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

Judgment Reserved on: 29.5.2024

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Judgment Pronounced on: 24.07.2024

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CRL.M.C. 7919/2023 & CRL.M.A. 29532/2023

PAWAN KANT

..... Petitioner

Through: Mr. Mukul Rohatgi and Mr. Dayan Krishnan, Sr. Advocates with Mr. Rishi Aggarwal, Mr. Parminder Singh, Mr. Abhay Agnihotri, Advocates

versus

DIRECTORATE OF REVENUE INTELLIGENCE..... Respondent

Through: Mr. Satish Aggarwala, SSC with Mr. Gagan Vaswant, Advocate.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of present petition filed under Section 482 Cr.P.C. read with Article 227 of the Constitution of India, the petitioner seeks quashing of complaint case being Ct. Case No. 2012/2022 titled as 'Directorate of Revenue Intelligence v. Salt Experience and Management Pvt. Ltd. & Ors.' as well as the summoning order dated 01.07.2023.

2. The facts, necessary for adjudication, are that the petitioner claims to be the Executive Chairman of Hero MotoCorp ('HMC') and owing to the nature and vast expense of its business, HMC availed the services of various entities including one *Salt Experience and Management Pvt. Ltd.* ('SEMPL') for managing meetings and events, both nationally and internationally.



Petitioner claims that in the year 2018, he had to urgently travel to London (and thereafter to Baltimore, USA) for attending certain business meetings and in this regard, services of the SEMPL were availed for logistical facilitation. *SEMPL* deputed one *Mr. Amit Bali* to assist the petitioner in this regard and on 20.08.2018, when the petitioner was travelling by flight being BA No.256, he was off-loaded by the Customs Authority. He was informed that his travel assistant *Mr. Bali* was caught with undeclared foreign currency being 50,049 USD, 30,745 Euros and 25,030 Pounds, cumulatively valued at INR 81,01,421/- . It was further informed that in his statement, *Mr. Bali* had disclosed that the seized currency belonged to the petitioner.

The petitioner, in his statement before the Customs Authority, denied that the said currency belonged to him and further stated that he was unaware that *Mr. Bali* was carrying such currency. He further stated that he used to carry cards to meet his personal expenses during the foreign trips.

3. Upon investigation and based upon 62 documents including statements of several witnesses, a show cause notice dated 17.07.2019 was issued to the petitioner, to which the petitioner sent a reply dated 01.10.2019 wherein he denied all the allegations levelled against him as also the factum that the seized currencies belonged to him.

4. At this stage, it is deemed apposite to extract the relevant contents of the show cause notice, which reads as under:-

“56.1 Now, therefore, M/s Salt Experience and Management Private Limited (M/s SEMPL), Mr. Amit Bali, Mr. Hemant Dahiya, Mr. K. R. Raman and Mr. Pawan Kant Munjal, are hereby called upon to show cause to the Adjudicating Authority i.e. the Additional/ Joint Commissioner of Customs, Terminal-3,



IGI Airport, New Delhi-110037, as to why:

- (i) *the foreign currencies i.e. 50,409 USD, 30745 Euro and 25030 Pound Sterling, totally equivalent to Rs. 81,01,421/- (Rs. Eighty One Lakh One Thousand Four Hundred and Twenty One only), as per the Notification No. 74/2018-Customs (NT) dated 16.08.2018, seized from Mr. Amit Bali on 20.08.2018 at IGI Airport, New Delhi should not be confiscated under Section 113(d) of the Customs Act, 1962 for violations of the provisions of the Customs Act, 1962 read with provisions of Foreign Exchange Management Act (FEMA), 1999, Rules, Regulations and Instructions issued thereunder;*
- (ii) *The foreign currencies viz. 25780 Euros and 50,250 USD, totally equivalent to Rs. 51,77,564/- (Rs. Fifty One Lakh Seventy Seven Thousand Five Hundred and Sixty Four only), details of which were found in the paper slip [kacchaparchi] recovered from Mr. Amit Bali and exported by him illicitly out of India in the past, as detailed supra, should not be held liable to confiscation under Section 113(d) of the Customs Act, 1962 for violations of the provisions of the Customs Act, 1962 read with provisions of Foreign Exchange Management Act (FEMA), 1999, Rules, Regulations and Instructions issued thereunder;*
- (iii) *The foreign currencies equivalent to Rs. 3,72,64,700/- (Rs. Three Crore Seventy Two Lakh Sixty Four Thousand And Seven Hundred only), details of which were found in the pen-drive recovered from the office of M/s SEMPL, exported by him illicitly out of India in the pastas discussed supra, should not be held liable to confiscation under Section 113(d) of the Customs Act, 1962 for violations of the provisions of the Customs Act, 1962 read with provisions of Foreign Exchange Management Act (FEMA), 1999, Rules, Regulations and Instructions issued thereunder;*
- (iv) *The foreign currencies equivalent to Rs. 21,35,25,172/- (Rs. Twenty One Crore Thirty Five Lakh Twenty Five Thousand One Hundred and Seventy Two Only), illegally carried out of India by Mr. Amit Bali through the Multi-*



currency Forex Travel cards issued in the name of other employees of M/s SEMPL and used for meeting the expenses of Mr. P. K. Munjal abroad, as discussed supra, should not be held liable to confiscation under Section 113(d) of the Customs Act, 1962 for violations of the provisions of the Customs Act, 1962 read with provisions of Foreign Exchange Management Act (FEMA), 1999, Rules, Regulations and Instructions issued thereunder;

(v) The foreign exchange equivalent to Rs. 13,90,20,897/- exported out of India by Mr. Amit Bali, over and above the prescribed limit of USD 2,50,000, in the financial years 2018-19, 2017-18, 2016-17, 2015-16 and 2014-15, as detailed supra, in violation of Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 dated 3rd May, 2000, should not be held liable to confiscation under Section 113(d) of the Customs Act, 1962 read with provisions of the Foreign Exchange Management Act (FEMA), 1999, Rules, Regulations and Instructions issued thereunder; and

(vi) penalty should not be imposed on each of them, individually, as discussed supra, under the provisions of Section 114(i) of the Customs Act, 1962.”

5. In the adjudication proceedings, the competent authority i.e. the Additional Commissioner of Customs, New Delhi, after considering the show cause notice as well as the reply, vide order dated 19.11.2019 directed for dropping of proceedings against the petitioner. It was categorically observed that SEMPL was the owner of the foreign currency and that the respondent had failed to prove that the petitioner was the ‘beneficial owner’ of the same, who was to enjoy its fruits.

In appeal, the appellate authority however disagreed with the findings and while allowing the appeal vide its order dated 30.07.2021, held the petitioner to be the ‘beneficial owner’ in terms of Section 2(3A), Customs



Act and consequently, penalty was imposed upon him.

6. Aggrieved by the order passed in appeal, the petitioner filed a challenge before Customs, Excise & Service Tax Appellate Tribunal (CESTAT), wherein vide order dated 28.03.2022, the order passed by the Commissioner of Customs (Appeals) was reversed and it was observed that the petitioner cannot be treated as a 'beneficial owner'.

Further, the said order of the CESTAT also came to be challenged before this High Court as well as Supreme Court, however, the said challenge also came to be dismissed vide orders dated 05.10.2023 and 26.04.2024 respectively.

Thus, in the adjudication proceedings, it was conclusively held that the petitioner was not the "beneficial owner" of the seized currency.

7. Apparently, in between on 19.04.2022, the Assistant Director, Directorate of Revenue Intelligence issued an Investigation Report for launching prosecution against the petitioner and sanction was also granted for the same. Consequently, the impugned complaint dated 06.10.2022 came to be filed before the learned MM and the impugned summoning order was passed.

8. Learned Senior Counsels for the petitioner have challenged the impugned complaint and summoning order by contending that the same are based upon the same facts which have become stale after passing of CESTAT order. It was contended that in terms of Section 129B(4) read with Section 130D of the Customs Act, the said order had become final and keeping in view Clause 15.9.2 of the Customs Manual, 2023, the prosecution and impugned complaint could not be continued.

It was further contended that as per Section 2(3A) of the Customs



Act, 1962, a beneficial owner can only be such an individual either on whose behalf some goods are imported/exported or who exercises effective control over such goods. However, in the present case, there is no material on record to show that the goods (in this case the foreign currency/exchange) were either being carried on behalf of the petitioner or that the petitioner had effective control over them.

9. Learned SSC for the respondent, on the other hand, has resisted the petition by contending that the same is premature and devoid of merits. He contended that the impugned complaint came to be filed for offence under Section 135 Customs Act, after due investigation and collection of evidence.

It was further contended that Clause 15.9.2 of the Customs Manual, 2023 provides for continuation of criminal proceedings in situations even if the alleged offender has been exonerated in adjudicatory proceedings and that the effect of such exoneration would depend upon the nature of findings. In this regard, he had argued that the petitioner has not been exonerated on merits, as evidenced in the order passed by this Court.

Insofar as the contention relating to the petitioner having no effective control over the goods (i.e. foreign currency/exchange) is concerned, it has been fairly conceded that the petitioner did not have any such effective control over the currency.

10. Since both the parties have made reference to Clause 15.9.2 of the Customs Manual, to appreciate their contentions, this Court deems it apposite to reproduce the same. The aforesaid clause reads as under:-

“15.9.2 Prosecution for withdrawal of Complaint already filed for prosecution

A. In cases where the complaint has already been filed in the



Court, it will be up to the Court to decide whether or not to pursue prosecution in terms of section 257 and 321 of Cr. P.C, 1973. If the order for withdrawal has been given by a Court, the prosecution can be withdrawn by the Assistant/Deputy Commissioner or Assistant/Deputy Director after getting a formal order from the Chief Commissioner/Principal CC or DGRI/Pr. DGRI as the case may be.

B. As per decision of Hon'ble Supreme Court in the case of Radhe Shyam Kejriwal [2011 (266) E.L.T. 294 (S.C.)]:

(a) the findings in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue, and

(b) in case of exoneration, however, on merit where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of circumstances cannot be allowed to continue, underlying principle being the higher standard of proof in criminal cases.

C. In respect of cases covered under clause (b) above, the Chief Commissioner/Principal CC or DGRI/Pr. DGRI would ensure moving an application through Public Prosecutor in the court for withdrawal of prosecution in accordance with law.

The withdrawal can only be effected with the approval of the court.”

11. A reading of the aforesaid clause makes it clear that the effect of exoneration upon the prosecution would depend upon its nature i.e. if the exoneration is on some technical ground, then the criminal prosecution may be continued. However, if the exoneration was on merits, then the prosecution cannot be allowed to be continued. This stems from the nature of the criminal prosecution and the higher standard of proof necessitated in such situations.

12. At the outset, it must be noted that the impugned complaint is based



upon the same factual matrix/situation as was under consideration in the adjudicatory proceedings and which had resulted in the exoneration of the petitioner. Thus, the prime question that this Court needs to answer is whether the exoneration of the petitioner was on technical grounds or based upon merits.

13. The CESTAT, while considering the material placed before it, had observed that:-

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25. Girijesh Kashmira, Cashier of SEMPL, in his statement made on 28.09.2018 stated that it he had handed over the foreign currency to Amit Bali. He clarified that the said foreign currency was taken out from the safe kept in the office and he had received instructions from K.R. Raman to give the foreign currency to Amit Bali.

26. The appellant, in his statement recorded on 20.08.2018, stated that he had meetings with business clients at London, after which he was scheduled to go to Baltimore for business meetings. He further stated that Amit Bali assisted him during his business travel and that he was not aware that Amit Bali was carrying foreign currency. He was also specifically asked that in that statement made on 20.08.2018 Amit Bali had stated that the seized currency belonged to him (the appellant), to which he replied that he did not know as to why Amit Bali had made such a statement and reiterated that the seized foreign currency did not belong to him.

27. The aforesaid statements made under section 108 of the Customs Act give credence to the factual averments made by the appellant regarding the contractual arrangement between HMC and SEMPL and the fact that the foreign currency did not belong to the appellant and in fact belonged to SEMPL, which currency was in the possession of Amit Bali for meeting the expenses to be undertaken. It also transpires that SEMPL would raise invoices for such expenses together with its service charge and thereafter payments were made by HMC. The actual owner of the foreign



currency having been identified, the concept of 'beneficial owner' does not arise. The Commissioner (Appeals), therefore, was not justified in reversing the finding recorded by the Additional Commissioner that the concept of 'beneficial owner' would not arise in the facts and circumstances of the case.

28. *It further transpires that HMC had arranged SEMPL as the service provider for the event management outside India and it was the responsibility of SEMPL to acquire foreign exchange which was acquired by SEMPL and handed over to Amit Bali for discharge of the contractual obligation of organising and arranging meetings. The Commissioner (Appeals) has merely on conjectures and surmises assumed the liability of the appellant in relation to the export of foreign currency.*

29. *The foreign exchange for corporate purposes has wrongly been treated as personal expenses merely because the appellant is the Chairman and Managing Director of HMC, which had organized, through SEMPL, events and meetings as part of its marketing and promotional activities. The meetings and events would benefit SEMPL and its business and it would not be correct to hold the appellant as the 'beneficial owner'.*

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39. *In view of the fact that the appellant is not a 'beneficial owner' defined under section 2(3A) of the Customs Act, the order dated 30.07.2021 passed by the Commissioner (Appeals) that imposes penalty and fine upon the appellant treating the appellant as a 'beneficial owner', cannot be sustained.*

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14. On the issue raised, the relevant observations of the Division Bench are extracted hereunder:-

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18. *That takes us to the principal question, namely of whether the Appellate Authority was justified in invoking the principles enshrined in Section 2(3A) and whether the respondent could justifiably be held to be the beneficial owner of the currency*



which was confiscated.

19. *The CESTAT in its judgment has found on facts that the respondent was undertaking the travel by virtue of being the Chairman and Managing Director of Hero MotoCorp. Ltd. and was proceeding on an official engagement. Undisputedly, the journey in the course of which the seizure was affected was not a personal visit of the respondent but was to attend to various business meetings and events for and on behalf of HMC and which meetings and events were being managed by SEMPL. It is in the aforesaid background that the Tribunal has come to the conclusion that the respondent could not be held to be the beneficial owner of the seized currency.*

20. *We further note from the various statements made in the course of investigation and the facts that stood recorded in the Order-in-Original that it was not the case of the appellant that the currency had been provided by the respondent. In fact, and to the contrary, the Order-in-Original refers to the currency being obtained from the stock as maintained by SEMPL and having been duly handed over by an employee of that entity to Mr. Amit Bali. While Mr. Ojha had sought to contend that in the past SEMPL employees are allegedly stated to have admitted to carrying currency which was utilized to meet the personal expenses of the respondent, the same is clearly immaterial since the proceedings emanating from the SCN in question stood restricted to the business travel of the respondent while acting as a Managing Director of HMC.*

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15. As noted earlier, the SLP filed against the aforesaid order stands dismissed.

16. The refusal of the Supreme Court as well as by Division Bench of this Court to interfere in the order passed by the CESTAT was after due consideration of the facts. A plain reading of the order passed by CESTAT leads to an irresistible conclusion that the decision by CESTAT, thereby



exonerating the petitioner, is not on technical grounds but a conclusion based upon merits.

The entire proceedings, as iterated above, clearly show that the aforesaid adjudication had attained finality, and it had been determined that the petitioner was not the 'beneficial owner' of the foreign currency/exchange and could not be held liable. Considering that the impugned complaint is based upon the same factual matrix as was under consideration in the adjudicatory proceedings (which have since attained finality) and further in line with the established legal principles as well as Clause 15.9.2 of the Customs Manual, the continuation of the present criminal proceedings is not tenable.

17. Further, insofar as the aspect of the petitioner being considered a beneficial owner is concerned, it must be noted that HMC (of which the petitioner was the Executive Chairman) and SEMPL are two distinct entities, and as recorded in the order passed by the Additional Commissioner of Customs, SEMPL was one of the independent, specialist third party service provider which provided certain services and raised invoices qua the same, which were duly paid by HMC. There existed no agent-principal or master-servant relation between SEMPL & HMC, and all transactions between them were on arms-length basis, duly audited by the statutory auditors of HMC.

Insofar as the relation between the petitioner and SEMPL was concerned, it was noted that the petitioner neither had any shareholding nor any financial interest in SEMPL (either directly or indirectly) and was also not a Director in SEMPL inasmuch as there were only three Directors: Mr. Hemant Dahiya (Managing Director), Mr. Herbart Mohan Spatt and Mr.



Abhishek Mehra. Further, in his statement, Mr. Hemant Dahiya had clearly stated that it was one Mr. K.R. Raman, who determined the expected expenses and upon whose directions, the aforesaid amount was given to Mr. Bali. Though initially, Mr. Bali had stated that the foreign currency belonged to the petitioner, however, later he backtracked from the same and stated that the foreign currency was for the use of the petitioner. However, it must be noted that apart from the aforesaid statement of Mr. Bali (which has been significantly changed since the time of his statement), nothing has been placed on record to show that the foreign currency was being carried on the instructions or for the benefit of the petitioner. Further, it has already been conceded by learned counsel for the respondent that the petitioner was not in effective control of the foreign exchange.

Considering the aforesaid aspect as well as the categorical admission by the petitioner that he was unaware that Mr. Bali was carrying such foreign exchange and that he used to manage the personal expense from his own cards, it cannot be said that the said foreign exchange was being carried on his behalf. Thus, the conditions as regards being a 'beneficial owner' have not been satisfied qua the petitioner in the present case. This factum has been succinctly discussed by the Additional Commissioner of Customs in his order, whereby the petitioner was made not liable and which order has since travelled upto the Supreme Court and the decision by the Additional Commissioner has been upheld.

18. Considering the factual situation expressed above as regards the petitioner not being the 'beneficial owner' as well as the fact that the subject complaint has been filed based upon the same facts as have been conclusively determined by the learned CESTAT, this Court finds that the



continuation of the subject complaint would be nothing but an abuse of the process of law.

19. Consequently, the petition is allowed and the complaint case being Ct. Case No. 2012/2022 is quashed. As a necessary sequitur, the summoning order dated 01.07.2023 is set aside. The petition alongwith pending application is disposed of in the above terms.

**(MANOJ KUMAR OHRI)
JUDGE**

JULY 24, 2024

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