IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL A No. 568 of 2008

UMESH K. MODI ..... Appellant
Through: Mr. Akhil Sibal with
Mr. Aditya, Advocates.

Versus

DEPUTY DIRECTOR OF ENFORCEMENT ..... Respondent
Through: None.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
31.07.2014

1. The Appellant, Umesh K. Modi, challenges in this appeal the impugned order dated 26th March 2008 passed by the Appellate Tribunal for Foreign Exchange ('AT') dismissing his Appeal No. 668 of 2004 thereby upholding the adjudication order ('AO') dated 31st March 2004 passed by the Deputy Director ('DD') of Directorate of Enforcement ('DoE') finding him guilty of the contravention of Section 8 (3) read with Section 8 (4) and Section 68 of the Foreign Exchange Regulation Act, 1973 ('FERA') and imposing a total penalty of Rs. 1 lakh each on certain directors of Modi Xerox Limited ('MXL') including the Appellant and Rs. 5 lakh on MXL.

2. The Appellant states that he was a part time, non-executive director of MXL but neither in-charge of nor responsible for the conduct of its

day-to-day affairs. MXL commenced its business in the year 1983-84 and had been importing goods/raw materials for its business requirements. MXL was amalgamated with Xerox Modicorp Limited ('XML') in the year 2000. Till 2001, it imported goods worth more than Rs. 700 crores.

3. By its letter dated 1st December 1989 the Reserve Bank of India ('RBI') informed the Enforcement Directorate ('ED') that 42 importers, including MXL had failed to submit exchange control copies of customs bills of entry as evidence of import against remittances of foreign exchange made by them. As regards MXL, it was stated that there were 20 such transactions between 12th June 1985 and 21st November 1985 amounting to approximately Rs. 2 crores.

4. Consequent upon the aforesaid letter, the ED issued a letter dated 29th April 1991 to MXL enclosing a statement of 20 remittances as forwarded to it by the RBI. MXL sent its reply dated 9th July 1993 pointing out that out of 20 transactions, it had already submitted bank certificates for four transactions. For the balance 16 transactions, MXL's bankers were unable to issue the bank certificates since those transactions pertained to the year 1985 and the bankers were unable to trace the old records. Accordingly, the Chartered Accountant certificates for all such transactions were enclosed. Certain other details of some of the transactions were also furnished.

5. For about eight years thereafter, no steps were taken by the ED. In the meantime, Foreign Exchange Management Act, 1999 ('FEMA') became effective from 1st June 2000. However, in terms of Section 49 FEMA there was a window of two years, i.e., between 1st June 2000 and 31st May 2002, for the ED to issue show cause notices ('SCNs') in respect of transactions which were in contravention of the provisions of FERA . This led to a spat of the SCNs being issued by the ED in cases that had not been proceeded with for more than eight or ten years, including that of MXL.

6. On 19th February 2001 the ED issued a Memorandum-cum-SCN to MXL and its directors, including the Appellant herein, stating that they appeared to have violated Section 8 (3) read with Section 8 (4) of FERA. As regards the particular role of the Appellant, the SCN included the following standard cyclostyled paragraph which reads as under:

> "And whereas it further appears that S/Shri As per Annexure B Proprietor/Partner(s)/Director(s)/ Manger/ Secretary of the said company firm has been responsible/supervisor/in-charge of the said company/ firm for the conduct of business of the company/firm at the relevant time when the aforesaid import was made and as such he/she/they has/have rendered himself/ herself/themselves liable also to be proceeded against under Section 50 of the Foreign Exchange Regulation Act, 1973 (46 of 1973)."

7. On receipt of the above SCN, the XML submitted its detailed reply dated 26th March 2001 where it was *inter alia* pointed out that MXL

had dissolved and merged with XML pursuant to order dated 10th January 2000 of the High Court of Allahabad. MXL referred to its earlier letter dated 9th July 1993 where it had stated that since its bankers had been unable to trace the old records, MXL was unable to furnish the details in relation to 16 transactions. In para 8 of the said reply XML set out the names of the persons comprising the Board of Directors ('BoDs') of MXL at the relevant time. This list contained 13 names and the name of the Appellant figured at Sl. No. 8. However, what is significant is that it was nowhere stated in the above reply of MXL that the Appellant was incharge of or responsible for the day-to-day affairs of MXL.

8. Separately, the Appellant sent his reply dated 9th April 2001 to the ED in response to the SCN. He categorically stated that he was never holding any office of Executive Director/Managing Director/Whole-time Director of MXL and was neither incharge of nor responsible for day-to-day affairs of MXL in terms of Section 68 (1) & (2) of FERA. Additionally he pointed out that the compliance certificates by the Company Secretary of MXL confirming that all the statutory requirements had been complied with, were placed at every Board meeting of MXL and therefore, its Directors had proceeded on the basis that MXL had complied with all the statutory requirements. The certified copies of the extracts of the minutes of the Board Meetings of MXL for the relevant period were enclosed.

9. By its communication dated 8th October 2003 the DD informed

MXL about the hearing in the adjudication proceedings under Section 51 of FERA. A further reply was sent by XML to the ED on 21st October 2003.

10. By the AO dated 31st March 2004 the DD held MXL and some of its directors, including the Appellant, to have violated Section 8 (3) read with Section 8 (4) and Section 68 of FERA. The AO and imposed a penalty of Rs. 5 lakhs on MXL and Rs. 1 lakh each on the directors including the Appellant herein. In the AO, it was observed that the SCN had not been issued to all the 13 directors of MXL whose names had been mentioned in MXL's letter dated 26th March 2001. The AO dropped the charges against the nominee directors of the financial institutions.

11. Aggrieved by the AO, the appeals were filed by XML and the directors including the Appellant. By the common impugned order dated 26th March 2008 the said appeals were dismissed. Relying on the decision of the Supreme Court in ***N. Rangachary v. Bharat Sanchar Nigam Limited (2007) 5 SCC 108*** the AT held that the Appellants could not be absolved of the responsibility on the ground that violation were a mere technical breach. It was held that there was nothing on record to show that any restriction had been placed on the powers of the directors with reference to subject transaction.

12. This Court has heard the submissions of Mr. Akhil Sibal, learned counsel for the Appellant. Despite the appeal being heard over two

days, none appeared for the Respondent. Nevertheless its reply on record has been considered.

13. The basis on which the proceedings against the Appellant were initiated for alleged violation by MXL of Section 8 (3) read with Section 8 (4) of FERA, is Section 68 of FERA which reads as under:

> **68. Offences by companies**
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> (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.
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> (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 anybody corporate and includes a firm or other association of individuals; and
> (ii) "director", in relation to a firm, means a partner in the firm.

14. The wording of Section 68 FERA is no different from Section 141 of the Negotiable Instruments Act, 1881 ('NI Act'). The legal requirement of the complaint filed under Section 138 NI Act having to make specific averments as to the role of the directors of a company, where such company is the accused, has been subject matter of several decisions of the Supreme Court. In ***SMS Pharmaceuticals Limited (I) v. Neeta Bhalla (2005) 8 SCC 89*** where in certain interpreting Section 141 NI Act, the Supreme Court stated that "a clear case should be spelled out in the complaint against the person sought to be made liable." It was further observed that "merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him." It was observed that it is necessary to specifically aver in a complaint that at the time the offence was committed, the person accused was in charge of, or responsible for the conduct of business of the company.

15. Later in ***Saroj Kumar Poddar v. State (NCT of Delhi) (2007) 3 SCC 693*** the Court emphasized that it was necessary to make 'specific

allegations' to show as to how and in what manner the director is liable. In ***SMS Pharmaceuticals Limited (2) v. Neeta Bhalla (2007) 4 SCC 70*** it was observed that there may be a large number of directors but all of them could not be held to be responsible for the conduct of the business of the company. It was pointed out that the averments should state that the persons who were liable for the commission of the offence of the company were both "in charge of and was responsible for the conduct of the business of the company."

16. In ***National Small Industries Corporation Limited v. Harmeet Singh Paintal (2010) 3 SCC 330***, the Supreme Court discussed the entire case law and noted that the decision in ***N. Rangachari v. Bharat Sanchar Nigam Limited*** (*supra*) cannot be said to have overlooked the previous decisions of the Court and was distinguishable on facts. It was then observed in para 38:

> "38. But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in charge of the business of the company" or by stating that "he was in charge of the day-to-day management of the company" or by stating that "he was in charge of, and was responsible of the company" or by stating that "he was in charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141 (1) of the Act. To put it clear that for making a person liable under Section 141 (2), the mechanical repetition of the requirements under Section 141 (1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused

> was guilty of consent and connivance or negligence and therefore, responsible under sub-Section (2) of Section 141 of the Act."

17. It is observed that in many of the SCNs issued by the ED, a standard cyclostyled paragraph is inserted to satisfy the requirement of the wording Section 68 (1) of FERA. This was noticed in the decision of this Court in ***Kavita Dogra v. Director of Enforcement (2014) 182 Com Cas 376***. A mechanical repetition of the words of the statute may not be sufficient as explained by the Supreme Court in ***National Small Industries Corporation Limited v. Harmeet Singh Paintal*** (*supra*). This has also to be examined in the context of stand taken by the concerned director to whom notice had been issued.

18. In the present case the Appellant gave a separate reply on 9th April 2001 to the SCN dated 19th February 2001 which has not been discussed in the AO. In other words the DD did not advert to specific defence of the Appellant that at the relevant time he was not a director in-charge of or responsible to the company for the conduct of its day-to-day affairs. The AT too does not appear to have noticed the above decisions of the Supreme Court and has mechanically concluded that since there was no restriction on the exercise of powers by the Appellant in relation to the transactions in question, he should be held liable. In light of the reply dated 9th April 2001 sent by the Appellant it was possible to discern the distinction between those directors who were in-charge of the day-to-day affairs of the company and those were not. The explanation offered by the Appellant is that the

Company Secretary of XML placed before the Board of Directors of MXL compliance certificates at every meeting held during the relevant period, which led the directors, including the Appellant, to believe that there were no contravention of any of the statutory provisions, appears to be a plausible one. This explanation has not been considered either by the DD or the AT.

19. In the considered view of the Court, the Appellant on his part discharged the burden in terms of Section 68 (2) of the FERA and was entitled to the benefit of doubt.

20. Consequently, this Court sets aside the impugned order dated 26th March 2008 of the AT and the impugned AO dated 31st March 2004 of the DD insofar as the Appellant is concerned and exonerates the charge of contravention of Section 8 (3) read with Section 8 (4) and Section 68 of the FERA.

21. The appeal is allowed in the above terms, but in the facts and circumstances of the case, with no order as to costs.

22. The amount, if any, deposited by the Appellant will be refunded to him within a period of four weeks, in accordance with law.

S. MURALIDHAR, J.

JULY 31, 2014
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