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HIGH COURT OF DELHI : NEW DELHI

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Judgment reserved on: 22.05.2008

Judgment delivered on: 04.06.2008

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Crl. A. No.43/2008

Dinkar Dogra

...Appellant

Through: Mr. Y.K. Kapur, Advocate

versus

Directorate of Enforcement

...Respondent

Through: Mr. Vineet Malhotra, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

VIPIN SANGHI, J.

1. This appeal under Section 35 of Foreign Exchange Management Act, 1999 read with Section 49 thereof and Section 54 of the Foreign Exchange Regulation Act, 1973 (the Act) is directed against the order dated 09.10.2007 passed by the Appellate Tribunal for Foreign Exchange, New Delhi (Appellate Tribunal), whereby the Appellate Tribunal has dismissed the said appeal preferred by the appellant herein against the adjudication order No.DD/(AV)/22/DZ/03/957 dated 28.10.2003, passed by the Deputy Director of Enforcement, New Delhi. By the impugned order, the Appellate

Tribunal has upheld the imposition of penalty *inter alia*, against the appellant herein to the tune of Rs.3 Lacs on account of violation of Section 18(2) read with Section 18(3) of the Act.

2. The appellant was one of the Directors of M/s Kwaliti Jewellers (India) Pvt. Ltd. (the company). The company exported goods to the tune of Rs.2,37,700/- and US\$ 99,366.25 to M/s A.K. Diamonds Imports, Houston, USA. The admitted position is that the said importer did not pay the entire price for the goods and substantial amount remained outstanding to be recovered by the company. The respondent, Directorate of Enforcement, issued a show cause notice bearing No.T-4/93/DZ/2000/DD(VS) dated 28.09.2000 to the company and its Directors, including the appellant herein, for non-realisation of export proceeds of Rs.2,37,700/- and US\$ 99,366.25 alleging violation of Section 18(2) and 18(3) and 68 of the Act. It was alleged that the payment for the goods, as aforesaid, was not received within the prescribed period, as extended by the RBI and that the company and its Directors appeared to have contravened Section 18(2) of the Act read with Central Government Notification No.F-1/67/EC/73-1 & 3 dated 01.01.1974, and Section 18(3) of the Act, and thereby they have rendered themselves liable to be proceeded under Section 50 of the Act. The noticees filed their replies before the Enforcement Directorate. The stand taken by the appellant in response to the show cause notice was that he had ceased to be a Director of the company w.e.f. 01.06.1995. There was

a change of management in the company. It was, therefore, alleged that after 01.06.1995, the appellant was not in a position to take any steps to effect recovery, as he was not associated with the business of the company. He neither had the authority nor the requisite papers or knowledge to be able to take any steps in this regard. Reliance was also placed on the communications issued by the RBI to the Union Bank of India, Overseas Branch, Connaught Circus, New Delhi, which was the bank through whom the exports have been made to show that the application of the company to seek offset of exports proceeds against the goods received was still pending when the appellant had resigned from the Directorship of the company. On that basis it was further argued that unless the said application was rejected, and till so long as it remained pending, there was no question of violation of Section 18(2) of the Act, since the company and its Directors were entitled to await the requisite permission from the RBI before initiating any steps to recover the outstanding amount from the importer. The adjudicating authority, however, did not accept the aforesaid submission of the appellant and held that sufficient efforts were not made to realise the amounts either before the company was taken over by the new management or after the new management took over the reigns of the company. No documents were produced regarding the extension granted by the RBI or to demonstrate the efforts made to realize the pending proceeds. Since the exports have taken place at the time when, inter alia, the appellant was a Director of the company, he was responsible to take

steps or the realisation of the outstanding proceeds. Therefore, the adjudicating authority imposed penalty of Rs.3 Lacs on each of the Directors, including the appellants, apart from a penalty of Rs.5 Lacs on the company. The appeal preferred before the Appellate Tribunal also met the same fate.

3. Before me, once again the submission of the appellant is that at the time when the appellant had resigned from the company the issue with regard to offset of export proceeds against the goods received were still pending before the RBI. In this regard reference is made to two communications dated 01.07.1995 and 09.08.1995 issued by the RBI to the company and the Union Bank of India, Overseas Branch, requiring them to furnish certain documents. Reference is made to the Memorandum of Understanding dated 31.05.1995 entered between Mr. Kiran Chimalwar and Mr. Dinkar Dogra, the appellant herein on one hand, and Mr. L.R. Sridhar, on the other hand, under which the management of the company was taken over by Mr. Sridhar. It is argued that from 01.06.1995, inter alia, the appellant walked out of the management of the company. Reference is also made to the copy of Form 32, stated to have been filed before the Registrar of Companies, which shows that, inter alia, the appellant resigned from Directorship of the company on 05.10.1995. Submission of learned counsel for the appellant is that it is well-settled, at least so far as Appellate Tribunal is concerned, that till so long as the application as aforesaid is pending before the RBI, it

cannot be said that the exporter has contravened Section 18(2) of the Act, which reads as follows:

“18(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 proceed of sales 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 ordinarily 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.”

4. He submits that decision of three Benches of two members each of the Appellate Tribunal relied upon in the written submission filed before the Appellant Tribunal have been ignored and brushed aside by the Tribunal while passing the impugned order. He also submits that the doctrine of precedent binds the Appellate

Tribunal just as, it binds the Courts. In support of his submission he relies on **Sayaji Iron & Engineering Company v. CIT** 253 ITR 749.

5. On the basis of the aforesaid submissions, the following questions of law are claimed to arise for consideration in this appeal, namely:-

(i) Whether there can be violation of Section 18(2) and Section 18(3) of the Act, when the application of the exporter is pending consideration before the RBI either for extension of time or for offset of the export proceeds against goods received.

(ii) Whether the Appellate Tribunal was bound to follow its earlier two Member Bench decision in 2003 (87) ECC 285 “**M/s Leatherage, Kanpur v. Director of Enforcement**” and the judgments followed therein.

(iii) Whether the Appellate Tribunal could have taken a different view from its decision in **M/s Leatherage, Kanpur** (*supra*), without referring to a larger Bench.

6. Learned counsel for the respondent in his response has vehemently opposed the admission of this appeal. He submits that the Principal laid down in the aforesaid decision of the two Member Bench of the Appellate Tribunal does not apply in the facts of the present case.

7. At first blush the submissions of the appellant appear to be forceful and attractive and undoubtedly give the impression that

the Appellate Tribunal has taken a view contrary to its earlier decisions and that it is against a reasonable view, that till so long as the application for extension of time to receive the export proceeds or offset of exports proceeds against goods received is pending before the RBI, there possibly cannot be any violation of the Section 18(2) of the Act. However, when one looks at the glaring facts of this case, one realises that the aforesaid argument of the appellant has hardly any foundation to stand on. As pointed out by learned counsel for the respondent, the stand of the appellant initially was that he had resigned from the Directorship of the company on 01.06.1995. This is so recorded in paragraph 3 of the appellate order. However, the appellant's own document, namely, Form-32 shows that he resigned from the Directorship of the company on 05.10.1995. It is further pointed out by the respondent that the importer was one Ashish Dogra, who was none other than a cousin brother of the present appellant. He was using the business name M/s A.K. Diamond Exports, USA and US Tools. Sh. Ashish Dogra was in fact one of the founder Directors of the company, when it was incorporated on 02.07.1993. Reference is made to the statement of the appellant recorded by the Enforcement Directorate, wherein, he, inter alia, states: -

“..... On being asked, I state that my cousin Shri Ashish Dogra is residing at USA since 1980 this address is as under: -

ASHISH DOGRA

8650, PineFall DR
Houston Texas 77057
USA.

.....”

“M/s Kwaliti Jewellers (India) Pvt. Ltd. was incorporated on 2/7/93 & the following were the directors:

1. Dinkar Dogra, Managing Director
2. Ashish Dogra, Director (NRI)
3. Kavita Dogra, Director
4. Kiran Chimalwar, Director
(coopted on 2/8/93).

Mr. Ashish Dogra NRI proposed us to set up a unit for manufacturing studded Jewellery for export to USA in the year 1993. He was in Jewellery business having retail jewellery stores in Houston Texas, USA. He offered to buy the total production.....”

“The guarantors were Dinkar Dogra & Kiran Chimalwar & Kavita Dogra (Directors of the company). In addition to the three 4th guarantor was Smt. SANDHYA DOGRA (sister in law of NRI Director Ashish Dogra).....”

“Since exports were being made to M/s A.K. Diamonds Exports in which Shri Ashish Dogra was the partner who also happens to be director in our company we were feeling secure on the realisation part due to the said reason. We had at no time any doubt about the bonafide of Shri Ashish Dogra. More over Ashish Dogra had also showed his inability in opening L.C on behalf of M/s A.K. Diamond Exports in favour of M/s Kwaliti Jewellers (India) Pvt. Ltd. Further US Tools & supplies USA to whom exports were also made which are also pending for realisation was introduced to us by Ashish Dogra One Mr. Yogi proprietor of the said firm was good friend of Ashish Dogra as claimed by him. It was under these circumstances that exports under D.A. Basis were made. It was our first attempt with regard to exports.”

“..... As regard efforts made by me I have to state that I spoke to Shri Ashish Dogra several times over telephone No.001713 8236613 & 011 17137899946 at Houston & wrote several letter to him. I also remember wrote a letter to Minister Commerce, Embassy of India in WASHINGTON DC dated 30/5/95 on behalf of the company stating the full facts with the request to intervene in the matter for realisation of export proceeds from M/s US Tools & supplies & M/s A.K. Diamond Exports. I also remember having sent several other letters to M/s A.K. Diamond Exports & US Tool & Supplies with the request to speed up the process of sending payments against the pending G.R.'s. As these documents in original are not available with me.....”

8. From the aforesaid extracts of the statement made by the appellant, it is clear that there was close personal as well as business proximity between the appellant, the company and the importer. The transactions were not undertaken with any sense of formality. It is also evident that no meaningful or serious efforts were made by the appellant even at the time when he was a Director to realise the export proceeds in their entirety from the importer. My attention has also been drawn to the aforesaid MOU dated 31.05.1995. A reading of the said MOU is also highly revealing. The MOU, wherein the party of the first part was, *inter alia*, the appellant, and the party of the second part was Shri L.R. Sridhar, *inter alia*, records as follows: -

“(h) **The party of the first part shall stand committed to assist the party of the second part to run the operations of the company physically till 30th Aug. 1995**, and legally in all manners to do all the acts and deeds necessary to ensure the

smooth operations of the Company.

(i) **The party of the first part** shall also assist the new board of Directors and the party of the second part to effect recoveries/adjustment of the dues recoverable from all the buyers/deters/ insurance, subsidy claims and to obtain Government approvals/ legal action as may be deemed necessary from time to time for the above mentioned purpose **from time to time.**

(j) All recoveries such as debts, insurance claim, subsidy refunds etc. made by the new Board of Directors for proceedings/act prior to 31st May but **received later are to be paid immediately to the party of the first party by the party of the second part after deducting the legitimate expenses in above recovery process.**

(l) **Mr. Dinkar Dogra is to be provided remuneration until 30th Aug. 95 for the physical involvement with the project as may be decided bu mutual consent.** (emphasis added)

9. The aforesaid clauses show that the beneficial interest in the receipt of the export proceeds was, inter alia, that of the appellant. Though he is stated to have resigned from the Directorship of the company from 01.06.1995 (which is in fact not the case as is evident from the Form-32, filed on record, which shows that he resigned on 05.10.1995), even if the aforesaid submission of the appellant were to be accepted, the MOU also shows that he continued to run the operations of the company till 30.08.1995. The appellant's contention that he was merely expected to assist the new Board of Directors and the company to recover or to seek adjustment of dues

recoverable from the buyer/debtors/insurers, does not hold water when one reads clauses (i) with clauses (h) & (j), which provide that the appellant shall run the operations of the company till 30.08.1995 and that he shall be recipient of the proceeds received from overseas. It was really the appellant's interest which was at stake, and it was for him to have taken the necessary steps for recovery of the export proceeds. Though it is argued by the appellant that the new management did not take any steps in this regard, the appellant is not in a position to show what steps he took either against the importer, or against the company to enforce the obligation of the company to take steps against the importer, as under taken by it under the MOU.

10. So far as the correspondence with the RBI is concerned, the two communications dated 01.07.1995 and 09.08.1995 merely show that the RBI repeatedly asked the company to furnish information and details. There is nothing on record to show that the matter was pursued by the company or by the appellant any further with the RBI or the importer, and it is not even claimed that the permission as sought from the RBI was, in fact, ever received by the company.

11. Section 18(3) of FERA, in such like cases raises a presumption that the person has not taken reasonable steps to receive or recover the payment for the goods and to have contravened the provisions of sub-Section (2) of Section 18 of the Act.

Section 18(3) of the Act reads as follows:

“18(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 therefor 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).”

12. In the facts of this case, not only the appellant has not rebutted the said presumption but, on the contrary, the facts set out above clearly show the complicity of the appellant in the failure of the company to realise the export proceeds in its entirety. It is well-known that *“An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest.” K.T. Dharanendrah v. R.T. Authority AIR 1987 SC 1321.*

13. In ***M/s Leatherage, Kanpur*** (*supra*), the facts were different than what they are in the present case, inasmuch as, there was plenty of material on record to show that the directors had made bonafide efforts to realise the debt, which is not the situation in the present case.

14. For the aforesaid reasons, reliance placed by the appellant on the decisions of the two member Bench of the Tribunal in ***M/s Leatherage, Kanpur*** (*supra*) as also the decision in 253 ITR 749, is wholly misplaced. The Tribunal was perfectly justified in not applying the ratio of the aforesaid decisions in the facts of this case.

15. For the aforesaid reasons, the appeal is dismissed with costs of Rs.10,000/-.

(VIPIN SANGHI)
JUDGE

June 04, 2008
RSK