(2007) 10 DEL CK 0188

In the Delhi High Court

Case No : Writ Petition (C) 6334 of 2007

Ashwani Kumar Jaswal — APPELLANT

Vs

Special Director of Enforcement Directorate of Enforcement and Another — RESPONDENT

Date of Decision : 05-10-2007

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Foreign Exchange Regulation Act, 1973 — Section 18(2), 18(3), 52(2), 52(3), 56

Citation : (2008) 100 DRJ 217

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Amit Sibol and Kamal Sawhney, for the Appellant; Suresh Kait, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—Issue rule. Mr. Suresh Kait waives notice of rule. With the consent of the counsel for the parties the matter was heard for disposal.

2. The limited grievance of the Petitioner in these proceedings is with regard to regarding orders of the Appellate Tribunal dated 21.2.2007 and 4.5.2006 whereby the requirement of pre-deposit embodied in Section 52(2) of the erstwhile Foreign Exchange Regulation Act (hereafter referred to as "FERA") was partially waived. As a result of the said orders, instead of the requirement of having to deposit Rs. 25 lakhs the Petitioner is now called upon to pre-deposit Rs. 10 lakhs as a condition for the hearing of his appeal.

3. The Petitioner was, at the relevant time, Managing Director of M/s Jaswal Granites Ltd. (hereafter "the Company"). The company engaged itself in export of Granite to foreign buyers. Since it did not receive foreign exchange remittances, proceedings under FERA were initiated. On 2.8.2000 a show cause notice was issued, calling upon it to satisfy why action for contravening Sections 18(2) & (3) of FERA ought not to be initiated. The show cause notice was

resisted by the Company as well as the Petitioner in his individual capacity. Parallely criminal proceedings were initiated for offences punishable under Sections 56 & 68 for contravention of provisions of the FERA.

4. On 24.7.2003 the Special Judge ,Economic Offences JWing, Hyderabad convicted the Company and the Petitioner was sentenced to six months S.I. An appeal was preferred by him to the Sessions Court which on 25.1.2005, allowed it. The Petitioner as well as the Company were acquitted on the merits. The revision u/s 397/401 Criminal Procedure Code against that judgment and order of the Sessions Court is pending.

5. On 8.9.2005 the Adjudicating Officer resumed proceedings; and oril 25.7.2006, by an ex parte order be concluded that the Company and the present Petitioner were guilty of the contraventions alleged. Accordingly a penalty of Rs. 50 lakhs was imposed on the Company; Petitioner waasaddled with the personal liability/penalty of Rs. 25 lakhs. This order was appealed against to the Appellate Authority which by the two impugned orders declined to grant full waiver of the requirement of pre-deposit.

6. Learned Counsel for the Petitioner relied upon averments in the proceedings as well as the documents and contended that the Petitioner is impecunious and does not have any financial resources; besides it is claimed that the Petitioner is a patient of Coronary heart disease and underwent a CAB procedure. It was contended that the house where the Petitioner is presently residing is mortgaged to the Bank of Baroda. he Petitioner is dependent on his wife''s earning. She is a Life Insurance Agent. In these circumstances, counsel contended that the direction to pay even Rs. 10 lakhs is onerous and deprives the Petitioner of his right to pursue the appeal. Counsel contended that having regard to the fact that the Petitioner''s appeal was allowed on merits by the Sessions Court, he is absolved of criminal charges, therefore, it would be unfair to require him to deposit a substantial amount of Rs. 10 lakhs on the basis of an ex parte order.

7. Mr. Kait, learned Counsel opposed the petition and submitted that the Appellate Authority exercised its discretion properly and scaled down the liability from Rs. 25 lakhs, i.e the amount originally determined by the Adjudicating Authority to Rs. 10 lakhs. It was contended that neither was this order arbitrary nor could the approach be characterized as injudicious and in any manner improper.

8. The narrative discloses that the Petitioner was at the relevant the Managing Director of the Company which faced FERA proceedings.

9. During the pendency of the adjudication of show cause notice, since criminal proceedings had been initiated apparently, the authorities deemed it appropriate to await the outcome of the criminal proceedings. Although the Petitioner and Company were acquitted by the erstwhile Sessions Court, the revision of the Enforcement Directorate is pending. Therefore, the Petitioner has the benefit of acquittal in his favour. This is a relevant factor; equally the circumstance that the

Company did not chose to contest the adjudication proceedings and has not even preferred an appeal would in my view assume some significance.

10. The order of the Appellate Authority was rendered in the context of Second Proviso to Section 52(3). That provision is by way of an exception entitling it to waive such amounts as are deemed appropriate, in the light of circumstances of each case. If the litigant is able to satisfy the Tribunal that it would incur undue hardship if payment of the entire liability is necessitated as a condition of hearing of the appeal, it can reduce the amount or waive it altogether. Therefore, the scope of jurisdiction of the Appellate Authority is to focus whether in the circumstances of a given case, the entire amount if insisted upon, would cause undue hardship and consequently robe the Appellant before it of the substantive right of being heard in the appeal. Here the Appellate Tribunal was given all the materials as is evident from a reading of the first impugned order dated 21.2.2007. It recorded that the bank guarantee accounts of the appellant were attached. However, the Appellate Tribunal did not apprise itself the hardship angle and apparently dismissed it on the ground that financial incapacity did not entitle the appellant for complete waiver of pre-deposit of penalty. Nevertheless, waiver of 60% of the penalty amount was given. Tough seemingly favourable order, mere advertance to a percentage of penalty by itself may not in given circumstances entitle the litigant to exercise his rights as an appellant. In this case ilia materials on record and submissions made show that the Petitioner is in extremely straitened circumstances; he is un-well for many years; he is surviving on the income of his wife and does not have any disposable assets. In the peculiar circumstances, the determination arrived at by the Appellate Tribunal that waiver of 60% penalty amount cannot be sustained.

11. In the light of the above findings, I am of the opinion that the impugned order deserves to be modified instead of the requirement of having pre-deposit of Rs. 10 lakhs, the Petitioner shall deposit Rs, 2.5 lakhs as a condition, under proviso to Section 52(2). The said amount shall be deposited within 4 weeks from today. The Appellate Tribunal shall consider the appeal of the Petitioner on its merits after satisfying itself about compliance with the present directions.

12. The writ Petition and the pending applications are allowed to the above extent. Order dasti.

