

CASE DETAILS

FIRST GLOBAL STOCKBROKING PVT. LTD. & ORS.

v.

ANIL RISHIRAJ & ANR.

(Criminal Appeal No. 2151 of 2011)

SEPTEMBER 21, 2023

[ABHAY S. OKA AND SANJAY KAROL, JJ.]

HEADNOTES

Issue for consideration: Whether the Enforcement Officer appointed under FERA, 1973 continued to have the authority or competence to file a complaint for the offences punishable under FERA before the expiry of the sunset period provided in sub-section (3) of s.49 of FEMA, 1999.

Foreign Exchange Management Act, 1999 – Foreign Exchange Regulation Act, 1973 – On 11.02.2002, the first respondent, who was an Enforcement Officer appointed under clause (e) of s.3 of FERA, filed a complaint against the appellants for various offences punishable under FERA and s.120-B of IPC – Cognizance taken by the Magistrate – Same was upheld by the High Court – Propriety:

Held: The Foreign Exchange Management Act, 1999 (FEMA) was brought into force with effect from 01.06.2000 – By virtue of sub-section (1) of s.49 of FEMA, the Foreign Exchange Regulation Act, 1973 (FERA) stood repealed – In the facts of the case, the cognizance was taken by the Magistrate within the sunset period of two years provided under sub-section (3) of s.49 of FEMA – The complaint was filed by the first respondent, an Enforcement Officer appointed under clause (e) of s.3 of FERA – The power under sub-clause (b) of clause (ii) of sub-section (2) of s.61 was exercised by the Central Government and all the Enforcement Officers were authorised to file complaints regarding the offences punishable u/ss. 56 and 57 of FERA – What is material here is sub-section (4) of s.49 of FEMA, which provides that subject to the provisions of sub-section (3), all offences committed

under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed – Sub-section (3) of s.49 saves the prosecution for the offences punishable u/ss. 56 and 57, which have been committed prior to the repeal of FERA, provided the competent Court takes its cognizance within two years from the date of coming into force of FEMA – In view of sub-section (4) of s.49, for the purposes of the prosecution of offences punishable u/ss. 56 and 57 of FERA, by a legal fiction, the provisions of the repealed Act will continue to apply – However, the same will continue to apply only for the purposes of prosecution of the offences which are saved by sub-section (3) of s.49 of FEMA – That is how the complaint filed by the Enforcement Officer, duly authorised under clause (ii) of sub-section (2) of s.61 of FEMA, will continue to be valid, inasmuch as by virtue of the legal fiction incorporated in sub-section (4) of s.49, the prosecution will continue to be governed by the provisions of FERA as if the same had not been repealed. [Paras 10 and 11]

LIST OF CITATIONS AND OTHER REFERENCES

M/s. P.V. Mohammad Barmay Sons v. Director of Enforcement 1993 Supp (2) SCC 724:[1992] 3 SCR 960 – relied on.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.2151 of 2011.

From the Judgment and Order dated 03.02.2010 of the High Court of Judicature at Bombay in CRLA No.1982 of 2008.

Appearances:

Siddhartha Dave, Sr. Adv., Braj Kishore Mishra, Abhishek Yadav, Prastut Dalvi, Ruchit Mohan, Advs. for the Appellants.

Ms. Aishwarya Bhati, A.S.G., Mukesh Kumar Maroria, Aman Sharma, Ms. Chitragda Rastvara, Shashwat Anand, Jitendra Kumar Tripathi, Shrirang B. Varma, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The Foreign Exchange Management Act, 1999 (for short, 'FEMA') was brought into force with effect from 1st June 2000. By virtue of sub-section (1) of Section 49 of FEMA, the Foreign Exchange Regulation Act, 1973 (for short, 'FERA') stood repealed. On 11th February 2002, the first respondent, who was an Enforcement Officer appointed under clause (e) of Section 3 of FERA, filed a complaint in the Court of the learned Chief Metropolitan Magistrate, Esplanade, Mumbai, against the appellants for various offences punishable under FERA and Section 120-B of the Indian Penal Code. Cognizance was taken by the learned Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai, on the said complaint on 11th February 2002 by passing an order of issue of process.

2. The appellants made separate applications for discharge, but the learned Additional Chief Metropolitan Magistrate rejected the applications. A revision application preferred against the order of rejection, was also dismissed. Being aggrieved by the said order, an application under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.PC') was filed by the appellants which has been dismissed by the impugned judgment dated 3rd February 2010 by the learned Single Judge of the High Court of Bombay.

SUBMISSIONS

3. Mr. Siddhartha Dave, the learned senior counsel appearing for the appellants has taken us through the relevant provisions of the FERA and the FEMA. As the High Court has not dealt with the merits of the complaint, even the learned senior counsel has not made submissions on the merits of the complaint. He submitted that under clause (ii) of sub-section (2) of Section 61 of FERA, cognizance of the offence punishable under Sections 56 and 57 could be taken by a Court only on a complaint in writing made by an officer specified under sub-clauses (a) to (c) of clause (ii) of sub-section

(2) of Section 61 of FERA. He submitted that under sub-clause (b) of clause (ii) of sub-section (2) of Section 61, only an officer authorised in writing on this behalf by the Director of Enforcement or the Central Government was empowered to file a complaint. The learned senior counsel pointed out that Section 3 of FERA provided for the appointment of different classes/categories of officers of Enforcement. He submitted that the appointment of officers made under Section 3 of FERA has not been saved by Section 49, which is a saving and repealing provision under FEMA. He submitted that the first respondent-Enforcement Officer was appointed under clause (e) of Section 3 of FERA and thus, with effect from 1st June 2000, the said officer is not empowered to exercise powers of an Enforcement Officer under FERA as the said powers have not been saved. The learned senior counsel submitted that assuming that cognizance is taken within the sunset period provided under sub-section (3) of Section 49 of FEMA, in view of clause (ii) of sub-section (2) of Section 61 of FERA, only an authorised officer could have filed the complaint and in the facts of the case, the Enforcement Officer who may have been authorised earlier, cannot perform duties of his office as from 1st June 2000, he ceased to be an Enforcement Officer. He would, therefore, submit that the Court was powerless to take cognizance of the complaint which was filed by an officer who was not authorised.

4. Ms. Aishwarya Bhati, the learned Additional Solicitor General appearing for the respondents, submitted that sub-section (4) of Section 49 of FEMA is a complete answer to the submissions made by the learned senior counsel appearing for the appellants. She submitted that the Enforcement Officer appointed under FERA continued to have the authority or competence to file a complaint for the offences punishable under FERA before the expiry of the sunset period provided in sub-section (3) of Section 49 of FEMA.

CONSIDERATION OF SUBMISSIONS

5. As can be seen from the statement of objects and reasons of FEMA, the legislature noticed that after 1993, there were significant developments, such as a substantial increase in foreign exchange reserves of our country, growth in foreign trade, rationalisation of tariffs, liberalisation of Indian investment abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign investors in the stock market. Keeping in view the entirely changed environment, by repealing FERA,

FEMA was brought on the Statute book with the objective of facilitating external trade and payments and promoting the orderly development and maintenance of the foreign exchange market in India. A perusal of the provisions of FEMA shows that there is a difference between its scheme and the scheme of FERA. There are elaborate provisions for penalty under Chapter IV of FEMA, and the penal provision is confined to sub-section (1C) of Section 13 of FEMA. Whereas Section 56 and Section 57 of FERA were more stringent in the sense that they covered a very large category of violations.

6. The procedure for taking cognisance of the offences punishable under Sections 56 and 57 was provided in Section 61 of FERA. Section 61 reads thus:

“61. Cognizance of offences.—

(1) Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973 (2 of 1974), it shall be lawful for any metropolitan magistrate and for any magistrate of the first class to pass a sentence of imprisonment for a term exceeding three years or of fine exceeding five thousand rupees on any person convicted of an offence punishable under section 56.]

(2) No court shall take cognizance—

(i) of any offence punishable under sub-section (2) of section 44 or subsection (1) of section 58,–

(a) where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(b) where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement; or

(ii) of any offence punishable under section 56 or section 57, except upon complaint in writing made by–

(a) the Director of Enforcement; or

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,—

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given 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;

(b) any appeal preferred to the Appellate Board under sub-section (2) of section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

(c) every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.”

(emphasis added)

9. From the impugned judgment, it appears that the submissions were made on behalf of the appellants that the word “and” in sub-section (3) must be read as “or”, and therefore, there is a bar on taking cognizance of the offence under FERA after the repeal of FERA. The High Court has elaborately and eruditely dealt with this argument. However, that need not

detain us as the submissions made before this Court proceed on the footing that there is a sunset period available of two years as provided in sub-section (3) of Section 49 of FEMA for filing complaints alleging the commission of offences punishable under Sections 56 and 57 of FERA and for taking cognizance thereof.

10. In the facts of the case, the cognizance was taken by the learned Magistrate within the sunset period of two years provided under sub-section (3) of Section 49 of FEMA.

11. We have perused the complaint filed by the first respondent. The complaint has been filed by the first respondent, who was, at the relevant time, an Enforcement Officer appointed under clause (e) of Section 3 of FERA. As noted earlier, the power under sub-clause (b) of clause (ii) of sub-section (2) of Section 61 was exercised by the Central Government and all the Enforcement Officers were authorised to file complaints regarding the offences punishable under Sections 56 and 57 of FERA. Thus, there is no difficulty in holding that the first respondent—Enforcement Officer, was authorised to file a complaint as provided in clause (ii) of sub-section (2) of Section 61 of FERA. What is material here is sub-section (4) of Section 49 of FEMA, which provides that subject to the provisions of sub-section (3), all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed. Sub-section (3) of Section 49 saves the prosecution for the offences punishable under Sections 56 and 57, which have been committed prior to the repeal of FERA, provided the competent Court takes its cognizance within two years from the date of coming into force of FEMA. In view of sub-section (4) of Section 49, for the purposes of the prosecution of offences punishable under Sections 56 and 57 of FERA, by a legal fiction, the provisions of the repealed Act will continue to apply. However, the same will continue to apply only for the purposes of prosecution of the offences which are saved by sub-section (3) of Section 49 of FEMA. That is how the complaint filed by the Enforcement Officer, duly authorised under clause (ii) of sub-section (2) of Section 61 of FEMA, will continue to be valid, inasmuch as by virtue of the legal fiction incorporated in sub-section (4) of Section 49, the prosecution will continue to be governed by the provisions of FERA as if the same had not been repealed. Therefore, during the sunset period, the

authorisation of the Enforcement Officers to file the complaints continues to be valid for the limited purposes of sub-section (3) of Section 49 of FEMA.

12. If the arguments of the appellants are accepted, the officer nominated under sub-clause (b) of clause (ii) of sub-section (2) of Section 61 of FERA will not be empowered to file complaints for the offences punishable under FERA even within the sunset period of two years. Such interpretation will prevent the Court from taking cognizance after the repeal of FERA on a complaint filed after the repeal of FERA by an officer authorised under sub-clause (b) of clause (ii) of sub-section (2) of Section 61 of FERA. Thus, no complaint can be filed during the sunset period of two years provided in sub-section (3) of Section 49 of FEMA. A Statute cannot be interpreted in such a manner that any provision thereof is rendered otiose. Therefore, we are unable to accept the submissions made by the learned senior counsel appearing for the appellants. Any construction which will defeat the plain intention of the legislature must be rejected. The Court must adopt the interpretation which makes the provisions of a Statute workable.

13. By FERA, the Foreign Exchange Regulation Act, 1947 (for short, ‘FERA, 1947’) was repealed. The repealing provision is provided under sub-section (1) of Section 81 of FERA. This Court, in the case of *M/s. P.V. Mohammad Barmay Sons v. Director of Enforcement*¹, interpreted clause (a) of sub-section (2) of Section 81 of FERA. Clause (a) of sub-section (2) of Section 81 of FERA reads thus:

“81.Repeal and saving–

(1)

(2) Notwithstanding such repeal–

(a) anything done or any action taken or purported to have been done or taken (including any rule, notification, inspection, order or notice made or issued, or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given or any proceedings taken or any confiscation

1 1993 Supp (2) SCC 724

adjudged or any penalty or fine imposed) 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;

(b);

(c);

(d);

(3)”

The issue before this Court was about the power of the authorities under FERA to investigate and enforce liability and penalty incurred under FERA, 1947, after its repeal. In paragraphs 7 to 9 of the aforesaid decision, this Court held thus:

“7. Shri Tulsi, the learned Additional Solicitor General placing reliance on *O. Abdul Aziz v. Addl. Director of Enforcement* [AIR 1983 Mad 59:(1982) 2 MLJ 359] and *A.K.L. Labbai Thambi Maraicar v. Govt. of India, Enforcement Directorate* [AIR 1983 Mad 102:(1982) 2 MLJ 59] contended that in view of Section 81(2) of the Act read with Section 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-section (2) of Section 81 of the Act. **The contention of the respondent is that the Repealed Act, after the Act had come into force in 1973, is a dead corpse and no life into it could be blown with the aid of Section 81(2) of the Act or Section 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 Section 6 of the General Clauses Act read with sub-section (2) of Section 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-repeal period. The things done adumbrated in Section 81(2) or Section 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, Section 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 Section 6 of General Clauses Act. What is unaffected by the repeal of the Act 7 of 1947 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 Section 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 Section 6 of the General Clauses Act.

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

9. In *Tiwari Kanhaiyalal v. CIT* [(1975) 4 SCC 101 : 1975 SCC (Tax) 214:1975 SCC (Cri) 312] where prosecution was laid after the repeal of the Income Tax Act, 1922, the contention raised was that saving clauses in Section 297 of 1961 Income Tax Act did not save the punishment incurred under the Repealed Act, therefore, recourse to Section 6 of General Clauses Act cannot be had, was negatived by this Court and it held that the repeal had not affected the liability incurred under Section 52 of the Income Tax Act, 1922 and it continued even after its repeal. The same view was reiterated in *CIT v. M/s Shah Sadiq & Sons* [(1987) 3 SCC 516, 524:1987 SCC (Tax) 270]. Accordingly, we hold that despite repeal of Act 7 of 1947 by operation of Section 6 of the General Clauses Act read with Section 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.”

(emphasis added)

14. Hence, the view taken by us in earlier paragraphs is fortified by the above decision.

15. The appeal fails, and the same is, accordingly, dismissed. As the complaint remained stayed from 7th January 2011, we direct the Trial Court to give necessary out-of-turn priority to the disposal of the complaint bearing CC.No.14/CW/2002, which is the subject matter of this appeal.