
(2012) 09 BOM CK 0160
In the Bombay High Court
Case No : Fera Appeal 56 of 2009

Ramniklal M. Doshi

APPELLANT

Vs

Special Director, Enforcement Directorate and Another

RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Foreign Exchange Regulation Act, 1973 — Section 18, 18(2), 18(3), 40, 50

Citation : (2012) 09 BOM CK 0160

Hon'ble Judges : R.D. Dhanuka, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Mili Thakkar with Mrs. S.V. Thakkar, for the Appellant; P.S. Jetly with Mr. M.S. Bhardwaj, for the Respondent

Judgement

R.D. Dhanuka, J.—These appeals filed by the appellants u/s 35 of the Foreign Exchange Management Act, 2000 (hereinafter referred to as "FEMA") read with section 54 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA") are directed against the order of the Appellate Tribunal for Foreign Exchange (hereinafter referred to as "Tribunal") dated 30th April, 2009. All these appeals arise out of common order passed by the Tribunal and were therefore heard together and being disposed of by a common order. Appeal No. 57 of 2009 is filed by M/s. Overseas Textiles Corporation (hereinafter referred to as "Firm") and Appeal Nos. 56 of 2009, 58 of 2009, 59 of 2009, 60 of 2009 and 61 of 2009 are filed by the partners of the said firm. For the sake of convenience, facts in Appeal No. 57 of 2009 are discussed in this order.

2. By the impugned order the Tribunal has sustained the findings of the Special Director, Enforcement Directorate, holding in terms of section 18(3) of FERA that the appellants did not take all reasonable steps to receive or recover the payments for the exported goods and therefore, shall be presumed to have contravened the provisions of sub section (2) of section 18 of FERA. The Tribunal has upheld the penalty of Rs. 8,00,000/- imposed on the firm M/s. Overseas

Textile Corporation and Rs.60,000/- on each of the partners of the said firm.

3. This appeal has been admitted on 10th September, 2009. The appellants have raised several questions of law. During the course of hearing, the appeal has been pressed by the counsel on question Nos. 1 to 4 which are as follows :

(1) Whether every non realization of export proceeds tantamount to a violation of S.18(2) of FERA?

(2) Whether the department's failure to aver the necessary ingredients of S.18(2) was sufficient reason for the Show Cause Notice to be set aside?

(3) Whether the actions of the firm were sufficient to cause reasonable steps within S.18(2) of FERA in the light of the judgments of FERA?

(4) Whether the department was correct in issuing the SCN, when the application of the Firm for write off was in consideration of the RBI?

4. Some of the relevant facts which have bearing on the subject matter of these appeals are as under :

Since 1986-87, the said Firm was exporting ready-made garments to one M/s. Shahi Textile Imports, GmbH Germany (hereinafter referred to as the "said party"). The firm used to receive payment from the said party in respect of such export though some time belatedly. During the year 1992-93 there was recession in Europe. According to the appellants, during the period between 1985 to 1992 the firm had business transactions with the said party worth more than Rs. 12 Crores. From 1st April, 1993, the firm had exported garments worth Rs.17,121,941.989 to the said party and received payments to the tune of Rs.14,198,266.43 leaving the balance outstanding of Rs.2,943,675.55. During the period 1.4.1993 to 13.10.1993, the firm exported to the said party in the sum of Rs.7,240,519/- whereas the amount recovered during that period was Rs.16,799/- leaving the outstanding balance of Rs.7,223,720/-. The last amount received by the firm from the said party on 26th December, 1993 was of Rs.314,065.11. The total outstanding from 1st April, 1992 to 13th October, 1993 was Rs.10,167,395/-.

5. On 27th December, 1993 the said party filed proceedings for its bankruptcy before a Local Court at Germany. On 12th January, 1994 the firm contacted Indian Ambassador at Germany. By letter dated 18th January, 1994, the Indian Ambassador informed the firm that there was very little chance of recovering the amount from the said party and advised the firm to file a suit in appropriate court. On 19th January, 1994, the firm filed their claim with the Official Liquidator for recovery of its claim. According to the Appellants, it was realized by the firm that there was no scope for recovery of any money from the said party. On 19th January, 1994 the firm lodged its claim for payment of the proceeds of the export bills with M/s. Lawyer Werner Schniewind who was appointed as the Official Receiver and Sequestrator by the German Court. On 22nd March, 1994 the firm filed its claim before the Judicial Administrator,

District Court, Germany. On 14th January, 1994, the Ambassador of India informed the firm that he had requested the Councilor (Com) to follow up on the points raised in his message and suggested that the claim of the firm for recovery of dues from the assets of the said party was to be filed urgently. On 18th January, 1994 the Councilor (Economic and Commercial) from the office of Embassy of India informed the firm that on contacting the Receiver appointed in respect of the said party, he was informed that the Banks as per German Law shall have the first claim in a bankruptcy case and cash assets of DM 20,000/- only was left by the said party. He further informs that most of this amount will go towards defraying the legal costs and that the Indian creditors are not likely to get anything at all.

6. On 19th January, 1994 the Firm lodged its claim with the Insolvency Liquidator. On 22nd March, 1994 the Firm filed an application with the Judicial Administrator, District Court, Germany making its claim. Between the year 1994 and 1996, there was further correspondence exchanged between the Reserve Bank of India, Bank of Baroda and the firm. The firm submitted various documents from time to time to the Reserve Bank of India as well as Bank of Baroda as requisitioned by the bank in respect of the permission sought by the firm for writing off of the amount of unpaid bills. On 14th March, 1996, the Reserve Bank of India informed the Bank of Baroda that as the ECGC had not settled the claim of the firm, the Bank of Baroda should approach the RBI for writing off after ECGC takes final decision in the matter. On 29th March, 1996 the firm informed the RBI that the ECGC had partially settled its claim of Rs.29,85,835/- and the said amount had been credited to their PSDL account with Bank of Baroda in settlement of outstanding bills. The firm forwarded details of the cheque received from ECGC and once again requested for permission to write off the amount of unpaid bills. On 14th June, 1996 the RBI informed the firm that its case was under consideration of RBI and requested to await.

7. On 27th January, 1997, the firm once again requested the RBI to grant permission to write off the amount of the unpaid bills as early as possible. The firm sent reminder to RBI on 8th August, 1997. On 14th October, 1997 RBI asked the firm to submit details of GR forms for which claims were settled by ECGC and the reasons for not settling the claim for the balance amount of Rs.67,41,935/-. On 12th November, 1997 the firm forwarded copy of the letter dated 14th February, 1997 received from ECGC setting out the reasons for not entertaining the claim and once again requested for permission to write off the amount of Rs.67.41 lacs.

8. On 25th July, 1998 the Bank of Baroda asked the firm to submit required information regarding export performance of the firm during the year 1994-1997 and latest position of overdue bills so as to enable the said bank to forward the same to RBI. The firm supplied the said information to the Bank of Baroda. On 5th November, 1998, the firm once again requested for permission to RBI to write off the pending dues. On 3rd August, 1999 the firm informed the Reserve

Bank of India that it had complied with all the requirements as per Para 6C.14(i) (d)(i) of Exchange Control Manual and requested the RBI to look into the matter and to grant permission to write off the amount of DM 5,29,984.56 in respect of exports made to the said party as there was no possibility of recovering the said amount from the said party. The firm had already submitted the necessary documents about the bankruptcy and certificate from the liquidator in respect of the said party to RBI. On 16th February, 1999, statement of one of the partners of the firm was recorded by the Enforcement Directorate, Mumbai u/s. 40 of FERA. The partner submitted various details and documents while statement was recorded. On 23rd December, 1999 the Additional Director, Enforcement Directorate, FERA issued show cause notice to the firm as well as partners alleging that the firm as well as the partners who were in charge and responsible for the conduct of the business of the firm, had acted in contravention of the provisions of section 50 of the FERA in respect of 47 GRI forms totaling to DM 5,35,777/- equivalent to Rs.6,74,1975.76 and had rendered themselves liable to be proceeded u/s 50 of the said Act. The firm as well as the partners filed reply to the said show cause notice contending that no violation was committed by the firm or the partners. The application for extension of period made by the firm was pending before the RBI. The firm had received part payments from the party barely about a week before the said party had applied for bankruptcy proceedings. The firm also filed written submissions before the Adjudicating Authority.

9. By an order in original dated 23rd November, 1999 the Additional Commissioner/Adjudicating Authority recorded a finding that no document was placed on record by the firm and its partners to show as to what transpired between them and the importer, questioning non-payment and impressing upon the importer that legal action would be taken against the exporter if the payment was not made on time. The learned Officer gave finding that there was no documentary evidence adduced or produced by the firm and therefore, he had reason to presume in terms of section 18(3) of the FERA that the notices did not take all reasonable steps to receive or recover the payments for the exported goods. The learned Adjudicating Authority rejected the argument of the firm that the firm had applied to RBI for writing off the outstanding amount and the same was under consideration with RBI. The learned Authority presumed that no such application was pending with the RBI. By the said order, the penalty of Rs. 8,00,000/- was imposed on the firm and a penalty of Rs.60,000/- on each of the partners of the firm.

10. In an appeal preferred by the firm as well as the partners before the make pre-deposit of 35% of the amount of penalty and subject to such pre-deposit allowed full dispensation of pre-deposit against the partners observing that the partnership firm was a compendium name of all the partners and does not enjoy separate legal personality. There is no dispute that the firm has complied with the said order and has deposited the amount as directed.

11. By an order dated 30th April, 2009, passed by the tribunal, the appeals filed by the firm as well as partners came to be dismissed. The tribunal gave following findings (i) that the appellants continued to export despite continuous defaults made by the said party in clearing the outstanding; (ii) No material had been brought on record showing part payments, if any, received from the importer; (iii) the importer approached RBI after expiry of about five years i.e. in 1999 which could not be termed as reasonable and effective steps and thus they failed to displace the rebuttable presumption available against them u/s. 18(3) of the Act; (iv) the appellants had not brought any material on record showing their efforts to realize overdue export proceeds except approaching the RBI for extension of time; (v) In so far as partners are concerned, no material had been brought on record to show that they had exercised all due diligence to prevent contravention or that the contravention had taken place without their knowledge; (vi) penalty imposed when compared with the overdue export proceeds, was neither harsh nor excessive requiring any intervention from the tribunal.

12. We have heard the counsel and with their assistance, we have perused the record.

13. The Learned Counsel for the appellants made following submissions:

(a) Application for extension for realization of export proceeds from the importer as well as application and reminders made to the Reserve Bank of India for writing off the outstanding was pending. It could not have been thus held that any violation of section 18(2) or (3) was committed by the appellants.

(b) Various part payments were received from the importer in respect of various transactions. The last of such part payment was received by the firm on 26th December, 1993, i.e. few days prior to the importer filing an application for bankruptcy. Though the details in respect of part payment were furnished while recording the statement of the partner of the firm u/s 40 of the Act, and were on record, erroneous finding came to be given by the tribunal that no material had been brought on record showing part payment from the defaulting importer. It is submitted that the compilation of correspondence with RBI, Bank of Baroda, Insolvency Liquidator, exchanged between 12th July, 1994 and 1st December, 1999 comprising of 83 pages and 46 documents was filed before the adjudicating Authority as well as tribunal and submissions were made thereon but have not been considered at all. The findings recorded without consideration of evidence produced is thus in breach of principles of natural justice and in violation of Article 14 of the Constitution of India. The appellants had taken all reasonable steps to recover outstanding export proceeds. The impugned order passed by the Authority as well as by the tribunal are on the basis of the presumption drawn above and ignoring the evidence produced by the appellants.

(c) The appellant firm has already suffered tremendous loss in view of the bankruptcy of the importer causing the firm defunct in last more than a decade. The penalty levied by the Authority is thus harsh, unreasonable and arbitrary.

(d) The penalty cannot be levied on the firm as well as against the partners. The authority has failed to prove that the partners had been in any manner responsible in not recovering the outstanding amount.

(e) In the alternate, it is submitted that in the event of this Court coming to the conclusion that the steps taken by the Appellants were not adequate, considering the hardship caused to the appellants, penalty already paid to the extent of 35% be treated in full and final satisfaction of the penal liability.

14. On the other hand the Learned Counsel appearing for the respondent made following submissions :

(a) The appellants did not take any effective steps to realize and repatriate the portion of outstanding despite extension granted by the RBI. The appellants failed to produce any documents showing the alleged realization of the export proceeds. No material has been brought on record to show that the appellants had exercised all due diligence to prevent contravention of section 18(2) and (3) of the Act. Regarding partners, it is submitted that none of the partner had produced any material on record showing that the contravention had taken place without his knowledge or that he had exercised due diligence to prevent such contravention. The Learned Counsel relied upon the finding of fact given by the tribunal.

15. The Supreme Court in the case of Bharat Carpets Vs. Director, Enforcement Directorate, has held as under :

7 According to Section 18(2) without general or special permission of the Reserve Bank of India, the exporter is required to repatriate the sale proceeds within the prescribed period of six months. Section 18(3) creates an rebuttable legal presumption against the exporter whenever the prescribed period expires without repatriation of the export proceeds to the effect that exporter had not taken requisite steps to obtain repatriation of the payment.

16. The question raised for consideration of this Court is whether the exporter in this case had made reasonable efforts to repatriate the export proceeds within the prescribed or extended period and as to whether the exporter had rebutted the legal presumption who admittedly failed to receive and repatriate the export proceeds within the prescribed and or extended period.

17. In our view, the decision of the Appellate Tribunal that the firm has failed to take reasonable steps for realizing the export proceeds is a finding based on facts viz:(a) that the appellants continued to export despite continuous defaults made by the said party in clearing the outstanding; (b) that the importer approached R.B.I., after expiry of about five years; and thus cannot be faulted. However, looking to the facts that the firm had taken some steps to realize export proceeds though may not be adequate, application for extension of time and to write off the export proceeds was pending consideration before the RBI, part payment was recovered by the firm from the importer, in our opinion, this is

a fit case for accepting the alternate submission of the assesses that the penalty should be restricted to 35% of the penalty imposed and the amount already paid by the firm may be treated in full and final satisfaction of the penal liability.

18. As far as penalties imposed on the partners is concerned, after considering section 4 of the Indian Partnership Act, 1932, the Supreme Court in the case of Purushottam Umedbhai and Co. Vs. Manilal and Sons, has held that the word "firm" or the "firm name" is merely a compendious description of all the partners collectively. In our view the firm acts through its partners. The authority has already imposed separate penalty on the firm. We are of the view that in the absence of lapse/negligence/bonafides on the part of the partners of the firm individually, imposition of penalty on each of the partners is unjustified, especially when penalty has been imposed upon the firm. We are therefore, of the view that the Revenue was not justified in levying penalty against the partners and thus the impugned order imposing penalty on the partners deserves to be set aside. We therefore, pass the following order :

(a) Impugned order dated 30th April, 2009 passed by the tribunal is modified. Penalty levied against the firm is reduced to 35% and since 35% of the penalty has already been deposited, the said liability stands discharged and FERA Appeal No. 57 of 2009 partly stands allowed in the aforesaid terms.

(b) The order of penalty imposed against the partners is set aside and accordingly the remaining FERA Appeals filed by the partners stand allowed.

(c) There shall be no order as to costs.