

P. V. Mohammad Barmay Sons

Vs

Director of Enforcement

Criminal Appeal No. 95 of 1981

(S. R. Pandian, K. Ramaswamy JJ)

20.08.1992

JUDGEMENT

K. RAMASWAMY, J.:-

1. A short but interesting question of law had arisen in this case. The appellant is a firm which owned three vessels, by name M.V. Fathel Beri, M.V. Fathel Rehman and M.V. Saad Salam. It carries on export of timber, coir etc. to Gulf countries and imported Euphraez Zabdi Dates on return. Out of the amounts payable in Pounds deducting the price for dates, the appellant had fitted 230 H.P. Gardner engine (second hand) to their vessel Fathelbari and 240 H. P. Calvin engine (second hand) to their vessel Fathel Rehman, which were purchased at the cost of Rs. 50,000/- and Rs. 55,000/- respectively. Out of the 'amount payable through Nakoda in Basrah, a sum Of Rs. 30,000/- was paid. For the third vessel Saad Salam an agreement was entered into to fit in a second hand engine with M/s. Mohd. Zasim of Kuwait at a price of 2,100 Kuwati Dinars and payable in three annual instalments. The Addl. Director, Enforcement Directorate, Madras adjudicated the proceedings against the appellant and found that the appellant had purchased two engines and got fitted to two motor vessels and agreement to the third engine was also concluded without obtaining the permission of the Reserve Bank of India. Thereby it contravened Ss. 5(1)(a) and 5(1)(b) of the Foreign Exchange Regulation Act of 1947, for short 'Repealed Act'. In this behalf admittedly this contravention was discovered on a raid conducted on the premises of the appellant on October 4, 1974. In consequence of discovery a notice was issued on October 11, 1974 and not having been satisfied with the explanations, a show cause notice was issued on October 18, 1975 an explanation was given by the appellant and found to have committed the contravention of Sec. 5(1)(a) & (b) and penalty was imposed on July 5, 1977. On appeal, while by order dated October 17, 1978, the Appellate Board confirmed the penalties, reduced the penalty from Rupees 50,000/- to Rs. 37,500/-. Questioning the legality thereof the appellant filed this appeal by special leave under Art. 136 of the Constitution of India.

2. The two fold main contentions have been raised by the appellant. The first contention is that the Act 7 of 1947 was repealed by Foreign Exchange Regulation Act, 46 of 1973 for short 'the Act'. No action was taken under the repealed Act before the Act came into force on September 19, 1973. The impugned action, therefore, is without jurisdiction and authority of law. It is also contended that the proceedings against the appellant was taken under the Sea Customs Act 1922 and the adjudicating authority imposed a penalty of Rs. 4,30,000/-. On Appeal, the Central Board of Excise and Customs by order dated August 19, 1975 set aside the penalty. For the same offence no proceedings under the Act could be taken. It is also contended that the finding is based on no evidence, since the

respondents did not prove the offence under the Repealed Act or under the Act.

3. Section 5(1)(a) and (b) of the Repealed Act reads thus :

"5(1) - Save as may be provided in and in accordance with any general or special exemption from the provisions of this subsection which may be granted conditionally or unconditionally by the Reserve Bank, no person in or resident in, (India) shall-

(a) make any payment to or for the credit of any person resident outside India.

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(b) draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside India."

Section 9(1)(a) and (c) of the 1973 Act provide thus :

"9(1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this subsection which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall-

(a) - make any payment to or for the credit of any person resident outside India;

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(c) - draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside India."

Section 23(1) of the Repealed Act prescribes penalty thus :

"No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder."\*

\* Portion extracted is of S. 21(1).-S. 23(1) of Foreign Exchange Regulation Act 1947, reads as follows-

23(1). If any person contravenes the provisions of S. 4, S. 5, S. 9, S. 10 sub-section (2) of S. 13, S. 17, S. 18-A or S. 18-B or of any rule, direction or order made thereunder he shall-

(a) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Directors of Enforcement in the manner hereinafter provided, or - Ed.

Section 50 of the Act provides penalty thus :

"If any person contravenes any of the provisions of this Act (other than Sec. 13,

Clause (a) of sub-section (1) of Sec. 18 and clause (a) of sub-section (1) of Sec. 19 or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount of the value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Asstt. Director of Enforcement specially empowered in this behalf by order of the Central Govt. (in either case hereinafter referred to as the adjudicating officer)."

A comparative study of these provisions of the Repealed Act and the Act clearly adumbrated that save as may be provided in accordance with any general or special exemption from the provisions of this subsection, which may be granted conditionally or unconditionally by the Reserve Bank of India, no person resident in or outside India shall make any payment to or for the credit of any persons residents outside India draw, issue negotiate any bill of exchange or promissory note or acknowledge any debt so that a right whether actual or contingent to receive a payment is created or transferred in favour of any persons resident outside India, in a contravention of the Repealed Act and the Act as well such person is liable to the penalty prescribed under the respective provisions. Three times the value was the penalty prescribed under the Repealed Act and five times the value has been prescribed under the Act. Except this difference, there is no difference as regards the language, nature of penalty and contraventions are concerned. Section 81 of the Act repeals and saves thus :

"Repeal and saving - (1) The Foreign Exchange Regulation Act, 1947 (7 of 1947), is hereby repealed.

(2) "anything done".....under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

Section 6 of the General Clauses Act, 1897 provides the effect of repeal thus :

"Where this Act or any Central Act or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

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(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment .....

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

4. Sri Tulsi, the learned Addl. Solicitor General placing reliance in *O. Abdul Aziz v. Addl. Director of Enforcement*, AIR 1983 Madras 59 and *A.K.L. Labbi Thambi Maraicar v. Govt. of India*, Enforcement Directorate, AIR 1983 Madras 102, contended that in view of Sec. 81(2) of the Act read with Sec. 6 of the General Clauses Act, the power of the respondents to investigate and enforce the liability or penalty incurred under the Repealed Act is saved, though the Act 7 of 1947 has been repealed under sub-sec. (2) of Sec. 81 of the Act. The contention of the respondent that the Repealed Act after the Act had come into force in 1973, the Repealed Act is a dead corpse and no

life into it could be blown with the aid of Sec. 81(2) of the Act or Sec. 6 of the General Clauses Act. We find no force in the contention. The effect of the repealed Act by operation of Clause (e) of Sec. 6 of the General Clauses Act read with sub-sec. (2) of Sec. 81 is that, though the Act obliterates the operation of Act 7 of 1947, despite its repeal, the penalty, liability, forfeiture or prosecution for acts done while the repealed Act was in force were kept alive, though no action thereunder was taken when the Repealed Act was in force. The rights acquired or accrued or the liabilities incurred or any penalty, forfeiture or punishment incurred during its operation are kept alive. Investigations to be made or any remedy which may have been available before the repeal be enforced are also preserved. Such rights, liabilities, penalty, forfeiture or punishment, due to repeal "shall not lapse". The saving clause, thus, aimed to preserve the legal effect and consequences of things done though those effects and consequences projected to post repealed period. The things done adumbrated in Sec. 81(2) or Sec. 6 of the General Clauses Act or penalty or punishment incurred would envisage that the things already done or liabilities, penalty, punishment or forfeiture incurred, though happened before the Act came into force, Sec. 81(2) of the Act empowers to effectuate the liabilities, penalties, etc. as if they have been in existence and amenable to be pursued under the Act or under the Repealed Act by operation of Sec. 6 of General Clauses Act. What is unaffected by the repeal of the Act 7 of 1977 is a right accrued, etc. There is a distinction between a legal proceeding for enforcing a right acquired or accrued or liability, penalty, forfeiture, punishment incurred and the legal proceedings for acquisition of a right, the former is saved whereas the latter is not. In spite of repeal the right to investigation or to take legal proceedings remain unaffected and preserved as if the old Act continues to be operative. What remains to be done, after the Act came into force, is the quantification, if necessary after due investigation and legal proceedings and if proved to impose the penalty, forfeiture or punishment. The Court takes cognizance of the offence and not the offender or the acts done. What the Court is to enquire into is whether the Act is incompatible with the repealed Act and whether it manifested any contrary intentions to the Repealed Act. Unless a different intention has been manifested in the Act, the Repealed Act would continue to be operative. Even in a case of bare repeal accompanied by a fresh legislation on the same subject, the provisions of the new Act will have to be looked into to find where and how far the new Act envisages a contrary intention affecting the operation of Sec. 6 of the General Clauses Act. Unless such contrary intention is manifested, liabilities, penalties, forfeiture or punishment under the Repealed Act will continue to exist and remain in force by operation of Sec. 6 of the General Clauses Act.

5. We have already seen that the Act did not evince any contrary intention. It merely reiterated the earlier law operating the field. Therefore, Clause (d) of Sec. 6 of the General Clauses Act gets attracted to the acts done or the penalties incurred or forfeiture or punishment had already been committed before the repealed enactment, though no criminal proceedings have been actually initiated under repealed enactment before its repeal.

6. In *Tiwari Kanhaiyalal v. Commr. of Income-tax, Delhi* (1975) 4 SCC 101 : (AIR 1975 SC 902) where prosecution was laid after the repeal of the Income-tax Act, 1922. The contentions raised was that saving clauses in Sec. 297 of 1961 Income-tax Act did not save the punishment incurred under the Repealed Act. Therefore, recourse to Sec. 6 of General Clauses Act cannot be had, was negated by this Court and held that the repeal had not affected the liability incurred under Sec. 52 of the Income-tax Act 1922 and it continued even after its repeal. The same view was reiterated in the *Commr. of Income-tax, U.P. v. M/s. Shah Sadiq & Sons* (1987) 3 SCC 516 at 524 : (AIR 1987 SC 1217 at p. 1221). Accordingly, we hold that despite repeal of Act 7 of 1947 by operation of Sec. 6 of the General Clauses Act read with Sec. 81(2), the penalty incurred by the appellant continued to subsist and the respondents are entitled to institute the proceedings, conduct investigation or enquiry and impose such penalty.

7. Article 20(1) of the Constitution of India provides that no person shall be convicted of any offence except for violation of the law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence. The Repealed Act prescribed three times the value as penalty and under the Act Sec. 50 provides five times penalty. So what would be impossible as penalty is three times. The penalty imposed as reduced by the appellate Tribunal is even not three times as contemplated under S. 23 of the Repealed Act. Therefore, though the Act evinced a contrary intention of imposition of higher penalty than one prescribed under the Act 7 of 1947, on the facts in this case, the penalty imposed is perfectly valid and legal.

8. The further contention that under the Sea Custom Act for the self same contravention, the penalty proceedings terminated in favour of the appellant, is of little avail to the appellant for the reasons that two Acts operate in different fields, one for contravention of FERA and the second for evasion of excise duty. The mere fact that the penalty proceedings for evasion of the excise duty had ended in favour of the appellant, does not take away the jurisdiction of the enforcement authorities under the Act to impose the penalty in question. The doctrine of double jeopardy has no application. The further contention that the offence is based on no evidence is devoid of any substance. Notice was given to the appellant. In the show cause notice contravention was brought to its notice the appellant gave the explanation. After consideration of the facts since there was no express permission granted by the Reserve Bank of India for the payments by the appellant to the agent outside India, the contravention was proved and penalty was imposed. It is the penalty under Section 5(1)(a) & (b) of the Repealed Act equivalent to Section 9(1)(a) & (c) of the Act. Therefore, the penalty imposed is based on material, valid reasons and proper findings.

9. Accordingly we do not find any merit to interfere with the order. The appeal is accordingly dismissed, but under the circumstances the parties are directed to bear their own costs.

Appeal dismissed.

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