

(2008) 01 MAD CK 0087

In the Madras High Court

Case No : W.A. No's. 1138 to 1144 of 2007 and M.P. No's. 1 of 2007

Indo International Ltd.

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 : 08-01-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14
Companies Act, 1956 — Section 16(3)
Customs Act, 1962 — Section 108, 135
Evidence Act, 1872 — Section 24
Foreign Exchange Management Act, 1999 — Section 10(5), 10(6), 13(1), 37, 40
Foreign Exchange Regulation Act, 1973 — Section 40
Income Tax Act, 1961 — Section 131

Citation : (2008) 01 MAD CK 0087

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;
V.T. Gopalan, ASG assisted by P. Wilson, Asst. Solicitor General, for the
Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, J.—As all the writ appeals arise out of common order dated 7th Aug., 2007, passed by learned single Judge and

common question of law involved, they were heard together and disposed of by this common judgment. While two of the writ appeals, W.A.

Nos.1138 & 1139 of 2007 are preferred by companies registered under the Companies Act, 1956, the other appeals are preferred by individuals,

who are the Directors/Officials of those two companies.

2. The brief facts of the case, as was pleaded by appellants before the writ court are as follows:

Indo International Ltd., and Rave Global Ltd., are companies engaged in export business of leather and other commodities. In the normal course

of their business, the Directors and other officials purchase foreign exchange under Liberalised Exchange Rule Management System and make

payment towards the same by way of crossed cheques from their banks. They purchase foreign exchange, but since company officials, including

the Directors were not able to make foreign trip as planned, the appellants surrendered the foreign exchange so purchased through authorised

money changers within a day or two and received the exchange value of foreign exchange by means of crossed cheque in their name. They also

paid back the amount within the prescribed period to the money changer through whom they had purchased foreign exchange on credit. Whiles,

the appellants received summons from the 1st respondent, Assistant Director, Directorate of Enforcement, Chennai, asking them to appear in

person in connection with proceeding under the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA") to produce copies

of applications for purchasing foreign exchange under Liberalised Exchange Rule Management System as also details of their financial status. The

summons were duly replied by appellants, but 1st respondent being not satisfied, preferred complaint against the appellants in F. No. T-

3/62/SZC/2002 (SK) dated 30th April, 2004, u/s 16(3) of the Act for alleged contravention of provisions of Section 10(5) read with Section

10(6) and Section 42(1) of FEMA before the 2nd respondent, the Special Director, Foreign Exchange Management Act, Directorate of

Enforcement, Government of India, New Delhi. A detailed reply was submitted by appellants denying the allegation of violation of any law on their

part, particularly, in respect of sections referred to above. However, 2nd respondent, on analysis of the facts, by its common order dated 31st

Jan., 2005, imposed penalty of Rs. 30 lakhs and Rs. 20 lakhs on the respective appellant companies. Individual cost were also imposed on the

Directors and Officials.

Against the aforesaid orders of the 2nd respondent, the appellants preferred appeal before the 3rd respondent, the Registrar, Appellate Tribunal

for Foreign Exchange, Ministry of Law, Justice and Company Affairs, Government of India, New Delhi, (hereinafter referred to as "Appellate

Tribunal"). Separate applications for waiver of pre-deposit of penalty amount were also preferred along with the appeals. The Appellate Tribunal,

by its different orders, dated 14th March, 2007, held that there was no prima facie case made out in the appeals and that the adjudication of the

order of the 2nd respondent is not ex-facie bad. Taking into consideration the sound financial condition of the appellant-companies, the Appellate

Tribunal, held that there is no need for any waiver of pre-deposit and, thereby, rejected the applications for waiver granting 45 days time to

appellants to deposit the penalty amount and made it clear that the appeals would stand dismissed in the event of non-payment of such amount.

The writ petitions preferred by both the companies and its Directors/Officials were dismissed by learned single Judge by impugned order dated 7th

Aug., 2007, giving rise to the present appeals.

3. We have heard Mr. Jamshed P. Cama, learned senior counsel for the appellants and Mr. V.T. Gopalan, Addl. Solicitor General of India and

Mr. P. Wilson, Assistant Solicitor General of India appearing for the respondents.

4. The only question involved in the appeals is whether the appellants have made out a case for waiver of the penalty amount for the purpose of

hearing of their appeals on merits.

5. Learned senior counsel appearing on behalf of appellants, while relied on relevant facts, made the following submissions in support of the

appellants claim for waiver:

a) Section 10(5) of FEMA relates to an authorised person, who were required to verify certain thing in accordance with law is not applicable to

the appellants, who purchased foreign exchange from such authorised person.

b) Though the appellants, who are other than authorised person, purchased foreign exchange for foreign travel of its Directors and Officials, foreign

travel having cancelled, the foreign exchange was sold to another authorised person and the foreign exchange given on credit to the appellants by

authorised person was returned within specified period of 30 days. Therefore, Section 10(6) of FEMA is not attracted in the case of the

appellants.

c) The company having not contravened any provisions of FEMA or any rule, direction or order made therein, no such allegation having shown in

the penal order, Section 42(1) of FEMA is not attracted in respect of both the companies.

d) The 2nd respondent having come to a definite conclusion that there was no actual loss of foreign exchange and that there is only a technical

contravention of the provisions of the Act and that there is no mis-utilisation of foreign exchange, the imposition of penalties was uncalled for.

e) The Appellate Tribunal failed to appreciate that no case has been made out by the respondents and, thus, there is no leg to stand. Therefore, it

was a fit case for waiver of deposition of pre-deposit amount for hearing of appeals on merits.

f) The Appellate Tribunal, while passing impugned order, has failed to notice the undue hardship the appellants will face if they are asked to deposit

the penal amount in advance, though there was no case made out against them.

Learned senior counsel for the appellants, while referred to different decisions of High Courts and Supreme Court, submitted that the respondents

have failed to make out a case of mis-utilisation of foreign exchange by the appellants. The foreign exchange is purchased on credit from authorised

person and was sold to another authorised person within a day or two, as permissible under law and credit amount having deposited to the

authorised person from whom foreign exchange was purchased within prescribed period of 30 days, no case was made out against the appellants.

6. Learned senior counsel appearing for the respondents, while highlighted the facts leading to initiation of proceedings, submitted that a good case

was made out showing violation of Section 10(6) of FEMA. It is informed that on specific information that Mr.Rajesh Lodha of the appellant

company was engaged in purchasing foreign exchange in his name and his father's name as well as other officials of the appellant company under

Liberalised Exchange Rule Management System, the residence and office premises of Mr.Lodha was searched by officers of Enforcement

Directorate. Statement of Mr. Lodha u/s 37 of foreign exchange management was recorded by invoking the provision u/s 131 of the Income Tax

Act. The statement u/s 37 of FEMA is akin to the statement obtained u/s 40 of the then Foreign Exchange Regulation Act; Section 108 of

Customs Act as well as Section 14 of the Central Excise Act. Such statements not being made before police officer are admissible evidence and

could be solely relied upon for the purpose of any proceeding for violation. Reliance was placed on Supreme Court judgment in K.I. Pavunny Vs.

Assistant Collector (HQ), Central Excise Collectorate, Cochin, , wherein the Supreme Court, while noticed Section 108 and 135 of the Customs

Act, 1962, held that a confessional statement recorded by reason of statutory compulsion or given voluntarily by accused pursuant to his appearing

against summons or on surrender cannot be said to have been obtained by threat, inducement or promise and held that such statement is admissible

in evidence within the meaning of Section 24 of the Evidence Act.

It is brought to the notice of the Court that Mr. Lodha had admitted that he purchased foreign exchange under Liberalised Exchange Rule

Management System credit facility for about a month and used to roll the money back into the business of the said company. He further admitted

that foreign exchange used to be purchased by post-dated cheques and issued to the said company and sold to full fledged money changers other

than the money changers from whom such foreign exchange was purchased. He has also stated that he used to avail foreign exchange using the

name of the other noticees. By the order in original, various amount of penalties have been levied on the company as also Mr.Lodha and others u/s

13(1) of FEMA.

Learned senior counsel for the respondents submitted that for preferring an appeal, pre-deposit of penalty imposed is a pre-condition for filing such

appeal. The Appellate Tribunal having noticed the relevant fact and that a strong case was made out by Revenue and the sound financial condition

of the appellant companies and its Directors, rejected the application, but allowed more time to make pre-deposit of penalty amount. 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.

7. Aforesaid submission made on behalf of respondents was countered by learned senior counsel appearing on behalf of the appellants. While it is

accepted that foreign exchange used to be taken on credit and resold to another full fledged money changer and credit amount used to be refunded

within 30 days to the money changers from whom it was purchased on credit, according to counsel for the appellants, it is open to any person to

utilise such money, if otherwise do not contravene any law. According to him, a person can take advantage of law. Reliance was placed on

Supreme Court decision in Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, , wherein Supreme Court, while dealing with the

Income Tax Act, observed ""that avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. The

tax payer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of device depends not upon considerations of

morality, but on the operation of the Income Tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it

may lawfully be circumvented"".

Reference was also made to Supreme Court decision in A.V. Fernandez Vs. The State of Kerala, , wherein Supreme Court observed as follows:

29. ...If the Revenue satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand,

the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying

to probe into the intentions of the legislature and by considering what was the substance of the matter....

8. We have noticed the rival contentions a made by the parties, the impugned orders and also noticed the decisions relied on by learned Counsel

appearing on behalf of the parties.

9. From the complaint dated 30th April, 2004, as on record, and impugned orders dated 31st Jan., 2005, it appears that Mr.Rajesh Lodha, in his

statement dated 26th July, 2002, admitted that he and other Directors and employees used to avail foreign exchange under Liberalised Exchange

Rule Management System for foreign visits from full fledged money changers and utilise the amounts for their business instead of foreign visits. In

his subsequent statement dated 12th Aug., 2002, he had given year-wise break-up of foreign exchange availed in the following manner:

Year US\$ - IC US\$ - Currency

2000 187000 2000

2001 1948300 3000

2002 69550 2450

Total 22,04,850 7,450

Mr. Lodha further stated that the entire amounts were surrendered to other full fledged money changers except from whom foreign exchange used

to be purchased on credit. In fact, he clarified that his company resorted to the aforesaid modus operandi to generate funds, which could be

utilised for business. Such funds used to be generated and used for the company as their companies were facing financial crunch and, thereby,

resorted to generate funds in the aforesaid manner.

10. As noticed earlier, it was contended on behalf of the appellants that if permissible under the law, a person can generate revenue on the

aforesaid fashion. It was suggested that the foreign exchange which was purchased having sold back, the foreign exchange was not utilised, but

Indian currency was utilised for business, which do not attract any provisions of FEMA. On the other hand, learned Counsel for the respondents

referred to Section 10(6) of FEMA, which reads as follows:

(6) Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration

made by him to authorised person under Sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the

specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign

exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to

have committed contravention of the provisions of the Act for the purpose of this section.

According to him, the appellants, who are covered within the meaning of "any person" other than authorised person, purchased foreign exchange

for the purpose other than the purpose mentioned in the declaration made by them to authorised persons under Sub-section (5) and having not

used it for such purpose and having used the money generated out of the foreign exchange for which it was not purchased, Section 10(6) is

attracted and for that penalty u/s 13(1) of FEMA could be imposed on the appellants.

11. Though the aforesaid submission made on behalf of the respondents seems

to be attractive, but there could be some counter argument and explanation, as raised by the appellants in the present case. However, as we are not supposed to decide such issue in the present appeals, which may be determined by the Appellate Authority, we refrain to give any finding on such issues. For determination of the issue, i.e., whether the appellants are entitled for waiver, we are of the view that the Revenue have made out a prima facie case, though the appellants may have also some prima facie case in their favour, but this is not the stage for determination. In this background, if a part of the appellate order regarding merit of the case has been set aside by learned single Judge by impugned order dated 7th Aug., 2007, no interference is called for against such part of the order.

12. So far as "undue hardship" is concerned, it was noticed by the Supreme Court in *S. Vasudeva Vs. State of Karnataka and others*, that in Indian conditions the expression "undue hardship" is normally related to economic hardship. "Undue" means something, which is not merited by conduct of the claimant or is very much disproportionate to it. Undue hardship is excessive hardship, that is not warranted by circumstances.

In the case of *Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another*, , the Supreme Court observed as follows:

13. For a hardship to be "undue" it must be shown that the particular burden to have 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.

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.

14. There being no merit, the writ appeals are dismissed. Consequently, connected miscellaneous petitions are also dismissed. But in the facts and circumstances, there shall be no order as to costs.