

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of judgment: 25.03.2009

+ **W.P.(C) 7764/2009, C.M. No. 4018/2009 (Stay Application)**
M/S AL-MADINA CONTRACTING EST. CO.

W.P.(C) 7765/2009, C.M. No. 4019/2009 (Stay Application)
SURAJ KANT SOOD

W.P.(C) 7766/2009, C.M. No. 4020/2009 (Stay Application)
SURAJ KANT SOOD

..... Petitioners

Through : Mr. J.S. Arora with Mr. Kewal Singh and
Ms. Mahima Kaushik, Advocates.

versus

UOI & ORS.

..... Respondents

Through : Mr. Sanjay Katyal with Mr. Saurabh, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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|----|---------------------------------------|-----|
| 1. | Whether the Reporters of local papers | Yes |
| | may be allowed to see the judgment? | |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be | Yes |
| | reported in the Digest? | |

S.RAVINDRA BHAT, J. (OPEN COURT)

1. Issue notice. Mr. Sanjay Katyal, Advocate accepts notice; and states that no reply needs to be filed. With consent of the parties, the matter was heard for disposal.

2. Since all the writ petitions involve common questions of fact and law, they were heard for disposal, together. The petitioners are aggrieved by a common order dated 06.01.2009, whereby their applications for dispensation with the requirement of pre-deposit under Section 19 (1) proviso of the Foreign Exchange Management Act was disposed.

3. Briefly the facts are that the petitioners' Mr. Shagan Lal Arora and Mr. Suraj Kant Sood, constituted a firm in the name of M/s. Al-Madina Contracting Est. Company. The objective of the firm was to facilitate recruitment and forwarding of labour to prospective employers in Iraq and other Middle-East countries. It is claimed that after carrying-on business for some time, the said concern was dissolved on 01.06.1986. Five Show Cause Notices were issued by the respondent, Enforcement Directorate (ED) to the firm and its partners. The notices alleged *inter alia* that the firm had to receive sums in excess of more than Rs.1,96,66,009/-, which it did not, from principals abroad; and therefore contravened Section 18(1) of the Foreign Exchange Regulation Act, 1973. It was also alleged that they had acquired foreign exchange to the extent of Rs. 52,02,000/- abroad from their principals; and that foreign exchange equivalent of Rs.52,02,000/- had been deposited unauthorisedly and in contravention of Section 8 of the FERA, 1973. The two notices to the partners also contained connected allegations.

4. The individuals as well as the firm resisted the notice. On 28.06.1999, the adjudicating authority, i.e. the Special Director of Enforcement Directorate apparently issued an *ex-parte* order imposing penalty of Rs. 50 lakhs for the charges leveled in the first Show Cause Notice and Rs. 13 lakhs each for the second and third Show Cause Notices against the firm. Thus, a total sum of Rs. 76 lakhs was directed to be paid by the firm. Mr.Shagan Lal Arora, ex-partner of the firm filed Appeal No. 327/1999 before the Tribunal. The other partner also preferred an Appeal

No. 376/1999 against the same order, on behalf of the firm.

5. On 28.06.1999, the same order also imposed total penalties in respect of two ex-partners. Mr. Suraj Kant Sood filed personal Appeal No. 328/1999 before the Tribunal. Mr. Shagan Lal Arora filed personal Appeal in respect of the penalties sought to be recovered from him individually, being Appeal No. 378/1999. In the four sets of appeals, the application for dispensation of the amount of pre-deposit was sought.

6. The Tribunal by its impugned order, after hearing the parties, directed as follows:

“5. In the light of above discussion, considering the facts and circumstances of the case in entirety, the statutory scheme and the plea for wherewithal it is felt that interest of justice would be served if exemption of 50% penalty amount is granted to substituted appellant i.e. appellant in appeal No.328/99 and to the appellant firm namely appellant in appeal No.327/99. These two appellants are directed to furnish bank guarantee of 50% of their respective penalty amounts in each appeals for a period of one year with undertaking to keep the respective bank guarantee alive until the disposal of these appeals. However the other appellants are directed to deposit the entire penalty amounts within 30 days from the date of receipt of this order. In case the appellants fail to furnish bank guarantees or make pre deposit as aforesaid within the period stated above the respective appeals will be dismissed on this ground alone. This matter may be listed for hearing on 5.3.09.”

7. It is contended that the Tribunal's order in these cases shows non-application of mind. Learned counsel submits that both the appeals in respect of the firm, though preferred separately by the partners could not have met with different fates. It is submitted that whereas the firm's appeal preferred by Mr. Shagan Lal Arora was able to secure relief to the extent of 50% waiver of deposit and the other 50% pre-deposit through bank guarantee (Appeal No. 327/1999), the appeal of the firm for the same grievance preferred by Mr. Suraj Kant Sood met with an entirely different fate. It was submitted besides that the Tribunal was informed that a dissolved firm could not be saddled with liability in the manner done by the Enforcement Directorate.

8. Learned counsel relied upon the judgment of Supreme Court in *State of Punjab v. M/s. Jullunder Vegetables Syndicate* 1966 (2) SCR 457 and submitted that wherever procedure for assessment are initiated against a firm – either before dissolution or thereafter – in the absence of express provision, to enable its continuation, after dissolution such proceedings cannot be completed as it loses its character as an assessable entity. Learned counsel submitted that provision of Section 68 of the erstwhile FERA, apart from creating a fiction that a firm was deemed to be a company which did not take the matter further indicates absence of an express provision casting liability on the dissolved firm, or any of its partners, on account of the firm. Learned counsel also relied upon provision of Section 189 of the Income Tax Act which enables authorities to assess a dissolved firm and cast liability upon the partners.

9. It was submitted that as a consequence, the direction for pre-deposit so far as appeals of the firm, though preferred by two partners; are plainly erroneous and liable to be set-aside. The counsel further submitted that so far as directions in respect of partners are concerned, the Tribunal has displayed complete non-application of mind. It was submitted that there was no distinction as to why Mr. Suraj Kant Sood, who was saddled with personal liability of Rs.7.62 lakhs had to pay the entire amount, whereas limited relief of 50% bank guarantee was given to Mr. Shagan Lal Arora, who was saddled with higher liability of Rs. 7.7 lakhs. Learned counsel submitted that in any event, without giving up the contentions on the merits and without prejudice measure, he is willing to furnish bank guarantee as in the case of Mr. Shagan Lal Arora's appeal.

10. Learned counsel for the respondents submitted that Section 19 casts a liability on an appellant aggrieved by the order of an adjudicating authority to deposit the entire amount

directed. The proviso is relevant only in cases of undue hardship. It is contended that the Tribunal was alive to this limitation as is evident from para 4 of its order where it relied upon the decision of *Benara Valves Ltd. & Ors. v. Commissioner of Central Excise* 2006 (12) SCALE 303. Learned counsel submitted that undue hardship as a concept cannot be stretched to include other aspects or merits of the case.

11. This Court has carefully considered the submissions of the parties. The Tribunal has facially committed an error as is evident from its inconsistent approach in regard to two appeals filed in respect of the firm itself. Ordinarily, this would have been sufficient for the Court to set aside and permit the matter for sufficient consideration. However, since the petitioners have argued on the question of dissolved firm's liability, this Court deems it appropriate to consider the same. Section 68 of the erstwhile FERA deemed a firm to be a company and this extended the scope of liability of even an unregistered partnership, which is clear from the explanation from Section 68(1). However, unlike in case of Income Tax Act, 1961 which contains a specific provision extending the liability even after dissolution of a firm saddling individual liability on a partner (or the partners of the erstwhile firm and further authorizing the Assessing Officer to recover the amounts from them, no such consequential provision was made in FERA. In these circumstances, the observations of the Supreme Court in *M/s. Jullunder Vegetables Syndicate (supra)* become significant. There, the expression "dealer" included a firm or Hindu Joint Family under Section 2 (d) of the relevant local Act. The Court was confronted with a fact situation where the firm had been dissolved. Speaking in that context, the Court observed as follows:

"In this context, as we have stated earlier, there cannot be a distinction on principle between an assessment made on a firm under a proceeding initiated before the dissolution and that made in a proceeding started after the dissolution. In either case, unless there is an express provision, no assessment can be made on a firm which has lost its character as an assessable entity."

12. This Court is *prima facie* of the opinion that the petitioners' arguments on the above aspect of liability of the firm, which stood dissolved prior to the issuance of Show Cause Notice has some substance. However, it would not be pertinent or appropriate for the Court to delve deeper and reflect on the matter since the merits of the appeal have to be considered by the Tribunal. The present observations are sufficient to show that serious question of law concerning the dissolved firm's liability have to be addressed by the Tribunal.

13. The Tribunal, to this Court's mind, fell into a grave error in not adopting the same approach *vis-avis* two partners, Mr. Shagan Lal Arora, who approached by filing Appeal No. 328/1999 and Mr. Suraj Kant Sood, who approached by filing Appeal No. 377/1999. Both these appeals were filed to escape individual liability cast on the erstwhile partners. In one partner's case, i.e. Mr. Suraj Kant Sood, the total liability worked out to be Rs. 7.62 lakhs and in case of Mr. Shagan Lal Arora, the total liability was Rs. 7.7 lakhs. Yet, without recording any reasons why the distinction was made, Mr. Shagan Lal Arora was afforded 50% relief and given the facility of furnishing balance 50% through bank guarantee whereas Mr. Suraj Kant Sood was denied that this displays a completely inconsistent, if not mindless approach.

14. For the above reasons, the Court is of the opinion that the impugned order, cannot be sustained. It is accordingly directed that the two appeals on behalf of the firm, i.e. Appeal Nos. 327/1999 and 376/1999 are entitled to a complete exemption from pre-deposit; the impugned order is accordingly modified to such effect. As far as other aspect, i.e. the Appeal of Mr. Suraj Kant Sood is concerned, i.e. Appeal No. 377/1999, he shall be entitled to the same relief as in the case of Mr. Shagan Lal Arora (in Appeal No. 328/1999). Consequently, he shall deposit 50% of

the amount by way of bank guarantee, within four weeks from today. The rest of the amount shall stand waived as in the case of Mr. Shagan Lal Arora.

15. The Tribunal is hereby directed to hear the appeal on their merits after satisfying itself with the compliance with the present directions.

16. The writ petitions and the accompanying applications are allowed in the above terms.

Order dasti.

**S. RAVINDRA BHAT,
JUDGE**

**MARCH 25, 2009
'ajk'**