

(2023) 07 BOM CK 0056
In the Bombay High Court
Case No : Writ Petition No.8148 Of 2004

Abdul Aziz Ahmed Ansari

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 21-07-2023

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Foreign Exchange Regulation Act, 1973 — Section 9(1)(b), 9(1)(d), 49, 51, 64(2)
Income Tax Act, 1961 — Section 143(3)
Customs Act, 1962 — Section 64(2)

Citation : (2023) 07 BOM CK 0056

Hon'ble Judges : G.S. Kulkarni, J; Rajesh S. Patil, J

Bench : Division Bench

Advocate : A.M.Z. Ansari, Rui Rodrigues

Final Decision : Allowed

Judgement

Rajesh S. Patil, J

1. This Writ Petition is filed under Articles 226 and 227 of the Constitution of India challenging a Judgment and Order dated 24 April, 2004 passed by the Appellate Tribunal for Foreign Exchange, in Appeal No.224 of 1995. The prayers as made in the Writ Petition are as follows:-

(a) That this Hon'ble Court be pleased in its writ jurisdiction to set aside the impugned order passed by the Appellate Authority dated 24.3.2004. (Annexure 'L').

(b) that this Hon'ble Court be pleased to issue a writ & or order in the nature of mandatory order the purpose of refund the amount Rs.1,48,000/- to the Petitioner, which was seized from his premises on 12.5.1988.

(c) Any other further relief may be granted to the Petitioner which this Hon'ble Court may deem fit and proper in the facts and circumstances of the aforesaid case.

2. Petitioner owned Cloth Stores by name Zaibash Cloth Stores at Madanpura, Mumbai. On 12th May, 1988, the officers of Enforcement Directorate (for short E.D.), raided Petitioner's Cloth Stores and seized cash from his cash box in Indian currency being an amount of Rs. 1,78,000/- and few other documents.
3. On 5 May, 1989, a Show Cause Notice was issued by the Assistant Director of Enforcement, to the Petitioner, alleging contravention of Section 9(1)(b) and Section 9(1)(d) of Foreign Exchange Regulation Act, 1973 (for short FERA). The said Show Cause Notice stated that the Petitioner had received Rs.45,000/- from persons residing outside India and made payment on behalf of person, who was residing outside India.
4. The Petitioner responded to the said Show Cause Notice on 1 June, 1989 by submitting a reply to the Assistant Director of Enforcement, Mumbai. In the said reply, the Petitioner denied allegations made in the Show Cause Notice and further furnished an explanation regarding Indian currency found in his Stores.
5. The Assistant Director of Enforcement passed an order on the Show Cause Notice dated 6 October, 1989, thereby holding the Petitioner guilty of the offences under Section 9(1)(b) and Section 9(1)(d) of FERA, and imposed penalty of Rs.15,000/- on each of the counts. The Enforcement Officer accordingly deducted Rs.30,000/- from Rs.1,78,000/-, which was seized from the Petitioner's Cloth Stores and the balance amount of Rs.1,48,000/- was forwarded to the Income Tax Department.
6. Being aggrieved by the Order passed by the Assistant Director of Enforcement, the Petitioner filed an appeal, (Appeal No.514 of 1989) before FERA Appellate Board. The Appellate Board on 25 February, 1992, after hearing the parties was pleased to allow the appeal of the Petitioner.
7. In the meanwhile the Assistant Director of Enforcement, under Section 9(1)(b) and 9(1)(d) of FERA issued another Show Cause Notice, to the Petitioner, dated 25 May, 1990. The said notice stated that the Petitioner had received amount of Rs.1,78,000/- from a person in India on behalf of person residing outside India and was supposed to make payment of Rs.2,89,000/- to various persons on instructions of certain individual residing outside India.
8. The Petitioner on 4 October, 1993 replied to the Second Show Cause Notice, through his advocate and denied allegations made in the Show Cause Notice dated 25 May, 1990.
9. On 16 May, 1995, the Deputy Director of Enforcement Directorate, passed an Order thereby holding the Petitioner guilty under Section 9(1)(d), r/w Section 64(2) of FERA and imposed a penalty of Rs.22,000/- on the Petitioner. The charges under Section 9(1)(b) were dropped.
10. The Petitioner thereafter preferred an appeal before FERA Appellate Board being Appeal No.224 of 1995. On 11 June 2000, the Foreign Exchange Management Act (FEMA) was enacted, thereby replacing the FERA. On

dissolution of FERA Board, and on constitution of FEMA Appellate Tribunal, by operation of Section 49 of FEMA, the Appeal was transferred to the FEMA Appellate Tribunal.

11. In the meantime Petitioner's appeal filed in the year 1993 against Order passed under Section 143 (3) of the Income Tax Act, being Appeal No.CIT(A)/XX/IT-59/RG-17(3)/03-04 was heard by the Commissioner of Income Tax. The said appeal of the Petitioner before the Commissioner of Income Tax was allowed on 16 July, 2004. The Commissioner of Income Tax, held that seized cash of Rs.1,78,000/- is reflected in the cash book and Balance Sheet of the firm M/s. Zaibash Colth Stores.

12. Petitioner by his letter posted on 28 February 2003, informed the Appellate Tribunal that due to poor financial condition, he was unable to attend hearing before the FEMA Appellate Tribunal at Delhi and requested for hearing to be held at Mumbai. However, the hearing was conducted in absence of the Petitioner at Delhi.

13. On 24 March, 2004, the FEMA Appellate Tribunal dismissed the appeal of the Petitioner. Being aggrieved by the said Order, the Petitioner has filed the present Writ Petition. In the Writ Petition, the Petitioner is praying for setting aside the impugned Judgment & Order passed by the FEMA Appellate Tribunal on 24 March, 2004. It is also prayed that a sum of Rs.1,48,000/- be refunded to the Petitioner, which was seized from the Petitioner's Cloth Stores on 12 May 1988.

14. By an Order dated 13 December, 2004, a Co-ordinate Bench of this Hon'ble Court had granted "Rule" on this Writ Petition.

15. Ms.Ansari, counsel for the Petitioner made submissions that the Petitioner, who was a small Cloth Stores owner, was not given a fair opportunity to defend himself and the impugned Order is passed in his absence. The impugned Order was passed by the Appellate Tribunal at Delhi, while the Petitioner was residing in Mumbai and due to poor financial condition was not able to attend the hearing and the said fact was informed by the Petitioner to the Appellate Tribunal. However, the Appellate Tribunal passed the impugned Order in absence of the Petitioner. It was further submitted that the penalty imposed on the Petitioner was very harsh and unjust. She further stated that two Show Cause Notices dated 5 May, 1989 and 25 May, 1990 were issued by E.D. based on the same facts and concerning same seizure. She further submitted that there was no evidence on record to hold the petitioner guilty. Therefore the present Writ Petition should be allowed and the impugned Order should be quashed and set aside. So also the Petitioner should be given a refund of Rs.1,48,000/- that was seized from his premises on 12 May, 1988.

16. Mr.Rui Rodrigues, advocate for Respondent No.1 / Union of India submitted that the Writ Petition has no merits and the impugned Order passed by the Appellate Tribunal was a reasoned Order and no interference is required in the said Order. The Petitioner has admitted that the notice of hearing was received

by him, however he chose not to attend the hearing, hence the Appellate Tribunal had no option but to proceed with the hearing in the absence of the Petitioner. After seizure the Petitioner's statements were recorded, when he had admitted that the offences were committed by him. Hence, the Writ Petition should be dismissed.

17. We have heard Counsel of both the parties. We have also gone through the record.

18. The Officers of E.D. had raided the Petitioner's cloth Stores on 12th May, 1988, and seized cash in Indian currency of Rs.1,78,000/-, and also few other documents were seized. Petitioner's statements were recorded by the officers of E.D., and as per the Respondents, the Petitioner had admitted of committing an offence, in his statement. However, on 24 May, 1988, the Petitioner retracted the statements made before the E.D. officers.

First Show Cause Notice

19. After almost one year of seizure the first Show Cause Notice was issued on 5th May, 1989 by the E.D. to the Petitioner, on the grounds that the sum of Rs.45,000/- was received by the Petitioner from a person residing outside India and the said money was distributed to various persons by the Petitioner in India, thereby contravening the provisions of Section 9 (1) (b) and 9 (1) (d) of the FERA . Petitioner replied to Show Cause Notice by his letter dated 1 June, 1989, explaining his case, that his store is in Madanpura area, which is a Muslim locality and due to EID festival there was lot of sale of clothes in his store on cash basis in the month of April, 1988 and the same can be seen from the Bank statement for the month of April, 1988 which shows Rs.1,07,000/- amount deposited in cash.

20. Pursuant to first Show Cause Notice, the Assistant Director of E.D. held enquiry under Section 51 of FERA. The Assistant Director of E.D. by its Order dated 6th October, 1989 held the Petitioner guilty of offences under Sections 9(1) (b) and 9(1)(d) of the FERA and on the ground that Rs.45,000/- was received from a person residing outside India, and imposed penalty of Rs.15,000/- on each of the Sections. Therefore, the E.D. deducted an amount of Rs.30,000/- from the seized amount of Rs.1,78,000/- and balance of Rs.1,48,000/- was sent to the Income Tax Department.

21. Being dissatisfied with Order dated 6th October, 1989 the Petitioner had preferred Appeal before Foreign Exchange Regulation Appellate Board. The FERA Appellate Board which heard the Petitioner's Appeal by its Order dated 25 February, 1992 allowed the Appeal of the Petitioner. The E.D. accepted the Order and did not carry the proceedings to a higher Court. Therefore, as far as the first Show Cause Notice dated 5 May, 1989 is concerned, the same was set aside and it was directed that penalty amount of Rs.30,000/- to be refunded back to the Appellant.

Second Show Cause Notice

22. Thereafter, after one more year that is on 25 May, 1990 a second Show Cause Notice dated 25 May 1990 was issued by the E.D. to the Petitioner, based on Panchnama dated 12th May, 1988, recorded two years ago stating therein that a sum of Rs.1,78,000/- was received by petitioner from person outside India and the Petitioner was to make payment of Rs.2,89,000/- to various persons in India on behalf of the person outside India. Thereby there was contravention of the provisions of Section 9(1)(b) and 9(1)(d) of the FERA.

23. As far as the second Show Cause Notice dated 25 May, 1990 was concerned, the same was replied by Petitioner by his letter dated 4 October, 1993. The said reply specifically stated that no statements of any person were recorded, who could be alleged to be recipients of the amount. The said letter also recorded that the amount of Rs.1,48,000/- was already released and was sent to the Income Tax Department. The Income Tax Department had issued directions under Section 132 A of the Income Tax Act. This fact itself shows that E.D. had arrived to the conclusion that Rs.1,48,000/- was not received by the Petitioner from a person outside India to be distributed in India. In fact, in Appeal No.514 of 1989, the Appellate Board had set aside the penalty of Rs.30,000/-. The said amount of Rs.30,000/- was refunded back to the Petitioner. The Appellate Board had held that there is no corroboration to the retracted confessional statement, therefore, the penalty was set aside. Therefore, the notice should be set aside.

24. Appeal filed by the Petitioner challenging the second Show Cause Notice was dismissed by the Deputy Director of E.D. by its Order in the appeal. However, it dropped the proceeding initiated against the Petitioner insofar as contravention of Section 9 (1) (b) of the FERA Act, to the tune of Rs.1,78,000/- was concerned. Penalty of Rs.22,000/- was imposed on the Petitioner.

25. An Appeal preferred before the FERA Appellate Board by the Petitioner, was subsequently transferred to the FEMA Appeal Tribunal, who heard the Appeal in the absence of the Petitioner as the Petitioner showed his helplessness to appear in Delhi due to financial constrain. The FEMA Appellate Tribunal dismissed the Petitioner's Appeal, therefore, the present Writ Petition is filed.

26. The Income Tax Commissioner (Appeals), had allowed the Appeal of the Petitioner thereby setting aside the Order passed under Section 143 (3) of the Income Tax Act.

27. The FEMA Appeal Tribunal has heavily relied upon the statement recorded of the Petitioner by the Officers of the E.D. at a time of raid/seizure. The Petitioner had retracted his statement on 25th May, 1988, a fact that the Assistant Director of E.D. while holding the Petitioner guilty of the offences under Section 9(1)(b) and 9(1)(d) of the FERA Act, had imposed penalty of Rs.30,000/- and had deducted the said amount from Rs.1,78,000/- which was seized from the Petitioner and the balance amount of Rs.1,48,000/- was sent to the Income Tax Department. This fact itself prove that the E.D. had not held the Petitioner liable

to have committed offence under Section 9 (1) (b) of the FERA, Act without any valid basis.

28. The Petitioner was successful in setting aside the first Show Cause Notice however, after the Petitioner was successful in setting aside the first Show Cause Notice; a second Show Cause Notice was issued as regards the same seizure of Rs.1,78,000/- in cash from the Cloth Stores of Petitioner.

29. This fact itself shows that after being unsuccessful in the first round, the E.D. had issued a second Show Cause Notice. The E.D. department had not recorded statement of any person who according to them had received any benefit from the said amount of Rs.45,000/-. There was no evidence to prove the petitioner guilty as regards proposed distribution of Rs.2,89,000/-. As regards the sum of Rs.45,000/- is concerned, the Petitioner had officially received these amounts and had shown the same in the Income tax returns. In fact, in the Order of the Commissioner of Income Tax (Appeals), it has been quoted that the assigning officer in his remand report dated 17th June, 2004 had admitted that seized cash seems to be cash on hand on the firm.

30. In fact, there is nothing on record to prove that the Petitioner had committed an offence under Section 9 (1) (d) of the FERA Act. No case is made out for holding the Petitioner guilty for violation of Section 9(1)(d) r/w Section 64(2) of the Customs Act. The seized documents do not corroborate the fact of receipt and distribution of said amount by the Petitioner.

31. This is a clear case where the Petitioner appears to have been deprived of his amount of Rs.1,48,000/- without authority of law on a totally untenable basis. The Petitioner could have utilized the said amount, the value of which at the relevant time was substantial. Considered from all angles, the Respondents could not have retained the said amount depriving the Petitioner from his legitimate entitlement. We would, hence be justified in allowing interest to the Petitioner in allowing this Writ Petition.

32. In the light of the above discussions we allow the Writ Petition by the following order :

Order

(i) The Petition is allowed in terms of prayer clauses (a) and (b) which read as under :-

(a) That this Hon'ble Court be pleased in its writ jurisdiction to set aside the impugned order passed by the Appellate Authority dated 24.3.2004. (Annexure 'L').

(b) that this Hon'ble Court be pleased to issue a writ & or order in the nature of mandatory order the purpose of refund the amount Rs.1,48,000/- to the Petitioner, which was seized from his premises on 12.5.1988.

(ii) An amount of Rs.1,48,000/- shall be refunded by the respondent to the

petitioner within a period of four weeks from today with simple interest at the rate of 6% per annum from 12 May 1988.

33. "Rule" is made absolute.