IN THE HIGH COURT OF SINDH AT KARACHI

Present: Mr. Justice Omar Sial

Criminal Acq. Appeal No. 15 of 2013
Criminal Acq. Appeal No. 46 of 2014

Appellant	:	Kamran Chandna through Mr. Mehmood A. Qureshi, Advocate
Respondents	:	Zulfiqar Momin and Muhammad Anees through M/s. Badar Alam & M. Kashif Badar, Advocates
	:	Asim Siddiqui through Syed Khurram Nizam, Advocate
	:	The State through Mr. Khaliq Ahmed, DAG
Date of hearing	:	12th October, 2022

JUDGMENT

A background to the case

1. Kamran Chandna, the appellant in both appeals, was the Managing Partner of Chandna Corporation ("**Chandna"**). On 05.04.2008 he filed a complaint with the F.I.A. He recorded that he had wanted to export 11 consignments of his product to the United States. For this purpose he engaged Trans Asia Shipping Agency ("**TSA"**) as his freight forwarder. The consignee in the U.S. was to be the New York Branch of the Metropolitan Bank. Chandna alleged that though the Combined Transport Bill of Lading was issued correctly, due to a fraudulent act committed by TSA in collision with their shipping agent in Pakistan, Portlink International Services ("Portlink"), the consignees name in the Master Bill of Lading (issued subsequently) was changed from Metropolitan Bank to Global Transportation Services ("**Global**") and Stone Path Logistics ("**Stone Path**"). He further alleged that the new consignee was hand in glove with TSA and that's the reason, the consignments were released in the U.S., without any payment being received. Consequently, Chanda alleged that he did not receive the payment for his goods and that the national exchequer was also wrongly deprived of the foreign exchange it was to receive on account of the incoming export proceeds.

2. Chandna went on to allege that when he brought up the issue with TSA, a settlement was reached between the parties. TSA reimbursed 75% of the value of goods and agreed to bring in to the country the requisite foreign exchange. TSA also promised that the remaining 25% of the payment would be given to Chandna by or before 10.04.2008. TSA's performance of the contract, to the extent of the 25% payment, was guaranteed by Metropolitan Bank, Karachi.

3. In the meantime, it seems, TSA had also taken up the issue with the foreign buyers who had received the consignment in the U.S. According to Chandna, a settlement was reached between TSA and the foreign buyer because of which TSA received USD 515,000 from the foreign buyer. Even then, Chandna alleged, neither did the foreign exchange come into the country nor did TSA give him the 25% which they had promised.

4. F.I.A. in its inquiry reached the conclusion that the 2 directors of TSA i.e. Zulfiqar Memon and Muhammad Anees (respondents in Criminal Acquittal Appeal No. 15 of 2013) and Asim Siddiqui (Director of Port Link and the respondent in Criminal Appeal No. 46 of 2014) had in the Master Bill of Lading fraudulently replaced the name of the shipper from Chandna to TSA and that a similar fraud was played by them in replacing the name of the consignee in the US from Metropolitan Bank to that of the foreign buyers i.e. Global and Stonepath. The foreign buyers had then taken away the consignment without paying money to the negotiating bank i.e. HSBC, US. The F.I.A. therefore registered F.I.R. No. 01 of 2009 against Zulfiqar Memon and Muhammad Anees under sections 409, 420, 468, 471 and 109 P.P.C as well as section 156(i) and 77 of the Customs Act, 1969 as well as section 12(1) of the Foreign Exchange Regulation Act, 1947. Asim Siddiqui's name was added subsequently.

5. The investigating officer of the case filed 2 separate challans in 2 separate courts. One challan was filed before the Tribunal for Foreign Exchange Regulation Cases ("**Tribunal**"). This challan was restricted to the offences under the Pakistan Penal Code i.e. sections 409, 420, 468, 471 and 109 P.P.C as well as the offence under the Foreign Exchange Regulation Act, 1947 ("**F.E.R.A.**") i.e. section 12(1). A separate challan was filed for the offences allegedly committed pursuant to the Customs Act, 1969 i.e. sections 156(1) and 77 before the learned Special Judge (Customs and Taxation), Karachi.

6. The nominated accused filed an application under section 265-K Cr.P.C. before the Tribunal seeking their acquittal on the ground that the charge was groundless and that there was no possibility of a conviction. The learned Tribunal vide its orders dated 18.12.2012 (for the accused Zulfiqar Memon and Muhammad Anees) and 21.01.2014 (for the accused Asim Siddiqui) while holding that the Tribunal had no jurisdiction to entertain the matter, in an unexplainable move, proceeded to acquit the 3 accused under section 265-K Cr.P.C.

7. It has been argued by the learned counsel for Chandna that (i) the Tribunal did have jurisdiction in the matter (ii) that even if it did not, it could not have acquitted the 3 accused once it determined that it had no jurisdiction. The learned counsels for the accused were of the view that the Tribunal did not have jurisdiction nor was it within the F.I.A.'s jurisdiction to investigate the case. Learned counsels for the respondents have been less forthcoming on the question as to how the Tribunal could acquit when it did not have jurisdiction. The learned DAG took the position that it was wrong of the Tribunal to acquit when it did not have jurisdiction. He supported the assertion that the F.I.A. did have jurisdiction to take cognizance of the matter. I have heard the learned counsels for all the parties as well as the learned DAG. Their respective arguments, for the sake of brevity are not being reproduced but are reflected in my observations and findings below.

8. The aspect of the case that has been strongly argued by all counsels is that of the Tribunal's jurisdiction. The remaining 2 questions i.e. whether F.I.A. had jurisdiction to entertain the complaint filed by Chandna and whether the Tribunal could have acquitted the 3 accused, are contingent on the answer of the jurisdiction question.

Jurisdiction

9. Pursuant to section 23-A(i) of the F.E.R.A. every Sessions Judge shall, for the areas within the territorial limits of his jurisdiction, be a Tribunal for trial of an offence punishable under section 23 of the F.E.R.A.

10. In accordance with section 23 of the F.E.R.A., the Tribunal has been empowered to try offences arising out of contraventions of any of the provisions of F.E.R.A. except the provisions of section 3, section 3A, section 3AA, section 3B, subsections (2) and (3) of section 4, section 10, sub-section (1) of section 12 and

clause (c) of sub-section (1) and sub-section (3) of section 20 or any rule, direction or order made thereunder.

11. Section 3, 3A, 3AA, 3B apply to authorized dealers, money changers and foreign exchanges and are therefore not concerned with the present dispute. Section 4(2) and (3) apply to situations concerning determining of foreign exchange rates and acquisition of foreign exchange, which too is not in dispute. Section 10 applies to situations where a person who has a right to receive any foreign exchange or to receive from any person resident outside Pakistan a payment in rupees does certain acts without the permission of the State Bank of Pakistan. Section 20(1)(c) and 20(3) deal with the powers of the State Bank to issue directives, the contravention of which may incur penal actions. It is not either parties case in the present proceedings that either one of the foregoing provisions are applicable or have been breached.

12. It is the applicability of section 12 of the F.E.R.A. where the parties are at odds. According to the appellant's counsel, section 12(2) has been contravened by the respondents'. While agreeing that a contravention of section 12(1) will not fall within the jurisdiction of the Tribunal, the learned counsel for Chandna was of the view that section 12(2) should be read as a standalone provision and as Chandna was the real seller of the consignments he was entitled to invoke the provisions of F.E.R.A. and the Tribunal had jurisdiction to entertain the case. On the other hand, the respondents stance is that, even speaking hypothetically, at best this is a case under section 12(1) of the F.E.R.A and thus in accordance with section 23 has been excluded from the ambit of cases which can be adjudicated upon by a Tribunal.

13. In order to facilitate reference, sections 12(1) and 12(2) F.E.R.A. are reproduced below:

> ***12. Payment for exported goods. (1)*** *The Federal Government may, by notification in the official Gazette, prohibit the export of any goods or class of goods specified in the notification from Pakistan directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner.*

(2) *Where any export of goods has been made to which a notification under subsection (1) applies, no person entitled to sell, or procure the sale of, the said goods shall, except with the permission of the State Bank, do or refrain from doing any act with intent to secure that:*

(a) the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(b) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the State Bank, or is delayed to such extent as aforesaid :

Provided that no proceedings in respect of any contravention of this subsection shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner

14. The Government of Pakistan has, by Notification Nos. I(6)-ECS/48 and I(7)ECS/48 both dated the 1st July, 1948, issued in pursuance of Section 12 of the F.E.R.A., prohibited the export by post and otherwise than by post, of any goods either directly or indirectly, to any place outside Pakistan, unless a declaration is furnished by the exporter to the Collector of Customs or to such other person as the State Bank may specify in this behalf that foreign exchange representing the full export value of the goods has been or will be disposed of in a manner and within a period specified by the State Bank. (Chapter 12 Section 1 of the Foreign Exchange Regulations Manual (hereinafter the "**Manual**")).

15. As required under the Federal Government Notification Nos. I (6)-ECS/48 and I(7)ECS/48 both dated the 1st July, 1948, the exporters are required to declare their exports to the Customs authorities by filing a Form 'E', which Form must be certified by the Authorized Dealer. (Chapter 12 Section 5(i) of the Manual). The format of a Form "E" is stipulated by the State Bank in Appendix V(10) of the Manual. Form E has to 2 parts to it. The first part is a declaration by the seller or the consignor or the exporter, as the case may be, in which he conforms the accuracy of the description and other details pertaining to the consignment being exported as well as an undertaking that the documents pertaining to the goods being exported shall be submitted to the bank whose

name appears in the Form E within 14 days of shipment of goods. The second part is a certification from the bank that the exporter is known to it, that the requisite arrangements have been made by the exporter for the realization of the export proceeds.

16. It is an admitted position that the Form E required for the export of the consignments, showed Chandna as the shipper. The Combined Transport Bill of Lading also reflected that Chandna was the shipper and the consignee was Metropolitan Bank. The party to be notified was MJT Importers. Although it is called the Combined Transport Bill of Lading, the document appears to reflect a Port to Port shipping rather than a Door to Door, Door to Port or Port to Door shipping. It is also pertinent to note that the Combined Transport Bill of Lading bears a stamp of "Shipped on Board" dated 26.10.2006. There could be an argument whether in such conditions the Combined Bill could be termed as a Bill of Lading, yet I am not commenting on this aspect, as the matter between the parties, I understand is pending adjudication in this Court. Be that as it may, it appears that things between the parties took a turn for the worst when the Bill of Lading which was issued for the consignment showed that the shipper of the consignment was not Chandna but TSA and that the consignee was Stone Path Logistics not Metropolitan Bank. According to Chandna this was done without his authorization and that this is the point in time where the fraud occurred. He also submitted that it was not only his business which had a complaint of this nature but that several other businesses too were exposed to similar situations i.e. the shipping agencies (which TSA was) in collaboration with the freight forwarders (which was TSA itself in this case) would issue Master Bills of Lading in the name of the consolidator of cargo (which TSA was) declaring them as shippers instead of the original shippers. Similarly, the delivery instructions at the port of delivery were also amended to replace the name of the original party to be notified with the name of a party allegedly linked with the shipper of the consignment. The cargo, therefore, at the port of delivery was handed over to the party allegedly in cohorts with the shipper without getting the exporter bills paid through the bank. The foreign buyers then purchase the goods at a lower value as they manage to avoid the C & F charges.

17. An important document in the present case is a Subrogation Agreement entered into between Chandna and TSA on 07.09.2007. The preamble to this agreement acknowledges the following:

(i) That Chandna delivered goods to TSA for shipment to New York for safe delivery to MJT Imports, Inc. and Basic Wear, Inc.

(ii) The said goods were illegally released by Global (TSA's principal) in the U.S. to MJT Imports, Inc. and Basic Wear, Inc.

(iii) TSA has paid Chandna approximately 75% of the value of the goods and that the remaining 25% would be paid by or before 10.04.2008.

(iv) Habib Neapolitan Bank has issued a guarantee on behalf of TSA to secure the 25% payment still remaining to be made by TSA to Chandna.

(v) Chandna agreed to subrogate to TSA all rights of recovery to the extent of its payment, plus any recoveries provided by law in Pakistan, the U.S. or any other jurisdiction which arise from the illegal delivery of shipments.

(vi) Chandna was indemnified against all losses he may incur in connection with the illegal release of the consignments without the original bills being duly endorsed.

18. It appears from the above agreement, which has also not been denied by the parties, that Chandna has already received 75% of the value of the goods from TSA. It is also not denied that foreign exchange in proportion to the 75% has been received in Pakistan and that the issue is pending before the State Bank of Pakistan's adjudication committee. Chandna having received the 75% (as admitted in the Subrogation Agreement) and having subrogated his rights and obtained an indemnity cannot blow hot and blow cold at the same time and seek TSA's penalization under the foreign exchange regulation, as far as the subject matter of this appeal is concerned. The goods were shipped in accordance with the final shipping documents (although Chandna says that it was a fraud) and thus for the records, and as far as the State Bank of Pakistan was concerned, the exporter was TSA and the obligation to bring in the foreign exports in accordance with the Manual was also TSA's. Learned counsel's reliance on section 12(2) of the F.E.R.A. to show that the Tribunal had jurisdiction to take cognizance (as section 12(1) had been expressly excluded from such cognizance by section 23-A

F.E.R.A.), in my opinion, and with much respect, is misconceived. The question of whether the foreign exchange from the consignments that were exported, was received or not, or whether a default had taken place by the shipper (TSA according to the documents finally furnished for export by TSA) will have to be decided by the State Bank of Pakistan, Metropolitan Bank and TSA. Chandna, having subrogated all rights cannot be permitted to step into the shoes of the State Bank and claim that as foreign exchange was not received for the export, he has the right to invoke section 12 F.E.R.A. It would not be appropriate that in criminal proceedings a discourse on the legal character of a subrogation be taken up. It would also be inappropriate that a deeper analysis of shipping, banking and trade laws be taken up. Indeed the civil courts seized of this issue are the forums to comment. There is no complaint from the State Bank or Metropolitan Bank on record that would reflect that Chandna is being held liable for anything in connection with the consignment or as a matter of fact that the export proceeds have not been received in Pakistan. As mentioned above, he has admitted that he has received 75% of the sale price. For the remaining 25% a guarantee was issued on behalf of TSA where Chandna was the beneficiary. If there has been a default on that ground, then the proper course for Chandna would have been to seek his relief under the law of contract, which I understand he has already done. He cannot be permitted to invoke the foreign exchange regulations for the recovery of the 25% balance. There are civil suits pending between the parties in this regard. To conclude, the Tribunal was not empowered under section 12(1) of F.E.R.A. to take cognizance of the offence complained of. The issue, in accordance with the provisions of the F.E.R.A. should be decided by the Adjudicating Officer. An appellate process for a person aggrieved by an order of the Adjudicating Officer is also provided in the F.E.R.A.

Acquittal of the Respondents

19. The learned Tribunal when it had reached a decision that it had no jurisdiction to entertain the case, could not have then gone ahead and acquitted the respondents. It erred in this regard. The learned Tribunal lost sight of the fact that apart from the foreign exchange aspect of the case, Chandna had also alleged violation of several provisions of the Pakistan Penal Code. It must be kept in mind that TSA itself has acknowledged illegalities in the changing of details in the shipping documents and Chandna has throughout maintained that he was

cheated. It is also debatable whether the powers of a trial court under section 265-K Cr.P.C. can be invoked when the grievance of a person is not that the charge is groundless or that a conviction is not possible, but that the court hearing the matter does not have jurisdiction. The learned trial judge seems to have erred on this aspect as well. The proper course would have been for the learned Tribunal to return the challan to the investigating officer for presentation before the court competent to take cognizance of the offences complained of under the Pakistan Penal Code.

Investigation by the F.I.A.

20. Section 3(1) of the F.I.A. Act, 1974 empowers the F.I.A. to inquire into and investigate any offence specified in the Act's schedule. At serial 4 of the schedule are offences in connection with the F.E.R.A. It appears that while the F.I.A. was empowered to inquire into and investigate the complaint filed by Chandna, a half-hearted and incomplete investigation was conducted. Be that as it may, at the stage when Chandna filed the complaint with the F.I.A., the case appeared to look like one under the foreign exchange legislation. There appears to be no *malafide* on part of the F.I.A. in this regard. However, as the position stands now, the dispute between Chandna and the respondents appears to have changed in nature to that of being a dispute between private individuals. As far as Chandna's complaint that he has been cheated is concerned, in view of the subsequent developments, will not attract the interests of the Federal Government. The State Bank of Pakistan and the Federal Government will necessarily be involved in the dispute between TSA, Metropolitan Bank and the State Bank of Pakistan viz-a-viz the export and subsequent remittance of the export proceeds, which I understand is already before the Adjudication Officer. In the changed circumstances, it is my view that the F.I.A. did not have the jurisdiction to entertain Chandna's complaint or investigate the same. Accordingly all the proceedings conducted by F.I.A. in the matter stand quashed.

Opinion of the Court

21. It is held as follows:

i. The learned Tribunal was correct in its opinion that the Tribunal did not have jurisdiction in the case. The appeal is therefore dismissed to this extent.

ii. The learned Tribunal erred in acquitting the respondents after coming to the conclusion that it did not have jurisdiction. The appeal is allowed to this extent.

iii. The F.I.A. did not have jurisdiction in the matter as far as the dispute between Chandna and the respondents in both appeals was concerned. Therefore the proceedings conducted by the F.I.A. are quashed.

iv. The above will not preclude the State Bank of Pakistan from initiating or continuing with proceedings against any person or entity that the State Bank is of the view, is guilty of an offence under the F.E.R.A.

v. The concerned Director in the F.I.A. is directed to ensure that F.I.R. No. 01 of 2009 is cancelled.

vi. The concerned Director in the F.I.A. is directed to ensure that the record of the case with the F.I.A. is transferred to the police station of the Provincial Police having jurisdiction in the matter.

vii. In the event Chandna wants to pursue his complaint, the Provincial Police shall examine the complaint which Chandna had filed before the F.I.A. and if it is of the view that a cognizable offence is made out under the Pakistan Penal Code, proceed to act in accordance with law.

22. Both appeals stand disposed of in the above terms.

JUDGE