

**HIGH COURT OF TRIPURA
AGARTALA**

W.P(C) NO.463 OF 2006

Shri Swapan Kr. Saha,
S/o Late Debendra Chandra Saha,
R/O Gandhighat,
P.S. West Agartala,
Distt. West Tripura.

...Petitioner.

- Versus -

1. The Union of India,
Represented by the Secretary,
Ministry of Finance,
Government of India,
New Delhi.

2. The Ld. Appellate Tribunal for Foreign Exchange,
Ministry of Law, Justice and Company Affairs,
Government of India, 4th Floor, B-Wing,
Janpath, Indian Oil Buildings,
New Delhi-1.

..... Respondents.

W.P(C) NO.464 OF 2006

Sri Bijoy Kumar Saha,
S/o Late Ramesh Chandra Saha,
Resident of Jogendranagar,
P.S. East Agartala,
Distt. West Tripura.

...Petitioner.

- Versus -

1. The Union of India,
Through the Secretary,
Ministry of Finance,
Government of India,
New Delhi.

2. The Appellate Tribunal for Foreign Exchange,

Ministry of Finance,
Government of India, 4th Floor, 'B'-Wing,
Janpath, (Indian Oil) Bhawan,
Janpath, New Delhi-110 001.

3. Addl. Commissioner of Customs & Central Excise (Adjudicating Authority),

(F.E.R.A.), Enforcement Directorate,
C.G.O. Complex, 3rd M.S.O. Building,
6th Floor, Kolkata-700 064.

..... Respondents.

**BEFORE
THE HON'BLE MR.JUSTICE S.C. DAS**

For the Petitioner : Mr. D.K. Biswas,
in WP(C) no.463 of 2006 Advocate.

For the petitioner
in WP(C) no.464 of 2006 : Mr. P.K. Ghosh, Advocate.

For the Respondents : Mr. A. Roy Barman, CGC.

Date of hearing & : **19.06.2015.**
delivery of judgment and
order.

Whether fit for reporting : **NO**

JUDGMENT & ORDER(ORAL)

Both the writ petitions are taken up together for disposal at the order stage itself on the submission of learned counsel of both sides.

2. Heard learned counsel Mr. D.K.Biswas for the petitioner in WP(C) 463 of 2006 and learned counsel Mr. P. K. Ghosh for the petitioner in WP(C) 464 of 2006.

3. Also heard learned CGC, Mr. A. Roy Barman for the respondents in both the writ petitions.

4. Common fact and point of law involved in both the cases and hence, this common order is passed for disposal of both the writ petitions.

5. By filing the writ petitions, the petitioners challenged a common order, dated 27.10.2006, passed by the appellate tribunal for Foreign Exchange, New Delhi in appeal Nos. 1293 of 2004 and 1294 of 2004 (Annexure-3 to the writ petition) where-under the appellate tribunal directed both the writ petitioners to deposit 10% of the penalty amount in respect of their respective appeal.

6. The brief fact is that the Additional Commissioner of Customs and Central Excise (Adjudicating authority, FERA) imposed penalty of Rs.1,60,00,000/- (rupees one crore sixty lakh) in the case of the petitioner Swapan Kumar Saha and 1,65,00,000/- (rupees one Crore sixty five lakh) in the case of the petitioner Bijoy Kumar Saha under the Foreign Exchange Regulation Act,1973. The petitioners preferred appeal before the appellate authority under the Foreign Exchange Regulation Act along with a separate application for stay of operation of the order contending that their financial condition is bad and it will

cause undue hardship to them if they require to pay any amount out of the penalty and according to them the penalty was unjustly imposed. On the basis of such prayer of the petitioners, the appellate tribunal on 14.09.2005 passed an order directing the petitioners to deposit 5% of the penalty amount in each appeal within 45 days from the date of passing order with further direction that failing to do so, the appeal will be dismissed on that ground alone. Both the petitioners challenged that order by filing WP(C) No.417 of 2005 and 418 of 2005 and both the writ petitions were disposed of by a common order passed by a single Judge of the then Gauhati High Court date 28.10.2005 with the following observation:-

“In view of the factual matrix discussed above and the submissions of the learned counsels, both the writ petitions are disposed of with a direction to the second respondent to review the impugned order if the same has been passed without obtaining and considering the verification report about financial status of the appellants-petitioners in terms of the second proviso to Section 52 of the said Act and the order dated 11.5.2006.

It is brought to my notice that the period of 45 days allowed by the learned Appellate Tribunal to deposit 5% of the penalty expires today. In view of this order the petitioners shall not be required to deposit any amount till the learned Appellate Tribunal passes necessary order in compliance with the above order.

Registry shall send a copy of this order directly to the learned Appellate Tribunal by today itself.”

7. In view of the above order, the respondents were supposed to consider the report about financial status of

the petitioners as per Second Proviso to Section 52 of the Foreign Exchange Regulation Act.

8. It is an admitted position that the respondents thereafter collected the financial status report of both the petitioners from the Income Tax Department. A copy of the report in respect of the petitioner Swapan Kumar Saha of WP(C) 463 of 2006 has been annexed as Annexure-2 and a similar copy in respect of the petitioner Bijoy Kumar Saha of WP(C) 464 of 2006 has been annexed as Annexure-12(a).

9. It is the grievance of the petitioners that the appellate tribunal without considering that financial status report submitted by the Income Tax authority in respect of the petitioners, passed the impugned order dated 27.10.2006 in the appeals preferred by the petitioners directing them to deposit 10% of the penalty amount and that order was totally arbitrary and passed with some extraneous consideration.

10. The relevant portion of the order passed by the appellate tribunal dated 27.10.2006 reads as follows:-

“In the above background of financial conditions of the respective appellants it is felt that the appellants are well off. It is common knowledge in India that Balance Sheets of proprietorship/ partnership/ contain some manipulated figures whereby huge black money market has generated. Moreover, the appellants have not come out themselves of their correct financial position. They have not even filed their bank account statements till now. Therefore, no undue economic hardships

will be caused to them if they are required to pay 10% of the penalty amount in respective appeal. Looking towards this and scheme of the Act appellants are directed to make pre deposit of 10% of the penalty amount in each appeal within 30 days from today failing which these appeals will be dismissed on this ground alone.”

11. A bare reading of the above order makes it clear that the appellate tribunal examined the financial status report collected from the Income Tax Department in respect of the petitioners but did not consider the contents of the report and applied own consideration that the reports may be manipulated and thereby black money is generated in the market. It has also been observed that the appellants have not come out themselves of their correct financial position.

12. It is expected that the appellate tribunal would pass the order based on certain materials and not on the personal ideas or experience of the Presiding Officer of tribunal. While the High Court has passed the order to verify the report about the financial status and while the tribunal was also pleased to collect the reports from the Income Tax authority in respect of financial status of the petitioners, the tribunal would take into consideration the report collected from the Income Tax authority in its letter and spirit and pass an appropriate order. While the same tribunal initially passed the order directing the appellants i.e. the petitioners herein to pay 5% of the penalty,

surprisingly after collecting the financial status report, the tribunal has increased the amount to 10% whilst the financial status report speaks otherwise. Even the tribunal's order does not speak it clearly about the financial status report collected by the tribunal before passing impugned order. Annexure-2 to WP(C) 463 of 2006 shows that the Income Tax Officer of Ward No.2, Agartala reported that the annual income of the petitioner Swapan Kumar Saha for the year 2003-2004 was Rs.2,08,670/-; for the year 2004-2005 was Rs.1,31,930/- and for the year 2005-2006 was Rs.1,40,900/-. The balance sheet of the petitioner Swapan Kumar Saha has been submitted for the assessment year 2005-2006 showing assets and properties valued at Rs. 7,57,981.73/-.

13. Similarly Annexure-12(a) of WP(C) 464 of 2006 in respect of the petitioner Bijoy Kumar Saha shows the report submitted by Income Tax Officer, Ward No.1 dated 28.08.2006 the annual income for the year 2003-2004 was Rs.78,040/- ; for the year 2004-2005 was Rs.80,480/- and for the year 2005-2006 was Rs.54,170/-. The balance sheet shows total amount of assets of Rs.537,650/-.

14. Learned counsel Mr. Biswas and Mr. Ghosh appearing for the petitioners submitted that the report of financial status collected by the respondents itself shows

that the petitioners have no financial status to pay 10% of the total penalty amount for consideration of their appeal and the order impugned passed by the appellate authority arbitrarily without considering the financial status report and hence, it is liable to be interfered and quashed.

15. Learned CGC, Mr. Roy Barman, on the other hand, submitted that the Additional Commissioner of Central Excise while exercising power under Foreign Exchange Regulation Act imposed a huge penalty of more than a crore definitely based on certain materials collected during inquiry. He has contended that the petitioners have a right to challenge that order before superior tribunal and the appeal has been filed which has to be admitted on payment of a part of the penalty and what amount should be paid is the discretion of the appellate tribunal and the Court may not interfere normally in the discretion of the tribunal. He has emphatically submitted that this Court in exercise of power under Article 226 of the Constitution need not interfere in the tribunal's discretion and that it may encourage the financial wrong doers.

16. Second Proviso to sub Section (2) of Section 52 of the Foreign Exchange Regulation Act, 1973 prescribes thus-

“Provided further that where the Appellate Board is of opinion that the deposit to be made will

cause undue hardship to the appellant, it may, in its own discretion, dispense with such a deposit either unconditionally or subject to such conditions as it may deem fit.”

17. In view of the above provision, the appellate tribunal is expected to consider the financial status of an appellant while directing them to make payment of a part or percentage of the penalty amount. Admittedly, the tribunal initially passed an order directing the appellants (petitioners) to pay 5% of the penalty and thereafter, the High Court passed the order to collect financial status of the petitioners and then to pass an appropriate order. The tribunal collected financial status report of the petitioners from the Income Tax authority and such financial status do not show that the petitioners have such financial position to make payment of such an amount as decided by the tribunal by its order dated 27.10.2006 and it will definitely cause undue hardship on the petitioners. While the tribunal has failed to exercise its jurisdiction in a judicious manner and while it is exercised to the detriment of the interest of a citizen and not in accordance with law, definitely this Court has jurisdiction to interfere in it and to set it at right. No doubt it is a discretion of the tribunal to decide as to what amount should be fixed but every discretion has to be exercised with reasons and while the discretion has been capriciously exercised, it cannot stand in the eye of law.

18. I, therefore, think it proper to interfere in the order dated 27.10.2006 and accordingly, the order is set aside and quashed and the tribunal (respondent No.2) is directed to reconsider the reports of the financial status collected from the Income Tax authority and to pass appropriate order in respect of the deposits to be made by the appellants, i.e. the petitioners in respect of their appeal before the appellate tribunal.

19. The writ petitions accordingly stand disposed of.

20. Parties to bear their own costs.

JUDGE.