IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.04.2015

Coram

The Honourable Mr.Justice T.S.SIVAGNANAM

W.P.No.19890 of 2008
and M.P.No.1 of 2008

1.M/s.Medopharm
Rep. By its Partner, Chennai.

2.Sardarmal Chordia
3.N.K.Kothari .. Petitioners

-vs-

The Special Director,
Directorate of Enforcement,
6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi. .. Respondent

Petition filed under Article 226 of the Constitution of India praying for issue of writ of Certiorari to call for the records in Appeal Nos.171 to 173 of 2007 on the file of the Appellate Tribunal for Foreign Exchange, New Delhi, and quash the common order dated 27.03.2008 passed therein.

For Petitioner : Mr.N.Viswanathan

For Respondents : Mr.K.Ramasamy,
Spl.P.P.

O R D E R

By consent, the writ petition itself is taken up for final disposal.

2.Heard Mr.N.Viswanathan, learned counsel for the petitioner and Mr.K.Ramasamy, learned Special Public Prosecutor appearing for the respondent / Directorate of Enforcement.

3.This writ petition impugns the order passed by the Appellate Tribunal for Foreign Exchange, New Delhi, dated 27.03.2008. The petitioner preferred the appeal challenging the order passed by the Special Director of Enforcement, Directorate of Enforcement, Government of India, New Delhi, dated 16.10.2007. The contravention alleged against the petitioners was under Section 8 of the Foreign Exchange Management Act, 1999 (FEMA) read with Regulations 8, 9 and 13 of Foreign Exchange Management (Export of Goods and Services) Regulations 2000 and Regulations 3 (1) and (2) of Foreign Exchange Management (Manner of Receipt & Payment) Regulations, 2000, read with Section 42 of FEMA, 1999.

4.Since this writ petition has been filed challenging the order passed by the Appellate Tribunal, which is, in fact, an order on an interim application requesting for stay of the fine amount directed to be paid, it may not be necessary to go into the factual aspects and suffice to note that the respondent / original authority, by the said order dated 16.10.2007, imposed a penalty of Rs.40 lakhs on the first petitioner, namely, M/s.Medopharm, under Section 13 of FEMA, 1999 and imposed a penalty of Rs.10 lakhs on each of the petitioners 2 and 3, who are the Managing Partner and Executive Director (Exports), under Section 13 of FEMA, 1999. The penalty was directed to be paid within 45 days from the date of receipt of a copy of the order.

5.The petitioners preferred appeal before the Appellate Authority and also sought for stay of the levy of fine on the first petitioner firm as well as its Managing Partner and Executive Director (Exports). It was contended that they have a good prima facie case and therefore, the entire demand should be dispensed with and the appeal should be heard on merits. The respondent resisted the application for dispensation of the pre-deposit of fine by contending that the petitioners mis-declared the destination of export and ultimately, diverted the consignment to Lagos (Nigeria), instead of original destination for a Port of Russia and therefore, the realisation of the export proceeds is of no consequence and the order passed by the original authority dated 16.10.2007 is valid and proper. The Appellate Tribunal, referred to the decision of the Hon'ble Supreme Court in the case of Benara Valves Ltd. & Ors vs. Commissioner of Central Excise & Anr., 2006 (12) Scale 303, in which the Hon'ble Supreme Court considered the expression ''undue hardship'' and after taking note of Section 52(2) of the FERA, 1973, the petitioners were directed to deposit 50% of the penalty amount in respect of the appeals, within a period of 30 days.

6.Challenging the aforesaid order, the petitioners approached this Court by filing this writ petition, which was admitted by this Court on 19.08.2008 and an order of interim stay was granted by this Court for a limited period. Subsequently, the interim order was not extended and the writ petition has been kept pending. The respondent has filed a counter-affidavit, inter alia, contending that the writ petition is not maintainable in the light of the effective alternative remedy available under the Act and the petitioners have to file a statutory appeal under Section 35 of the FEMA, 1999 and therefore, the writ petition is liable to be dismissed. That apart, the counter also deals with the factual contentions and seeks to justify the direction issued by the Appellate Tribunal directing the petitioners to deposit 50% of the penalty amount, as pre-deposit and condition precedent for hearing the appeal.

7.After hearing the learned counsels for the parties and perusing the materials placed on record, it may be true that there is an effective alternative remedy for the petitioners under Section 35 of the FEMA, 1999 and by-passing the said remedy, which is also an appeal before this Court, the petitioners should not have approached this Court by filing this writ petition. However, an exception has been drawn to such a proposition, in case where the writ petition has been entertained, despite existence of an alternate remedy and it is pending for several years before this Court for adjudication and in such circumstances, this Court has held that it would be very harsh for this Court to direct the petitioners to avail the alternate remedy after several years when the writ petition was admitted and kept pending.

8.Therefore, this Court is of the view that it may not be necessary for the petitioners to exercise the alternate remedy provided under Section 35 of the FEMA, 1999, though such remedy is to file an appeal before this Court. Hence, the contention raised by the respondent in the counter-affidavit regarding the maintainability of the writ petition is, accordingly, answered and the writ petition is held to be maintainable.

9.It is submitted by the learned counsel for the petitioners that the appeals are ripe for hearing and they are posted before the Appellate Authority today. Since the petitioners did not have the benefit of interim stay in this writ petition, though it was initially granted, the petitioners are required to pre-deposit the amount as directed by the Appellate Tribunal to enable them to canvass the appeals on merits. Learned counsel for the petitioners submitted that some indulgence may be shown, so that they would be able to deposit the money and get along with the appeals on merits.

10.Taking note of the fact that the first petitioner is a partnership firm, against which a fine of Rs.40 lakhs has been imposed and that petitioners 2 and 3, being the Managing Partner and Executive Director (Exports), against whom a sum of Rs.10 lakhs each has been imposed as fine and also taking into consideration that the appeals have been listed for hearing, there will be a direction to the first petitioner to deposit a sum of Rs.15,00,000/- (Rupees fifteen lakhs only) as against fine amount of Rs.40 lakhs and petitioners 2 and 3 to deposit a sum of Rs.2,50,000/- (Rupees two lakhs fifty thousand only) each, as against the fine of Rs.10 lakhs each. The said pre-deposit shall be effected within a period of six (6) weeks from the date of receipt of a copy of this order. If such pre-deposit is made within the period fixed by this Court, then the Appellate Authority shall hear the petitioners' appeal petition on merits and dispose of the same in accordance with law. If the petitioners fail to comply with the direction issued by this Court within the time stipulated, the benefit of this order shall not enure to the petitioners and the writ petition will stand automatically dismissed without further reference to this Court.

11.With the above directions, the writ petition is disposed of. No costs. Consequently, M.P.No.1 of 2008 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sra
To
The Special Director,
Directorate of Enforcement,
6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi.

1 cc to Mr. N.Viswanathan,Advocate, SR.No.20218

W.P.No.19890 of 2008

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