

(2011) 01 DEL CK 0404
In the Delhi High Court
Case No : Writ Petition (C) 101 of 2009

Surinder Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 31B

Foreign Exchange Management Act, 1999 — Section 49(4)

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

Citation : (2011) 01 DEL CK 0404

Hon'ble Judges : Dipak Misra, C.J; Manmohan, J

Bench : Division Bench

Advocate : Mathews J. Nedumpara and Rabin Majumdar, for the Appellant;
None, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present writ petition has been filed seeking quashing of the show cause notice dated 27 February, 2001 as well as the adjudication order dated 23 December, 2004 primarily on the ground that Sections 18(2) and 18(3) of the Foreign Exchange Regulation Act, 1973 (in short, 'FERA') as well as Section 49(4) of the Foreign Exchange Management Act, 1999 (in short, 'FEMA') are unconstitutional and void.

2. Briefly stated the relevant facts of the present case are that in the year 1991-1992, the Petitioner exported goods worth Rs. 70,70,164/- to M/s. Pinky Original Inc., New York. However, as the foreign purchaser became bankrupt, it did not repatriate the sale proceeds to the Petitioner. On 27 February, 2001, Deputy Director, Enforcement Directorate, issued a Show Cause notice to the Petitioner alleging violation of Sections 18(2) and 18(3) of FERA. Though in reply to the said Show Cause notice the Petitioner sought waiver of repatriation of export proceeds yet the Enforcement Directorate vide its adjudication order dated 23rd December, 2004 imposed a penalty of Rs. 70 lacs.

3. Thereafter, the Petitioner challenged the adjudication order before the Appellate Tribunal for Foreign Exchange and sought complete waiver of pre-deposit of penalty. However, the Tribunal has directed the Petitioner to deposit 20% of the penalty. The Petitioner has complied with the said order but has filed the present petition challenging the legality and validity of Sections 18(2) and 18(3) of FERA on the ground that they are manifestly arbitrary and irrational.

4. Sections 18(2) and 18(3) of FERA and Section 49(4) of FEMA are reproduced herein below:

a) FERA

18. Payment for exported goods.-

xxx xxx xxx

2) Where any export of goods, to which a notification under Clause (a) of Sub-section (1)--applies, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

(A) in a case falling under Sub-clause (i) or Sub-clause (ii) of Clause (a) of Sub-section(1), (a) that payment for the goods -

(i) is made otherwise than in the prescribed manner, or

(ii) is delayed beyond the period prescribed under Clause (a) of Sub-section (1), or

(b) that the proceeds of sale of the goods exported do not represent the full export value of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank; and

(B) in a case falling under Sub-clause (ii) of Clause (a) of Sub-section (1), also that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade:

Provided that no proceedings in respect of any contravention of the provisions of this Sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period.

3) Where in relation to any goods to which a notification under Clause (a) of Sub-section (1) applies the prescribed period has expired and payment therefore has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of Sub-section (2).

b) FEMA

Repeal and Saving

49.

(4) Subject to the provisions of Sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

5. Mr. Mathews J. Nedumpara, learned Counsel for the Petitioner submits that the maxim *lex neminem cogit ad vana seu inutilia peragenda* - the law does not require anyone to do vain or useless things - is the moot point. He further submits that the aforesaid Sections require that every exporter, without fail to repatriate/realize every penny of proceeds of exports of goods, commodities or services. Learned Counsel for the Petitioner submits that shortfall of even one rupee leads to a presumption that the exporter has not taken all reasonable steps for repatriation and as a consequence both adjudication proceedings and penal prosecution normally follow and the burden of proof is entirely on the exporter.

6. According to Mr. Nedumpara, it is this presumption which is unconstitutional, being absolutely irrational. He submits that to presume that the overseas buyer has not discharged his obligations because of failure on the part of the exporter to take all reasonable steps, is unreasonable. He further submits that to require the exporter to secure full realization of the proceeds of the export is to require him to do the impossible. Consequently, Mr. Nedumpara submits that the maxim *lex neminem cogit ad vana seu inutilia peragenda*, therefore, squarely applies to the present situation.

7. Having heard the learned Counsel for the Petitioner, we are of the opinion that the impugned provisions of FERA do not compel anyone to do an impossible act. The impugned Sections only raise a presumption against the exporter, but the same can be rebutted by the exporter. Consequently, the impugned provisions are valid.

8. We also find that the constitutional legality and validity of Sections 18(2) and 18(3) of FERA has already been upheld by the Supreme Court in *Seema Silk and Sarees and Another Vs. Directorate of Enforcement and Others*, The relevant portions of the said judgment is reproduced herein below:

8. Mr. Mathews J. Nedumpara, learned Counsel appearing on behalf of the Appellants, would submit that Sections 18(2) and 18(3) of the Act placing the burden of proof upon the accused must be held to be a law having draconian character and, thus, is unconstitutional. It was submitted that by reason of the said provision, discrimination has been made between a domestic trader and an exporter and, thus, the same is violative of Article 14 of the Constitution of India. It was urged that validity of the said provision must be judged on the touchstone of commercial considerations inasmuch as whether an exporter may not be able to repatriate the export proceeds particularly when such exports are made to the

developing countries.

9. ...Such repatriation of exports proceeds, thus, being uncertain, it was urged, the impugned provisions as also the Constitution 39 Amendment Act cannot be sustained.

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13. The Appellants have questioned the validity of the Act only on the ground of infringement of Article 14 of the Constitution of India. Apart from the fact that the Act is protected under Article 31B of the Constitution of India having been placed in the Ninth Schedule thereof, even otherwise, we do not find any reason to arrive at a conclusion that the Act is ultra vires Article 14 of the Constitution of India. A discrimination on the ground of valid classification which answers the test of intelligible differentia does not attract the wrath of Article 14 of the Constitution of India. Hardship, by itself, may not be a ground for holding the said provision to be unconstitutional.

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19. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. (See *Hiten P. Dalal v. Bratindranath Banerjee and M.S. Narayana Menon v. State of Kerala*.)

20. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. In a case of this nature, particularly, when an appeal against the order of the Tribunal is pending, we do not think that the Appellants are entitled to take the benefit thereof at this stage. Such contentions must be raised before the criminal court.

21. Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the Appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law.

(emphasis supplied)

9. From the aforesaid, it is apparent that FERA finds place in the Ninth Schedule of the Constitution of India and in accordance with Article 31B of the Constitution, none of the Acts specified in the Ninth Schedule can be held ultra vires even if the provisions of the said Act are inconsistent or abridge any of the fundamental rights contained in Part-III of the Constitution of India. As far as the

other pleas on merits of the case are concerned, we are not inclined to deal with the same as the Petitioner's appeal is already pending adjudication before the Appellate Tribunal for Foreign Exchange.

10. Consequently, the present writ petition is dismissed with costs of Rs. 15,000/- to be paid within eight weeks hence to Prime Minister Relief Fund. A receipt of costs shall be filed before the Appellate Tribunal for Foreign Exchange.