M/S TELESTAR TRAVELS PVT. LTD. & ORS. A

v.

SPECIAL DIRECTOR OF ENFORCEMENT

(Civil Appeal Nos. 1306-1309 of 2013)

FEBRUARY 13, 2013 B

[T.S. THAKUR AND M.Y. EQBAL, JJ.]

Foreign Exchange Regulation Act, 1973:

ss. 8 and 14 – Dealing in foreign exchange without previous permission of Reserve Bank – An Indian company dealing with a foreign company based in U.K. and money transactions made through another company based outside India and alleged to be a paper company – Held: There is no reason to interfere with the concurrent findings of fact that the company concerned was a paper company controlled by appellants from India – There appears to be sufficient evidence on record for the Adjudicating Authority and the Appellate Tribunal to hold that the appellants were guilty of violating the provisions of FERA that called for imposition of suitable penalty against them – Appellate Tribunal has already given relief by reducing the penalty by 50% – Keeping in view the nature of violations and the means adopted by appellants to do so, there is no room for any further leniency. C D E

Adjudication Rules under FERA: F

r. 3 – Delay in pronouncement of order – Held: Delay by itself would not constitute a ground for setting aside an order that may otherwise be found legally valid and justified – A careful examination of the adjudication by the Authority and that of the Appellate Tribunal and the High Court indicates that no illegality or irregularity has been demonstrated – Foreign Exchange Regulation Act, 1973 – s.51 – Administrative law. G

 H

A *Evidence:*

Retracted statements – Evidentiary value of – Held: Adjudicating Authority and Appellate Tribunal have both correctly appreciated the legal position and applied the same B *to the case at hand to hold that the statements were voluntary and, therefore, binding upon appellants.*

Evidence Act, 1872:

s.139 – Cross-examination of person called to produce C *a document – Held: The documents relied upon by Adjudicating Authority produced by two officials of Indian High Commission in London, were permitted to be inspected – Therefore, refusal of Adjudicating Authority to permit cross examination of witnesses producing the documents cannot* D *even on principles of Evidence Act be found fault with.*

Appellant No. 1-travel agency was engaged in the business of booking of tickets for crew members working on ships. For the purpose, the appellants had arrangement with a company based in U.K. (CTL), which E **would send Pre-paid Ticket Advice (PTA) to appellants in India. The appellants would then secure ticket from the air line concerned. The money for the tickets would then be credited into the Swiss bank account of another company ('B' Ltd.) registered in British Virgin Islands. 'B'** F **Ltd. would transfer the funds to CTL towards the price of tickets after realizing 3% of the ticket price towards commission payable to the appellant company. The Directorate of Enforcement issued a shows cause notice for adjudication proceedings as contemplated u/s 51 of** G **the Foreign Exchange Regulation Act, 1973 stating that 'B' Ltd. was only a paper company and was entirely a holding of the appellant company and was being controlled by it. The Adjudicating Authority, by order dated 29.3.2001, held the appellant-company guilty of**

H

violation of provisions of ss. 8 and 14 of FERA, and imposed upon it a penalty of Rs.90,000/- for contravening s.14 and Rs.85,00,000/- for contravention of s.8(1) of FERA. A consolidated penalty of Rs.20,00,000/- each was imposed on the remaining appellants. The Appellate Tribunal for Foreign Exchange, in appeal, reduced the penalty by 50%. The further appeals of the appellants were dismissed *in limine* by the High Court.

Dismissing the appeals, the Court

HELD: 1.1. Whether or not 'B' Ltd. is a paper Company and whether or not it was controlled and operated by the appellants is essentially a question of fact to be determined on the basis of the material collected in the course of the investigation. The Adjudicating Authority and Tribunal have answered that question in the affirmative taking into consideration the statements made by the appellants as also the documents that were recovered from their premises. There appears to be sufficient evidence on record for the Adjudicating Authority and the Tribunal to hold that the appellants were indeed guilty of violating the provisions of FERA that called for imposition of suitable penalty against them. Therefore, there is no reason to interfere with the concurrent findings of fact that 'B' Ltd. was a paper company controlled by the appellants from India. [para 12 and 15] [1021-C-D; 1023-G-H; 1024-A-B]

1.2. Delay in the pronouncement of the order by itself would not constitute a ground for setting aside the order that may otherwise be found legally valid and justified. A careful examination of the adjudication by the Authority and that of the Appellate Tribunal and the High Court indicates that no illegality or irregularity has been demonstrated. That apart delayed pronouncement of the order by the Adjudicating Authority was not urged as a ground of challenge before the Tribunal or the High

A **Court. The hearing had been concluded by the Adjudicating Authority in keeping with the requirement of s.51 of FERA and s.30 of Adjudication Rules under FERA. [para 6-7] [1015-B-C; 1016-B-D, F]**

B *Ram Bali v. State of U.P.* **2004 (1) Suppl. SCR 195 = (2004) 10 SCC 598 – relied on.**

Bhagwandas Fatechand Daswani and Ors. v. HPA International and Ors. **2000 (1) SCR 254 = 2000 (2) SCC 13,** *Kanhaiyalal and Ors. v. Anupkumar and Ors.* **2002 (4) Suppl.** C **SCR 366 = (2003) 1 SCC 430 and** *Anil Rai v. State of Bihar* **2001 (1) Suppl. SCR 298 = (2001) 7 SCC 318 – cited.**

1.3. As regards the plea that retracted statements of D **the appellants were wrongly relied upon by the Adjudicating Authority, suffice it to say that the Adjudicating Authority has specifically held that the statements were voluntary in nature and that the subsequent retraction is a mere afterthought with a view** E **to escaping the consequences of the violations committed by them. The Appellate Tribunal also held that retracted statements could furnish a sound basis for recording a finding against the party making the statement. The Adjudicating Authority and the Appellate Tribunal have both correctly appreciated the legal position** F **and applied the same to the case at hand, while holding that the statements were voluntary and, therefore, binding upon the appellants. [para 9, 11] [1017-A-C; 1019-C-D]**

K.T.M.S. Mohd. v. Union of India **1992 (2) SCR 879 =** G **(1992) 3 SCC 178,** *K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin* **1997 (1) SCR 797 = (1997) 3 SCC 721 – referred to.**

Vinod Solanki v. Union of India & Anr. **2008** H **(17) SCR 1070 = (2008) 16 SCC 537 – held inapplicable**

1.4. In the case at hand, the Adjudicating Authority also placed reliance upon documents produced by two officials of Indian High Commission in London, and the appellants were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of s. 139 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the Adjudicating Authority to permit cross-examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants. [para 20] [1028-A-D]

Surjeet Singh Chhabra v. Union of India and Ors. **1996 (7) Suppl. SCR 818 = (1997) 1 SCC 508;** *M/s Kanungo & Company v. Collector of Customs and Ors.* **(1973) 2 SCC 438- referred to**

New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr. **2007 (13) SCR 598 = (2008) 3 SCC 279,** S.C. *Girotra v. United* **1995 Supp. (3) SCC 212,** *Lakshman Exports Ltd. v. Collector of Central Excise* **(2005) 10 SCC 634, and** *M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors.* **1972 (1) SCR 241 = (1971) 2 SCC 617 - cited**

1.5. There is no reason much less a compelling one to interfere with the quantum of penalty imposed upon the appellants by the Tribunal. The Adjudicating Authority had imposed a higher penalty. The Tribunal has already given relief by reducing the same by 50%. Keeping in view the nature of the violations and the means adopted by the appellants to do that, there is no room for any further leniency. [para 21] [1028-F]

A **Case Law Reference:**

2000 (1) SCR 254	**cited**	**para 5**
2002 (4) Suppl. SCR 366	**cited**	**para 5**
B **2001 (1) Suppl. SCR 298**	**cited**	**para 5**
2004 (1) Suppl. SCR 195	**relied on**	**para 6**
1992 (2) SCR 879	**referred to**	**para 11**
1997 (1) SCR 797	**referred to**	**para 11**
C **2008 (17) SCR 1070**	**held inapplicable**	**para 11**
2007 (13) SCR 598	**cited**	**para 16**
1995 (3) Suppl. SCC 212	**cited**	**para 16**
D **2005 (10) SCC 634**	**cited**	**para 16**
1972 (1) SCR 241	**cited**	**para 16**
1996 (7) Suppl. SCR 818	**referred to**	**para 18**
E **1973 (2) SCC 438**	**referred to**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1306-1309 of 2013.

From the Judgment & Order dated 14.03.2008 of the High F Court of Judicature of Bombay in FERA Appeal No. 8, 9, 10 & 11 of 2008.

Shyam Diwan, Tarun Gulati, Neil Hildreth, Shruti Sabharwal, Nirman Sharma, Praveen Kumar for the Appellants.

G P.P. Malhotra, ASG, Chetan Chawla, Priyanka Mathur, Anil Katiyar, Shreekant N. Terdal for the Respondent.

The Judgment of the Court was delivered by

H **T.S. THAKUR, J.** 1. Leave granted.

2. These appeals arise out of a common judgment and order dated 14th March, 2008 passed by a Division Bench of the High Court of Judicature at Bombay whereby the High Court has partly allowed FERA Appeal Nos.8 to 11 of 2008 that assailed the common order dated 28th November, 2007 passed by the Appellate Tribunal for Foreign Exchange, New Delhi and reduced the penalty imposed upon the appellants for contravention of Sections 14 and 8(1) of the Foreign Exchange Regulation Act, 1973 by 50%. The factual matrix in which the adjudication order came to be passed by the Deputy Director, Directorate of Enforcement, Mumbai and the appellate order passed by the Tribunal for Foreign Exchange, New Delhi has been set out in the order passed by the Tribunal and the order passed by the High Court of Bombay mentioned earlier. It is, therefore, unnecessary to recount the facts over again except to the extent it is absolutely necessary for disposal of these appeals.

3. Appellant-Telestar Travels Private Ltd. carries on a travel agency and specialises in booking of tickets for crew members working on ships. Most of the shipping companies are based abroad with their representatives located in Mumbai who would issue instructions to the appellant-company to arrange air passage for the crew from Bombay and other places in India to particular ports abroad. The company would then take steps to have tickets issued on the basis of such instructions for different destinations. The appellant's case is that the travel agents in U.K. had of late started offering cheap fares for seaman/crew travelling to join the ships. In order to benefit from such low fare tickets the shipping companies are said to have desired that the benefit of such low fare tickets be organized for them by the appellant. In order to make that possible the appellant-company claims to have approached M/s Clyde Travels Ltd. (CTL) in Glasgow (U.K.) for getting such cheap seaman tickets. According to this arrangement, the CTL would send a Pre-paid Ticket Advice (PTA) to the appellant in India based on which the appellant would secure a ticket from the

A airline concerned. The money for the tickets would then be credited into the Swiss bank account of Bountiful Ltd., a company registered in British Virgin Islands. Bountiful Ltd. would out of money so received transfer funds to CTL towards the price of the tickets apart from realising 3% of the ticket price
B towards commission payable to the appellant-company. The appellant-company claims that the process of purchase of tickets as aforementioned was a commercial arrangement that was legally permissible and did not involve any violation of FERA. The Directorate of Enforcement, Mumbai, did not,
C however, think so. According to the Directorate, Bountiful Ltd. was a paper company that held Swiss bank account which was in turn operated by a person named Mr. Shirish Shah, a Chartered Accountant, operating from London on the instructions of Mr. Rajesh Desai, appellant in SLP (C) No.15549
D of 2008 who was none other than the son of Mr. Arun Desai, Managing Director of Telestar Travels Pvt. Ltd. appellant in SLP (C) No.15547 of 2008. The further case of the Directorate was that documentary evidence seized from the office of M/s Telestar and the residence premises of the Managing Director in the course of investigation conducted under Section 37 of
E FERA unerringly revealed that Bountiful Ltd. was entirely a holding of the appellant-Telestar Pvt. Ltd. and entirely controlled in its operation and financial management by Mr. Arun N. Desai and his two sons Mr. Sujeet A. Desai and Mr. Rajesh A. Desai, appellants in these appeals. It was on the basis of the
F investigations conducted by the Directorate, the statements of the promoters of Telestar Pvt. Ltd. recorded during the course of such investigation and other material collected by the Directorate, a notice was issued by the Directorate calling upon them to show cause why the adjudication proceedings as
G contemplated under Section 51 of the FERA should not be filed against them for the contravention pointed out in the show cause notice. The show cause notice was followed by an addendum by which the Directorate sought to place reliance upon a report dated 15th January, 1997 received from the High
H Commission of India, at London and the revised list of

documents enclosed and communicated to the appellants. The appellants filed their replies in which they denied the allegations that Bountiful Ltd. was a paper company or that the same was being controlled from India by the appellants. By their letter dated 23rd September, 1997 the appellants sought to cross-examine Mr. Livingstone of CLD and the Indian High Commission officials in London who had met him. He also sought to cross-examine Miss Anita Chotrani and Mr. Deepak Raut upon whose depositions Directorate of Enforcement sought to place reliance in support of its case. The Adjudicating Authority eventually passed an order on 29th March, 2001 holding the appellants guilty of violation of provisions of Sections 8 and 14 of FERA inasmuch the appellants had received payments from various persons on account of tickets booked by them for US $ 846116.14 and GB Pounds 156943.16 which were credited to the account No.10975 at Geneva and which they failed to surrender to an authorised dealer in foreign exchange in India within three months of becoming the owner or holder thereof without the general permission of the RBI as required under Section 14 of FERA. The Adjudicating Authority has further held the appellants guilty of transferring foreign exchange of GB Pounds 138671.40 and US $ 672131.85 from the said Geneva Account No.10975 of M/s Bountiful Ltd. to various persons during the period of November, 1994 to July, 1995 without the previous general or special permission of the RBI, thereby contravening Section 8(1) of FERA, 1973. The Adjudicating Authority on that basis levied a penalty of Rs.90,00,000/- for contravening Section 14 and Rs.85,00,000/- for contravention of Section 8(1) upon M/s Telestar Pvt. Ltd., Mumbai. The Authority further levied a consolidated penalty of Rs.20,00,000/- each upon the remaining appellants Mr. Arun N. Desai, Managing Director, Mr. Rajesh Desai and Mr. Sujeet Desai, his sons.

A B C D E F G

4. Aggrieved by the order passed by the Adjudicating Authority, the appellants appealed to the Appellate Tribunal for

H

A Foreign Exchange, New Delhi. The Tribunal, as already mentioned, allowed the said appeals but only in part and to the limited extent of reducing the penalty imposed by the Adjudicating Authority by 50%. The Tribunal, upon reappraisal of the entire material on record, affirmed the findings recorded B by the Adjudicating Authority that the appellants had indeed committed violation of Sections 8 and 14 of the FERA 1973 as noticed earlier. The further appeals before the High Court of Judicature at Bombay by the appellants also failed and were dismissed *in limine* by the High Court by order dated 14th C March, 2008. Hence the present appeal.

5. Appearing for the appellants, Mr. Shyam Diwan, learned senior counsel, made a three-fold submission in support of the appeals. Firstly, he contended that the judgment and order passed by the Adjudicating Authority was *ex parte* D hence liable to be set aside. Elaborating that submission Mr. Diwan argued that since the adjudication order had been passed by the authority concerned nearly 3½ years after the matter was finally argued before it, the requirement of affording an opportunity of being heard to the appellants arising under E Section 51 of FERA was not satisfied. It is submitted that the appellants had been prejudiced on account of delayed pronouncement of the adjudication order as the documents available with them could not be placed before the said authority after the hearing of the matter. He further contended F that Rule 3 of the Adjudication Rules provided for a personal hearing which was no doubt provided on the date the matter was finally argued before the Adjudicating Authority but which hearing ought to have been repeated as the pronouncement of the order by the Authority had been delayed. Reliance in G support of the submission was placed by Mr. Diwan upon the decisions of this Court in *Bhagwandas Fatechand Daswani and Ors. v. HPA International and Ors.* (2000) 2 SCC 13, *Kanhaiyalal and Ors. v. Anupkumar and Ors.* (2003) 1 SCC 430 and *Anil Rai v. State of Bihar* (2001) 7 SCC 318.

H

6. On behalf of respondent, it was per contra argued by Mr. P.P. Malhotra, learned Additional Solicitor General, that the order passed by the Adjudicating Authority was fully compliant with the provisions of Section 51 read with Section 30 of the Rules under FERA and could not be treated as an *ex parte* order by any stretch of reasoning. He also contended that mere delay in the pronouncement of adjudication order was not enough to justify setting aside of the order if the same was otherwise found to be legally valid and unacceptable. No prejudice was, at any rate, caused to the appellants by the delay, according to Mr. Malhotra, who placed reliance on the decision of this Court in *Ram Bali v. State of U.P.* (2004) 10 SCC 598 to argue that delay in the pronouncement was not itself sufficient to declare the order to be bad in law. This Court has, according to Mr. Diwan, deprecated the practice of Courts and Authorities delaying the pronouncement of orders and matters that have been heard and reserved for such pronouncements. There is no gainsaying that any Court or Authority hearing the matter must within a reasonable time frame pronounce the orders especially when any misgiving arising out of inordinate delay which gave rise to unnecessary apprehensions in the minds of litigants especially in the minds of a party that has lost the matter at the hand of such long delay. We can only express our respectful agreement with the observations made by this Court in the decisions relied upon by Mr. Diwan that have issued guidelines and set out time frame considered reasonable for pronouncement of order by Courts and Authorities. Even so, the question remains whether delay by itself should constitute a ground for setting aside the order that may otherwise be found legally valid and justified. Our answer to that question is in the negative. The decision of this Court in *Ram Bali v. State of U.P.* (2004) 10 SCC 598 is one such case where the Court repelled a similar argument and declared that delay was not a ground by itself that otherwise specifically dealt with the matter in issue. The Court at best put to caution requiring a careful and closer scrutiny of the order that was pronounced after undue delay but if upon such scrutiny

A also the order is not found to be wrong in any way it may decline to set aside the same.

7. We have in the instant case heard the matter at considerable length for a careful examination of the adjudication by the Authority and that of the Appellate Tribunal and the High Court to examine whether it suffers from any illegality or material irregularity causing prejudice to the appellants. We are of the view that no such illegality or irregularity has been demonstrated. That apart delayed pronouncement of the order by the Adjudicating Authority was not urged as a ground of challenge before the Tribunal or the High Court both of whom have remained silent on this aspect. Even on the question of prejudice we find the contention of Mr. Diwan to be more imaginary than real. The argument regarding prejudice is founded on the plea that the appellants could not place some of the documents which they have now placed before this Court for consideration. It is further admitted that no application for permission to produce these documents was filed by them before the Adjudicating Authority no matter they could have done so if they really indeed needed to place reliance on such documents. Mr. Malhotra was, in our view, justified in contending that the hearing had been concluded by the Adjudicating Authority in keeping with the requirement of Section 51 and Rule 3 of the Adjudication Rules under FERA. The first limb of the contention urged by Mr. Diwan, therefore, fails and is hereby rejected.

8. It was next argued by Mr. Diwan, that the Adjudicating Authority had placed reliance upon the retracted statements of the appellants while holding that Bountiful Ltd. was a paper company and that its financial control lay in their hands, so that receipt and appropriation of the foreign exchange by that device was a clear violation of the provisions of FERA.

9. A reading of the order passed by the Adjudicating Authority would show that the appellants had in their responses to the show cause notice and the addendum to the same

specifically raised a contention that the statements made by them were not voluntary and could not, therefore, be relied upon. That contention was not only noticed by the Adjudicating Authority but specifically dealt with and rejected holding that the statement was voluntary in nature and that the subsequent retraction is a mere after thought with a view to escaping the consequences of the violations committed by them. The Adjudicating Authority, we are more than satisfied, was aware of the requirement of examining the voluntary nature of the statements being relied upon by it. It has accordingly examined that aspect and given cogent reasons for holding that the statements were indeed voluntary and incriminating both. The Adjudicating Authority has observed:

> *"On going through the records of the case, I find that the statements dated 24.8.95, 25.8.95 and 6.2.96 of Shri Arun N. Desai, the Noticee No.1 and the statements dated 24/25.8.95 of Rajesh N. Desai and Sujeet Desai, the Noticee Nos. 2 & 3 were all given by the respective notices in their own handwriting and in the language known to them. Shri Arun Desai, in his statements, had explained in detail the functioning of M/s Telestar Travels, the Travel Agency, mainly engaged in booking of domestic and international air tickets for crew members joining foreign ships; the need for entering into an agreement with agents abroad; the mode of payments received ant eh commission/profit earned on the tickets booked by them through the overseas shipping companies and also how their commission was being remitted either by draft or telegraphic transfer into their account No.82886 in Bank of Baroda, Churchgate Branch etc. I thus find that the statemtns of the notice I contain such inner and minute details, which could have been given out of his personal knowledge and could not have been invented by the officers who recorded the said statements. Moreover, the statement of the notice No.1 have been confirmed by the statements of the other two*

notices S/Shri Rajesh and Sujeet Desai, in their respective statements given before the Enforcement Officers. Even otherwise there is nothing on record that might cast the slightest doubt on the voluntariness of the statements in question. I am, therefore, of the view that the statements in question were given by the respective three notices voluntarily in explanation of the plethora of documents seized from the business/residential premises of the notices and contain those details which they wished to state. The retraction subsequently filed by the notices S/Shri Rajesh Desai and Sujeet Desai are merely an afterthought to escape from the clutches of law and I reject them in toto."

10. In the appeal filed by the appellants before the FERA Appellate Tribunal also a contention as to the voluntary nature of the statements made by the appellants was urged on their behalf but rejected by the Tribunal in the following words:

"It is argued that the statements given by Shri Arun Desai, Rajesh Desai and Sujeet Desai were not the voluntary ones which were dictated by the Enforcement Officers and were obtained under threats and coercion which were subsequently retracted and that there was no corroborative material to support them. But we find no force in these arguments because the appellants, in their statements, had explained in detail the functioning of M/s. Telstar Travels, which was engaged in booking of domestic and international air tickets for crew members joining foreign ships, the need for entering into an agreement with agents abroad, the mode of payments received and the commission earned on the tickets booked by them through the Over Shipping Companies and how their commission was remitted through Banking channel. Moreover, they were written in their own handwriting and in the language known to them. The statements contained such inner and minute details

which could have been given out of their personal knowledge and could not have been invented by the officers of the Department."

11. The Tribunal has relying upon the decision of this Court in *K.T.M.S. Mohd. v. Union of India* (1992) 3 SCC 178, *K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin* (1997) 3 SCC 721 held that retracted statements could furnish a sound basis for recording a finding against the party making the statement. There is, in that view, no gainsaying that the Adjudicating Authority and the Appellate Tribunal have both correctly appreciated the legal position and applied the same to the case at hand, while holding that the statements were voluntary and, therefore, binding upon the appellants. Decision of this Court in *Vinod Solanki v. Union of India & Anr.* (2008) 16 SCC 537 relied upon by Mr. Diwan does not lend any help to the appellants. The decision is an authority for the proposition that a person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by an inducement, threat or promise by a person in authority. The burden is on the authority/prosecution to show that the statement sought to be relied upon was voluntary and that the Court while examining the voluntariness of the statement is required to consider the attending circumstances and all other relevant facts. The decision does not hold that even when a statement is founded upon consideration of the relevant facts and circumstances and also found to be voluntary, it cannot be relied upon because the same was retracted. We may usefully refer to the legal position stated in the following paragraph by this Court in *K.T.M.S. Mohd. & Anr.* (supra):

"34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of

A Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi
B manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails
C to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent
D retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law,
E this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its
F opinion before accepting the inculpatory statement lest the order will be vitiated..."

(emphasis supplied)

12. That brings us to the submission of Mr. Diwan that the
G arrangement arrived at between the Appellant Company, on the one hand, and Clyde Travels Ltd. and Bountiful Ltd., on the other, was commercial in nature which the Adjudicating Authority and the Tribunal had failed to appreciate in its true and correct perspective. There was, according to Mr. Diwan,
H

no real basis for the Adjudicating Authority and the Tribunal to hold that Bountiful was a paper company and that it was being controlled by the Desais from India. Mr. Diwan made a strenuous attempt to persuade us to reverse the findings of fact recorded by the Adjudicating Authority and the Tribunal on this aspect. We regret our inability to do so. Whether or not Bountiful Ltd. is a paper Company and whether or not it was controlled and operated by the appellants is essentially a question of fact to be determined on the basis of the material collected in the course of the investigation. The Adjudicating Authority and Tribunal have answered that question in the affirmative taking into consideration the statements made by the appellants as also the documents that were recovered from their premises. All these documents and incriminatory circumstances have been discussed in the following passage by the Adjudicating Authority:

> *"...A perusal of the records indicate that various incriminating documents together with the Indian currencies were seized from the office premises of M/s Telstar Travels and also from the residence of Shri Arun Desai, the Managing Director of the said company. All the three noticees S/Shri Arun Desai and his two sons Rajesh and Sujeet Desai, have given their statements before the Enforcement Officer, in explanation of the said seized documents. It is also noticed that the seizure of documents and currencies had not been disputed by the notices at any point of time. Shri Rajesh Desai, son of the said Shri Arun N. Desai and one of the noticees in the impugned SCN, while explaining page No.18 of the bunch of documents marked 'G', had clearly admitted that it was the message from Shri Sirish Shah from London informing that US $ 33884 has been credited on 14.11.94 to the account of Bountiful. Similarly page Nos.30 & 34 of file marked 'I', contain instructions to transfer certain amounts to the account of Clyde Travels Ltd. Glasgow. When Shri Rajesh Desai was questioned as to how could*

A *issue such instructions in respect of the account of Bountiful Ltd., he clearly explained in his statement dated 24.8.95 that the account No.10975 of Bountiful at Geneva was an account of a paper company held by him for the sole purpose of receiving and making payments in*
B *respect of seamen airline tickets which were obtained at the very cheap rates from M/s Clyde Travels, Glasgow, with whom M/s Telstar had a tie up since August 1994; that Shri Sirish Shah was a Chartered Accountant in London, who was known to both M/s. Clyde Travels and*
C *Telstar; that the said Shri Sirish Shah was used by him for giving instructions to the bank for operating the account of Bountiful Ltd. At Switzerland that the last balance for the said account of Bountiful was US$ 98761.70. Shri Rajesh Desai further explained the page*
D *Nos. at 111 to 125 of file marked 'E' seized from the office of M/s. Telstar Travels. P. Ltd., in his statement dated 24.8.95, admitting the same to be the statement of account of Bountiful Ltd. with Banque De Financement, Geneva, which showed credits of amounts remitted by*
E *various overseas shipping companies against PTA tickets purchased for their crew; that the said credits represented amounts transferred from the bank accounts of their overseas shipping companies; that the debits represented the amounts transferred to the Bank of Scotland Glasgow which is the account of M/s. Clyde*
F *Travels Ltd. in Glasgow; that he was the person giving instructions to Shri Sirish Shah, Chartered Accountant of P.S.J. Alexandar & Co, London to transfer funds from the account in Geneva of M/s. Bountiful to various places which included transfer of funds to M/s Clyde Travels Ltd,*
G *Glasgow which forms a major portion of transfer for PTA tickets."*

13. Dealing with the invoices issued by Bountiful Ltd. to M/s. Ocean Air Ltd. and M/s Scot Travel Ltd., Hong Kong, the
H Adjudicating Authority held that appellant Telestar Pvt. Ltd. had

issued directions that the amount payable be deposited to the credit of M/s Bountiful Ltd. The Adjudicating Authority observed:

> *"... I also find from the records, certain invoices of Bountiful ltd. Drawn on M/s. Ocean Air Ltd. and on M/s. Scot Travel Ltd, Hong Kong, which were produced by Miss Anita Chotrani Travel Co-ordinator of M/s. Denklau Marine Services, Mumbai, which contain directions of M/s Telstar to credit the amount of the bill to the A/c No.10975 of M/s Bountiful Ltd, at Geneva. A scrutiny of the bills produced by the said Miss Anita Chotrani, given by Telstar, it was found that several air tickets of Air India booked by Telstar were also billed in these Bountiful invoices and payment of these Air India tickets have been directed to the Geneva Account. Moreover the bills do not bear any signatures nor the identity of the person allegedly managing the billing on behalf of Bountiful Ltd."*

14. The Adjudicating Authority has also noticed and relied upon incriminating circumstances like instructions issued by appellant Telestar to Bountiful to remit an amount of Rs.4,74,033/- to M/s Aarnav Shipping Company towards repairs of MV Rizcun Trader, a ship owned by one of their principals M/s United Ship Management, Hongkong. Similarly a payment of US$ 12500/- made from Bountiful Account to Mustaq Ali Najumden is also evidenced and was made on the instructions of appellant-Shri Rajesh Desai, which the latter explained to be kickbacks paid to overseas shipping company for giving ticketing business to Telestar.

15. Suffice it to say that there may be sufficient evidence on record for the Adjudicating Authority and the Tribunal to hold that the appellants were indeed guilty of violating the provisions of FERA that called for imposition of suitable penalty against them. It was not the case of the appellants that the findings were unsupported by any evidence nor was it their case that the statements made by the appellants were un-corroborated by any independent evidence documentary or otherwise. In the

A circumstances, therefore, we see no reason to interfere with the concurrent findings of fact on the question whether Bountiful was or was not a paper company controlled by the appellants from India.

16. That brings us to the third limb of attack mounted by
B the appellants against the impugned orders. It was argued by Mr. Diwan that while holding that Bountiful Ltd. was a paper Company and was being controlled and operated from India by the appellants through Shri Sirish Shah, the Adjudicating Authority had relied upon the statements of Miss Anita Chotrani
C and Mr. Deepak Raut, and a communication received from the Indian High Commission in London. These statements and the report were, according to Mr. Diwan, inadmissible in evidence as the appellant's request for an opportunity to cross examine these witness had been unfairly declined, thereby violating the
D principles of natural justice that must be complied with no matter the strict rules of Evidence Act had been excluded from its application. Inasmuch as evidence that was inadmissible had been relied upon, the order passed by the Adjudicating Authority and the Tribunal were vitiated. Reliance in support was
E placed by Mr. Diwan upon the decisions of this Court in *New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr.* (2008) 3 SCC 279, *S.C. Girotra v. United* 1995 Supp. (3) SCC 212, *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, and *M/s Bareilly Electricity Supply*
F *Co. Ltd. v. The Workmen and Ors.* (1971) 2 SCC 617.

17. Mr. Malhotra, on the other hand, argued that the right of cross-examination was available to a party under the Evidence Act which had no application to adjudication proceedings under FERA. He relied upon the provisions of
G Section 51 of the Act and Adjudication Rules framed thereunder in this regard. He also placed reliance upon a decision of this Court in *Surjeet Singh Chhabra v. Union of India and Ors.* (1997) 1 SCC 508 to argue that cross-examination was unnecessary in certain circumstances such as the one at hand

H

where all material facts were admitted by appellants in their statements before the concerned authority. A

18. There is, in our opinion, no merit even in that submission of the learned counsel. It is evident from Rule 3 of the Adjudication Rules framed under Section 79 of the FERA that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a *de novo* enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case. For instance, a similar plea raised in *Surjeet Singh Chhabra v. Union of India and Ors.* (1997) 1 SCC 508 before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed: B C D

> **"3.** *It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-*

A *examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by*
B *him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the*
C *confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds*
D *the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner."*

19. We may also refer to the decision of this Court in *M/s Kanungo & Company v. Collector of Customs and Ors.* (1973) 2 SCC 438. The appellant in that case was carrying on
E business as a dealer, importer and repairer of watches in Calcutta. In the course of a search conducted by Customs Authorities on the appellant's premises, 280 wrist watches of foreign make were confiscated. When asked to show cause against the seizure of these wrist watches, the appellants
F produced vouchers to prove that the watches had been lawfully purchased by them between 1956 and 1957. However, upon certain enquiries, the Customs Authorities found the vouchers produced to be false and fictitious. The results of these enquiries were made known to the appellant, after which they
G were given a personal hearing before the adjudicating officer, the Additional Collector of Customs. Citing that the appellant made no attempt in the personal hearing to substantiate their claim of lawful importation, the Additional Collector passed an order confiscating the watches under Section 167(8), Sea Customs Act, read with Section 3(2) of the Imports and Exports
H

(Control) Act, 1947. The writ petition filed by the appellant to set aside the said order was allowed by a Single Judge of the High Court on the ground that the burden of proof on the Customs Authorities had not been discharged by them. The Division Bench of the High ~~Court~~ reversed this order on appeal stating that the burden of proving lawful importation had shifted upon the firm after the Customs Authorities had informed them of the results of their enquiries. In appeal before this Court, one of the four arguments advanced on behalf of the appellant was that the adjudicating officer had breached the principles of natural justice by denying them the opportunity to cross-examine the persons from whom enquiries were made by the Customs Authorities. The Supreme Court rejected this argument stating as follows:

> *"**12.** We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our-opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."*

20. Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by

A Miss Anita Chotrani and Mr. Raut. These documents were, it is admitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness
B producing the documents is not subjected to cross examination. Such being the case, the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to
C the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The
D third limb of the case of the appellants also in that view fails and is rejected.

21. Mr. Diwan lastly argued that the penalty imposed was disproportionate to the nature of the violation and that this Court could at least, interfere to that extent. We do not see any reason
E much less a compelling one to interfere with the quantum of penalty imposed upon the appellants by the Tribunal. The Adjudicating Authority had, as noticed earlier, imposed a higher penalty. The Tribunal has already given relief by reducing the same by 50%. Keeping in view the nature of the violations
F and the means adopted by the respondent to do that, we see no room for any further leniency.

22. In the result, these appeals fail and are, hereby, dismissed with costs assessed at Rs.50,000/- in each appeal. Cost to be deposited within two months with the SCBA
G Lawyers' Welfare Fund.

R.P. Appeals dismissed.