IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.04.2024

Pronounced on : 03.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.No.16979 of 2021 and
WMP.Nos.17983 of 2021 & 16475 of 2022

1.M/s.Midas Communication Technologies Pvt Ltd.,
Rep. By its authorised signatory Shirish Purohit,
No.1, Nesamani Street, Thanthai Periyar Nagar,
Kaiveli, Pallikaranai,
Chennai 600 100
2.Shirish Purohit ... Petitioners

Vs.

The Special Director,
Directorate of Enforcement (Adjudication),
Southern Regional Office,
Shastri Bhavan III Block III Floor,
26, Haddows Road,
Chennai 600 006 ... Respondents

**PRAYER**: Writ Petition is filed under Article 226 of Constitution of India praying to issue a Writ of Certiorari calling for the records from the respondent in connection with the impugned order No.SDE/SRO/CEZO/01/2021 in File No.T-4/07/CEZO/SRO/2015 dated 17.06.2021 insofar as the petitioners have been found contravening the provisions of Section 7(1)(a) of Foreign Exchange Management Act, 1999 r/w regulation 9(1) and 13 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 and the penalty imposed in para 6 in respect of the alleged contraventions and the consequential impugned Demand Notice beaing File No.T-5/SDE/SRO/CEZO-1/01/2021 dated 14.06.2022 and quash the same.

(Prayer amended vide order dated 21.07.2022 made in WMP.No.16476/2022 in WP.No.16979 of 2021)

For Petitioners : Mr.V.Prakash,
Senior Counsel
for Mr.K.Krishnamoorthy

For Respondents : Mr.N.Ramesh,
Senior Panel Counsel

**ORDER**

This writ petition has been filed challenging the order passed by the respondent dated 17.06.2021 thereby found that the petitioner contravened the provisions of Section 7(1)(a) of Foreign Exchange Management Act, 1999 r/w Regulations 9(1) and 13 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 and imposed penalty and also challenging the demand notice dated 14.06.2022.

2. The second petitioner formed the first petitioner and he is one of the Directors. Now the first petitioner has no operations, no

revenues and no staff or employees. It is facing liquidation proceedings and the second petitioner is now an employee in some other company. It is facing liquidation after cancelled an order midway by the Bharat Sanchar Nigam Limited. It was challenged in the writ appeal in W.A.(MD).650 of 2010. The Hon'ble Division Bench of this Court found that the cancellation of order is illegal. The petitioner had exported goods to Brazil in the year 2004-2005 and the value of the order was about 10 million US dollars. This supply was made to a customer with whom the petitioners had an existing relationship and it was believed that the transactions will be honoured as done in the previous instances. Unfortunately, after supply of equipments, purchasing company went in doldrums and did not clear the goods from the port. The petitioners were caught in a bind as the equipments could not be brought back also and the port charges involved was also unaffordably high and the equipments also could not be used.

2.1 Though efforts were made to locate some alternate purchasers, but that also did not materialise and efforts were made through Indian Embassy at Brazil for recovery of the proceeds of the export and it was also not materialised. The Indian Embassy in Brazil confirmed that bringing back the uncleared material would cost more than the cost of the exported equipment. It was investigated by the respondent between the years 2003 and 2005 resulting in issuance of show cause notice dated 14.10.2015. On receipt of the same, the petitioners had submitted detailed explanation.

3. The learned Senior Counsel appearing for the petitioners submitted that during the period between March 2003 to June 2008, there were 39 invoices to different countries in different parts of the world. Without giving opportunity of hearing, the impugned order has been passed. It is clear violation of principles of natural justice. The authorised person is duty bound to act in accordance with the directions of the Reserve Bank of India as and when such notifications are issued by the Reserve Bank of India. The Banks are authorised person within the meaning of Section 2(c) of Foreign Exchange Management Act, 1999 (hereinafter called as 'FEMA'). Therefore, it is the duty of the bank to

disclose the action taken on the representation for write off to the exporter in time. Therefore, the petitioners are not guilty of any non declaration in terms of Section 7(1)(a) of FEMA r/w Regulation 9(1) and 13 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 (hereinafter called as 'Regulations) since it is not the case of the respondent that the petitioners did not declare the value of the export or not declared correctly. The issue is non recovery of portion of the exports done to multiple customers with whom the petitioners had ongoing export businesses then and permission sought for from the dealers for writing off a portion of the bills which were non commodity engineering technical exports in the interest of further export business. Such concessions are given in the course of business especially non commodity engineering export business and the write off was pending with the authorised dealers who because of the investigation relating to other company by the respondent were not willing to take a decision and sought for no objection certificate from the respondent. Whereas the stand of the Directorate was that it fell within the domain of the decision making of the dealers.

3.1 He further submitted that the petitioners' request to write off was neither rejected nor acceded to and after more than 12 years, the notice was issued for such transactions. Therefore the delay of more than 10 years with regard to the subject transaction is unfair and deprived the petitioners reasonable opportunity to defend themselves in respect of the alleged contraventions. The copy of the letter dated 01.07.2013 was not furnished to the petitioners and the entire information received from the dealers / banks had been behind back of the petitioners and without giving any opportunity for petitioners herein to impeach the veracity of the information, the impugned order has been passed. No materials gathered behind one's back can be relied on without giving opportunity to the said person to challenge the correctness and accuracy of the said information. He further submitted that though there is alternative remedy by way of appeal under Section 18 of FEMA, in view of the violations of the principles of natural justice and the error of law apparent on the face of it, the writ petition is very much maintainable as against the order impugned in this writ petition under Article 226 of the Constitution of

India.

4. The respondent filed counter and the learned Senior Panel Counsel appearing for the respondent submitted that FEMA, 1999 itself is a complete code within itself by providing various statutory appeals for any person aggrieved on the order passed by the adjudicating authority as well as the order passed by the appellate authority. As per Sections 17 and 19 of FEMA, 1999, any aggrieved person on the order passed by the adjudicating authority shall file appeal before the Special Director and before the Appellate Tribunal respectively. As per Section 35 of FEMA, 1999, filing of further appeal by the aggrieved person before the jurisdictional High Court is also envisaged in the Act itself. Therefore, the order passed by the respondent is appealable under Section 19 of FEMA and the writ petition is not maintainable without exhausting the appeal remedy under Section 19 before the Appellate Authority. Entertaining this writ petition would defeat the provisions of the Statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fees or deposit of some amount of penalty or fulfilment of some other conditions for entertaining the appeal.

4.1 He further submitted that in respect of 8 outstanding export bills negotiated through Canara Bank, Chennai, neither had those eight bills been realised nor had the bills been written off nor had any extension been granted for realisation of those outstanding 8 bills. The noticees had not submitted any documentary evidence during the personal hearing in spite of sufficient opportunity provided. In respect of 13 outstanding export bills, negotiated through City Bank, Chennai those 13 bills neither been realised nor had the bills been written off nor had any extension been granted for realisation of those outstanding 13 bills. The petitioners failed to submit any documentary evidence before the adjudicating authority with regards to taking steps to realise the outstanding export proceeds. In respect of 16 outstanding export bills, negotiated through Axis Bank Mylapore, Chennai, neither had those 16 bills been realised nor had the bills been written off nor had any extension been granted for realisation of those outstanding 16 bills. The authorised person is duty bound to act in accordance with the directions of the Reserve Bank of India and it is the duty of the bank to disclose the action taken on the representation for write off to the exporter in time. As per the Master Circular on Export of Goods and Services issued by the Reserve Bank of India, exporters are allowed to write off outstanding export dues only if the aggregate value of such export bills written off and bills extended for realisation does not exceed 10% of the export proceeds due during the calender year and such export bills are not a subject of investigation by the respondent.

4.2 He further submitted that the petitioner had come to the adverse notice of the respondent for the contravention of the provisions of FEMA as early as in the year 2007. Only after, the petitioners approached the authorised dealers for write off the unrealised export proceeds. One of the authorised dealer i.e. Canara Bank by way of its letter dated 22.10.2008 had requested the respondent to give no objection certificate for processing the request for self write off the export dues by the petitioners. The City Bank, Anna Salai by its letter dated 01.07.2013, stated that the bank had received request for self write off with incomplete details. Therefore, it was not accepted by them. Therefore, it is clear that the petitioners made request for self write off is only afterthought with intention to evade from the clutches of law. As per the Regulations, onus is on the exporter to realise the amount representing the full export value of the goods exported. Likewise, any omission of the Reserve Bank to give direction shall not have the effect of absolving the person committing the contravention from the consequences thereof.

4.3 He further submitted that as per Regulation 15 of Regulations, 'provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof, where in relation to goods or software export of which is requited to be declared on the specified form, the specified period has expired and the payment thereof has not been made as aforesaid, Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it be expedient for the purpose of securing-(a) the payment therefor if the goods or software has been sold and b) the sale of goods and payment thereof, if goods or software has not been sold or re-import thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf. Further, Regulation 9 mandates that full export value should be realised and repatriated to India within 12 months from the date of the export. Regulation 13 specifies that no person do or refrain anything or take refrain from taking any action which has the effect of securing that the payment of goods is delayed or they do not represent the full export value of the goods or the payment of goods is made otherwise than in the specified manner. Insofar as the petitioner is concerned, the payment of goods exported under 37 invoices were not realised and it is in violation of the aforesaid Regulations. Export bills remained outstanding during the adjudication proceedings and the regulations framed under Section 7 of FEMA puts the entire onus on the exporter to realise export value of the goods exported.

4.4 He further submitted that in respect of delay is concerned, the employee of the first petitioner Mr.Krishnamurthy died on 28.01.2016. The second petitioner was the Director who was in full charge of the company. The petitioners never made any submission before the respondent about the demise of the said Krishnamurthy and his demise had adversely affected them to make proper submissions. Therefore, the disputed questions of facts cannot be gone into by way of writ petition under Article 226 of the Constitution of India.

5. Heard, the learned counsel appearing on either side and perused the materials available on record.

6. From the above submissions, in this writ petition, the points for consideration are as follows:

*(i) Whether the writ petition is maintainable or not when the statutory alternative remedy is available?*

*(ii) Whether the order impugned can be sustainable or not?*

7. As against the order passed by the adjudicating authority i.e. the respondent, there is statutory appeal for any person aggrieved by the order passed by the adjudicating authority under Section 17 of the

FEMA, 1999. But the existence of the alternative remedy is not an absolute bar to the maintainability of this writ petition under Article 226 of the Constitution of India. It can be entertained where there is a breach of fundamental rights, where there is violation of the principles of natural justice, where there is an excess of jurisdiction or where challenge to the *vires* of the statute or delegated legislation.

8. The specific ground raised by the petitioners is that the petitioners were not given opportunity of hearing after receipt of the letter from the respective banks. Therefore, it is clear violation of principles of natural justice. No materials gathered behind one's back can be relied on without giving opportunity to the said person to challenge the correctness and accuracy of the said information. That not having been done in the present case and as such, it is clear violation of principles of natural justice. Further, there is huge delay for imposing of penalty for contravention of Section 7(1)(a) of FEMA, 1999 r/w Regulations 9(1) and 13 of Regulations, 2000. Therefore, the writ petition is very much maintainable without exhausting the alternative

remedy as provided under Section 17 of FEMA, 1999.

9. The first petitioner is the indigenous manufacturer of various telecommunication and networking product. On complaint, the respondent alleged that the petitioners had realised export proceeds made by it to Brazil during the period between the years 2004 to 2005 valued at 10 million US dollars. Therefore, investigation was initiated against the first petitioner. During the investigation, letters were sent to the petitioners' bankers i.e. Axis Bank, Mylapore, Chennai, Canara Bank, Chennai and City Bank, Chennai. The Manager of the first petitioner was served with notice and statement was recorded under Section 37 of FEMA, 1999 on 09.01.2008 and 19.07.2013. During the period March 2003 to June 2008 by raising 39 bills had exported telecommunication and other allied products to various overseas importer to an extent of 10792473 US dollars equivalent to Rs.46,77,54,277.44/- and failed to realise the export proceeds and thereby contravened Section 7(1)(a) of FEMA r/w Regulations 9(1) and 13 of Regulation, 2000. After filing of complaint, the petitioners were issued show cause notice dated 14.10.2015, and on receipt of the same, the petitioners had sent their

reply dated 16.12.2015. Thereafter, the impugned order was passed on 17.06.2021 thereby imposed penalty. It is relevant to extract provisions under Section 7(1)(a) of FEMA, 1999 hereunder:

> *"7. **Export of goods and services**-*
>
> *(1) Every exporter of goods shall-*
>
> *(a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India"*

10. It is also relevant to extract the provisions under Regulations 9(1) and 13 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 hereunder:

> *"9. Period within which export value of goods/software to be realized.-*
>
> *(1) The amount representing the full export value of goods or software exported shall be realized and*

*repatriated to India within (twelve months) from the date of export:*

*Provided that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorized dealer as soon as it is realized and in any case within fifteen months from the date of shipment of goods:*

*Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period of (twelve months) or fifteen months, a the case may be."*

***"13. Payment for the export-***

*In respect of export of any goods or software for which a declaration is required to be furnished under regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorized dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing-*

*(i) That the payment for the goods or software is made otherwise than in specified manner; or*

*(ii) That the payment is delayed beyond the period specified under these regulations; or*

*(iii) That the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank, or subject to the direction of the Reserve Bank, by an authorized dealer:*

*Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period."*

11. The issue is non recovery of portion of the exports done to multiple customers with whom the petitioners had ongoing export businesses then and permission sought for from the dealers for writing off a portion of the bills which were non commodity engineering technical exports in the interest of further export business. Their request

for write off was neither rejected nor acceded to and after more than 12 years, the petitioners were served notices for such transactions. Therefore, the long delay of more than 10 years with regard to the transactions is unfair and deprived of the petitioners a reasonable opportunity to defend themselves in respect of the alleged contraventions. Further, the entire information received from the dealers / banks had been behind the petitioners' back and without an opportunity to the petitioners, it was adjudicated. Therefore the petitioners are not guilty of any non declaration in terms of Section 7(1)(a) of FEMA r/w Regulation 9(1) and 13 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000.

12. Further, it is not the case of the respondent that the petitioners did not declare the value of the export or not declared correctly. Further the first petitioner is no longer in operation for more than a decade. The second petitioner is employed in other company. The first petitioner has no operation, no revenues and no staff or employees and it is facing liquidation proceedings. There is absolutely no explanation for the delay in issuance of notice, that too after period of 10

years. Therefore, the impugned order cannot be sustained and the same is liable to be quashed.

13. Accordingly, the impugned order dated 17.06.2021 and the demand notice dated 14.06.2022 are quashed and this writ petition is allowed. Consequently, connected miscellaneous petitions are closed. There shall be no order s to costs.

03.06.2024
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Neutral Citation:Yes/No
Index: Yes/No
Speaking/Non-speaking order
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**G.K.ILANTHIRAIYAN, J.**

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To
The Special Director,
Directorate of Enforcement (Adjudication),
Southern Regional Office,
Shastri Bhavan III Block III Floor,
26, Haddows Road,
Chennai 600 006

W.P.No.16979 of 2021

03.06.2024

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