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(2006) 12 DEL CK 0051

In the Delhi High Court

Case No : Writ Petition (C) 18296-99 of 2006

Hindustan Lever Ltd. and Others — APPELLANT

Vs

Special DTE of Enforcement and Another — RESPONDENT

Date of Decision : 13-12-2006

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Foreign Exchange Regulation Act, 1973 — Section 18(2), 18(3)

Citation : (2007) 139 DLT 85 : (2007) 76 SCL 343

Hon'ble Judges : Mukul Mudgal, J;J.P. Singh, J

Bench : Division Bench

Advocate : Ravinder Narain Nupur Singh and Rajan Narain, for the Appellant; P.P. Malhotra, ASG and Rajdeepa Bhera, Chetan Chawla, Gaurav Sharma and Sonia Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This writ petition challenges the order dated 22nd September 2006 passed by the Respondent No. 2, the Appellate Tribunal for Foreign Exchange (hereinafter referred to as the Appellate Tribunal) by which the petitioner No. 1 M/s Hindustan Lever and its three directors petitioner No. 2, Mr. K.B. Dadiseth, petitioner No. 3, Mr. S.M. Datta and petitioner No. 4 Mr. D.M. Buckle were directed to deposit the penalty imposed upon them by the respondent No. 1 Special Director, Enforcement Directorate by his order dated 17th July 2000 to the extent stated in the order dated 22nd September, 2006.

2. The brief facts of the case as per the case setup by the petitioner are as under:

(a) On 25th November, 1993, a show cause notice was issued to the petitioner No. 1 requiring it to show why an action u/s 18(2) read with Section 18(3) of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the "FERA") should not be initiated against it as well as petitioner Nos. 2, 3 & 4 for non-recovery of export proceeds of about Rs. 2.95 crores within the stipulated time, against exports made by the petitioner No. 1 between 1982-1991.

(b) On 4th January 1994, the petitioner No.1 replied to the show cause notice dated 25th November 1993 stating that:

(i) Out of the aforesaid amount of Rs. 2.95 crores, an amount of Rs. 45.6 lakhs was already adjudicated upon by the Respondent No.1 in a separate legal proceedings, and its order dated 4th October 1993 had not been challenged by the respondent and Therefore, attained finality.

(ii) Rs. 2.49 crores were the subject matter of summons notice dated 20th October 1993 issued by Central Economic Intelligence Bureau.

(iii) An amount of Rs. 2.01 crores related to exports to State Company for Food stuffs trading, Iraq, which could not be recovered due to the complete embargo on all exports from and to Iraq imposed by United Nations on Iraq. Therefore, no payments could be retrieved from Iraq in respect of such exports.

(iv) Out of the remaining amount of Rs. 43 lakhs, Rs. 27.67 lakhs were in respect of shipment to USSR where the respective companies had ceased to exist in view of the disintegration of the Russian Federation.

(v) The balance of Rs. 20.77 lakhs instituted a small proportion of the total exports to various countries and an effort to recover the same would be a drain on the force.

(c) Pursuant to the earlier show cause notice, dated 25th November 1993, a further Opportunity Notice dated 26th October 1994 was issued to the petitioner No.1 as well as petitioner Nos. 2, 3 & 4.

(d) On 29th October 1994, the petitioner No. 1 filed a reply to the show cause notice dated 25th November, 1993 issued by the Respondent No. 1 in respect of exports made by the petitioner No. 1 to Iraq, USA, Canada and Italy during the period 1982-1991 for which payments could not be recovered.

(e) On 10th November 1994, the petitioner No. 1 made a representation to the Respondent No. 1 wherein it was stated that the petitioner Nos. 2, 3 & 4 sought to be prosecuted were neither responsible nor were involved in any manner with the export business of the company and Therefore, cannot be held liable for the alleged contravention of Section 18(2) of the FERA.

(f) On 17th July 2000, the Respondent No. 1 held that the petitioner No. 1 as well as the petitioner Nos. 2, 3 & 4 guilty of contravention u/s 18(2) read with Section 18(3) of the FERA for not recovering export proceedings to the extent of Rs. 2.45 crores (excluding the amount already adjudicated upon) and imposed the penalty of Rs. 1.25 crores on the petitioner No. 1 as well as a penalty of Rs. 25 lakhs each on the petitioner Nos.2, 3 & 4.

(g) On 4th September, 2000 an appeal was filed by the petitioner No. 1 and the petitioner Nos. 2, 3 & 4 in the FERA Tribunal against the order dated 17th July 2000 passed by the Respondent No. 1 and on 4th December 2000 the Appellate Tribunal granted an ad-interim stay of the impugned order dated 17th July 2000

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with the direction that the prayer for waiver of deposit was to be heard separately. On 13th October 2005, the ad-interim stay granted by the Appellate Tribunal by its order dated 4th December, 2000 was vacated by it.

(h) On 23rd December, 2005, the Appellate Tribunal restored the ad-interim stay vacated by its order dated 13th October 2005 and adjourned the matter till 29th March 2006 in view of the contention of the petitioner No.1 with respect to extension of 5 GRIs (Rs. 2.01 crores relating to Iraq) up to the 31st December 2006 as well as the pending waiver application with respect to the other amounts. On 29th March 2006 the stay of the order dated 17th July 2000 was continued till 22nd September, 2006.

(i) On 26th September, 2006, the Appellate Tribunal passed an order directing the petitioner No. 1 to pre-deposit the 15% of the penalty amount imposed upon them by the respondent No.1 by its impugned order dated 17th July 2000.

3. The principle plea raised by the learned Counsel for the petitioner Mr. Ravinder Narain, is based on the judgment of the Hon''ble Supreme Court in Mehsana Dist. Co-op. Milk P.U. Ltd. Vs. Union of India (UOI), . The learned Counsel for the petitioner has submitted that the impugned order dated 22nd September 2006 is merely based on prima facie balance of convenience without addressing the merits of the case at all. In the process of doing so, only financial hardship has been taken into account. The Hon''ble Supreme Court has laid down the following position of law in the case of Mehsana Dist. case (supra):

2.The issue here relates to the order passed by the Commission (appeals), Central Excise and Customs, u/s 35F of the Central Excise Act, 1944. 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.

4. The learned Counsel for the petitioners thus, submitted that the fact of financial hardship, if any, caused to the petitioners was not a material circumstance which ought to have been taken into account while imposing the condition of pre-deposit of 15% of the penalty amount imposed on the petitioners. He submitted that without recourse to the consideration of the prima facie merits of the case, the Respondent No. 2, the Appellate Tribunal directed the petitioners to deposit the penalty merely by looking at the financial hardship that would be caused to the petitioners without considering the financial hardship on the individual directors. This approach of the Appellate Tribunal was erroneous and contrary to the judgment of the Hon''ble Supreme Court in Mehsana Dist. case (supra).

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5. He has further relied upon the judgment of the Tribunal in Taj Traders & Transport Co. Ltd. v. Director of Enforcement 1995 CL 109 where the following position of law was laid down:

It would, Therefore, follow that if an application seeking extension of time or for permission for writing off the outstanding export proceeds is pending consideration of the Reserve Bank, the question whether there has been a contravention of the provisions of Section 18(2) cannot be determined unless and until the Reserve Bank has refused extension of time or the permission for writing off, as the case may be. If any adjudication proceedings are initiated during the pendency of such applications before the RBI, such proceedings would be pre-mature and without jurisdiction.

6. The learned Additional Solicitor General Mr. P.P. Malhotra, has however, rebutted the above pleas of the learned Counsel for the petitioner by submitting that the judgment of the Tribunal in Taj Traders (supra) is not binding on this Court quite apart from the fact that the reasoning in the said judgment is not logical. In our view, this writ petition can be disposed of on the primary plea of the learned Counsel for the petitioner that the merits of the case of the petitioner were required to be looked into as mandated by the order of the Hon''ble Supreme Court in the said judgment of Mehsana Dist. (supra). However, the judgment of the Hon''ble Supreme Court does not rule out the prima facie examination of balance of convenience but merely notes that after the prima facie merits of the case is examined, financial hardship and other relevant factors Constituting balance of convenience are required to be looked into.

7. We have perused the above order dated 22nd September, 2006 and we are satisfied that the order calls for no interference in the writ jurisdiction in view of the fact that prima facie merits of the disputes have been addressed by the Appellate Tribunal in its order dated 22nd September 2006 in the following terms:

4.The arguments advanced by Ld. Counsel Shri Ravinder Narain more or less touch merits of the case which this Tribunal cannot consider presently at this stage while deciding application for dispensation of pre-deposit of the penalty. These lengthy arguments will be appreciated at the time of hearing on merits. On the other hand, the appellants have a case to answer and adjudication order is not bad ex facie. The question of displacement of adverse legal presumption u/s 18(3) will need proper appreciated of all facts whether they constitute a reasonable step for repatriation of export proceeds. the Directors holding such position are commonly entitled to manage the affairs of the company and Article 149 of the Article of Association. It is well-settled that company''s action and mind is controlled by Board of Directors. The question here is of negligent behavior of the company in not taking reasonable steps when the judgment in U.P. Pollution Control Board Mohan Meakins Ltd. 2000 CLC 887 (SC) speaks opposite to the contentions of the counsel. Moreover, there is no deeming proviso against pendency of request of waiver, hence, long pendency of 8 years by now is sufficient to assume rejection of the same. However, after deducing the value

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of the GRIs where extension is granted till 31st December, 2006, by RBI, the remaining amount is admittedly 15% of the total. Hence, we direct the appellants herein after dispensing with 85% of the penalty to make pre-deposit of 15% of the amount of penalty in their each case within 45 days from date of receipt of this order failing which respective appeal will be dismissed on this ground alone. These appeals are fixed for further hearing and reporting of compliance on 28th November, 2006.

8. Thus, in reducing the amount of penalty to be predeposited to 15% of the amount levied, the Appellate Tribunal has taken into account the prima facie merits of the case in the above extract. It is clear that the 15% of the amount of the penalty was derived after deducing the value of GRIs, which shows that the Appellate Tribunal did consider the prima facie merits of the petitioner''s case which satisfies the requirement laid down by the Hon''ble Supreme Court in Mehsana Dist. case (supra). The financial hardship and the other balance of convenience clearly indicated that when only 15% of the penalty of Rs. 2 crores was required to be deposited and after taking into account the financial health of the company, there was no financial hardship warranting interference with the pre-deposit of 15% of the penalty.

9. Mr. Narain has argued that the directors of the company cannot be held responsible. It is submitted that the they were, at the relevant time, not the Directors of the company looking after that aspect of the business of the company in respect of which the penalty was imposed for the alleged infraction at the relevant time, i.e., years 1982-1991. The petitioner No. 4 Sh. D.M. Buckle was not even the Director of the company at the relevant time.

10. In so far the case of the petitioner No. 4 Sh. D. M. Buckle is concerned, since there is no rebuttal pointed out to us, at this stage, we are of the view that he should not be asked to make the pre-deposit of Rs. 3.75 lakhs. However, as far as other directors are concerned, there is no cause or occasion to interfere with the order of the pre-deposit. The authority imposing the penalty is not further required to go into intricate details of the sub-division of the business of the company and is consequently not required to find out which director was dealing with the specific business transactions which led to the penalty. As long as as the petitioner Nos. 2 and 3 were directors of the company at the relevant time, they are liable to pay the amount of the penalty in case the violation is established. At this stage, we are Therefore not inclined to interfere with the 15% of the penalty amount as ordered by the Appellate Tribunal. Accordingly the writ petition stands dismissed and is disposed of. While dismissing the writ petition, we extend the time to deposit 15% of the penalty amount up to the period of one week, i.e., not later than 19th December 2006 instead of 11th December, 2006 as ordered by the Appellate Tribunal.

11. This matter was argued at length before us and a number of judgments were cited on merits but we are not dealing with them as in our view, any observations on the merits of the matter are likely to prejudice the hearing

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before the Appellate Tribunal.

12. The writ petition is accordingly dismissed with the above modification in the impugned order dated 22nd September, 2006 with costs quantified at Rs. 10,000/- payable to the Respondent No.1 before the next date of hearing before the Appellate Tribunal. A copy of this judgment be given dusty to the learned Counsel for the parties.

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