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W.P.No.7950 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.04.2024

PRONOUNCED ON : 23.05.2024

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.No.7950 of 2020
and W.M.P.No.9386 of 2020

M/s.Calyx Chemical & Pharmaceuticals Ltd.,
Through its authorized signatory,
Unit No.110, Marwah's Complex,
Krishnala Marwah Marg,
Off. Saki Vihar Road,
Andheri (East),
Mumbai – 400 072,
Maharashtra, India.

... Petitioner

-Vs-

1. Office of Additional Director of Enforcement,
Directorate of Enforcement,
Southern Regional Office,
3rd Floor, Murugesan Complex,
No.84, Greaves Road,
Chennai – 600 006.

2. Smitesh Shah
C/o. Vatika Business Center,
Supreme Business Park,
B- Wing, 7th Floor,
Hiranandani Gardens,
Powai – Mumbai – 400 076.

...Respondents



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Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, to call for the records of the order dated 28 February, 2020 and bearing File No.T-4/08/CEZO/SRO/2017 passed by the Respondent No.1, and quash the same.

For Petitioner : Mr.Sathish Parasran, Senior Counsel
For Mr.M.V.Swaroop
For Respondents
For R1 : Mr.N.Ramesh
Senior Panel Counsel
For R2 : Mrs.V.Ashwini

ORDER

This writ petition has been filed challenging the order dated 28.02.2020, passed by the first respondent thereby declaring the petitioner guilty of contravention of the provisions under Section 10(6) of the Foreign Exchange Management Act, 1999 (hereinafter referred to as “FEMA”) read with Regulation 6(1) of the Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulation, 2000, to the tune of Rs.15,19,23,511/- and imposed penalty of Rs.16,72,00,000/- and it shall be paid within a period of 45 days from the date of receipt of that order.

2. The petitioner company is engaged in the manufacturing and



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sale of essential products such as active pharmaceuticals ingredients for multi-therapeutic segments. By an order dated 06.02.2018, the Nation Company Law Tribunal (hereinafter referred to as “NCLT”) admitted the petitioner company to the Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC”) on an application filed by the State Bank of India. One Mrs.Charu Sandeep Desai was initially appointed as the Interim Resolution Professional of the petitioner company and later appointed as Resolution Professional (hereinafter referred to as “RP”). The powers as well as the management of the petitioner company was vested with RP.

3. The RP issued public advertisement inviting prospective resolution applicants to submit a resolution plan for resolving the insolvency of the petitioner company. In response, two companies incorporated under the Laws of India viz., M/s.Khilari Infrastructure Private Limited and M/s. Topnotch Chemicals Private Limited (hereinafter referred to as “resolution applicant”) submitted their resolution plan for revival of the petitioner company and the resolution of its insolvency.



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4. In pursuant to the approval of the resolution plan by the creditors of the petitioner company, an application in M.A.No.1346 of 2018 was filed by the RP before the NCLT under Section 30(6) r/w, Section 31(1) of the IBC, for approval of the resolution plan and by an order dated 16.04.2019, the resolution plan was approved by the NCLT. It was also approved by the National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT”) by an order dated 30.08.2019. The said order was challenged before the Hon'ble Supreme Court of India and the same was also dismissed by an order dated 20.02.2020, thereby confirming the order passed by the NCLAT.

5. As per the resolution plan, the resolution applicant took over the control and management of the erstwhile corporate debtors. The shares of the petitioner company were issued to the resolution applicant and the existing share capital of the petitioner company was cancelled. The management of the petitioner company was also changed as per the resolution plan and the erstwhile promoters, including the second respondent



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are not part of the Board of Directors of the petitioner company. While being so, the first respondent by an order dated 28.08.2020 imposed penalty of Rs.15,20,00,000/- on the petitioner company for certain contravention that had been alleged to have committed by the petitioner company even prior to commencement of the corporate insolvency resolution process. Hence, the present writ petition.

6. The learned Senior Counsel appearing for the petitioner submitted that as per the impugned order, the petitioner had imported 23 consignments of chemical through Chennai Port in the year 2010-11, wherein the declared value appeared to be on higher side and also the importers had already paid the overseas suppliers but not bothered to take clearance of the goods. Therefore, the first respondent initiated investigation against the petitioner company under FEMA and also against the second respondent, the then Director of the petitioner company.

6.1. During the investigation, the second respondent submitted that payment has been made in respect of the said consignments as per the agreed



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terms and conditions and out of 23 consignments, 14 consignments were cleared and put to use for the intended purpose. However, 9 consignments have not been cleared and continue to be lying in the port. Therefore, the petitioner and the second respondent served with show cause notice dated 31.03.2017, issued by the then Adjudicating Authority, for the alleged contravention of the FEMA laws by the petitioner company in respect of the nine consignments, which had not cleared in 2010-2011.

6.2. The enquiry was sought to be held as contemplated under Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeals) Rules, 2000, after giving opportunity of hearing to the petitioner company and the second respondent. In fact, already resolution plan was approved by the NCLT and the resolution applicant was in the process of taking over the petitioner company. However, the petitioner and the second respondent had taken adjournment and informed to Resolution Professional. In turn, the Resolution Professional by her letter dated 16.08.2019 informed to the first respondent about the order passed by the NCLT. She had demitted office as RP and thus, she was no longer in charge of the affairs of the



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company.

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6.3. In the meanwhile, on 28.12.2019, the President of India promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 bringing about certain amendments in the Insolvency and Bankruptcy Code, thereby introduced Section 32A in the IBC, providing immunity to corporate debtors resolved under the IBC for offences committed prior to corporate insolvency resolution process. According to Section 32A of the IBC, notwithstanding anything to the contrary contained in the IBC or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of corporate insolvency resolution process shall cease and the corporate debtor shall not be prosecuted for such an offence from the date of the resolution plan has been approved by the adjudicating authority under Section 31 of the IBC, if the resolution plan results in the change in the management or control of the corporate debtor to a person other than those specified under Section 32A.

6.4. He further submitted that the petitioner company, being a



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corporate debtor resolved under the IBC following the approval of the resolution plan by the order dated 16.04.2019 on the file of the NCLT, is covered by Section 32A as per the amendment ordinance. In enquiry, the first respondent had given final opportunity of hearing on 09.01.2020, to the petitioner as well as the second respondent. On 09.01.2020, it was informed about the conclusion of the corporate insolvency resolution process of the petitioner and new management has taken over the petitioner company based on the order dated 16.04.2019, passed by the NCLT, thereby approving the resolution plan and also requested to drop the charges. However, the Adjudicating Authority imposed penalty of Rs.15,20,00,000/-. He further submitted that as per the the provision 32A of IBC, the petitioner was granted immunity in respect of past liabilities and actions of the erstwhile management as per the order passed by the NCLT. Hence, he prayed to quash the impugned order.

7. The first respondent filed counter and the learned Senior Panel Counsel appearing for the first respondent submitted that the writ petition



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itself is neither maintainable in law nor on fact, since there is alternative remedy provided under Section 16(1), 19(1) and 35 of the FEMA. The petitioner had imparted 23 consignments of chemicals wherein the declared value appeared to be on higher side and the importers had already paid the overseas suppliers but not bothered to take clearance of the goods. Therefore, the first respondent had initiated investigation against the petitioner and the second respondent herein.

7.1. He further submitted that a statement was recorded from the second respondent, who was the founder of the petitioner company, under Section 37 of FEMA. He had admitted that the petitioner company had imported 23 consignments of chemical during the year 2010-2011 through Chennai port and they imported various chemicals from M/s. Victory Mercantile Corporation, Singapore. However, in these 23 consignments there were no imports. The reason for not clearing the consignments, he stated that the material was sold on high seas sales to Avon Organics and Apex Drugs & Intermediates in Hyderabad and their clearing agent wrongly filed the Bill of Entry which was later amended for high seas and in the



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entire process took four to six months and the customers cancelled the order and the Bill of Entry had to be refiled. Therefore, it was ascertained that the petitioner had cleared only 13 consignments and failed to clear eight consignments and there is no Bill of Entry in respect of two consignments. The second respondent further stated that the petitioner did not have any finances and as such, they could not be cleared the consignments. They unable to sell the material due to drastic change in the price of the said material. Therefore, nine consignments have not been cleared and continue to be lying in the port.

7.2. From the statements recorded from other Directors of proposed purchaser, the first respondent found that though the petitioner company made payments to the overseas suppliers for the goods imported by them, they have not bothered to clear the goods insofar as nine consignments. Therefore, the petitioner company had intentionally imported goods not for the purpose of clearing, but to send foreign exchange out of the country under the guise of importing and trading the goods locally. Therefore, the petitioner had just for the purpose of sending outward



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remittances, adopted modus operandi of importing goods of unknown chemicals with over valuation purportedly for selling them on high seas basis, with malafide intention of not to clear the same, thereby the petitioner company contravened the provisions of Section 10(6) of FEMA r/w Regulation 6(1) of Foreign Exchange Management (Realization, Repatriation and Surrender of Foreign Exchange) Regulation, 2000 and liable for penal action in terms of Section 13(1) r/w. Section 42(1) of FEMA.

7.3. Therefore, the Adjudicating Authority had issued show cause notice to the petitioner and the second respondent to show cause as to why adjudication proceedings as contemplated under Section 16 of FEMA, should not be held against them in the manner as provided under Rule 4 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 for the above contravention committed by the petitioner and the second respondent. After conducting due enquiry, the impugned order has been passed.

8. Heard the learned counsel appearing on either side and perused the materials placed before this Court.



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9. In respect of preliminary objection as to the maintainability of the writ petition, the learned Senior Panel Counsel appearing for the first respondent relied upon the judgment of the Hon'ble Supreme Court of India reported in **(2010) 4 SCC 722** in the case of **Raj Kumar Shivhare Vs. Assistant Director** which held as follows :-

“31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case, the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact, there could hardly be any reason since the High Court itself is the appellate forum.”

Therefore, the writ petition itself is not maintainable since, there is



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alternativeremedy provided under Section 16(1), 19(1) and 35 of the FEMA.

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10. That apart, the petitioner was not granted any immunity from the adjudication proceedings initiated under the provisions of FEMA. Whereas as per the order passed by the NCLT, the company had immunity from regulatory or administrative proceedings but not adjudicating proceedings as per Section 43 of FEMA. Further the proceedings arising in relation to the provisions of Section 13 of FEMA shall not abate by the reason of insolvency of the person liable under that Section. Further, the adjudication proceedings were initiated by way of issuing show cause notice dated 31.03.2017. It is much before the corporate insolvency resolution process.

11. It is relevant to extract the relevant portion of the order passed by the NCLT dated 16.04.2019, under the head of “All other liabilities and debts” as follows:-

“Notwithstanding anything else contained herein, all claims on the Company by ANY Governmental Authority for payment of ANY statutory dues or tax, and all liabilities of the Company towards such Governmental Authority, for the



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period prior to the NCLT Approval Date (including in respect of proceedings referred above), shall stand extinguished pursuant to the payments to be made as set out above. The Resolution Applicant or the Company shall not, in any manner whatsoever, at present or in future, be directly or indirectly responsible or liable for any additional statutory claims/liabilities. It is hereby clarified that all claims or liabilities towards Governmental Authorities shall stand extinguished even if no payment is made towards Income Tax liability as stipulated in the table set out in this Clause 5.1, on account of non-submission of claims by the NCLT Approval Date.

Consequently, the aforesaid proceedings pertaining to the said years and any other proceedings (ongoing or future) pending before any Governmental Authority shall stand withdrawn, dismissed and disposed of without any consequences and/or liability (tax, interest, fine, penalty, etc.) to the Company or the Resolution Applicant.”

12. Though the learned Senior Counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court of India made in ***Civil Appeal No.5121 of 2021*** dated ***03.09.2021***, in the case of The ***Assistant Commissioner of State Tax & ors Vs. M/s. Commercial Steel***



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Limited, in respect of maintainability of the writ petition, which held that when the existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution of India. But the writ petition can be entertained in exceptional circumstances where there is a breach of fundamental rights, a violation of principles of natural justice, an excess of jurisdiction or a challenge to the vires of the statute of delegated legislation. But none of the exceptions as stated above is applicable to the petitioner herein, since there is no breach of fundamental right and the petitioner was duly served with show cause notice and given opportunity of hearing. Further the first respondent has power to impose the penalty.

13. The learned counsel appearing for the second respondent submitted that the recovery of penalty amount of Rs.1,52,00,000/- by the proceeding dated 28.02.2020 was challenged before this Court in W.P.No.9058 of 2020. Subsequently, the recovery of penalty proceeding was withdrawn and therefore, the writ petition was also dismissed as withdrawn by this Court, by an order dated 24.01.2024. However, insofar as the penalty



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imposed on the petitioner has not been withdrawn so far. Therefore, this Court finds no infirmity or illegality in the order passed by the first respondent. This writ petition is devoid of merits and liable to be dismissed.

14. Accordingly, the Writ Petition stands dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

23.05.2024

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

rts



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To
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1. The Additional Director of Enforcement,
Office of Additional Director of Enforcement,
Directorate of Enforcement,
Southern Regional Office,
3rd Floor, Murugesan Complex,
No.84, Greams Road,
Chennai – 600 006.



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G.K.ILANTHIRAIYAN. J.

rts

ORDER IN
W.P.No.7950 of 2020
and W.M.P.No.9386 of 2020

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