

(2011) 06 MAD CK 0286

In the Madras High Court

Case No : Writ Petition No. 20376 of 2010 and M.P. No. 1 of 2010

S.H. Jiffri Kareem

APPELLANT

Vs

The Appellate Tribunal for Foreign Exchange, The Special
Director and The Assistant Director, Enforcement Directorate

RESPONDENT

Date of Decision : 07-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Exchange Management Act, 1999 — Section 18, 35, 49(4), 49(5)
Foreign Exchange Regulation Act, 1973 — Section 13(4), 52, 9(1)

Citation : (2011) 8 MLJ 32

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M. Abdul Nazeer, for the Appellant; M. Dhandapani, for Respondents 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner has filed the present writ petition seeking to challenge the order dated 01.07.2010 passed in Appeal No. 488/1994 by the first Respondent Appellate Tribunal for Foreign Exchange and after setting aside the same, seeks for a direction to the first Respondent to forbear from hearing the Appeal No. 488/1994.

2. When the writ petition came up for hearing on 03.09.2010, this Court directed the learned standing counsel for the Enforcement Directorate to take notice for the second and third Respondents and to get instructions. Pending the writ petition, no interim order was passed. On notice from this Court, the Respondents have filed a counter affidavit dated 23.03.2011.

3. It is the case of the Petitioner that a sum of Rs. 40,00,000/- was imposed as penalty against the Petitioner for contravention of the provisions of Section 9(1) (b) and 9(1)(d) of the Foreign Exchange Regulation Act, 1973 (Central Act, 46 of 1973) (shortly "FERA"). This was on account of the Petitioner having received a

sum of Rs. 1,08,50,000/- from non local person on behalf of one Syed Ibrahim of Bahrain, who is a person residing outside India, during November 1989 to August 1990. He has also paid various amounts totaling a sum of Rs. 1,03,26,500/- to various persons under the orders of said Syed Ibrahim of Bahrain without the permission of the Reserve Bank of India. It is claimed that the Petitioner's confessional statement which was corroborated by the confessional statement of other persons, who were assisting him in making compensatory payments as well as by the statements of recipients and documents recovered and seized from his custody. A sum of Rs. 3,50,000/- was recovered from the custody of the Petitioner, which is an amount found involved in contravention of the provisions of the FERA, but it was directed to be adjusted towards payment of penalty amount. As against the said order, the preferred an appeal u/s 52 of the FERA before the first Respondent sometime during October 1994. He has also filed an application to dispense with the pre-deposit of penalty of Rs. 40,00,000/- which is a condition precedent for entertaining the appeal. The Petitioner's appeal was taken on file as FERA 488/1994 and he was also asked to appear for a hearing on 15.12.1994 vide communication dated 29.11.1994.

4. It is the stand of the Petitioner that the waiver of pre-deposit of penalty was taken up at Foreign Exchange Regulation Appellate Board at income tax Appellate Tribunal, New income tax Building at Chennai by the first Respondent Board and was argued by the learned senior counsel. It was further asserted that the appellate Board orally informed that they have allowed the appeal. But the Petitioner was not able to state as to why there was no further proceedings, after the request of the Petitioner was considered by the Tribunal in the waiver of pre-deposit application. It is the stand of the Petitioner that subsequently, he had received a notice dated 30.10.2007 asking to appear for an enquiry. The Petitioner, through his counsel, sent a letter dated 06.11.2007 stating that on 15.12.1994 he was orally informed that his application was allowed and he requested a copy of the order allegedly passed by the Tribunal. But instead of conceding the request, he had issued a fresh notice to appear to argue the application on 01.07.2010. The Petitioner, on receipt of the said notice, stated that since his apprehension has been orally allowed by the Tribunal and he has asked for a copy of the order passed by the Tribunal, they cannot fix a fresh date of hearing without considering his request.

5. Considering these issues, the Appellate Tribunal [which had come into existence in terms of the new enactment namely Foreign Exchange Management Act, 1999 (in short "FEMA") and constituted u/s 18 of FEMA held that the financial constrain pleaded by the Petitioner is not valid and the amount confiscated was adjusted towards payment of penalty. The Tribunal has also held that there was no case for waiver of pre-deposit. In para 3 of the impugned order, it had observed as follows:

3. However, in the light of the above discussion and after considering the background of the case in entirety, the statutory scheme under FERA Act, we are

of the opinion that the Appellant has utterly failed in proving undue hardship on his part and application is liable to be rejected. An order is passed accordingly. The Appellant is directed to make balance amount of penalty within 30 days from the date of receipt of this order failing which this appeal will be dismissed on this ground alone. This appeal is fixed on 3rd September, 2010 for reporting the compliance of this order and for further hearing.

Challenging the same, the writ petition came to be filed.

6. In the counter affidavit, all the allegations of the Petitioner are controverted. It is stated that the Presenting Officer of the previous Appellate Board did not pass any orders. In paragraph 4 of the counter affidavit, it was averred as follows:

4. ...The Board issued notice to the both parties on 15.12.1994 to appear before the Appellate Tribunal Camp duly constituted at Chennai, but the Appellate Tribunal did not pass any orders on 15.12.1994. Amidst, the Petitioner herein approached the Hon'ble High Court of Judicature of Madras at Chennai and filed Writ Petition No. 18142 of 1994 challenging the Adjudicating Order dated 29.03.1994 and the same was dismissed by the Hon'ble High Court on 26.07.1999.

It was also claimed that the Petitioner has not established a prima facie good case and not satisfactorily proved that there was a financial disability and therefore, the Tribunal was right in rejecting the request of the Petitioner for waiver of pre-deposit.

7. Mr. M. Abdul Nazeer, learned Counsel for the Petitioner once again contended that this Court should undertake an exercise of calling for records so as to find out whether the Tribunal actually passed the order as asserted by him and should not proceed on the basis of a fresh notice, which was issued after a period of 15 years from the date of earlier hearing. This Court is not willing to undertake any such exercise. No Tribunal can pass any oral orders and if the orders are in writing, the Petitioner should make an application before the Tribunal and procure an order copy, so as to coming to this Court for the correctness or otherwise of the statement made by him. After the last hearing namely on 15.12.1994, many changes have taken place in the statutory law relating to Foreign Exchange. The FERA of 1973 has been repealed by FEMA of 1999 and it had come into existence with effect from 01.06.2000. u/s 49(4) of FEMA, all offences committed under FERA shall continue to be governed by the provisions of FEMA. u/s 49(5) of FEMA, any appeal filed u/s 52 of FERA, which was disposed before the commencement of FEMA, shall be stand transferred and shall be disposed of by the Appellate Tribunal constituted u/s 18 of FEMA. If the order of earlier Appellate Board under FERA was not challenged after coming into force of FEMA, the act also gives further 60 days from the date of commencement of FEMA. u/s 35 of FEMA, any person aggrieved against the decision of the Tribunal can also file an appeal to the High Court.

8. Therefore, in the present case, the challenge made by the Petitioner to the

impugned order, does not stand to legal scrutiny. Except by contending that the earlier Appellate Board had orally allowed the petition for waiver of pre-deposit, the Petitioner is not able to prove to the satisfaction of the Court that there was such an order in existence. It must also be noted that FEMA is a complete Court by itself and the question of challenging the Tribunal's order in a writ petition under Article 226 of the Constitution of India, will not arise.

9. In this context, it is necessary to refer to a judgment of the Supreme Court in *Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another*, wherein the Supreme Court while dealing with an alternative remedy available under the FEMA held that the Act cannot be bypassed and the jurisdiction under Article 226 of the Constitution of India cannot be invoked. In the following passages found in paragraphs 31 and 32, the Supreme Court had observed as follows:

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the Appellant's counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

10. Very recently, the Supreme Court in *United Bank of India Vs. Satyawati Tondon and Others*, dealt with SARFAESI Act and DRT Act and in paragraphs 55 and 56, it had held as follows:

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

56. In so far as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the Appellant from taking action in furtherance of notice issued u/s 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the Respondent has not appeared to contest the appeal, the costs are made easy.

11. In the light of the above, this Court is not inclined to entertain the writ

petition and hence, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.