IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 1732 OF 2003

Union of India rep. by the
Director of Enforcement
Enforcement Directorate
6th Floor, Lok Nayak Bhawan
Khan Market, New Delhi 110 003. .. Appellant

- Vs -

M.Balamurugan
M/s.Oceanic Export Corporation
No.99, Armenian Street
Chennai 600 001. .. Respondent

Appeal filed under Section 54 of the Foreign Exchange Regulation Act, 1973, r/w Section 49 of the Foreign Exchange Management Act against the order dated 27.02.2003 passed by the Appellate Tribunal for Foreign Exchange, New Delhi, made in Revision Petition No.13 of 2001.(DD/MAS/92/99(33) dated 30.3.2000 on the file of the Deputy Director of Enforcement, Chennai-6.

For Appellant : Mr. M.Dhandapani

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the revision filed by it, the appellant is before this Court by filing the present appeal raising the following question of law :-

> "Whether the discretion exercised by the adjudicating authority not to confiscate the currency in terms of Section 63 of the Foreign Exchange Regulation Act, but to appropriate the amount towards penalty levied under Section 51 is defective and unsustainable in law?"

2. Though the appeal was admitted on 29.7.03 and the case was thereafter listed on 19.2.15, however, in the interregnum no steps

have been taken by the Department to serve notice on the other side. However, we do not wish to dismiss the appeal on the issue of lack of service and we propose to deal with the appeal on its merits.

3. The brief facts, leading to the issuance of show cause notice and charge is as under :-

On information, the officers of the Enforcement, Chennai, searched the office premises of M/s.Oceanic Export Corporation at No.99, Armenian Street, Madras - 1 on 15.7.92 under Section 37 of the Foreign Exchange Regulation Act, 1973 (for short 'the Act'), which resulted in the seizure of Indian currency of Rs.2,70,000/= besides certain other documents. Persons were examined based on the search and their statements were recorded. From the investigations conducted and the statements recorded, it appeared that the respondent, M.Balamurugan, the Managing Partner of M/s.Oceanic Export Corporation, during the period 1991-1992, had received a total sum of Rs.19,76,500/= from various persons in India, as per the instructions of N.Rajendran of Malaysia, a person residing outside India, without the previous general or special exemption from the Reserve Bank of India in contravention of the provisions of Section 9 (1) (b) of the Act and that during the said period, he made payments totalling to Rs.27,60,000/= to various persons in India by order or on behalf of the said N.Rajendran of Malaysia, without the general or special exemption from the Reserve Bank of India in contravention of the provisions of Section 9 (1) (d) of the Act and that he had also made payments totalling to Rs.45,000/- on four occasions during March, 1992 to June, 1992 to the said N.Rajendran of Malaysia, when the said Rajendran came to India without the previous general or special exemption from the Reserve Bank of India in contravention of the provisions of Section 9 (1) (a) of the Act.

4. It is further evident from the said investigation that K.Ramachandran and K.Mani, employees of M/s.Oceanic Export Corporation had abetted the respondent, M.Balamurugan in making payments of Rs.2,60,000/= and Rs.30,000/= respectively without the general or special exemption from the Reserve Bank of India to local persons by order or on behalf of N.Rajendran of Malaysia, a person residing outside India, in contravention of the provisions of Section 9 (1) (d) r/w Section 64 (2) of the Act.

5. Therefore, a show cause Notice No.T.4/23-M/93(SCN) dated 13.7.93 was issued to M.Balamurugan, K.Ramachandran and K.Mani for the aforesaid contraventions requiring them to show cause in writing as to why adjudication proceedings as contemplated under Section 51 of the Act should not be held against them for the aforesaid contraventions. The appellant was also required to show cause as to why the amount of Rs.2,70,000/= seized from his office premises and the amount of Rs.30,000/- from out of the proceeds of the demand draft for Rs.35,000/- surrendered by Ramachandran, one of his employees, being the amount involved in the contravention, should not

be confiscated to the Central Government under Section 63 of the Act.

6. Based on the reply submitted by some of the noticees and hearing the arguments of the learned counsel for the parties, the Deputy Director, viz., the adjudicating authority, on consideration of the entire facts, passed the following order :-

> "In the light of my above findings, I have no hesitation to come to a conclusion that the Noticee Shri M.Balamurugan has contravened the provisions of Sec. 9 (1) (b) and Sec. 9 (1) (d) of the Act to the extent of Rs.19,76,500/- and Rs.27,60,000/- repsectively and Sec. 9 (1) (a) of the Act to the tune of Rs.45,000/-. S/Shri K.Ramachandran and K.Mani, the employees of M/s.Oceanic Export Corporation have contravened the provisions of Sec. ((1) (d) r/w Sec. 64 (2) of the Act to the extent of Rs.2,60,000/- and Rs.30,000/- respectively. Accordingly, I hold them guilty of the charges as set out in the Show Cause Memorandum No.T.4/23-M/93(SCN) dated 13.7.93. However, having regard to the facts that Shri Balamurugan has received the amounts under instructions of his maternal uncle and made payments mostly to their relatives and friends and that S/Shri K.Ramachandran and K.Mani have acted as per the instructions of their employer, I take a lenient view and impose penalties on them as under, in exercise of the powers conferred on me under Sec. 50 of the Act.

S. No.	Name of the Party	Penalty Imposed
1	Shri M.Balamurugan	Rs.1,00,000/- for contravention of Sec. 9 (1) (b) of the Act. Rs.2,00,000/- for contravention of Sec. ((1) (d) of the Act. Rs.5,000/- for contravention of Sec. 9 (1) (a) of the Act.
2	Shri K.Ramachandran	Rs.10,000/- for contravention of Sec. 9 (1) (d) r/w Sec. 64 of the Act.
3	Shri K.Mani	Rs.1,000/- for contravention of Sec. 9 (1) (d) r/w Sec. 64 of the Act.

As regards the amount of Rs.2,70,000/- seized from the premises of M/s.Oceanic Export Corporation and Rs.30,000/- out of Rs.35,000/- seized in the form of Demand Draft, I find that the same have been conclusively proved as the amounts involved in the contravention of Sec. 9 (1) (b) of the Act. Since, I feel that the imposition of penalty as above would meet the ends of justice, I do not propose to confiscate the above amounts of Rs.2,70,000/- and Rs.30,000/- totalling to Rs.3,00,000/- but order that the same be adjusted against the total penalty of Rs.3,05,000/- imposed on Shri Balamurugan.

The balance penalty of Rs.5,000/- payable by Shri M.Balamurugan and the penalty of Rs.10,000/- imposed on Shri K.Ramachandran and Rs.1,000/- imposed on Shri K.Mani should be paid at the Office of the Deputy Director, Enforcement Directorate, Shastri Bhavan, 3rd floor, 3rd Block, No.26, Haddows Road, Chennai-600 006, by means of Demand Draft drawn in favour of the Deputy Director, Enforcement Directorate, Chennai, within 45 days from the date of receipt of this order. While paying the penalty, the order No. and date mentioned in the 1st page should be quoted without fail."

7. By the above order, the adjudicating authority imposed a total penalty of Rs.3,05,000/- on the appellant and while adjusting the confiscated amount towards the said penalty further directed that the balance amount imposed towards penalty, on the appellant, to be paid within a prescribed time.

8. Aggrieved by the said order, the Department/appellant pursued the matter before the Tribunal primarily contending that the show cause notice proceeds on the basis that there is violation of Sections 9 (1) (b), 9 (1) (d) and 9 (1) (a) of the Act and, therefore, in addition to the penalty, the seized amount should have been confiscated under Section 63 of the Act, which has not been done and, therefore, the adjudication order is liable to be modified by ordering confiscation of the amount seized.

9. However, the Tribunal, on considering the facts in the case, rejected the appeal filed by the Special Director holding that it is a matter of discretion for the adjudicating authority regarding the question of confiscation and, therefore, the review petition was dismissed against which the present appeal has been filed by the appellant/Department.

10. Learned standing counsel appearing for the appellant/Department contended that without any valid reason, the Tribunal has confirmed the order of the adjudicating authority in

adjusting the penalty from the confiscated amount. It is further contended that the Tribunal having found that the amounts seized having been conclusively held to be involved in the contravention of Section 9 (1) (b) of the Act, ought not have affirmed the order, as the same is against the provisions of Section 63 of the Act. It is the further contention of the learned counsel for the Department that the adjudicating authority having reached the conclusion that the amount seized from the appellant has been conclusively involved in the contravention of the Act, the same is liable to be confiscated and no order of adjustment of penalty from out of the confiscated property could be made as the same is invalid and unconstitutional. Further, the reasons attributed by the adjudicating authority for arriving at such a finding and passing such an order, as confirmed by the Tribunal, is not sound in law, incorrect and lacks propriety and, accordingly, the order is liable to be set aside.

11. Heard the learned standing counsel appearing for the appellant/Department and perused the materials available on record as also the relevant provisions of the Act.

12. The reason for the Department filing the appeal seems to be that the adjudicating authority having conclusively held that there is contravention of the Act, rendering the currency liable for confiscation, should have confiscated the currency. According to the Department, there is no element of discretion vested with the adjudicating authority under Section 63 of the Act for not confiscating the amount. The word "may" found in Section 63 of the Act should be read as "shall". The discretion, if at all, is available only under Section 51 and not under Section 63 of the Act. If there is a finding rendered that the currency is liable for confiscation, the adjudicating authority has no option except to confiscate the same. The appeal is canvassed on the above premise as could be culled out from the typed set of documents.

13. For better clarity, Section 51 of the Act, which provides for penalty and Section 63 of the Act, which provides for confiscation of currency, security, etc., are extracted hereunder :-

> "51. Power to adjudicate. - For the purpose of adjudging under Sec. 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

63. Confiscation of currency, security, etc. - Any court trying a contravention under Sec. 56 and the adjudicating officer adjudging any contravention under Sec. 51 may, if it or he thinks fit and in addition to any sentence or penalty which it or he may impose for such contravention, direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the direction made in this behalf.

Explanation. - For the purposes of this section, property in respect of which contravention has taken place shall include --

(a) deposits in a bank, where the said property is converted into such deposits;

(b) Indian currency, where the said property is converted into that currency;

(c) any other property which has resulted out of the conversion of that property."

(Emphasis supplied)

14. From a bare reading of the above provisions, it is clear that Section 51 provides that the adjudicating authority, under Section 50, may impose such penalty as he thinks fit, in accordance with the provisions of that Section. Under Section 63, the adjudicating authority, adjudicating any contravention under Section 51, in addition to any penalty, which he may impose for such contravention, may also, if he thinks fit, direct that any currency, security or other money or property in respect of which contravention has taken place, pass an order for confiscation to the Central Government as provided under Section 63.

15. A reading of the above provisions clearly reveal that an element of discretion is in-built in Section 51 as also in Section 63. Section 63 clearly specifies that discretion is vested with the authority and the authority "may confiscate the goods, if he thinks fit". The discretion, to confiscate/not to confiscate the currency, is embedded in the Section itself. Such being the case, we do not find any substantive reason to accept the Department's contention that the word "may" in Section 63 should be read as "shall". There is no occasion for this Court to read the word "may" in an alternate

way to suit the convenience of the Department. The section should be read as a whole in plain language and nothing should be read into the Section, which is not intended by the Legislature. Both the provisions clearly provide for discretion of the adjudicating authority in the matter of imposition of penalty as also confiscation. Therefore, if the adjudicating authority has exercised his discretion not to confiscate the goods and adjusted the same towards penalty, the same cannot be said to be bad in law and against the provisions of the Act.

16. Insofar as the present case is concerned, we find that the adjudicating authority, for reasons best known, taking into consideration the totality of the contravention and the quantum of currency seized, has imposed a penalty of Rs.3,05,000/= and levied the same under Section 51 in a sum of Rs.3,05,000/= and also exercised his discretion under Section 63 not to confiscate the currency. This power has been exercised by the adjudicating authority in consonance with the provisions of Section 63, which empowers the authority to use his discretion, if he thinks fit, to impose penalty but not to confiscate the currency under Section 51. Unless this Court finds that such discretion, exercised by the authority, on the face of it, is irrational, arbitrary and unreasonable, the said order cannot be said to be an erroneous one.

17. For the reasons stated above, no question of law, much less substantial question of law arise for consideration in this appeal. In the result, this appeal fails and the same is dismissed confirming the order passed by the Tribunal. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

GLN
To

1. The Director of Enforcement
   Enforcement Directorate
   Government of India
   6th Floor, Lok Nayak Bhawan
   Khan Market, New Delhi 110 003.

2. The Appellate Tribunal for
   Foreign Exchange
   New Delhi.

3.The Deputy Director of Enforcement,
Shastri Bhavan, 3rd Floor, 3rd Block,
26, Haddows Road, Chennai -6.

1 cc to Mr. M.Dhandapani, Advocate Sr.No.34880/15.

C.M.A. NO. 1732 OF 2003

sr(co)
pmk.28.9.2015