
(1983) 05 DEL CK 0009

In the Delhi High Court

Case No : Criminal Appeal No. 253 of 1979

Escorts Ltd.

APPELLANT

Vs

Foreign Exchange Regulation Appellate Board

RESPONDENT

Date of Decision : 13-05-1983

Acts Referred:

Citation : (1985) 57 CompCas 684 : (1983) 24 DLT 321 : (1985) 5 ECC 141

Hon'ble Judges : Gian Chand Jain, J

Bench : Single Bench

Judgement

Jain, J.—This judgment shall also dispose of Cr.A. No. 252 of 1979 (H. P. Nanda v. Foreign Exchange Regulation Appellate Board) as both these appeals arise out of common order.

2. There is no dispute so far as the facts of the case are concerned. S/Shri H. P. Nanda, C. K. Hazari, Rajan Nanda and Surjit Singh, appellants in the other appeal are managing director, joint director, joint director and vice-president, respectively, of M/s. Escorts Ltd. (for short "the company"), appellant in this appeal. Besides various other activities, the appellant company is also carrying on an export business in readymade garments. In the year 1971, it exported readymade garments goods worth Rs. 14,55,770 to Raja Rani Corporation, New York (for short "the buyer"). By letter dated February 10, 1972, the buyer raised disputes regarding the quality of the goods exported and the late supply. It proposed to pay 50% of the price without prejudice to its rights or a reference of the disputes to the arbitrator or appointment of an independent investigator such as Counsel General of India in New York for checking its records and verifying the accuracy of the statements made by it. This followed another letter dated March 2, 1973, in which the buyer indicated that it had suffered loss in excess of \$1 lakh 50 thousands, it was not possible for it to bear the burden of such a huge amount and it was always ready and willing to get the matter investigated. A cheque for \$5,000 was enclosed as the first payment against the settlement proposed in the first letter. The company wrote a letter on April 11, 1972, to the

Consul-General of India, Embassy of India, Washington, requesting them to obtain the financial standing of the buyer and to ascertain the quantity and the invoice value of the goods said to be lying in stock with the buyer and to use their good offices in pressuring the buyer to make payments in full in order to avoid legal complications. After some correspondence, the buyer agreed to pay 50% of the price with the condition that for the balance of the amount the company would have to seek arbitration. The permission of the Reserve Bank of India was sought in this behalf, and was accorded, vide their letter dated January 3, 1973. A sum of Rs. 8.98 lakhs was received leaving a balance of Rs. 5.57 lakhs.

3. On April 28, 1973, the Reserve Bank of India accorded the approval for the appointment of the Consul-General of India, Washington, to arbitrate the dispute regarding the recovery of the remaining amount. On May 14, 1973, the company wrote a letter to the Consul-General, Embassy of India, New York, to arbitrate in the matter. On July 16, 1973, the company was informed by the Consul-General of India that they were not in a position to function as arbitrator in the said dispute. The company was further informed that the matter regarding the arbitration of the dispute was under consideration. After certain reminders, the Consul-General ultimately informed the company, vide its letter dated January 21, 1974, that the matter had been referred to the Ministry of Commerce for consideration and the company would hear from them shortly. The Deputy Secretary, Ministry of Commerce, Government of India, vide letter dated February 11, 1974, advised the company to pursue the matter further under the auspices of the American Arbitration Association, New York. A copy of this letter was sent to the Reserve Bank of India by the company, vide its letter dated February 16, 1974.

4. On February 23, 1974, the company addressed a letter to the Consul-General of India with a copy to the American Arbitration Association asking for the charges, etc., for purposes of arbitrating the dispute in question. The American Arbitration Association replied to various queries, vide its letter dated March 5, 1974. The company was further informed by the said Association, vide letter dated April 3, 1974, that in more than 80% of the cases, the parties had local representatives and if they wanted to have a legal counsel, they would recommend some name. On the request of the company, the Bar Association of New York City recommended the name of Mr. George D. Garafillou for engagement as a counsel. On enquiries by the company, the said counsel informed that he would charge \$3,500 as retainer and in all 20% of the amount realized, besides the company would have to incur \$ 1,100 towards fees to the American Arbitration Association and \$500 for expenses towards professional testimonies, examination before trial, etc. Before the matter regarding going to the arbitration could be settled, the company received a letter dated September 5, 1974, from the buyer whereby it agreed to pay \$60,000 (about Rs. 4.94 lakhs) against the company's total outstanding amounting to Rs. 5.57 lakhs. \$1,200 were to be paid on the approval of the offer and the rest in 12 monthly

Installments. The company then wrote a letter dated September 13, 1974, to the Reserve Bank of India seeking its approval for accepting the said offer. The Reserve Bank of India granted the necessary approval, vide its letter dated October 4, 1974. This approval, however, was without prejudice to the action, if any, that may be taken against the company for normalization of the full export proceeds. Admittedly, a sum of Rs. 4.94 lakhs was realised in accordance with the said offer leaving a balance of Rs. 63,456 as unrealised.

5. The appellants were served with notices dated June 22, 1977, and August 23, 1977, to show cause why action should not be taken against them for contravening the provisions of ss. 10(1) and 12(2) of the Foreign Exchange Regulation Act, 1947 (hereinafter called "the Act"), for refraining from taking necessary steps which had the effect of securing the receipt by them of the whole/part of the amount of Rs. 14,51,007.17 delayed or ceased to be receivable in whole or in part. After considering the reply submitted by the appellants, it was decided to hold adjudication proceeding against all of them.

6. After hearing the appellants, the Special Director of Enforcement, vide his order dated February 17, 1978, held that the delay in realisation of the amount had been condoned by the Reserve Bank of India. The appellants, however, had not given any plausible reason for allowing the rebate of Rs. 63,456. There was no evidence regarding the poor quality of goods, etc., which indicated that the appellants were not anxious to realise the balance amount and permitted the buyer to retain the said amount which was further confirmed from the circumstances that the buyer's firm was owned by the brother-in-law of Mr. H. P. Nanda, chairman/managing director of the company. With these findings, he found the appellants guilty of contravening the provisions of ss. 10(1) and 12(2) of the Act and imposed a penalty of Rs. 30,000 on the company only.

7. The appellants filed an appeal s. 23E of the Act. The learned member of the Foreign Exchange Regulation Board, vide his order dated August 31, 1979, held that the appellants had taken all steps reasonably practicable under the circumstances to make the best out of the bargain. It would have been disastrous if they were to rampart the goods. There was no means rea. With these observations, the order of the learned special director was confirmed. The amount of penalty was, however, reduced from Rs. 30,000 to Rs. 3,000.

8. Feeling aggrieved, the appellants filed these appeals under s. 23EE of the Act.

9. Mr. K. K. Jain learned counsel for the appellants, contended that in view of the findings recorded by the learned member of the Board, the appellants could not be held guilty of contravening the provisions of ss. 10(1) and 12(2) of the Act and the impugned order was illegal. On the other hand, the contention of the learned counsel for the respondent is that there was admittedly short realisation to the extent of Rs. 63,456 and thus contravening of the said provisions. The circumstances noticed by the learned member simply justified a lenient view which he has already taken and no further interference was called for.

10. The Act is designed to safeguard and conserve foreign exchange which is essential to the economic life of a developing country. To achieve this object, it prohibits certain positive and negative acts. Any person contravening these provisions is liable to penalty under s. 23 of the Act. What is prohibited by the provisions contained in ss. 10(1) and 12(2) of the Act ? These provisions prohibit, inter alia, doing or refraining from doing an act, without the permission of the Reserve Bank of India, which results in short realisation of foreign exchange.

11. The charge against the appellants, as is apparent from the order of the learned special director, is that without any general or special permission of the Reserve Bank of India, they refrained from taking necessary steps for Realizing the full value of the goods exported to the buyer. The steps which the appellants failed to take related to the appointment of an arbitrator for deciding the disputes raised by the buyer as directed by the Reserve Bank of India in their letter dated January 3, 1973. It is not disputed that the appellants took initial steps for getting the disputes decided by an arbitrator. True, reference to the arbitrator was not finalised. But in my judgment it is not because the appellants did not want it but because on making enquiries it was found that it would result in loss of much more foreign exchange. The fee of the counsel which the appellants were required to engage would have been much more than the amount short realised. Besides, the appellants were required to pay fee to the American Arbitration Association and to spend a lot of money on other expenses noticed earlier. Learned member of the Board himself has observed :

"... it appears to me that they have followed the best possible course and realised more than 95% of the value of the consignment. It would have been disastrous if the appellants were to rampart the goods or go in for arbitration and even the Reserve Bank of India at one time after considering the situation had agreed to a 50% realization "

12. In view of the above facts found by the learned member coupled with his findings that there was no means rea, the negative act of the appellants had not the effect of securing that the foreign exchange ceased in part to be recoverable by them. Agreeing to accept the proposal of the buyer and thus Realizing more than 95% of the value of the consignment and that too with the prior approval of the Reserve Bank of India, though accorded without prejudice to the action, if any, that may be taken against the appellants, in my view had not the effect of securing short realisation of a part of the foreign exchange. Their action, I feel on the other hand, had the effect of saving much of the foreign exchange which was required to be spent for getting the dispute settled by arbitration. In such circumstances, the ingredients of ss. 10(1) and 12(2) of the Act, on the facts found by the learned Member, have not been made out. Consequently, it cannot be said that the appellants contravened any of the said provisions.

13. I, Therefore, accept the appeals and set aside the impugned order. Fine paid by the company would be refunded.