

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 4311/2007

Reserved on : 22nd March 2010

Decision on : 21st April 2010

DR. S.RAMAKRISHNA

..... Petitioner

Through: Mr. C. Mukund with
Ms. Firdouse Q. Wani, Advocate.

versus

ENFORCEMENT DIRECTORATE & ORS.

..... Respondents

Through: Ms. Rajdipa Behura with
Mr. C.S.Chauhan, Advocate.

CORAM: JUSTICE S.MURALIDHAR

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| 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 Digest? | Yes |

JUDGMENT
21.04.2010

1. The challenge in this petition is to an order dated 22nd August 2002, passed by the Special Director, Enforcement Directorate (ED) informing the Petitioner that the adjudication proceedings in respect of the Memo. No. T-4/2-BAN/2000 (SCN I & II) dated 28th February 2000 and 27th March 2001 would be held in accordance with the procedure laid down in the Rules of the Adjudication Proceedings and Appeal Rules, 1974 (hereinafter referred to as 'APAR') and accordingly fixing the case for personal hearing before him on 12th September 2002. Also challenged are all the consequential proceedings upon passing of the aforementioned order including the adjudication order dated 17th February 2005, passed by the Special Director finding the Petitioner guilty and levying a penalty of Rs. 10 lakhs for contravention of

Section 18(2) and 18(3) of the Foreign Exchange Regulation Act, 1973 (FERA) and the orders dated 7th February 2006 and 19th January 2007, passed by the Appellate Tribunal of Foreign Exchange (‘Appellate Tribunal’).

2. On 30th August 1999 a search was conducted by the officers of the ED at the Chennai residence-cum-office of the petitioner who was the Chairman of M/s Suri Computers Pvt. Limited, Chennai and M/s Sita Electronics, Hyderabad. Summons were issued to him on that date and his statement was recorded. He was subsequently arrested and taken to Hyderabad by the officers of the ED. On 31st August 1999 his statement was recorded again at Hyderabad. He was again arrested but subsequently released on bail.

3. On 28th February 2000, the aforementioned show cause notice was issued to him by the Special Director, ED requiring the petitioner to explain why adjudication proceedings under Section 51 FERA should not be held against him for alleged violation of Section 18(2) read with Section 18(3) of FERA. On 23rd December 2000, the Petitioner replied to the show cause notice. On 27th March 2001 a second show cause notice was issued, requiring the Petitioner to explain why adjudication proceedings should not be held against him for alleged violation of Section 9(1)(c) of FERA. The Petitioner replied to the second show cause notice on 19th August 2001.

4. In the meanwhile, the Foreign Exchange Management Act, 1999 (FEMA) was enacted. Under Section 49(3) of FEMA no court could take cognizance of an offence under FERA and no Adjudicating Officer could take notice of any contravention under Section 15 of FERA “after expiry of the period of

two years from the date of the enactment” of the FEMA. In other words, after 31st May 2002 the Adjudicating Officer could not take notice of any contravention under Section 51 of FERA.

5. On 22nd August 2002 the impugned communication was addressed to the petitioner fixing the date of hearing before the Special Director on 12th September 2002 at Chennai. Thereafter the adjudication order was passed on 17th February 2005, levying a penalty of Rs. 50 lakhs on the Petitioner. The appeal filed by the petitioner before the Appellate Tribunal came up for hearing on 2nd January 2006 when the question of pre-deposit of the penalty amount was considered. By the impugned order dated 7th February 2006, the Appellate Tribunal required the Petitioner to furnish an unconditional bank guarantee of Rs. 25 lakhs in favour of the Special Director, ED within 45 days as a condition to the appeal being taken up for hearing. The Petitioner's application for the modification of the above order was dismissed and the appeal itself was dismissed by the Appellate Tribunal on 19th January 2007. According to the Petitioner this was done despite his demonstrating his lack of financial capacity to comply with the order dated 07.02.2006 passed by the Appellate Tribunal.

6. Before this Court it has been contended by the Petitioner that the proceedings against the Petitioner under FERA were initiated only on 22nd August 2002, i.e., after the expiry of the 'sunset' period on 31st May 2002 in terms of Section 49(3) of FEMA. Therefore, the proceedings against the Petitioner for the alleged contravention of FEMA were without the authority of law. Although this point was not urged before the Adjudicating Officer, it

was submitted that since it was a question of jurisdiction, it could be raised at any stage.

7. By an order dated 30th May 2007 while noting the above said submission, it was directed by this Court that no coercive steps will be taken against the petitioner pursuant to the impugned order.

8. This Court has heard the submissions of Mr. C. Mukund, learned counsel for the Petitioner and Ms. Rajdipa Behura, learned counsel for the ED.

9. Mr. Mukund seeks to draw a distinction between the “initiation” of adjudication proceedings and their “commencement” under the FERA after the Adjudicating Officer forms a prima facie view and an anterior stage when he only issues a show cause notice under Section 51 FERA, requiring the notices to show cause as to why adjudicating proceedings should not be held against him. In other words, he submits that there are two stages in the adjudication proceedings under the FERA.

10. Referring to the APAR, and in particular Rule 3, it is submitted that in the instant case, the show cause notice dated 28th February 2000 did not signify the ‘commencement’ of proceedings under the FERA. It was only the communication dated 22nd August 2002 which signified the commencement of proceedings. He submits that the words “shall take notice of any contravention under Section 51 of the repealed Act” appearing in Section 49(3) FEMA signified the ‘commencement’ of proceedings before the Adjudicating Officer in terms of Rule 3(3) of APAR. Rule 3(1) of the APAR

on the other hand could at best be considered to be an 'initiation' of proceedings. He makes a reference to the 11th Report of the Standing Committee of Finance (1998-99) on the Bill preceding FEMA; the minutes of the 32nd sitting of the Standing Committee on Finance held on 9th December 1998 and the Rajya Sabha Debates held on 8th December 1999 on the Bill preceding the FEMA, and submits that the expectation was that all possible steps leading to the commencement of proceedings under the FERA would be completed during the sunset period expiring on 31st May 2002. The intention of the Parliament was not to permit commencement of proceedings under FERA after that date.

11. Mr. Mukund relies on the judgment of the Supreme Court in *S.K. Sinha v. Videocon International Ltd.* (2008) 2 SCC 492 where it was explained that the word "commencement" connotes "take notice of judicially", and that in the context of Section 49 (3) it involves the formation of a prima facie opinion by the court where there was sufficient ground for proceeding in the matter. He also placed reliance on the judgment of this Court in *Bachraj Bengani v. A.K. Roy* 2009 IV AD (Del) 333.

12. Learned counsel appearing for the ED submitted that the proceedings in the instant case commenced with the issuance of the show cause notice under Section 51 of the Act on 28th February 2000 as regards offence under Section 2(1) of FERA and the show cause notice dated 27.03.2001 as regards the contravention of Section 9(1)(c) of FERA. Both show cause notices were preceded by the formation of a prima facie opinion of the ED and were issued

well before the expiry of the sunset period in terms of Section 49(3) of FEMA. Therefore, there was no illegality committed in proceeding with the matter under the FERA and the Rules made thereunder. She refers to the decision of the Single Judge of the Madras High Court in *Deputy Director, Enforcement Directorate, Madras v. Naina Maricair AIR 1990 Madras 22*.

13. In order to appreciate the above contention, reference may be made first to Section 50 and 51 of the FERA. Under Section 50 if any person contravenes any of the provisions of the FERA [Section 13(1)(a), 18A and 19(1)(a)], he shall be liable to such penalty not exceeding five times the amount involved in the contravention or Rs.5,000/- whichever is more as may be adjudicated by either the Director of Enforcement or any other officer of the ED not below the rank of Assistant Director. Section 51 of FERA reads as under:-

“51. Power to adjudicate.- Power to adjudicate. For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.”

14. In order to effectuate the above powers of adjudication, the Central

Government has made operational the APAR, 1974 with effect from 1st January 1974. Rule 3 of the APAR which is relevant for the present case reads as under:-

“3. Adjudication proceedings. – (1) In holding an inquiry under section 51 for the purpose of adjudging under section 50 whether any person has committed contravention as specified in section 50, the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why adjudication proceedings should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of offence alleged to have been committed by him.

(3) If, after considering the cause, if any, shown by such person, the adjudicating officer is of the opinion that adjudication proceedings should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his lawyer or after authorized representative.

(4) On the date fixed, the adjudicating officer shall explain to the person proceeded against or his lawyer or authorized representative, the offence alleged to have been committed by such person indicating the provisions of the Act or of the rules, directions or orders made thereunder in respect of which contravention is alleged to have taken place.

(5) The adjudicating officer shall then give an opportunity to such person to produce such documents

or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to a future date; and in taking such evidence the adjudicating officer shall not be bound to observe the provisions of the Indian Evidence Act, 1872.

(6) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

(7) If, upon consideration of the evidence produced before the adjudicating officer, the adjudicating officer is satisfied that the person has committed the contravention, he may, by order in writing, impose such penalty as he thinks fit in accordance with the provisions of section 50:

Provided that the notice referred to in sub-rule (1), and the personal hearing referred to in sub-rules (3), (4) and (5) may, at the request of the person concerned, be waived.”

15. It appears from the reading of Rule 3(1) that even prior to holding an enquiry under Section 51 the adjudicating officer shall “in the first instance, issue a notice to such person” asking him to show cause “why adjudication proceedings should not be held against him”. This notice under Rule 3(1) of APAR is, therefore, even prior to the commencement of adjudication proceedings. When a reply is received from the noticee then the Adjudicating Officer is expected to consider the said reply and form an “opinion” whether adjudication proceedings should be held. Upon formation of such opinion, the Adjudicating Officer shall under Rule 3 (3) “issue a notice fixing a date

for the appearance of that person either personally or through his lawyer.....”

16. In the instant case, the wording of the show cause notice dated 28th February 2000 is indicative of the fact that this was a notice relatable to Rule 3 (1) of the APAR. After the preamble clause the notice reads as under:

“Now therefore, the said M/s Suri Computers Pvt. Ltd. Hyderabad and S/Shri Dr. S. Ramakrishna, Chairman, S. Gunaranjan Managing Director, S. Prem Kumar and Rajiv B. Desai, Directors of the said company and M/s Sita Electronics Ltd., Hyderabad and Director of the said company are required to show case in writing in duplicate within 30 days of the receipt of this Memorandum, why Adjudication Proceedings as contemplated in Section 51 of the Foreign Exchange Regulation Act, 1973 should not be held against them for the aforesaid contravention.

In issuing this Memorandum, reliance is placed, inter-alia, on the documents listed in the Annexure to this Memorandum. The originals of the said documents will be made available to the notices of this Memorandum or their Advocate or other authorised representative for inspection, if they so desire at the office of the Assistant Director, Enforcement Directorate, Hyderabad(III Floor, Damyanthi Chamber Adarsh Nagar, Hyderabad) after fixing an appointment with him.

Their attention in this connection is also invited to Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 whereby in case it is decided to hold Adjudication Proceedings personal hearing of the case could be waived at their request. In case they prefer the case to be disposed of on the basis of available evidence, they may intimate their preference, so that without requiring their personal attendance or the attendance of lawyer or other

authorised representative.”

17. Likewise in the notice dated 27th March 2001, it has been stated as under:-

“This Memorandum to issued under Rule (3)(1) of the Adjudication Proceedings and Appeal Rules, 1974 read with sub-section 3&4 of Section 49 of FEMA, 1999. In case it is decided to hold adjudication proceedings personal hearing of the case could be waived at their request. In case they prefer the case to be disposed of on the basis of available evidence they may intimate their preference, so that if adjudication proceedings are to be held, the case may be decided without requiring their personal attendance or the attendance of lawyer or other authorised representative.”

18. There can be no manner of doubt, therefore, that both notices dated 28th February 2000 and 27th March 2001 were notices relatable to Rule 3(1) of APAR which was the first of the two stages involved in the adjudication proceedings under FERA, 1973. If at this stage, after considering the replies to these notices the adjudicating officer was of the opinion that no further proceedings were called for, he could drop the proceedings. However, after considering such reply, if the adjudicating officer formed an opinion that adjudicating proceedings should be held then under Rule 3(3) of APAR he shall fix a date for appearance of the noticee. What should happen thereafter at the hearing is set out in Rules 3(4) to 3(7). The final adjudication order would thereafter be passed in terms of Rule 3(7) of APAR.

19. Turning now to the impugned communication dated 22nd August 2002, it

seems that this was relatable to Rule 3(3) of APAR since it informed the petitioner of the date of hearing of the adjudication proceedings, arising from the notices dated 28th February 2000 and 27th March 2001. This is evident from unnumbered paras 1 and 4 of the said communication dated 22nd August 2002 which read as under:-

“This is to inform you that after considering the cause shown by you in reply to the above mentioned memorandum, the Special Director of Enforcement is of the opinion that Adjudication proceedings as contemplated in Sec. 51 of the FERA, 1973 should be held against you in accordance with the procedure laid down in Rules of the Adjudication Proceedings and Appeal Rules, 1974 and has accordingly fixed this case for personal hearing before him on 12.9.2002 at 12 Noon in the office of this Directorate at 9/1, Madras Bank Road, Behind India Garage, Bangalore.

4. Your attention in this connection is invited to the provisions to Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 whereby in case it is decided to hold Adj. Proceedings personal hearing of the case could be waived at your request. In case, you prefer to waive personal hearing you may intimate accordingly so that the case may be decided without your personal attendance on the basis of available evidence.”

20. The question that arises is whether the Adjudicating Officer took “notice of the contravention” under Section 51 of FERA when the notices dated 28th February 2000 and 27th March 2001 were issued by him under Rule 3(1) of APAR or he took such “notice of contravention” only when he issued the

letter dated 22nd August 2002, fixing the date of hearing of the adjudication proceedings on 28th February 2000 under Rule 3(3) of APAR. In other words, when does an Adjudicating Officer “take notice of a contravention” under Section 51 of FERA?

21. Section 49 (3) of FEMA reads as under:-

“(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and **no adjudicating officer shall take notice of any contravention** under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.” (emphasis supplied)

22. The attempt by learned counsel for the Petitioner here is to draw a parallel between a court taking “cognizance of an offence” and an adjudicating officer taking “notice” of any contravention. He submits that the principle of *ejusdem generis* must apply and the latter act must take colour from the former. Therefore, according to him, first as no ‘cognizance’ can be said to be taken by a court till it has applied its mind to the materials on record, no adjudicating officer can take ‘notice’ of a contravention till he considers the reply and forms an opinion in terms of Rule 3(3) APAR.

23. In *Videocon International Ltd.*, the Supreme Court had occasion to interpret the word “cognizance” occurring in Section 49 (3) of FEMA. In the said case, the Chief Enforcement Officer, ED filed a criminal complaint against Videocon International Ltd. on 24.05.2002 for alleged contravention of Sections 18(2) & (3), 68(1) and 56(1) of FERA. This was one week prior

to the expiry of the sunset period. On 24th May 2002 itself the Magistrate took cognizance of the offence and issued summons to the accused. On 3rd February 2003, the Magistrate issued process requiring the respondent to appear before the court and answer the charge under the FERA. The High Court held that cognizance could be said to have been taken by the Magistrate only when he ordered issuance of process on 3rd February 2003. Since this was beyond the expiry of the sunset period, the proceedings were quashed. Reversing the High Court's judgment, the Supreme Court observed that the word "cognizance" was not defined in the Criminal Procedure Code, 1973 (CrPC). In its ordinary meaning, it signified become "aware of". In para 20 it was explained by the Supreme Court as under (SCC @ p. 499):

"20. "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance."

24. Thereafter in para 24 in *Videocon International Ltd.*, it was explained that "initiation of proceedings", dealt with in Chapter XIV of Cr.PC was different from "commencement of proceedings" covered by Chapter XVI. It was observed as under (SCC @ p. 500-01):

"From the above scheme of the Code, in our judgment, it

is clear that “Initiation of Proceedings”, dealt with in Chapter XIV, is different from “Commencement of Proceedings” covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.”

25. In para 36 in *Videocon International Ltd.*, it was explained that “taking cognizance of offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings”.

26. There are three distinct stages highlighted by the Supreme Court in *Videocon International Ltd.* The first is the Magistrate taking judicial notice of the offence “with a view to initiating proceedings”. Therefore, taking notice judicially of the offence is equated to “taking cognizance”. In para 36 of *Videocon International Ltd.*, it was explained that “taking cognizance of an offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings”. Therefore, following ‘cognizance’, the proceedings were ‘initiated’ under Chapter XIV. Then comes the third stage of “commencement” of judicial proceedings. This is explained from the observation in para 24 of *Videocon International Ltd.*, where it was observed that “without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a

Magistrate under Chapter XVI”.

27. If one were to compare the above Scheme of CrPC with the Scheme laid out in Rule 3 APAR, then the following three stages are apparent:

- (i) The Adjudicating Officer takes notice of the contravention and issues a notice in the first instance under Rule 3(1). This is similar to taking ‘cognizance’.
- (ii) After considering the reply, the Adjudicating Officer ‘initiates’ the proceedings under Rule 3(3) when he fixes a date for hearing;
- (iii) On the date fixed under Rule 3(4) the Adjudicating Officer ‘commences’ the proceedings.

28. Therefore, in the light of the law explained by the Supreme Court in *Videocon International Ltd.*, it appears to this Court that when the notices dated 28.02.2000 and 27.03.2001 were issued, the Adjudicating Officer had taken “notice of the contravention”.

29. In *R. Sivarajan v. Deputy Director Enforcement Directorate 1987 (12) ECC 256*, a learned Single Judge of the Madras High court was considering whether the proceedings under Section 51 of FERA “had not been initiated within a period of one year within the date of seizure”. It was held that that “the enquiry under Section 51, it is already stated, is criminal in nature” and could be stated to have commenced only with the issue of notice under sub-rule (3) of Rule 3 APAR. It was then concluded that the conclusion reached

at the enquiry held in pursuance of the notice under sub-rule (3) is the ‘satisfaction’ of the Adjudicating Officer that is referred to in Section 51. It was held that “at the stage of sub-rule (1), no proceeding under Section 51 could be said to have been initiated.”

30. This Court does not find the above observations to be helpful to the petitioner in the present case. In the first place, the said court was not considering the question of interpretation of Section 49 (3) of FEMA. The wording of Section 51 which requires the Adjudicating Officer to be “satisfied that the person has committed contravention” is different from Section 49(3) where the requirement is that he should “take notice of any contravention under Section 51.” Section 49(3) FEMA does not require any satisfaction to be arrived at by the Adjudicating Officer. In any event, in ***Deputy Director, Enforcement Directorate v. Naina Maricair AIR 1990 Madras 22***, a Division Bench of the Madras High Court overruled the judgment of the learned Single Judge in ***R. Sivarajan***. The Division Bench referred to the judgment of the Kerala High Court in ***Bhaskaran Pillai v. Enforcement Directorate 1978 Ker LT 436*** and held that “adjudication proceedings under Section 51 of the Act commenced, when show cause notice is issued by the Adjudicating Officer under Rule 3(1).”

31. The considered view of this Court, is that in the instant case, the Adjudicating Officer took notice of the contravention when he issued the notices on 28th February 2000 and 27th March 2001 to the Petitioner. This was within the sunset period. Therefore, the proceedings were not bad in law on that score.

32. Consequently, there is no error committed by the Adjudicating Officer in communicating on 22nd August 2002 that the proceedings would continue under FERA, 1973. The contention of the learned counsel for the Petitioner on this aspect is accordingly rejected.

33. The challenge to the validity of the orders dated 7th February 2006 and 7th January 2007, passed by the Appellate Tribunal requires to be considered. The plea urged by the Petitioner is essentially one of financial hardship. It is seen in the instant case that the adjudication order, as regards the contravention of Section 18(2) and (3) of FERA, 1973 levied a penalty of Rs. 10 lakhs on the Petitioner. As regards the second show cause notice dated 27th March 2001 a penalty of Rs. 20 lakhs was levied on the petitioner for contravention by Suri Computers Pvt. Limited of Section 9(1)(c) FERA, 1973, another Rs. 20 lakhs for the contravention by M/s Sita Electronics Pvt. Ltd. under Section 9(1)(c). Therefore, the total penalty amount was Rs. 50 lakhs. The Petitioner was by the order dated 7th February 2006 directed by the Appellate Tribunal to furnish a bank guarantee to the extent of 50% of the penalty amount, i.e., a sum of Rs. 25 lakhs. It is pointed out that M/s Sita Electronics Pvt. Ltd., of which the petitioner was Chairman, suffered huge losses and even the State Bank of India which had a decree in its favour for the dues owed by the said company could not execute the decree. It is also pointed out that in the criminal case, the petitioner was acquitted of the offence under Section 8(1) FERA and for the violation of Section 18(2) FERA the company was fined Rs. 5,000/-. The Petitioner was punished till the rising of the court. It is submitted that in the application for modification of the order dated 7th February 2006, the Petitioner had pointed out that M/s

Sita Electronics Pvt. Ltd. was in liquidation. As regards Suri Computers Pvt. Limited he pointed out that he had resigned as its Managing Director on 29th October 1989 itself. The circumstances under which the petitioner could not arrange a bank guarantee were explained as under:-

“6. That the appellant, despite its best efforts, could not arrange Bank Guarantee for the 50% of the penalty amount because any Bank **stand as Guarantor for anyone in the Following circumstances:**

i) if one is desirous of Bank Guarantee from the bank then he should have working capital limit with the Bank and the desirous person should give margin money to the 25%-30% of the amount for which the bank has to furnish Guarantee.

ii) When the desirous person is not having working Capital limit with Bank then the desirous person has to give 100% margin money in the form of Fixed deposit in order to procure Bank guarantee.

7. That the appellant is not in position to give any margin money to the Bank as the appellant is running into big losses and does not have any liquidity in order to fulfill the bank's requirement for getting Bank Guarantee. **No Bank is prepared to stand as Guarantor for a company which is in Bad Financial Shape.”**

34. In the liquidation proceedings undertaken against M/s Sita Electronics Pvt. Ltd., the High Court of Andhra Pradesh observed that the Petitioner was not involved in the day to day affairs of that company. All the company's properties had been disposed of in 1996 itself.

35. This Court finds that in the order dated 19th January 2007, the Appellate Tribunal has observed that “the appellants have not shown any bonafide

efforts” in complying with the order for furnishing the bank guarantee. The observations do not appear to be justified in view of what was specifically pleaded and the application filed before the Appellate Tribunal, portions of which have been extracted hereinabove. Moreover, in the order dated 7th February 2006, the Tribunal itself has observed that a dismal picture of the financial condition was projected. However, it went on to observe that:

“it is difficult to believe that the appellants with such an acquisitive instinct cannot make pre-deposit of a partial amount of the penalty. An American Legal Researcher Mr. Derret has recorded on economic projection that in Indian society when records of Government hospitals and schools are looked into, the income of Rs.500 is generally shown by every patient or parent depicting a dismal picture to avail of unprovided benefits. The position of appellant in Appeal No.2/06 is also projected having a bad finance.”

36. In the considered view of this Court, the above observations are based on surmises and conjectures and are not borne out by the records of the case. A decision directing the furnishing of a bank guarantee of Rs. 25 lakhs cannot possibly be based on such surmises and conjectures. The Appellate Tribunal erred in approaching the matter casually without adverting to the specific pleadings. Consequently, this Court holds that the Petitioner has been able to demonstrate lack of financial capacity to furnish bank guarantee to the tune of Rs. 25 lakhs as a pre-condition to his appeal being entertained.

37. Considering the facts and circumstances, therefore, both the orders dated 7th February 2006 and 19th January 2007, passed by the Appellate Tribunal

are hereby set aside. Since the appeal has been dismissed only on the ground of failure to comply with the order dated 7th February 2006 and since that does not involve any substantial question of law for which a statutory appeal may be filed, this Court directs that subject to the petitioner depositing, within a period of four weeks from today, a sum of Rupees one lakh, the Petitioner's appeal will be heard by the Appellate Tribunal. The said appeal will now be placed for hearing before the Appellate Tribunal on 1st June 2010 or any day thereafter when the Appellate Tribunal sits. On that date, if the Petitioner is not able to produce proof of having deposited a sum of Rupees one lakh within a period of four weeks from today, his appeal before the Appellate Tribunal will automatically stand dismissed.

38. The writ petition is disposed of in the above terms with no orders as to costs. A copy of this order be sent to forthwith to the Appellate Tribunal for Foreign Exchange.

S. MURALIDHAR, J.

21st APRIL, 2010
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