

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: 29th November, 2017

+ **CRL.A. 160/2016 & Crl.M.A. 2662/2016 (stay)**

SILICON GRAPHICS SYSTEMS INDIA PRIVATE LIMITED

..... Appellant

Represented by: Mr. Rajiv Tyagi, Mr. Divakar
Kumar, Advs.

versus

SPECIAL DIRECTOR OF ENFORCEMENT & ORS

..... Respondent

Represented by: Mr. Amit Mahajan, CGSC for
UIO with Mr. Kunal Dutt, Adv.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Appellant imported certain equipments from its parent company having its office at California, USA and applied to the Reserve Bank of India for release of foreign exchange for remittances against the imports. It is the case of the appellant that the documents of title to the imported goods were routed through Citi Bank and upon receipt of the goods at the Indian Port the appellant filed the Bills of Entry with the Customs Authorities for clearance of the goods and the bankers' copy with the City Bank to remit the foreign exchange in respect of the imports. Upon remittance being made Citi Bank released the documents of title to the goods which were then filed with the Customs Authorities for release of the goods from Indian customs. According to the appellant Citi Bank was thus responsible for filing the

exchange control copies with the Reserve Bank of India.

2. The appellant contends that after more than 5-6 years of all the equipments and spares being imported by the appellant, respondent issued a memorandum dated 8th June, 2001 in view of the limitation under Section 14(3) of the Foreign Exchange Management Act, 1999 (in short FEMA) repealing the Foreign Exchange Regulation Act, 1973 (in short FERA). On 10th April, 2002 a reminder was issued to the appellant alleging non-submission of documentary evidence of imports into India to which appellant replied to the respondents informing the non-receipt of the Annexures. The appellant also applied to Citi Bank for providing the necessary certificates and the certified copies of the Bills of Entry submitted. The appellant submitted the two certificates provided by Citi Bank along with the affidavits of their Managing Director with regard to the remittances made against the Bills of Entry, the certificate of its Chartered Accountant certifying that the foreign exchange had been duly utilized for the imports and the list of its Directors also informing that the appellant was unable to produce the original Bills of Entry for the imports made.

3. It is the case of the appellant that on utter non-application of mind respondent issued a memorandum dated 31st May, 2002 holding against the appellant in respect of 12 remittances for which the Bills of Entry had allegedly not been filed. The appellant vide its letter dated 2nd July, 2002, 31st July, 2002 and 31st October, 2002 sought further time to furnish the copies of 12 Bills of Entries as Citi Bank was not cooperating. The appellant filed with the respondent the certificate given by the Citi Bank with respect to the remittances made against the 12 Bills of Entries issued against the supporting documents. It also filed a list of Bills of Entries that

had been submitted to the Citi Bank for a value of ₹15,10,303.21. However the Special Director of the respondent passed the adjudication order dated 26th September, 2003 holding that the appellant has failed to file the Bills of Entry in respect of an amount of US\$ 6,82,489.95 and imposed a penalty of ₹2,04,00,000/- upon the appellant and a further penalty of ₹50 lakhs on each of its Directors being respondents No.2 to 5 in the present appeal.

4. Aggrieved by the adjudication order dated 25th September, 2003 the appellant filed an appeal before the Appellate Tribunal of Foreign Exchange under Section 191 of the FEMA along with an application under Rule 10(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 for dispensation with pre-deposit of penalty. The application for dispensation of pre-deposit was dismissed in default by the Appellate Tribunal on 9th February, 2010 as the learned counsel for the appellant could not reach the office of the Appellate Tribunal in time due to adverse weather. The appellant thus filed an application for recall of the order dated 9th February, 2010 which was allowed and the matter was posted for hearing.

5. Vide the order dated 12th November, 2015 the Appellate Tribunal partly allowed the application of waiver of pre-deposit of penalty amount and directed the appellant to deposit 10% of the penalty amount i.e. an amount of ₹40,40,000/- and furnish credible security for the balance 50% while failing to notice the negative net worth of appellant of more than ₹ 350 million.

6. Thus, the limited issue in this appeal is whether the impugned order dated 12th November, 2015 passed by the learned Appellate Tribunal deciding the application for dispensation and directing appellant to deposit

10% of the penalty amount and to furnish a credible security for the balance 50% warrants interference.

7. Though learned counsel for the appellant has insisted that the present appeal be treated as a civil appeal, however the said issue need not detain this Court further in view of the decision of the Supreme Court reported as (2010) 4 SCC 772 Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Anr.

8. The primary ground on which the appellant seeks modification of the order impugned is financial hardship to the appellant and otherwise financial credibility of the appellant based on its assets. In M/s. Hindustan Steel Ltd. Vs. The State of Orissa (1969) 2 SCC 627 dealing with the question of imposition of penalty Supreme Court noted:

“Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.”

9. It is trite law that at the stage of deciding the application for dispensation of the pre-deposit the Tribunal is not required to embark upon a detailed inquiry to find out the merits of the appeal as held by this Court in Priya Shah Vs. Enforcement Directorate (2009) 93 SCL 96 (Delhi):

“The appellate authority is not required to embark upon a detailed inquiry to find out whether the stand of the appellant is on a strong footing or not. What is required to be considered at

that juncture is as to whether the appellant has made out a prima facie case in his favour, the balance of convenience qua the deposit or otherwise lies in whose favour and whether the deposit of the duty demanded is likely to cause undue hardship to the appellant.”

10. On the one hand the appellant contends its financial credibility and on the other hand undue economic hardship. The Tribunal has waived off substantial pre-deposit and has directed only 10% of the penalty amount to be deposited with a surety for the balance 50% which cannot be said to be undue hardship on the appellant. Considering its own claim of financial stability, on the facts of the case this Court finds no error in the impugned order.

11. Appeal and application are accordingly dismissed.

NOVEMBER 29, 2017
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(MUKTA GUPTA)
JUDGE