
(2005) 02 DEL CK 0209
In the Delhi High Court
Case No : WP (C) . 2570 and CM. 1848/05

Bank of Baroda

APPELLANT

Vs

Appellate Tribunal for Foreign Exchange

RESPONDENT

Date of Decision : 24-02-2005

Acts Referred:

Citation : (2005) 3 BC 345 : (2005) 118 DLT 308 : (2005) 81 DRJ 213 : (2005) 100 ECC 195

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Manmohan Sarin, J.—Petitioner/Bank of Baroda, assails the order dated 11th January, 2005, passed by the Appellate Tribunal for Foreign Exchange in Appeal No. 1096/04, requiring it to make a pre deposit of 50% of the penalty amount of Rs. 10 lacs and submit a bank guarantee for the remaining 50% amount within 30 days, as a pre condition for hearing of the appeal in terms of Proviso to Section 19 of the Foreign Exchange Management Act, 1999 (in short "FEMA").

2. The present writ petition raises an interesting question, regarding interpretation to be given to the expression Undue hardship, as it appears in Proviso to Section 19 of the FEMA. The said Section is reproduced for facility of reference:

19. Appeal to Appellate Tribunal--(1) Save as provided in Sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in Sub-section (1) of Section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal: Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

3. Mr. Pramod B. Agarwala appearing on behalf of the petitioner/Bank submits that even though before the Tribunal, petitioner bank had pleaded that dispensation from deposit of penalty should be granted, since money was required to be utilized in business, he does not press the said argument. He submits that Undue hardship as it appears in the proviso, is not confined to a case of financial hardship only. The submission being that Undue hardship would cover within its ambit cases, where a party has a strong prima facie case and is not granted waiver of deposit. He submits that simply because petitioner happens to be a bank and may not have any financial hardship, the same would not mean that dispensation of penalty cannot be granted even in deserved cases.

4. Let us consider as to what is meant by the expression undue hardship. In Oxford English Dictionary, the meaning of undue is given as unwarranted or inappropriate because excessive or disproportionate. Strouds Judicial Dictionary gives the following meaning to undue hardship as per judicial decisions cited therein:

For a hardship to be undue it must be shown in my opinion that the particular burden to the applicant to have to observe or perform the requirement is out of proportion to the nature of requirement itself and the benefit which the applicant would derive from compliance with it. (Re Walsh (1944) VLR 147)

Again in *Liberian Shipping Corpn Pegasus v. Kingsons* (1967) 2 KB 86 it is given as But even if a claimant has been at fault himself, it is an undue hardship, if the consequences are out of proportion to his fault.

5. It would be seen from the foregoing that the expression undue hardship would include within its ambit cases where the burden sought to be imposed is disproportionate to the fault or guilt. This assumes relevance in the context of considering waiver of deposit on the basis of a good prima facie case without there being financial hardship.

6. Let us examine some judicial decisions where similar provisions namely Section 129-E of the Customs Act, 1962, Section 35F of Central Excise Act, 1944 have been considered by the courts.

(i) Reliance is invited to *V.I.P. Sea Foods Vs. Collector of Customs*, wherein it was held that Tribunal has not correctly appreciated the various relevant factors, which ought to be considered in exercising the discretion under Provision to Section 129-E. Petitioner has a prima facie case for consideration on merits. Besides, petitioner's financial circumstances undoubtedly constitute a relevant factor.

(ii) Reference is next invited to a decision of the Division Bench in *Keramos v. CEGAT*, New Delhi 2003(153) ELT 301 (Delhi). The Court while dealing with similar provision in Section 35F of Central Excise Act, 1944 noted as under:

The provisions are mandatory in nature and failure to deposit the amount in question renders the appeal incompetent. The factors to be kept in view while considering an application of waiver of deposit are well established. These are a *prima facie* case in favor of the applicant, the balance of convenience *qua* deposit or otherwise, irreparable loss, if any, to be caused in case waiver is not granted and safeguarding of public interest.

(iii) Reference may lastly be made to a recent decision of the Supreme Court in *Mehsana Dist. Co-Op Milk P. U. Ltd. v. Union of India*, (Civil Appeal No. 2668/2003 decided on 31st March, 2003). The Court while dealing with waiver of pre-deposit under Provisio of Section 35 of the Central Excise Act, 1944 noted as under:

By the impugned order, the appellants have been directed to deposit an amount of Rs. 30 lakhs by way of pre-deposit. The reasoning given in support of such order is wholly unsatisfactory. The Appellate Authority has not at all considered the *prima facie* merits and has concentrated upon the *prima facie* balance of convenience in the case. The Appellate Authority should have addressed its mind to the *prima facie* merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors.

7. From the foregoing judicial pronouncements, as noted above, the position, which emerges is that the Tribunal while considering any application for waiver of deposit is to take into account firstly the existence of a *prima facie* case. In case, it is found that a party has a. very strong *prima facie* case, and/or where the errors in the impugned order are writ large on the record, in such a case, it would be competent for the court in the exercise of its jurisdiction to grant waiver of pre-deposit since in such a case requiring a pre deposit itself would amount to undue hardship . What is a *prima facie* case is well settled? It refers to an arguable or triable case. The Tribunal once it comes to the conclusion on perusal of the pleadings, documents and on hearing of the parties that there is a good *prima facie* case to be considered, the next step in exercise of discretion is determining the quantum of waiver to be granted. In determination of the quantum of waiver, factors, such as, balance of convenience, financial hardship of the parties, its capacity to pay or secure the amount and irreparable loss are to be considered. The said discretion is to be exercised in accordance with well settled principles for exercise of judicial discretion.

8. Coming to the facts of the present case, the Adjudicating Officer had, vide its order of 15th May, 2002, imposed a penalty on Sh. Gurucharan Singh Sethi and Smit Surinder Kaur, who had acquired foreign exchange to the extent US \$ 2,22,895 and pound sterling 3,49,920 equivalent to Indian Rs. 3 crores. The said

Sh. Gurucharan Singh Sethi and Smit Surinder Kaur had deposited the amounts in NRI Account, maintained with the petitioner--Bank of Baroda and Punjab National Bank, without obtaining any general or special permission. Under the Rules and Guidelines, an account holder could deposit US \$ 10,000 at any one point of time, without any special permission or declaration. The Adjudication Officer held the deposits made to be in contravention of Section 8 of FERA and imposed a penalty of Rs. 30 lacs on Sh. Gurucharan Singh Sethi and Smit Surinder Kaur. The impugned order records that deposits with Bank of Baroda and Punjab National Bank were deliberately made in such a manner that it did not exceed US \$ 10,000 for any one deposit. The dates of deposit, the frequency and deposit on consecutive dates were found to be closely proximate. The frequency and dates of deposits were such as would have brought it to the knowledge and attention of the Bank that the attempt was to circumvent the provisions by a Non-Resident Indian. It should have raised serious doubts on the Non Resident Status of the depositor. Relevant portion of the order is reproduced for facility of reference:

The authorized dealers, having accepted the deposits frequently on consecutive days, should have been more cautious while accepting the same. As per para 29B.8(C) of 1987 Exchange Control Manual, the authorized dealers should satisfy themselves that the account holder is still normally resident outside India and the same guidelines were in force as per para 13B.22(c) of Exchange Control Manual, 1993. I find that the authorized dealers-Bank of Baroda and Punjab National Bank-failed to show diligence in this aspect while carrying out the transactions of accepting and crediting hard foreign currency from the noticee, namely Shri Gurcharan Singh Sethi and Smt.Surinder Kaur. It is felt that while holding on to the legal frame work, the authorized dealers are expected to discharge caution and diligence in such transactions also. In the instant case, had the noticee banks exercised due caution, the repeated and frequent deposits of foreign currency involving amounts in such manner that the same did not exceed US \$ 10,000 or its equivalent could have been detected and the transactions involving violations of the provisions of the FERA, 1973 could have been prevented.

9. The impugned order goes on to hold further, the Bank should have exercised due diligence and caution while accepting such deposits. Both Bank of Baroda & Punjab National Bank, noticee Nos. 2 & 3 had not exercised caution & diligence and failed to observe the procedures which were expected from them. Accordingly, I find that the charges in the SCN, against Bank of Baroda & Punjab National Bank also are proved, Accordingly, the charges in the show cause notice against Bank of Baroda & Punjab National Bank of having abetted notice No. 1 in contravention of Section 8(1) read with Section 64(2) and also read with Sections 6(4), 6(5), 49, 73(3) of FERA, 1973 were held to be proved. Resultantly, he imposed the penalty of Rs. 10 lacs on the petitioner-Bank. It is not necessary, at this stage, to delve into the merits, which is the function of the Appellate Tribunal. The aforesaid facts and findings have only been noticed as

urged by counsel for the petitioner in support of his contention that petitioner has a strong prima facie case in its favor, which requires consideration and merits waiver of pre deposit of penalty in appeal.

10. Ms. Rajdipa Behura, learned Counsel for the respondent opposing the petition, submits that the manner of deposits made by the notice, which were accepted and credited by the petitioner Bank clearly demonstrates that there was lack of diligence and failure to take due and reasonable care. It would have been apparent even on a cursory look at the transactions to ask for the passport details to ascertain the non-resident status and thereby resultantly detect the violation of Foreign Exchange Regulation Act.

11. Having noted the legal position, as it emerges and the judicial principles to be applied for waiver of pre deposit, as discussed in paras 5,6 & 7,I find that there is considerable merit in the submission of Mr. Pramod B. Agarwala. Petitioner Bank and its officials can reasonably urge that as long as they are conforming and not violating the overall limit of accepting deposits, which can be made, without any declaration, they could not be held to be in contravention of statutory provisions and least of all accused of abetting an offence u/s 8(1) read with Section 64(2) and also read with Sections 6(4), 6(5), 49, 73(3) of FERA, 1973. Moreover, it also raises the issue, whether by mere negligence there can be abetment of an offence? Petitioner itself has a reasonably good prima facie case, requiring consideration. However, the factors as pointed out by the Special Director regarding the failure or omission to be diligent, the frequency and dates of transactions are such which raises serious doubt on the Non Resident Indian status of the depositors and demonstrates circumventing of the provisions. These need to be gone into and considered in the appeal. Keeping the above factors in mind and meaning and interpretation of the expression undue hardship as it appears in Section 19 and recognising that it is not a case of financial hardship, consideration of factors such as balance of convenience or absence of financial hardship should not negate the plea of waiver of deposit, as per the principles enumerated in paras 6 & 7 hereinbefore. The appropriate order in this case would be to require the petitioner to deposit 50% of the penalty amount i.e. a sum of Rs. 5 lacs within 15 days from today. In case, petitioner makes the deposit of Rs. 5 lacs within 15 days with the respondent the appeal shall be heard and disposed of in accordance with law.

Writ petition stands allowed to the above extent with directions, as aforesaid.