
(2010) 11 MAD CK 0205

In the Madras High Court

Case No : Civil Miscellaneous Appeal No's. 491-492 of 2008 and M.P. No. 1 of 2008

Sri Renuga Soft-X Towels

APPELLANT

Vs

Dy. Dir., Dte. of Enforcement

RESPONDENT

Date of Decision : 03-11-2010

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 18, 18(2), 18(3), 50, 54
Foreign Exchange Regulation Rules, 1974 — Rule 8
Income Tax Act, 1961 — Section 10(2)

Citation : (2011) 267 ELT 475

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : B. Kumar for M. Balagopal, for the Appellant; M. Dhandapani, Spl. Counsel, for the Respondent

Final Decision : Dismissed

Judgement

R. Subbiah, J.—These appeals are preferred being aggrieved over the common final order dated 30-10-2007 passed in Appeal Nos. 04/2002 and 05/2002 on the file of the Appellate Tribunal for Foreign Exchange, New Delhi, confirming the Adjudication Order No. DD-MAS/42/2000 (SS) dated 13-10-2000 passed by the Deputy Director, Directorate of Enforcement, Chennai.

2. The facts, which are necessary to decide the issue involved in these appeals, are as follows:

(a) The Appellant firm, who is an exporter of cotton and cotton products, had earned foreign exchange on sizeable exports made by them. During the year 1996-97, the Appellant had exported cotton products to M/s. N.X. General Trading Company, United Arab Emirates, M/s. Arguel, France and M/s. Betty Blanc SA, France. The Appellant had realised only a part of the amount in respect of one export bill i.e. export made to M/s. N.X. General Trading Company, UAE.

(b) From the investigation conducted by the Directorate of Enforcement, it appeared that during 1996-97, the Appellant firm had effected shipments of cotton and cotton products to M/s. N.X. General Trading Co., UAE, M/s. S.A. Arguel, France and M/s. Betty Blanc. SA, France for a total export value of US \$ 1,55,166.57 and after realising US \$ 18,362.05, the Appellant failed to realise the outstanding export proceeds to the tune of US \$ 1,36,804.52 within the stipulated period and in the prescribed manner, thereby contravening the provisions of Section 18(2) read with Section 18(3) of the Foreign Exchange Regulation Act (FERA"), 1973. Hence, the Respondent issued a show cause notice dated 7-1-2000, proposing adjudication proceedings for violation of FERA, 1973 for non-realising the outstanding export proceeds within the stipulated time. The specific charge against the Appellant was that for the non-repatriating the outstanding proceeds by way of foreign exchange to the country within the stipulated period, the Appellant contravened the provisions of Section 18(2) read with 18(3) of the FERA. The Appellant herein had submitted a reply to the show cause notice dated 28-1-2000. The Appellant's representatives had also appeared for the personal hearing and made submissions in the matter and explained the case of the Appellant to the effect that the non-repatriation of export proceeds was neither wilful nor deliberate. The Appellant had also submitted the documents, namely, the communication from their legal representative in France, which shows that the foreign buyer to whom the goods were supplied became bankrupt and the sale proceeds could not be realised from them and prayed for dropping of the proceedings initiated by the Respondent. But, the Respondent passed an adjudication order dated 13-10-2000, holding that the Appellant company and its Director are guilty of having contravened the provisions of Sections 18(2), 18(3) and Notification under FERA, 1973, read with Section 68 of the FERA. The Respondent held that the Appellant and its Director were guilty of the charges and levied a penalty of Rs. 3,00,000/- on the company and that Rs. 1,00,000/- on the Director of the Appellant company u/s 50 of the FERA. Aggrieved over the said adjudication order dated 13-10-2000, the Appellant had preferred two appeals before the Appellate Tribunal for Foreign Exchange, New Delhi; but the Appellate Tribunal, by its final order dated 30-10-2007 dismissed both the appeals and confirmed the adjudication order passed by the Deputy Director.

3. Challenging the same, the Appellant filed the present appeals raising the following substantial questions of law:

(a) Whether in the facts and circumstances of the case, the appellate Tribunal was right in coming to the conclusion that the Appellant company had not taken all reasonable steps to recover the sale proceeds of the exported goods when it is evident that the purchaser of goods in France had gone into liquidation and the official liquidator appointed by the Court at France have stated that chance of recovery of any money from the company in liquidation is remote and next to impossible?

(b) Is the Appellate Tribunal right in thinking that reasonable steps within the meaning of Section 18(3) of FERA must necessarily be included filing of suit in France for the recovery of export proceeds even though the purchaser company had gone into liquidation?

4. Learned Senior Counsel for the Appellant submitted that in the show cause notice issued by the Respondent department, they made a charge against the Appellant that an amount of USD 1,36,804.52 against 6 GR forms mentioned in the said notice is outstanding and not repatriated the export proceeds, as referred to u/s 18 of FERA, 1973. In this regard, the learned senior counsel for the Appellant, by inviting the attention of this Court to each G.R. submitted that in respect of G.R. Nos. AJ 483280 dated 8-4-1996 and AM 039439 dated 10-12-1996 under which the export was made to M/s. N.X. General Trading Company, UAE., the invoice value was US \$ 32871.25 and 12600.00 respectively and the amounts outstanding in US \$ were 14509.20 and 12600.00. But the other four - shipments under G.R. Nos. AM 751497 dt. 4-7-1997, AM 751051 dt. 17-7-1997, AM 751050 dt. 19-7-1997 under which the export was made to SA. Arguel, France and AN 937148 dated 5-11-1997 relating to Betty Blanc. France, nothing was realised.

5. In this regard, the learned senior counsel submitted that M/s. N.X. General Trading Company, UAE., was carrying on the business under a partnership. As per the law prevailing in the United Arab Emirates, the citizen of India cannot own a business and he can only be a partner along with the citizen of UAE. In the instant case, in the said firm, one Chandrasekaran was a partner, but the said firm was closed due to the death of Chandrasekaran. Since the partnership firm was closed, the Appellant was not in a position to realise the foreign export proceeds. To substantiate the same, the learned senior counsel for the Appellant had also produced a letter from M/s. N.X. Trading Company, UAE,. With regard to the export made to SA Arguel, France under 3 G.R. Forms, the learned senior counsel submitted that the said SA Arguel, France did not take delivery of the goods. Therefore, the goods exported to SA Arguel, France, was diverted to Betty Blanc. France. But, M/s. Betty Blanc. France, did not pay any amount for the consignment diverted to them either to SA Arguel, France or to the Appellant. When the Appellant contacted, the Agent-Commercial by name Vincent Sandana, after getting knowledge from the Legal Representative of the said company viz., Yannick Guguen, informed them that M/s. Betty Blanc, had become an insolvent. Even thereafter, the Appellant had sent several communications to their Agent-Commercial to recover the export proceeds from the foreign buyer and after contacting the Legal Representative of the Company through various communications, finally the Agent-Commercial sent a reply to the Appellant stating that he had done the maximum possible under French Commercial Law to recover the amount and also through the income tax department and thereby impliedly expressed his inability to recover the export proceeds. Thus, the learned senior counsel for the Appellant, by producing various correspondences between the Appellant, their Agent-Commercial and the Legal Representative of

the company, submitted that the Appellant had taken all reasonable steps to realise the export proceeds and in spite of that, they did not realise the same. Since there are ample evidence on the side of the Appellant to prove that they had taken all reasonable steps to recover the export proceeds and hence, the application of Section 18(3) of the FERA does not arise. Under such circumstances, the impugned order passed by the authority below is liable to be set aside.

6. Combating the said submissions, the learned Special Counsel appearing for the Respondent submitted that under Rule 8 of FERA Rules, full export value of the goods exported should be realised within a period of six months from the date of shipment of the goods. If the exporter is not in a position to realise the goods, he has to obtain permission from the Reserve Bank, who is the only authority to extend the period; but in the instant case, the Appellant had not approached the Reserve Bank for extension of time. Under such circumstances, it cannot be construed that the Appellant had taken all reasonable steps to secure the export proceeds. Therefore, there is a violation of the provisions of Sections 18(2) read with 18(3) of the FERA and as such, no fault could be found in the order passed by the Respondent.

7. By way of reply, the learned senior counsel for the Appellant submitted that the various correspondences exchanged between the Appellant and the overseas buyers would show that the Appellant had taken all reasonable steps to recover the payment of the goods. But the Respondent, without considering the same, has come to the conclusion as if the Appellant had not taken effective j step to recover the amount by approaching the Embassy of India, in the buyers country seeking their assistance, or by filing any legal proceedings as against the foreign buyers to recover the export proceeds. The learned senior counsel further submitted that since the foreign buyer has become insolvent, no useful purpose would be served by initiating legal proceedings against them and for filing a suit would amount to spending good money to recover the bad due. Therefore, the Appellant had not taken steps to get extension from the Reserve Bank of India. The learned senior counsel further submitted that various correspondences exchanged between the parties would show that they had taken requisite steps to recover the amount and the non-approaching of the Reserve Bank for extension of time, does not mean that they had not taken effective steps.

8. Heard the learned Counsel for the parties and perused the materials available on record.

9. In view of the submissions made by the learned Counsel on either side, the short question that has to be decided in this appeal is, whether any requisite and reasonable steps had been taken by the Appellant to recover the export proceeds from the overseas buyers? From the evidence on record, I find that out of 6 shipments, two G.R. forms were pertaining to the export made to M/s. N.X. General Trading Company, UAE. Since one of the partners in the said firm viz., Chandrasekaran died and as such, the company had been closed, which would be

evident from the letter sent by the foreign buyer to the Appellant. Similarly, a bunch of correspondences exchanged between the Appellant, their Agent-Commercial and their Legal Representatives in respect of the export made to SA, Arguel, France, would show that the said company had become insolvent. It is, no doubt the Appellant was continuously in touch with their Agent- Commercial at France to take steps to recover the amount and finally the Agent-Commercial expressed his inability to recover the amount. In this regard, the Appellant did not take any further steps. Now, according to the Appellant, further steps such as filing a suit at France, contacting the Indian Embassy at foreign countries, etc. would amount to expending huge amount of good money for bad dues. Therefore, based on the correspondence between the Appellant and their Agent-Commercial, the authority below ought to have accepted the case of the Appellant that they had taken the reasonable steps.

10. In this regard, now the question arises is, whether the correspondence produced by the Appellant that had been exchanged between themselves and their Agent-Commercial and the Legal Representative are sufficient enough to come to the conclusion that the Appellant had taken necessary and reasonable steps to recover the amount or not? But, according to the Respondent, the said correspondences are internal in nature and as such, no reliance could be placed to these documents. According to the Respondent, it is the case of the Appellant that they are not in a position to recover the amount. When that being the position, as per Rule 8 of FERA Rules, the Appellant ought to have approached the Reserve Bank for getting extension of time and the Reserve Bank might have waived the recovery of the amount; but, in the instant case, the said legal requirement was not complied with by the Appellant. Therefore, it cannot be construed that the Appellant had taken all reasonable steps. Per contra, it is the defence of the Appellant that when it has become sure that the recovery was not possible since M/s. N.X. Trading Company, UAE., the partnership firm had been closed in view of the death of one of the partners viz., Chandrasekaran and another firm Betty Blanc. France had become insolvent and in the circumstances and situation, by approaching the Reserve Bank for extension of time, will not fetch any result. Therefore, the failure to approach the Reserve Bank for the extension does not amount that the Appellant had totally failed to take any reasonable steps and it has to be decided based on the evidence produced by the Appellant on their side and not based on the ground of failure to obtain extension from, the Reserve Bank of India.

11. The learned senior counsel has also relied on the meaning of the word "Reasonable" given in "LAW LEXICON" which is extracted hereunder:

"Reasonable". The expresso "reasonable" means "rational, according to the dictates of reason and not excessive, or immoderate". An act is reasonable when it is conformable or agreeable to reason, having regard to the facts of the particular controversy. The question whether a particular gift made by a Hindu father is within reasonable limits must be answered with reference to the facts

and circumstances of the particular cause, the word "reasonable" meaning what is just, fair and equitable in view of the value, income and financial position of the estate, the number of persons who constitute the joint Hindu family, the relationship which the donor bears to the donee and any other circumstances which may appear in the case and are relevant and material to its determination. *S. Raghbir Singh Sandhawalia Vs. The Commissioner of Income Tax*, . The word "reasonable" in Section 10(2)(x), income tax Act or in Rule 12 of Schedule I of the Excess Profits-tax Act, and the words "necessary having regard to the requirements of the business" in the same rule do not mean that there must be a legal liability to pay. *Shyamlal Pragnarain Vs. Commissioner of Income Tax, U.P., Lucknow*, . "Reasonable" is an objective expression and its objectivity is to be determined judicially by the Court to consider the nature of the restrictions. The Court must look upon the restrictions from every point of view. It being the duty of the Court to safeguard fundamental rights, the greater is the obligation upon the Court to scrutinize the restrictions placed by the Legislature as carefully as possible. In order to decide whether a restriction is reasonable or not, the Court must look at the nature of the restriction, the manner in which it is imposed, its extent, both territorial and temporal, and if after considering all this the Court comes to the conclusion that the restriction is unreasonable, then the restriction is not justified and the Court will not uphold that restriction. *Emperor Vs. Jeshingbhai Ishwarlal*, .

It is difficult to say what is reasonable unless regard be had to the circumstance of each case with reference to which the word "reasonable" is to be interpreted. Where a contract has to be performed or duty discharged within a reasonable time (or within no specified time which connotes a reasonable time) such time will have to be determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the contract is to be performed or the duty discharged. An obligation to perform a contract within a reasonable time does not require so speedy a fulfilment as one to be done "directly" or "as soon as possible". (Stroud.)

12. A reading of the above would show that the word "reasonable" has to be viewed under the circumstances of each case. So far as this case is concerned, this Court is of the considered opinion that the word "reasonable" has to be interpreted in consonance with the object of the Act. The object of FERA is to see that the country's foreign exchange resources were not wasted under any circumstances and were properly utilised to advance the national interest. When the object of the Act is to see the proper utilisation of the country's foreign exchange resources for national interest, in my considered opinion, that merely based on the correspondence that has between the Appellant, their Agent-Commercial and legal representative of the foreign company, it cannot be construed that the Appellant had taken reasonable steps to secure the amount. Be that as it may, when the Act envisages the legal requirement for getting the extension of time from the Reserve Bank of India, the Appellant ought to have approached the Reserve Bank of India for getting extension of time to realise the

foreign proceeds. Therefore, I am not satisfied with the explanation given by the Appellant for not getting permission from the Reserve Bank of India.

13. In my considered opinion, any amount of correspondence sent by the Appellant to the foreign buyers or to the Legal Representative or to the Agent-Commercial, is only an internal correspondence. Unless the Appellant approaches the Reserve Bank to get the extension for recovery of the export proceeds and unless the Reserve Bank of India on its adjudication, waives the recovery of the proceeds, it cannot be construed that the Appellant had taken all reasonable steps within the terms of the relevant Act, especially when the object of FERA is not to waste the foreign exchange resources and to utilise the same to advance the national interest. Further more, I find that no substantial question of law is involved in this appeal. In this regard, a reference could be placed on the decision relied on by the Respondent in the case reported in *Raghavan Nair v. Deputy Director, Enforcement Directorate CFC (Ker.) 83*, as follows:

11. We are of the opinion that a finding on what was the amount payable by the foreign buyer in respect of the goods is necessarily a question of fact. It is true, that if there was no evidence to support even a finding of fact, the sustainability of that finding may throw out a question of law. But if there are some materials which would sustain either of the two possible conclusions on a point of fact, the choice of one rather than the other may not involve a question of law at all. It is significant, that in the present case, the original and appellate authorities came to the conclusions on this question of fact largely on the basis of the correspondence which emanated from the Appellant himself and the explanation which the Appellant had offered. Reference is also made by the adjudicating officer to the statement of the Appellant and his manager on 4-6-1976 and 26-11-1979 respectively in relation to the transactions which are involved in the charges levelled against the Appellant. We are of the opinion that no question of law is involved which require appellate scrutiny by this Court u/s 54 of the 1973 Act. We are, therefore, inclined to uphold the preliminary objection raised by the revenue.

Therefore, in my considered opinion, I do not find any infirmity in the order passed by the Respondent. The letter correspondence between the Appellant and their foreign buyers is not sufficient enough to prove the reasonableness of the Appellant to secure the foreign proceeds within the purview of the Act. Therefore, I am not inclined to accept the submissions made by the learned senior counsel for the Appellant.

14. For the reasons stated above, both the civil miscellaneous appeals are dismissed. No costs. Consequently, connected M. Ps. are closed.