

Raman Narula Vs. the Director of Enforcement

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Court : Delhi

Decided On : Feb-25-2014

Judge : S. Muralidhar

Appellant : Raman Narula

Respondent : The Director of Enforcement

Advocate for Pet/Ap. : Mr. Harish Gulati, Mr. Anindiya Malhotra

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI R-55 + CRL.A. 149 of 2008
RAMAN NARULA Appellant Through: Mr. Harish Gulati and Mr. Anindiya
Malhotra, Advocates. versus THE DIRECTOR OF ENFORCEMENT Through:
NoneRespondent WITH R-56 CRL.A. 186 of 2008 CLUB MED INDIA
BRANCH OFFICE Appellant Through: Mr. Harish Gulati and Mr. Anindiya
Malhotra, Advocates. versus SPECIAL DIRECTOR OF ENFORCEMENT
.....Respondent Through: None CORAM: JUSTICE S. MURALIDHAR

ORDER

2502.2014 1. Raman Narula has filed Crl. Appeal No.149 of 2008 under Section 35 of the Foreign Exchange Management Act, 1999 (FEMA) against the order dated 11th December 2007 passed by the Foreign Exchange Appellate Tribunal (AT) in Appeal No.294 of 2005 filed by him. Crl. A. 186 of 2008 has been preferred by Club Med India Branch Office (hereafter Club Med India), against the same

impugned order of the AT which was common to its Appeal No.297 of 2005.

2. The background to these appeals is that Club Mediterranee Hong Kong Ltd. (hereinafter Club Med Hong Kong) was part of a group of companies that runs and maintains beach resorts in the name and style of Club Med Resorts at various places in South-East Asian countries like Malaysia, Thailand, Australia, Indonesia, Mauritius and Maldives. Club Med Hong Kong wanted to open a branch office in India to attract Indian tourists to the Club Med resorts. The branch was named Club Med India. On 25th June 1994, Club Med Hong Kong appointed Mr. Raman Narula as its Sales and Marketing Manager. On 3rd November 1994, it submitted an application to the Reserve Bank of India (RBI) for permission to open a branch office in India. On 22nd November 1994, the RBI granted Club Med Hong Kong permission to open its branch office. Among the activities that the RBI permitted Club Med India to carry out were: (i) To open offices in India to promote tourism in India and to provide services to the tourists (marketing of services) i.e. reservation of accommodation, booking of passage etc. and (ii) To support Club Med for technical and financial collaborations with prospective Indian partners for management and development of resorts in India. On 11th January 1995, the RBI granted approval to Club Med India, subject to the conditions stipulated therein, to collect foreign exchange or travellers cheques to Indian travellers for reservation of Club Med resorts abroad.

3. As far as Mr. Narula was concerned, the relevant facts are that Club Med India became operational in September/October 1995 and Mr. Narula was appointed as its liaison officer. He continued as such till October 1996. Sometime in July 1997, one Mr. Sameer Sindhwani was appointed as the Accountant of Club Med India.

4. It has been stated by both the Appellants that Club Med India never made profits and practically no business was carried out in the financial year 1994-95. Club Med India was finally wound-up in the year 1998. According to Mr. Narula, he had no control over the functioning of Club Med India. He had no knowledge of its books of accounts. The accounts of Club Med India were under the direct control and supervision of Club Med Hong Kong. The case of Mr. Narula is that the task entrusted to him was to obtain sanction from the RBI for launching Club Med

India and to promote the sales of the hotel resorts bookings in India after the branch became operational.

5. On 23rd December 1997, after Mr. Narula had left the services of Club Med India, the Enforcement Directorate (ED) sought information from Club Med India on a point raised by the Department of Revenue, Economic Intelligence Bureau. This was followed by the ED issuing a Memorandum/Show Cause Notice (SCN) on 30th December 1999 to Club Med India, Mr. Narula, Mr. Sindhwani and Mr. Stephen John Michie and Mr. Ng ChoonHuat of Club Med Hong Kong.

6. Inter alia, it was stated in the SCN that the branch office had collected US Dollar (USD) 8,39,240, converted USD245,506 to Indian Rupees as commission and remitted USD593,734 to Club Med Hong Kong. The SCN referred to the fact that for the period 6th March 1997 to 5th October 1997, Club Med India had collected a membership fee from 441 members and remitted the same to Club Med Hong Kong; it had caused remittance of insurance premium of USD3087 without the prior permission of the RBI; between November 1995 and February 1998, Club Med Hong Kong issued credit notes to the value of USD832,245.3 in favour of Club Med India which the latter had a right to receive in India, but which instead of being paid to it in India was adjusted against the amounts payable to Club Med Hong Kong on account of invoices raised on Club Med India. The SCN noted that Club Med India had refrained from taking steps to recover the said amount from Club Med Hong Kong and, therefore, the said amount ceased to be receivable here. This was done without the general or special permission of the RBI.

7. The SCN also stated that Club Med Hong Kong had raised debit notes to the value of USD145,471.46 on Club Med India, out of which USD17486.2 was adjusted against the amounts payable by the former to the latter. By acknowledging the debt to the tune of USD145,471.46, a right was created in favour of Club Med Hong Kong. Payments to the tune of USD17486.2 had been made to Club Med Hong Kong by way of adjustments in the respective credit notes. All of this was done without the general or special permission of the RBI.

8. On the basis of the above allegations, the SCN proceeded to require the noticees to show cause why they should not be held liable for contravention under

Sections 8(1), 16(1), 9(1)(a) and 9(1)(c) of the Foreign Exchange Regulation Act, 1973 (FERA). Para 25 of the SCN stated, inter alia, that Mr. Narula and Mr. Sindhwani were in-charge of and responsible to Club Med India for the conduct of its business and, therefore, were liable to be proceeded against under Section 68(1) FERA.

9. Replies to the SCN were sent by Mr. Narula on 28th January 2000 and Club Med India on 19th May 2003 denying any contravention of the provisions of FERA. Inter alia, Mr. Narula pointed out that no remittance was made during his tenure and the reasons for raising the debit note and acknowledging the debt could best be given by Club Med Hong Kong and the Chief Accountant working under its control. He also pointed out that the India branch had no juristic corporate personality or financial existence, independent of Club Med Hong Kong. He also stated that he had no control over the maintenance of accounts or the activities of the Chief Accountant.

10. As far as Club Med India was concerned, in its reply it was pointed out that for the bookings done in India from Indian customers, the India branch could retain 15% towards its commission and remit 85% to Club Med Hong Kong. In some cases, the Hong Kong office sold the Club Med products directly to customers in neighbouring countries. However, on its own, Club Med Hong Kong remitted 15% commission to the Indian branch out of the said sales. In order to enable the Indian branch to know the exact commission amount, Club Med Hong Kong gave the details of the sale proceeds in the form of credit notes. It was pointed out that these credit notes did not mean, in any way, that the Indian office was to receive the entire amount reflected in them. They were to receive only 15% of the amounts so reflected.

11. As regards the expenses incurred by Club Med Hong Kong on advertisements, costs etc., information sent by it to Club Med India in the form of debit notes indicating the nature of the expenses. These debit notes did not mean that the Indian branch owed any money to Club Med Hong Kong. It was pointed out that this is a form of accounting system adopted by the Hong Kong office.

It was pointed out that the remittance of the membership fee, which included the insurance cover, was done only through an authorised dealer. It, therefore, did not require the prior approval of the RBI. As regards the credit notes for USD832,245.30, it was sent only to enable the Indian office to calculate the 15% commission component and it did not mean that the entire amount was to be received since it related to the 100% amounts paid by the passengers abroad. The said amount was, therefore, not due to the Indian branch and the question of seeking the permission under Section 16 of FERA did not arise. As regards the debit notes, it was pointed out that the amounts therein were never remitted by the Indian branch nor were they meant to be remitted. The debit notes did not also mean that the Indian branch acknowledged the amount therein as a debt. The amount was only by way of an adjustment in respect of the credit notes with the debit notes and this was reflected in the bank statement of July 1997.

12. The Special Director (SD) passed an adjudication order (AO) dated 4th February 2005. In the said order, the SD observed as under:

87. Having regard to the above, I hold that the charges in the SCN against Mr. Stephen John Michie and Mr. Ng. Choon Huat @ Jimmie Ng. in terms of Section 68 of the FERA, 1973 are held as established. However, the charges against S/Shri Raman Narula and Samir Sindhwani (noticee nos. 2 &

5) are not proved in the light of discussions hereinbefore.

13. However, in para 88 of the same order, after stating that the following penalties were imposed on noticee Nos.1, 3 and 4 as the charges against them in the SCN had been held as proved, the SD also imposed penalties on Mr. Narula, Noticee No.2 as under:

(a) Penalty of Rs. 5,000 (Rupees Five Thousand only) for contravention of Section 8(1) of the FERA, 1973. (b) Penalty of Rs. 15,00,000 (Rupees Fifteen Lakhs only) for contravention of Section 16(1) of the FERA, 1973. (c) Penalty of Rs. 2,50,000 (Rupees Two Lakhs Fifty Thousand only) for contravention of Section 9(1)(c) of the FERA, 1973. (d) Penalty of Rs. 30,000 (Rupees Thirty Thousand only) for contravention of Section 9(1)(a) of the FERA, 1973.

14. As far as Club Med India was concerned, the following penalties were imposed:

(a) Penalty of Rs. 25,000 (Rupees Twenty Five Thousand only) for contravention of Section 8(1) of the FERA, 1973. (b) Penalty of Rs. 75,00,000 (Rupees Seventy Five Lakhs only) for contravention of Section 16(1) of the FERA, 1973. (c) Penalty of Rs. 12,00,000 (Rupees Twelve Lakhs only) for contravention of Section 9(1)(c) of the FERA, 1973. (d) Penalty of Rs. 1,50,000 (Rupees One Lakh Fifty Thousand only) for contravention of Section 9(1)(a) of the FERA, 1973.

15. More than a month thereafter, on 7th March 2005, the SD purportedly issued a Corrigendum, which reads as under:

CORRIGENDUM In adjudication Order No.SDE/SKP/III/16/2005 dated 4.2.2005, paragraph No.87 is deleted and in paragraph No.88 in line No.2 after the words Noticee No.1 and before the name Mr. Stephen John Michie, the name Shri Raman Narula-Noticee No.2 is inserted. Consequent to the above, paragraph Nos. 88, 89 and 90 may be treated as paragraphs 87, 88 & 89 respectively.

16. Aggrieved by the aforementioned AO and the Corrigendum, Mr. Narula filed Appeal No.294 of 2005, whereas Club Med India filed Appeal No.297 of 2005.

17. By the impugned common order dated 11th December 2007, the AT affirmed the order of the SD in respect of the charges under Sections 16(1), 9(1)(a) and 9(1)(c) of FERA, setting aside the AO to the extent it held the Appellants guilty of violation of Section 8(1) FERA.

18. Aggrieved by the above order of the AT, the present appeals have been filed. The impugned order of the AT was stayed during the pendency of these appeals.

19. This Court has heard the submissions of Mr. Harish Gulati and Mr. Anindiya Malhotra, learned counsel for the Appellants. None has appeared on behalf of the Respondent. However, the counter affidavits filed by the Respondent in both the appeals have been taken into consideration.

20. As far as the appeal of Mr. Narula is concerned, at the outset, it must be observed that the manner in which the SD has proceeded to issue a Corrigendum, deleting the entire para 87 of the original AO, is violative of Section 65 of FERA. As was noticed earlier, in the original para 87 of the AO, the SD pointedly held that a charge against Mr. Raman Narula and Mr. Sindhwani were not proved in the light of the discussions hereinbefore.

By deleting the entire para 87 by way of the Corrigendum, the AO was clearly trying to substitute the above specific finding in favour of Mr. Narula by purporting to review the AO which was clearly not permissible in law. There is no provision in the FERA that authorises the adjudicating officer or the SD to review an AO, and in any event, suo moto. All that Section 65 FERA permits is correction of clerical errors. Section 65 FERA reads as under:

65. Correction of clerical errors, etc.- Clerical or arithmetical mistakes in any decision or order passed by the Appellate Board or the adjudicating officer under this Act, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Appellate Board or the adjudicating officer or his successor in office, as the case may be: Provided that where any correction proposed to be made under this section will have the result of prejudicially affecting any person no such correction shall be made (i) after the expiry of a period of two years from the date of such decision or order; and (ii) unless the person affected thereby is given a reasonable opportunity for making a representation in the matter.

21. In the first place, what was sought to be changed by the Corrigendum dated 7th March 2005 was by no means a clerical error. Even assuming it was then, as in the present case where it was likely to affect Mr. Narula, it was mandatory for the SD in terms of the proviso (ii) to Section 65 FERA, to give Mr. Narula a reasonable opportunity of making a representation. In the present case, no prior notice was issued to Mr. Narula by the SD when the Corrigendum was issued nearly one month after the original AO was passed. The Court has no hesitation in holding the action of the SD in issuing the Corrigendum dated 7th March 2005 to be in violation of Section 65 FERA. The said Corrigendum is, therefore, illegal.

22. Nevertheless, even if para 87 of the AO is restored, it will have to be reconciled with para 88, which proceeds to impose penalties on Mr. Narula, even after holding that the charges against him are not proved. Thus, we have in the AO two inconsistent paragraphs - one holding Mr. Narula not guilty of the charges against him and the other imposing penalties on him. This is another reason why the impugned AO dated 4th February 2005, as far as Mr. Narula is concerned, is, on the face of it, unsustainable in law.

23. Independent of the above, it is even otherwise noticed that the case against Mr. Narula is essentially on the basis that in terms of Section 68 FERA, he was at the relevant time in-charge of the affairs of Club Med India and responsible to it for the conduct of its business. Section 68 FERA 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 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 any body corporate and includes a firm or other association of individuals; and (ii) "director", in relation to a firm, means a partner in the firm.

24. In the first place, it must be noticed that Section 68 applies only to companies.

Club Med India was certainly not a company or a firm under any law in India. Secondly, if it is taken to be an association of individuals apart from the SCN stating that Mr. Narula was in-charge of and responsible to Club Med India for the conduct of its business, no documents or material have been referred to which could constitute the basis of such an allegation. In para 9 of the SCN a reference is made to the statement of Mr. Narula that he was given the authority to open accounts and operate them. It is pointed out that Mr. Narula was permitted to hold accounts only for the needs of Club Med India and he was not otherwise in-charge of its affairs which were being directly controlled by Club Med Hong Kong.

25. In the AO, in para 85, the SD refers to the fact that Mr. Narula had been interacting with the RBI and the other agencies and obtained the requisite permission for opening of the Club Med India branch. The SD, after noting the submissions of Mr. Narula that the transactions which formed the subject-matter of the SCN took place after he left the services of Club Med India, however, refers to records of the branch from the inception to till such time Mr. Narula left the service which revealed a number of transactions that purportedly took place during the period when Mr. Narula was the person in-charge of the branch.

26. Mr. Gulati is right in his submission that there is no document referred to by the SD which could form basis of the above conclusion. No such details have been set out in the SCN issued to Mr. Narula to enable him to meet the said allegations. On the contrary, Mr. Narula, in his reply to the SCN, very categorically stated that he was only a liaison officer and not in-charge of the accounts of CMI. The SCN does not reflect any period during which the violation took place nor does it refer to any material on the basis of which such a conclusion can be drawn. The statements made by Mr. Narula and Mr. Sindhvani under Section 40 FERA, which have been referred to in the SCN, were required to be corroborated by independent material which does not appear to be the case.

27. As far as Mr. Sindhvani is concerned, the SD appears to have accepted his explanation that he was only an accountant and has proceeded to exonerate him completely on that basis. It is pointed out by Mr. Gulati that, on the same reasoning, Mr. Narula could not be held liable under Section 68 of FERA.

28. It is seen that for the purposes of Section 68 FERA, it was necessary for the ED to have laid a factual basis for alleging that Mr. Narula was in-charge of and responsible to Club Med India for the conduct of its business. The reply of Mr. Narula to the SCN stated that the affairs of Club Med India were controlled by Club Med Hong Kong and in fact Club Med India was not a separate entity. Its accounts were also maintained under the supervision and control of Club Med Hong Kong. It is not possible, therefore, to accept the reasoning of the SD that Mr. Narula could be held liable for the activities of Club Med India under Section 68 FERA.

29. As far as the impugned order of the AT is concerned, the Court finds that in para 19 it is again stated that The employee appellants were senior persons who were in charge looking after the day to day business of the appellant company during the relevant period. Hence, they are certainly responsible for their acts to the appellant company. Therefore, the imposition of the penalty against them with the aid of Section 68 of FERA cannot be found as bad.

The AT appears to have completely overlooked the grounds urged by Mr. Narula to arrive at a similar conclusion as that of the SD.

30. For the aforementioned reasons, the Court finds that the case against Mr. Narula by the ED was not sustainable in law and that both the AO as well as the impugned order of the AT are erroneous. Crl. Appeal No.149 of 2006 filed by Mr. Narula is accordingly allowed and the AO and the impugned order of the AT to the extent it holds that he contravened Sections 16(1), 9(1)(a) and 9(1)(c) are hereby set aside.

31. Coming to the appeal of Club Med India, the Court finds that the scope of the present appeal is confined to the alleged violation by it of Sections 16(1), 9(1)(a) and 9(1)(c) FERA, since, by means of the impugned order of the AT, the AO, to the extent it holds Club Med India responsible for violation of Section 8(1) FERA, has been set aside. As regards violation of Section 16(1), it is seen that the explanation offered by Club Med India that it was to receive 15% commission, but in fact, it was only issued credit notes as regards the bookings directly made by customers abroad was a plausible one. Further, there was no obligation on Club Med Hong Kong to pay Club Med India 15% commission on such bookings directly

made by the customers abroad. The question of Club Med India seeking permission from the RBI would arise only if it claimed payment of the said 15% commission. As it turned out, the said commission was in fact adjusted against the payments which were to be repatriated to Club Med Hong Kong. It turned out to be only an accounting adjustment because in fact no amounts were remitted by Club Med India to Club Med Hong Kong. The explanation offered by Club Med India in reply to the SCN, as explained by its accounts which was available with the ED ought not to have been rejected by the SD. When, in fact, no foreign exchange has been utilised for making any remittance abroad, and the so-called payments which were to be received were in fact not owed to Club Med India, the question of a violation of Section 16 or Section 9(1)(a) and 9(1)(c) did not arise. It does appear that even in respect of the debit notes, the adjustments were part of an accounting procedure. The fact remains that the Indian branch neither remitted nor intended to remit the amount mentioned in the debit notes.

32. For the aforementioned reasons, the Court finds that even as regards Club Med India, the impugned order of the SD dated 4th February 2005 and the order of the AT affirming it, cannot be sustained in law. Consequently, Crl. A. 186 of 2008 is allowed and the AO and the impugned order of the AT are set aside. S. MURALIDHAR, J.

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