

(2010) 08 MAD CK 0310

In the Madras High Court

Case No : C.M.A. No. 2101 of 2010 and M.P. No's. 1 and 2 of 2010

Fayshaw Apparels

APPELLANT

Vs

The Appellate Tribunal for Foreign Exchange and The Special
Director

RESPONDENT

Date of Decision : 27-08-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F

Customs Act, 1962 — Section 112, 129E

Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 —
Regulation 13, 9

Foreign Exchange Management Act, 1999 — Section 13, 17(1), 19, 19(1), 19(2)

Citation : (2010) 08 MAD CK 0310

Hon'ble Judges : R. Banumathi, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : R. Muthukumaraswamy for G. Derrick Sam, for the Appellant; M.
Dhandapani, Spl. Counsel for FEMA, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—These Appeals arise out of the Order of Appellate Tribunal for Foreign Exchange, New Delhi dated 28.5.2010 in Appeal Nos. 91, 92, 93 and 94 of 2010 rejecting the applications for dispensation of pre-deposit and directing the Appellants to make payment of full amount of penalty within 30 days from the date of receipt of the order and holding that on failure to make full payment the appeals will be dismissed on that ground. M/s. Fayshaw Apparels is the appellant in C.M.A. No. 2 101 of 2010, M/s. Shaw Garments Pvt. Ltd. is the appellant in C.M.A. No. 2 103 of 2010 and B.P. Byram Shaw, the Managing Partner/Managing Director of the said firm and Company is the Appellant in C.M.A. Nos. 2102 and 2104 of 2010.

2. The brief facts are that the Appellant firm/Company are exporters of garments covered by eight shipping bills through ICD, Irugur, Coimbatore and the same were exported through Tuticorin Port. The value of the outstanding export

proceeds is Rs. 1,13,20,461/- in respect of M/s. Fayshaw Apparels and Rs. 87,92,412/- in respect of M/s. Shaw Garments Private Limited. In terms of Section 8 of Foreign Exchange Management Act (in short, "FEMA") the exporters are required to take all reasonable steps to realise and repatriate to India the amount of foreign exchange within prescribed period and manner as mentioned in the GR forms. According to the Department, the Appellants have failed to take all reasonable steps to realise and repatriate to India the foreign exchange to the tune of Rs.1,13,20,461/- and Rs. 87,92,412/- and hence they are liable for appropriate action under FEMA, 1999.

3. The case of Appellants is that shipments were not realised in respect of two shipments and only part realisation was received. Show cause notices were issued to the Appellant firms and their Managing Director alleging that the Appellants failed to prove reasonable steps to realise the outstanding export proceeds in respect of 10 GR forms involving amount of Rs. 1,13,20,461/- and Rs. 87,92,412/- in contravention of the provisions of Sections 7 and 8 of FEMA, 1999 read with Section 9 and 13(i)(ii) of Foreign Exchange Management (Export of Service) Regulation, 2000 (in short, "FMR, 2000"). According to the Appellants, by letter dated 5.7.2007, they have intimated RBI about the non-realisation of the export proceeds and the efforts taken to realise the sale proceeds from K. Gunasekar, the agent of the buyer till they learnt that he was detained under COFEPOSA. Further, according to the Appellants, they have requested RBI to waive the outstanding export dues.

4. Holding that the Appellants have contravened provisions of Sections 7 and 8 of FEMA, 1999 read with Regulations 9 and 13(i) and (ii) of FEMR, 2000, the Special Director, by order No. SDE/SKS/IV/2/2010, imposed a penalty of Rs. 40,00,000/- on M/s. Shaw Garments Pvt. Ltd., and further penalty of Rs. 10,00,000/- on the Managing Director and by other Order No. SDE/SKS/IV/1/2010, imposed a penalty of Rs. 50,00,000/- on the firm M/s. Fayshaw Apparels and further penalty of Rs. 10,00,000/- on the Managing Partner in terms of Section 13 of FEMA, 1999. Being aggrieved by the orders of the Special Director, the Appellants have preferred appeals before the Appellate Tribunal for Foreign Exchange, New Delhi.

5. Holding that the Appellants have failed to show reasonable steps on their part which would have been taken by a prudent businessman under similar circumstances, referring to decisions of Supreme Court in *Monotosh Saha Vs. Special Director, Enforcement Directorate and Another*, and *Union of India v. Adani Exports Ltd.* 2007 AIR SCW 7134, the Appellate Tribunal rejected the applications for dispensation and directed the Appellants to make full payment of penalty within 30 days from the date of receipt of the order and observing that on failure to make payment the appeals would be dismissed on that ground alone. Being aggrieved with the order of the Appellate Tribunal rejecting dispensation applications, the appellants have come forward with these Appeals.

6. Learned Senior Counsel for Appellants Mr. R. Muthukumaraswamy submitted

that the penalty imposed will not stand to the test and while so, imposing condition of pre-deposit of penalty would cause "undue hardship" to the Appellants. It was further contended that for more than 14 years, the Appellants were exporting garments and are having clean record of exports and earned foreign exchange to the tune of more than Rs. 16 Crores and the past history of earning foreign exchange by the Appellants ought to have been taken into account by the Appellate Tribunal. It was further submitted that under the proviso to Section 19 of Foreign Exchange Management Act, discretion has to be exercised judicially and the insistence of pre-deposit of the penalty, which itself was a huge sum would deprive the Appellant the statutory right of the appeal, which would cause "undue hardship to the Appellant. The learned Senior Counsel would further urge that there is no revenue loss to the Government and the penalty was imposed on the notional loss of foreign exchange on account of non-realisation of export proceeds.

7. Countering the arguments, Mr. Dhandapani, learned Counsel for Respondents submitted that even though goods were exported in 2002, till show cause notices were issued, the Appellants have not taken any steps to realise the exported proceeds and Appellants have not shown any "undue hardship". Placing reliance upon *Indu Nissan OXO Chemicals Industries Limited v. Union of India* (2007) 13 SCC 487, the learned Counsel would further contend that mere financial hardship is not "undue hardship" and in fact the Appellate Tribunal has imposed penalty, which is very much lesser than the non-realised proceeds of the exported garments.

8. As the only challenge in these appeals is, the rejection order relating to pre-deposit, we shall deal with the issue relating to dispensation of pre-deposit. As per Section 19, the person appealing against the order has to deposit the amount of penalty while filing the appeal. As per the proviso, if the pre-condition of deposit would cause "undue hardship" to the Appellant, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the interest of the revenue. Section 19 of FEMA, 1999 reads as under:

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.

(2).... (3).... (4).... (5).... (6)....

9. The principle relating to grant of stay pending disposal of the matters before the forums concerned was discussed in several cases. It is to be noted that in such matters, where discretion is available to the authorities/Appellate Tribunal, discretion has to be exercised judicially. Referring to *Union of India v. Adani Exports Ltd.* 2007 AIR SCW 7134, the Appellate Tribunal has highlighted the relevant aspects while rejecting the prayer for dispensation of pre-deposit. In the said judgment, the Supreme Court observed as under:

9. ...The three aspects to be focussed while dealing with such applications are: (a) prima facie case, (b) balance of convenience, and (c) irreparable loss. The Tribunal categorically found that these factors were established by the respondents. Even when the Tribunal decides to grant full or partial stay it has to impose such conditions as may be necessary to safeguard the interest of revenue. This is an imperative requirement u/s 129-E of the Act. (Customs Act)....

10. The expression used in proviso to Section 19(1) is not mere hardship, but "undue hardship". "Undue hardship" means something which is not merited by the conduct of the Claimant. Section 35-F of the Central Excise Act is identical to Section 19(1) of FEMA. u/s 35-F of Central Excise Act, the person desirous of preferring an appeal against any decision or order has to deposit the duty or penalty before filing the appeal. Proviso to Section 35-F is identical to the proviso to Section 19(1), where the Appellate Tribunal is of the opinion that the deposit of duty demanded or penalty levied 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 interest of the revenue.

11. Considering the scope of expressions "undue hardship", and "safeguard the interest of the revenue", and observing that while dealing with application for dispensation of pre- deposit, the interest of the revenue has to be kept in view, in *Benara Valves Ltd. v. Commissioner of Central Excise* (2006) 13 SCC 347, the Supreme Court held as under:

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for

waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva v. State of Karnataka* (1993) 3 SCC 467 that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be "undue" it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue.

12. The questions falling for our consideration are, whether the Appellants have shown undue "hardship" while rejecting the application for dispensation of pre-deposit and whether the Appellate Tribunal has judicially exercised the discretion. It is true that merely establishing a prima facie case, interim order of dispensation of deposit should not be passed. Only where it appears that the penalty imposed has no legs to stand or it would be undesirable to ask the Appellant to pay the full or part of the penalty, the Appellate Tribunal can dispense with the condition of pre-deposit of penalty on such conditions as it may deem fit. But such petition should not be disposed off in a routine manner unmindful of the consequences on the revenue flowing from the order requiring the Appellant to deposit full or part of the penalty.

13. As rightly contended by the learned Counsel for Respondents, Government is encouraging exports to foreign countries mainly to earn foreign exchange. The purpose of encouraging exports is not only to earn foreign exchange, but also to preserve the foreign exchange in order to improve the wealth of the nation. While considering the applications for dispensation with pre-deposit, Courts will have to keep in view the interest of the revenue of the State/Government Exchequer. u/s 129-E of the Customs Act, for filing of Appeal from any order, there is a condition for pre-deposit. In the decision of *Indu Nissan OXO Chemicals Industries Limited v. Union of India* (2007) 13 SCC 487, the Commissioner imposed a penalty of Rs. 10,00,00,000/- u/s 112(a) of the Customs Act. In the appeal preferred before the Customs, Excise and Service Tax

Appellate Tribunal (in short, CESTAT"), the CESTAT has directed the applicants to deposit Rs. 2,00,00,000/- (2 Crores), which was challenged before the High Court and High Court confirmed the order of the CESTAT. In the appeal before the Supreme Court in the above said decision, the Appellant thereon submitted that its bonafide is writ large and the Company had become a sick company and therefore insistence of pre-deposit even of a part, which is a huge sum of Rs. 2 Crores, would deprive the Appellant of the statutory right of the appeal. It was pointed out that the Appellant would be subject to "undue hardship", since as per its financial statements the Appellant has suffered huge losses. Declining to interfere with the order of CESTAT confirmed by the High Court imposing penalty of Rs. 2 Crores, the Supreme Court referring to Metal Box India Ltd. Vs. Commissioner of Central Excise, Mumbai, , held as under:

10. 6. Principles relating to grant of stay pending disposal of the matters before the forums concerned have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

7. The applicable principles have been set out succinctly in Siliguri Municipality and Others Vs. Amalendu Das and Others, , Samarias Trading Co. Pvt. Ltd. Vs. S. Samuel and Others, and Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, .

8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a licence to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given. vide (2006) 13 SCC 347.

14. In the instant case, the amount payable by a foreign buyer in respect of exported goods is necessarily a question of fact. The learned Counsel for Respondents submitted that even though goods were exported in 2002, till show cause notices were issued, there were no steps taken on the part of the Appellants for realisation and there was no proof to show that the Appellants have taken reasonable steps to realise the exported proceeds and therefore the adjudicating authority came to the conclusion that the Appellants did not take any reasonable steps to realise export on proceeds as contemplated in the FEMA and based upon materials the Appellate Tribunal has rightly rejected the

applications for dispensation of deposit of penalty.

15. As per Section 13 of FEMA, where any person contravenes any provisions of the Act or contravenes any condition, subject to which authorisation is issued by Reserve Bank of India he will be liable to penalty on adjudication upto thrice the sum involved in such contravention if the amount is quantifiable. As pointed out earlier, in respect of Fayshaw Apparels, the outstanding is Rs. 1,13,20,461/- and in respect of M/s. Shaw Garments Private Limited, outstanding is Rs. 87,92,412/-. The transaction was in 2002. The Appellants are said to have corresponded with Reserve Bank of India only in 2007. In the case of Fayshaw Apparels, the penalty imposed on the firm is only Rs. 50,00,000/- plus Rs. 10,00,000/- was imposed on its Managing Partner as against the outstanding of Rs. 1,13,20,461. Likewise, in the case of Company - Shaw Garments Private Limited, penalty of Rs. 40,00,000/- on the firm plus Rs. 10,00,000/- on the Managing Director was imposed as against the contravention of Rs. 87,92,412/-. Even though the adjudicating authority can impose penalty thrice the sum involved in such contravention, the adjudicating authority has imposed penalty much lesser than the amount involved in contravention. In our considered view, the adjudicating authority itself has judicially exercised its discretion in imposing less penalty and taking note of the same Appellate Tribunal has judicially exercised its discretion in dismissing the applications for dispensation of pre-deposit of penalty.

16. Learned Senior Counsel for the Appellants submitted that the Appellants have exported the garments based on the instructions of one K. Gunasekar of M/s. Field Line Trading LLC, Dubai, who was the agent of Overseas Buyers and the said Gunasekar was detained under COFEPOSA by Air Customs, Chennai and in 2007 the Appellants have intimated the Reserve Bank of India about the non-realisation of the export proceeds in respect of the said shipping bills and the Appellants were taking all efforts to realise the sale proceeds from the said Gunasekar, agent for the buyer and these aspects were not taken note of by the Appellate Tribunal. It was further submitted that appellants are not having huge turnover but only having medium level of business and to direct the appellants to pay Rs. 1,10,00,000/- would cause undue hardship, which aspect was not kept in view by the appellate Tribunal.

17. The question whether the Appellants have taken reasonable steps for realisation of export proceeds and whether detention of the said Gunasekar under COFEPOSA has any relevance for realisation of export proceeds are the matters to be considered by the Appellate Tribunal while hearing up the Appeals. Likewise, the question whether the Appellants have taken reasonable steps for realisation of sale proceeds also falls for consideration before the Tribunal while hearing the appeals and we consciously refrain ourselves from expressing any opinion on those questions, lest we would be expressing our views on the merits of the matter.

18. As rightly submitted by the learned Counsel for Respondents, the object of

Foreign Exchange and Management Act is for promoting the orderly development and maintenance of foreign exchange market in India. The purpose of encouraging exports is in order to improve the foreign exchange reserves to improve the wealth of the nation. A prima facie case has been made out as to the contravention of the provisions of FEMA and on being satisfied of the prima facie case, the Appellate Tribunal has rightly dismissed the applications dispensing pre-deposit. Mere financial difficulties cannot be said to be "undue hardship". When the Appellate Tribunal has judicially exercised its discretion, High Court/Appellate Court will not interfere with the exercise of discretion, which has been judicially exercised. The views expressed by us in this order shall not be construed as expression of opinion on the merits of the matter.

19. In the result, all the Civil Miscellaneous Appeals are dismissed. The Tribunal in the impugned order dated 28.5.2010 has directed the Appellants to make payment of full amount of penalty within thirty days from the date of receipt of the order. The Appellants are directed to comply with the order of the Tribunal within 30 days from today (27.08.2010). However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.