1.97 and resigned from such post

on 6.4.98. Further it is contended that one Vinay Bagla who was chairman and MD of noticee company was looking after the entire export affairs pertaining to the noticee company in UK and who was also the director of the UK buyer namely the subsidiary of the noticee company in UK. The contention of the appellant that he was not director of the appellant company at the relevant time cannot be accepted on the face the copy of letter dated 2.4.1988 of noticee company available will the appeal papers showing that the appellant was appointed as executive director, Internal Trading Division way back in 1988. So the position emerging that he was in charge of the company's export to Europe prior to 1997 was not controverted. The appellant is well aware of the position what he held in the noticee company during the period from April, 1988 to 1997. Despite no material including certified copy of statutory form No. 32 in support of his contention has been brought on record. Section 106 of the Evidence Act 1872 provides that when a particular fact is within special knowledge of a person burden of proof of that fact lies upon him. In that view of the matter when he fails to discharge the said burden adverse inference is permissible.

6. In the instant case reference has been made to the provisions of section 5 of the Companies Act to ascertain the scope of "officer who is in default" in relation to working of companies who are in default. In the instant case the appellant is charged with the contravention of provisions of FER Act, 1973. It is well settled that FER Act is a special Act regulating certain aspects of foreign exchange providing substantial revisions as well as procedural aspect. Section 68 of FER Act while dealing with vicarious liability provides that where a person committing the contravention under the Act is a company every person who at the time of contravention committed, was in charge of, and was responsible to the company for conduct of its business shall be deemed to be guilty of contravention."

7. The relevant portion of section 68 is read 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."

8. The above provision docs not contain any ambiguity. Moreover it is not controverted that the appellant was an officer of the notice company at the relevant time. It is well settled that court will not construe the provision of a statute with reference to that of another statute unless both are pari materia. In this regard reference may aptly be made to decision of Supreme court in Sudesh Kumar v. State of Uttrakhand AIR 2008 SC 1120 where Hon'ble Court while examining the scope of Juvenile Justice Act observed as under :

"It can be noticed from Ramji Missar case (supra) and Pratap Singh case (supra) that the object and purpose of the Probation of Offenders Act, 1958 for applying the relevant provisions to the accused are different and cannot be said in pari material with the Juvenile Justice Act, 1986 and the Juvenile Justice (Care and Protection of Children) Act, 2000. The court would not construe a section of a statute with reference to that of another statute unless the latter is in pari materia with the former. Therefore, a decision made on a provision of a different statue will be of no relevance unless underlying objects of the two statute are in pari mateira. The decision interpreting various provisions of one statute will not have the binding force while interpreting the provisions of another statute."

9. As regards the contention that appellant could not be penalized in absence of any material showing he was responsible for the conduct of the noticee company, it is seen that the SCN clearly spell out that during the relevant period he was one of the persons in charge of and responsible to the said noticee company for its day to day businesses.

10. In SMS Pharmaceuticals Ltd. v. Neeta Bhalla JT 2005 (8) SC 450 the Hon'ble Supreme Court while considering vicarious liability of the officers of the corporate

bodies for the act done in the name of such body observed :

"A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence 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, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence."

11. In *Everest Advertising Pvt. Ltd. v. State Govt. of NCT of Delhi* 2005 SCALE 479, the Hon'ble Court relying on the decision of *SMS Pharmaceuticals case (Supra)* and *Saroj Kumar Poddar v. State (NCT of Delhi)* 2007 (2) SCALE 36 on the question of vicarious liability of the company official held that :

"The averments must state that the person who is vicariously liable for commission of the offence of the company both was in charge of and was responsible for the conduct of the business of the company Requirements laid down therein must be read conjointly and not disjunctively. When a legal fiction is raised, the ingredients therefore must be satisfied"

12. In the instant case SCN issued to the appellant contained charges of vicarious liability. It is also not controverted that during the relevant period the appellant was in charge of noticee company's International Trading Division concerning export of various products to European market as is evident from the letter dated 2.4.1988. In such a situation and in absence of any material contrary brought on record the impugned order cannot be faulted with. Rather it is to be maintained of sustained.

13. Turning towards the question of quantum of penalty it is seen that same is neither excessive nor harsh in comparison to the amount involved in contravention. The same does not require any interference of this tribunal. This appeal is therefore liable to be dismissed.

14. For the reasons stated hereinabove, this appeal is dismissed for having no merits. The amount pre deposited, if any, may be appropriated towards realization of penalty. The appellant is permitted to deposit the balance amount of penalty, if any, within 7 days from the receipt of this order failing which Enforcement Directorate may realize the same in accordance with law.

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