

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

Date of decision: 26th July, 2011

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W.P.(C) 2008/2004

SMT. ADARSH KAUR GILL

..... Petitioner

Through: Mr. Vivek Sood, Adv.

Versus

ASSISTANT DIRECTOR & ORS.

..... Respondents

Through: Mr. Sachin Datta & Mr. Manikya
Khanna, Advs. for R-2.
Mr. M.L. Bhargava, Adv. for R-3&4.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Not necessary |
| 2. | To be referred to the reporter or not? | Not necessary |
| 3. | Whether the judgment should be reported in the Digest? | Not necessary |

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 26th September, 2003 of the Enforcement Directorate under the Foreign Exchange Regulation Act (FERA), 1973 to the extent it exonerates the respondent No.3 Gurnir Singh Gill and respondent No.4 Smt. S.K. Gill. The petitioner also seeks a

mandamus to the Enforcement Directorate to ensure fresh adjudication qua the respondents No.3&4.

2. Notice of the petition was issued on 17th February, 2004 and Rule was issued on 9th November, 2004. The counsel for the petitioner, the counsel for the Enforcement Directorate and the counsel for the respondents No.3&4 have been heard.

3. The Enforcement Directorate had initiated the proceedings against M/s Saz International Pvt. Ltd., petitioner and the respondents No.3&4 for failure to take steps for realization of export outstanding to the tune of US\$ 1,37,475. The petitioner as well as the respondents No.3&4 were concerned with the said Company M/s Saz International Pvt. Ltd. The order dated 26th September, 2003 (supra) finds that the export outstanding were due during January, 1985 to June, 1985; that the petitioner was the Director of the exporting firm and had admitted to the export of goods and found the petitioner guilty of, instead of repatriating the sale proceeds of the sold goods into India, utilizing the same in USA. It was further held that the petitioner in the last week of December, 1984 had taken over the affairs of

M/s Saz International Pvt. Ltd. from the respondents No.3&4; that the respondent No.4 had in April, 1985 filed a suit in this Court against M/s Saz International Pvt. Ltd. and the petitioner and certain other persons for recovery of dues and damages. The order dated 26th September, 2003 (supra) thus holds that the charge against the respondents No.3&4 did not stand established under Section 68(1) of the Act as they were not the persons incharge of and responsible for the day-to-day activities of M/s Saz International Pvt. Ltd. and since they were removed from the said Company in the year 1984. The respondents No.3&4 were accordingly held not liable for the contravention.

4. The counsel for the respondents No.3&4 has today urged that the petitioner had preferred an appeal to the Appellate Tribunal for Foreign Exchange against the order aforesaid and which appeal was dismissed vide order dated 28th May, 2010. It is contended that the challenge if any to the exoneration of the respondents No.3&4 was to be in the said appeal and in fact was so made in the appeal and has been negatived. It is yet further contended that the petitioner if aggrieved from the order dated 28th May,

2010 of the Appellate Tribunal has the remedy of second appeal to this Court. It is thus contended that the remedy of this writ petition would in any case be not maintainable and the writ petition is liable to be dismissed on this ground alone.

5. The counsel for the Enforcement Directorate has also referred to ***Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement*** (2010) 4 SCC 772 to contend that the Apex Court has in the said judgment commented adversely to the entertaining of the writ petitions where the alternative remedy of appeal is provided.

6. The counsel for the petitioner has also not controverted that the appeal to the Appellate Tribunal was qua the exoneration of the respondents No.3&4 also. He has however contended that the Appellate Tribunal has not returned any findings in this regard.

7. The Appellate Tribunal in para 8 of the order dated 28th May, 2010 has noticed the contention of the petitioner herein who was the appellant therein that the respondents No.3&4 had been wrongly exonerated and the

penalty of ₹5,00,000/- imposed on the petitioner alone was excessive. It was further the contention of the petitioner before the Appellate Tribunal that the respondent No.4 continued to be the Managing Director of the Company and continued to send letters to the RBI in the capacity of the Managing Director of the Company. The Appellate Tribunal in para 11 of the order also notices the contention of the petitioner that the petitioner is similarly placed as the respondents No.3 & 4 and was also liable to be exonerated.

8. The Appellate Tribunal though has not returned any findings on the argument of the petitioner of the respondent No.4 also being liable since he also claimed to be the Managing Director, has negated the argument of the petitioner claiming equality with the respondents No.3&4 by observing that no claim for negative equality can be made.

9. The counsel for the petitioner has urged that since notice of this petition as well as the Rule therein was issued, the question of maintainability cannot be gone into. The said argument is noted only to reject the same. No such plea can be raised nor is there any basis for the same. A perusal of the order sheet does not show that the question of

maintainability was gone into at any stage or any finding returned thereon. Merely because notice of the writ petition is issued would not prevent the respondents from taking all pleas available to them including that as to the maintainability of the writ petition.

10. The counsel for the petitioner has next contended that though the challenge was made to the exoneration of the respondents No.3&4 before the Appellate Tribunal also but could not have been so made. It is contended that no appeal lay against such exoneration.

11. There is some controversy as to the provision under which the appeal was maintainable, with the counsel for the respondents contending that the appeal was made under Section 52 of FERA 1973 and the counsel for the petitioner contending that the appeal to the Appellate Tribunal was under Section 19 of the Foreign Exchange Management Act (FEMA), 1999. However, in my opinion the same would be of no avail inasmuch as the provisions as to appeal under both the Acts are similar. The appeal to the Appellate Tribunal under both Acts, lies at the instance of any person aggrieved by the order. Thus the contention of the counsel for the petitioner

that the petitioner could not have appealed to the Appellate Tribunal against the exoneration cannot be accepted.

12. The counsel for the petitioner however with reference to the proviso of Section 19 of FEMA has sought to contend that the appeal under FEMA lies only against orders of levy of penalty. The argument is fallacious. Merely because the proviso provides for deposit of penalty while preferring appeal against the order imposing penalty, cannot be said to limit the wide amplitude of the main provision providing for appeal “by any person aggrieved from any order made by the adjudicating authority”. “Any order” would include an order exonerating some of the noticees. Reference may also be made to Section 49(4) of FEMA, being a transitory provision providing for the cases governed by FERA to be continued to be governed by the said Act notwithstanding the repeal thereof. In this regard, it may also be noted that the order dated 26th September, 2003 of the Enforcement Directorate also records the same to have been made under the provisions of the FERA and not under the provisions of FEMA.

13. Once it is held that the grievance as raised in this petition is

appealable and once it is admitted that appeal indeed was preferred, this writ petition would definitely be not maintainable. Moreover, the counsel for the petitioner on enquiry is unable to state whether any remedy has been taken by the petitioner against the order dated 28th May, 2010 of the Appellate Tribunal. He merely states that he has not been engaged for the said purpose. Even if the Appellate Tribunal has not returned any findings on the grievances raised by the petitioner qua the exoneration of the respondents No.3&4, the dismissal of the appeal indicates that the said grievance has also been negatived. The petitioner has not challenged the order of Appellate Tribunal in this petition. If the petitioner is aggrieved of the order of the Appellate Tribunal, she has remedies thereagainst and cannot pursue this petition qua the order which has been subject matter of appeal.

14. Need is therefore not felt to go into the challenge on merits. It may however be observed that I have also raised the query as to the locus of the petitioner to maintain the present petition. Though the counsel for the petitioner has contended that any citizen can challenge any order of exoneration but has been unable to show any case law thereon.

15. There is thus no merit in the petition. The same is dismissed with no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

JULY 26, 2011
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