IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 21.12.2022

PRONOUNCING ORDERS ON : 23.12.2022

Coram:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
AND

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P.No.11210 of 2010
and MP Nos, 1, 2 and 3 of 2010

1.Indian Overseas Bank
Represented by its
Deputy General Manager
Treasury (Foreign) Department
Central Office
762, Anna Salai, Chennai-2.

2.K.S.Ganesan
Deputy Manager
Indian Overseas Bank
90/C-32, Janak Puri, New Delhi.

3.R.R.Kelkar
Asst.Manager
Indian Overseas Bank
Fort. Mumbai.

4.K.V.Udupa
Senior Manager
Indian Overseas Bank
Fort. Mumbai. ..Petitioners

.Vs.

Special Director of Enforcement
Government of India
Ministry of Finance
Department of Revenue
Jamabhoomi Chambers
1st Floor
Walchand Hirachand Marg
Mumbai-1. ..Respondent

Writ Petition under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the respondent in Adj. Order No.ADJ/14-15/B/SDE/RAJ/2010/FERA 3645 dt.25.2.2010 and quash the proceedings passed therein.

For Petitioners : Mr.F.B.Benjamin George

For Respondent : Mr.N.Ramesh
Special Public Prosecutor (ED)

ORDER

The Indian Overseas Bank (IOB) and its employees have questioned the adjudication order passed by the Special Director of Enforcement in proceedings no.ADJ/14-15/B/SDE/RAJ/2010/FERA 3645 dated 25.02.2010, imposing penalty for the contravention of Section 64(2) of the Foreign Exchange Regulation Act(hereinafter referred to as 'the FERA').

2. The brief facts of the case are as under:

2.1. M/s.Trinity International Corporation was maintaining a Current Account No.1764 with the IOB, Janakpuri Branch, New Delhi. On 05.12.1991, the proprietor of the said concern issued a cheque for a sum of Rs.1,54,20,800/- from his Account No.1764 with IOB, to transfer the said amount to Standard Chartered Bank(SCB), Mumbai to a particular account number. The IOB, New Delhi directed IOB, Mumbai to transfer the above said amount to SCB, Mumbai. The account that was maintained in SCB, Mumbai belonged to SCB, London and SCB, Birmingham. Accordingly, the money was transferred and it was credited to the Convertible Rupee Account of SCB, London on 16.12.1991.

2.2. The above said transaction was found to be a violation, since it is an irregular transaction in a vostro account maintained by a foreign bank. Hence, show cause notices were issued to the bank and its officers pointing out to the violation of various provisions of FERA.

2.3. On receipt of the show cause notices, the bank and its officers gave their replies and ultimately, the Special Director of Enforcement through impugned order dated

25.02.2010 gave a finding that there is contravention of Section 64(2) of FERA and accordingly, imposed penalties on the bank as well as the individual officers who were directly responsible in the transaction. Aggrieved by the same, the present Writ Petition has been filed before this Court.

3. Heard Mr.F.B.Benjamin George, learned counsel for the petitioners and Mr.N.Ramesh, learned Special Public Prosecutor (ED) appearing on behalf of the respondent.

4. The learned counsel for the petitioners submitted that the IOB is an authorised dealer in foreign exchange and it is the Reserve Bank of India(RBI)which is empowered to issue directions and to ensure compliance with the provisions of the Act and the RBI had already exercised its powers under Section 73(3) of FERA and directed the IOB to repatriate/surrender the amount that had already gone out of India and the same has been complied with by the bank and reported to the RBI on 03.12.1993. Hence, there is no violation of the provisions of the FERA. The learned counsel further contended that the Special Director of Enforcement lacks jurisdiction to impose penalty against the petitioners and hence, the present Writ Petition is maintainable even though an alternative remedy of appeal is available.

5. Per contra, the learned Special Public Prosecutor appearing on behalf of the respondent submitted that not even a part of the cause of action had arisen within the jurisdiction of this Court and hence, the Writ Petition itself is not maintainable before this Court. The learned counsel also brought to our notice the alternative remedy of appeal provided under the Act before the Appellate Tribunal and the further remedy of Second Appeal before the High Court. Hence, it was submitted that the present Writ Petition is liable to be dismissed since there is an efficacious alternative remedy available to the petitioners against the order passed by the respondent.

6. We have carefully considered the submissions made on either side and the materials available on record.

7. The proceedings were initiated by the Directorate of Enforcement by issuing show cause notice to the concerned parties in the year 1993. The proceedings were initiated for violation of the provisions of FERA and when the FERA was in force. The FEMA replaced FERA and it was brought into force on 01.06.2000. Section 49 of the FEMA contains the sunset clause. Section 49(4) of FEMA makes it abundantly clear that all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act, as if that Act has not been repealed. Section 49(5) of FEMA further makes it clear that any action taken under the repealed Act, insofar as it is not inconsistent with the provisions of FEMA, be deemed to have been done under the corresponding provisions of FEMA. The effect of the above provisions is that the order passed by the Special Director of Enforcement on 25.02.2010 in accordance with FERA, must be treated to be an order under FEMA and consequently, the appellate remedy available under FEMA will automatically apply and that is the reason why, even in the impugned proceedings dated 25.02.2010, the petitioners were informed that an appeal against the order dated 25.02.2010 will lie before the Appellate Tribunal in line with Section 19 read with Section 49(5)(a) of the FEMA.

8. Section 50 of the FERA provides that the adjudication as against any contravention of provisions of the FERA must be adjudged by the Director of Enforcement or any other officer of the enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by the order of the Central Government. In the instant case, there was no requirement for the Central Government to empower the adjudicating authority since the adjudication itself was done by the Special Director of Enforcement. In view of the same, there is no doubt in our mind that the Special Director of Enforcement had the power and jurisdiction to adjudicate for the contravention of the provisions of FERA and impose penalty. Consequently, it cannot be held that the Special Director of Enforcement lacks power or jurisdiction to pass the impugned order dated 25.02.2010.

9. The adjudicating authority has passed the order after giving sufficient opportunity to all the parties concerned. Hence, the impugned order dated 25.02.2010 does not suffer from violation of principles of natural justice.

10. The learned counsel appearing on either side made submissions touching upon the merits of the case. If we are to deal with the merits of the case, we have to necessarily get into disputed questions of fact. There is no absolute bar in High Court entering into disputed questions of fact and it will depend upon the facts of each case. The law on this issue has been succinctly put by the Apex Court ***NTPC Ltd. v. Mahesh Dutta*** reported in (2009) 8 SCC 339.

11. In the instant case, on going through the materials placed before us and after carefully considering the order passed by the Special Director of Enforcement, we find that we have to necessarily deal with a lot of documents and get into disputed questions of fact. To avoid such a scenario, the enactment itself provides for further remedies under

Section 19 of FEMA before the Appellate Tribunal and thereafter, under Section 35 of the Act, by way of filing a further Appeal before the High Court against the order passed by the Appellate Tribunal. These remedies have been provided to enable an aggrieved person to contest the order passed by the adjudicating authority, both on facts and on law. These appellate remedies cannot be bypassed and the doors of the High Court cannot be knocked straight away under Article 226 of the Constitution of India.

12. It is true that where the High Court has entertained a Writ Petition and it is pending for a long time, the Writ Petition should not be thrown out on the ground of alternative remedy. However, it is not an absolute rule and there are appropriate cases where the parties will have to be directed to avail an efficacious alternative remedy of appeal. That course can be adopted at any stage and even at the stage of Writ Appeal. In the present case, there is no lack of jurisdiction for the Special Director of Enforcement to pass the impugned order, there is no violation of principles of natural justice and this Court does not find any special circumstances to disregard the alternative remedy and to decide the dispute in this Writ Petition. Apart from these reasons, we have already held that the case requires determination of disputed facts based on documents and it will be fit and proper if this exercise is done before the Appellate Tribunal.

13. In the present case, the entire cause of action has taken place at Mumbai and the order has also been passed by the Special Director of Enforcement at Mumbai. Just because the IOB has a Treasury(Foreign) Department at Chennai, that by itself will not become a part of the cause of action. This is yet another ground on which we are not inclined to entertain the present Writ Petition.

14. In the light of the above reasoning, we are not inclined to go into the merits of this case and deal with various factual issues that were raised on either side. We are inclined to relegate the petitioners to the Appellate Tribunal to work out their remedy in accordance with law and it will be left open to the petitioners to raise all the grounds before the Appellate Tribunal.

15. In the result, the Writ Petition is disposed of with the following directions:

a) The petitioners are permitted to file appeal against the order passed by the Special Director of Enforcement in Proceedings No.ADJ/14-15/B/SDE/RAJ/2010/FERA3645 dated 25.02.2010 within a period of 45 days from the date of the receipt of copy of this order.

b) When this Writ Petition was entertained, interim order was passed and thereby, the operation of the order of the Special Director of Enforcement dated 25.02.2010 was stayed. Consequently, the penalty amount was not recovered from the petitioners during the pendency of the Writ Petition. We are inclined to extend this interim protection till the appeal is filed before the Appellate Tribunal. After the appeal is filed, it is left open to the Appellate Tribunal to decide upon the continuation of the interim order.

c) The period that was spent during the pendency of this Writ Petition shall be taken into account and given credit under Section 14 of the Limitation Act and if the appeal is filed within the time stipulated by this Court in clause (a), the appeal shall be entertained and the same shall be dealt with on merits.

d) It is left open to the petitioners to raise all the grounds before the Appellate Tribunal and the same shall be considered on its own merits and in accordance with law and the order passed in this Writ Petition will not have any bearing upon the final decision to be taken by the Appellate Tribunal and ;

e) If the petitioners do not file the appeal within the time limit fixed by this Court before the Appellate Tribunal, it shall be deemed that the petitioners are not availing the appellate remedy and the order passed by Special Director of Enforcement, dated 25.02.2010 shall become final.

No costs. Consequently, connected miscellaneous petitions are closed.

(P.N.P.,J.) **(N.A.V.,J.)**

23.12.2022
Internet : Yes/No
Index : Yes/No
Speaking order /Non-Speaking order
KP

To

Special Director of Enforcement
Government of India
Ministry of Finance
Department of Revenue
Jamabhoomi Chambers
1st Floor
Walchand Hirachand Marg
Mumbai-1.

P.N.PRAKASH,J.

and

N. ANAND VENKATESH,J.

kp

**Order in
W.P.No.11210 of 2010**

23.12.2022