

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition (Civil) No.1793/2008**

% **Date of Decision: 19.08.2009**

Virender Kumar Yadav Petitioner
Through Ms. Sangita Bhayana, Advocate.

Versus

Union of India & Ors. Respondents
Through Ms. Rajdipa Behura, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

ANIL KUMAR, J.

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1. The petitioner seeks setting aside of order dated 31st January, 2008 passed by the Appellate Tribunal for Foreign Exchange in appeal No.132/2007 directing the appellant to deposit 20% of the penalty amount within 30 days from the date of receipt of the said order.

2. The brief facts to comprehend the disputes are that the penalty was imposed on the petitioner by the Special Director of Enforcement on the allegation that the partner of the petitioner Sh. Hardeep Singh @ Babu and another person Sh. Raman B. Gupta, Sh. Sunil Gill and Sh. Rajiv Kumar and Sh. Deepak were illegally acquiring and transferring

foreign currency out of India to bring into India gold, silver and other dutiable goods.

3. The allegation of the petitioner is that the respondents alleged that the goods were purchased by Raman B.Gupta in Hongkong from Sh.Atul P.Shah and consequently Sh.Raman B.Gupta and his others have acted contrary to the provisions of Section 8(1) and 8(2) of FERA, 1973.

4. The petitioner has contended that statements under Section 40 of FERA, 1973 were recorded of Sh.Raman B.Gupta and Sh.Atul P.Shah. Some incriminating documents are also alleged to have been recovered from the residence of Sh.Raman B.Gupta, Sh.Atul P.Shah and from the residence of Smt.Subhadra, mother-in-law of Sh.Atul P.Shah.

5. The further assertion of the petitioner is that on the basis of an alleged show cause notice which was never received by him after adjudication, the respondent no.3 has imposed a penalty of Rs.1,25,00,000/- each on the petitioner and others by order dated 26th March, 1997.

6. The petitioner further pleaded that he had filed a W.P(C) No.12940/2006 titled Virender Kumar Yadav v. Union of India and Ors seeking quashing of the order dated 26th March, 1997 imposing a

penalty of Rs.1,25,00,000/- pursuant to the adjudication proceedings under Section 8(1) and 8(2) of FERA, 1973. The plea taken by the petitioner in that writ petition was that he became aware of the penalty imposed upon him when the proceedings were initiated under Section 57 and 49(3) and (4) of Foreign Exchange Management Act.

7. The writ petition filed by the petitioner being W.P (C) No.12940/2006 was disposed of by this Court by order dated 22nd August, 2007 holding that there was no proof (acknowledgement Card etc) evidencing service of order on the petitioner. The counsel for the respondent had also agreed to supply a copy of the order dated 26th March, 1997 and pursuant thereto the petitioner was directed to prefer an appeal before the Appellate Tribunal, Foreign Exchange in terms of Section 19 of FEMA within two weeks of the receipt of the order which was to be dispatched by the respondents.

8. The petitioner thereafter filed the appeal under Section 52 of Foreign Exchange Regulation Act, 1973 read with Section 19 of Foreign Exchange Management Act, 1999 against the order No.T-4/55-B/94 dated 26th March, 1997 bearing the file No.41-43/B/SDE/PXA/97 passed by the Special Director of Enforcement, Mumbai along with an application under Section 52(2) Second Proviso read with Section 19(1) Second Proviso for exemption from depositing the penalty amount. Along with the appeal the petitioner also filed the copies of the medical

certificate of his wife and copies of the income tax return for the year 2005-2006; 2006-2007 and for the year 2007-2008.

9. The application for dispensation from depositing the penalty amount was disposed of by order dated 31st January, 2008 directing the petitioner to deposit 20% of the penalty amount holding that the plea of the counsel for the petitioner that the adjudication order is solely based on retraction confessional statement of the petitioner without any independent corroboration, will be considered when the matter will be heard at length at the time of final disposal. It was held that the adjudication order is not ex facie bad and petitioner had not bothered to file any reply to the show cause notice and did not join the adjudication proceedings. Regarding the financial hardship to the petitioner it was held that undue hardship is a matter within the special knowledge of the petitioner and he had to establish the same and a mere assertion will not be sufficient. The Appellate Tribunal while disposing of the application of the petitioner for dispensation with the pre deposit also held that for a hardship to be 'undue' it must be shown that the particular burden shall be out of proportion to the nature of the requirement itself and the benefit which the applicant would derive from compliance with it. In the circumstances, it was held that 'undue' is more than just hardship and it would mean excessive hardship or a greater hardship than the circumstances warrant. Without considering the documents filed by the petitioner to show that directing petitioner to

deposit Rs.25 lakhs will not cause undue hardship to the petitioner and without considering whether the petitioner has a prima facie case in his favor or not, the application has been disposed of.

10. The said order is impugned by the petitioner on the grounds that the Tribunal has not even noted the pleas and contentions of the petitioner correctly. It is contended that no confessional statement was given by the petitioner which was retracted later on and on the basis of which he could be convicted. It is contended that the retracted confessional statement of a co-accused could not be the basis for imposing penalty on the petitioner especially when there are no such documents detailed in the adjudication order, which would corroborate the statement and implicate the petitioner. It is contended that on the basis of the statement of Raman B.Gupta, co-accused, the penalty could not be imposed on the petitioner. Regarding the alleged confessional statement of Sh.Atul P.Shah it is contended that he has not implicated petitioner in his confessional statement.

11. The learned counsel for the petitioner has categorically contended that it was never asserted before the Appellate Tribunal that petitioner had made the confessional statement which was retracted by him. In the circumstances, it is contended that the Appellate Tribunal has passed the order mechanically without considering whether there is a prima facie case against the petitioner or not. Relying on the copy of the

appeal filed before the Appellate Tribunal it is contended that the plea has been recorded by the Appellate Tribunal is contrary to the grounds raised by the petitioner in the grounds of appeal.

12. The petitioner has also challenged the order on the ground that though the documents were filed to show the undue hardship, however, except discussing as to what is the undue hardship, the facts of the case of the petitioner has not been applied by the Appellate Tribunal. Even according to the order passed undue hardship had to be established by the petitioner and “undue” means something more than just hardship. The petitioner has contended that his monthly income is Rs.10,000/- per month which is based on the Income Tax returns filed by the petitioner and the petitioner has also filed the documents pertaining to medical status of his wife. In the circumstances, it is contended that if he is earning only Rs.10,000/- per month, he cannot deposit Rs.25 lakhs especially considering that the money is required by him on account of the medical condition of his wife and in the circumstances petitioner has discharged his burden and taking these facts into consideration, the inevitable inference is that the direction to deposit Rs.25 lakhs to the petitioner will cause excessive hardship and though the petitioner did not get the show cause notice and could not reply to the same and there is no material against him which will implicate him and will saddle him with the liability to pay Rs.1,25,00,000/-.

13. It is also contended on behalf of the petitioner that he discharged his burden by averring facts in respect of 'undue hardship' and producing the documents regarding undue hardship caused to him which have not been considered at all by the Tribunal. Even the respondents have failed to rebut the same and in the circumstances no other inference could be drawn other than that the direction to the petitioner to deposit Rs.25 lakhs shall cause 'undue hardship' to him.

14. The petition is contested by the respondent and a counter affidavit of Sh.R.K.Rawal, Assistant Director of Enforcement Directorate has been filed. It is contended that the documents seized from the premises of the co-noticees, Sh.Raman B.Gupta, Mr.Atul P.Shah and Smt. Subhadraaben show that there is sufficient material to connect the participation of the petitioner in committing and abetting the offences. It is further contended that sufficient opportunities were given for personal hearing, however, no written submissions were filed by the petitioner. Regarding the retraction of the statement by Sh.Raman B.Gupta it is contended that the retraction is of no value as there is sufficient corroborative material available to implicate the petitioner.

15. It is further asserted by the respondent that the accused was sent show cause notice by post which he failed to accept and it was served by Rule 10(c) of the Adjudication Process and Appeal Rules, 1974.

16. I have heard the learned counsel for the parties and have perused the petition, counter affidavit and the documents filed by the parties. This Court by order dated 22nd August, 2007 in W.P(C) No.12940/2006 Virender Kumar Yadav v. Union of India has already held that the order of adjudication was not received by the petitioner and consequently the respondents were directed to give the copy of the order. Regarding the service of show cause notice also although it is contended that there is some evidence, however, despite a specific plea taken by the petitioner in his appeal before the Appellate Tribunal that show cause notice was not served on him nothing has been produced by the respondent to show that the show cause notice was duly served on the petitioner.

17. From the grounds of appeal raised before the Appellate Tribunal, it is also apparent that the ground taken by the petitioner is that he could not be implicated and penalized on the basis of the statement of a co-accused which was also retracted when there is nothing to corroborate his statement even if it is held that retraction is of no consequence. However, what are those documents is not clear either from the order of the adjudicating authority nor the respondents have referred to the documents in their counter affidavit nor the respondents have produced the documents to show prima facie the implication of the petitioner and justification for penalizing the petitioner with a penalty of Rs.1,25,00,000/-.

18. The order of the Tribunal also proceeds on the assumption that the petitioner had made a confessional statement which was retracted which could be considered at the time of final adjudication of the appeal. The order has been passed mechanically by the Appellate Tribunal without referring to the grounds taken by the petitioner to come to a prima facie conclusion whether a prima facie case has been made out by the petitioner or not. The learned counsel for the respondent is also unable to show as to how the petitioner could be penalized on the basis of an alleged confessional statement of petitioner which was never made by him. The Tribunal, therefore, has proceeded on a wrong assumption that the petitioner had made a confessional statement. In the circumstances, the Tribunal has not considered whether the petitioner has a good prima facie case in his favour or not.

19. From various judicial pronouncements on this issue, the position, which emerges is that the Tribunal while considering any application for waiver of deposit is to take into account firstly the existence of a prima facie case. In case, it is found that a party has a very strong prima facie case, and/or where the errors in the impugned order are writ large on the record, in such a case, it would be competent for the Court in the exercise of its jurisdiction to grant waiver of pre-deposit since in such a case requiring a pre deposit itself would amount to “undue hardship”. There is no denying of the fact that while dealing

with the application for stay it is neither desirable nor proper for the Tribunal or any other authority to embark upon a detailed inquiry to find out whether the stand of the appellant before it is correct or not because expression of any opinion on merits at that juncture, without full-fledged hearing and consideration of entire material, is likely to cause prejudice to either side. But at the same time, the authority concerned is required to consider whether with reference to the material placed before it, a prima facie case for grant of stay is made out or not and the balance of convenience lies in whose favor.

20. What is a prima facie case? It is well settled that it refers to an arguable or triable case. The Tribunal once it comes to the conclusion on perusal of the pleadings, documents and on hearing of the parties that there is a good prima facie case to be considered, the next step in exercise of discretion is determining the quantum of waiver to be granted. In determination of the quantum of waiver, factors, such as, balance of convenience, financial hardship of the parties, its capacity to pay or secure the amount and irreparable loss are to be considered. The said discretion is to be exercised in accordance with well settled principles for exercise of judicial discretion.

21. Some judicial decisions where similar provisions namely Section 129-E of the Customs Act, 1962, Section 35F of Central Excise Act, 1944 have been considered by the Courts are laid down.

(i) In *VIP Sea Foods v. Collector of Customs* reported at 1989 (44) ELT 606 (Kerala), it was held that “Tribunal has not correctly appreciated the various relevant factors, which ought to be considered in exercising the discretion under Provision to Section 129-E. It was held that the petitioner had a prima facie case for consideration on merits. It was held that petitioner’s financial circumstances undoubtedly constitute a relevant factor.

(ii) Reference can next be made to a decision of the Division Bench in *Keramos v. CEGAT, New Delhi* reported at 2003(153) ELT 301 (Delhi). The Court while dealing with similar provision in Section 35F of Central Excise Act, 1944 noted as under:

“The provisions are mandatory in nature and failure to deposit the amount in question renders the appeal incompetent. The factors to be kept in view while considering an application of waiver of deposit are well established. These are a prima facie case in favor of the applicant, the balance of convenience qua deposit or otherwise, irreparable loss, if any, to be caused in case waiver is not granted and safeguarding of public interest.”

(iii) Reference may also be made to a decision of the Supreme Court in *Mehsana Dist. Co-Op Milk P.U. Ltd. v. Union of India* (Civil Appeal No. 2668/2003 decided on 31st March, 2003). The

Court while dealing with waiver of pre-deposit under proviso of Section 35 of the Central Excise Act, 1944 noted as under:

“By the impugned order, the appellants have been directed to deposit an amount of Rs. 30 lakhs by way of pre-deposit. The reasoning given in support of such order is wholly unsatisfactory. The Appellate Authority has not at all considered the prima facie merits and has concentrated upon the prima facie balance of convenience in the case. The Appellate Authority should have addressed its mind to the prima facie merits of the appellants’ case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors.”

22. In the facts and circumstances it cannot be denied that the petitioner has a good prima facie case. The Tribunal has not even appreciated the contentions of the petitioner. On consideration of the pleas and contentions raised in the appeal, it will be inevitable to hold that the petitioner has a prima facie case. There is no confessional statement of the petitioner. The petitioner has not retracted his statement. The confessional statement by the co-accused implicating petitioner was retracted by him. But there are no documents shown by the respondent which will corroborate the statement of co-accused so far as it pertains to implication of petitioner. The other co-accused also retracted his confessional statement, but in his confessional statement he had not implicated the petitioner.

23. The petitioner has produced his income tax returns to show that his earnings are not more than Rs.10,000/- per month. The petitioner in the circumstances has discharged his initial burden. The plea of the learned counsel for the respondent that it cannot be believed that the petitioner who is running a restaurant at a prominent place will earn only Rs.10,000 per month. The respondent could have got ascertained as to how many employees are working for the petitioner and how big his restaurant is or some other facts to rebut the allegation of the petitioner, which has not been done. In the circumstances, on mere denial by the respondent, the income tax returns filed by the petitioner cannot be ignored. The petitioner has also produced medical record of his wife to show that he requires considerable amount of money for her treatment. In the circumstances if the petitioner is directed to deposit 25 lakhs of rupees, by any yardstick it will cause 'undue hardship' to the petitioner. The Tribunal has elaborated what is 'undue hardship' but failed to apply the facts of the present case to infer whether 'undue hardship' shall be caused to the petitioner or not. If the petitioner is directed to deposit the amount, in the present facts and circumstances and considering the prima facie case in favor of petitioner, it still cause irreparable loss to him. Therefore it has to be inferred that the impugned order directing petitioner to deposit rupees 25 lakhs as a condition for hearing his appeal is vitiated and is liable to be set aside.

24. Having come to the conclusion that the impugned order is vitiated, two options are available at this stage i.e either (i) the matter of stay be remitted back to the Tribunal for reconsideration and (ii) to direct the Tribunal to hear the appeals of the petitioners on merits on such terms and conditions as may be deemed fit by this Court. To cut short the life of litigation, this Court would prefer the latter course.

25. Accordingly, having regard to the facts and circumstances of the case the order dated 31st January, 2008 passed by the Appellate Tribunal for Foreign Exchange in appeal No.132/2007 directing the appellant to deposit 20% of the penalty amount within 30 days from the date of receipt of the said order is set aside and the writ petition is allowed and the petitioner is granted complete dispensation from the deposit of any amount of penalty for hearing of his appeal. The appeal shall be heard by the Tribunal on merits without petitioner depositing any amount in the facts and circumstances of the case.

26. The writ petition and the application seeking interim relief stand disposed of in the above terms. There will be no order as to costs.

August 19, 2009
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ANIL KUMAR, J.