IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.08.2024

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**
and
THE HONOURABLE **MR. JUSTICE G.ARUL MURUGAN**

C.M.A.Nos.1236 & 1297 of 2008
and C.M.A.Nos.700 to 714 of 2008
and
M.P.Nos.1 & 2 of 2008 in
C.M.A.Nos.1236 & 1297 & 700 to 714 of 2008

C.M.A.Nos.1236 & 1297 of 2008
T.Rafeeq Ahmed,
Partner,
South East Tanning Company
Now having Office at Old No.26, New No.53,
Vepery High Road, Periamet,
Chennai. ..Appellant

Vs

1. Special Director,
Enforcement Directorate,
(Foreign Exchange Regulation Act, 1973),
New Delhi.

2. The Appellate Tribunal For Foreign Exchange,
Government of India, 4th Floor,
'B'Wing, Janpath (Indian Oil) Bhavan,
Janpath,
New Delhi. ... Respondents

PRAYER : Appeal filed under Section 54 of Foreign Exchange Regulation Act to set aside the Common Adjudication Order No.SDE (SSB)/IV/5 to 8/2004 dated 26.02.2004 passed by the Special Director, Enforcement Directorate, the First Respondent herein, imposing a penalty on the Appellant and modified and reduced by 50% of the amount by the learned Appellate Tribunal for Foreign Exchange, New Delhi vide its common order dated 27.11.2007 in appeal No. 43 of 2007.

For Appellant : Mr.S.Dhayaleeswaran

For Respondents : Mr. S.Kumaraguru
Standing Counsel for Enforcement Directorate

C.M.A.Nos.700 to 714 of 2008

South East Tanning Co.
No.5, Naval Hospital Road,
Chennai – 600 003
Rep. By its Partner,
Mr.A.Hafeezur Rehman ....Appellant in C.M.A.No. 700 of 2008

A.Hafeezur Rehman,
Partner,
South East Tannin Co,
No.5 Naval Hospital Road,
Chennai – 600 003. ....Appellant in C.M.A.No.701 of 2008.

New Great Shoe Co,
By Partner Mr.A.Mohammed Akbar,
No.5 Naval Hospital Road,
Chennai – 600 003.
Rep. By Power of Attorney Agent,
Mr.A.Hafeezur Rehman .... Appellant in C.M.A.No.702 of 2008

A.Moh.Akbar,
Partner,
New Great Shoe Co.,
No.5, Naval Hospital Road,
Chennai. - 600 003 .... Appellant in C.M.A.No.703 of 2008

Yousuf Sultan
Partner,
New Great Shoe Co.,
No.5, Naval Hospital Road,
Chennai – 600 003.
Rep. By Power of Attorney Agent,
Mr. Hafeezur Rehman .... Appellant in C.M.A.No.704 of 2008

Mohd. Umer,
Partner,
New Great Shoe Co.,
No.5 Naval Hospital Road,
Chennai – 600 003.
Rep. By Power of Attorney Agent,
Mr.Hafeezur Rehman ... Appellant in C.M.A.No. 705 of 2008

South East Tanners (Pvt) Ltd.,
No.5 Naval Hospital Road,
Chennai – 600 003
Rep by its Director,
Mr.Mubeen Ahmed ... Appellant in C.M.A.No.706 of 2008

Mohd Akbar,
Director,
South East Tanners (Pvt) Ltd.,
No.5, Naval Hospital Road,
Chennai – 600 003.
Rep. By Power of Attorney Agent,
Mr.A.Hafeezur Rehman ... Appellant in C.M.A.No.707 of 2008

V.H.Khalilul Rehman,
Director,
South East Tanners (Pvt) Ltd.,
No.5, Naval Hospital Road,
Chennai – 600 003.
Rep. By Power of Attorney Agent,
Mr.A.Hafeezur Rehman ... Appellant in C.M.A.No.708 of 2008

Mobin Ahmed,
Director,
South East Tanners (Pvt) Ltd.,
No.5, Naval Hospital Road,
Chennai – 600 003. ... Appellant in C.M.A.No.709 of 2008

A.Hafeezur Rehman,
Guarantor,
South East Tanners (Pvt) Ltd.,
No.5 Naval Hospital Road,
Chennai – 600 003 ... Appellant in C.M.A.No.710 of 2008

Benil Leather Corporation,
By Partner Mr.A.Hafeezar Rehman,
No.5 Naval Hospital Road,
Chennai - 600 003. .... Appellant in C.M.A.No.711 of 2008

A. Hafeezur Rehman,
Partner,
Benil Leather Corporation,
No.5 Naval Hospital Road,
Chennai - 600 003. .... Appellant in C.M.A.No.712 of 2008

Mohd.Akbar,
Partner,
Benil Leather Corporation,
No.5 Naval Hospital Road,
Chennai - 600 003. ... Appellant in C.M.A.No.713 of 2008

Mohd. Azam,
Partner,
Benil Leather Corporation,
No.5, Naval Hospital Road,
Chennai – 600 003.
Rep. By Power of Attorney Agent,
Mr.A Hafeezur Rehman .... Appellant in C.M.A.No.714 of 2008

Vs

Director,
Enforcement Directorate,
(Foreign Exchange Regulation Act)
New Delhi .... Respondent in C.M.A.Nos 700 to 714 of 2008

PRAYER in C.M.A.Nos.700 to 714 of 2008 : Appeal filed under Section 54 of Foreign Exchange Regulation Act to set aside the Common Adjudication Order No.SDE (SSB)/IV/5 to 8/2004 dated 26.02.2004 passed by the Special Director, Enforcement Directorate, the First Respondent herein, imposing a penalty on the Appellant and modified and reduced by 50% of the amount by the learned Appellate Tribunal for Foreign Exchange, New Delhi vide its common order dated 27.11.2007.

For Appellants : Mr. Kalyan Jhabakh
for M/s. Surana and Surana

For Respondents : Mr. S.Kumaraguru
Standing Counsel for
Enforcement Directorate

COMMON JUDGMENT

(Judgment of the Court was delivered by **G.ARUL MURUGAN,J.)**

The above appeals are filed under Section 54 of the Foreign Exchange Regulation Act, 1973 challenging the common order dated 27.11.2007 passed by the Appellate Tribunal for Foreign Exchange, New Delhi.

2. Since all the appeals arise out of a common order, by consent of the learned counsel for the appellants, they are heard together and disposed of by this common order.

3. The short facts to be noted in these appeals is that, based on the information received from the Reserve Bank of India, that M/s. South East Tanning Company and its sister concerns, who are the exporters of leather garments, have not realized the substantial amount of foreign exchange in respect of the exports made by them, enquiries were initiated against the exporters by the Enforcement Directorate. During the enquiry, it came to light that the four concerns have not realized the following payments for the exports made by them to their buyers, M/s. Sulmanos, Italy & M/s. V/O Soujupushnina, *Moscow,USSR:*

1. M/s. South East Tanning Co

(From M/s. Sulmanos, Italy)

US$.	1,53,055.62
DM.	20,53,267.00
Pounds Stg.	64,308.50
ECU.	1,75,319.82
Lira.	32,96,18,856.00

Total Indian Value : Rs.1,49,91,922.62/-

From M/s. C/o. Sojuzpuzhnina, Moscow

Rs.3,45,136.00

Rs.5,56,404.00

Rs.4,97,079.00

Rs.5,13,853.51

Rs.6,07,269.32

Rs.6,54,480.68

Total Value : Rs.31,74,222.51/-

2. M/s.New Great Shoe Co.

(From M/s. Sulmanos, Italy)

DM.	9,03,269.04
Pounds Stg.	1,61,824.89
US$.	2,455.90
LIRA	4,95,57,615.00
ECU.	1,84,083.17

Total Indian Value : Rs.82,23,723.06/-

3. M/s. South East Tanners (P) Ltd,

(From M/s. Sulmanos, Italy)

US$	1,55,065.44
LIRA	30,15,74,027.00
ECU	30,186.99

Total Indian Value : Rs.36,80,431.64/-

4. M/s.Benil Leather Corporation

(From M/s. Sulmanos, Italy)

Pounds Sty.	24,532.98
ECU.	1,31,793.78
LIRA	8,84,79,137.00
DM	4,02,273.43

Total Indian Value : Rs.38,65,103.28/-

4. Pursuant to the above, Memorandum in No.T-4/02-M/2002 containing four Show Cause Notices ie., SCN-I, SCN-II, SCN-III and SCN-IV were issued to 1. M/s. South East Tanning Co., 2. M/s. New Great Shoe Co., 3. M/s. South East Tanners (P) Ltd., and 4. M/s. Benil Leather Corporation, respectively for contravention of Section 18(2) and Section 18(3) of the Foreign Exchange Regulation Act, 1973, hereinafter referred to as 'Act' along with the Partners and Directors of the above concerns were charged for the contravention of the said provisions in terms of Section 68 of the FERA Act. In the enquiry, Mr.A. Hafeezur Rehman, Partner of M/s. South East Tanning Co., and also being either a Partner, Director or a guarantor in the other concerns had given a statement that, all the above concerns operating from the same address

are engaged in the export of leather garments mainly to their buyer M/s. Sulmanos, Italy and also further exports to buyers in Russia, Germany, France, etc. Even though they were predominantly exporting the semi finished goods to Russia during 1960 to 1973, due to the restrictions brought by the Government progressively, due to change of policy, major portion of the exports were made to M/s. Sulmanos, Italy and due to change of management in the buyers in the year 1976, there has been difficulty in the realization of proceeds and therefore export documents were negotiated through State Bank of Hyderabad, State Bank of India (Overseas Branch) and State Bank of Travancore.

5. As the concerns were not in a position to take appropriate proceedings against the Buyer as their accounts were frozen on 20.10.1986, the exporters have authorized the State Bank of India to initiate legal proceedings against M/s. Sulmanos, Italy. However based on the proceedings initiated by the buyer, M/s. Sulmanos was declared "bankrupt" by the Court at Italy. Based on the authorization, the State Bank of India had initiated legal proceedings, where provisional injunction was obtained on 23.05.1988 and the Banks were able to recover the payment for exports made to the buyer at Italy. The letters

issued by the Bank were submitted. In so far as the export proceeds due from M/s. Sojuzpushnina, USSR, he had submitted that the entire payment has been realized and had requested for a weeks time to submit the Foreign Inward Remittance Certificate (FIRC) after collecting the same from the Bank.

6. The State Bank at Hyderabad by its letter dated 12.04.2004 addressed to T.Rafiq Ahmed, a Partner of M/s. South East Tanning Co., had intimated that the Court in Italy had decreed in favour of the Banks and as per the decree, an amount of Euro 389,336.51, which is equivalent to Rs.1,99,34,029/- has been received by the Bank. The Bank also by its letter dated 05.06.2004 had intimated that, consequent to non-availability of records for verification, they are not in a position to issue any No Due Certificate and the remittances received from M/s. Sojuzpushnina, Moscow, USSR.

7. The adjudicating authority ultimately came to the conclusion that the exporters were not able to substantiate and conclusively prove that they had taken adequate, sincere and reasonable steps for realizing the substantial amount for the export outstanding, which normal prudent

business principles necessitated to be undertaken and therefore held that the charges against the Firm/Company and the Partner/Director/Guarantor, who are the appellants herein, stands proved for violation of Section 18(2), 18(3) and 68 of the FERA Act. On coming to such a conclusion, the adjudicating authority proceeded and imposed penalty for the proved charge in the following manner.

T-4/02-11/200248(SCN-I)

a. Penalty of Rs 10,00,000/-(Rupees Ten lakhs only) on M/s South East Tanning Co. -noticee no 1.

b. Penalty of Rs.5,00,000/-(Rupees Five lakhs only) on Sh.A. Hafeezur Rehman. Partner -noticee no.2.

c. Penalty of Rs. 5,00,000/-(Rupees Five lakhs only) on Sh.T. Rafiq Ahmed, Partner -noticee no.3.

T-4/02-M/2002(SCN-II)

a. Penalty of Rs.4,00,000/-(Rupees Four lakhs only) on M/s New Great Shoe Co. noticee no.1.

b. Penalty of Rs. 2,00,000/-(Rupees Two lakhs only) on Sh. A. Mohd. Akbar, Partner noticee no.2.

C. Penalty of Rs.2,00,000/-(Rupees Two lakhs only) on Shri Yousuf Sultan, Partner noticee no.3.

d. Penalty of Rs.2,00,000/-(Rupees Two lakhs only) on Shri Mohd. Umer, Partner noticee no.4.

T-4/02-M/2002(SCH-III)

a. Penalty of Rs 2,00,000/-(Rupees Two lakhs only) on M/s South East Tanners (P) Ltd. noticee no.1.

b. Penalty of Rs.1,00,000/-(Rupees One lakh only) on Shri Mohd. Akbar, Director noticee no.2.

c. Penalty of Rs.1,00,000/-(Rupees On lakh only) on Shri V. Shri V.H.Khalilul Rehman, Director noticee no.3.

d. Penalty of Rs.1,00,000/-(Rupees On lakh only) on Sh.MubinAhmed, Director noticee no.4.

e. Penalty of Rs.1,00,000/-(Rupees One lakh only) on Shri M.A. Hafeezur Rehman, Guarantor noticee no.5.

T-4/02-M/2002(SCN-IV)

a. Penalty of Rs.2,00,000/-(Rupees Two lakhs only) on M/s Benil Leather Corporation noticee no.1.

b. Penalty of Rs.1,00,000/-(Rupees One lakl? only) on Sh.A. Hafeezur, Partner noticee no.2.

c.Penalty of Rs.1,00,000/-(Rupees One lakh only) on Shri Mohd. Akbar, Partner noticee no.3.

d. Penalty of Rs.1,00,000/- (Rupees One lakh only) on Shri Mod.Azam, Partner – noticee no.4

e. Penalty of Rs.1,00,000/- (Rupees One Lakh Only) on Sh.H.M.Abdul Wahab, Parner – noticee No.5

8. The order of the adjudicating authority was challenged before the Appellate Tribunal in Appeal No's.1278 of 2004, 42 to 56 of 2007. The Appellate Tribunal by a common order dated 27.11.2007 by taking note of the fact that, since with regard to SCN- 1, the State Bank of Hyderabad had notified the exporter about the receipt of a sum of Rs.1,81,66,145.13/-, exonerated the partners and the firm but however since no repatriation of the export proceeds made to Russian Firm was undertaken, had reduced the penalty by 50%. By recording that these letters does not cover the other firms, holding that there is no evidence of suit by Company nor of any receipt of price, had dismissed their appeals and confirmed the penalty covered under SCN-II, SCN-III & SCN-IV in respect of exports made both to Italy and Russia. Assailing the orders passed by the Appellate Authority, the partnership firm, company, individual partners and the Directors have preferred the above 17 separate appeals by raising the substantial question of law.

9. Heard Mr. S.Dhayaleeswaran & Mr. Kalyan Jhabakh, learned counsels appearing for the Appellants and Mr.A.Kumaraguru, learned Standing counsel appearing for the Respondents in all the appeals.

10. Mr. Kalyan Jhabakh, learned counsel appearing for the appellants, submitted that, since the accounts of the appellants were frozen, the payments were not able to be realized for the exports made and expressing their inability to the Bankers, they have assigned the State Bank of Hyderabad to initiate legal proceedings against M/s. Sulmanos, Italy, which details had been clearly furnished in the statement during the enquiry by the Appellant. The learned counsel by relying on the letter dated 12.04.2004 of the State Bank of Hyderabad addressed to M/s. South East Tanning Company submitted that, the Bank had intimated that based on the orders obtained by the Court in Italy, a sum of Rs.1,99,34,029/- has been received by them and also further, by letter dated 21.04.2004, the details of the payments received in respect of all the five Banks which includes the four Indian Banks in respect to the Insolvency proceedings initiated against M/s. Sulmanos, Italy contended that the entire payments due towards the exports made by the Appellants to Italy have been realized by the Bankers.

11. The learned Counsel further by relying on the letter dated 04.06.2004 sent by M/s. South East Tanning Company to the State Bank of India, seeking for details about the payments received from M.s,

Sojuzpushnina, USSR, for which the Bank had replied on 05.06.2004, intimating that due to long lapse of time and consequent to non-availability of records for verification, the details could not be furnished, contends that, when the appellants have taken all the earnest steps for recovery of the export proceeds from the exports made to both Russia and Italy, they have not contravened the provisions of the FERA Act and the adjudicating authority had without considering these aspects imposed penalty and the Appellate Authority also, by taking note of the letter addressed to one of the Partners, came to the conclusion that the concerns covered under SCN- 2, SCN-3 & SCN-4 had not taken any steps and have dismissed the appeals confirming the penalty in toto, which is erroneous, he contended and sought for interference of this Court.

12. Mr. S.Dhayaleeswaran, learned Counsel, appearing on behalf of one of the partners in M/s. South East Tanning Company, submitted that the appellant T.Rafeeq Ahmed, had resigned from the partnership firm with effect from 17.02.1987 and had also executed a dissolution deed and therefore he is no way connected with the above transactions. The learned counsel further contended that, in fact challenging the order

of the adjudicating authority, the appellant had preferred separate appeal in Appeal.No.460 of 2004. It is his further contention that, no notice was issued to him in the appeal, but whereas in the appeal filed by the Firm in Appeal.No.1278 of 2004, based on the directions of the Tribunal, two separate appeal in A.No.42 of 2007 and A.No. 43 of 2007 were taken up and this appellant had no knowledge about these appeals and without any notice, all the appeals came to be disposed of by the common order only pursuant to which, notice was issued in the separate appeal preferred by him and by order dated 24.01.2008, the appeal was dismissed as infructuous since the issue had already been decided and therefore sought for intervention of this Court.

13. Per contra Mr. A.Kumaraguru, learned Standing counsel for the Enforcement Directorate submitted that, all the appellants being the Partners/Directors of individual firm/company, who are indulged in the manufacture and export of leather products have exported the goods to Italy and Russia during the year 1981 to 1986 and they have not received the sale proceeds towards the exports made and they have neither taken any steps towards the recovery of proceeds nor had approached the RBI seeking for extension of time and thereby they have violated the

provisions of FERA Act.

14. The learned Standing Counsel further contended that, based on the SCN-I to SCN-IV issued, enquiry was conducted and even though the appellants have taken a stand that the payments have been realized from Russia and they will file necessary documents have failed to substantiate their claim by filing any materials and therefore it is evident that the export proceeds have not been realized, which is in violation of the Foreign Exchange Regulation Act. The learned Standing Counsel also contended that, since the Bank had intimated that the export proceeds have been received by them, pursuant to the decree obtained by them in the Court at Italy against the buyer M/s. Sulmanos, Italy, the Appellate Authority had rightly interfered in the penalty imposed against SCN-1 to the extent of 50% and had confirmed the penalty in respect of other SCNs, since no materials were submitted to evidence that either the proceeds were realized or appropriate proceedings were undertaken by the appellants, which needs no interference and sought for dismissal of the Appeals.

15. Heard the rival submissions and perused the materials available on record.

16. M/s. South East Tanning Company and its sister concerns M/s. New Great Shoe Co., M/s. South East Tanners (P) Ltd., M/s. Benil Leather Corporation, all operating at No.5, Naval Hospital road, Chennai, are engaged in the manufacture and exports of leather materials. Mr.A. Hafeezur Rehman is either a partner or Director in the above concerns. These concerns have been manufacturing and exporting the semi-finished leather goods mainly to Russia and Italy and based on the information received from the RBI that a substantial amount of Foreign Exchange had not been realized in respect of the exports made by these concerns, the Enforcement Directorate initiated an enquiry by issuing a Memorandum containing 4 notices in SCN-I, SCN-II, SCN-III & SCN-IV, all dated 31.01.2002, as against the appellants for the contravention of Section 18(2) and Section 18(3) of the FERA Act, 1973. For easy reference Section 18(2) & 18(3) of the FERA Act are extracted hereunder,

"18. Payment for Exported Goods:

(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 efect 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-

(i)is made otherwise than in the prescribed manner, or

(ii)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.*

(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).

17. In the enquiry, the appellants, Mr.A. Hafeezur Rehman had appeared and gave a statement to the effect that, since due to some change of management in the buyer M/s.Sulmanos, Italy, the proceeds towards the exports made to them were not able to be realized and since all the business activities of the exporters had to be abruptly stopped, they were not able to organize funds to launch legal proceedings against the buyer M/s.Sulmanos, Italy and based on their request and assignment made, the State Bank of India initiated recovery proceedings for the amounts due towards the exports made during March/April 1987. Since M/s. Sulmanos, Italy had initiated insolvency proceedings, the four

Indian Banks with the other Banks had initiated proceedings and obtained restraint orders and have ultimately recovered the money from M/s. Sulmanos, Italy. Based on the request made by M/s. South East Tanning Company, the Bank by two letters dated 12.04.2004 and 21.04.2004 had furnished the details of the payments received from Italy by all the five Banks in India and also certified that an amount of Euro 389,336.51, which is equivalent to Rs.1,99,34,029/- has been received by the Bank. The letter dated 12.04.2004 has been addressed to M/s. South East Tanning Company which clearly reveals that the entire outstanding from M/s. Sulmanos, Italy has been received by the Bank and the letter dated 21.04.2004 has been addressed to Mr.A. Hafeezur Rehman, M/s. South East Tanning Company giving the entire details of the payments received by the Banks.

18. The Appellate Authority, while considering this issue, had only taken note of the contents of the letter dated 12.04.2004 and had arrived at a finding that since the payments have been received by the Bank for the exports made which is covered under SCN-1, the penalty to the extent of 50% was alone set aside. However, as rightly contended by the learned counsel for the appellant and even as per the memorandum

issued by the 2 nd respondent dated 31.01.2002, only a sum of Rs.1,49,91,922.62/- was pending towards the sale proceeds towards the exports made to M/s. Sulmanos, Italy and a sum of Rs.31,74,222.51 was pending towards the exports made to M/s. Sojuzpushnina, USSR as covered under SCN-I. Further SCN-II, SCN-III, SCN-IV are issued only in respect of the non realization of the sale proceeds for the export made to M/s. Sulmanos, Italy for an outstanding sum of Rs.82,23,723.06, Rs.36,80431.64 and R.38,65,103.28 respectively. As such for all the 4 concerns, a total sum of Rs.3,07,61,180.60/- was outstanding to be realized for the exports made to M/s. Sulmanos, Italy. From the letter dated 21.04.2004 issued by the Bank, it could be seen that a sum of 3,91,029.01 Euro, which is equivalent to Rs.3,62,25,124/- has been received by all the five Banks in Chennai, which only goes to show that, in respect of all the exports made by the Appellants covered under SCN-1, SCN-2, SCN-3 & SCN-4 to M/s. Sulmanos, Italy, the Banks had collectively taken steps through State Bank of India and have received the entire payments towards the exports made by the Appellants.

19. Since M/s. South East Tanning Co. is the lead concern and Mr. A. Hafeezur Rehman who had appeared and given the statement in

the enquiry is the person connected with all the other concerns, which are admittedly the sister concerns of M/s. South East Tanning Co., the Bank on the request has addressed the letter to the lead Company. In fact the appellate authority has accepted this letter issued by the Bank and found that the sale proceeds towards the exports made to Italy has been realized by the Banks within the Country and the Department also has accepted this finding and only the exporters are on appeal. The appellate authority has not taken in to account the total sale proceeds realized towards the exports made to Italy but by only holding that since the letter is addressed to a parter of a Firm, the other exporters cannot take benefit of it and dismissed their appeals, when the fact remains that all the exporters are sister concerns and total value of the sale proceeds to be received towards the exports made to Italy covered in the memorandum in all the 4 SCN has been realized by the Banks as intimated by them.

20. Therefore, since the appellants were not in a position to take appropriate proceedings against the purchaser at Italy for the exports made by them due to the non-receipt of payments and subsequent proceedings by the Bank, based on the authorization made by the exporters/appellants, the Banks were able to initiate appropriate

proceedings which had resulted in the recovery of money from the Italian Buyer and thereby the entire sale proceeds towards the exporters have been realized in the Country by the Bank. When the appellants/exporters have taken adequate steps to realize the sale proceeds from the buyers in Italy for the exports made by them, of course through the Bank by assigning their rights in favour of the Bank, it cannot be taken that the sale proceeds have not been realized or no effective steps have been taken to attract the offenses charged against them. As such the charge against the appellants under Sec.18(2) and 18(3) of the Act, in so far as the non realization of the payments towards the exports made to Italy cannot be sustained and the substantial question of law in so far as the penalty imposed in the SCN-II, SCN -III & SCN-IV for the exports made to Italy is answered in favour of the appellants and against the respondents.

21. As regards the issue in respect of non realization of the sale proceeds towards the exports made to the Buyer at Russia, it could be seen that the appellants had in fact submitted before the adjudicating authority that they have received the payments and they will file the necessary materials evidencing the proof of realization, but however no

materials were produced by the appellants for either having realized the sale proceeds nor for taking any steps against the purchaser M/s.Sojuzpushnina, USSR. Even though, the learned counsels contended that they had requested the Bank to furnish the details in respect of the payments received from the Buyer at Russia, the perusal of the communication furnished by the Bank on 05.06.2004 is only to the effect that due to long lapse of time and consequent non availability of records, they are not able to comply with the request. From this communication, no details in respect of any realization made or any proceedings undertaken for recovery of these amounts is able to be perceived.

22. In such circumstances, it can be only taken that, even though the appellants have made exports to Russia, during the year 1981 to 1986, they have not realized the payments towards the exports made and also they have not taken any effective steps towards the recovery of sale proceeds. The Appellate Authority had rightly taking note of these aspects and had arrived at a conclusion that the appellants had violated the provisions of the Act and therefore had confirmed the penalty imposed as against the non realization of the sale proceeds towards the exports made to Russia. Therefore, we find no error or infirmity in the

finding of the appellate authority in confirming the penalty in so far as the exports made to Russia is concerned.

23. Coming to the submissions made by Mr. Dhayaleshwaran, learned counsel appearing on behalf of one of the partners in M/s. South East Tanning Company that the appellant T.Rafeeq Ahmed is not a partner as he has resigned from the partnership firm as early as on 16.02.1987, when these transactions of exporting the goods to Italy and Russia had been undertaken by M/s. South East Tanning Company during the period from 1981 to 1986, the appellant had admittedly been a partner at the relevant point of time and necessarily he is bound to exonerate himself from the charges in respect of the non realization of the dues towards the exports made to foreign countries, when he was admittedly a partner. Further, in so far as the contention that he had filed a separate appeal in A.No.460 of 2004 and no notice was issued to him and whereas without his knowledge, the Appeal in A.No.43 of 2007 was numbered and the decision was taken in his absence is not able to be appreciated, as from the perusal of the materials, it could be seen that, in fact the appellant had filed the appeal in A.No.460 of 2004 where by an order dated 22.07.2004 passed by the Tribunal, full dispensation of pre-

deposit of penalty was granted. When the appellant had availed the benefit of non payment of pre-deposit of the penalty by filing application in the appeal and obtained order for waiver of the pre-deposit on 22.07.2004, we are unable to accept the contention that he had no knowledge of the above appeal and further the other appeals have been decided in his absence.

24. In view of the above discussions, we are inclined to confirm the order of the appellate authority in so far as the penalty imposed for the exports made to Russia but however set aside the penalty imposed in so far as the exports made to Italy is concerned. Since the penalty has been imposed by the adjudicating authority compositely for non realization of the sale proceeds both for a sum of Rs.1,49,91,922.62/- outstanding for the exports made to Italy and a sum of Rs. 31,74,222.51/- outstanding towards the exports made to Russia, which in all comes to a total sum of Rs. 1,81,66,145.13/- and since the penalty imposed in respect of exports made to Italy has been set aside, now the corresponding penalty only towards the exports made to Russia, which is confirmed works out to almost 20% of the total penalty imposed by the adjudicating authority under SCN-I. As the entire exports covered under

SCN-II, SCN-III and SCN-IV are only made to Italy and in view of the above findings, the penalty imposed therein are liable to be set aside.

25. In the nutshell,

(i) C.M.A.Nos.1236 of 2008, C.M.A. No. 700 of 2008 and C.M.A. No. 701 of 2008 are partly allowed.

(ii) C.M.A. No.1297 of 2008 is dismissed.

(iii) C.M.A.Nos.702 of 2008 to C.M.A. No.714 of 2008 are allowed.

(iv)The penalty imposed by the Adjudicating Officer for contravention of the provisions, towards the exports made to Italy are set aside and the penalty imposed in respect of the exports made to Russia alone is confirmed. As a sequel, the penalty imposed by the Adjudicating Officer in SCN-I as reduced by the appellate authority to 50%, is modified by reducing the penalty to 20% and the penalty imposed by the adjudicating officer in SCN-II, SCN-III & SCN-IV as confirmed by the appellate authority are set aside.

(v) No Costs.

The memo filed dated 09.08.2024, intimating the death Mr. A. Hafeezur Rehman on 09.11.2019, along with the death certificate dated 18.11.2019, appellant in C.M.A.Nos.701,710 & 712 of 2008 is recorded.

(A.S.M.,J) **(G.A.M.,J)**
09.08.2024

Index: Yes/No
Neutral Citation : Yes
Speaking order : Yes
Sma

To

1. Special Director,
   Enforcement Directorate,
   (Foreign Exchange Regulation Act, 1973),
   New Delhi.

2. The Appellate Tribunal For Foreign Exchange,
   Government of India, 4th Floor,
   'B'Wing, Janpath (Indian Oil) Bhavan,
   Janpath,
   New Delhi.

Dr.ANITA SUMANTH,J
AND
G.ARUL MURUGAN,J.

Sma

C.M.A.Nos.1236 & 1297 of 2008
and C.M.A.Nos.700 to 714 of 2008

09.08.2024