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CRL.A. No. 940 of 2008

SHAILENDRA SWARUP

..... Appellant

Through: Mr. Kailash Vasdev, Senior
Advocate with Ms. Bindu Saxena,
Ms. Aparajia Swarup and Mr. K.K. Patra,
Advocates.

versus

SPECIAL DIRECTOR, ENFORCEMENT
DIRECTORATE

..... Respondent

Through: Ms. Rajdipa Behura with
Ms. Monica Gupta, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
25.11.2014

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1. This appeal is directed against an order dated 2nd July 2008 by the Appellate Tribunal for Foreign Exchange ('AT') dismissing the Appeal No. 1268 of 2004 filed against Adjudication Order ('AO') No. SDE (SKD) III/264/2004 dated 3rd November 2004 passed by the Special Director, Enforcement Directorate ('ED'), Government of India, *inter alia* holding the Appellant to be in contravention of Sections 18(2) and 18(3) read with Section 68 of the Foreign Exchange Regulation Act, 1973 ('FERA') and levying a penalty of Rs. 5 lakhs on the Appellant.

2. The facts leading to the filing of the present appeal are that the Appellant was a part-time non-executive director of Flex Industries Ltd. ('FIL') from 10th November 1990 till 31st October 2001. By a letter dated 31st October 2001 addressed to the Board of Directors of the FIL, the Appellant resigned. An intimation under Form No. 32 to that effect was filed by the FIL with the Registrar of Companies ('ROC') on 13th November 2011. This Form No. 32 with the acknowledgment of the ROC has been enclosed as Annexure A to the appeal.

3. On 28th May 2002, the ED issued a Memorandum/Show Cause Notice (SCN) to FIL and its Directors in relation to the non-realisation of the export proceeds to the value of Rs. 1,10,96,544.22. These exports are stated to have taken place during the period 1996-99. The SCN was addressed to FIL and its Directors, including the Appellant, at the address of the company, "A-107-109, Sector-IV, NOIDA (UP)".

4. The case of the Appellant is that he never received the said SCN and was never informed by the FIL of its receipt. The Appellant has placed on record, copies of two letters sent on behalf of the FIL to the ED in response to the said SCN. The first is dated 19th May 2004 with the subject matter stating "In the case of M/s Flex Industries Ltd." The

said letter has been addressed to the ED by M/s A. Arora & Associates, Chartered Accountants. It begins with the line “Under instructions and on behalf of our captioned client.....”. A second reply was sent on behalf of FIL by the said firm of Chartered Accountants on 12th July 2004. The AO dated 3rd November 2004 refers to the aforementioned replies but states that it is filed on behalf of the “noticees” although at the time when the notice was issued, the Appellant was no longer a Director of FIL.

5. The question before the Adjudicating Authority in relation to the Directors of FIL was whether each of them to whom notices were issued, were during the relevant period “in charge of and responsible to the said company for the conduct of the day-to-day business of the company”.

6. In para 5 of the AO, the SD stated as under:

“I have carefully considered reply dated 19.2.04 filed by Shri Anil Arora, CA on behalf of Shri Ashok Chaturvedi, Smt. Rashmi Chaturvedi and Shri R.P. Agarwal noticees. The submission is not supported by any documentary evidence”.

7. Clearly, therefore, there was no separate reply filed on behalf of the Appellant. The fact that the Appellant was no longer a part-time non-

executive Director with FIL was not brought to the notice of the SD throughout the period when the adjudication proceedings were pending before him.

8. Consequently, the SD proceeded on the basis that the Appellant had been duly served. The SD, in the impugned AO, held that FIL as well as each of its Directors were liable for contravention of Sections 18(2) and 18(3) FERA read with Section 68 FERA. A uniform penalty of Rs. 5 lakhs was levied on each of the Directors, including the Appellant.

9. The Appellant has placed on record a copy of the Memorandum of Appeal in Appeal No. 1268 of 2004 filed by the FIL. It was specifically averred by the Appellant before the AT that he was an advocate of thirty-five years' standing and was a non-executive part-time Director of FIL "from 10th November 1990 till his resignation on October 31, 2001". He enclosed a copy of the resignation letter dated 31st October 2001 and copy of the Form 32 filed by the FIL, pursuant to such resignation, with the ROC.

10. The Appellant specifically averred that he was not aware of the proceedings of the Adjudicating Authority and even the issuance of

the SCN in which the AO was passed and “became aware of the proceedings and impugned order after passing of the same only on or about December 2, 2004” when he received from the FIL a copy of the said AO. In para 3 of the Memorandum of Appeal, it was specifically averred as under:

“3. The Appellant was not served SCN or any other notice by the Special Director, Enforcement Directorate, the Respondent herein, before or after the passing of the impugned order. On or about 2nd December 2004 the Company informed the Appellant about the impugned order. The Appellant came to know about the proceedings, the SCN and the impugned order only when the Company informed the Appellant about the impugned order and therefore, could not appear or authorize any person to represent him. Further the Appellant had resigned as Director of the Company on about 31st October 2001, much before the commencement of the proceedings or issue of SCN to the Company and therefore, even otherwise the Appellant could not have known about the proceedings or the SCN.”

11. On the merits of the case, it was averred by the Appellant that he was not “at the time of the alleged contravention nor at any other time” the person in charge of or responsible to the company for conduct of its affairs much less day-to-day business. It was further averred that no SCN under Rule 4 of the Foreign Exchange

Management (Adjudication, Proceedings and Appeal) Rules, 2000 was served on the Appellant.

12. In the Appellant's Appeal No.1268 of 2004 and the appeals filed by the other Directors, the impugned common order was passed by the AT on 2nd July 2008. The said impugned order of the AT fails to note the separate averments put forth in Appeal No. 1268 of 2004. In the entire impugned order, there is no discussion of the facts averred by the Appellant, in particular of his having resigned from the FIL on 31st October 2001 and therefore not receiving the SCN. It is evident from para 14, that the order proceeds on the basis that "it is not controverted that SCNs issued to the appellants contain clauses which spell out that the appellants were charged for vicarious liability". In effect, therefore, there is no discussion in the impugned order of the central point that arose for consideration in the appeal filed by the Appellant, i.e., whether the Appellant was ever issued a SCN in the adjudication proceedings and whether the AO as far as Appellant is concerned stood vitiated on that ground.

13. At the time of issuance of notice in the appeal on 15th December 2008, the Court stayed the impugned order of the AT qua the Appellant.

14. In the reply filed in the present appeal it has been repeatedly asserted by the ED that the Appellant was one of the Directors of FIL during the relevant period of export; that the Appellant failed to take steps for realising the export goods; that the SCN had been duly served upon the Appellant; that he was represented by an advocate before the Adjudication Officer “and that the Adjudicating Officer has passed order after granting ample opportunities to the Appellant to defend the matter”.

15. Even while the appeal was at the stage of admission one issue raised by the Appellant which is noted in the Court’s order dated 15th December 2008, is that Form 32 had been filed by the FIL in respect of both the resignation of the Appellant as well as of one Mr. Amar Singh from the Board of Directors of FIL. Mr. Amar Singh resigned on 7th November 2001. However, Amar Singh had not been proceeded against by the ED.

16. The explanation as to why the ED did not proceed against Mr. Amar Singh, is given in the counter-affidavit where it is stated that the ED had recorded the statement of one Mr. Pradeep Verma, Assistant General Manager (Commercial) who had informed the ED that Mr. Amar Singh was “actually not connected with the day-to-day

functioning of the company and that Shri Amar Singh had resigned on 7.11.01”. The ED in its reply stated that Mr. Verma had named the Directors of FIL who according to him were conducting the day-to-day business of the FIL. This included the Appellant.

17. It may be noticed at this stage that the statement of Mr. Verma was recorded by the ED on 8th March 2002, 18th March 2002, 20th May 2002 and 28th March 2002. By that time, the Appellant had already ceased to be a Director of FIL. It is strange that the said fact was not disclosed by Mr. Verma to the ED when his statement was recorded.

18. In the Memorandum of Appeal filed in this Court in para 3(a), the Appellant has specifically averred that he ceased to be a Director of FIL since 31st October 2001 and has enclosed the copy of the Form 32 filed with the ROC in that behalf. In reply to para 3 (a), it is stated by the ED that the Appellant had admitted that he was a Director in the FIL till 31st October 2001, and that he continued as a Director during the period the exports took place, i.e., from 1996 to 1999. In other words, there is no denial that the Appellant ceased to be a director with effect from 31st October 2001.

19. The ED has not been able to deny that the SCN was served on FIL and its directors, including the Appellant only at the address of the company and at the time when the Appellant had ceased to be a director. It is not the case of the ED that even after coming to know, when the appeal was filed by the Appellant, that he had ceased to be a director of FIL with effect from 31st October 2001, it offered to serve him a separate SCN at his address. Consequently, it is evident that no SCN was in fact served upon the Appellant at his address as on the date of the SCN, i.e., 28th May 2002.

20. The ED ought to have fairly stated before the AT that since no SCN had been served on the Appellant at his ordinary place of his residence, the AO qua him should in fact be set aside and the ED should be permitted to serve a separate SCN on him. However, even before this Court it was repeatedly asserted that as far as the ED was concerned, it had served the SCN on the Appellant through FIL. Therefore the Court is constrained to observe that the fundamental requirement of the Adjudication Proceedings and Appeal Rules, 1974 ('APAR') (1974 Rules) and in particular Rule 10 (reproduced herein below) has not been satisfied in the present case.

21. Rule 10 of the APAR reads as under:

“10. Service of Notices and Orders:

A notice or an order issued under these rules shall be served on any person in the following manner, that is to say,

- (a) by delivering or tendering the notice or order to that person or his duly authorized agent;
- (b) by sending the notice or order to him by registered post with acknowledgment due to the address of his place of residence or his last known place of residence or the place where he carries on, or last carried on, business or personally works or last worked for gain;
- (c) if the notice or order cannot be served under clause (a) or clause (b), by affixing it on the outer door or some other conspicuous part of the premises in which the person resides or is known to have last resided, or carried on business or personally works or last worked for gain and that written report thereof should be witnessed by two persons.”

22. In terms of Rule 10(b), service of notice had to be on either the address of his place of residence or his last known place of residence or the place where he carries on, or last carried on, business or personally works or last worked for gain. There can be no doubt that as on 28th May 2002, i.e., the date of the SCN, it had to be served either at the place of residence of the Appellant or the last known place of his work. As on that date, his address was not the address of FIL.

23. Even after coming to know that as on the date of the issuance of the SCN, the Appellant was no longer a director of FIL and therefore the notice issued to him at the address of FIL could not obviously be treated to have been served upon him, the ED was not prepared to say that the AO qua him must be set aside on that ground.

24. The AT failed to deal with the central point in the appeal filed by the Appellant. It has also failed to note his submissions in that regard.

25. It is contended by Ms. Behura that the ED went by the statement of Mr. Pradeep Verma to conclude that the Appellant was in charge of the day-to-day affairs of the FIL during the relevant period, i.e., 1996-99. It is submitted that even in his Memorandum of Appeal before the AT, the Appellant did not place any material to show anything to the contrary, except his bald assertion that he was not in charge of the day-to-day affairs of the FIL.

26. The occasion for the Appellant to avail of the defence available to him under Section 68(1) FERA, i.e., to show that he was not in charge of the day-to-day affairs of the company or that the infraction complained of had not occurred with his knowledge or that he had exercised due diligence to avoid such contravention would arise only

after he was served with the SCN along with the documents relied upon against him by the ED. In this case, the documents include the statement of Mr. Pradeep Verma. It is not the case of the ED that even on the date of the AO, it had actually served on the Appellant, the documents relied upon in the SCN. Consequently, it is not open to the ED to now contend that even without the relied upon documents being served on the Appellant, he should somehow have made out his case before the AT in support of his defence under the proviso to Section 68 (1) FERA. The impugned AO was in violation of the principles of natural justice, as well as the requirement of Section 51 FEMA read with Rule 10 of the APPR.

27. Ms. Behura, learned counsel appearing for the ED, placed reliance on a decision dated 18th November 2009 in CrI. A. No. 575 of 2008 (*Shailendra Swarup v. The Director, Enforcement Directorate*) to urge that in an appeal filed by the present Appellant in relation to the proceedings initiated against another company (i.e., M/s Modi Xerox Limited) of which he was the Director, this Court had not accepted the plea of the Appellant that he was not liable for the conduct of day-to-day affairs of the company and had dismissed the appeal.

28. The Court finds that the said case did not concern the issue of non-service of the SCN on the Appellant, which is the central point in the present case. The Court is informed that in any event a Special Leave Petition No.1370 of 2010 has already been filed against the said judgment and leave has been granted by the Supreme Court on 18th November 2014.

29. For the aforementioned reasons, the court is of the view that the impugned AO dated 3rd November 2004 and the impugned order dated 2nd July 2008 of the AT are unsustainable in law and are hereby set aside.

30. The appeal is allowed in the above terms but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

NOVEMBER 25, 2014/akg