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**(2010) 09 DEL CK 0300**

**In the Delhi High Court**

**Case No :** Writ Petition (C) No's. 9864-71 of 2003

Ganesh Polytex Ltd. and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 23-09-2010

**Acts Referred:**

Constitution of India, 1950 — Article 226

Foreign Exchange Management Act, 1999 — Section 49(3)

Foreign Exchange Regulation Act, 1973 — Section 18, 18(1), 18(2), 18(3), 51

**Citation :** (2010) 260 LLJ 362

**Hon'ble Judges :** Dr. S. Muralidhar, J

**Bench :** Single Bench

**Advocate :** R.K. Virmani, Nikhil Nayyar and Ashish Kothari, for the Appellant;  
None, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

S. Muralidhar, J.—The challenge in this writ petition under Article 226 of the Constitution is to a show cause notice dated 4th December 2003 issued by the Commissioner, requiring the Petitioners to appear before the Adjudicating Officer/Commissioner for a hearing on 17th December 2003 pursuant to a Memorandum issued by the Deputy Director, Directorate of Enforcement ("DoE") on 28th February 2002 asking the Petitioners to show cause why they should not be proceeded against for contravention of the provisions of Section 18(2) of the Foreign Exchange Regulation Act, 1973 ("FERA").

2. The factual background is that during the years 1992-93, the Petitioner No. 1 Company effected shipment of goods valued at US \$ 94814.20 under the cover of GR forms to a party at Binapole in Bangladesh. The consignment was of cotton yarn dyed cloth which was to be dispatched to M/s Azim Garments Ltd. ("AGL") at Dhaka. The consignment was booked for carriage by M/s Transport Corporation of India Ltd. ("TCIL"). It is stated that TCIL undertook, under the contract of carriage, to deliver the goods to AGL under the order of Islami Bank

Bangladesh, Dhaka. As regards the condition of delivery, it was specifically notified by the carrier TCIL that the consignment covered by the lorry receipt form shall be stored at the destination under the control of TCIL and shall be delivered by the order of the consignee bank, whose name was mentioned in the lorry receipt. The relevant documents in regard to the goods sent to AGL through TCIL were negotiated by the Petitioner No. 1 through the American Express Bank, New Delhi.

3. It is stated that for a long time thereafter Petitioner No. 1 did not receive any payment or receive any advice about the retirement of the documents by the consignee. Petitioner No. 1 accordingly made enquiries from TCL and the banks but could not trace the whereabouts of the goods. Consequently Petitioner No. 1 requested the bank to return the documents so that the goods could be called back from TCIL. The bankers of the Petitioner No. 1 i.e., the American Express Bank by their letter dated 9th March 2003 requested the Islami Bank Bangladesh that the unpaid documents be returned as the acceptance and payment for the goods were not forthcoming.

4. Efforts were made by the American Express Bank again by writing on 8th May 1993 to the Bangladesh Bank to arrange for the payment through the Islami Bank Bangladesh. Ultimately the Islami Bank, Bangladesh returned all the documents to the American Express Bank by their letter dated 16th June 1993. After having received the documents from the American Express Bank on 12th July 1993 the Petitioner No. 1 served a legal notice on TCIL informing it that the goods were not delivered by TCIL as per the terms and conditions of the contract. Since the export was not complete on account of the non-delivery of the goods by TCIL, no payment of foreign exchange was received by the Petitioner No. 1 for the goods meant for export. In reply to the legal notice dated 12th July 1993, TCIL by its letter dated 22nd July 1993 asked the Petitioner No. 1 to surrender the original consignee copy along with the invoice and further instructed to pay one side freight enabling TCIL to rebook the goods covered under the five consignments to be delivered in India.

5. The Petitioners state that from the above reply it appeared that TCIL was still in custody of the goods in question. A further reminder was sent on 31st July 1993 to TCIL. In reply thereto TCIL made a commitment for re-booking of all the consignments in 15-20 days to Delhi. TCIL again held out that the goods were in its lawful custody. That was reiterated by TCIL on 11th September 1993 as well. It appears that TCIL kept doing a flip-flop on whether in fact the entire goods were still in its custody. By a letter dated 11th September 1993 the TCIL had stated that the consignments were lying in its godown in a safe condition. However, by a subsequent letter dated 29th September 1993 signed by Shri I.L. Mishra, Controller of Operations of TCIL it was informed that four consignments had already been delivered and documents sent to the parties directly.

6. Faced with the above situation, Petitioner No. 1 filed a complaint being Original Petition No. 341 of 1993 against TCIL before the National Consumer

Disputes Redressal Commission ("NCDRC") for recovery of the value of the goods together with interest and costs.

7. For several years thereafter no action was taken by the DoE for any alleged contravention by the Petitioners of Section 18(2) of the FERA 1973. In 1999, the Foreign Exchange Management Act, 1999 ("FEMA") was enacted. Section 49(3) FEMA gave the DoE a sunset period up to 31st May 2002 for starting adjudication proceedings under the FERA. On 28th February 2002 a Memorandum was issued by the Deputy Director, DoE asking the Petitioners to show cause why proceedings should not be initiated against the Petitioners for contravention of Section 18(2) FERA. The Petitioners replied to the above memorandum pointing out that reasonable steps had been taken for recovery of the amount for the consignment which had been exported to Binapole in Bangladesh and that the non-receipt of the export proceeds was for reasons beyond the control of the Petitioners. Reference was also made to the fact that OP No. 341 of 1993 filed by Petitioner No. 1 against TCIL for recovery of the value of the goods was pending before the NCDRC.

8. After the above reply was submitted, no action was taken for a long time. Meanwhile the sunset period came to an end. Thereafter on 4th December 2003 the impugned notice was received from the Adjudicating Officer in purported exercise of the powers vested in the said officer by virtue of the Notification dated 28th August 2003. It is at this stage that the Petitioners approached this Court with the present writ petition in which notice was issued on 30th December 2003. It was directed by this Court that in the meanwhile the date of hearing before Respondent No. 2, i.e., the Adjudicating Officer may not be fixed before the next date of hearing. This interim order was further made absolute on 3rd December 2004 by directing that no further action will be taken pursuant to the impugned notice till the disposal of the writ petition.

9. A preliminary objection was taken in the counter affidavit filed on behalf of the DoE that the Petitioners should have exhausted the alternative remedy of approaching the Appellate Authority. It is further submitted that since the show cause notice was issued on 28th February 2002 for contravention of the provisions of the FERA, the issue was within the domain of the Adjudicating Officer in terms of the Adjudication Proceeding & Appeal Rules, 1974 (hereinafter "the Rules"). It is submitted that in terms of Section 49(3) FEMA, a sunset period of two years had been granted for the issuance of a show cause notice. It is submitted that since the show cause notice dated 28th February 2002 was issued within the sunset period which expired on 31st May 2002, the proceedings initiated against the Petitioners was entirely in accordance with law. It is further submitted that the Notification dated 28th August 2003 authorising the Adjudicating Officer to act as such did not cause any prejudice to the Petitioners.

10. In rejoinder, it was submitted by the Petitioners that all reasonable steps had been taken to receive back the goods in question and therefore the provisions of Section 18(2) FERA were not attracted at all. It was submitted that the show

cause notice dated 28th February 2002 was not proceedings within the meaning of Section 49(3) FEMA since it was issued by Shri A.K. Lawande, Deputy Director who was not the Adjudicating Officer within the meaning of Section 49(3) FEMA. It was submitted that no Notification prior to 31st May 2002 empowering Shri A.K. Lawande to act as an Adjudicating Officer within the meaning of Section 49(3) FEMA had been provided.

11. An additional affidavit dated 14th September 2010 was filed by the Petitioners placing on record a copy of an order dated 20th December 2006 whereby the NCDRC had allowed the Petitioners' OP No. 341 of 1993 and directed TCIL to pay to the Petitioners " 29,74,321.45 together with interest @ 12% per annum from the date of booking up to the date of filing of the complaint as well as pendente lite and future interest at the said rate. Petitioner No. 1 was also awarded costs of " 25,000/- by the NCDRC. An appeal against the said order of the NCDRC was filed by the TCIL before the Supreme Court. The said Civil Appeal No. 1427 of 2007 was admitted on 30th march 2007. However, as a condition for stay of the operation of the order of the NCDRC, TCIL (the Appellant in the above Civil Appeal) was asked to deposit the awarded amount before the NCDRC within eight weeks and the Petitioners were permitted to withdraw the amount upon furnishing security to the satisfaction of the Registrar, NCDRC.

12. Mr. R.K. Virmani, learned Senior counsel appearing for the Petitioners submits that the obligation u/s 18(2) FERA that the Petitioners should take reasonable steps to receive back the goods sent by way of export had been fulfilled in the instant case. Even if the court were not to go by the fact that the Petitioners had also taken steps to recover the value of the goods from TCIL since the matter was sub judice before the Supreme Court, nevertheless as long as the Petitioners were able to show that they had taken reasonable steps to receive back the goods in question, the provisions of Section 18(2) FERA were not attracted. He reiterated other submissions about the notice u/s 49(3) FEMA not having been issued within the sunset period, i.e., on or before 31st May 2002 and further the notice not having been issued by a properly authorized Adjudicating Officer.

13. Despite the case being heard finally on 27th August 2010 and 22nd September 2010, none appeared for the Respondents on either date.

14. As far as the contention that the notice dated 28th February 2002 issued by the DoE is not really a notice within the meaning of Section 49(3) FEMA, this Court has already taken a view in S. Ramakrishna (Dr) v. Enforcement Directorate 2010 V AD (Delhi) 230 that such a notice would constitute initiation of proceedings under the FERA in terms of Section 49(3) FEMA read with the Rules. It is stated that the said judgment is pending consideration before a Division Bench of this Court. Nevertheless this Court is not inclined to take a different view in present matter and therefore negatives this ground.

15. As regards the second ground concerning proper authorization of the

Adjudicating Officer who had issued the notice dated 28th February 2002, this Court had by an order dated 13th December 2004, while recording the above contentions, required the Respondents to place on record the notification authorising the officer who had issued such memorandum. The Respondents have failed to comply with the said order of this Court.

16. For the purpose of Section 49(3) there has to be a proper authorization of the Adjudicating Officer who issues the notice of contravention of Section 18 FERA. Section 49(3) of the FEMA reads as under:

49. Repeal and saving.....(3). Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the repealed Act after the expiry of a period of two years from the date of the commence of this Act. (emphasis supplied)

17. The impugned notice dated 4th December 2003 was issued by the adjudicating officer who was authorised in terms of the notification dated 28th August 2003. By this notice, the Petitioners were informed of the date of hearing before the Adjudicating Officer. However, u/s 49(3) FEMA, the Adjudicating Officer who takes notice of the contravention, and who consequently issued the notice dated 28th February 2002 had been authorized as such. No such notification has, however, been produced.

18. In the circumstances, this Court is constrained to observe that there is no notification placed on record to negative the contention of the Petitioners that the officer who issued the notice dated 28th February 2002 lacked the proper authorization to do so in terms of Section 49(3) FEMA. This would have the inevitable effect of vitiating the entire proceedings that followed such notice.

19. This brings up the last contention of the Petitioners on merits. Section 18(2) and 18(3) of the FERA read as under:

18. Payment for exported goods...(2) Where any export of goods to which a notification under Clause (a) of Sub-section (1) applies, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing--(A) in a case falling under Sub-clause (i) or Sub-clause (ii) of Clause (a) of Sub-section (1),--

(a) that payment for the goods--

(i) is made otherwise than in the prescribed manner, or

(ii) is delayed beyond the period prescribed under Clause (a) of Sub-section (1), or

(b) that the proceeds of sale of the goods exported do not represent the full export value of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank; and

(B) in a case falling under Sub-clause (ii) of Clause (a) of Sub-section (1), also that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade:

Provided that no proceedings in respect of any contravention of the provisions of this Sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period.

(3) Where in relation to any goods to which a notification under Clause (a) of Sub-section (1) applies the prescribed period has expired and payment therefore has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of Sub-section (2). (emphasis supplied)

20. In terms of Section 18(2) read with the FERA Rules the realization of the export proceeds has to be within six months. It is delayed beyond that period then a presumption would be drawn that the exporter did not take reasonable steps to secure the realization of the export proceeds. This is a rebuttable presumption. It can be rebutted by the exporter by proving that he had taken all reasonable steps "to receive or recover the payment for the goods". Therefore, he has to show one of the two things. Either that he took reasonable steps to receive the goods or recover the payment for the goods.

21. In the considered view of this Court, the Petitioners have, in the instant case, been able to show that the Petitioner No. 1 took all reasonable steps to receive back the goods that had been despatched for export. The Petitioner No. 1 wrote to TCIL asking it to re-book the consignment for the delivery back at New Delhi. TCIL, for reasons best known to it, was unable to do so. It first stated that all the six consignments were in its custody. Later it contradicted this by stating that four of the consignments had been delivered to the consignee. There is already a finding rendered by the NCDRC on this aspect. Since that judgment is pending consideration before the Supreme Court, this Court does not wish to comment on the aspect any further. However, for the purposes of Section 18(2) read with 18(3) FERA, all that an exporter has to show is that he took all reasonable steps to receive back the goods. Petitioner No. 1 took steps to receive the goods back at Delhi and also recover the amounts Constituting the export proceeds. The Petitioners have in fact succeeded in their claim before the NCDRC. Independent of that fact, it has been shown by the Petitioners that they took all reasonable steps to receive the goods back at New Delhi. In the circumstances, there was no contravention by the Petitioners of Section 18(2) FERA.

22. As regards the preliminary objection raised by the DoE, the Petitioners cannot possibly go before the Appellate Authority at this stage since there is in

fact no adjudication order. The Petitioners have been able to show that the essential ingredient of Section 18(2) read with Section 18(3) FERA has not been satisfied in the present case. It will not be in the interests of justice after nearly eight years, to require the Petitioners to face the entire proceedings before the Adjudicating Authority to demonstrate that the notice issued to them on 28th February 2002 was without jurisdiction. The facts necessary to even prima facie draw the inference of violation of Section 18(2) FERA by the Petitioners do not exist in the present case.

23. Consequently, the impugned show cause notice dated 28th February 2002 issued by the Deputy Director, DoE and the consequent memorandum dated 4th December 2003 issued by the Adjudicating Officer are hereby set aside.

24. The writ petition is accordingly allowed but in the circumstances with no orders as to costs.