

(2014) 12 BOM CK 0012
In the Bombay High Court
Case No : Fera Appeal (ST) No. 29354 of 2014

Thirumalai Chemicals Ltd.

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 09-12-2014

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 3, 50

Citation : (2014) 12 BOM CK 0012

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J

Bench : Division Bench

Advocate : V. Sridharan, Sr. Adv., Prakash Shah, Lakshmi Menon and PDS Legal, Advocate for the Appellant; G. Hariharan, Pankaj Kapoor and Pradeep S. Jetly, Advocate for the Respondent

Judgement

1. This Appeal by the Appellant challenges the order passed by the Appellate Tribunal for Foreign Exchange, New Delhi on 1st October, 2014 in applications styled as applications for waiver of predeposit of penalty amount in appeal Nos. 787 of 2004, 788 of 2004, 789 of 2004 and 790 of 2004, which have been filed before the Tribunal by the present Appellant/Applicant.

2. An order passed on 27th January, 2004 styled as adjudication order was impugned in these four Appeals. It is common ground that each of these Appeals was barred by time and therefore, applications were made seeking condonation of delay in filing of the same. Upon those applications, earlier view taken by the Tribunal and upheld by this Court was that the Tribunal cannot condone the delay beyond a total period stipulated in the Foreign Exchange Regulation Act, 1973. Therefore, these Appeals were dismissed on 25th October, 2007. Since these Appeals were dismissed only on the ground that they were barred by limitation, the Appellant/Applicant impugned that order by filing separate Writ Petitions in this Court. Each of these Writ Petitions were dismissed on 24th July, 2008. A Special Leave Petition was filed in the Hon'ble Supreme Court and by a reported Judgment, the Hon'ble Supreme Court allowed these Appeals of the Appellant.

The Judgment in that behalf is reported in Thirumalai Chemicals Limited Vs. Union of India (UOI) and Others, . The Appeals were restored to file.

3. Upon restoration, the applications for seeking interim relief and in the above nature were filed and which have been decided by the impugned order.

4. The only contention raised before us by Mr. Sridharan, the learned Senior Counsel appearing for the Appellant, is that in condoning the delay after the Judgment of the Hon"ble Supreme Court, the Tribunal holds, on 17th July, 2014, that the adjudicating authority concluded the proceedings exparte. It imposed exorbitant penalties. There was no opportunity provided to the Appellant to defend. The order of the adjudicating authority did not mention that the Appellant was duly served with the proceedings or had knowledge thereof. Such being the circumstances, the delay was condoned. Mr. Sridharan submits that a contrary finding could not have been rendered on the applications seeking waiver of the predeposit of the amount of penalty. Mr. Sridharan submits that if the Appellant indeed had no knowledge of the proceedings, they were concluded exparte and excessive penalties have been imposed, this was a fit case where the Tribunal could have granted complete waiver of the condition of predeposit and taken up the Appeals themselves for hearing and final disposal. The order does not mention that the Appellant would not be available in the event an adverse order is passed and in favour of the Revenue. In these circumstances and when the Reserve Bank of India (RBI) has also clarified that the alleged irregularity has been and is capable of being regularised, then, this was not a case where the Appellant should have been forced to deposit 25% of the penalty amount and give a bank guarantee in the sum of 75% for the balance. Therefore, this Appeal raises substantial questions of law.

5. On the other hand, Mr. Hariharan, the learned Counsel appearing for the Director, Enforcement Directorate/Respondent before us, submitted that the order under challenge is interlocutory in nature. It is not necessary for this Court to interfere in its appellate jurisdiction only on the ground that another view is possible. The Appeal does not raise any substantial question of law and when the equities and rights have been properly balanced. Hence, the Appeal be dismissed.

6. With the consent of the learned Counsel appearing for both sides, we have taken up this Appeal itself for disposal. Though the order is interlocutory, yet, the approach of the Tribunal raised substantial questions of law. The Appeal is therefore admitted on the following substantial questions of law:

"(a) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in passing an order dated 1st October, 2014 (Exhibit-A) directing the Appellant to predeposit 25% of the penalty imposed in the case and to furnish a bank guarantee for the remaining 75% of the penalty as a condition for hearing of the Appeals?

(b) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in passing the impugned order dated 1st October, 2014 (Exhibit- A) of

predeposit, when the Appellate Tribunal itself in the order dated 17th July, 2014 (Exhibit-S) while condoning the delay in filing of the Appeals before the Appellate Tribunal, has found, as a fact, that the original orders dated 27th January, 2004 of the adjudicating authority (Exhibit-D1 to D4) have been passed exparte without service of the show cause notice and without service of memo fixing the date of the personal hearing?

(c) Whether the impugned order of predeposit dated 1st October, 2014 (Exhibit A) is unsustainable in view of the decision of this Hon''ble High Court dated 18th October, 2007 in M/s. Nicholas Piramal India Ltd. vs. Union of India in the Writ Petition No. 7103 of 2007 with Writ Petition No. 7738 of 2007 (Exhibit-U) wherein it has been held that the Appellate Tribunal ought to have exercised its jurisdiction for waiver of predeposit where the proceedings before the adjudicating authority were exparte?

(d) Whether in the facts and circumstances of the case, the impugned order dated 1st October, 2014 (Exhibit-A) of predeposit is unsustainable in light of the decision of the High Court Bombay dated 29th June, 2005 in M/s. Beri Mercurio Ltd. vs. Union of India in Writ Petition No. 2908 of 2005 (Exhibit-V), wherein it has been held that where the documents like Bill of Entry and other proof of import are available, the matter ought to have been remanded back to the adjudicating authority for fresh adjudication?

(e) Whether in view of the order dated 18th March, 2005 (Exhibit-M) of the Appellate Tribunal granting stay against order dated 17th January, 2004 of adjudicating authority, Appellate Tribunal has jurisdiction to pass another order of stay/waiver of predeposit, in the same Appeal?

(f) Whether an order of predeposit dated 1st October, 2014 (Exhibit-A) could have been passed by the Appellate Tribunal when the adjudicating orders dated 27th January, 2004 (Exhibit-D1 to D4) are a nullity as Notification No. 308E dated 20th March, 2003 and Notification No. 395E dated 31st March, 2003 are ultra vires of Section 3/Section 50 of the FERA, 1973?

(g) Whether an order of predeposit dated 1st October, 2014 (Exhibit-A) could have been passed by the Appellate Tribunal when the adjudicating orders dated 27th January, 2004 (Exhibit-D1 to D4) are void as the Notification No. 308E dated 20th March, 2003 and Notification No. 395E dated 31st March, 2003 are a nullity on account of being passed after the repeal of the FERA, 1973?"

7. In the light of the limited controversy and the brief submissions as noted above, we take up the Appeal itself and dispose it of by this order.

8. We have perused the impugned order. The Tribunal was aware of the fact that the Appeals were brought by this very Appellant and to challenge an order passed in the year 2004. The Appeals were dismissed as barred by limitation. That view of the Tribunal, though maintained by this Court, was later on reversed and set aside by the Hon''ble Supreme Court. Resultantly, the Appeals were

restored to the file of the Tribunal. While rendering a finding on the applications seeking condonation of delay, the Tribunal has expressed an opinion that the proceedings were concluded behind the back of the Appellant. Therefore the orders of the adjudicating authority are exparte. There is nothing on record which would attribute to the Appellants the knowledge of the proceedings or the order passed against them. In the meanwhile, the Appellants had also approached the RBI. The RBI Exchange Control Department addressed a communication to the Deputy Director of Enforcement Directorate, Government of India and communicated that non submission of EC copies of Bill of Entries in respect of import transaction of M/s. Thirumalai Chemicals Ltd./the Appellant before us, came to be examined and what has been found is that, based on the documents and submitted by the authorised dealer, the RBI has proceeded to delete the entries from the record and regularised the transactions. This communication is also referred by the Tribunal in the impugned order. We do not see how in the light of the conclusions which have been recorded on 17th July, 2014 in the applications seeking condonation of delay, which are prima facie and in the light of this communication from the RBI, which is on record, could the Tribunal conclude that this is not a case for complete waiver of the condition of predeposit. The Enforcement Directorate could not point out anything to the contrary in order to prove at the prima facie stage that the financial health of the company is such that it would not be able to comply with a final adverse order, if any passed.

9. In such circumstances, the Tribunal, in insisting on deposit of amount to the extent of 25% and submitting a bank guarantee in the balance has committed an error apparent on the face of record. Its prima facie conclusions and which are recorded in the applications for condonation of delay could have been taken into consideration in the given facts and circumstances. Though it is proper to hold that the ambit and scope of the two applications, one for condonation of delay and one of waiver of condition to predeposit, is not identical, the two applications have to be dealt with and decided on different considerations, yet, there ought to be some consistency in the discussion that would be required and with regard to the orders passed by the adjudicating authority and they being exparte. If the Appellant was prima facie denied a fair and reasonable opportunity in defending themselves and at the same time had no knowledge of the proceedings initiated against it, then, all the more that proper conditions being imposed including cooperating with the Tribunal in earlier disposal of the Appeals, the Applications could have been granted.

10. Thus, instead the orders passed by the Tribunal, recalling and substituting them with the following directions, we allow the Appeal. Hence, the following order:

"(i) The impugned order is quashed and set aside.

(ii) There will be a waiver of predeposit of the penalty amount pending the hearing and final disposal of the Appeals and the Respondent is restrained from

taking any coercive measures to recover the same pending the hearing and final disposal of the Appeals.

(iii) The Tribunal to endeavor and dispose of the Appeals as expeditiously as possible and within a period of two months of the date of receipt of the copy of this order.

(iv) The Appellant to cooperate with the Tribunal in expeditious disposal of the Appeals and by not seeking any unnecessary adjournments.

(v) We clarify that we have not expressed any opinion on the rival contentions and our order shall not be taken as binding or containing any observations which shall influence the outcome of the pending Appeals. The Tribunal shall decide the Appeals on their own merits and in accordance with law, uninfluenced by any observation made in this order, which we have made for the purpose of these stay applications."

11. The Appeal is disposed of. There would be no order as to costs.

12. We are informed that the Tribunal has placed these Appeals for direction on 15th January, 2015. Mr. Sridharan has assured the Court that the Appellant would appear before the Tribunal on that date and also bring to the notice of the Tribunal the present order and thereafter cooperate in disposal of the Appeals as directed by us.