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Case Comment: Riddhisiddhi Bullions Limited v Union of India

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Abbreviations: FT(D&R) Act, 1992: The Foreign Trade (Development and Regulation) Act, 1992; FEMA, 1999: The Foreign Exchange Management Act, 1999; FTP: Foreign Trade Policy; FTRR, 1993: Foreign Trade Regulation Rules, 1993; AD: Authorized Dealer; PTH: Premier Trading House; NA: Nominated Agency; ITC (HS): Indian Trade Classification (Harmonised System); CT Act, 1962: The Customs Act, 1962; DGFT: Director General of Foreign Trade; ADGFT: Additional Director General of Foreign Trade; CAD: Current Account Deficit; IECN: Importer-Exporter Code Number; Forex: Foreign Exchange; FT: Foreign Trade; AD: Authorized Dealer.

INTRODUCTION

This case focuses on the significance of the powers of the RBI by which penalties can be imposed by it under the FEMA, 1999, and cancellation of NA Certificate to deal in Foreign Trade under the FT (D&R) Act, 1992 can be done. It deals with violation of the impugned circulars of the RBI which were issued under Section 11¹ of the FEMA, 1999 for regulating import-export of gold. It could result in imposing fiscal penalty by the RBI under the FEMA, 1999 (Section 13)² and

¹ Foreign Exchange Management Act, 1999, s 11

² Foreign Exchange Management Act, 1999, s 13

cancelling the application for renewal of license annually by the ADGFT under the FTRR, 1993 (Rule 10)³. Import-export can be done under the conditions of the FTP issued under FT (D&R) Act 1992, Section 3⁴. Dealings in foreign trade **need** to have an **ITC (HS) Code**, which contained a condition that it is **subject to the RBI's regulations**.

Under the FEMA Act, 1999, the RBI is the regulating authority for the import of gold, as it is the custodian and controller of Forex reserves. The Authorities under the FT (D&R) Act, 1992 can issue the NA certificate, only its holder can import gold. The certificate contained a specific condition that it is subject to any circular issued or condition imposed by the RBI or by the Customs authorities. The RBI manages Forex, its reserve level shows the country's economic strength. A continuous increase in the gold's imports was resulting in a continuous reduction in Forex reserves, increasing the CAD. To curb this adverse position, the RBI issued the impugned Circular No. 15 (22nd July 2013) requiring one set of NAs (PTH) to import gold only for exports (100% exports), while other sets of NAs to export at least 20% of gold imported. So, this case is concerned with the powers of the RBI by which penalties can be imposed by it under the FEMA, 1999, and cancellation of license to deal in Foreign Trade can be done by the DGFT or the ADGFT under the FT (D&R) Act, 1992.

FACTS OF THE CASE

The Writ Petition was submitted to the Bombay High Court pursuant to Article 226⁵ of the Indian Constitution to challenge the legality and validity of various circulars issued by the RBI (22nd July 2013 - 21st May 2014). The petitioner is the **AD**, who only can deal in foreign exchange as per Section 11 of the FEMA, 1999, it requires the RBI's authorization and is subject to the instructions issued by it from time to time; it claims to be recognized as a **PTH** and also having the **NA Certificate, granted every year** to it by the **authorities (ADGFT)** under the FT (D&R) Act, 1992, which was **subject to the directions of the RBI**, as given in the impugned circulars, and which enables it to import precious metals in terms of paragraph 4A.4 of the FTP, 2010-15⁶.

³ Foreign Trade Regulation Rules, 1993, r 10

⁴ Foreign Trade (Development and Regulation) Act, 1992, s 3

⁵ Constitution of India, 1950, art.226

⁶*Riddhisiddhi Bullions Limited v Union of India* (2015) Writ Petition No. 1334/2021

The dispute raised is in regard to the 2 consignments of 100 Kgs. gold each, both shipped from UAE on 22nd July 2013, which was given **after the issuance** of the **RBI circular** on the same day mandating the NA certificate holder to **export 100% of the gold bars imported** by them. But the petitioner had exported only 350 kgs. of gold out of 550 kgs. of gold imported. This point was also raised in the EDI data (24th July 2013) at Ahmedabad Air Customs Cargo-

“Put up compliance to the RBI Circular No. 15 (22nd July 2013) and satisfaction thereon”.

After this, the RBI issued another circular dated 14th August 2013 making it incumbent on all NAs to export at least 20% of the gold imported into the country which they confirmed but they don't show the required proof and reasons for their activities demanded by the authorities. Hence, Respondent No. 3, ADGFT, Mumbai Zonal Unit issued a show-cause notice under **Section 14 r/w Section 11(2)**⁷ of the FT (D&R) Act, 1992, informing that the request for renewal of the NA Certificate can't be considered for non-compliance with the conditions and the impugned RBI circular and a fiscal penalty was also proposed alleging violation of Rule 13(2)⁸ of the FTRR, 1993.

Against this, the petitioner claimed that:

- i) The RBI's directions shouldn't be taken into consideration for canceling the application for a license as this power is with the ADGFT under the FTRR, 1993,
- ii) When the cargo was cleared by the Customs Authorities after due checking of the compliance with the RBI's directions, then, later on, the violations of the directions should not be taken into consideration by the ADGFT.

Against these actions, this writ petition was filed.

⁷ Foreign Trade (Development and Regulation) Act, 1992, s 14 r/w s 11(2)

⁸ Foreign Trade Regulation Rules, 1993, r 13(2)

ISSUES RAISED

- i) Whether the ADGFT has the power to cancel the license under Rule 10 of the FTRR, 1993 due to a failure to adhere to the RBI's conditions relating to forex under the FEMA, 1999, wherein the RBI can also impose penalties?
- ii) Whether the ADs will also be held liable if they contravene the directions issued by the RBI under Section 11 of the FEMA, 1999?

JUDGMENT PRONOUNCED

It was seen that a specific 8-digit ITC (HS) Code for every product needed to be imported and exported is used by the Indian Customs to ease the process of buying and selling to suit the national trade requirements. *ITC (HS) Code 71081200 (for gold)* of import policy is **subject** to the RBI Regulations and Central Government has **clearly allowed** RBI to regulate the import of gold under **Rule 7⁹ of the FTRR, 1993 accompanied by Section 47¹⁰ of the FEMA, 1999¹¹**.

Therefore, it was held that the petitioner committed a violation of the FEMA by its action in not exporting the required quantity from the imported material as mandated.

Analysis of **Section(s) 10(1), 10(4) & 10(6)¹² of the FEMA, 1999** was done and it was held that:

- i) the RBI can authorize any person (AD) **to deal in Forex or Foreign Security**
- ii) **Only the ADs can deal with them**
- iii) It will be subject to the RBI's rules, regulations, and directions issued from time to time.

While explaining the rationale of due penalty, it was held that even though the Customs Officer **failed** to check the applicability of the impugned circular, failure to detect a violation by a

⁹ Foreign Trade Regulation Rules, 1993, r 7

¹⁰ Foreign Exchange Management Act, 1999, s 7

¹¹ Riddhisiddhi Bullions Limited (n 6)

¹² Foreign Exchange Management Act, 1999, ss 10(1), 10(4) & 10(6)

monitoring authority at **one point in time** doesn't give blanket protection to the petitioners for violations **detected subsequently**. Hence, it was held that ADGFT and RBI **both** can issue sanctions and impose penalties and ADs will be held liable for the non-compliance with the RBI's directions [Section(s) 11 & 12 of the FT (D&R) Act, 1992, read with Section 13 of the FEMA, 1999 and Rule 7 of the FTRR, 1993].

Analysis and glance at the constitutionality of the powers of RBI to restrict dealings in Forex and consequent restriction on sales of goods under the FEMA, 1999:

The power of the RBI was dealt with by the Court and it held that:

*“The RBI transacts the business specified in Section 17¹³ of the RBI Act, 1934, one of which is to act as an agent for the Central Government or the State Government or any local authority, etc. in business set out in Section 17 (11)¹⁴. Its **sub-section (12)** empowers it to transact the business of **purchase and sale of gold or silver coins and gold and silver bullion and foreign exchange**”¹⁵.*

After looking at the objectives of the FERA, 1973 and the FEMA, 1999, we can see that they necessarily bring in the RBI and the Ministry of Commerce, the Government of India as well as the DGFT. The FEMA's object of consolidating and amending the forex law is to facilitate **external trade**, and payments, and to promote and develop the forex market in India. It is the function of the government to maintain peace and security, and protect against economic or other kinds of adverse problems of a nation. But when this function is delegated to a statutory authority then it should be considered as a State, as was held under Article 12¹⁶ of the Indian Constitution in the case of *Ajay Hasia etc. v Khalid Mujib Sehravardi and Others*, 1980 that:

“We may summarise the relevant tests gathered from the decision in the International Airport Authority's case as follows:

(1)

¹³ Reserve Bank of India Act, 1934, s 17

¹⁴ Reserve Bank of India Act, 1934, s 17(11)

¹⁵ Riddhisiddhi Bullions Limited (n 6)

¹⁶ Constitution of India, 1950, art.12

(5) "If the functions of the corporation are of **public importance and closely related to governmental functions**, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government"¹⁷.

So, the RBI can be considered a State and we will look at the constitutionality of its powers from this point of view. The RBI has full authority to regulate remittances under the FEMA, 1999, and this Act read with the FTP, 2010-15 would enable the RBI to impose conditions regarding importing gold for maintaining the forex reserves and improving the CAD balance, so that country's economic situation can be good. Moreover, the Central Government under the *FT (D&R) Act, 1992 Section 3* can make provisions **relating to imports and exports**. These provisions as contained in the *FTP 2010-15* make import and export free, **except when regulated**. Such regulation would be **as per FTP and/or ITC (HS), which contained a condition that it was subject to the RBI's regulations**.

Since the gold bars (specific item) were imported by ITC (HS) Code, and the relevant import policy allows it **subject to the RBI regulations**, therefore, RBI's regulations have to be followed, and there was a clear violation by the petitioner of them by not exporting 100% of the gold imported by them. It was so heated topic that in the news of The Hindu on 6th March 2013, on "**Current Account Deficit biggest concern: Raghuram Rajan**", Dr. Raghuram Rajan stated:

*"In the near-term, we have to focus more on financing CAD through foreign inflows, because reducing it will take time. The best way is to increase exports relative to imports"*¹⁸.

This problem was of so much concern that 2 fertilizer subsidies were capped to fight against the menace of CAD, and it was proposed at that time to cut the urea subsidy also, so as to maintain the forex reserves and macro stability of the country. Moreover, the RBI had asserted that the widening CAD has become a major constraint on easing monetary policy¹⁹. As the NA Certificate had a **specific endorsement** that it has been subject to the RBI guidelines among

¹⁷ *Ajay Hasia Etc. v Khalid Mujib Sahravardi and Others Etc.*, (1981) SCR (2) 79

¹⁸ 'Current account deficit biggest concern: Raghuram Rajan' (*The Hindu*, 6 March 2013)

<<https://www.thehindu.com/business/Industry/current-account-deficit-biggest-concern-raghuram-rajana/article4479710.ece>> accessed 17 May 2022

¹⁹ *Ibid*

various other conditions, so, ADGFT can cancel the license, NA Certificate under Rule 10 of the FTRR, 1993 for non-adherence to the RBI's conditions, and the ADs can be imposed with a penalty for violation of the same by the RBI under Section 11 of the FEMA, 1999. The State can impose reasonable restrictions on the exercise of the right under Article 19(1)(g)²⁰ by making a law under Article 19(6)²¹ of the Indian Constitution in the interests of the general public. The same goes for Article 302²² where restrictions can be on the freedom of trade, commerce, or intercourse in the public interest. If any Circular or policy is made by the RBI having the Central Government's approval, like 100% export specific goods imported, and no sale of them in the Indian territory, it will have to be looked at in regard to these 2 provisions.

The preamble to the RBI Act, 1934 tells that the RBI's function is:

“to....., keeping of reserves with a view to secure the country's monetary stability generally, to..... advantage”.

The Preamble of FEMA, 1999 states that its objective is to **facilitate external trade and payments**, development, and maintenance of the forex market in India²³.

What are Reasonable restrictions which can be imposed on the Right to Trade freely under Article 19(6)? Below is the case for it. In the case of **Bishambhar Dayal Chandra Mohan v The State of U.P., (1982) 1 SCC 39-**

“It signifies that the limitation imposed on a person in the enjoyment of the right should not be an arbitrary or of an excessive nature, beyond what is required in the interests of the public”²⁴.

Moreover, in the case of **SIEL Ltd. v The Union of India, (1998) 7 SCC 26 -**

²⁰ Constitution of India, 1950, art.19(1) (g)

²¹ Constitution of India, 1950, art.19(6)

²² Constitution of India, 1950, art.302

²³ Foreign Exchange Management Act, 1992, Preamble

²⁴ *Bishambhar Dayal Chandra Mohan and Others v The State of Uttar Pradesh and Others* (1982) 1 SCC 39

*“In determining the reasonableness of a piece of economic legislation **more latitude** should be given to the State than that given in respect of a legislation **relating to fundamental rights**”²⁵.*

As the forex reserve is a scarce commodity and important for the survival of the country in this age of globalization and the open-sector economy, its disposal and use have to be regulated properly, and **for that**, RBI was empowered under the RBI Act, 1934, the FEMA, 1999 **to regulate foreign dealings** and imposing conditions on the foreign trade so as **to restrict the forex reserves flowing outside** the country.

In the case of *Internet and Mobile Association of India v The Reserve Bank of India, 2018*, it was held that:

*“RBI is now vested with the obligation to operate the monetary policy framework in India. An indication of the primary objective of the monetary policy is provided in paragraph 3 of the Preamble of the RBI Act, 1934 which says that the maintenance of price stability is the prime objective even while the objective of growth is to be kept in mind”.*²⁶

Hence, there is a **reasonable nexus** if the restrictions imposed by the RBI on the foreign trade in specified goods, and the penalties imposed by it in these regard, with these objectives and hence a Constitutionally valid step.

CONCLUDING REMARKS

The case deals with the aspects of the operational and legal field of foreign exchange dealings with respect to the powers of the RBI over the transactions of these types. Any kind of foreign exchange dealings has to be seen with respect to the Foreign Trade Policy, and the consequent RBI orders, as all these orders and the functioning of the customs officers are in line with the objectives of the FTP issued from time to time. Hence, these orders must not be overlooked as they are backed by the government’s FTP policies. Any Kind of contravention, thus, will result in the transaction being nullified and criminal/civil penalties/actions have to be followed.

²⁵ *SIEL Ltd. v Union of India* (1998) 7 SCC 26

²⁶ *Internet and Mobile Association of India v Reserve Bank of India* (2018) Writ Petition (Civil) No. 528/2018