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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **LPA 203/2009 & CM No. 6626/2009**

NIMESH SUCHDE PROP.

M/S. SIDDHARTH POLYMERS

..... Appellant

Through: Mr. Ajay Majithia and Mr. Rajesh
Kumar, Advocates.

versus

UOI & ORS.

..... Respondents

Through: Ms. Rajdipa Behura & Mr. Deepak
Anand, Advocates.

Reserved on : July 13, 2009

Date of Decision: July 22, 2009

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the digest? Yes

J U D G M E N T

MANMOHAN, J :

1. Present Letters Patent Appeal has been filed by the appellant challenging the order dated 03rd March, 2009 whereby appellant's writ petition for waiver of pre-deposit has been dismissed. Learned Single Judge has held that the appellant has failed to make out a strong prima facie case to enable him to seek relief under Article 226 of the Constitution.

2. Briefly stated the material facts of this case are that appellant was issued a show cause notice dated 16th October, 2001 under Sections 8(3) and 8(4) of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA, 1973"). In the show cause

notice, it was stated that though the appellant had in 1998-1999 imported marble slabs/blocks from M/s. Arfound Trading Establishment, Dubai, Vital Pharmaceuticals, London, D. Martino, Silvestro, Italy etc. at a declared value of US\$ 3,49,220.80, the Custom department on examination of the said imports had loaded the value of the said marbles at the rate of US\$ 300 per metric tonne as the said marbles were restricted items under the Exim Policy. Thus, according to the show cause notice, the enhanced value of the said consignment for the purpose of import duty was US\$ 4,74,219.40 and accordingly the appellant's firm had not used the foreign exchange for the purpose for which it had been granted to it without any previous, general or special permission of the RBI. The Special Director, Enforcement at Mumbai passed an ex parte order dated 29th January, 2002 wherein he held as under:

“From the above, it would be clear that the imports of marble made by the noticee firm M/s. Siddharth Polymers was not covered by any proper import licence as the said marbles were restricted items under Exim Policy prevailing at the relevant time. Secondly, it is seen that the noticee firm has not produced any valid import licence before the Customs. Thus, it is apparent that the imports of marbles were totally illegal without any import licence. Once this aspect is proved, it is equally proved that the noticee firm has not utilized the foreign exchange for the specific purpose it was granted. Thus, the charges for the contravention of Sec. 8(3) r/w 8(4) ibid against the noticee Sh. Nimesh Suchde, Prop. of M/s. Siddharth Polymers are proved beyond a reasonable doubt, as he has failed to produce the requisite permission of the RBI in the matter. I therefore, hold him guilty for the aforesaid contravention.

Now in exercise of powers conferred on me u/s 50 ibid, I impose a penalty of Rs.20,00,000/- (Rupees Twenty lakhs only) on Sh. Nimesh Suchde, Prop. of M/s. Siddharth Polymers for the aforesaid contravention”

3. The Appellate Tribunal for Foreign Exchange dismissed the appellant's application for dispensation of pre-deposit of penalty and further observed that if the penalty amount was not deposited within 30 days, the appellant's appeal before the Appellate Tribunal would also stand dismissed. It is pertinent to mention that the Appellate Tribunal based its conclusion on the ground that the goods imported were

allegedly of higher value and, therefore, it was automatic that the kind and quality of imported goods were different.

4. As mentioned hereinabove, even the appellant's writ petition filed against the order of Appellate Tribunal was also dismissed by learned Single Judge of this Court.

5. Learned counsel for appellant submitted that there was a strong prima facie case in appellant's favour for waiver of pre-deposit as Sections 8(3) and 8(4) of FERA, 1973 were inapplicable to the facts of the present case.

6. Per contra, learned counsel for respondent submitted that in the present case penalty had been levied as the appellant had indulged in under-invoicing of its goods.

7. While dealing with cases of waiver of pre-deposit under Section 19 of FEMA, the Supreme Court in the case of ***Monotosh Saha v. Special Director, Enforcement Directorate & Anr.*** reported in **2008(11) SCALE 603** has observed as under:

"11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the realization of penalty". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the realization of penalty have to be kept in view.

12. As noted above there are two important expressions in Section 19(1). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be 'undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word “undue” adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.”

8. As the present case pertains to Sections 8(3) and 8(4) of FERA, 1973, the same are reproduced hereinbelow for ready reference:

“8. Restrictions on dealing in foreign exchange.

XXX

XXX

XXX

(3) Where any foreign exchange is acquired by any person, other than an authorized dealer or a money-changer, 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 authorized dealer or to a money-changer.

(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 maybe, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.”

9. On a perusal of the file, we are prima facie of the opinion that no independent finding of under valuation of goods has been arrived at by the Adjudicating Officer. In fact, Adjudicating officer has reached the said conclusion only on the basis of the order passed by the Custom Authorities, which in turn is based on the premise that goods were imported by the appellant without any import licence. However, the admitted position before us is that goods had been imported after taking due permission from the Reserve Bank of India. Consequently, we have grave doubts as to the applicability of Sections 8(3) and 8(4) of FERA, 1973.

10. It is a settled position of law that if sustainability of adjudicating order is itself in doubt then dispensation, on ground of undue hardship should be granted. Moreover, as M/s. Siddharth Polymers has been closed long ago and the appellant's financial position is stated to be precarious, we are of the view that a case of undue financial hardship has also been made out. We are, accordingly, of the view that appellant has made out a strong prima facie case in its favour and consequently we grant waiver of pre-deposit as prayed for by the appellant. With the aforesaid observations, present appeal is allowed. Needless to say that our observations would not prejudice any of parties at the time of final disposal of the appellant's appeal before the Appellate Tribunal.

**MANMOHAN
(JUDGE)**

CHIEF JUSTICE

JULY 22, 2009
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