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

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Judgement delivered on: 11.02.2015

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W.P.(C) 1055/2015

BATool DAWOOD

..... Petitioner

versus

ADDITIONAL DIRECTOR, DIRECTORATE OF
ENFORCEMENT, GOVT. OF INDIA

..... Respondent

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W.P.(C) 1063/2015

SHAHNAZ DAWOOD

..... Petitioner

versus

ADDITIONAL DIRECTOR, DIRECTORATE OF
ENFORCEMENT, GOVT. OF INDIA

..... Respondent

+

W.P.(C) 1311/2015

SPACE AGE POLYMERS PVT. LTD.

..... Petitioner

versus

ADDITIONAL DIRECTOR, DIRECTORATE OF
ENFORCEMENT, GOVT. OF INDIA

..... Respondent

+

W.P.(C) 1312/2015

MISS BILQUIS BANO

..... Petitioner

versus

ADDITIONAL DIRECTOR, DIRECTORATE OF
ENFORCEMENT, GOVT. OF INDIA

..... Respondent

Advocates who appeared in the case:

For the petitioners: Mr Ajay G. Majithia, Advocate
For the respondent: Mr Sanjay Jain, ASG with Mr Kirtiman Singh, Ms Pallavi Shali & Mr Waize Ali Noor, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

WP(C) No. 1055/2015 & CM Nos. 1874/2015 & 1875/2015

WP(C) No. 1063/2015 & CM Nos. 1884/2015 & 1885/2015

WP(C) No. 1311/2015 & CM Nos. 2312-2314/2015

WP(C) No. 1312/2015 & CM Nos. 2317-2319/2015

1. The captioned writ petitions seek to assail a common order passed by the Appellate Tribunal for Foreign Exchange (in short the Tribunal) dated 08.12.2014. The judgement of the Tribunal dated 08.12.2014, ruled on the prayer made by the petitioners in their respective appeals to waive the pre-deposit of penalty imposed by the Adjudicating Authority. The appeals preferred before Tribunal were numbered as: Appeal No. 219/2010, 220/2010, 221/2010 & 222/2010.

1.1 To be noted, the first appeal, i.e., Appeal No. 219/2010, was filed by the company, i.e., petitioner in WP(C) No. 1311/2015, while the remaining three appeals were filed by the three directors of the said company, i.e., Space Age Polymers Pvt. Ltd. (in short SAPPL).

1.2 The Adjudicating Authority, vide order dated 22.10.2010, has imposed penalty of Rs. 23 lacs on SAPPL, and gone on to impose a separate penalty of Rs. 20 lacs each on the remaining petitioners. The impugned order notes that there was a fourth director, Sh Asgar Ali Dawood, who had to be dropped from the proceedings by the respondent herein at the relevant point in time, as he had expired on 27.05.1998.

2. The sum and substance of the proceedings taken out by the respondent is, the failure on the part of the petitioners, i.e., the original appellants, to realize export proceeds vis-a-vis two (2) GRs out of eight (8) GRs. On account of this failure, the Adjudicating Authority proceeded against the petitioners, i.e., the original appellants, under Section 18(2) and 18(3) read with Section 68(c) of the Foreign Exchange Regulation Act, 1973 (in short the FERA).

3. To be noted, prior to the adjudication, a show cause notice was issued to the SAPPL and its four directors, which included late Sh. Asgar Ali Dawood. This show cause notice was issued on 09.05.2002, within the “sun-set” period. It is for this reason that in the show cause notice, while referring to the provisions of Section 18(2) and 18(3) and Section 68(c) of the FERA, reference was also made to provisions of Section 49(3) and 49(4) of the Foreign Exchange Management Act, 1999 (in short the FEMA).

4. Mr Jain, the learned ASG, who appears on advance notice on behalf of the respondent, has raised a preliminary objection with regard to the maintainability of the writ petitions. Mr Jain submits that the present writ petitions are not maintainable, in view of the fact, that a statutory appeal to the concerned High Court is available to the petitioners herein under Section 35 of the FEMA. In support of his submissions the learned ASG relied upon the judgement of the Supreme Court in the case of ***Thirumalai Chemicals Limited vs Union of India & Ors., (2011) 6 SCC 739***.

4.1 Mr Jain has gone on to say that that the writ court, should not, exercise its powers under Article 226 of the Constitution as a statutory remedy by way of an appeal under Section 35 of FEMA is available to the petitioners. He has buttressed his submission by seeking to place reliance on another judgement of

the Supreme Court in the case of *Raj Kumar Shivhare vs Assistant Director, Directorate of Enforcement and Another (2010) 4 SCC 772*.

5. Mr Majithia, learned counsel for the petitioners, however says that Section 35 of the FEMA is not available to the petitioners as proceedings in the instant case were commenced under FERA. It is also the learned counsel's contention that an appeal under FERA is also not available as the impugned order is an interim order. According to him, the remedy by way of an appeal under Section 54 of the FERA is available only against a final order. In this connection, it is submitted that Section 54 will apply only to decision and orders passed under Sub-Sections (3) and (4) of Section 52. Mr Majithia says that the order, on the plea for waiver of pre-deposit of penalty, was passed by the Tribunal under Sub-Section (2) of Section 52. It is thus, his contention, that the only remedy, if at all, the petitioners have, at their command, is a petition under Article 226 of the Constitution.

6. Having examined the provisions of Section 49(3) and 49(4) of the FEMA, it is quite clear that the proceedings by way of a show cause notice were initiated against the petitioners during the sun-set period and, therefore, it was well within the powers of the respondent to invoke the provisions of FERA. The sun-set period lasts for two (2) years, commencing from 01.06.2000, when FEMA was brought into force. The sun-set period, thus, ended on 31.05.2002. Admittedly, the show cause notice was issued on 09.05.2002, that is, within the sun-set period.

6.1 The question, therefore, which arises for consideration is: whether the appeals were dealt with by the Appellate Tribunal (which is the new avatar of the Appellate Board) under FERA or FEMA.

7. Mr Jain, during the course of his argument, referred to me, the

provisions of Section 49(5)(b) of the FEMA. It is Mr Jain's submission that the appeals were dealt with under the aforesaid provision, and thus, the disposal of the appeals was by the Appellate Tribunal under FEMA.

8. I must confess, to me, the language of Section 49(5)(b) of FEMA is suggestive of the fact that it is only an appeal, which was pending before the Appellate Board, and which could not be disposed of before the commencement of the Act (i.e., FEMA), would stand transferred to the Appellate Tribunal. Therefore, to suggest that the subject appeals, were disposed of by the Appellate Tribunal, based on the said provision, in my view, does not appear to be, on a plain reading of the provision, the correct position of law.

9. However, Mr Majithia, has not made life easy for himself as the title of appeals filed on behalf of the petitioners herein, refer to Section 19 of FEMA. In fact in paragraph 6 of the appeals filed, the averments made, only re-emphasise this point.

9.1 I would have thus taken the matter further and perhaps agreed with Mr Majithia that since the subject appeals were not pending on the date of commencement of FEMA, the Appellate Tribunal, which got constituted after the dissolution of the Appellate Board, had exercised powers under FERA and not had taken recourse to the provisions of the FEMA.

9.2 However, what comes in the way of the petitioners, is the judgement of the Supreme Court in the case of *Thirumalai Chemicals Limited vs Union of India & Ors.* The Supreme Court, albeit in the context of an issue pertaining to limitation and the power to condone the same under the two acts, i.e., FERA and FEMA, has made the following relevant observations:

“.....25. The appellate Board under FERA, it may be noted stood dissolved and ceased to function when FEMA was enacted. Therefore, any appeal against the order of the adjudicating officer made under FERA, after FEMA came into force, had to be filed before the Appellate Tribunal constituted under FEMA and not to the Appellate Board under FERA. Section 52 of FERA stipulates the limitation for an appeal against the orders of the adjudicating officer to the Appellate Board. It provides the period of limitation as 45 days but the Board may entertain an appeal after the expiry of 45 days but not beyond 90 days. Under FEMA, an appeal lies to the appellate tribunal constituted under that Act and Section 19(2) provides that every appeal shall be filed within 45 days from the date on which a copy of the order of the adjudicating authority is received. The appellate is however empowered to entertain appeals filed after the expiry of 45 days if it is satisfied that there was sufficient cause for the delay in filing the appeal. Though both Section 52(2) of FERA and Section 19(2) of FEMA provide a limitation of 45 days and also give the discretion to the appellate authority to entertain an appeal after the expiry of 45 days, if the appellant was prevented by sufficient cause from filing an appeal in time, the appellate authority under FERA could not condone the delay beyond 45 days whereas under FEMA, if the sufficient cause is made out, the delay can be condoned without any limit. The question we have already pointed out is whether Section 52(2) of FERA or Section 19(2) of FEMA will govern the appeal. As noticed above, any provision relating to limitation is always regarded as procedural and in the absence of any provision to the contrary, the law in force on the date of the institution of the appeal, irrespective of the date of accrual of the cause of action for the original order, will govern the period of limitation.”

26. Section 52(2) can apply only to an appeal to the Appellate Board and not to any Appellate Tribunal. Therefore, irrespective of the fact that the adjudicating

officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily Section 19(2) of FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of FERA. As we are not concerned with the appeals to Appellate Board, but appeals to the Appellate Tribunal, limitation being a matter of procedure, only that law that is applicable at the time of filing the appeal, would apply. Therefore, Section 19(2) of FEMA and not Section 52(2) of FERA will apply. As noticed above, under Section 19(2), there is no ceiling in regard to the period of delay that could be condoned by the appellate tribunal. If sufficient cause is made out, delay beyond 45 days can also be condoned. The tribunal and the High Court misdirected themselves in assuming that the period of limitation was governed by Section 52(2) of FERA.....”

(emphasis is mine)

10. Having regard to the observations of the Supreme Court, this court cannot but decline the request of the petitioners to entertain the writ petitions. The Supreme Court in the case of ***Raj Kumar Shivhare vs Assistant Director, Directorate of Enforcement and Another*** has also taken a view that where an alternate remedy is available, a writ court should abjure intervention, under Article 226 of the Constitution. To this though, one must add a caveat, which is, in a case where there is a complete lack of jurisdiction or, breach of principles of natural justice, a writ court's power under Article 226 of the Constitution to intervene, is not denuded. The judgement of the Supreme Court, for obvious reasons, does not delve into this aspect, in view of the norms laid down in that behalf in its earlier judgements. [see ***State of U.P. vs Mohammad Nooh AIR 1958 SC 86 paragraph 10***] These writ petitions, however, do not throw up such issues.

11. In so far as Section 35 of the FEMA is concerned, it gives a right to an aggrieved party to prefer an appeal against “any” “order” or “decision” of the Appellate Tribunal. Therefore, an appeal, even against an interim order of the Appellate Tribunal, will be available to the petitioners. The appeal, however, will have to be preferred, by the aggrieved party (in this case the petitioners herein) before the concerned High Court. The explanation to Section 35 of the FEMA, sets out, as to which High Court would be the appropriate court in a given case. It is not the petitioners’ case that they are ordinarily residents of Delhi or, they carry on business or personally work for gain within the jurisdiction of this court. That being so, this court is not the appropriate court where an appeal under Section 35 of FEMA can be preferred by the petitioners.

12. In these circumstances, the writ petitions are disposed of with liberty to the petitioners to approach the concerned High Court.

13. Mr Majithia says that he should be given some leeway to approach the concerned High Court.

14. I find no difficulty in accepting such a request. Therefore, the Appellate Tribunal will take no precipitative action in respect of the pending appeals for the next four (4) weeks. In case necessary steps, by way of an appeal, are not taken within the period indicated above, this liberty granted by me, will stand dissolved peremptorily.

RAJIV SHAKDHER, J

FEBRUARY 11, 2015

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