

P.V. Mohammad Barmay Sons vs Director Of Enforcement on 20 August, 1992

Equivalent citations: 1993 AIR 1188, 1992 SCR (3) 960, AIR 1993 SUPREME COURT 1188, 1992 AIR SCW 3609, 1993 SCC(CRI) 777, 1992 (3) SCR 960, 1992 (4) JT 565, 1993 (2) SCC(SUPP) 724, (1993) 76 COMCAS 27, (1992) 61 ELT 337, (1993) MADLW(CRI) 331, (1992) 2 RECCRIR 507, (1992) 3 SCJ 10, (1992) 3 CURCRIR 265, (1992) 3 ALLCRILR 464

Author: K. Ramaswamy

Bench: K. Ramaswamy, S.R. Pandian

PETITIONER:

P.V. MOHAMMAD BARMAY SONS

Vs.

RESPONDENT:

DIRECTOR OF ENFORCEMENT

DATE OF JUDGMENT 20/08/1992

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

PANDIAN, S.R. (J)

CITATION:

1993 AIR 1188 1992 SCR (3) 960
1993 SCC Supl. (2) 724 JT 1992 (4) 565
1992 SCALE (2) 227

ACT:

Foreign Exchange Regulation Act 7 of 1947 Sections 5(1)(a), (b) and 23(1) read with Sections 9(1)(a), (c) and 50 of the Foreign Exchange Regulation Act 46 of 1973-Comparative study-Language, penalty and contraventions-Whether differ.

Foreign Exchange Regulation Act 46 of 1973-Section 81 read with Section 6 (e) of the General Clauses Act-Repeal of the Foreign Exchange Regulation Act 7 of 1947-Rights acquired or accrued, penalty, liability, forfeiture or punishment incurred whether kept alive.

Foreign Exchange Regulation Act 46 of 1973-Section 81 read with Section 6(e) of the General Clauses Act-Legal

proceeding for enforcing a right acquired or accrued or liability, penalty, forfeiture, punishment incurred and legal proceedings for acquisition of a right-Distinction.

Foreign Exchange Regulation Act 46 of 1973-Section 81 read with section 6(e) of the General Clauses Act-Acts done, penalties, forfeiture or punishment incurred before the Repealed Act 7 of 1947, though no proceedings initiated there-under-Whether attracts Section 6 of the General Clauses Act-Legislative intention of Act 46 of 1973-Appreciation-Court's duty.

Foreign Exchange Regulation Act 46 of 1973-Sections 9(1)(a), (c) and 50 read with Section 5(1)(a), (b) and 23 of the Foreign Exchange Regulation Act 7 of 1947-Penalty imposed-Legality of-Doctrine of double jeopardy, Whether applicable.

HEADNOTE:

The appellant-firm owned three vessels and carried on export of timber, coir etc. to Gulf countries and imported Emuphraez 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 its first vessel and 240 H.P. Kalvin engine (second hand) to its second vessel. The

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second-hand engines 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 an agreement was entered into to fit in a second hand engine with one M/s. Mohd. Zsaim of Kuwait at a price of 2,100 Kuwaiti Dinars and payable in three annual instalments.

On 4.10.1974, a raid conducted on the premises of the appellant by the respondent and it was discovered that the appellant contravened Secs. 5(1)(a) and 5(1)(b) of the Foreign Exchange Regulation Act, 1947. In consequence of discovery a notice was issued on 11.10.1974 and not having been satisfied with the explanations, a show-cause notice was issued. An explanation was given by the appellant. The Addl. Director, Enforcement Directorate in the proceedings, 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 and that the appellant was found to have committed the contravention of Sec. 5(1)(a) & (b) and penalty of Rs. 50,000 was imposed on 5.7.1977.

On appeal, the Appellate Board confirmed the penalties, reduced the penalty from Rs. 50,000 to Rs. 37,500.

The appellant filed this appeal by special leave under Art. 136 of the Constitution of India challenging the order of the Appellate Board.

The appellant contended that the Foreign Exchange Regulation Act 7 of 1947 was repealed by the Foreign Exchange Regulation Act 46 of 1973; that no action was taken under the repealed Act before the Act 46 of 1973 came into force on 19.9.1973 and, therefore, the action was without jurisdiction and authority of law; 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 and on Appeal, the Central Board of Excise and Customs set aside the penalty; that for the same offence no proceedings under the Act 46 of 1973 could be taken; that the finding was based on no evidence, since the respondent did not prove the offence under the repealed Foreign Exchange Regulation Act, 1947 Act or under the Foreign Exchange Regulation Act, 1973.

The respondent submitted that in view of Sec. 81 (2) of the Foreign

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Exchange Regulation Act, 1973 read with Sec. 6 of the General Clauses Act, the power of the respondent to investigate and enforce the liability or penalty incurred under the Repealed Act was saved, though the Act 7 of 1947 was repealed under sub-sec. (2) of Sec. 81 of the Act.

Dismissing the appeal, this court

HELD : 1, A comparative study of the provisions of the repealed Foreign Exchange Regulation Act 7 of 1947 and the Foreign Exchange Regulation Act 46 of 1973 clearly adumbrated that save as may be provided in accordance with any general or special exemption from the provisions of this sub-section, 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, is a contravention of the Repealed Act 7 of 1947 and the Act 46 of 1973, 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, in nature of penalty and contraventions are concerned. [967 D,E,F]

2.01. The effect of the Repealed Act of 7 of 1947 by operation of clause (e) of Sec. 6 of the General Clause Act read with sub-sec. (2) of Sec. 81 is that though the Act 46 of 1973 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. [968-G]

2.02. The rights acquired or accrued or the liabilities incurred or any penalty, forfeiture or punishment incurred during the operation of the Repealed Act 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 affects and consequences projected to post repealed period. [968-H-969A]
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2.03. The things done adumbrated in Sec. 81(2) of the Act 46 of 1973 or Sec. 6 of the General Clause 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 46 of 1973 came into force, Sec. 81(2) of the Act 43 of 1973 empowers to effectuate the liabilities, penalties, etc. as if they have been in existence and amenable to be pursued under the Act 46 of 1973 or under the Repealed Act 7 of 1947 by operation of Sec. 6 of General Clauses Act. What is unaffected by the repeal of the Act 7 of 1947 is a right accrued, etc. [969-C]

3. 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 later 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. [969-D]

4.01. What remains to be done, after the Act 46 of 1973 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 intention 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. [969-E-F]

4.02. The Act 46 of 1973 did not evince any contrary intention. It merely reiterated the earlier law operating the field. Therefore, Clauses(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.

[969-H-970-A]

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5.01. The Repealed Act prescribed three times the value as penalty and under the Act 43 of 1973 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 Sec. 23 of the Repealed Act. Therefore, though the Act 43 of 1973, 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. [970-D]

5.02. 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 not application.

[970-F-H]

5.03. 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 Sec. 5(1)(a) & (b) of the Repealed Act equivalent to sec.9 (1) (a) & (c) of the Act. Therefore, the penalty imposed is based on material, valid reasons and proper findings. [971-A-B]

0. Abdul Aziz & Ors. v. Addl. Director of Enforcement, AIR 1983 Madras 59; A.K.L. Labbai Thamdi Maraicar v. Enforcement Directorate & Ors., AIR 1983 Madras 102; Tiwari Kanhaiyalal & Ors. v. Commissioner of Income-tax, Delhi, [1975 4 SCC 101 and The Commissioner of Income-tax, U.P. v. M/s Shah Sadiq & Sons, [1987] 3 SCC 516 at 524, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 95 of 1981.

From the Judgment and Order dated 17.10.1978 of the Foreign Exchange Regulation Appellate Board, New Delhi in Appeal No. 112 of 1977.

S.P. Singh and Sunil Kr. Singh for the Appellants. K.T.S. Tulsi, Addl. Solicitor General, Ms. A Subhashini, Ms. A. Kripal and Kailash Vasdev for the Respondent.

The Judgment of the Court was delivered by K. RAMASWAMY, J. 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 Beir, 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 Fatherlbari and 240 H.P. Kalvin engine (second hand) to their vessel Fazther Rehman, which were purchases 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 installments. The Addl. Director, Enforcement Directorate, Madras adjudicated the proceedings against the appellant and found that the appellant had purchased two engines and got them fitted into 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 Secs. 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 he was 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 Rs. 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.

Two 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 Customs Act, 1962 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.

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

"5(1) - Save as may be provided in an in accordance with any general or special exemption from the provisions of this sub-section 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 sub-section 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 provisions of this Act or of any rule, direction or order made thereunder."

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) 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 sub-section, 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, is a contravention of the Repealed Act

and the Act as well and 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 Clause 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 proceeding 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."

Sri Tulsi, the learned Addl. Solicitor General placing reliance in O. Abdul Aziz & Ors. v. Addl. Director of Enforcement, AIR 1983 Madras 59 and A.K.L. Labbai Thambi Maraicar v. Enforcement Directorate & Ors., AIR 1983 Madras 102, contended that in view of Sec. 81(2) of the Act read with Sec. 6 of the General Clause 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 7 of 1947 has been repealed under sub-sec. (2) of Sec. 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 Sec. 81(2) of the Act or Sec. 6 of the General Clause 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 Clause 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 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 later 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 the 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 was 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.

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 Sec. 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 repealed enactment, though no criminal proceedings have been actually initiated under repealed enact-

ment before its repeal.

In *Tiwari Kanhaiyalal & Ors. v. Commissioner of Income- tax, Delhi*, [1975] 4 SCC 101 where prosecution was laid after the repeal of the Income-tax Act, 1992, the contention 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 effected 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 *Commissioner of Income-tax, U.P. v. M/s Shah Sadiq & Sons.*, [1987] 3 SCC 516 at 524. 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 contained to subsist and the respondents are entitled to institute the proceedings, conduct investigation or enquiry and impose such penalty.

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 imposeable as penalty is three times. The penalty imposed as reduced by the appellate Tribunal is even not three times as contemplated under Sec. 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.

The further contention that under the Customs Act 1962 for the self same contravention, the penalty proceedings terminated in favour of the appellant, is of little avail to the appellant for the reason that the two Acts operate in different fields, one for Contravention of FERA and the second for evasion of customs duty. The mere fact that the penalty proceedings for evasion of the customs 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 Sec. 5(1) (a) & (b) of the Repealed Act equivalent to Sec. 9(1)(a) of the Act. Therefore, the penalty imposed is based on material, valid reasons and proper findings.

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.

V.P.R.

Appeal dismissed.