

(1995) 07 DEL CK 0048

In the Delhi High Court

Case No : C.M. (M) No. 239 of 1994 and C.M. No. 1034 of 1994

Union of India

APPELLANT

Vs

Auto and General Engg. Co. and others

RESPONDENT

Date of Decision : 17-07-1995

Acts Referred:

Citation : (1996) 85 CompCas 670 : (1995) 35 DRJ 25 : (1996) 54 ECC 20 : (1995) 60 ECR 595 : (1995) 80 ELT 246

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : Manmohan Sarin, Anshul Tyagi, Sanjay Yadav and Ms. Barkha Babbar, for the Appellant; Harish Gulati and Pawan Narang, for the Respondent

Judgement

Anil Dev Singh, J.—This is a petition under article 227 of the Constitution of India challenging the orders of the third respondent Chairman, Foreign Exchange Regulation Appellate Board, dated December 6, 1993, and March 28, 1994. Briefly stated the facts are as under :

2. Respondent No. 1, Auto General Engineering Company, exported agricultural equipment worth Rs. 1,92,002.66 and Rs. 1,00,845 to Bacha Inc. Sanfransico California, a subsidiary of the first respondent. The Reserve Bank of India, vide its letters dated June 27, 1983, and August 21, 1984, intimated the Directorate of Enforcement that the exporter had failed to realise the export proceeds. Pursuant to the investigation, it was revealed that non-realisation of the export proceeds was to the tune of U.S. dollars 1,81,897.68 and 97,886.00. On February 23, 1988, a notice was issued by the Director, Enforcement Directorate, to the first respondent and its partners, respondent No. 2 and Mrs. Iqbal Kaur Chadha, requiring them to show cause why adjudication proceedings as contemplated by section 51 of the Foreign Exchange Regulation Act, 1973 (for short "FERA"), be not held against them for contravening section 18(2) read with section 18(3) thereof. A reply was given by the said respondents and Mrs. Iqbal Kaur Chadha, vide their letter dated March 24, 1988. The stand of the exporters

was that the United States imposed a countervailing duty of 18.45 per cent. on the import of industrial fasteners from India and as a consequence thereof the goods were unable to compete in the U.S. market. Besides, there was a slump in the agricultural sector from 1982 onwards, as a result whereof their subsidiary company, to whom goods were exported, was not able to sell the same. The sum and substance of their contention was that due to the aforesaid circumstances they were unable to realize the export proceeds. On August 10, 1990, the Special Director passed an order holding the first and the second respondents guilty of the contravention section 18(2) read with section 18(3) of the FERA and imposed the following penalties.

First respondent Rs. 3.5 lakhs. Second respondent Rs. 3.5 lakhs.

3. It was further directed that the penalties should be paid within 45 days of the receipt of the order. Feeling aggrieved by the order of the Special Director, the first and the second respondents filed an appeal before the Foreign Exchange Regulation Appellate Board on September 22, 1990. Along with the appeal, they also moved an application for dispensing with the deposit of the penalty amount. In the application, it was, inter alia, pleaded that the deposit of the penalty amount would cause hardship to them as they had been suffering losses in business and were not in a position to deposit the penalty amount. This application came to be decided by the Foreign Exchange Regulation Appellate Board on August 17, 1993. According to the order of the Board, the first and the second respondents were required to deposit a sum of Rs. 1,75,000 each within sixty days as a condition precedent for hearing of the appeal. Not able to deposit the said amount within the time granted by the Board, they moved an application on November 8, 1993, for extension of time and for permitting them to make the payment in Installments. This application was disposed of by the Board by its order dated December 6, 1993, whereby the said respondents were directed to deposit a sum of rupees one lakh within three days from the date of the order, a further sum of Rs. 70,000 by December 31, 1993, and the balance sum of Rs. 1,80,000 in three Installments of Rs. 60,000 each by March 31, 1994. Pursuant to the order they deposited a sum of Rs. 2.30 lakhs. In so far as the remaining amount of Rs. 1.20 lakhs is concerned, the first and the second respondents moved yet another application dated February 18, 1994, requesting the Board to waive the same. Substantially acceding to the request, the Board, by its order dated March 28, 1994, waived the condition of deposit of rupees one lakh out of the remaining amount of Rs. 1.20 lakhs on the ground that in the circumstances, to insist that the said respondents deposit the same would cause undue hardship to them. However, the respondents were directed to deposit a sum of Rs. 20,000 before April 4, 1994. The petitioner, Union of India, being dissatisfied with this order of the Board as also its order dated December 6, 1993, has filed the instant petition.

4. Learned counsel for the petitioner contended that the impugned orders suffer from patent illegality as the Board did not having any power to review its order

dated August 17, 1993, whereby the said respondents were directed to deposit a sum of Rs. 3.75 lakhs, 50 per cent. of the total amount of penalty of Rs. 7.50 lakhs, within 60 days from the date of the order as a condition precedent for hearing of the appeal. He pointed out that despite the fact that they had violated the order, the Board by its subsequent orders dated December 6, 1993, and March 28, 1994, not only extended the time for making the deposit but also substantially reduced the amount originally directed to be deposited as a condition for hearing the appeal.

5. Learned counsel for the first two respondents, however, submitted that the Board, while passing the subsequent order, did not re-examine or review the correctness of its earlier order. According to him, the order of the Board dated August 17, 1993, relating to the pre-deposit of the penalty amount was in the nature of an interim or interlocutory order and since such orders do not affect the merits of the case, no finality can attach to them.

6. I have considered the submissions of learned counsel for the parties.

7. The second proviso to section 52 endows the Board with the power to dispense with the requirement of the pre-deposit of the penalty amount Section 52 reads as under :

"52. Appeal to Appellate Board. - (1) The Central Government may, by notification in the Official Gazette, constitute an Appellate Board to be called the Foreign Exchange Regulation Appellate Board consisting of a chairman (being a person who has for at least ten years held a civil judicial post or who has been a member of the Central Legal Service (not below Grade I) for at least three years or who has been in practice as an advocate for at least ten years) and such number of other members, not exceeding four, to be appointed by the Central Government for hearing appeals against the orders of the adjudicating officer made u/s 51.

(2) Any person aggrieved by such order may, after depositing the sum imposed by way of penalty u/s 50 and within forty-five days from the date on which the order is served on the person committing the contravention, prefer an appeal to the Appellate Board :

Provided that the Appellate Board may entertain any appeal after the expiry of the said period of forty-five days, but not after ninety days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time :

Provided further that where the Appellate Board is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, in its own discretion, dispense with such a deposit either unconditionally or subject to such conditions as it may deem fit.

(3) On receipt of an appeal under sub-section (2), the Appellate Board may, after making such further inquiry as it deems fit, confirm, modify or set aside the

order appealed against and the decision of the Appellate Board shall, subject to the provisions of section 54, be final and if the sum deposited by way of penalty under sub-section (2) exceeds the amount directed to be paid by the Appellate Board, the excess amount shall be refunded.

(4) The Appellate Board may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer u/s 50 read with section 51 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceeding and make such order in the case as it thinks fit.

(5) No order of the adjudicating officer made u/s 50 read with section 51 shall be varied by the Appellate Board so as to prejudicially affect any person without giving such person a reasonable opportunity for making a representation in the matter; and subject thereto, the Appellate Board shall follow such procedure, in respect of the proceedings before it, as may be prescribed."

8. Thus, under the second proviso to section 52(2) of the FERA, the Board is empowered to dispense with the payment of the penalty imposed u/s 50 by the adjudicating officer in whole or in part. However, such discretion has to be exercised judicially and in the interest of justice. In case deposit of the penalty before hearing of the appeal would cause undue hardship to the appellant, the Board in its discretion can dispense with the pre-deposit or direct partial deposit of the penalty amount. The question of dispensing with the amount of penalty partially or wholly arises at an interim stage of the proceedings in the appeal, that is, a stage prior to the final determination of the rights of the parties. Such a step is a procedural step in the final adjudication of the appeal. The order of the Board dispensing with the pre-deposit either unconditionally or subject to certain conditions is not a decision on the merits of the case. Such an order is passed to prevent hardship and to advance justice so that the appellant does not lose his right of appeal for failing to deposit the penalty amount due to reasons beyond his control. For good and valid reasons, the Board can pass orders which have the effect of modifying or altering the interlocutory order relating to the pre-deposit of the penalty amount. If held otherwise, the Board will not be able to pass appropriate orders in a case where such orders are required to be passed having regard to the circumstances of the case and/or the supervening events, which may have a crippling effect on the capacity of the appellant to make the payment of the penalty amount or such amount directed to be paid by the Board as a condition precedent for hearing the appeal. Therefore, I am of the considered view that the order contemplated by the second proviso to section 52(2) of the FERA is merely of an interlocutory nature, in aid of the process of final adjudication of the appeal.

9. Learned counsel for the petitioner submitted that there was no supervening event, which could justify the passing of the order dated March 28, 1994, by the Board. In this context, he also pointed out that despite the fact that in the application of the first two respondents dated November 8, 1993, they had pleaded that the assets of the company had been attached by this court in the

suit filed by the Canara Bank against them, the Board by its order dated December 6, 1993, merely extended the time to deposit the amount directed to be paid by its earlier order dated August 17, 1993, and to make payment by Installments. Therefore, by a subsequent order the Board was not justified in waiving the pre-deposit of rupees one lakh.

10. A perusal of the application dated November 8, 1993, would show that the request of the respondents was only for extension of time and no request was made for waiving any amount out of the amount directed to be deposited under the order of the Board dated August 17, 1993. It was only by a subsequent application dated February 18, 1994, that they requested for waiver of Rs. 1.20 lakhs on the ground that in spite of the best efforts they had not been able to raise a loan. The Board, while considering the request of the first and the second respondents for waiving an amount of Rs. 1.20 lakhs, noted that they had been able to deposit a sum of Rs. 2.30 lakhs. The Board felt that to ask the respondents to deposit a further sum of Rs. 1 lakh would be to cause undue hardship to them. This view of the Board cannot be said to be either arbitrary or perverse.

11. Having regard to the above discussion, the petition is dismissed as having no merit.