

Yespee Vs. Director of Enforcement

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Oct-10-2003

Judge : Smt. P.N. Santhakumari, Member

Appeal No. : ORDER IN APPEAL NO. 424 OF 1997

Appellant : Yespee

Respondent : Director of Enforcement

Advocate for Pet/Ap. : Mahendra Singh for the Appellant. T.K. Gadoo for the Respondent.

Judgement :

1. This appeal was preferred from the order of the adjudicating authority/Special Director of Enforcement, Mumbai, in proceedings under section 51 of the Foreign Exchange Regulation Act, 1973 (the Act) for charge of contravention of section 18

(2) and

(3) of the Act; by virtue of the impugned orders, the appellants were found guilty of the charge and so were ordered to pay a penalty; the penalty imposed on the firm/first noticee was Rs. 4,00,000, whereas that on the partners was Rs. 40,000 each. The Enforcement Directorate had issued Show Cause Notice to these appellants (noticees in the adjudication proceedings); by virtue of SCN T-4/40/B/SDE/PKA/96, dated 10-7-1996 in respect of the export proceeds

outstanding to the tune of Rs. 27,79,445 under 12 invoices to foreign countries abroad. The appellants had submitted in their reply that the firm had started its business only in 1992 and that on account of certain communal riots during December 1992 to January 1993, they had a lot of problems to arrange shipments of their goods in time and so there was slight set back in the business, besides the plea that the appellants had from time to time applied for grant of extension of time for realization of the outstanding export dues and time was granted till 30-5-1995. Adjudication proceedings was held against the appellants and by virtue of the impugned orders, the appellants were found guilty and so was imposed with penalty. Aggrieved with the said findings and orders, this appeal was preferred jointly by all the appellants.

2. This appeal though jointly filed by three persons in 1997, the same having been entertained so far by this office without noting the defect of filing the appeal by persons more than one, and also considering the payment of separate fees for appeal, at this late hour I feel it unfair to return the appeal on the said defect and so the appeal was taken up for hearing on merits. The appeal was dismissed for default on 22-4-2003; the mistake of the amount shown in the said orders i.e., Rs. 12,000 instead of Rs. 4,80,000 was corrected by virtue of the orders of this Tribunal dated 23-9-2003. Per an IA filed by the appellants on 4-8-2003, this appeal previously dismissed for default was restored on file so as to enable the appellants for hearing the case on merits and so was the case ordered to be listed for hearing to 29-9-2003 and on 6-10-2003. As the case came up for hearing, both sides were represented by counsel.

3. The only point arises for decision is whether the appellants had made reasonable efforts for realization of the outstanding export proceeds and if the impugned findings and orders sustain in law?

4. I have heard the counsel for the appellant and also the DLA Mr. Gadoo for the respondents.

The point : According to the appellants, they had persistently perused the matter by repeated telephone calls and fax reminders to the overseas buyers and so was the entire dues except the sum of US\$ 4,400 realised, and even thereafter the

appellants had continued their untiresome efforts for realization of the said amount pending the adjudication proceedings. The entire amounts were received ultimately by November 1996; in this context, the appellants also relied on the letter from Vijaya Bank dated 13-11-1996; according to the appellants they had informed their authorized dealers Vijaya Bank vide their various letters about the details of receipt of remittance against all the pending bills along with annexure indicating receipt of the entire export proceeds from time to time. The counsel for the appellants submits in arguments that the adjudicating authority had lost sight of all those documents produced on behalf of the appellants including the letter issued by Vijaya Bank on 13-11-1996. The counsel insisted on his submissions that even at the time of the last hearing date of the adjudication proceedings on 18-11-1996, the factor of realization of the last outstanding balance of US\$ 4,420 was brought to the notice of the adjudicating authority by a submission dated 26-11-1996 but the Special Director had wrongly ignored the same and those documents were never relied on. It was further argued on behalf of the appellants that the Special Director/adjudicating authority had miserably failed to adopt a judicial approach in the matter besides the failure to take note of the case laws and cardinal principle of criminal jurisprudence as on the question of burden of proof. In reply to the submissions of the appellants, the Id. DLA submitted that the appellants had totally failed to realize the outstanding export proceeds within the stipulated time and that they had failed to get the time for realization extended by RBI and also there was no permission general or special granted by the RBI for the non-realisation. I have closely scrutinized the records and also the validity of the pleadings set forth in arguments by either side.

5. The records reveal that all the 12 invoices covered by the SCN, six were relating to the export effected in January to September 1993 while the remaining six to February-March 1994. The export by the said six invoices of 1994 was to the foreign buyers by name Courage Sportswear, USA; the total amounts due shown in the SCN in Indian currency was Rs. 25,00,370. In answer to the charge of contravention of section 18(2) and (3), the counsel for the appellants submitted in arguments that it was slightly due to communal riots in Bombay during early 1993 the export made under four invoices was held and had reached the buyer late and the goods were being of seasonal nature the buyer could not dispose of the same

in time and so was the failure for realization of the export proceeds within the stipulated time; it was further pointed out in arguments that the exporter was trying to persuade the buyers to remit the money by various telephone calls and fax messages and that was how the entire amounts were received. In this context, the Id. DLA sticks on his plea that non-initiation, of any legal proceedings against the buyers and also the exporters failure to approach the Indian Embassy for the needful unerringly indicates the failure of the exporter to take any reasonable efforts for realizing the amounts. On a close scrutiny of the materials on record, it is clear that in the written submissions made on 1-8-1996, the appellants had narrated the situation which led to the delay in shipment and also the resultant delay in the realization of the sale proceeds and also regarding their submissions to M/s. Vijaya Bank, the authorized dealer, seeking for extension from the RBI. Referring to the impugned orders, the counsel for the appellants canvassed in arguments that the appellants had applied to the RBI for extension of time from time to time and so was the time extended up to 30-5-1995. It is clear from the records that though the sale proceeds outstanding in the 12 invoices could not be realized within the stipulated time, the exporters had taken reasonable efforts as expected of a reasonable man and so was the entire amount realized during the pendency of the adjudication proceedings. The impugned orders reveal that though the appellant firm had conveyed to their bankers the receipt of the remittance of US\$ 33,200 and of 3,500 they had failed to furnish copies of FIRCs against which the above payments were received and there was no confirmation from the exporters bank regarding receipt of such payments. But as rightly submitted by the Counsel for the appellants in view of the receipt of the entire sale proceeds pending the proceedings, the adjudicating authority would have duly considered the circumstances under which the shipment was held and the realization also was hurdled. As rightly submitted on behalf of the appellants, the entire sale proceeds under the 12 invoices in question having been realized though beyond the stipulated time, the realization was in consequence to the efforts taken by the exporter; it is pertinent to note that the appellants had taken all reasonable efforts for the realization of the export dues and so was the entire dues were realized. As such the impugned findings of the adjudicating authority that the firm and its partners were guilty of contravention of section 18(2) and (3) is,

therefore, unsustainable and is set aside.

6. As the impugned findings stand quashed, the order of penalty also is set aside.

7. In the above premises, allowing the appeal, the impugned findings and order of penalty is set aside.

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