SUPREME COURT OF INDIA

M/s. Seema Silk & Sarees

Vs.

Directorate of Enforcement

Crl.A.No.860 of 2008

(S.B. Sinha and Lokeshwar Singh Panta JJ.)

12.05.2008

JUDGMENT

S.B. Sinha, J:

1. Leave granted.

2. Constitutionality of Sub-sections (2) and (3) of Section 18 of the *Foreign Exchange Regulation Act, 1973* (for short "the Act") is in question in this appeal which arises out of a judgment and order dated 30.07.2007 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 336 of 2007.

3. Appellant No. 1 herein is a partnership firm and Appellant No. 2 is its partner. Appellant No. 1 used to export garments and textiles to various countries. It allegedly could not repatriate the value of goods from the export proceeds. According to the appellants, whereas export to developed economies like US, UK, Europe and Japan, on credit basis, does not undergo severe competition and very minimal profit margin can be maintained, export to the less developed countries or the countries with poor legal system earn greater profit margin.

4. Appellants' business allegedly came to a standstill because of its inability to repatriate export proceeds to the tune of 16.5 crores from a few overseas buyers. A notice was issued by the Enforcement Directorate under Sections 18(2) and 18(3) of the Act alleging that in view of their failure to repatriate the entire sale proceeds of the exports which the appellants have made during 1997-98, the said provision is attracted.

> "They, in the cause shown, allegedly furnished details of repatriation they could bring about as also the steps taken by them in that behalf. They applied for extension of time through the authorized dealer, viz., the Canara Bank. However, with the passage of time, the Branch Manager of the Bank did not grant any extension of time for repatriation of the export proceeds. A suit was also filed by the Canara Bank before the Debt Recovery Tribunal, Mumbai."

5. The Enforcement Director, in the aforementioned proceedings, imposed a penalty of Rupees One Crore on the firm and Rs.25 lakhs each on the partners. An appeal preferred by the appellants before the Appellate Tribunal was allowed holding that the appellants have taken all reasonable steps for repatriation. A further appeal was taken by the Enforcement Directorate before the High Court which was marked as FA Nos. 8 and 9 of 2005. However, the High Court although entertained the appeal, did not pass any order of stay.

6. A criminal case was also initiated. Cognizance thereon was taken and the appellants were summoned by an order dated 19.06.2004 by the Chief Metropolitan Magistrate, Esplanade Court, Mumbai. Appellants thereafter filed a criminal application bearing No. 6901 of 2005 for quashing of the criminal proceedings pending against them. The said application was disposed of by an order dated 26.07.2006 observing that as the appellants had already filed application for discharge, the learned Magistrate may pass appropriate order thereupon.

> "By an order dated 10.10.2006, the said application for discharge was dismissed. It was inter alia contended by the appellants in the said discharge application that the order of Tribunal being civil in nature, the same was binding on the criminal court and, thus, the prosecution against them under Section 56 of the Act for was not maintainable. The order taking cognizance having been passed on 27.05.2002, the same was contended to be bad in law."

7. Appellants preferred writ petition thereagainst questioning the constitutionality of Sections 18(2) and 18(3) of the Act as also constitutional validity of the Constitution 39th Amendment Act. By reason of the impugned judgment, the said writ petition has been dismissed.

8. Mr. Mathews J. Nedumpara, learned counsel appearing on behalf of the appellants, would submit that Sections 18(2) and 18(3) of the Act placing the burden of proof upon the accused must be held to be a law having draconian character and, thus, is unconstitutional.

> "It was submitted that by reason of the said provision, discrimination has been made between a domestic trader and an exporter and, thus, the same is violative of Article 14 of the Constitution of India.
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> It was urged that validity of the said provision must be judged on the touchstone of commercial considerations inasmuch as whether an exporter may not be able to repatriate the export proceeds particularly when such exports are made to the developing countries. The learned counsel would contend that all traders in terms of the provisions of the Income Tax Act, 1961 make a provision for bad debt. When a trader suffers loss, it is permissible to make a provision for writing off such bad debts. It was furthermore urged that in terms of the provisions of the Income Tax Act, the accounts are required to be audited by a Chartered Accountant and, thus, the impugned law being contrary to the accounting practice should not be sustained. Such repatriation of exports proceeds, thus, being uncertain, it was urged, the impugned provisions as also the Constitution 39th Amendment Act cannot be sustained."

9. Mr. G. E. Vahanvati, learned Solicitor General appearing on behalf of the respondents, on the other hand, would submit that a domestic trader and an exporter belong to different classes and such classification, being valid, the impugned provisions are not ultra vires Article 14 of the Constitution of India.

It was pointed out that having regard to the nature of business and the risk involved in the export of commodities, the appellant could approach the Reserve Bank of India for grant of exemption and in that view of the matter it does not cause even any hardship to any individual.

10. Sections 18(2) and 18(3) of the Act reads as under:

"18. Payment for exported goods:

(1) ***

(2) Where any export of goods, to which a notification under clause (a) of sub-section (1) applies, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing -

(A) In a case falling under sub-clause (i) or sub- clause (ii) of clause (a) of sub-section (1),-

(a) That payment for the goods -

i. Is made otherwise than in the prescribed manner, or

ii. Is delayed beyond the period prescribed under clause (a) of sub-section (1), or

(b) That the proceeds of sale of the goods exported do not represent the full export value of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank; and

(B) In a case falling under sub-clause (ii) of clause (a) of sub-section (1), also that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade: Provided that no proceedings in respect of any contravention of the provisions of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period.

(3) Where in relation to any goods to which a notification under clause (a) of sub-section (1) applies the prescribed period has expired and payment therefor has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that

such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of sub-section (2)."

11. Admittedly, the Act finds place in the Ninth Schedule of the Constitution of India. In terms of Article 31B of the Constitution of India inter alia none of the Acts specified in the Ninth Schedule is ultra vires even if it is inconsistent with or takes away or abridges any of the rights conferred by any provisions of Part III of the Constitution of India.

12. Appellants have questioned the validity of the Act only on the ground of infringement of Article 14 of the Constitution of India. Apart from the fact that the Act is protected under Article 31B of the Constitution of India having been placed in the Ninth Schedule thereof, even otherwise, we do not find any reason to arrive at a conclusion that the Act is ultra vires Article 14 of the Constitution of India. Discrimination on the ground of valid classification which answers the test of intelligible differentia does not attract the wrath of Article 14 of the Constitution of India. Hardship, by itself, may not be a ground for holding the said provision to be unconstitutional.

In *Ajoy Kumar Banerjee v. Union of India*[1], this Court held:

"50. Differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution. This principle is too well-settled now to be reiterated by reference to cases. There is intelligible basis for differentiation. Whether the same result or better result could have been achieved and better basis of differentiation evolved is within the domain of legislature and must be left to the wisdom of the legislature. Had it been held that the scheme of 1980 was within the authority given by the Act, we would have rejected the challenge to the Act and the scheme under Article 14 of the Constitution."

13. No case has been made out that the Act is confiscatory in nature. No foundation fact has also been brought on record.

Appellants have not annexed even a copy of the writ petition. The learned counsel has not been able to satisfy us that there existed any factual foundation in support of his argument.

In *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO*[2], this Court held:

"69. The issue that the 2003 Act is in violation of the equality clause contained in Article 14 of the Constitution of India was not raised before the High Court. Only in one of the civil appeals, prayer was made for urging additional ground and the same having been directed, additional ground has been taken to urge the said question. A

ground taken, however, must be based on a factual foundation. For attracting Article 14, necessary facts were required to be pleaded. The foundational facts as to how Section 14 of the 2003 Act would be discriminatory in nature have not been stated at all. The Government of Tamil Nadu has also not been given any opportunity to meet the said contention.

70. It is now trite that such factual foundation, unless is apparent from the statute, itself, cannot be permitted to be raised and that too for the first time before this Court."

It was further opined:

"74. In absence of necessary pleadings and grounds taken before the High Court, we are not in a position to agree with the learned counsel appearing on behalf of the appellants that only because Section 13 of the repealed Act is inconsistent with Section 14 of the 2003 Act, the same would be arbitrary by reason of being discriminatory in nature and ultra vires Article 14 of the Constitution of India on the premise that charging section provides for levy of tax on sale and consumption of electrical energy, while the exemption provision purports to give power to exempt tax on "electricity sold for consumption" and makes no corresponding provision for exemption of tax on electrical energy self-generated and consumed."

14. In absence of such factual foundation having been pleaded, we are of the opinion that no case has been made out for declaring the said provision ultra vires the Constitution of India.

15. A domestic trader and an exporter stand on different footings. The said provisions were made when the country was undergoing severe `foreign exchange crunch'. The Parliament in its wisdom has inserted the said provisions so as to prevent fraud. Sub-section (1) of Section 18 of the Act provides for filing of an application for grant of exemption by the Reserve Bank of India. Refusal to give such an exemption is required to be preceded by reasonable opportunity of making a representation.

16. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. [See *Hiten P. Dalal v. Bratindranath Banerjee*[3], *and M.S. Narayana Menon v. State of Kerala*[4],]

17. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. In a case of this nature, particularly, when an appeal against the order of the Tribunal is pending, we do not think that the appellants are entitled to take the benefit thereof at this stage. Such contentions must be raised before the criminal court.

18. Commercial expediency or auditing of books of accounts cannot be a ground for questioning the constitutional validity of a Parliamentary Act. If the Parliamentary Act is valid and constitutional, the same cannot be declared ultra vires only because the appellant faces some difficulty in writing off the bad debts in his books of accounts. He may do so. But that does not mean the statute is unconstitutional or the criminal prosecution becomes vitiated in law.

19. An order of discharge can be interfered with by the High Court on limited grounds. At that stage, it need not be shown that the appellants may not ultimately be convicted. It is enough if there exists a strong suspicion.

20. The factual matrix involved in the matter is one of the accounting. The burden being on the appellants to show that they had taken all permissible steps as are provided for under the law, the question of passing any order of discharge at this stage would not arise.

21. The export was to the tune of US $ 55, 03,218.78. Appellants on their own showing exported goods to the countries like USA, Canada, France, Indonesia, etc. They did not obtain any general or special permission from the Reserve Bank of India for non-realisation of export proceeds beyond six months which is the period specified under Sub- section (1) of Section 18 of the Act.

22. As all contentions as to whether the appellants have committed any offence or not shall remain open, we are of the opinion that no case has been made out for interference of the impugned judgment. The appeal is dismissed. No order as to costs.

[1]*[(1984) 3 SCC 127]*
[2]*[(2007) 5 SCC 447]*
[3]*(2001) 6 SCC 16*
[4]*(2006) 6 SCC 39*