Ashok Kumar Doshi Vs. Union of India and Ors.

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Court : Kolkata

Decided On : May-05-2016

Judge : Girish Chandra Gupta

Appellant : Ashok Kumar Doshi

Respondent : Union of India and Ors.

Judgement :

ORDER
SHEET APO NO.118 OF 2016 GA NO.1220 OF 2016 WITH WP NO.144 OF 2016 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE ASHOK KUMAR DOSHI Versus UNION OF INDIA AND ORS.BEFORE: The Hon'ble JUSTICE GIRISH CHANDRA GUPTA The Hon'ble JUSTICE ASHA ARORA Date : 5th May, 2016.

Mr.N.K.Poddar,Sr.Advocate, Mr.M.C.Ghosh, Mr.V.Tibrewal, advocates for appellant Mr.K.J.Tiwari,advocate for respondents The Court : The subject matter of appeal is a judgment and order dated 8th April, 2016 by which the learned Writ Court dismissed the writ petition.

The writ petition was filed challenging an order dated 24th August, 2015 by which the learned Appellate Tribunal for Foreign Exchange refused to dispense with the amount of deposit of the penalty fully.

The learned Tribunal restricted the dispensation to 85%, in other words, the right to prefer an appeal was granted subject to deposit of 15% of the amount of penalty.

Challenging the aforesaid order passed under section 52(2) of the Foreign Exchange Regulation Act, 1973, the writ petition was filed.

The admitted facts are as follows:On 27th October, 1991 and 28th November, 1991, search took place at the premises of one Sr.Majid Godil & ORS.in execution of search warrant issued under section 37 of the Foreign Exchange Regulation Act, 1973.

During search, several documents were seized.

A sum of Rs.2 lakhs were also seized.

Confessional statements of the appellant Sr.Ashok Kumar Doshi were recorded on 24th January, 1992 and 3rd March, 1992.

The appellant, however, retracted on 5th March, 1992 the statement made by him on 24th January, 1992 and 3rd March, 1992.

It also appears that the statements of the principal of the appellant Sr.S.Jegathesan @ Surya were also recorded on 25th May, 1992, 14th October, 1992, 15th October, 1992, 5th November, 1992 and 18th November, 1992.

Show cause notices were issued on 20th October, 1992 to various persons including the appellant and his principal, the said Sr.S.Jegathesan.

An adjudication order was passed on 24th September, 1993.

The appellant was penalised for the alleged violation of section 9(1)(b) of Foreign Exchange Regulation Act, 1973 in respect of a sum of Rs.13,96,000/- and penalty of a sum of Rs.40,000/- and Rs.15,000/were imposed on the appellant and his principal respectively.

The aforesaid order dated 24th September, 1993 has, however, been set aside by the learned Tribunal by its order dated 19th August, 2009 on the ground that there was no legal evidence to back up the conviction.

A fresh show cause notice was issued both against the appellant and his principal, the said Sr.S.Jegathesan on 31st July, 2001.

It is not in dispute that the fresh show cause notices were issued on the basis of the facts which had already come to the light by virtue of the search which took place on 27th October, 1991 and 28th November 1991.

The show cause notices were also issued on the basis of the selfsame statements of the appellant and his principal recorded in the year 1992, full particulars whereof have already been indicated hereinabove.

Point of substance urged by Mr.Poddar is that the Tribunal failed to take cognizance of the fact that there is not one sentence in the adjudicating order justifying any explanation offered on behalf of the prosecution for the delay in issuing the show cause notice.

There is in fact, according to him, no explanation offered for the delay of nine yeaRs.He submitted that the delay of more than nine years amounts to an act of acquiescence on the part of the authorities and this stale issue could not have been permitted to be raked up.

He added that the learned Tribunal has noticed that the appellant is now 75 years old.

The appellant is a person of no means.

He acted merely as an agent of the said Sri.

S.Jegathesan.

The learned Tribunal although opined that the appellant has been able to make out an arguable case, but did not notice the fact that it was impossible or it would amount to denying an opportunity to the appellant to have access to the justice if the pre-condition for deposit is not fully waived.

Mr.Tiwari, learned advocate appearing for the revenue submitted that the writ petition was not maintainable and has rightly been dismissed.

He drew our attention to a judgment of the Apex Court in the case of Raj Kumar Shivhare versus Assistant Director, Directorate of Enforcement and Another, reported in 2010 (4) SCC772wherein dealing with the question of refusal on the part of the Tribunal to waive the deposit, the writ petition was dismissed and the Apex Court opined as follows:- 35.

In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein.

A writ petition in the facts of this case is therefore clearly not maintainable. He, however, has no answer to offer as to why was there delay in issuing the show cause notice for about nine yeaRs.He does not also have any answer to offer as to why, when all the information were available, with the revenue the show cause notice could not be issued in the year 1992 itself.

Reference in this regard may be made to the judgment of the Apex Court in the case of Parashuram Pottery Works Co.LTD.versus Income-tax Officer, Circle I, Ward A, Rajkot reported in 1977 (106) ITR1wherein the following views were expressed.

At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. The judgment cited by Mr.Tiwari is of no application to the facts and circumstances of the case.

Their Lordships were considering a case under the Foreign Exchange Management Act, 1999, whereas the present case is a case under Foreign Exchange Regulation Act, 1973.

The observations in paragraph 35 of the judgment, quoted above, were made in view of section 35 of the Foreign Exchange Management Act, 1999 which provides for an appeal against any order of the Tribunal on a question of law but an identical provision is not there in the 1973 Act.

Section 54 of the 1973 Act provides for an appeal to the High Court only against an order passed under sub-section 3 or subsection 4 of section 52, whereas the order under challenge is an one under sub-Section 2 of section 52.

Therefore, the appellant could not have challenged the order of the learned Tribunal under section 54 of 1973 Act.

The learned Tribunal omitted to notice that there was unexplained delay of nine years in issuing the show cause notice.

The learned Tribunal also ignored the fact that the appellant was a mere agent of the principal, Sr.S.Jegathesan.

Considering the facts and circumstances of the case, we are of the opinion that the Tribunal should have dispensed with the deposit fully.

In that view of the matter, the appeal is allowed.

The appellant shall be entitled to press the appeal without having to deposit any amount by way of pre-deposit under section 54 of 1973 Act.

It is clarified that the views expressed herein are for the purpose of disposal of this appeal and shall not preclude the Tribunal from arriving at its own conclusion on merits in accordance with law.

(GIRISH CHANDRA GUPTA, J.) (ASHA ARORA, J.) sb.