OD - 16 to 22

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION [FOREIGN EXCHANGE]
ORIGINAL SIDE

Present:
The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi

FEA/13/2009

THE HOOGHLY MILLS CO. LTD. & ORS.

VERSUS

UNION OF INDIA & ORS.

FEA/15/2009

RAM NIWAS CHIRIMAR

VERSUS

UNION OF INDIA & ORS.

FEA/16/2009

MRINAL MUKHERJEE

VERSUS

UNION OF INDIA & ORS.

FEA/17/2009

BAL BINOD BAJORIA

VERSUS

UNION OF INDIA & ORS.

FEA/18/2009

ARUN KUMAR BAJORIA

VERSUS

UNION OF INDIA & ORS.

FEA/19/2009

BIMAL KUMAR PODDAR

VERSUS

UNION OF INDIA & ORS.

FEA/20/2009

PURUSHOTTAM MAL RUNGTA

VERSUS

UNION OF INDIA & ORS.

For the Appellants	: Mr. Sudhir Mehta, Adv. Ms. Sreyashee Biswas, Adv. Ms. Puja Goswami, Adv. Mr. Saswati Chatterjee, Adv...
For the Respondent	: Mr. Vipul Kundalia, Adv. Mr. Anurag Roy, Adv. Ms. Aditi Singhania, Adv. Ms. Uneaza Ali, Adv...
Hearing Concluded on	: June 8, 2023
Judgement on	: June 8, 2023

DEBANGSU BASAK, J.:-

1. Seven appeals are taken up for analogous hearing as they emanate out of the same order in appeal dated

March 2, 2009 passed in respect of adjudication order No.SDE(SSB)/II/07/2003 dated August 28, 2003 of the Special Director, Enforcement Directorate. The appeal being No.FEA/13/2009 is at the behest of the company while the appeals being FEA/15/2009 to FEA/20/2009 are appeals at the behest of the directors of such company.

2. The Enforcement Directorate issued a memorandum dated May 3, 2002 to the company and its directors calling upon them to show cause as to why adjudication proceedings should not be initiated against them for their failure to take action to secure the receipt of export proceedings to the tune of US$ 6,37,000 out of the total invoice value of US$ 8,37,200 in respect of 3GRs all dated March 29, 1996.

3. The show cause notice dated May 3, 2002 resulted in an order of adjudication dated December 30, 2002. The adjudication order on appeal was set aside on the ground of violation of principles of natural justice and was remanded for fresh adjudication. The fresh adjudication resulted in an order dated August 28, 2003.

4. The order dated August 28, 2003 was made the subject-matter of the challenge before the Appellate Tribunal Foreign Exchange by the appellants. The appeals by the appellants before the Appellate Tribunal Foreign Exchange were disposed of by the impugned order dated March 2, 2009.

5. Before the adjudicating authority as also before the appellate authority, primarily two points were canvassed on behalf of the appellants. The first point was with regard to the sun set clause of Foreign Exchange Amendment Act, 1999. Such contention was negated by the adjudicating authority as well as by the appellate authority.

6. The second point canvassed by the appellants was that, the appellants took reasonable steps within the meaning of Section 18(3) of the Foreign Exchange Regulations, 1973 and, therefore, they should not be proceeded against for violation of the provisions of the Act of 1973.

7. The adjudicating authority as well as the appellate authority rejected the first and second contentions of the appellants. Rejection of the second contention of the appellants will appear from paragraph 17 of the impugned order of the appellate authority.

8. Bereft of unnecessary details, the factual matrix relevant for consideration of the impugned order of the appellate authority dated March 2, 2009 are as follows :

(i) Appellant company exported materials under 3GR on or about March 29, 1996.

(ii) Prescribed period within the meaning of Section 18 of the Act of 1973 initially expired on September 30, 1996. The appellant company did not receive the entirety of the price of goods sold and delivered from the importer.

(iii) Appellant company filed a suit being CS/299/1999 before the Hon'ble High Court at Calcutta on May 17, 1999 seeking recovery of the balance price of goods sold and delivered being the subject-matter of the export.

(iv) Prescribed period was extended by the Reserve Bank of India till May 31, 2000.

(v) Appellant company applied for extension of the prescribed period before the Reserve Bank of India which application was returned due to incomplete documentation.

(vi) The impugned show cause notice dated May 3, 2002 was issued.

(vii) CS/299/1999 was decreed by the Hon'ble High Court at Calcutta on July 8, 2002.

(viii) Show cause notice resulted in an adjudication order dated December 30, 2002.

(ix) Adjudication order dated December 30, 2002 was set aside by the appellate authority on the ground of violation of the principles of natural justice and the matter was remanded for re-adjudication.

(x) Re-adjudication order dated August 28, 2003 was passed by the adjudicating authority.

(xi) Being aggrieved by the order dated August 28, 2003, the appellants preferred appeals before the appellate authority resulting in the impugned order dated March 9, 2009.

9. The issue in the present appeals revolves around Section 18 of the Act of 1973 and in particular Section 18(3) thereof. The issue is whether, filing of the suit by the appellants before the Hon'ble High Court at Calcutta and obtaining a decree thereon for realisation of the balance of the price of goods sold and delivered to the importer would constitute "reasonable steps to receive or recover the payment for the goods" as envisaged under Section 18(3) of the Act of 1973 or not.

10. The learned advocate appearing for the appellants contends that, the appellants having filed a suit before the Hon'ble High Court at Calcutta for the balance price of goods sold and delivered within the extended period and obtaining a decree thereon, such steps should be construed to be reasonable steps taken on behalf of the appellants to receive or recover the payment of the goods exported within the meaning of Section 18(3) of the Act of 1973. He contends that, a part of the cause of action arose within the jurisdiction of the Hon'ble High Court at Calcutta. It is nobody's case that, the decree passed by the Hon'ble High

Court at Calcutta is a nullity due to lack of jurisdiction. The inability of the appellants put to the decree into execution is of no consequence since the appellants took such steps as were available reasonably to them to recover the price of goods sold and delivered.

11. Learned advocate for the respondents submits that, mere filing of a suit for recovery of the balance of the price of goods is not sufficient in the facts and circumstances of the case. He submits that, the appellants were dealing with a foreign buyer. The appellants did not produce any materials either before the adjudicating authority or before the appellate authority or even before this Court to establish that, the appellants took any steps for the purpose of executing the decree at the relevant place. The appellants took no steps to either approach the country at which, assets of the foreign buyer were available to execute the decree passed by the Hon'ble High Court at Calcutta. The appellants did not institute a suit at a place where the foreign buyer was situated to obtain a decree from such court. Therefore, the steps taken by the appellants in filing the suit before the Hon'ble High Court at Calcutta and obtaining a decree thereon should not be construed to be a reasonable steps within the meaning of Section 18(3) of the Act of 1973.

12. Section 18(3) of the Act of 1973 is as follows :

> "*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).*"

13. In our understanding, Section 18(3) of the Act of 1973 raises a rebuttable presumption in favour of the Department to assume that, the person acted in contravention of the provisions of sub-Section (2) of Section 18 of the Act of 1973 when the entirety of the payments not received by the exporter. A person governed under the Act of 1973, falling within the ambit of Section 18, is required to establish that such person took all reasonable steps to receive or recover the payment for the goods so as to rebut the presumption prescribed under Section 18(3) of the Act of 1973.

14. In other words, a person governed under Section 18 of the Act of 1973 can produce materials before the adjudicating authority to dislodge the statutory presumption under Section 18(3) of the Act of 1973. In the facts and circumstances of the present case, the issue is whether, filing of a suit for recovery of the balance of the price of the goods sold and delivered in respect of an export in any court in India and obtaining a decree therein would constitute taking all reasonable steps to recover the payment for the goods envisaged under Section 18(3) of the Act of 1973 or not.

15. As noted above, the export was effected on March 29, 1996 with the appellants receiving a period till September 30, 1996 to obtain the payments for the export. The appellants received a portion of the payment of the export leaving a balance. The appellants obtained extension for receipt of the balance of the price of goods exported and such extension continued till May 31, 2000. Between the periods September 30, 1996 and May 31, 2000 the appellants filed a suit before the Hon'ble High Court at Calcutta being CS/299/1999 against the foreign buyer, on May 17, 1999 seeking recovery of the balance of the price of the goods exported. Such suit was decreed on July 8, 2002. The factum of filing of the suit as also the decree passed thereon was brought to the notice of the adjudicating authority as well as the appellate authority. Both the authorities were of the view that filing of the suit and obtaining of the decree thereof was of no consequence and did not meet the parameters prescribed under Section 18(3) of the Act of 1973.

16. With the deepest of respect, we are unable to accept the contentions of the respondent that, filing of the suit before a court of law in India for the balance price of the goods exported did not constitute taking reasonable steps to receive or recover the payment of the goods within the meaning of Section 18(3) of the Act of 1973. Export occurred from India. Courts in India would, therefore, be competent to adjudicate upon the issues relating to the export including suit for recovery of the balance of the price of the goods sold and delivered. In the facts of the present case, it is nobody's case that, the court passing the decree on the suit filed by the appellants, acted without jurisdiction.

17. The contention of the respondents that, the appellants took no steps to execute the decree or took no steps to file a suit at a place where the foreign buyer was situated and therefore it cannot be said that the appellants took all reasonable steps in terms of Section 18 (3) of the Act of 1973, is unacceptable in the facts and circumstances of the present case. The appellants explained their conduct in filing the suit in India and not approaching a court where the foreign buyer was situated on the ground of high cost involved. Such an explanation is plausible and should be accepted. The appellant as the exporter and as a plaintiff seeking to recover the balance of the price of goods sold and delivered is entitled to file a suit in a court of competent jurisdiction of its choice. Section 18(3) of the Act of 1973 cannot be read to mean that such choice of the plaintiff which is otherwise available to the exporter under the law of India, stands overridden and that, an exporter of India is required to file a suit at a place of the choice of the Department. Such a construction of Section 18(3) of the Act of 1973 cannot be accepted.

18. In the facts of the present case, the key phrase in Section 18(3) of the Act of 1993 is 'all reasonable steps to receive or recover the payment for the goods'. In fact, the key words are 'all reasonable steps'.

19. Section 18 (3) of the Act of 1973 requires an exporter to take steps to receive or recover the payment of the goods. The word 'steps' is qualified with the word 'reasonable'. Therefore, an exporter is required to take such steps as are fair, practicable and sensible to receive or recover the payment for the goods exported. The words 'reasonable steps' are preceded by the word 'all'. The word 'all' in Section 18 (3) of the Act of 1973 is used as a determiner. Therefore, an exporter is required to take all fair, practicable and sensible steps to receive or recover the payment of the exported goods. As to whether or not, an exporter took all reasonable steps to receive or recover the payment for the exported goods is a question of fact which is required to be determined in each case. At times, mere filing of the suit and obtaining of decree thereon without taking any further steps may not be construed to be 'all reasonable steps' as contemplated under Section 18 (3) of the Act of 1973. However, in a given set of facts filing of a suit and obtaining a decree thereon may constitute all reasonable steps within the meaning of Section 18 (3) of the Act of 1973. In a given situation, the quantum of the balance payment may be such and the importer may be located at a place where, further steps to enforce a decree passed by a Civil Court in India at a place where the importer is situated may not be cost effective. It may not otherwise be possible to execute the decree of a Civil Court of India in a foreign country. These impediments must be factored in to consider as to whether the steps taken by the exporter to receive or recover the payment of the goods exported constitutes 'all reasonable steps' within the meaning of Section 18 (3) of the Act of 1973 or not.

20. In the facts of the present case, the exporter company exported goods of the invoice value of US$ 8,37,200 and received payment of a portion thereof leaving a sum of US$ 6,37,200 outstanding. The exports took place in 1996. Suit was filed for recovery and a decree with regard thereto was obtained. The decree could not be executed in India due to lack of assets of the importer in India. The appellants claimed that, execution of the decree in the foreign country where the importer was situated was not cost effective and feasible. In the facts of the present case, the explanation offered by the appellants with regard to inability to execute the decree obtained is plausible.

21. In such circumstances, we find that, the appellants adequately explained the steps taken by them to receive or recover the payment of the goods exported. The steps taken by the appellants in filing a suit and obtaining a decree thereon within the extended period is a reasonable step taken to receive and recover the payment of the goods exported within the meaning of Section 18(3) of the Act of 1973. Such facts rebut the statutory presumptions of Section 18(3) of the Act of 1973.

22. Consequently, the impugned show cause notice dated May 3, 2002, the adjudication order passed thereon dated August 28, 2003 and the impugned order of the appellate authority dated March 2, 2009 are set aside.

23. FEA/13/2009, FEA/16/2009, FEA/17/2009, FEA/18/2009, and FEA/19/2009 are allowed. Interim applications are disposed of.

24. The Court is informed that the appellants in FEA/15/2009 and FEA/20/2009 expired during the pendency of the appeal.

25. Since no steps for substitution were taken in such appeals, FEA/15/2009 and FEA/20/2009 will be treated and disposed of by the Department as abated.

[DEBANGSU BASAK, J.]

26. I agree.

[MD. SHABBAR RASHIDI, J.]

S.Das/