P. Kannan Vs. the Additional Director of Enforcement and ors.

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Court : Chennai

Decided On : Nov-03-1988

Reported in : 1990(26)ECC149

Judge : Swamikkannu, J.

Appeal No. : Writ Petition No. 6220 of 1981

Appellant : P. Kannan

Respondent : The Additional Director of Enforcement and ors.

Disposition : Petition dismissed

Judgement :
ORDER

1. This is a petition for issue of a writ of certiorarified mandamus calling for the records in Appeal No. 1163/77, on the file of the 2nd respondent and orders dated 15.3.1980 and 27.5.1980 passed by the 2nd respondent in Appeal No. 163/77 and quash the same and direct the 2nd respondent to hear the Appeal No. 163 of 1977 without insisting for deposit of penalty as a condition for hearing the appeal.

2. It is inter alia stated in the affidavit sworn to by the petitioner herein that a show cause notice was issued to the petitioner on 4.10.1966 by the Director of Enforcement, New Delhi charging the petitioner for contravention of Section 12(2) of the Foreign Exchange Regulation Act, 1947. The Petitioner submitted a reply

dated 21.10.1966. Subsequently adjudication proceedings were initiated and on order dated 30.8.67 was passed by the Director of Enforcement. The petitioner filed a writ petition in W.P. No. 2982 of 1967 challenging the order of the Director of Enforcement, and the order of the Director was quashed by this Court in that writ petition. The writ petition was allowed on the ground that it was not made out that there was any intention on the part of the petitioner to contravene the provisions of Section 12(2) of the Foreign Exchange Regulation Act,1947.

3. Even though no case has been made out that the petitioner had intentionally violated Section 12(2) of the Act, the Ist respondent thought it fit to initiate the proceedings by issuing a fresh show cause notice. Accordingly a fresh show cause notice was issued on 13.9.1967. The petitioner appeared before the Ist respondent and produced two letter from the petitioner's Bankers from which it was clear that steps were being taken to realise the monies from the Foreign buyer and that there was no intention on the part of the petitioner to repatriate the sale proceeds. The Ist respondent ultimately passed an order dated 8.8.1967 imposing a penalty of Rs. 40,000/- on the petitioner. The petitioner preferred on appeal before the Appellate Board, the 2nd respondent herein, in Appeal No. 1163 of 1977. The Appellate Board seems to have passed an order on 25.3.1980 calling upon the petitioner to deposit Rs. 5,000/- out of the penalty of Rs. 40,000/-. By then, the petitioner had already closed his business and he had been out of Madras for some time and the petitioner could not contact his counsel. The petitioner was given two months time from 25.3.1980 to make deposit Since the petitioner came to know about the order very late, i.e., in the middle of May, 1980, he immediately sent a telegram requesting for some more time to make the deposit. But the 2nd respondent seems to have passed on order dated 27.5.1980 dismissing the petitioner's appeal on the ground that the petitioner had not made the necessary deposit as per order dated 25.3.1980. The petitioner preferred an appeal on C.M.A. No. 434 of 1981 before this Court under Section 54 of the Foreign Exchange Regulation Act, 1973. When the C.M.A, came up for admission, this Court was of the view that the vires of the provisions of the Foreign Exchange Regulations Act cannot be questioned in the appeal. Hence the C.M.A. was dismissed at the stage of admission itself.

4. It is contended on behalf of the petitioner that the order of the 2nd respondent dismissing the appeal for non-deposit of penalty is against law.

5. It is inter alia contended in the counter affidavit filed on behalf of respondents 1 to 3 that the petitioner exported 4 shipments of stainless steel utensils valued at Rs. 1,07,090.52 p. to Malaysia during 1963 on outright sale basis. They failed to repatriate the proceeds of these exports. On receipt of report from the Reserve Bank of India, Madras, a show cause notice was issued to the Petitioner-firm on 4.10.1966 by the Director of Enforcement, New Delhi charging the firm for contravention of the provisions of Section 12(2) of the Foreign Exchange Regulation Act, 1947. In their reply dated 21.10.1966 to the show cause notice, the petitioner stated that they could not realise the sale proceeds of the exported goods as there was no market of their goods in the foreign market and that they have not received any reply to their letter addressed to the foreign buyer. Adjudication proceedings were initiated and the case was heard and adjudicated by the Director of Enforcement. The order of the Director was challenged by the petitioner in Writ Petition No. 2982 of 1987 [1967?]. In a combined Judgment in a series of petitions including this case, this Court found that the Director had not recorded any finding with regard to the existence of intent on the part of the exporters not to realise the proceeds as required under the provisions of Section 12(2) as it stood before 1.4.1965 when the Central Act of 1964 came into force. Therefore, the adjudication order was quashed.

6. Fresh show cause notices were, therefore, issued to the petitioner on 30.9.1975 bringing out their intent in not realising the proceeds in question. No reply was received to this notice. The case was adjudicated by the Additional Director of Enforcement imposing a penalty of Rs. 40,000/- Aggrieved by the said order of the Additional Director, the petitioner filed an appeal before the Foreign Exchange Regulation Appellate Board, without depositing the penalty amount. Considering the financial status of the petitioner, the Foreign Exchange Regulation Appellate Board in their order dated 15.3.1980, directed the appellant, the petitioner herein, to deposit part of the penalty amount, i.e., Rs. 5,000/-by 20.5.1980, failing which the appeal would stand dismissed. The appellant who received the order neither deposited the amount within the stipulated time nor sought any extension of time

for the deposit. The petitioner sent a telegram to the Foreign Exchange Regulation Appellate Board seeking two weeks' time. The time given for deposit was two months from the last hearing date on which the order for deposit was passed. Since the deposit was not made as directed by the Foreign Exchange Regulation Appellate Board the appeal was dismissed by the Foreign Exchange Regulation Appellate Board on 27.5.1980. Aggrieved the Order of the Appellate Board, the petitioner has filed the present Writ petition before this Court for the issuance of a writ of certiorarified mandamus to quash the order dated 27.5.1980.

7. The petitioner was issued a show cause notice on 4.10.1966 by the Director of Enforcement, New Delhi for a contravention of Section 12(2) of the Foreign Exchange Regulation Act, 1947. The petitioner submitted a reply on 21.10.1966. This Court quashed the adjudication order and observed that if the Director of Enforcement takes fresh action, the petitioner will have an opportunity of producing the correspondences which he came to have with him for the purpose of proving the case. A fresh show cause notice was issued to the petitioner on 30.9.1975 bringing out their intent in not realising the proceeds in question. No reply was received for this notice. Hence the case was adjudicated by the Additional Director of Enforcement and penalty of Rs. 40,000/- was imposed on the petitioner. The petitioner preferred on appeal against the order of the Additional Director of Enforcement to the Foreign Exchange Regulation Appellate Board. The Board, after considering the petitioners' financial status, posted the case on 25.3.1980 and sent a notice to the petitioner on 25.2.1980. The above notice was sent to the petitioner to his Residential address. The notice was also served on the petitioners' counsel. The appeal No. 163 of 1977 filed by the petitioner was taken up by the Foreign Exchange Regulation Appellate Board on 25.3.1980 and the petitioner was absent, though he and his counsel were served with notice. The Appellate Board found after due enquiry that the petitioner was getting an annual income of Rs. 12,000/- from his business. Hence the Appellate Board felt that the petitioner will not be in a position to pay anything in excess of Rs. 5,000/- towards penalty. In the circumstances, the petitioner was asked to deposit a sum of Rs. 5,000/- by 20.5.1980 failing which the appeal will stand dismissed. This order was served on the petitioner to his residential address. It is true that the petitioner had sent a telegram requesting two weeks time for paying

the penalty amount. But, on 27.5.1980, when the matter was taken up by the Foreign Exchange Regulation Appellate Board, the petitioner was absent though the notice was served on the petitioner. The Board found that though two months time was given for payment of the penalty, the petitioner had failed to deposit the amount. Hence the Board found that the petitioner was not interested in prosecuting the appeal and hence the appeal was dismissed by the order of the Board dated 28.5.1980. The Learned Counsel for the respondents had referred to the provisions of Sections 52 and 54 of the Foreign Exchange Regulation Act, 1973 in support of his contention that there is no substance in the various contentions of the petitioners

8. The point for consideration, is whether the relief sought for by the petitioner herein in this writ petition can be granted or not.

9. A careful reading of the provisions of Section 52(2), II proviso, makes it clear that the Foreign Exchange Regulation Appellate Board has a discretionary power either to dispense with the penalty imposed or it can make any condition which it feels appropriate in the circumstances. In the instant case, the Board had made enquiries and found that the petitioner will not be in a position to pay anything in excess of Rs. 5,000/-. Hence the petitioners was asked to pay only Rs. 5,000/- and not the entire penalty amount of Rs. 40,000/-. The petitioner having failed to do so and having failed to appear before the Board, cannot now complain that he was not given adequate opportunity. The Learned Counsel for the respondents relied on the order passed in Writ petition No. 910 of 1980 dated 7.4.1980 in Messrs. T. Azeerur Rahman v. Foreign Exchange Regulation Appellate Board and Ors. in this regard. In that case, it was found that the discretion was vested in the Appellate Board to insist the payment of the amount before the appeal is entertained, and that the Court cannot interfere in such matters which are purely discretionary in nature.

10. In the instant case, the Foreign Exchange Regulation Appellate Board made suitable enquiries and found that the petitioner will be able to pay only Rs. 5,000/- out of the penalty amount of Rs. 40,000/-. The petitioner was granted two months time and on his failure to deposit the penalty amount or appear before the Board,

the Board had no option but to dismiss the appeal. Hence the petitioner cannot complain that if he had been heard on merits, there is possibility of setting aside the order of adjudication.

11. It is common ground that C.M.A. No. 434 of 1981 filed in this Court under Section 54 of the Foreign Exchange Regulation Act, 1973 was dismissed at the stage of admission itself. Under these circumstances, this Court does not find any merit in the writ petition.

12. In the result, the writ petition is dismissed. Under the circumstances, there is no order as to costs.