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**S. Kumar Vs. Additional Director of Enforcement and Foreign Exchange Regulation Appellate Board**

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**Court : Delhi**

**Decided On : May-19-1981**

**Reported in : 20(1981)DLT294**

**Judge : D.B. Khanna, J.**

**Acts : Foreign Exchange Regulation Act, 1947 - Sections 4(3); [Foreign Exchange Regulation \(Amendment\) Act, 1973](#) - Sections 54**

**Appeal No. : Criminal Appeal No. 180 of 1979**

**Appellant : S. Kumar**

**Respondent : Additional Director of Enforcement and Foreign Exchange Regulation Appellate Board**

**Advocate for Pet/Ap. : D.P. Wadhawa, Adv**

**Judgement :**

**D.R. Khanna, J.**

(1) This is an appeal moved under section 54 of the Foreign Exchange Regulation Act, xvii of 1973 against an order dated 26.7.1979 of Shri V.V. Vaze, Member, Foreign Exchange Regulation Appellate Board.

(2) The background of the facts is that Pearl Cycle Industries Ltd., obtained two import licenses for the import of cycle chain plant of the value of Rs. 7,00,000.00 equivalent to about Deutsche Marks 605227. This was said to be the outer limit of the imports. However, the actual total price of the equipment came to Dm 5,20,280. The Technical Manager of the company then wrote to the supplier in Germany, asking for modifications in the proforma invoice in order to make up the amount of Rs. 7,00,000. Having obtained that, the equipment worth Rs. 7,00,000.00 was thus stated to have been imported by this process. It was alleged that the company indulged in over-invoicing of the bills and in this way contravened section 4(3) of the Foreign Exchange Regulation Act, 1947.

(3) Penal proceedings were, therefore, commenced against the Pearl Cycle Industries Ltd. and the present appellant, namely, S. Kumar, who was stated to be its Managing Director., by the Additional Director of Enforcement. He later by an elaborate order dated 31.3.1977, imposed a penalty of Rs.10,000.00 on the company and Rs.15,000.00 on Mr. S. Kumar. Reference was made to the letter of the Technical Director which had been written to the supplier in Germany in which in continuance of an earlier letter, 'certain modification in the proforma invoice for the chain plant as well as for certain spares, totally to make an amount of Rs.7,00,000.00 ' was sought. The stamping dies to be provided for, were required to be identical to the sample sent. The dispatch of proforma invoice was, therefore, required to be expedited to enable the opening of a letter of credit for the balance amount. The Directorate of Enforcement, therefore, alleged that in this way final bills were obtained by the company to cover the entire amount of Rs. 7,00,000.00 , and thus more foreign exchange was remitted than was necessary for the purpose. S. Kumar who appeared for the company before the Additional Director of Enforcement, contended that no inflation of prices was done. Rather more tools were obtained which were connected with same machine as the license was not only for cycle chain manufacturing machine but for tools as well. In this manner, more material permissible under the license was added in order to fully utilise the same.

(4) The Additional Director then found that items at Sr. Nos. 43 to 56 as per list submitted by the company) were new items which had not been included in the

earlier invoice and to this extent no irregularity existed. However, with regard to the other items at Sr Nos. 1 to 42, a comparative chart was prepared, and it was found that there was clear over invoicing in prices. Thus to the extent of Dm 12,024, foreign exchange was remitted unwarrantedly and used for purpose for which it had not been obtained. The money equivalent of this in Indian currency came to around Rs. 14,000.00 . The Pearl Cycle Industries Ltd. was, therefore, made liable to pay penalty of Rs. 10,000.00 .'

(5) As regards S. Kumar, it was noted that he was a Director of the company at the relevant time in 1959, and he was intimately connected with the purchase of the machinery. His contention that he was merely an Executive Director and not connected with the management of the company, was not accepted. He was found to be a whole-time Director and later became Managing Director from 7.5.1960. His liability was, therefore, invoked under section 23-G of the Act. The penalty of Rs. 15,000.00 was levied on him.

(6) S. Kumar later moved an appeal before the Foreign Exchange Regulation Appellate Board, which was rejected by Mr. V.V. Vaze by the impugned order. It is in these circumstances that he feeling aggrieved, has moved the present appeal before this Court. None, however, appeared from his side at the time of its hearing. The respondent has, therefore, been heard.

(7) In the grounds of appeal, it has been urged that S. Kumar as Director of the company was in charge of sale of its product and its commercial activities, and that the matters relating to import and installation of the chain plant were with the Technical Director of the company who was a German. He was, then, fore, if at all, responsible for whatever happened and the appellant did not come into the picture. In the circumstance no vicarious liability, it has been pleaded, sued on him. As regards the letter addressed by the Technical Director to the German supplier, the stand taken has been that all that the company wanted was to- utilise the entire amount of foreign exchange of Rs. 7,00,000.00 , and not that over invoicing of certain items was manipulated.. No evidence, it has been asserted, existed before the authorities below which showed that he was remotely connected with the alleged contravention of the provisions of section 4(3) of the

1947 Act. In any case the quantum of the penalty was also stated to be quite excessive.

(8) At the outset it must be said that these being penalty proceedings, where quasi-criminal in nature, and the onus of proving the contravention of section 4(3) of the 1947 Act and the connivance of the appellant in the same or neglectful act on his part in facilitation of the same rested on the Director of Enforcement.

(9) Both the authorities below have after considering the material placed before them come to clear findings that the present appellant was the whole-time Executive Director of the Pearl Cycle Industries Ltd., he later became its Managing Director from 7.5.1960. In the totality of circumstances it was found that he was intimately connected with the purchase of machinery and was guilty of contravention read with Section 23-G(2). Furthermore, from the comparison of invoices and the nature of items to which different prices were attributed it was concluded that this was a case of over-invoicing and therefore, the company and the Director were liable for penal consequences.

(10) In my considered opinion, all those findings were basically those of facts and depended upon their appraisal and drawing appropriate inferences there from. Thus whether the items for which higher prices were being allowed in the revised invoices were the same or not was primarily factual. So far as the new items added later, they were not taken into consideration for levy of penalty. In all this appraisal, I do not see any legal implications involved.

(11) Under Section 68 of the Foreign Exchange Regulation Act 1973, every person who at the time of, and was responsible to, the company for the conduct of its business is deemed to be guilty of the contravention and is liable to be proceeded against and punished accordingly. In the present case the authorities below have in clear terms come to the opinion that S. Kumar as Executive Director was whole-time in charge of and responsible to the company for the conduct of its business. He was not able to show under the proviso to Section 68(1) that the contravention took place in the present case without his knowledge or that he exercised all' due diligence to prevent such contravention. These were again findings based on factual state of affairs.

(12) Now a perusal of Section 54 of the Foreign Exchange Regulation Act 1973 under which the present appeal has been moved shows that such appeal is maintainable on questions of law only. That being the position, it cannot be said that the orders of authorities below suffer from any legal infirmity or that they committed any error of law in coming to their finding. It is now well settled that whether in particular circumstances which are leased' upon factual appraisalment of evidence, a penalty is called for or not is essentially a question of fact and no legal implications are involved. So in this respect in the decisions in Sree Meenakshi Mills Limited v. Commissioner of Income tax, Madras ( : [1957]31ITR28(SC) ), Hindustan Steel Ltd. v. State of Orissa (ITR 710) and Oriental Investment Co. Ltd. v. Commissioner of Income Tax Bombay, : [1957]32ITR664(SC) . There is thus no escape from the conclusion that the findings of the authorities below being based upon facts, the second appeal is not maintainable. It is thereforee, rejected.

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