



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

% **Reserved on : 22nd March, 2022**
Pronounced on: 31st May, 2022

+ **CRL.A. 1176/2016**

SMT KAMINI SADH

..... Appellant

Through: **Mr. Amandeep Singh, Advocate**

versus

**SPECIAL DIRECTOR OF ENFORCEMENT
& ANR**

.....Respondent

Through: **Mr. Amit Mahajan, CGSC with
Mr. Kritagya Kumar Kait,
Advocate for Respondents**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant Criminal Appeal under Section 35 of the Foreign Exchange Management Act, 1999 (hereinafter "FEMA") has been filed on behalf of the appellant against the order dated 30th August, 2016 passed by the Appellate Tribunal for Foreign Exchange in Appeal No. 138/2007.

FACTUAL MATRIX

2. The appellant is a proprietor of M/s Shrestha International, working as an exporter of readymade garments. During the period from year 1990 to 1994, the appellant exported goods vide 44 GR Forms to a company in France. The concerned buyer in France became bankrupt and



therefore, some of the export proceeds against the said consignments could not be realized. The total outstanding amount, thereby, came out to be USD 3,52,784.40 and INR 39,000/-.

3. The appellant was served a Show Cause Notice No. T-4/87-D/2001 dated 5th November, 2001, by the Directorate of Enforcement (hereinafter “ED”)/respondent no. 2, asking her to show as to why proceedings as provided under Section 51 of the Foreign Exchange Regulation Act, 1973 (hereinafter “FERA”) should not be initiated against her for contravening the provisions under Section 18(2) and 18(3) of the Act. The contents of the Show Cause Notice alleged that the company of the appellant took or refrained from taking an action so as to affect security of export to the tune of USD 3,52,784.40 and INR 39,000/- in respect of goods that were shipped by it under the cover of GR forms. It was also alleged that this led to delay beyond prescribed period, without any permission of the Reserve Bank of India (hereinafter “RBI”) for effecting the securing of receipt of the full export value of goods exported from the country of final destination of the goods.

4. The appellant furnished a reply to the said Show Cause Notice submitting that only some GR Forms were not realized and others were duly realized, however, the concerned Bank, that is, Indian Overseas Bank, continued to show all of them pending. It was also submitted, in the reply to Show Cause Notice, that a decree was passed with respect to claims of recovery against M/s Concord Fashions Pvt. Ltd. but the same could not be executed as the buyer had gone bankrupt.

5. Thereafter, the respondent authority passed the order dated 23rd August, 2007, imposing a penalty of Rs. 25,00,000/- on the appellant for



contravening Section 18(2) and 18(3) of the FERA. The appellant filed an appeal against the order before the Appellate Tribunal for Foreign Exchange (hereinafter “the Appellate Tribunal”), whereby vide order dated 23rd August, 2007, claim of the appellant was rejected due to non-deposition of a pre-deposit. The appellant, subsequently, submitted an amount of Rs. 15,00,000/- and her appeal was restored. In the said appeal, the impugned order dated 30th August, 2016 was passed by the Tribunal, whereby, the penalty on the appellant was reduced from Rs. 25,00,000/- to Rs. 15,00,000/- and the pre-deposit made by the appellant was proposed to be appropriated towards the said penalty.

6. The appellant is before this Court against the said order of the Appellate Tribunal.

SUBMISSIONS

7. Learned counsel appearing on behalf of the appellant submitted that Section 18(3) of the FERA stipulates that in case payment is not received within the prescribed period it shall be presumed that such person has not taken all reasonable steps to receive or recover the payment for the goods and he shall accordingly be presumed to have contravened the provisions of sub-section (2) of Section 18, except where the contrary is proven. It is submitted that in accordance with the requirements of the FERA, the appellant took reasonable steps to realize the proceeds of sale from the foreign company and wrote various letters to it, which was also acknowledged in the order dated 23rd August, 2007. The appellant made efforts to trace the owner of the foreign Company through the Embassy of India in Paris as well as a private party, however, the same was of no avail. It is submitted that the sister concern of the



appellant's Company had also been entangled in a similar situation with the same foreign buyer and its export bills were also not cleared, whereupon, a recovery suit was filed in the Courts of France and a decree was obtained in the favour of the sister Company, however, the said decree could not be executed since, the owner of the buyer company was missing and therefore, the recovery of the dues could not be made. It is submitted that despite all these reasonable steps and measures taken by the appellant, in accordance with the requirement of Section 18(3) of the FERA, the Appellate Tribunal passed the impugned order imposing the penalty of Rs. 15,00,000/-.

8. It is further submitted that Section 18(2) of the FERA stipulates that a person exporting goods is duty bound to take any action or refrain from taking any action to secure proceeds from such export. The same provision also provides for an exception clause where the person may refrain from doing anything or may refrain from taking any action for securing such payment, i.e., if he takes permission from the RBI. It means the obligation of the exporter is to secure the payment against the goods exported except in a situation where the permission has been granted by the RBI for waiver. It is submitted that the Indian Overseas Bank had, with the due permission of the RBI, written off all the pending and outstanding GRs of the appellant's firm and hence, there has been no contravention of the provisions of the FERA. Thereafter, the RBI waived the condition laid down under Section 18(2) of the FERA by writing off the outstanding dues of the appellant against the export bills. The said writing off was also acknowledged by the Adjudicating Authority in its order dated 23rd August, 2007 as well as the Appellate Tribunal in the



impugned order. It is vehemently submitted that the waiver obtained from the RBI would be rendered infructuous if the penalty is still imposed upon the appellant.

9. The learned counsel for the appellant also relied upon the judgment of Calcutta High Court in ***Modern Malleables Limited v. B.R. Sinku***, **2010 SCC OnLine Cal 1502**, the relevant part of which is as follows:-

“7. The adjudicating authority while disposing of the proceedings observed at para 36 & 37 as follows:

“36. Based upon the facts as discussed hereinbefore, I find that the noticees had regularised all the GRIs (subject matter of the present proceedings) by either realising proceeds, or through write off duly approved by the RBI. As such, I am inclined to feel that the company has discharged all its legal obligations. At this juncture, it is pertinent to keep in mind that the company's outstandings spread over a span of a number of years related to exports made to different Public Sector Undertakings and Government organisations abroad and, in fact, represented retention money kept by the said undertakings for disbursement after certification by the authorities concerned in regard to the satisfactory execution of the projects. Considering the facts on record, I find that the noticees undertook earnest efforts for realising the pending proceeds as a result of which all the GRIs were regularised, even though after consuming a considerable period of time.

37. Having heard to the elaborate discussion in the preceding paras and viewed in the perspective that the GRIs (in respect of which the SCN was issued) stand regularised, I am of the



opinion that the charges against the noticees now do not survive with strength. Hence, these would deserve to be dropped.”

8. The adjudicating authority has observed that the noticees undertook earnest efforts for realising the pending proceeds as a result of which all the GRIs were regularised, even though after consuming a considerable period of time. It has also been observed that the Company has discharged all its legal obligations. The learned counsel for the petitioner has also submitted that the RBI approved ‘write off’ in respect of the outstanding unrealised export value in respect of the GRIs involved in the complaint. It is contended that the adjudicating authority exonerated the petitioners of self-same charges placed on identical allegations because of the approval of the ‘write off’ by the RBI. It is submitted that in view of the grant of post facto approval for extension of time in respect of the GRIs involved in the impugned criminal proceedings by the RBI and the release all those GRIs by the State Bank of Hyderabad through which the export was negotiated, no violation of the Act can be said to have been committed by the petitioners relating to the GRIs in question and, as such, the impugned proceedings are liable to be quashed.”

10. Reliance is further placed upon ***Kamal Suri vs. Deputy Director of Enforcement, 2008 SCC OnLine Del 22***, where a Coordinate Bench of this Court observed as under:-

“14. In Sunil Gulati this Court discussed the earlier judgments of the Hon'ble Supreme Court in Assistant Collector of Customs v. L.R. Malwani, (110) ELT 317 (SC), G.L. Didwania v. Income Tax Officer, 1995 Supp (2) SCC 724 and Uttam Chand v. Income Tax Officer,



(1982) 133 ITR 909 and came to the following conclusions:

1. On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.

2. The findings in the departmental proceedings would not amount to res judicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of prosecution.

3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and that criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that insofar as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal Court by producing necessary evidence.

4. In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these



criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits of the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.

15. Uttam Chand and G.L. Didwania were cases where the prosecution was launched simultaneously with the adjudication proceedings on the same set of facts. There was a complete exoneration on merits in the



adjudication proceedings. The Court then concluded that such exoneration would render the criminal proceedings unsustainable in law. In P.S. Rajya v. State of Bihar, (1996) 9 SCC 1 apart from departmental proceedings against the appellant for owning assets disproportionate to his known sources of income, proceeding were launched to prosecute him under the Prevention of Corruption Act, 1947. Thereafter the appellant was completely exonerated in the departmental inquiry. While holding that the pending criminal proceedings were unsustainable in law, the Supreme Court explained the rationale in para 17 as under:

17. At the outset we may point out that the learned Counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it. On these premises, if we proceed further then there is no difficulty in accepting the case of the appellant. For if the charge which is identical could not be established in a departmental proceedings and in view of the admitted discrepancies in the reports submitted by the values one wonders what is there further to proceed against the appellant in criminal proceedings.

16. The settled law as noticed above and as summarised by this Court in Sunil Gulati is that where there is a complete exoneration on merits in the adjudication proceedings, the continuation of criminal



proceedings on the same set of facts cannot be sustained.”

11. It is submitted that the Hon’ble Supreme Court in ***Life India Corporation vs. Escorts, AIR 1986 SC 1370***, observed that once RBI has granted permission it is not open for anyone to go against the permission and question the same. The Hon’ble Supreme Court observed as under:-

“Under the scheme of the Act, it is the Reserve Bank of India that is constituted and entrusted with the task of regulating and conserving foreign exchange. If one may use such an expression, it is the 'custodian-general' of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the Reserve Bank of India and the Reserve Bank of India alone that has to decide whether permission may or may not be granted under Sec. 29(1) of the Act. The Act makes it its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally.”

12. It is submitted that in light of the abovementioned submissions, observations of the High Courts as well as the Hon’ble Supreme Court, the impugned order is liable to be set aside alongwith the penalty imposed upon the appellant. It is also prayed that the amount of Rs. 15,00,000/- be refunded to the appellant by the respondent department.

13. *Per Contra*, Mr. Amit Mahajan, learned CGSC appearing on behalf of the respondent no.2/ED vehemently opposed the instant appeal and submitted that there is no error in the order of the Appellate Tribunal. It is submitted that the Show Cause Notice dated 5th November, 2001, was



served upon the appellant since she could not repatriate the exports value to the tune of USD 3,52,784.40 and INR 39,000/-, thereby, contravened Section 18(2) of the FERA.

14. The learned CGSC for the respondent no.2/ED submitted that as per the requirements of Section 18(2) and 18(3) of the FERA, the appellant was duty bound to take reasonable and adequate steps for securing the proceeds of sale from the foreign buyer. Merely writing letter to the buyers and not filing or pursuing any civil remedy before the Courts of France did not amount to taking adequate and reasonable steps by the appellant.

15. It is submitted that the Appellate Tribunal, although reduced the amount of penalty against the appellant, however, it upheld the contravention of the provisions as observed by the Adjudicating Authority. Relying upon the judgment of ***Bharat Carpets vs. Directorate of Enforcement, (2008) 8 SCC 142***, the learned CGSC submitted that while interpreting the provisions of FERA, the Hon'ble Supreme Court has held that the adequate steps for repatriation of foreign exchange have to be taken within a period of six months. Section 18(3) of the FERA creates a rebuttable legal presumption against an exporter whenever the prescribed period expires without repatriation of export proceeds to the effect that the exporter had not taken requisite steps for repatriation of the payment. It is submitted that it was observed by the Appellate Tribunal that in accordance with the provisions of FERA, adequate steps were not taken by the appellant within the prescribed period of six months.

16. It is submitted that the words “all reasonable steps” have to be construed in consonance with the facts and circumstances of a case and



the concerned authorities were to be *prima facie* satisfied that such “reasonable steps” were taken by the appellant for effecting the securing of sale proceeds. It is submitted that upon giving the appellant appropriate and fair opportunity of being heard and presenting its case and keeping in view the steps taken by the appellant as well as the entirety of the matter, both the Adjudicating Authority and the Appellate Tribunal were of the view that *prima facie*, the steps taken by the Appellant were not enough to exonerate the appellant from its liability under Section 18 of the FERA.

17. The learned CGSC relied upon the judgment of ***Sri Renuga Soft-X Towels vs. The Deputy Director, Directorate Enforcement, 2010 SCC OnLine Mad 5619***, to submit that while considering a similar question the Madras High Court observed that sending communications to the other party would amount to the communications being internal documents and would not be enough to be considered as taking reasonable steps so as to exonerate the appellant therein from its liability under FERA. The appellant herein admittedly had sent some letters to the foreign buyer in France, which were not sufficient or reasonable steps in order to absolve the liability of the appellant. The relevant paragraphs of the said judgment are reproduced hereunder:-

“9. In view of the submissions made by the learned counsel on either side, the short question that has to be decided in this appeal is, whether any requisite and reasonable steps had been taken by the appellant to recover the export proceeds from the overseas buyers? From the evidence on record, I find that out of 6 shipments, two G.R. forms were pertaining to the export made to N.X. General Trading Company, UAE. Since



one of the partners in the said firm viz., Chandrasekaran died and as such, the company had been closed, which would be evident from the letter sent by the foreign buyer to the appellant. Similarly, a bunch of correspondences exchanged between the appellant, their Agent-Commercial and their Legal Representatives in respect of the export made to SA, Arguel, France, would show that the said company had become insolvent. It is, no doubt the appellant was continuously in touch with their Agent-Commercial at France to take steps to recover the amount and finally the Agent-Commercial expressed his inability to recover the amount. In this regard, the appellant did not take any further steps. Now, according to the appellant, further steps such as filing a suit at France, contacting the Indian Embassy at foreign countries, etc. would amount to expending huge amount of good money for bad dues. Therefore, based on the correspondence between the appellant and their Agent-Commercial, the authority below ought to have accepted the case of the appellant that they had taken the reasonable steps.

10. In this regard, now the question arises is, whether the correspondence produced by the appellant that had been exchanged between themselves and their Agent-Commercial and the Legal Representative are sufficient enough to come to the conclusion that the appellant had taken necessary and reasonable steps to recover the amount or not? But, according to the respondent, the said correspondences are internal in nature and as such, no reliance could be placed to these documents. According to the respondent, it is the case of the appellant that they are not in a position to recover the amount. When that being the position, as per Rule 8 of FERA Rules, the appellant ought to have approached the Reserve Bank for getting extension of time and the Reserve Bank might have waived the recovery of the



amount; but, in the instant case, the said legal requirement was not complied with by the appellant. Therefore, it cannot be construed that the appellant had taken all reasonable steps. Per contra, it is the defence of the appellant that when it has become sure that the recovery was not possible since N.X. Trading Company, UAE., the partnership firm had been closed in view of the death of one of the partners viz., Chandrasekaran and another firm Betty Blanc. France had become insolvent and in the circumstances and situation, by approaching the Reserve Bank for extension of time, will not fetch any result. Therefore, the failure to approach the Reserve Bank for the extension does not amount that the appellant had totally failed to take any reasonable steps and it has to be decided based on the evidence produced by the appellant on their side and not based on the ground of failure to obtain extension from the Reserve Bank of India.

12. A reading of the above would show that the word "reasonable" has to be viewed under the circumstances of each case. So far as this case is concerned, this Court is of the considered opinion that the word 'reasonable' has to be interpreted in consonance with the object of the Act. The object of FERA is to see that the country's foreign exchange resources were not wasted under any circumstances and were properly utilised to advance the national interest. When the object of the Act is to see the proper utilisation of the country's foreign exchange resources for national interest, in my considered opinion, that merely based on the correspondence that has between the appellant, their Agent-Commercial and legal representative of the foreign company, it cannot be construed that the appellant had taken reasonable steps to secure the amount. Be that as it may, when the Act envisages the legal requirement for getting the extension of time from



the Reserve Bank of India, the appellant ought to have approached the Reserve Bank of India for getting extension of time to realise the foreign proceeds. Therefore, I am not satisfied with the explanation given by the appellant for not getting permission from the Reserve Bank of India.

*13. In my considered opinion, any amount of correspondence sent by the appellant to the foreign buyers or to the Legal Representative or to the Agent-Commercial, is only an internal correspondence. Unless the appellant approaches the Reserve Bank to get the extension for recovery of the export proceeds and unless the Reserve Bank of India on its adjudication, waives the recovery of the proceeds, it cannot be construed that the appellant had taken all reasonable steps within the terms of the relevant Act, especially when the object of FERA is not to waste the foreign exchange resources and to utilise the same to advance the national interest. Further more, I find that no substantial question of law is involved in this appeal. In this regard, a reference could be placed on the decision relied on by the respondent in the case reported in *Raghavan Nair v. Deputy Director, Enforcement Directorate (CFC (Ker) 83)*, as follows:*

“11. We are of the opinion that a finding on what was the amount payable by the foreign buyer in respect of the goods is necessarily a question of fact. It is true, that if there was no evidence to support even a finding of fact, the sustainability of that finding may throw out a question of law. But if there are some materials which would sustain either of the two possible conclusions on a point of fact, the choice of one rather than the other may not involve a question of law at all. It is significant, that in the present case, the original and appellate authorities came to the



conclusions on this question of fact largely on the basis of the correspondence which emanated from the appellant himself and the explanation which the appellant had offered. Reference is also made by the adjudicating officer to the statement of the appellant and his manager on 4-6-1976 and 26-11-1979 respectively in relation to the transactions which are involved in the charges levelled against the appellant. We are of the opinion that no question of law is involved which require appellate scrutiny by this Court under section 54 of the 1973 Act. We are, therefore, inclined to uphold the preliminary objection raised by the revenue”.

Therefore, in my considered opinion, I do not find any infirmity in the order passed by the respondent. The letter correspondence between the appellant and their foreign buyers is not sufficient enough to prove the reasonableness of the appellant to secure the foreign proceeds within the purview of the Act. Therefore, I am not inclined to accept the submissions made by the learned senior counsel for the appellant.”

18. It is further submitted that the writing off of the outstanding amount by the RBI was carried out towards a number of cases, including the instant case, for the reason that the export bills were of value less than Rs. 2,00,000/- and more than 10 years old. It is submitted that the RBI waiver was obtained in the instant matter on technical ground that the case pertained to the bracket where the bills were less than Rs. 2,00,000/- and was more than five years old. Therefore, the write off by the RBI could not have had any implication on the penalty imposed under the provisions of the FERA. It is submitted that if such a plea of the appellant is accepted it would defeat the purpose of the law in relation to foreign



exchange for repartition of the foreign exchange of the Country and the parties would be free to not get the foreign exchange back to the country but would continue to take benefits/ incentives attached to exports such as duty-free imports, duty drawback etc.

19. Learned CGSC for the respondent department submitted that keeping in view the principles as established by the Hon'ble Supreme Court and High Courts as well as in light of the provisions of the FERA, the instant appeal be dismissed for being devoid of any merit.

FINDINGS AND ANALYSIS

20. Heard learned counsel for the parties and perused the record. I have perused the impugned order passed by the Appellate Tribunal.

21. The relevant provisions of the FERA, that have been invoked in the instant matter are reproduced hereunder:-

“18 (2) Where any export of goods, to which a notification under clause (a) of sub-section (1) applies, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

(A) in a case falling under sub-clause (i) or sub-clause (ii) of clause (a) of sub-section (1),-

(a) that payment for the goods -

1. is made otherwise than in the prescribed manner, or

2. is delayed beyond the period prescribed under clause (a) of sub-section (1), or

(b) that the proceeds of sale of the goods exported do not represent the full export value of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank; and



(B) in a case falling under sub-clause (ii) of clause (a) of sub-section (1), also that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade: Provided that no proceedings in respect of any contravention of the provisions of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period.

18 (3) Where in relation to any goods to which a notification under clause (a) of sub-section (1) applies the prescribed period has expired and payment therefor has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of sub-section (2).”

22. With respect to the question before this Court, the provision stipulates that any person effecting an export of goods is also responsible, rather duty bound, to also effect the securing of proceeds from such export/sale. The only exception, as per the language of the provision, is permission from the RBI, which if obtained may lead to granting of the leverage of not securing the proceeds within the stipulated and prescribed period. Further, sub-section 3 makes a presumption against the person who has not been able to secure the proceeds from exports that he/she has not taken all reasonable steps so as to recover the amount to be realized from the proceeds of sale. The purpose behind these provisions becomes



clearer when seen from the standpoint of the legislature and its intention and purpose of bringing into the Act into existence. The preamble of the FERA states as hereunder:-

“An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country.”

23. It is evident from the objective, as specified in the preamble of the Act, that the need at the time of enactment of the Act was to accommodate trade deficit with the aim to also conserve foreign exchange resources in the Country. The purpose behind the Act was to ease out the foreign exchange crunch that the Country was going through. The objective, therefore, was to make such enabling provisions to facilitate due, proper and timely realization of the amount that is accrued by foreign buyer towards goods exported and to also facilitate regularized foreign exchange.

24. In the background of the aforementioned provisions as well as the purpose of the Act, the next question before this Court is, whether the steps taken by the appellant were ‘reasonable steps’ as have been stipulated under Section 18(3) of the FERA. There are no established principles or guidelines laid down by law to the question as to what amounts to reasonable steps under Section 18(3) of the FERA, and therefore, the same has to be established in light of the facts and circumstances of each case.



25. In the instant matter, the appellant upon non-realization of payment towards exported goods made attempts to communicate with the buyer in France. The following communications were made by the appellant, as have been enlisted in her reply dated 26th March, 2004, to the Show Cause Notice by the respondent no. 2/ED:-

1. Letter dated 22.06.1993 of the Advocates in Paris, which had been engaged by the Indian exporters.
2. Letter dated 02.08.1993 of the Embassy of India Paris.
3. The letter of Advocates in Paris dated 08.12.1993.
4. Embassy of India, Paris letter dated 23.07.1993.
5. Embassy of India, Paris letter dated 02.08.1993.
6. The noticee firm's letter dated 04.08.1993 is the S.H.O., Sri Nivas Puri, New Delhi.
7. The noticee firm's letter dated 06.07.1994 is one Mr. Jose Dasliwa, Paris, France.
8. Correspondence with the Indian Overseas Bank and RBI regarding obtaining the permission of the RBI.

26. It is found that the appellant made correspondence with the foreign buyer Company inquiring and intimating about the lapse in payment as well as with the RBI seeking its permission under Section 18(2) of the FERA, by way of sending the abovementioned letters. These communications were sent by the appellant personally and internally to the said entities in order to effect the recovery, however, these steps and measures taken by the appellant, although efforts made towards the recovery of the proceeds of sale, were infact not sufficient to meet the requirement of the provision necessitating “reasonable steps” to be taken



for securing the sale proceeds of exports. These communications, in the nature of mere intimations, demands and requests did not equate with effecting recovery by means of taking all reasonable steps as stipulated by Section 18(3) of the FERA for recovery of outstanding amount. Further, another remedy was sought by the appellant by way of filing of a Civil Suit, however, the same was not pursued by her or anyone on her behalf, which in itself is a testament to the casual approach for securing and effecting recovery from the foreign buyer. Moreover, a decree was obtained against the same foreign buyer by the sister concerned of the appellant's firm, which was also not executed. It is pertinent to note that taking convenient steps to effect recovery of payment cannot be equated with taking reasonable steps.

27. It is the appellant's case that with the permission of the RBI, the Indian Overseas Bank, had written off the outstanding GRs, however, to this respect it is found that the RBI did not write off the amount considering the merits of the case of the instant appellant by making any observations regarding the adequate steps taken by the appellant, and instead, the same was done on the technical ground that the case pertained to the bracket where the bills amounted to less than Rs. 2,00,000/- and were more than five years old. Reference is made to ***Sri Renuga Soft-X Towels (Supra)***, whereby the Madras High Court observed that correspondences of this nature are internal in nature and cannot amount to taking "all reasonable steps" by the person concerned with the aim of securing the recovery of outstanding amount and unrealized GRs.



28. Keeping in view the aforesaid, it is found that the appellant undertook the basic and primary measures of contacting and communicating with the foreign buyers and approaching the RBI after the lapse of the stipulated time period, however, these fundamental steps in themselves were not sincere, serious and sufficient attempts to effectively cause the recovery of the proceeds of sale. Another relevant factor to be considered is that the Appellate Tribunal reduced the penalty imposed upon the appellant by about 60 percent, that is from Rs. 25,00,000/- to Rs. 15,00,000/-, which in itself is a relief granted to the appellant despite having been found guilty of contravening the provisions of the FERA.

29. In light of the facts and circumstances, contentions raised, arguments advanced and judgments cited, it is found that there is no error in the impugned order dated 30th August, 2016 passed by the Appellate Tribunal in Appeal No. 138/2007. The Tribunal has rightly imposed the penalty upon the appellant and this Court does not find any substantial ground or cogent reason to invoke its extraordinary jurisdiction and interfere with the said order. Accordingly, the instant Criminal Appeal is dismissed.

30. Pending applications, if any, also stand disposed of.

31. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 31, 2022
gs/ms