

M/S. BHARAT CARPETS

v.

DIRECTOR, ENFORCEMENT DIRECTORATE
(Criminal Appeal No. 38 of 2003)

JULY 7, 2008

[DR. ARIJIT PASAYAT AND G.S. SINGHVI, JJ.]

Foreign Exchange Regulations Act, 1973: s.18(2) and (3) – Non-Repatriation of export proceeds – Penalty – Imposition of – Held: Penalty rightly imposed as no material put forth by appellant-exporter for having taken any steps for repatriation of the amount involved – s.18(3) creates rebuttable legal presumption against exporter whenever prescribed period expires without repatriation of export proceeds that the requisite steps to obtain repatriation were not taken .

A notice was issued against the appellant-Firm and partners to show cause as to why action be not taken against them for non realization of export proceeds. The authorities were not satisfied with the reply of appellant and imposed penalty of Rs.80,000 on the appellant firm and Rs.10,000 each on the 2 partners. Hence the present appeal.

Dismissing the appeal, the Court

HELD: Appellants had placed no material whatsoever as to what steps were taken for repatriation of the amount involved. According to s.18(2) of Foreign Exchange Regulations Act, 1973, the exporter is required to repatriate the sale proceeds within the prescribed period of six months. S.18(3) creates a rebuttable legal presumption against the exporter whenever the prescribed period expires without repatriation of the export proceeds to the effect that exporter had not taken requisite steps to obtain repatriation of the payment. [Para 7] [109-C,D & E]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 38 of 2003

From the final Judgment and Order dated 30.1.2002 of the Appellate Tribunal for Foreign Exchange, New Delhi in Appeal No. 372 of 1999

B Indra Makwana for the Appellant.

M. Chandrasekharan, A.S.G. Manish Pushkarna, Vikas Sharma, Sanjeev Bhardwaj and B. Krishna Prasad for the Respondent.

C The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of the Appellate Tribunal for Foreign Exchange, New Delhi (in short the 'Tribunal'). In the appeal before the Tribunal challenge was made by three appellants i.e. the present appellant and two of its partners to the adjudication order dated 15.6.1999 passed by the Assistant Director, Enforcement Directorate imposing total penalty of Rs.1,00,000/- i.e. Rs.80,000/- against the appellant firm and Rs.10,000/- each against the two partners for alleged violation of Section 18(2) and 18(3) of the Foreign Exchange Regulation Act, 1973 (in short the 'Act').

2. Background facts in a nutshell are as follows:

F A Show Cause Notice (in short 'SCN') No.T-4/340/D/94-SCN/DD/8097 to 8100 dated 30.9.1994 was issued to Appellant M/s Bharat Carpets (a Partnership Firm) and two of its partners, i.e., (1) Abdul Rasheed; and (2) Abdul Waheed asking them to show cause why adjudication proceedings under Section 51 of the Act should not be held against them for non-realisation of export proceeds under GR(1) PP No. AA-677411 dated 2.4.1992 of the value equivalent to Indian Rs.2,18,833/- and (2) GP-576895 dated 13.5.1991 of the value equivalent to Indian Rs.2,93,338/-, i.e. a sum total of Rs.5,12,171/-, within the stipulated period of six months or the extended period of RBI, if any, in contravention of the provisions of Section 18(2)

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read with 18(3) of the Act and Notification No.F/67/EC/73-1 & 3 A
both dated 1.1.1974.

The noticees gave written reply to the SCN stating that with regard to GP No. 576895 dated 13.5.1991 they have been continuously in correspondence with the authorized banker for the remittance of export proceeds from foreign buyer and final reply will be submitted after receipt of the same. With regard to other GR/PP No.AA-676411 dated 2.4.1992, it was replied that the shipment through Japanese Airlines was dispatched to the original consignee, i.e., M/s Rose Carpets. But within a short period but before delivery (either of goods or Bill of Lading); the appellants came to know the weak financial position of consignee; so they requested through their banker to intimate the foreign bank not to deliver documents of title of goods to M/s Rose carpets but to change such document delivery to new buyer M/s Roman -Inc., 100, Park Plaza Drives. The authorized dealer/banker instead of sending the requested communication dated 16/17th April, 1992, to the correct office of the foreign bank, sent it to a wrong place and that is why the title documents were wrongly handed over despite clear instructions to the contrary whereby the consignment was delivered to original consignee M/s Rose Carpets. In this way, the appellants cannot be held guilty of the non-realisation of the export proceeds of PP No. AA-677411 dated 2.4.1992 inasmuch as that the wrong delivery, despite appellant's timely action, cannot only be attributed to the authorized dealer against whom the appellants are pursuing their remedies before the Civil Court and Consumer Disputes Redressal Forum. Because the financially weak original consignee did not pay, the appellants cannot be held guilty of the violations. B
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3. The stand of the appellants before the Tribunal was that consignment exported initially in the name of M/s Rose Carpets was directed to fresh/new consignee M/s Roman Inc. and intimation to this effect was given to the authorized banker well within time to hand over the Bill of Lading to the new consignee. It is because of the misfeasance and malfeasance or negligence G
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A of the authorized banker, the Bill of Lading was handed over to
old consignee enabling him to take delivery of the goods. The
appellants changed the consignee because of the anticipated
non-payment by M/s Rose Carpets due to its weak financial
position, and the negligence of the authorized banker cannot
B be a factor against the appellants and their conduct cannot be
faulted. It was also contended that the exported goods never
reached the intended consignee and, therefore, goods in ques-
tion cannot be termed as exported goods under Section 18 of
the Act. Further, the initiation of legal proceedings against M/s
C Rose Carpets, whose financial position is too bad, can be of
little use except to add to the total loss of the appellants who
had already suffered badly.

4. On the other hand, learned counsel for the respondent
contended that the appellants exported the goods in the year
D 1991-92 and what to say of repatriation of export proceeds
within six months the export proceeds have not been repatri-
ated even long after. No extension from RBI was obtained ei-
ther, so the impugned order is perfectly correct and requires to
be maintained.

E 5. So far as the consignment dated 2.4.1992 is concerned,
the Tribunal accepted the stand of the appellants before it and
exonerated them. It was noted, however, by the Tribunal that the
appellants did not place any material so far as the repatriation
of Rs.2,93,338/- relating to goods exported by PP- 576895
F dated 13.5.1991 and no arguments was advanced in the facts
of the individual liability of the partners. In that view of the mat-
ter, the Tribunal held that the appellants have been rightly held
as guilty for having committed violation of Section 18(2) of the
Act. The penalty amount was, however, reduced to Rs.60,000/
G - so far as present appellant is concerned. Since deposit of
Rs.80,000/- had been made by it, the remaining amount of
Rs.20,000/- was directed to be refunded.

6. In support of the appeal, learned counsel for the appel-
H lants submitted that because of the deficiency in services of the

bank, action has been taken and, therefore, the appellant should not have been held guilty.

7. Learned counsel for the respondent on the other hand submitted that so far as the goods sent by GR/PP No. AA 677411 dated 2.4.1992 is concerned, material was placed by the appellants to show that it had taken for all possible score. Therefore, the Tribunal has held that the appellants are not guilty. So far as the other consignment is concerned, as rightly noted by the Tribunal, no material was placed relating to repatriation of the amount involved. He, therefore, submitted that no interference is called for. Additionally, it is submitted that the appellant had an alternative remedy under Section 54 of the Act which has not been availed and, therefore, the appeal should be dismissed. We need not go into the question relating to the alternative remedy. Appellants had placed no material whatsoever as to what steps were taken for repatriation of the amount involved. According to Section 18(2) without general or special permission of the Reserve Bank of India, the exporter is required to repatriate the sale proceeds within the prescribed period of six months. Section 18(3) creates a rebuttable legal presumption against the exporter whenever the prescribed period expires without repatriation of the export proceeds to the effect that exporter had not taken requisite steps to obtain repatriation of the payment.

8. Above being the position, we find no merit in the appeal which is accordingly dismissed.

D.G.

Appeal dismissed.