

(2011) 110 SCL 150

Bombay High Court

Case No: Writ Petition No. 1777 of 2011

Brentfield Travels
Company Pvt. Ltd.

APPELLANT

Vs

The Reserve Bank of
India and Another

RESPONDENT

Date of Decision: Sept. 23, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226
- Foreign Exchange Management Act, 1999 - Section 15

Citation: (2011) 110 SCL 150

Hon'ble Judges: D.Y. Chandrachud, J; A.A. Sayed, J

Bench: Division Bench

Advocate: Aditya Chitale and Kiran Phakade, for the Appellant; Zeob Cutlerywala, instructed by y, Udwadia and Udeshi for Respondent Nos. 1 and 2, for the Respondent

Judgement

D.Y. Chandrachud, J.

The Petitioner in these proceedings under Article 226 of the Constitution of India challenges an order passed by the Deputy General Manager of the Reserve Bank of India on 22 March 2011 on an application for compounding of contraventions of the provisions of the Foreign Exchange Management Act, 1999. The application for compounding was, in the present case, submitted u/s 15 on 27 September 2010. By an order dated 22 March 2011 the Deputy General Manager of the Reserve Bank as Competent Authority has stated that the contraventions which were observed are of a sensitive nature which require further investigation by the Directorate of Enforcement. Consequently the view adopted is that the contravention could not be compounded at the present stage and the compounding application was consequently returned together with the compounding fees in the sum of Rs. 5000/- paid by the Petitioner.

2. In the present case, from the records before the Court, it appears that the Petitioner received certain amounts in foreign exchange from the NRO account of two British nationals, Mr. Sayed Abad Ahmed and Mrs. Moya Ahmed towards equity subscription in the Petitioner. In the application for compounding submitted by the Petitioner, it was stated that the two British nationals were named as the first directors of the company and that they had remitted foreign exchange from time to time in the amount of Pound Sterling 57,400 equivalent to Rs. 49.95 lacs to the Bank of India, Madgaon Branch which was credited to the NRO/NRE account of the foreign nationals. According to the Petitioner, the amount was remitted for allotment of shares by the company. In the application for compounding the Petitioner stated that a mistake was made by remitting the foreign exchange in the individual names of the directors instead of sending the amount towards credit to the company's account. This contravention was sought to be compounded u/s 15 of the Foreign Exchange Management Act, 1999.

3. The Petitioner was called for a personal hearing. The impugned order dated 22 March 2011 contains the following reasons for not allowing the compounding application at this stage:

It is observed from the documents submitted and the admissions made by the applicant company that the equity subscription in the company was received from the NRO account of the investor and the amount (credit in the NRO A/c) represents currency and traveler's cheques encashed in India and not an inward remittance through normal banking channel and therefore, the method of investment is not in compliance with the provisions of FEMA. Further, it is observed that the company is not engaged in the business activities as stated in the MoA and the statement of accounts produced during the personal hearing on February 4, 2011 indicate that the source of income accrued to the company is the rent collected from the occupants of the immovable property purchased by the company. The contraventions observed are, therefore, of sensitive in nature which requires further investigation by the Directorate of Enforcement. In view of this, the contraventions cannot be compounded at this stage.

4. Section 15 of the Foreign Exchange Management Act, 1999 provides as follows:

15. Power to compound contravention.--(1) Any contravention u/s 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

(2) Where a contravention has been compounded under Sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

5. The Central Government has framed the Foreign Exchange (Compounding Proceedings) Rules, 2000 which govern the procedure for compounding. The Reserve Bank has also issued a circular on 28 June 2010 being Circular No. RBI/2009-10/56 A.P (DIR Series) Circular No. 56.

Para 3.5 of the circular provides as follows:

3.5 The Reserve Bank shall examine the nature of contravention keeping in view, inter alia, the following indicative points:

- a. whether the contravention is technical and/or minor in nature and needs only an administrative cautionary advice;
- b. whether the contravention is serious and warrants compounding of the contravention; and
- c. whether the contravention, prima facie, involves money-laundering, national and security concerns involving serious infringements of the regulatory framework. If, before disposal of the compounding application by issue of a compounding order the Reserve Bank finds that there is sufficient cause for further investigation, it may recommend the matter to the Directorate of Enforcement (DoE) for further investigation and necessary action under FEMA, 1999 by them or to the Anti Money Laundering Authority instituted under the Prevention of Money Laundering Act, 2002 or to any other agencies, as deemed fit. Since the compounding application will have to be disposed of within 180 days, the application will be disposed of by returning the application to the applicant in view of such investigation required to be conducted.

Para 4.3 of the circular specifies certain factors which are to be taken into consideration for the purpose of passing a compounding order and for adjudging the quantum of the amount on the payment of which the contravention shall be compounded. Para 4.3 reads as follows:

4.3 The application for compounding shall be processed further and disposed of on merits upon consideration of the records and submissions and at the absolute discretion of the CA. The following factors, which are only indicative, may be taken into consideration for the purpose of passing compounding order and adjudging the quantum of sum on payment of which contravention shall be compounded.

- (i) the amount of gain of unfair advantage, whether quantifiable, made as a result of the contravention;
- (ii) the amount of loss caused to any authority/agency/exchequer as a result of the contravention;

(iii) economic benefits accruing to the contravener from delayed compliance or compliance avoided;

(iv) the repetitive nature of the contravention, the track record and/or history of non-compliance of the contravener;

(v) contravener's conduct in undertaking the transaction and in disclosure of full facts in the application and submissions made during the personal hearing; and

(vi) any other factor as considered relevant and appropriate.

Para 7.3 of the circular specifies that cases of contravention, such as those having a money laundering angle, national security concerns and/or involving serious infringement of the regulatory framework or where the contravener fails to pay the sum for which contravention was compounded within the specified period in terms of the compounding order, shall be referred to the Department of Enforcement for further investigation and necessary action in accordance with law would be initiated.

6. The letter of the Competent Authority dated 22 March 2011 furnishes reasons on the basis of which it has been concluded that the contravention cannot be compounded at this stage. Those reasons cannot be regarded as extraneous to the exercise of the power to compound. In any event, it has been stated by Learned Counsel for the Reserve Bank that it has not finally concluded that the contravention cannot be compounded but all that has been stated in its opinion is that the matter requires further investigation by the Directorate of Enforcement having regard to the sensitive nature of the contravention. As a matter of fact upon a reference being made by the Reserve Bank of India, the Directorate of Enforcement issued a summons to appear to a Director of the Petitioner on 15 July 2011. The Court is informed by Learned Counsel for the Petitioner that a statement was recorded by the Directorate of Enforcement. The Directorate of Enforcement has not been impleaded as a party to these proceedings. However, evidently investigations are being conducted by the Directorate of Enforcement as will appear from the summons issued on 15 July 2011.

7. The power to compound has to be exercised judiciously having regard to the considerations which have been set out in the statute and in the circular issued by the Reserve Bank of India. There is no absolute right to claim a compounding of contraventions. An application for compounding in fact does postulate that a breach has taken place. It is for the Competent Authority to decide as to whether the contravention is of a technical nature or whether it is of a sensitive nature involving broader issues of national security or money laundering or a serious infringement of the regulatory framework in which case a compounding cannot be allowed. In fact, even this is not an exhaustive list of factors since the facts of each case will have to be considered by the Competent Authority when it decides whether the application for compounding should be granted. There is a public interest element in the enactment of regulatory statutes such as

the FEMA. Whether compounding of a breach would compromise the public interest involved in the enforcement of law has to be considered in the facts of each case. The circular which has been issued by the Reserve Bank makes it clear that the factors which have been set out in it are only indicative in nature. In that view of the matter, we are not inclined to pass any orders the effect that of which will stall the investigation which is being conducted by the Directorate of Enforcement. The Competent Authority has merely observed that at this stage, it was not inclined to grant an order of compounding having regard to the sensitive nature of the contravention and was of the view that the matter will have to be further investigated by the Directorate of Enforcement. This is a reasonable and bona fide exercise of power. Consequently, we dispose of this petition with the clarification that it would be open to the Reserve Bank of India, at the appropriate stage, upon the conclusion of the investigation by the Directorate of Enforcement to take a final view on the nature of the contravention and to determine as to whether the contravention is of a nature such that it can be compounded u/s 15 of the Foreign Exchange Management Act, 1999.

8. With these observations, we accordingly dispose of the petition. There shall be no order as to costs.