

(2008) 04 MAD CK 0111

In the Madras High Court

Case No : Review Application No's. 20 to 26 of 2008 and M.P. No's. 1 and 2 of 2008

Indo International Ltd. and Others

APPELLANT

Vs

Assistant Director, Directorate of Enforcement, The Special Director, Enforcement Foreign Exchange Management Act, Directorate of Enforcement, Government of India and The Registrar, Appellate Tribunal for Foreign Exchange, Ministry of Law, Justice and Company Affairs, Government of India

RESPONDENT

Date of Decision : 17-04-2008

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 10(5), 10(6), 13(1), 16(3), 42(1)

Citation : (2008) 5 MLJ 1058

Hon'ble Judges : S.J. Mukhopadhaya, J;M. Venugopal, J

Bench : Division Bench

Advocate : Jamshed P. Cama, SC for K. Sridhar Associates, for the Appellant; P. Wilson, Asst. Solicitor General, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, J.—All these review applications have been preferred by petitioner against common judgment dated 8th Jan., 2008, passed in W.A. Nos. 1138 to 1144 of 2007.

2. The main ground taken for review is that the court has made certain observations without noticing the averments made in the writ petition and other documents, which learned Counsel wanted to rely giving effect to error of observation made with regard to the financial condition of the petitioners.

One of the question raised for determination in these review applications is whether the court is supposed to refer each and every ground and document, if not specifically raised by counsel for the party nor relies upon at the time of hearing of the case.

3. For proper appreciation of the review applications, it is desirable to notice

certain facts as mentioned hereunder:

Two of the petitioners are companies whereas the rest of the petitioners are Directors/Officials. For violating the provisions of the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA"), after due procedure and issuance of summons, being not satisfied, the Assistant Director, Directorate of Enforcement, Chennai, preferred complaint against the petitioners on 30th April, 2004 u/s 16(3) of FEMA for alleged contravention of Sections 10(5) read with 10(6) and 42(1) of FEMA before the Special Director, Directorate of Enforcement, Government of India, New Delhi. The Special Director, Directorate of Enforcement, by its impugned order, imposed the following penalties against the petitioners u/s 13(1) of FEMA:

Order No.SDE/PKD/IV/5/2005 F. No.T-4/2-M/2004

- 1) Penalty of Rs. 30,00,000/= (Rupees Thirty Lakhs only) on M/s. Indo International Ltd.
- 2) Penalty of Rs. 10,00,000/= (Rupees Ten Lakhs only) on Shri Umraomal Lodha.
- 3) Penalty of Rs. 3,27,000/= (Rupees Three Lakhs Twenty Seven Thousand only) on Shri Ram Abatar Jain.
- 4) Penalty of Rs. 6,00,000/= (Rupees Six Lakhs only) on Shri Rajesh Lodha.
- 5) Penalty of Rs. 5,000/= (Rupees Five Thousand only) on Smt. Ashu Lodha.

Order No.SDE/PKD/IV/6/2005 F. No.T-4/2-M/2004

- 1) Penalty of Rs. 20,00,000/= (Rupees Twenty Lakhs only) on M/s. Rave Global Ltd.
- 2) Penalty of Rs. 10,00,000/= (Rupees Ten Lakhs only) on Shri Rajesh Lodha, Director of M/s. Rave Global Ltd.
- 3) Penalty of Rs. 5,00,000 (Rupees Five Lakhs only) on Smt. Ashu Lodha, Director of M/s. Rave Global Ltd.
- 4) Penalty of Rs. 30,000/= (Rupees Thirty Thousand only) on Shri Ram Abtar Jain.
- 5) Penalty of Rs. 10,000/= (Rupees Ten Thousand only) on Shri Umraomal Lodha.

4. Against the said order, the petitioners preferred appeal before the Registrar, Appellate Tribunal for Foreign Exchange, New Delhi, with separate application for waiver of pre-deposit of penalty amount. The Appellate Tribunal, by its different orders dated 14th March, 2007, held that no prima facie case was made out and rejected the applications for waiver, but granted 45 days time to the appellants to deposit the penalty amount. The petitioners, thereafter, preferred writ petitions, which were heard by learned single Judge, who set aside certain part of the observations of the Appellate Tribunal, but affirmed the order rejecting the

application for waiver of penalty amount and dismissed the writ petitions on 7th Aug., 2007. The appeals were also dismissed by detailed common judgment dated 8th Jan., 2008, giving rise to these review applications.

5. The Division Bench, by impugned judgment dated 8th Jan., 2008, discussed the respective cases to find out whether a prima facie case was made out by parties and also made certain observations with regard to the financial condition of the petitioners. At paragraph-13 of the judgment, the following observation was made:

13. In the present case, we find that there is a prima facie case also made out by the Revenue and the company is in a position to pay the amount, which has not been disputed by the appellants, we agree with the observation as made by learned single Judge and, thereby, uphold the rest part of the impugned order passed by the Appellate Tribunal dated 31st May, 2005, by which the appellants were asked to deposit the amount within 45 days.

In the circumstances, while we reject the submission as made on behalf of the appellants, with a view to give them another opportunity, allow the appellants further time of thirty days to deposit the amount, if not already deposited.

6. When the aforesaid cases were taken up, learned senior counsel for the petitioners tried to highlight error apparent on the face of the judgment by referring to aforesaid paragraph-13, particularly the sentence where the court observed "the company is in a position to pay the amount, which has not been disputed by the appellants". It was submitted that no such admission was made by the appellants nor any such submission was made by the counsel for the petitioners/appellants. It was submitted that during the course of oral arguments, the petitioners accounts were placed on record, the court was pleased to enquire how much the petitioners were inclined to deposit. In response the petitioners had pointed out that at best, in deference to the Court question, they could perhaps borrow and deposit upto 10% of the amount in issue. The rest of the arguments were advanced to quash the demand for pre-deposit.

Learned senior counsel relied on the pleading made in the writ petitions and other applications to suggest that all the time the petitioners had taken plea that their financial position was not good to pay the pre-deposit penalty amount. Reliance was placed on additional typed sets, wherein the balance sheets of petitioners, M/s. Indo International Ltd. and M/s. Rave Global Ltd. have been enclosed.

7. We have heard the learned Counsel for the parties and noticed the submissions and certain documents, which have been placed along with the review applications, but were not highlighted before the court during the hearing of the appeals.

8. At this stage we may mention that at the time of hearing of the appeals,

almost similar stand was taken when it was argued that the Appellate Tribunal has not determined all the points as were raised by the petitioners/appellants. This will be evident from sub-paragraph of paragraph-6 of the impugned judgment dated 8th Jan., 2008, wherein in the concluding portion, the Division Bench of this Court observed as follows:

A perusal of Sub-clause (a) (b) and (c) of para-6 of the impugned order will show that the appellants have not raised all the points as raised in the present appeals.

9. At this stage, we may only mention recalling our hearing at the time of the appeals when the main argument was advanced on the merit of the case. Thrust was made that there was no prima facie case made out to proceed against the petitioners and, thereby, they were not liable to pay any amount. By way of argument, when it was asked, learned senior counsel submitted that at best the appellants are ready to pay 10% of the penalty amount. No specific document was relied on before the Division Bench with regard to the financial condition of the appellants. We may mention that there are various documents, which are enclosed with the typed sets, which are unaffidavited, without any specific pleading with regard to each of such document. If one or other document is specifically relied by learned Counsel before the court, we take notice of the same, otherwise we do not rely on other documents, which are not relied by the counsel for the parties, though merely enclosed with one or other typed sets.

It is now settled law that if different grounds are raised in a case and large number of documents are filed along with the petition, at the time of hearing if the counsel for such party do not raise such a ground or do not rely on one or other documents, the Court is not obliged to look into each and every ground mentioned in the petition and to each and every document to give a finding on such ground and documents, though not argued at the time of hearing.

10. However, as in the present case, it was specifically pleaded by way of affidavit that those documents were relied upon, we have gone through the documents as now filed with the additional typed sets.

From the additional typed set it will be evident that balance sheet of M/s. Indo International Ltd. and M/s. Rave Global Ltd. have been enclosed for the year since 2001 to 2006. No specific balance sheet or income tax return has been filed by individual petitioners. Atleast such document has not been highlighted by senior counsel, apart from the balance sheets of the aforesaid two companies.

11. Learned senior counsel for the petitioners placed much reliance on two certificates given by Ravi & Raghu, Chartered Accountants of Chennai, both dated 14th Feb., 2008, issued in respect of M/s. Indo International Ltd. and M/s. Rave Global Ltd. The balance sheets, as referred to above of the aforesaid two companies were also relied upon to show that there is a current liability of the company, which is more than the current assets as on 31st March, 2006 and, thereby, both the companies are running in loss.

From the balance sheets of both the companies, as enclosed with the typed sets, it will be evident that atleast one of the company is still functioning and both the companies have their assets. Profit and loss may be reflected in the books of account, but the question is whether the company or any individual is capable to pay the dues. From the certificate given by Ravi & Raghu, Chartered Accountants, dated 14th Feb., 2008, in favour of M/s. Indo International Ltd., it will be evident that though in the books of account the asset of the company is shown to be less than the liability, but the said company actually incurred profit of Rs. 194.12 lakhs for the year ended 31st March, 2006, and paid back the loan amount of M/s. Central Bank of India by way of one time settlement for more than Rupees One Crore.

Similarly, from the certificate given by Ravi & Raghu, Chartered Accountants dated 14th Feb., 2008, issued in respect of M/s. Rave Global Ltd., though it is shown that the company has no business activity since 1st April, 2001, except sale of Rs. 19.28 lakhs during the year 2005-2006 and other income of Rs. 115.71 lakhs shown during the year ended 31st March, 2005, it will be evident that the said company has paid loan amount with M/s. Union Bank of India for more than Rupees One Crore. In the aforesaid background, in absence of specific pleading, it cannot be accepted that the petitioners have no money to pay the pre-deposit amount to the respondents which is between Rs. 5,000/= to Rs. 30,00,000/=. If the loan amount due to one or other bank is payable by the companies and they are paying more than crores respectively, irrespective of their balance sheet, for the purpose of depositing the statutory amount, they cannot claim that they are not in a position to pay. So far as individual petitioners are concerned, they have also not made out any case.

We have already noticed that it is not a big amount, which has been ordered to be paid by individuals. It is only Rs. 10 lakhs to be deposited by Mr. Umraomal Lodha, Rs. 3.27 lakhs by Mr. Ram Abatar Jain, Rs. 6 lakhs and Rs. 10 lakhs by Mr. Rajesh Lodha and Rs. 5 lakhs by Smt. Ashu Lodha.

12. We, accordingly, hold that the petitioners have not made out any case of waiver of statutory amount nor any case is made out to review the judgment dated 8th Jan., 2008, passed in W.A. Nos. 1138 to 1144 of 2007. There being no merit, all the review applications are dismissed. Consequently, connected miscellaneous petitions are also dismissed. But there shall be no order as to costs.