

SUPREME COURT OF INDIA

Tulip Star Hotels Ltd.

Vs.

Special Director of Enforcement

C.A.No.680 of 2014

(Surinder Singh Nijjar and Fakkir Mohamed Ibrahim Kalifulla JJ.)

16.01.2014

JUDGMENT

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

1. Leave granted.

2. In these two appeals, the challenge is to a common judgment of the Division Bench of the High Court of Judicature at Bombay in FEMA Appeal Nos.3 & 4 of 2008, dated 14th October 2010.

3. Brief Facts which led to the culmination of the present appeals are required to be stated. The Appellant in SLP No.7655 of 2011 is the company and the Appellant in SLP No.7657 of 2011 was also proceeded against as the Executive Director of the company. The Respondent issued a show cause notice against the Appellants dated 29th April 2002, wherein it was alleged that the Appellant in SLP No.7655 of 2011 sold foreign currency to the value of 1,47,000 US\$ and 1000 Sterling £ of UK between 29.4.1997 to 5.6.1997 through unauthorized persons deputed by M/s Hotel Zam Zam in violation of Sections 6(4), 6(5), 7 & 8 of the Foreign Exchange Regulation Act, 1973 (hereinafter called "FERA") as well as paragraph 3 of the Memorandum of FLM issued by RBI. The Appellants were called upon to show-cause why penalty should not be imposed against them under Section 50 of FERA read with Section 49 (3) & (4) of Foreign Exchange Management Act (hereinafter called "FEMA"). Subsequently, by order dated 28.10.2004 the Respondent imposed a penalty of Rs.50,000/- each on both the Appellants. The Appellants preferred appeals before the Appellate Tribunal for Foreign Exchange in Appeal

Nos.1259 and 1260 of 2004, which were also dismissed by order dated 2.7.2008. The above said orders of the Original Authority, as well as the Appellate Authority, were the subject matter of challenge before the Division Bench of the High Court in FEMA Appeal Nos.3 & 4 of 2008. The Division Bench having confirmed the orders of the lower authority, as well as the tribunal, the Appellants have come forward with these appeals.

4. We heard Mr. H.N. Salve, learned Senior Advocate for the Appellants and Mr. S.K. Bagaria, learned Addl. Solicitor General for the Respondent. We also perused the written submissions filed on behalf of the appellant as well as the respondent. We also perused the order of the Original Authority, the Tribunal, as well as the Division Bench and having heard the counsel for the respective parties we proceed to decide these appeals.

5. Mr. Salve, learned senior counsel, appearing on behalf of the Appellants in his submissions mainly contended that there was no violation at all in the matter of Sale and Purchase by the Appellant company to M/s Hotel Zam Zam in relation to the sale of 1,47,000 US\$, as well as 1000 Sterling £ of UK in between 29.4.1997 and 5.6.1997, inasmuch as both the Appellant company, as well as M/s Hotel Zam Zam are duly licensed Full Fledged Money Changers, in short FFMC. According to the learned senior counsel, such transactions as between the licensed FFMCs are wholly authorized under the provisions of FERA, as well as the Memorandum of FLM of the Reserve Bank of India. The learned senior counsel further contended that in the confiscation proceedings initiated against the Appellants, as well as M/s Hotel Zam Zam, as per the order dated 21.8.1998 it was found that no statutory violation can be attributed to the Appellants and therefore, the imposition of penalty as against the Appellants by the Original Authority and the confirmation of the same by the Tribunal and the Division Bench are therefore liable to be set aside.

6. As against the above submissions, Mr. Bagaria, learned Addl. Solicitor General would contend that by virtue of the statutory stipulations contained in sub-sections (4) and (5) of Section 6, Section 7 and 8 of FERA read along with paragraph 3 of the Memorandum of FLM of the RBI, there was a clear violation of the statutory provisions committed by the Appellants, hence the penalty imposed by the Original Authority as confirmed by the Appellate Authority, as well as the High Court cannot be faulted. It was also submitted that the Original Authority, the Appellate Tribunal and the High Court have reached a concurrent finding based on documents, materials, as well as statements on record and the said conclusions are

not perverse and therefore, the same do not call for interference. Reliance was placed upon the decisions in Collector of Customs vs. Swastic Woollens Pvt. Ltd. - 1988 (Supp) SCC 796, Commissioner of Central Excise vs. Charminar Non-Wovens Ltd. – (2009) 10 SCC 770 and Ghisalal vs. Dhapubai (dead) by LRs & Ors. – (2011) 2 SCC 298. It was also contended that Hotel Zam Zam purchased the foreign exchange from the appellant at a higher rate than the exchange rate fixed by the RBI and on this ground as well the proceedings initiated against the appellant and the imposition of penalty was justified. To support the said contention, reliance was placed upon the decision in P.V. Mohammad Barmay Sons vs. Director of Enforcement – 1992 (61) ELT 337.

7. When we consider the submissions of the respective counsel we find Sections 6(4), 6(5), 8(2) of FERA and Para 3 and 9 of the Memorandum of FLM of RBI, are required to be noted which are as under:

“Section 6 Authorised dealers in foreign exchange:-

6(4) An authorized dealer shall, in all his dealings in foreign exchange and in the exercise and discharge of the powers and of the functions delegated to him under Section 74, comply with such general or special directions or instructions as the Reserve Bank may, from time to time, think fit to give, and except with the previous permission of the Reserve Bank, an authorized dealer shall not engage in any transaction involving any foreign exchange which is not in conformity with the terms of his authorization under this section.

6(5) An authorized dealer shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of, any contravention or evasion of the provisions of this Act or of any rule, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorized dealer shall refuse to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person report the matter to the Reserve Bank.

Section 8: Restrictions on dealings in foreign exchange:-

(2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorized dealer or a money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorized by the Reserve Bank.

Paragraphs 3 and 9 of the FLM

Authorised Officials

3. All money-changers should arrange to forward lists giving full names and designations of their representatives who are authorized to buy and sell foreign currency notes, coins and travelers cheques on their behalf together with their specimen signatures, at the end of each calendar year to the office of Reserve Bank under whose jurisdiction they are functioning. Any changes in their list should also be brought to the notice of Reserve Bank. No person other than the authorized representative should be allowed to transact money-changing business on behalf of the money-changer

Purchases from other Money-changers and Authorized Dealers:-

9. Money-changers may freely purchase from other money-changers and authorized dealers in foreign exchange or their exchange bureau, any foreign currency notes and coins tendered by the letter. Rupee equivalent of the amount of foreign currency purchased should, however, be paid by way of a cross cheque drawn on their bank account or if made by way of a bankers' cheque/pay order/demand draft, it should be accompanied by a certificate from the bank issuing the relative instrument certifying that the funds for the instrument have been received by it by debit to the applicants bank account. In no circumstances should payments in respect of such sale be made in cash."

8. Under Section 6(4) it is stipulated that a full fledged money changer (FFMC) as an authorized dealer in foreign exchange should strictly comply with the general or special directions or instructions that may be issued by the RBI and that except with the previous permission of the RBI, authorized dealers should not engage in any transaction involved in any foreign exchange, which is not in conformity with

the terms of his authorization. Under Section 6(5) it is stipulated that an authorized dealer should before undertaking any transaction in foreign exchange should ensure verification on certain aspects in order to ensure that there is no contravention of the provisions of FERA and if the FFMC has any reason to believe that any such contravention or evasion is contemplated by a person who seeks to indulge in any transaction in foreign exchange, the FFMC should report the matter to the RBI.

9. Section 8 of FERA imposes restrictions on dealings in foreign exchange. The said provision imposes restriction to the effect that no person other than the authorized dealer in India, shall purchase or otherwise acquire or borrow any foreign exchange. Under sub section 2, it is stipulated that except with the previous general or special permission of RBI, an authorized dealer or a money changer should enter into any transaction providing conversion of Indian currency into foreign currency or vice versa, at rates of exchange other than the rates for the time-being authorized by RBI.

10. De hors the above provisions, the other relevant provisions are paragraphs 3 & 9 of the Memorandum of FLM issued by the RBI. A close scrutiny of paragraph 3 disclose that the said paragraph has been issued by the RBI to state as to who can be called as 'authorized officials' of money changers. The said paragraph also imposes a restriction to the effect that other than an authorized representative, nobody else should be allowed to transact money changing business on behalf of the money changer.

11. Paragraph 9 virtually gives a free hand for the money changers to indulge in purchase of foreign currency etc., and the only restriction is that while making such purchase, the purchase value should be paid only by way of an instrument and not by way of cash.

12. Keeping the above provisions in mind, when we refer to the nature of transaction that had taken place as between the Appellants and M/s Hotel Zam Zam, the following facts are not in controversy:

- a) The Appellants, as well as M/s Hotel Zam Zam, are licensed FFMC.
- b) The Appellants sold foreign exchange of 1,47,000 US \$ and 1,000/- sterling £ of UK as between April 1997 to June 1997 to M/s Hotel Zam Zam.

c) The purchase value of the above foreign currency was at a higher rate than the existing retail rate that prevailed in the market.

d) The purchase value was paid by M/s Hotel Zam Zam by way of Pay Orders.

e) Prior to the transaction, at the instance of the Appellants, a Xerox copy of the RBI license of M/s Hotel Zam Zam was produced and based on which the transaction was effected. f) The transactions were effected on 29.04.1997, 06.05.1997, 29.05.1997 and 05.06.1997 and the amounts transacted were 7,000 US\$, 1000 Sterling £ of UK, 40,000 US\$ and 1,00,000 US\$ on the respective dates. In all 1,47,000 US\$ and 1000 Sterling £ of UK were sold by the Appellants to M/s Hotel Zam Zam.

g) All the above transactions were made and the foreign currency was handed over to Shri Rakesh Mahatre, a representative of M/s Hotel Zam Zam.

13. Based on the above undisputed facts relating to the transaction as between the Appellants and M/s Hotel Zam Zam, the Original Authority reached a conclusion that the Appellants failed to verify the authorization in favour of the persons concerned to buy/sell foreign exchange on behalf of the said money changers as contemplated under the relevant provisions. In other words, it was concluded that it was incumbent upon the Appellants by virtue of the terms of instructions contained in paragraph 3 of the Memorandum of FLM issued by RBI to have verified the bonafides of the persons deputed to them by M/s Hotel Zam Zam before handing over the foreign currencies to such persons. It was, therefore, ultimately concluded that the said failure on the part of the Appellants resulted in contravention of the directions contained in paragraph 3 of the Memorandum of FLM read with Section 6(4), 6(5) and 7 of FERA. Ultimately the Appellants were found guilty for the said contraventions and the penalty came to be imposed. The said order of the Original Authority was confirmed by the Tribunal, as well as the Division Bench of the High Court.

14. The above impugned orders disclose that the only violation or contravention related to the stipulations contained in paragraph 3 read with Section 6(4) and 6(5) of FERA. It will be relevant to note that the variation in the rates of purchase value of the foreign currency was not the basis for the ultimate conclusion about the

contravention held against the Appellants. Therefore, keeping aside the said aspect, when we examine the contravention held proved against the Appellants, we feel it appropriate to make a reference to paragraph 9 in the forefront. Under paragraph 9 of the FLM as between the money changers, a free hand has been given for purchase and sale of any foreign currency notes etc. in rupee value. The only restriction imposed therein is that the Indian rupee value of the foreign currency should not be paid by way of cash, but should always be paid in the form of an instrument such as banker's cheque/pay-order/demand draft etc., or by debiting to the purchasers' bank account. Therefore, if under paragraph 9 such a free hand has been given to the money changers, namely, FFMCs in the matter of purchase of foreign currency etc., by making payments in the form of negotiable instruments under the relevant statutes, the question that would arise for consideration would be whether in a case of this nature where such a transaction had taken place in between two licensed FFMCs and the said transaction was carried on by exchange of foreign currency by way of payment in the form of pay-orders and that the sale effected by the Appellants and the purchase made by the other FFMC, namely, M/s Hotel Zam Zam was not disputed, can it still be held that there was any violation at all in order to proceed against the Appellants for imposing a penalty? When we examine the said issue, we are unable to accede or countenance the stand of the Respondent that the foreign currencies to the values mentioned in the earlier paragraphs were handed over to the representative of M/s Hotel Zam Zam by one Mr. Rakesh Mahatre and, therefore, the whole transaction was in contravention of Sections 6(4) and 6(5) of FERA and paragraph 3 of FLM.

15. When we examine paragraph 3 of FLM, we find that the caption of the said paragraph is "Authorized Officials". The purport of the said paragraph was to ensure that any licensed money changers should allow transaction of its money changing business in its premises only through such persons who are the listed authorized officials as certified by the office of the Reserve Bank under whose jurisdiction such money changers operate their business. The last part of paragraph 3 makes the position a little more clear which states that "no person other than the authorized representative should be allowed to transact money-changing business on behalf of the money-changer". Apparently when a money changer operates its business from its premises, any transaction by way of sale or purchase as part of its money changing business should be carried out only through an authorized representative.

16. When we extend the application of the said stipulation to the case of present nature, it can only be said that if such transaction had taken place as between the

Appellants and the purchaser M/s Hotel Zam Zam, it should have been carried on only through their respective authorized representatives. The statement of Mr. Peter Kerkar, the Appellant in SLP (C) No.7657 of 2011, disclose that on each occasion the transaction was negotiated by the Branch Manager of the Appellant with one Ms. Pinky of M/s Hotel Zam Zam. It is not the case of the Respondent that neither of these two persons who indulged in the transaction of money changing business were not the authorized officials of their respective establishments. If the said factum relating to the business transactions, which had taken place as between the Appellants and M/s Hotel Zam Zam is not in controversy, we fail to see how a violation of paragraph 3 can be alleged as against the Appellants.

17. It is stated that after the transaction as between the Appellants and M/s Hotel Zam Zam concluded, M/s Hotel Zam Zam stated to have indulged in some transaction, which was in violation of the provisions of FERA with which the Appellants were not in any way concerned. It can also be safely held that for any violation or contravention of the provisions of FERA or FEMA at the instance of M/s Hotel Zam Zam after the money changing transaction as between the Appellants and the said concern had come to an end, the Appellants cannot in any way be held responsible or proceeded against.

18. In our considered opinion that in the peculiar facts of this case and having regard to the nature of transactions which had taken place as between the Appellants and M/s Hotel Zam Zam in the manner in which it has been narrated in the impugned order of the Original Authority as noted by the Tribunal, as well as the Division Bench of the High Court, we are convinced that there was no scope to allege a violation of paragraph 3 of the FLM or for that matter Sections 6(4) and 6(5) of FERA, 1973. Based on the interpretation of Sections 6(4), 6(5) of FERA, 1973 and paragraphs 3 & 9 of the FLM, we have held that the Original Authority, the Appellate Tribunal as well as the Division Bench of the High Court failed to appreciate the issue in the proper perspective while holding the appellant guilty of the violation alleged. Therefore, none of the judgments relied upon by the respondents for the proposition that concurrent findings of fact should not be interfered with does not apply to the facts of this case.

19. Once we steer clear of the above position, we come to the question of the higher value at which the foreign currency was alleged to have been sold by the Appellants to M/s Hotel Zam Zam. As pointed out by us earlier, the said act was not the basis for the contravention and imposition of the penalty as against the

Appellants. To rule out any controversy, the conclusion of the Original Authority as recorded in its order for finding the Appellants guilty of paragraph 3 of the FLM read with Sections 6(4), 6(5) and 7 of FERA, can be usefully extracted which reads as under:

“.....Thus by not insisting on the authorization from the said Hotel Zam Zam disclosing the names, address and other particulars of the persons deputed by them for purchasing foreign exchange from M/s Cox and Kings Travel & Finance Ltd., the said M/s Cox and Kings Travel & Finance Ltd. has contravened the directions contained in para 3 of the Memorandum FLM R/w SEC. 6(4), 6(5) and 7 of the FERA, 1973. I, therefore hold them guilty for the said contraventions.”

20. This apart, when we refer to the confiscation order passed by the Commissioner of Customs in its order dated 21.08.1998, it has been specifically stated as under:

“The statements of Mr. Chitrang Mehta, Manager of M/s LKP dated 06/7-08-97 indicated that there is transaction at prices higher than those prevailing market rates. However, it is also a known fact that the rates for the foreign exchange can be fluctuating and there is hardly any transaction effected at the rates which are recorded for that day to be prevailing in the market not only for the foreign currency but also for to be other goods e.g. shares in the stock market or the metals and other commodities being traded in the specific markets. It is also to be considered that large transactions were being entered into by them and profit made on the sales of such large transactions would not ipso facto induce me to conclude that the mere fact of sales at higher prices would be a preconcerted knowledge that the dollars sold are to be smuggled out of India. I find that the price at which Ms. Pinky Jaisinghani was purchasing the dollars from other FFMCs were settled between her mentor Shri Suleman Tajuddin Patel and not considerations of any other kind.”

21. Therefore, in the impugned orders of the Original Authority, as well as the Tribunal and the Division Bench, the sale effected by the Appellants on a rate higher than the rate prevailing in the market was not the basis for the alleged violation of paragraph 3 of the FLM read with Sections 6(4), 6(5) and 7 of FERA. In the confiscation order passed by the Customs Authorities, where again the Appellants were also one of the noticees, no fault was found as against the

Appellants on that ground. In the light of our above conclusions, as regards the higher value at which foreign currency alleged to have been sold by the appellant to Hotel Zam Zam, the reliance placed upon the decision in P.V. Mohammad Barmay Sons (supra) has also no application. The said decision came to be rendered entirely under different facts which cannot be applied to the facts of the present case.

22. Having reached the above conclusions, we are convinced that the impugned orders by which the Appellants were found guilty of the violation of paragraph 3 of FLM read with Sections 6(4), 6(5) and 7 of FERA and the consequential imposition of penalty of Rs.50,000/- was wholly unjustified. The impugned orders are liable to be set aside and they are accordingly set aside. If the Appellants have parted with the penalty amount imposed under the impugned orders, the Respondent is directed to refund the same to the Appellants along with simple interest at the rate of 6% per annum, within two months from the date of this judgment. The appeals are allowed with the above directions.