

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.M.C. 848/2010

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Reserved on: 15th December, 2014
Decided on: 17th December, 2014

RUCHI SOYA INDUSTRIES LTD

..... Petitioner

Through: Mr. G.L.Rawal, Sr.Advocate with
Mr.Rajesh Rawal, Jagjit Singh and,
Mr.Saurabh, Advocates.

versus

**ASSTT. DIRECTOR, ENFORCEMENT
OF DIRECTORATE**

..... Respondent

Through: Ms.Rajdipa Behura, Advocate for ED.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. The present petition is directed against the order dated 11th November, 2009 whereby the review petition filed by the Petitioner herein was dismissed.

2. The backdrop of the facts being that an Import License was issued for import of Tin Plates to the Petitioner, which was imported and foreign exchange so allocated was utilized on establishing Letter of Credit in favour of the foreign suppliers and imported 94.025 MTs of Tin Plates from Brazil. The imported goods were cleared from the Customs on or about 25th March, 1995 on payment of duty. The documents of import were sent by the foreign suppliers through bank and the same were released to the Petitioner by the Bank on acknowledgement of Letter of Credit issued by the State Bank of Hyderabad in 1995 itself. A show cause notice was issued to the Petitioner by the Respondent alleging that the foreign exchange allocated against the

said license having not been utilized why adjudication proceedings under Section 51 of Foreign Exchange Regulation Act, 1973 (in short 'FERA') read with Section 8 (3) and (4) of Foreign Exchange Management Act, 1999 (in short 'FEMA') be not held against the Petitioner.

3. The Adjudicating Authority passed the order on 27th August, 2003 imposing a penalty of Rs.28,26,000/- on the Petitioner. Aggrieved by the said order the Petitioner filed an appeal before the Respondent No.2 along with an application seeking waiver of the pre-deposit of the penalty amount. The Respondent No.2 directed the Petitioner to deposit 50% of the penalty amount within three months vide order dated 12th February, 2004. Much beyond three months having elapsed, on 13th October, 2004 the Petitioner filed an application for withdrawal of the order dated 12th February, 2004 with a request by the Petitioner to afford re-hearing in the matter afresh. On 23rd May, 2008 the appeal was posted for hearing however, the appeal and application were dismissed as the Petitioner was not represented considering the material available on record. The Petitioner filed an application seeking withdrawal of order dated 23rd May, 2008 inter alia submitting that the counsel who came to attend the matter fell sick and thus could not appear in time on the said date and thus the application and appeal had been dismissed. The two members of the Respondent No.2 opined differently and thus the matter was referred to the third Member. On 11th November, 2009 by majority order, the review petition filed by the Petitioner was dismissed in accordance with Section 52 (6) of FERA.

4. Learned counsel for the Petitioner relying upon the decision in Minas Minerais De Goa Pvt. Ltd. vs. Union of India and others, W.P. (C) No.7736/2009 decided on 28th July, 2009 seeks to draw a distinction between

a power of procedural review and a review on merits and contends that the power of procedural review is an inherent power and need not be specifically conferred by a statute. To ascertain whether it was a procedural review sought or a review on merit it would be necessary to consider the order dated 23rd May, 2008 review of which was sought by the Petitioner. Vide order dated 23rd May, 2008 when the appeal filed by the Petitioner and the application seeking withdrawal of the direction dated 12th February, 2004 of pre-deposit of penalty amount came up for hearing and the counsel for the Petitioner was not available the Tribunal passed the following order; even in the absence of the counsel for the Petitioner, considering the merits of the matter:

“The following order is delivered by Km. Vijay Laxmi, Member, Appellate Tribunal for Foreign Exchange:

2. This appeal is filed against Adjudication Order No.ADJ/1013/AD (PKB)/B/2003 dt. 27.08.03 passed by Asst. Director Directorate of Enforcement, Mumbai imposing a penalty of Rs.28,26,000/- (Rupees twenty eight lakhs twenty six thousand only) against M/s Ruchi Soya Industries Ltd. for contravention of the provisions of Section 8 (3) & 8 (4) of FERA, 1973 for not producing evidence for import of goods against remittance of foreign exchange equivalent to Rs.18,84,040/-. This appeal is filed by the appellant along with application for dispensation from pre-deposit of penalty amount under Section 52 (2) of the FERA on ground of prima facie good case and undue hardship where the appellant was directed by the Tribunal to deposit 50% amount of penalty in the interest of the Govt. vide its order dt. 12.02.04 where 3 months time was given to the appellants for depositing 50% amount of penalty. The appellant instead of complying this order moved an application for review which was received in this Tribunal on 18.01.05 i.e. after expiry of more than 10 months. Dr.Shamsuddin, DLA, argued that pre-deposit of

penalty amount is the condition precedent for filing an appeal to challenge the impugned order and the appeal is liable to be dismissed in this case where the appellant has utterly failed to comply with the pre-deposit order. Today the appellant is neither present nor represented where having no option I proceed to decide this appeal on the basis of material available on record because this is a very old appeal of the year 2003. The appellant has not complied with the order in the name of review application. He is not even present today to press this application. However, conceding availability of review powers being procedural it is difficult to find out grounds for review in this case which can be summarized as under:

- (a) error apparent on the face of the records,
- (b) availability of fresh evidence having a substantial bearing which was not available earlier despite due diligence.
- (c) similar grounds.

3. The appellant has utterly failed to establish either of the above mentioned grounds where the application for review is rejected. It would be relevant here to mention the relevant provisions of the FERA, 1973, regarding pre-deposit of penalty amount for filing of appeal by the appellant for better appreciation of the legal position which are produced below:

“52. Appeal to Appellate Board (1) The Central Government may by Notification in the Official Gazette constitute an Appellate Board.....

- (2) Any person aggrieved by such order may (on payment of such fee as may be prescribed and), after depositing the sum imposed by way of penalty under Section 50 and within 45 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 expiry of said period of forty five days but not after 90 days, from the date aforesaid if it is satisfied that 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.”

4. Thus under the statutory scheme the appellants are under an obligation to file appeal simultaneously along with penalty amount unless and until dispensation is granted under Second proviso to Section 52 (2) on the application of the appellants after getting satisfied about the prima facie good case and undue hardship of the appellants. In the instant case, the appellate has not taken care to comply the judicial order despite sufficient indulgence shown by this Tribunal by granting 50% dispensation in favour of the appellant which shows lack of bonafide on the part of the appellant. The order was passed long back on 12.02.04 where the appellant has shown total defiance towards judicial order where equity does not lie in his favour. Looking towards this situation this appeal is liable to be dismissed. An order is passed accordingly. Record of this appeal may be consigned to Record Room.”
5. The decision in Ram Kirpal vs. Union of India, 1998 (103) E.L.T. 8 (Guj.) relied upon by the Petitioner dealt with the inherent jurisdiction of every Tribunal to correct any error committed by it so that justice is done both to the assessee and the revenue. It drew a distinction between the

procedural review and a review on merits and held that review does not confer power to re-hear matter on merits. There is no dispute to the propositions laid down in the decisions cited by the learned counsel for the Petitioner however, suffice it is to state by the application on which the impugned order dated 11th November, 2009 was passed by a majority opinion, the Petitioner had not sought a procedural review but a review on merits as the appeal and application were not dismissed on the ground of the petitioner's counsel not being available but on merits after perusing the material available vide order dated 23rd May, 2008.

6. During the course of arguments learned counsel for the Petitioner has strenuously stated that in his written submissions he agreed to make 50% pre deposit and sought time to deposit. These written submissions stated to be filed by the Petitioner on 15th September, 2009 are not on record of the Tribunal. However, in view of the endorsement even if it is accepted that the written submissions in para-7 submitted that without prejudice to the submissions the Petitioner herein prayed for time of two months to comply with the order dated 12th February, 2004, the same would not enure to the benefit of the Petitioner in as much as this alternate submission of depositing the amount was not taken when the application for withdrawal of the direction of pre-deposit was being considered.

7. I find no merit in the petition. The same is dismissed.

8. Registry is directed to send back the record of Tribunal forthwith.

(MUKTA GUPTA)
JUDGE

DECEMBER 17, 2014/‘vn’