

Khan Carpets Export Ltd Vs. Deputy Director of Enforcement

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Aug-27-2001

Judge : D.P. Sharma, Chairperson

Appeal No. : APPEAL NO. 154 OF 2001

Appellant : Khan Carpets Export Ltd

Respondent : Deputy Director of Enforcement

Advocate for Pet/Ap. : Najmi Waziri for the Appellant. Shamsuddin for the Respondent.

Judgement :

1. This appeal is against the Adjudication Order No. 45/2001 /DD(VS) dated 29-11-2000 of the Deputy Director of Enforcement, Calcutta, whereby a consolidated penalty of Rs. 3 lakhs is imposed on the appellants for contravening the provisions of section 18(2) read with section 18(3) of the Foreign Exchange Regulation Act, 1973.

2. Vide Memorandum No. C-70/99 SCN/DD dated 22-11-1999, the appellant-company was charged with failure to take steps to realise the total export proceed amounting to DM 1,63,866.89 from the German buyer in respect of two consignments vide GR Form Nos. AL375281 dated 30-5-1996 and AL935203 dated 1-7-1996 and thereby contravened the provisions of section 18(2) read with section 18(3) and was asked to show- cause why action should not be taken for

the said contravention of the provisions of the Act. In their reply, the company admitted the non- realisation of the amount but denied the charge that they have failed to take reasonable steps for its realisation and stated the steps which they had taken for the realisation of the outstanding export proceeds and, therefore, claimed that the non-receipt of the amount was beyond their control, especially as the buyer has gone into liquidation and, consequently, they could not realise the amount despite having the Courts decree against the buyer. The appellants pleaded for dropping of the charge before the adjudicating authority. The Adjudicating Officer, however, was of the view that the appellants failed in their efforts to realise the export proceeds during the initial years. The adjudicating authority was also not convinced with the aforesaid contention of the appellants in the absence of any documentary evidence regarding the liquidation and the slump in the market and accordingly held the appellants guilty of the alleged contravention and imposed the penalty which is the subject-matter of challenge in this appeal.

3. Shri Najmi Waziri, the learned counsel of the appellants submitted that the appellant-company being fully aware of its obligations under the Act, diligently pursued the realization of payment of the said consignments. When after many reminders, no payment was made for the said consignments, the appellant-company despite its on-going business relations with the said importer, was constrained to initiate legal action for recovery of the said amounts. Like any prudent business person, the appellant- company first tried to recover the money through the good offices of the India Trade Promotion Organisation at Germany. This effort of persuasion, negotiation and conciliation took a few months. However, as nothing worthwhile was emerging from the said efforts, the appellant-company appointed the law firm of Graf Von Westphalen and Modest, Hamburg, Germany, to initiate legal action for recovery of the said amounts from the defaulting importer. There was no delay in taking the above diligent and reasonable steps for recovery of the said amount. vide order dated 6-8-1997, the competent court in Hamburg ordered for recovery of the entire amount with interest and costs of the suit with effect from 5-4-1997, from the above said importer. However, the said amount could not be recovered immediately due to the non-availability of details of the judgment debtors assets. Subsequently, the said importer went into liquidation

and an Official Liquidator was appointed. The Liquidator submitted the detailed reports containing the assets and liabilities of the defaulting importer. Later he intimated the appellant-company's lawyers that a total amount of DM 40,000 had been recovered from the defaulting importer's assets. From which payments had to be made to the other debtors of the said defaulter (importer) corresponding to/in ratio to the amount of their respective original debts (Hauptforderung). From the said amount the share apportioned to and received by the appellant-company was DM 14905.91, out of which an amount of D.M. 11004.64 plus DM 25 (as cost of transfer) was deducted as solicitors fees and the remaining DM 3926.31 was remitted to the appellant-company. The balance of DM 152887.29 remained unpaid. In the meantime, appropriate extensions were obtained from the Reserve Bank of India upto 13-4-2000.

4. Dr. Shamsuddin, challenged the correctness of the claim made by Shri Waziri and stated that the extension of time was with regard to other GRs and not in respect of GRs in respect of which the penalty has been imposed. Shri Waziri was asked to show the copy of necessary extension by Reserve Bank of India in respect of the relevant GRs as claimed by him. Shri Waziri sought two weeks time for filing necessary copy of the RBIs letter of extension. Vide his application dated 18-7-2001, Shri Waziri filed a copy of RBIs letter No. Kan.EC.3012/02.01.3106/99-2000 dated 8-4-2000 extending time for recovery of export proceeds upto 30-4-2000 in respect of GR Nos. AL 375281 and AL 935303. Shri Waziri submitted that subsequent to the issue of show-cause notice the company has realised two months of DM 30685.27 and DM 12130.60. He reiterated that the Court ordered a decree on 6-8-1997 in favour of the company but the decree could not be executed for the liquidation of the company. Shri Waziri submitted that the appellant has, however, realised a total sum of DM 53905.91. Shri Waziri further submitted that regarding balance of the amount the company was not having reasonable prospects of its realisation and, therefore, wrote a letter to the RBI, Kanpur on 16-8-2000 to write off the aforesaid two GR forms.

5. I have given my careful consideration to the submissions made by the appellants in their memorandum of appeal as well as orally at the time of the hearing and also of the respondents. The appellants can be said to have

sufficiently discharged their onus under sub-section (3) of section 18. It cannot be said that the appellants company has failed to take all reason-able steps for realisation of the outstanding export proceeds. The non-realisation of the export proceeds provides basis for statutorily presump-tion in terms of section 18(3). The appellant-company has successfully rebutted that presumption by showing that they have infact taken all action which an average prudent businessman would take in the facts and circumstances of the case. The learned Adjudicating Officer appears to have erred in laying undue emphasis on inaction on the part of the appellant-company during the initial period to realise the export proceeds. An integrated view ought to have been taken in the matter and the action taken by the exporters should have been considered in its totality. Besides, the impugned order is also open to objection for imposing a consolidated penalty on the appellant-company as well as all its Directors without having regard to the provisions of section 68(1) of the Act. There is nothing on record to show that all the Directors on whom the penalty has been imposed alongwith the company satisfy the description of the persons on whom the penalty under section 68(1) can be imposed. From the material available on record, it cannot be said that all the Directors on whom the penalty has been imposed under the impugned order were at the time the contravention alleged to have been committed by the company, were incharge of and were responsible to, the company for the conduct of the business of the company.

6. In the facts and circumstances and for the reasons stated above, the impugned order is set aside and the appeal is accordingly allowed.

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