

(1982) 03 BOM CK 0032

In the Bombay High Court

Case No : Misc. Petition No. 1524 of 1978

Yvonne Surendranath Sinha

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-03-1982

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 35 ECR 139 : (1993) 64 ELT 7

Hon'ble Judges : S.P. Kurdukar, J

Bench : Single Bench

Judgement

Kurdukar, J.—This petition under Article 226 of the Constitution of India is filed by the two petitioners challenging the action of the respondent No. 2 forfeiting the bond at Ex. A dated 1-12-1965.

2. The petitioners are the present partners of the firm M/s. S.S.I. Films and are carrying on business at Agarwal Building, Room No. 14, 1st Floor, Kalina, Santa Cruz (East), Bombay 400 029. One Surendranath Sinha and one Irshad Ali both since the deceased were the partners of the said firm M/s. S.S.I. Films. Surendranath Sinha died in Bombay in or about the year 1971 and the petitioner No. 1 the widow was taken as the partner of the said firm along with Irshad Ali the other partner. Irshad Ali also died in Bombay on or about 16-1-1978 and thereafter petitioner No. 2 was taken as the partner in the said firm of M/s. S.S.I. Films along with the petitioner No. 1.

3. Surendranath Sinha and Irshad Ali started the production of Motion Pictures in the name and style of S. S. I. Films. They decided to produce the Motion Picture named "SAAZ AUR AWAZ". For the purpose of production of the said film "SAAZ AUR AWAZ" the producers (hereinafter referred to as the "the petitioners") applied to the 2nd respondent for issue of licences for import of colour films. The 2nd respondent accordingly issued three licences to the petitioners. The first licence is dated 10-1-1963 for the value of Rs. 80,000/-, second is dated 2-3-1965 for the value of Rs. 1,53,356/- and the third is dated 29-9-1965 for the

value of Rs. 1,00,125/-. While issuing the said three import licences the 2nd respondent put a condition upon the petitioners to the effect that the petitioners shall earn foreign exchange and/or export the said Motion Picture to the extent of about 133.33 per cent of the value of the films imported under the said licences. It is no more in dispute that the value in respect of the first two licences was made good by the petitioners. It is also no more in dispute that the petitioners have imported the goods under the third licence and exhausted the same to the extent of Rs. 98,091/-. The petitioners, therefore, say that the obligation of the petitioners under the said import licences respectively was to earn foreign exchange to the value of Rs. 1,00,000/-, Rs. 1,91,695/- and Rs. 1,30,788/-. Thus the petitioners were under the obligation to earn foreign exchange to the extent of or equivalent to a sum of Rs. 4,22,483 /-. While issuing the said import licences the 2nd respondent used to take a bank guarantee to the extent of about 50 per cent of the value of import allowed in favour of the President of India. As stated earlier the dispute only centers round the import licence dated September 29, 1965 which was for a sum of Rs. 1,00,125/-. The petitioners imported colour positive cinema films worth Rs. 98,091/-. The 2nd respondents for allowing the said import of the value of Rs. 98,091/- required the petitioners to furnish a bank guarantee to the extent of Rs. 49,046/- in favour of the President of India. Accordingly the petitioners through respondent No. 4 furnished a bank guarantee on 1-12-1965 for Rs. 49,046/-. The guarantee bond is at Ex. A. The petitioners accordingly produced the Motion Picture and released the same in India and also exported the same outside India. Due to unavoidable difficulties the petitioners could not earn foreign exchange and the time was extended by the 2nd respondent from time to time and the bank guarantee was accordingly renewed from time to time. The 2nd respondent by his last letter dated 24th June 1968 extended the bank guarantee for a further period upto 1st December 1969. The same is produced and annexed and marked at Ex. C. The petitioners by their letter dated July 1, 1968 informed the 2nd respondent about the export of the said motion picture and earning of foreign exchange to the tune of Rs. 30,603.14 Ps. The petitioners by their another letter dated December 2, 1968 applied to the 2nd respondent for further extension. Thereupon the 2nd respondent by his letter dated January 4, 1969 informed the petitioners that further extension will be considered provided the petitioners produced a letter from the Reserve Bank of India permitting time for realisation of the proceeds of export. On January 10, 1969, the petitioners by their letter informed the 2nd respondent about the realisation of foreign exchange worth Rs. 22,000/-. The petitioners further by their letter dated January 23, 1969 enclosed the documents or evidence of having earned the foreign exchange worth Rs. 17,983.94. It is relevant to note here that on June 6, 1966 the Indian currency was devalued. The 2nd respondent by his letter dated April 26, 1969 at Ex. P asked the petitioners for higher export due to the devaluation. The petitioners replied to the said letter by their letter dated May 3, 1969 stating, inter alia, firstly that the said film was a flop picture, therefore, the foreign buyers were not even willing to take delivery on the contracted price;

secondly as they have practically fulfilled the obligation of earning the foreign exchange excepting to the extent of Rs. 2,036.08 and thirdly that it was not possible for them to earn the foreign exchange on the enhanced basis due to devaluation of the rupee. On June 2, 1969 the petitioners produced documents showing additional foreign exchange which they had earned by exporting the said film to the extent of Rs. 22,915/-. The 2nd respondent felt that the petitioners have failed to comply with the terms and conditions of the bond to get the foreign exchange as agreed and therefore by his letter dated January 22, 1971 asked the bank why the said bond should not be forfeited. It may be stated that the 2nd respondent did not inform the petitioners in this behalf. The bank in its own turn informed the petitioners about the letter received from the 2nd respondent in connection with the forfeiture of the bond by the bank. On the request of the petitioners the time of the bond was extended upto November 31, 1971 [sic]. The petitioners in their letter also stated that they have exceeded the amount and therefore the third bond should be discharged. It is then alleged by the petitioners that there was no reply from the 2nd respondent. However, on January 25, 1971 the petitioners sent a letter to the 2nd respondent stating that one foreign bill of Rs. 55,000/- was lying unpaid and that the bond should not be forfeited.

4. It is also alleged by the petitioners that on January 10, 1966 the petitioners applied to the 2nd respondents for registering two contracts for export of film. The first contract was with U.S.A. and Canada for the sum of Rs. 7,500/- and the second one was with Arabian Gulf dated January 10, 1966 for Rs. 20,000/-. On June 18, 1963 the petitioners also applied to respondent No. 2 for registering the contract in respect of the same film before its production for exporting the same to Fiji Islands and New Zealand for Rs. 13,000/-. According to the petitioners these contracts were not registered by the 2nd respondent and with the result they could not export the same expeditiously. The petitioners then stated that these contracts were not registered by the 2nd respondent as the 2nd respondent was insisting that the petitioners must get 57.5% more than the contracted amount due to devaluation. The petitioners then alleged that thereafter they wrote a letter to the foreign buyers but, however, the foreign buyers by their letter dated August 2, 1968 informed the petitioners that they were not willing to increase the price. The petitioners thereafter stated in para 9 of the petition that due to delay on the part of the respondent No. 2 in permitting the export of the said film and/or entering the said contracts in his register the three foreign distributors and/or exhibitors did not fulfill the said contract entered into with them and take delivery of the said films.

5. The petitioners in para 7 of the petition alleged that by their letter dated June 2, 1968 applied for further extension of time for the compliance with the condition of the said bond with regard to earning of foreign exchange and also informed the respondent No. 2 to the effect that a part compliance of the said bond was already effected to the extent of Rs. 55,000/-. The said amount was partly recovered then and partly thereafter. The 2nd respondent by his letter

dated June 24, 1968 agreed to extend the period for compliance with the condition of the said bond with regard to earning of the balance of the foreign exchange provided the petitioners renewed and/or furnished a bank guarantee for a further period of one year. In compliance with the said letter the petitioners sent a bank guarantee renewed and valid upto December 1, 1969. The petitioners by their letter dated July 1, 1968 further informed the 2nd respondent that they had submitted the documents of having exported the said motion picture and earned foreign exchange to the extent of Rs. 30,603.14. The petitioners by their letter dated December 2, 1968 applied for extension of time to the 2nd respondent for compliance with the terms of the said bond and the 2nd respondent by his letter dated January 4, 1969, informed the petitioners that their obligation for extension of time for compliance with the said bond will be considered provided the petitioners furnished and/or produced a letter from the Reserve Bank of India the respondent No. 3 permitting the time for realisation of the proceeds of the export in case the proceeds have not been realised within six months from the date of the export. The letter is dated January 4, 1969. The petitioners by their letter dated January 10, 1969 informed the 2nd respondent of having realised the foreign exchange worth Rs. 22,000/-. The petitioners, therefore stated that as against the total foreign exchange earning worth Rs. 1,30,788/-, they have earned the foreign exchange valued at Rs. 1,18,000/- thereby leaving a balance of Rs. 19,147.69 to be earned by them. The letter is at Ex. E. The petitioners by their letter dated January 23, 1969 further enclosed the documents of evidence of having further earned the foreign exchange to the tune of Rs. 17,983.94. The petitioners therefore stated that after the aforesaid earnings of the foreign exchange under the said invoice referred to in the said letter dated January 23, 1969 the total balance of foreign exchange worth a sum of Rs. 2,000/- or so remained to be earned by the said petitioners.

6. It is then alleged by the petitioners that the 2nd respondent by his letter dated April 26, 1969 informed the petitioners that they had imported the positive unexposed colour film worth Rs. 98,091/- and were under an obligation to export the prints of the colour film "SAAZ AUR AWAZ" to earn the foreign exchange to the extent of Rs. 1,30,788/-. By the very same letter the respondent No. 2 tried to inform the petitioners that they were under an obligation to export the said colour film to the extent of the value of Rs. 2,05,991/- being the post-devaluation value of Rs. 1,30,788/-. The said letter is at Ex. P. The petitioners by their letter dated May 3, 1969 informed the 2nd respondent that the said film was a flop picture and the foreign buyers were reluctant to take delivery of the said film even on the basis of the contract entered into prior to the devaluation of the Indian currency. By the same very letter the petitioners further pointed out that as per the condition of the bond they had fulfilled their obligation of earning the foreign exchange and/or of exporting the said film, excepting to the extent that there was a shortfall to the extent of a sum of Rs. 2,036.08. The petitioners also stated that it was not possible for them to earn foreign exchange on the

enhanced basis at the rate of 57.5 per cent above the original amount in view of the devaluation of the rupee. The petitioners therefore stated that the total earnings made by export of the said film is set out in the schedule of earning is annexed to Ex. I. and therefore they are not liable to earn anything more. According to the petitioners the letter issued by the 2nd respondent to the bank forfeiting the bank guarantee is illegal and they have no right to forfeit the same.

7. The 2nd respondent filed his affidavit and the main contention raised on behalf of the 2nd respondent is that the petitioners were put to the strict proof to show that they had exported the said film of the value of Rs. 2,05,990/-. The 2nd respondent, also stated that the petitioners must make good the difference of the value of the export after devaluation. The 2nd respondent submitted that the petitioners did not produce the relevant EP copy of the Shipping Bill and therefore in the absence of EP copy of the shipping bill the petitioners are not entitled to get any benefit from these documents. The 2nd respondent further averred that the petitioners might have earned the foreign exchange in respect of these documents as against some other items. The 2nd respondent submitted that the claim made by the petitioners in this behalf is false and the same be dismissed.

8. In this petition two questions need to be considered, firstly whether the petitioners have exported the film as stated by them in the petition in paragraph 7 and secondly the delay on the part of the 2nd respondent in registering the contract has resulted into canceling the three contracts which has led to the loss of foreign exchange as referred to in para 9 of the petition. This matter was heard by S. K. Desai, J. on January 27, 1982 and passed the following order :

"In paragraph 8 of the petition the petitioners who are the widow and daughter respectively have averred that the producers have earned foreign exchange of Rs. 4,84,481.04 in respect of the film mentioned in paragraph 3 of the petition as against the obligation under the three bonds to receive foreign exchange which comes to Rs. 4,19,584.50. The affidavit in reply is in the following terms :-

"With reference to paragraph 8 of the petition, I do not admit the correctness of the total earnings made by the export of the said film and put the petitioners to the strict proof thereof."

"I would like the respondents to investigate the total earnings made by the petitioners and report to the Court whether the same comes to Rs. 4,84,481.04 as alleged by the petitioners or not. The necessary affidavit of the person who has made the investigation to be filed on or before 1st March, 1982. The respondents will also keep all the documents submitted by the producers and mentioned in Ex. I in Court and in the said affidavit to be filed indicate in respect of item 1 to 4 the heads of various documents submitted. To stand over till 8th March, 1982."

9. On March 8, 1982 the petitioners filed the affidavit and in the affidavit they have stated as follows :-

"I say that after the matter was adjourned on 27th January 1982, I discussed the matter with the officer who had attended the matter on behalf of the second respondents and I was given to understand that the only objection which the respondent Nos. 1 and 2 had was with regard to the petitioners and their predecessors not filing the export promotion copy of the shipping bill. I further came to know from the said officer that the export promotion copy of the shipping bill was foreign exchange earned has not been utilised for importing anything else or taking other concessions under the Export Promotion Scheme of the Government. I say that I also came to know that if I filed an affidavit to that effect that the earning of the foreign exchange the evidence of which has been produced before the respondent Nos. 1 and 2 has not been utilised for taking any other benefit the matter will be put an end to.

I say that the petitioners themselves or even their predecessors-in-title, namely, Shri Surendranath Sinha and Shri Irshad Ali the original producer of the said film have not taken any advantage or benefit under the Export Promotion Scheme of the Union of India or the second respondent. I say that the foreign exchange earned by them from the export of the film "SAAZ AUR AWAZ" has been utilised only towards the fulfillment of the bond executed by the original producers. I say that no other advantage has been taken either by the Petitioners or the original producers against the export of the said film "SAAZ AUR AWAZ". I say that the Export Promotion copies of the shipping bill appeared to have been lost or misplaced, therefore, the same are not filed before the 2nd respondent."

10. In spite of the order passed by S. K. Desai, J. on January 27, 1982 and notwithstanding the affidavit filed by the petitioners on March 8, 1982, the 2nd respondent came with the affidavit today dated March 22, 1982. This affidavit is very much unsatisfactory and does not explain the query put by the Court. This affidavit in my opinion is not the answer to the affidavit filed by the petitioners on March 8, 1982. I see no apparent reason as to why the statement of the petitioners contained in paragraph 7 of the main petition as well as in paragraphs 3 and 4 of the affidavit of Shakeela Irshad Ali dated March 8, 1982 should not be accepted. If this has been accepted it is clear that the petitioners have earned the foreign exchange from the said film to the extent of Rs. 1,77,577/-. The petitioners were required to earn the foreign exchange to the extent of Rs. 2,05,990/-. Thus the balance which was not earned by the petitioners comes to Rs. 28,433/-. In order to make good this amount the learned Advocate for the petitioners seeks to rely upon the three contracts which were not registered by the 2nd respondent. According to the petitioners in para 9 of the petition they have stated that the petitioners had applied for registration of these contracts prior to June 1966 and the total amount covered by these three contracts comes to Rs. 40,500/-. These three contracts were not registered by the 2nd respondent expeditiously and with the result the petitioners could not export the same in 1968 when the contracts were registered. According to the petitioners by that time the foreign buyers had refused to take delivery of this film with the result petitioners could not earn the amounts covered by these three contracts.

There is no satisfactory explanation contained in the affidavit of the 2nd respondent in this behalf. In my opinion, there is no reason to demerit the statement made by the petitioners. If this amount is taken into account then it is clear that the petitioners-producers have complied with the terms of the agreement and they have discharged the obligation contained in the bonds and earned the foreign exchange from the export of the said film as agreed upon. The action of the 2nd respondent to forfeit the bond of guarantee given by the petitioners is illegal and cannot be sustained. Petition must therefore succeed. The rule is made absolute in terms of prayers (a) and (b) with no order as to costs.