IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.02.2016

Coram:

The Hon'ble Mr.Justice V.RAMASUBRAMANIAN
and
The Hon'ble Mr.Justice N.KIRUBAKARAN

Civil Miscellaneous Appeal No.681 of 2007

Mohammed Yusuff Sahib ... Appellant

Versus

Special Director,
Enforcement Directorate,
New Delhi. ... Respondent

Civil Miscellaneous Appeal filed under Section 54 of the Foreign Exchange Regulation Act, 1973, against the decision of the Appellate Tribunal for Foreign Exchange, New Delhi, made in RP 180/2005 dated 26.9.2006.

For Appellant : Mr.J.Ferozkhan
For Respondent: Mr.M.Dhandapani, Standing Counsel

JUDGMENT

(Judgment of the Court was made by V.Ramasubramanian, J

This appeal arises out of an order passed by the Appellate Tribunal for Foreign Exchange, in a Revision Petition filed by the appellant herein.

2. We have heard Mr.J.Ferozkhan, learned counsel for the appellant and Mr.M.Dhandapani, learned Standing Counsel for the Directorate of Enforcement.

3. On 4.10.1996, the business and residential premises of the appellant were searched under Section 37 of the Foreign Exchange Regulation Act, 1973. In the course of the search, Indian Currency of Rs.60,000/- was recovered from his business premises and Indian Currency of Rs.9,40,000/- was recovered from his residential premises.

4. On the basis of the material recovered during the search and on the basis of the statements recorded from the

appellant and others, a show cause notice dated 2.4.1997 was issued to the appellant by the Special Director of Enforcement, New Delhi, calling upon him to show cause as to why adjudication proceedings under Section 51 of the Foreign Exchange Regulation Act, 1973 should not be initiated against him and as to why the Currency seized from his premises should not be confiscated to the Central Government in terms of Section 63 of the Foreign Exchange Regulation Act, 1973.

5. Eventually, an Order of Adjudication in Original was passed by the Commissioner of Customs (Exports) on 4.11.2004, holding the appellant, guilty of the charge under Section 9(1)(d) of the Foreign Exchange Regulation Act, 1973, in view of the fact that he had no permission from Reserve Bank of India to make payments in India, on behalf of a person resident outside India. However, by a strange reasoning to the effect that the case was 9 years old and that there was an endeavour to complete the adjudication proceedings initiated under the Foreign Exchange Regulation Act, 1973 within a time frame, after the new Act namely Foreign Exchange Management Act, 1999, came into effect, the Adjudicating Officer imposed a penalty of Rs.25,000/- upon the appellant. The Adjudicating Officer also imposed a penalty of Rs.1,00,000/- upon the accomplice and directed the release of the seized amount of Rs.10,00,000/-, after deducting the total fine amount of Rs.1,25,000/- imposed upon both the persons.

6. Neither the accomplice S.M.Sultan, nor the appellant filed any appeal against the order of the Adjudicating Officer, holding them guilty of the respective charges. Therefore, the finding of the Adjudicating Officer that the appellant was guilty of violation of Section 9(1)(d) of the Foreign Exchange Regulation Act, 1973 and the finding of the Adjudicating Officer that S.M.Sultan was guilty of contravening the provisions of Section 8(1) of the Foreign Exchange Regulation Act, 1973, attained finality.

7. However, the Special Director, Enforcement Directorate filed a Revision before the Appellate Tribunal for Foreign Exchange, under Section 54(2) of the Foreign Exchange Regulation Act, 1973. This Revision was allowed by the Tribunal by an order dated 26.9.2006, modifying the order of the Adjudicating Officer and increasing the penalty imposed upon the appellant from Rs.25,000/- to Rs.5,00,000/-. The Tribunal also directed the confiscation of the amount of Rs.10 lakhs to the Government of India, under Section 63 of the Foreign Exchange Regulation Act, 1973. It is against the said order that the appellant is before us.

8. At the outset, Mr.J.Ferozkhan, learned counsel for the appellant raised a preliminary objection to the very

maintainability of the Revision filed by the Special Director, Enforcement, before the Appellate Tribunal for Foreign Exchange. According to the learned counsel for the appellant, a Special Director of Enforcement, entrusted with the duty of adjudication, cannot be treated to be an aggrieved person, so as to enable him to file a Revision or Appeal.

9. In support of the above contention, Mr.J.Ferozkhan, learned counsel for the appellant, placed reliance upon the decision of a learned Judge of this Court in Director of Enforcement v. Rama Arangannal [1981 (1) MLJ 64] and the decision of the Supreme Court in Mohtesham Mohd. Ismail v. Special Director, Enforcement Directorate [(2008) 1 MLJ (Crl) 577 (SC)].

10. In the case of Rama Arangannal, the learned Judge of this Court held that where an authority is vested with the powers of a quasi-judicial Tribunal, it would be a traverse of justice, to allow such an authority to file an appeal against the order passed by an appellate authority setting aside his own order.

11. What happened in Rama Arangannal was that an order of adjudication was passed by the Deputy Director of Enforcement. As against the said order, the affected party filed an appeal before the Foreign Exchange Regulation Appellate Board. The Board allowed the appeal of the individual. As against the order of the Board, the Director of Enforcement filed a further appeal before this court. A preliminary objection was raised about the maintainability of the appeal before this court. Immediately, the Director of Enforcement filed a petition to permit him to amend the cause title so that the appeal could be treated as one filed by the Union of India represented by the Director of Enforcement.

12. Thiru. G.Ramanujam, J (as he then was), held on a reading of the Explanation to Section 54 of the Foreign Exchange Regulation Act, 1973 that under the said provision, it is only Central Government who can be treated as an aggrieved party for the purpose of filing an appeal. The appeal was filed by the Directorate of Enforcement who was the initial authority to pass the adjudication order. Therefore, the court held that the appeal was not maintainable and that it cannot even be made maintainable by allowing an application for amendment of the cause title.

13. Similarly, in the case of Mohtesham Mohd. Ismail, an order of adjudication was passed by the Special Director. The appeal was filed by the individual to the Board. The Board allowed the appeal of the individuals. Therefore, the Special Director of Enforcement filed an appeal to the High Court, without impleading the Central Government as a party. The High

Court dismissed the appeal, placing reliance upon the decision of the learned Judge of this court in Rama Arangannal as well as on the decision of the Punjab and Haryana High Court in Director of Enforcement v. Lal Chand [(1985) 6 ECC 55]. While allowing the appeal of the individual, the Supreme Court reiterated the principles laid down in Rama Arangannal and held that when an adjudicating authority exercises a quasi-judicial power and discharges judicial functions, it cannot prefer appeal against the order passed by the superior authority setting it aside.

14. In response to the above contentions of the learned counsel for the appellant, Mr.M.Dhandapani, learned Standing Counsel for the Department relied upon a decision of a Division Bench of this Court in A.Michael v. Union of India [(2009) 96 SCL 321(Mad.)].

15. We have carefully considered the above submissions.

16. Before getting into the decision relied upon by the learned counsel for the appellant, it is necessary to take note of one fundamental aspect. Under the Foreign Exchange Regulation Act, 1973, a set of officers were created under Section 3. They were (1) Directors (2) Additional Directors (3) Deputy Directors (4) Assistant Directors and (5) such other classes of officers. Under Section 5 of the Foreign Exchange Regulation Act, 1973, the Central Government was empowered to authorise any officer of Customs or Central Excise or Police, to exercise such of the powers and to discharge such of the duties of the Director of Enforcement. The power of adjudication was conferred under Section 51 of the Foreign Exchange Regulation Act, 1973, upon the Adjudicating Officer. As against an order passed by the Adjudicating Officer, under Section 51, an appeal was provided under Section 52 of the Foreign Exchange Regulation Act, 1973, to the Appellate Board. The Order of the Appellate Board, was made subject to a further appeal to the High Court under Section 54 of the Act. Thus, a three tier maxim was created under the Foreign Exchange Regulation Act, 1973. The expression "Adjudicating Officer", was not defined in the Foreign Exchange Regulation Act, 1973.

17. In so far as the Foreign Exchange Management Act, 1999 is concerned, Section 2(a) defined the expression "Adjudicating Authority", to mean an officer authorised under Section 16(1) of the Act. Section 16(1) empowered the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities. The procedure for adjudication was also laid in various sub-sections of Section 16 of Foreign Exchange Management Act, 1999.

18. Therefore, Section 17(1) of Foreign Exchange Management Act, 1999 provided a right of appeal to one or more Special Directors (Appeals), as against an order made by an

Adjudicating Authority, if such Adjudicating Authority was an Assistant Director or Deputy Director of Enforcement.

19. As against the orders passed by the Special Director (Appeals), on an appeal under Section 17, a further appeal was provided under Section 19 to the Appellate Tribunal. Similarly, if the Original Order itself is passed by a person of the rank of Director, the appeal would lie to the Appellate Tribunal. As against the order of the Appellate Tribunal, a further appeal is provided to this Court under Section 75 of the Act. Thus, a four tier maxim was created under the Foreign Exchange Management Act, 1999.

20. A careful comparison of the provisions of the Foreign Exchange Regulation Act, 1973 and the Foreign Exchange Management Act, 1999 would show that there was no post of Special Director under the Foreign Exchange Regulation Act, 1973. Under the Foreign Exchange Management Act, 1999 a Special Director was created only as Appellate Authority, though a person of the rank of Director would also be an Adjudicating Authority. Therefore, the decision in Rama Arangannal and Mohtesham Mohd. Ismail will not be of any assistance to the appellant, in view of the fact that the Department could be taken to be an aggrieved person and that the right of appeal under Section 19 of the Foreign Exchange Management Act, 1999 is conferred upon any aggrieved person. Since the Original Order of Adjudication was by the Collector of Customs, nominated under Section 16(1) of the Act, the appeal filed by the Special Director of Enforcement, before the Tribunal cannot be treated as not maintainable. The Department will come within the meaning of the expression "aggrieved person". Hence, the preliminary contention regarding the maintainability of the appeal filed by the respondents before the Tribunal, is liable to be rejected.

21. On merits, as rightly observed by the Tribunal, the appellant did not file any appeal as against the finding that he was guilty of violation of Section 9(1)(d) of the Act. The discretion supposedly exercised by the Original Authority to let off the appellant with a penalty of Rs.25,000/- cannot be approved. First of all we do not think that he had a discretion. Even assuming that he had a discretion, the manner in which the first authority exercised the discretion and the reasonings given by him are wholly unsustainable as can be seen from the extract of para 21 of the order of the Original Authority, which reads as follows:-

> "However, the case is about 9 years old and since it is an endeavour to complete the adjudication proceedings, under the repealed Foreign Exchange Regulation Act, 1973, I take a lenient view and impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) on Shri

S.M.Sultan, in terms of Section 50 of FERA, 1973.
"

22. Therefore, we are of the view that the order of the Tribunal does not call for any interference. There are no merits in the appeal and hence the appeal is dismissed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To
1.The Registrar,
Appellate Tribunal for Foreign Exchange,
4th floor, B Wing, Janpath Bhawan Janpath
New Delhi-110 001

2.The Special Director,
Enforcement Directorate,
New Delhi.

+1 cc to Mr.M.Dhandapani Advocate sr.10632
+1 cc to Mr.J.Ferozkhan Advocate sr.10760

C.M.A. No.681 of 2007

aa12/04/2016