(2012) 10 AP CK 0037

Andhra Pradesh High Court

Case No: C.M.S.A.M.P. No''s. 119 and 123 of 2012 in C.M.S.A. No. 47 of 2012

KPR Plastic Limited, now known as K.P.R. Teleproducts Limited and K.P. Sarathy	APPELLANT
Vs	
The Union of India and Others	RESPONDENT

Date of Decision: Oct. 30, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Foreign Exchange Regulation Act, 1973 - Section 35, 52, 52(3), 52(4), 54

Citation: (2013) 3 ALD 113

Hon'ble Judges: K.G. Shankar, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

K.G. Shankar

C.M.S.A.M.P. No. 119 of 2012:

1. The appellants seek for condonation of delay of 1394 days in filing the second appeal. The second appeal assails the order of the Appellate Tribunal for Foreign Exchange, New Delhi, Camp Court at Hyderabad (the Appellate Tribunal, for short), dated 15-9-2008, in Appeal No. 206 of 2002. The second appeal was laid u/s 54 of the Foreign Exchange Regulation Act, 1973 (the Act, for short). Section 54 of the Act reads:

54. Appeal to High Court.--An appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52:

Provided that the High Court shall not entertain any appeal under this section if it is filed after the expiry of sixty days of the date of communication of the decision or order of the Appellate Board, unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

.....

The proviso contemplates limitation of 60 days for filing appeal. Indeed, the proviso also empowers the High Court to condone the delay in filing the appeal. Sri D.V. Seetharama Murthy, learned Senior Counsel for the petitioners-appellants, however, mainly contended that there was no delay in filing the second appeal at all and that the petition is laid as a safety precaution only. He placed reliance upon the expression in the provision "sixty days of the date of communication of the decision or order of the Appellate Board" and contended that the order of the appellate Tribunal was never communicated to the appellants, so much so, there was no delay at all in filing the second appeal.

Sri P.S.P. Suresh Kumar, learned Standing Counsel for the contesting respondents 1 and 3 (Enforcement Directorate or ED, for short), on the other hand, pointed out that the order was indeed communicated to the appellants and that the appellants were aware about the proceedings before the Appellate Tribunal. Admittedly, the appellants were represented by a counsel before the Appellate Tribunal. It is the contention of the learned Standing Counsel that it cannot be gainsaid that the appellants were not aware about the orders of the Appellate Tribunal.

2. Proceedings were initially launched against the appellants before the Deputy Director, Enforcement Directorate, under the provisions of Act on the letter dated 03-11-1995 from the Reserve Bank of India. In the process, notice was issued to the appellants on 19-12-2001 by the Enforcement Directorate to produce the concerned machinery. When the orders of the Deputy Director dated 24-9-2001 were challenged before the Appellate Tribunal, the appellants were granted stay on 23-9-2002. However, two criminal cases were instituted against the appellants in C.C. No. 69 of 2002 for non payment of the penalty and C.C. No. 99 of 2002 for violation of the provisions of Sections 8(3) and 8(4) of the Act. The two cases were pending on the file of the Special Court for Economic Offences, at Hyderabad.

3. The appellants filed W.P. No. 22039 of 2002 seeking stay of the criminal proceedings. The appellants initially obtained interim order in their favour. However, on 28-11-2008, the writ petition was finally disposed of staying the prosecution of the two criminal cases pending final orders by the Appellate Tribunal. The important point in this context is that the Appellate Tribunal had already disposed of Appeal No. 206 of 2002 filed by the appellants on 15-9-2008. However, the orders in the writ petition dated 28-11-2008 stayed the criminal proceedings until disposal of the appeal before the Appellate Tribunal, which was already disposed of. It would appear that the orders in W.P. No. 22039 of 2002 were passed

after hearing both sides. It is contended by the learned Senior Counsel for the appellants that neither the appellants nor the contesting respondents (respondents 1 and 3) were aware about the disposal of the appeal till 2010, lest the contesting respondents would have brought it to the notice of the High Court in W.P. No. 22039 of 2002 that the Appellate Tribunal had already disposed of the appeal.

4. Be that as it is, the office of the 1st respondent informed the Special Public Prosecutor about the disposal of the appeal by the Appellate Tribunal through letter dated 24-8-2010 so as to enable the Prosecutor to proceed with the trial of C.C. Nos. 69 of 2002 and 99 of 2002. The learned Senior Counsel for the appellants contended that the question of the Special Public Prosecutor being informed about the disposal of the appeal by the Appellate Tribunal would not have arisen but for the fact that no one was aware about the disposal of the appeal. Be it noted that after communication dated 24-8-2010 referred to above, C.C. Nos. 69 of 2002 and 99 of 2002 were prosecuted resulting in the conviction of the appellants in both the cases through judgments dated 25-7-2012.

5. While things stood thus, the appellants filed W.P. No. 23655 of 2012 on 03-9-2012 challenging the orders of the Appellate Tribunal in Appeal No. 206 of 2002. Through orders dated 15-9-2012, the High Court was pleased to dispense with the filing of the certified copy. In the writ petition, the contesting respondents 1 and 3 raised an objection that there was an equally efficacious alternative remedy by way of an appeal u/s 54 of the Act and that the writ petition consequently was not maintainable. It is the case of the learned Senior Counsel for the appellants that the present appeal was preferred thereafter and that W.P. No. 23655 of 2012 was withdrawn.

6. Now, the limited question in this petition is whether the delay has satisfactorily been explained or not. The delay is for over four years, as the appeal was disposed of by the Appellate Tribunal on 15-9-2008 and this second appeal was filed on 10-10-2012. Thus, there was a delay of 1394 days. Undoubtedly, the delay is abnormal. It is not as though the appellants are illiterates or persons without influence, authority or knowledge. The 1st appellant is a Company while the 2nd appellant, former Managing Director of the Company, is said to be a sitting Cabinet Minister in the State of Andhra Pradesh. I therefore wholly agree with the contention of the learned Standing Counsel for the Enforcement Directorate that the appellants cannot plead ignorance of the proceedings before the Court.

7. However, as had already been referred to, the learned Senior Counsel for the appellants relies upon the phrase "the date of communication of the decision" and contended that there was no communication and that the date of information or date of knowledge have no relevance in this second appeal. The learned Standing Counsel for the contesting respondents submitted that the order was despatched to the 2nd appellant through post. Indeed, he produced a copy of the Despatch Register showing transmitting copy of the order of the Appellate Tribunal to the 2nd

appellant. However, there is no prima facie proof that the 2nd appellant received the communication such as Postal Acknowledgment. In the absence of such prima facie proof, I am constrained to accept the contention of the learned Senior Counsel for the appellants that the impugned order was not communicated, so much so, the sixty days'' time envisaged by Section 54 of the Act has never commenced to run.

8. The learned Standing Counsel for the contesting respondents 1 to 3 submitted that the period of limitation should be considered to have commenced at least from the date on which the criminal proceedings commenced against the appellants and culminated in the conviction of the appellants on 25-7-2012. Indeed, the appellants must have been aware about the orders of the appellate Tribunal. Otherwise, in view of the orders in W.P. No. 22039 of 2002, they would have resisted the trial of the two criminal cases. At the same time, as rightly submitted by the learned Senior Counsel for the appellants, the limitation does not commence to run from the date of information or knowledge about the disposal of the appeal by the Appellate Tribunal but commences from the date of communication. I am afraid that I cannot read the words "date of communication" occurring in Section 54 of the Act as date of information or knowledge. Consequently, the second appeal cannot be considered to be barred by limitation. The petition deserves to be disposed of recording that there was no delay for condonation and that the appeal can be considered for admission considering that there was no delay in filing the second appeal. This petition is disposed of accordingly.

C.M.S.A. No. 47 of 2012:

9. This second appeal is filed u/s 54 of the Foreign Exchange Regulation Act, 1973 (the Act, for short) although the Memorandum of Grounds of Second Appeal reads that it was an appeal u/s 35 of the Act. u/s 54 of the Act, appeal lies to the High Court on questions of law only from a decision or order of the appellate Tribunal passed under Sections 52(3) or 52(4) of the Act.

10. It may be noticed that unlike Section 100 of the CPC (CPC, for short), where a second appeal lies upon a substantial question of law, Sec. 54 of the Act envisages that a question of law in juxtaposition with substantial questions of law as a condition precedent for an appeal. Sri P.S.P. Suresh Kumar, learned Standing Counsel for the contesting respondents 1 and 3 (Enforcement Directorate or ED, for short), submitted that the second appeal did not show any question of law for adjudication and that the very appeal therefore deserves to be dismissed. The Supreme Court recently considered the parameters of substantial question of law in Union of India (UOI) Vs. Ibrahim Uddin and Another, The Supreme Court referred with approval to the views of Salmond on Jurisprudence (12th edition, page 69). Salmond dealt with the question of fact and law in Topic 10 of Chapter 1 of Book I. However, the niceties of the question of law, substantial question of law, mixed question of fact and law and pure question of fact perhaps fall for consideration at the time of the disposal of the appeal. Prima facie, ground No. 16 in the

Memorandum of Grounds of Second Appeal consists of various questions of law. Consequently, ADMIT.

C.M.S.A.M.P. No. 123 of 2012:

11. The appellants sought for suspension of the operation of the order of the Appellate Tribunal for Foreign Exchange, New Delhi, Camp Court at Hyderabad (the appellate Tribunal, for short), dated 15-9-2008, in Appeal No. 206 of 2002 arising from the orders of the Deputy Director, Enforcement Directorate, dated 24-9-2011. Interim stay was initially granted till 31-10-2012. The same is in force. However, both sides chose to argue the stay application on merits. Hence, this order.

12. The 1st appellant is a Company incorporated in 1994. The Company was established to set up a Unit for manufacturing Telephone Cable Insulation Compound (TCIC). The 2nd appellant is/was its Managing Director at the relevant time.

13. The appellants entered into an agreement with a Switzerland based Company, by name M/s. BUSS AG, Basel, on 12-8-1994 for supply of machinery styled as BUSS KO - KNEADER PLANT TYPE MDK/E 100-SSD 140 on a consideration of Swiss Francs 1,624,400 the approximate value of which, in the Indian currency is Rs. 470 lakhs. The agreement was to the effect that 15% of the value of the machinery at an approximate cost of Rs. 69 lakhs was to be paid in advance and that the balance of 85% of the cost of the machinery was payable through 10 half yearly instalments over a period of 5 years. The 1st appellant was to furnish Differed Payment Guarantee from any Indian bank for the balance cost of the machinery. These facts are undisputed and indeed are the basis for the claim by the Reserve Bank of India.

14. It is the case of the appellants that Andhra Bank agreed to provide the Differed Payment Guarantee through a letter dated 02-02-1995. The 1st appellant subsequently obtained approval of the Ministry of Finance for the import of the machinery against the Differed Payment Guarantee agreement. The Exchange Control Department, Reserve Bank of India, sanctioned credit for import of the machinery. On the basis of the approval of the Reserve Bank of India and on the agreement to sanction of the Differed Payment Guarantee by the Andhra Bank, the 1st appellant remitted a sum of Rs. 69,02,727/- in foreign exchange to the Swiss Company constituting the advance payment of 15%. The appellants contended that the Andhra Bank however subsequently backed out and refused to provide Differed Payment Guarantee facility. The appellants informed the Swiss Company about the inability of the appellants to fulfill the agreement dated 12-8-1994 and requested the Swiss Company to return the advance paid. The Swiss Company declined to do so on the ground that the machinery was customary ordered and customary manufactured, that the Swiss Company in fact spent more money than the advance paid for the manufacture of the machinery and that it therefore would not be able to return the advance paid.

15. In the meanwhile, a Show-cause Notice was issued on 22-01-1998 directing the appellants to comply with Sections 8(3) and 8(4) of the Act. As the appellants did not comply with the Show-cause Notice, the Deputy Director of Enforcement Directorate took up the case. Subsequently, the Deputy Director, Enforcement Directorate, passed orders on 24-9-2001 and the Appellate Tribunal passed orders on 15-9-2008. This is the functional factual matrix around which, the rival claims emanate.

16. Sri D.V. Seetharama Murthy, learned Senior Counsel for the appellants, contended that there was no violation of the provisions of the Act and that the orders of the Deputy Director, Enforcement Directorate and the Appellate Tribunal are bad and are liable to be set aside. On the other hand, Sri P.S.P. Suresh Kumar, learned Standing Counsel for the contesting respondents 1 and 3, submitted that the appellants patently violated Sections 8 and 8(4) of the Act and that the penalty imposed was consequently justified.

17. The appellants allegedly violated Sections 8(3) and 8(4) of the Act. For the purpose of brevity and clarity, the two relevant provisions are produced below:

8. Registration on dealing in foreign exchange.--

(1) ...

(2) ...

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a moneychanger, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a moneychanger.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.

18. The learned Senior Counsel for the appellants contended that the appellants did not violate Section 8(3) of the Act and that the question of drawing any presumption

u/s 8(4) of the Act does not arise where there was no violation u/s 8(3) of the Act. Section 8(4) of the Act presumes that a person had not been able to use the foreign exchange for the purpose for which he had acquired the same in the event goods are not bought for the value representing foreign exchange acquired within a reasonable time. Indeed, this is a presumption. In view of the clause "unless the contrary is proved", occurring in Section 8(4) of the Act, the presumption u/s 8(4) of the Act is a rebuttable presumption.

19. The learned Senior Counsel for the appellants contended that Section 8(4) of the Act has no application unless Section 8(3) of the Act operates. u/s 8(3) of the Act, when any person had been permitted conditionally to acquire foreign exchange, such a person shall use the foreign exchange for the purpose for which the same was acquired and that if it comes to the notice of such person that the acquired foreign exchange cannot be used for the purpose for which it has been acquired, he shall refund the same by way of sale to an authorised dealer or money-changer. Such sale shall be within 30 days from the date on which the person who acquired the foreign exchange comes to know that the foreign exchange could not be used for the purpose for which it was acquired.

20. The learned Senior Counsel for the appellants contended that in the present case, it is not as though the appellants failed to utilize the acquired foreign exchange for the purpose for which it was acquired. The Reserve Bank of India issued Permit No. EC.HY.IMP. 4/20/94-95, dated 26-10-1994. The date of expiry was 25-12-1994. The purpose of the remittance was "advance remittance for import of plant and machinery" from M/s. BUSS AG, Basel, Switzerland. No other conditions were attached to the permit of remittance in foreign exchange. It is contended by the learned Senior Counsel for the appellants that the remittance was an advance for import of machinery and that the advance was already paid.

21. I may pass for a moment to accept the contention of the learned Standing Counsel for the contesting respondents that more or less every fact is admitted by the appellants. Thus, the facts are not in dispute. That the appellants obtained foreign exchange constituting 15% of the cost of the machinery is admitted, that the Andhra Bank initially agreed to provide Differed Payment Guarantee and has declined to do so on a later date are not in dispute. The appellants failing to sell the foreign exchange to an authorised dealer, much less within 30 days from the date on which the Andhra Bank went back is also not in dispute. This petition deserves to be judged in this background, however, keeping in mind that it is a stage of hearing an interlocutory application but not the final hearing of the main case.

22. The learned Senior Counsel for the appellants contended that the advance was not the entire cost of the machinery and that Sections 8(3) and 8(4) of the Act cannot be invoked directing the appellants to produce the machinery or sell back the foreign exchange received by it where the foreign exchange constituted only 15% of the cost of the machinery. He contended that the appellants fulfilled the purpose for

which the foreign exchange was obtained by paying the same to the Swiss Company and that it is not a case where the foreign exchange is lying in the hands of the appellants for the appellants to sell the same to any authorised dealer. He contended that the appellants acted bona fide in sending the foreign exchange to the Swiss Company and that there would not have been any trouble or controversy had Andhra Bank not gone back on its promise to issue Differed Payment Guarantee.

23. The learned Standing Counsel for the contesting respondents 1 and 3 submitted that when the Deputy Director, Enforcement Directorate, passed orders on 24-9-2001, the appellants did not bother to honour the award and that despite the nonchalant attitude of the appellants, the contesting respondents 1 and 3 nevertheless accorded an opportunity to the appellants to comply with the statutory requirement by issuing an Opportunity Notice on 19-12-2001. Admittedly, the appellants had not responded to the Opportunity Notice dated 19-12-2001. Only thereafter, prosecution was initiated against the appellants under Sections 56 and 57 of the Act. The claim of the learned Standing Counsel for the contesting respondents 1 and 3 is that it is irrelevant for the Reserve Bank of India as to why the foreign exchange had not been utilized properly. He submitted that the failure of the Andhra Bank to stand by its earlier word, if any, is a private affair between the Andhra Bank and the appellants and that inasmuch as the controversy is between the Reserve Bank of India on the one side and the appellants on the other side, the only question is whether the appellants complied with Section 8(3) of the Act or otherwise. He submitted that there cannot be any doubt that the appellants violated the provisions of Section 8(3) of the Act as they neither imported machinery nor deposited the foreign exchange received by it.

24. I consider that this is the controversial question which shall be decided in the second appeal. Did the appellants violate Section 8(3) of the Act ? Can the appellants justify not selling the foreign exchange received by them in terms of Section 8(3) of the Act, assuming that the appellants could not go ahead with the agreement dated 12-8-2004 with M/s. BUSS AG, Basel, Switzerland, on account of the failure of Andhra Bank to stand by its earlier agreement ? If so, whether the failure of the Andhra Bank to provide for differed payment guarantee justifies the appellants to exonerate them from liability u/s 8(3) of the Act ?

25. These are the substantial questions which deserve to be considered in the main appeal. While such important questions are pending adjudication in the appeal, it would be just and proper to stay the operation of the orders of the appellate Tribunal in Appeal No. 206 of 2002. It may be noticed that the appellants enjoyed stay during the pendency of the appeal. The learned Standing Counsel for the contesting respondents 1 and 3 indeed is correct in stating that there was no stay from 15-9-2008 on which date, the appeal was disposed of by the Appellate Tribunal. However, where there was stay till the date of the disposal of the appeal and this

second appeal assails the order in the first appeal, it would be rather just and proper to stay further proceedings in pursuance of the order in appeal pending disposal of the second appeal. Added to it, substantial and important questions of law arise for adjudication in this case. Thus, prima facie case for grant of stay is made out.

26. Where the appellants enjoyed stay during the pendency of the appeal before the Appellate Tribunal, balance of convenience would be met if such stay is continued during the pendency of the present appeal. The appellants, consequently, have made out balance of convenience in their favour. At any stage, non-granting of stay may not cause irreparable loss, where the appellants were penalized to a tune of Rs. 3,00,000/-, which cannot be treated to be a considerable amount for an industry capable of raising more than Rs. 69 lakhs (for payment in the shape of foreign exchange). Consequently, I consider that no damage much less irreparable loss would occur to the cause of the appellants even if interim stay is not granted. However, where the appellants have made out prima facie case and the balance of convenience is in favour of the appellants, it would be just and proper to stay the operation of the further proceedings pursuant to the orders in Appeal No. 206 of 2002 on the file of the Appellate, Tribunal. Accordingly, the appellants are granted stay of the operation of the orders in Appeal No. 206 of 2002 on the file of the Appellate Tribunal pending disposal of the Civil Miscellaneous Second Appeal. No costs.