

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
%

Judgment Reserved on: 11th November 2009
Judgment Delivered on: 18th November 2009

+ **CRL.A. No.575/2008 and Crl.M.A.8045/2008**

SHAILENDRA SWARUP Appellant

Through: Mr.Rajiv Bansal, Mr.K.K.Patra
and Mr.Shivendra Swarup,
Advocates.

versus

THE DIRECTOR, ENFORCEMENT DIRECTORATE
..... Respondent

Through: Ms. Rajdipa Behura
and Ms.Deepti Sharma,
Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J

1. M/s Modi Xerox Limited was a company incorporated under the Indian Companies Act 1956, in the year 1983; 17 remittances were made by this company through its banker Standard Chartered Bank wherein foreign exchange has been released for import of certain goods for which the exchange control copy of the bill of entry had not been submitted either to the authorised dealer or to the Reserve Bank of India. This was during the period 12.6.1985 to 21.11.1985.

2. On 19.2.2001 show cause notice/memorandum had been issued by the Enforcement Directorate to 21 persons including the present petitioner who has been arrayed as respondent no.12 i.e. Shailendra Swarup to show cause as to why adjudication proceedings as contemplated in Section 51 of the Foreign Exchange Regulation Act, 1958 (hereinafter referred to as the FERA) be not initiated. On page no.3 of the said document while enumerating the names of noticee's as per annexure B it had been averred that the said persons, including present petitioner has been responsible/supervisor/incharge of the said company/firm for the conduct of the business of the firm/company at the relevant time when the aforesaid import was made as such he/she/they has/have rendered himself/herself/themselves liable to be proceeded against under Section 50 of the FERA. The last page of the document specified that the notice has been addressed to the company arrayed as No.1 and the present petitioner Shailendra Swarup arrayed as No.2.

3. Reply to this notice was returned on 26.3.2001. This reply was given by the company through Mukesh Dugar, its Company Secretary. The allegations in the show cause notice had been refuted; it was averred that the adjudication proceedings be dropped as the transactions are more than 15 years old and it would be inequitable to continue with these proceedings, being against the principles of natural justice. Para 8 of the reply had detailed the list of directors of the company at the relevant time

which included the name of the present petitioner Shailendra Swarup at serial No.9. It is relevant to state that there was no averment made in this reply that the present petitioner was not a full time director or was not incharge of the affairs of the company.

4. On 4.7.2003 Mukesh Dugar, Company Secretary, attested an affidavit stating therein that the company Modi Xerox Limited had since merged with Xerox Modi Corporation Limited. Mr.Shailendra Swarup who was the Director of the Modi Xerox was only a part time director and was never Incharge of the day to day business of the company.

5. Notice of the adjudication proceedings was issued on 8.10.2003.

6. Reply to this notice was given by the present petitioner on 29.10.2003 wherein for the first time it had been averred that the petitioner Shailendra Swarup is a practising Advocate and was only a part time Non-Executive Director of Modi Xerox Limited; he was never incharge of or responsible for the conduct of the business of the company.

7. The Adjudication Proceedings culminated in the order dated 31.3.2004. The submissions of the present petitioner had been noted on internal page 18 of the said order. The present petitioner along with four other persons were held guilty for having contravened the provisions of Section 8(3) read with Section 8(4) and Section 68 of the FERA; penalty of Rs.1 lac was imposed upon each of them.

8. This Adjudication Order had become the subject matter of an appeal before the Appellate Tribunal. The Appellate Tribunal vide impugned order dated 26.3.2008 had upheld the order of adjudication. The submission of the present petitioner that he was a part time Director was rejected. No modification was made in the penalty imposed either.

9. This Court is seized of the appeal which has been filed against the order of the Appellate Tribunal dated 26.3.2008.

10. On behalf of the petitioner, it has been urged that there was not an iota of evidence before the Appellate Tribunal to draw the conclusion that at the time when the contravention was committed the petitioner was incharge of and was responsible to the company for the conduct of the business of the company; in the absence of this necessary ingredient not having been prima facie established either before the Adjudicating Authority or before the Appellate Tribunal; provisions of Section 68(1) are not satisfied; no penalty could have been imposed upon the present petitioner. The Courts below had failed to appreciate that the petitioner is a practicing Advocate, under Section 48 of the Bar Council Rules, he is not permitted to have a whole time interest in a company. There is also no explanation as to why pick and choose policy was adopted by the Adjudicating Authority and the Appellate Tribunal; as to why and how only five persons had been nailed out of 13 so-called directors of the company; present petitioner had no financial stakes in the company; he was in his

professional capacity imparting legal advice only; he could not have been roped in; the Courts below have also failed to appreciate that the Company Secretary had on affidavit specifically averred that the present petitioner was only a part time Director.

11. Attention has also been drawn to an order dated 13.2.2004 passed by the Special Director of the Enforcement Directorate wherein the plea of the petitioner that he was only a Non-Executive Director of M/s Xerox Modi Corporation Ltd. had been accepted. It is submitted that the Special Director is a person who is superior in rank to a Deputy Director; the adjudicating order had been passed by a Deputy Director; the finding of a superior officer has to hold good against a finding of an inferior officer; on this analogy as well it is clearly established that the petitioner was only a part time Director of the company.

12. It is relevant to state that this order makes reference to certain remittances which were made for the period 1.12.1993 to 13.6.1999. The subject matter of the present proceedings relate to remittances having been made during the period 12.6.1985 to 21.11.1985. In this view of the matter, it is clear that this order cannot and would not have any application to this argument propounded by the petitioner.

13. Learned counsel for the petitioner has placed reliance upon judgments of Supreme Court reported in (2005) 8 SCC 89 SMS Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr. and (2007) 9 SCC 481 N.K.Wahi vs. Shekhar Singh & Ors. to substantiate his

submission that to launch a prosecution against the alleged directors, there must be a specific allegation in the complaint as to the part played by them in the transaction; there should be a clear and an unambiguous allegation as to how the directors are incharge of and responsible for the conduct of the business of the company; in the absence of any specific averment the net result would be that the complaint would not be entertainable. It is further submitted that the provisions of Section 138 of Negotiable Instruments Act are almost para materia to Section 68(1) of the Companies Act; it is only those category of persons who are Incharge of and responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence. It is submitted that the liability can be cast only on those persons who have something to do with the transaction; mere use of a particular designation of an officer without more may not be enough. Reliance has also been placed upon a judgment reported in (1978) 48 Comp. Cases 85 *Om Prakash Khaitan vs. Shree Keshariya Investment Ltd.* It is submitted that the present petitioner who is a full time Advocate had agreed to be appointed as a director of the company only to give a favourable projection to the management of the company; he was on the board only by virtue of his technical skill; he had no financial stakes in the company; he could not have been made liable for the breaches and the fault of the company.

14. Arguments have been rebutted by the learned counsel for the Enforcement Directorate. It is pointed out that the

propositions of law as argued by the learned counsel for the petitioner are not in dispute; it is submitted that the present proceedings are adjudication proceedings in which there is no formal complaint; as such the submissions of the learned counsel for the petitioner that there should have been a specific averment that the petitioner was in charge of the day to day affairs and the conduct of the business of the company in the complaint is a mis-understanding of the procedure; in adjudication proceedings there is no formal complaint. Attention has been drawn to the Adjudication Proceedings and Appeal Rules 1974 which Rules have been formulated under the powers conferred under Section 79 of the FERA. Rule 3(2) reads as follows:

S.3 Adjudication proceedings:

“(1)
(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.”

Further these rules which have a statutory force clearly indicate that it is only the nature of offence alleged to have been committed which has to be indicated in the notice and no more.

15. Perusal of the record shows that the contravention for having violated the provisions of Section 8(3) & (4) of the FERA relate to the period 12.5.1985 to 21.11.1985. The show cause notice dated 19.2.2001 apart from the 21 persons mentioned in annexure B, was specifically addressed to the company who was arrayed as No.1 and the present petitioner Shailendra Swarup arrayed as No.2. This show cause notice/memorandum had stated that the persons arrayed therein were responsible and

Incharge of the conduct of the business of the company at the relevant time when the import was made and as such rendered himself liable to be proceeded against under Section 50 of the FERA.

16. The reply given by the company signed by the Company Secretary Mukesh Dugar is dated 26.3.2001. The Company Secretary has detailed the names of 13 persons as Directors of the company at the relevant time which include the present petitioner Shailendra Swarup. This reply had requested for a personal hearing; as already discussed supra; this reply has nowhere stated that the present petitioner was only a part time Director.

17. It was only as an afterthought and later on that the petitioner in his subsequent reply dated 29.10.2003 took up a plea that he was only a part time director and relied upon an affidavit dated 4.7.2003 of the Company Secretary Mukesh Dugar which even otherwise does not appear to have been filed either before the Adjudicating Authority or the Appellate Tribunal. No such plea had been taken in any of the earlier communications.

18. Judgment relied upon by the learned counsel for the petitioner lays down the undisputed proposition of law that in order to penalise a Director of a company under criminal law it must be specifically averred that the said Director was in charge of the affairs of the company and responsible to it for conduct of its business at the time of commission of the offence. This

proposition is not in dispute and in fact is accepted by the learned counsel for the Department. There is also no dispute that the provisions of Section 141 of Negotiable Instrument Act are more or less para materia the provisions of Section 68 of the FERA; both of which deal with offences by a company. In (2005) 8 SCC 89 SMS Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr., it has been held by the Supreme Court that to make an officer of a company liable there are two mandatory requirements to be fulfilled :-

- i. It should be stated that the persons sought to be arrayed as accused apart from a company was a person in charge of and responsible for the conduct of the company
- ii. Such a person was in that capacity at the time of the commission of the offence.

19. In the present case the record reveals that this was an admission by the company itself through its Company Secretary in the reply dated 26.3.2001 wherein it was stated that the present petitioner is a director of the company. This was an answer to the specific averment made in the show cause notice that Shailendra Swarup was Incharge of the affairs of the company and responsible to it for the conduct of its business. This finding of the Adjudicating Authority was not faulted with by the Appellate Tribunal and rightly so.

20. There is no merit in the appeal. It is dismissed.

**(INDERMEET KAUR)
JUDGE**

NOVEMBER 18 , 2009
nandan