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

% **Date of decision: 10th September, 2015**

\+ **W.P.(C) No.20524/2005**

M/S INDIA EXPORT HOUSE (P) LTD. ..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed and Mr. Rishabh Kapur, Advs.

Versus

APPELLATE TRIBUNAL FOR FOREIGN EXCHANGE & ANR ..... Respondents

Through: Mr. Subhash Bansal and Mr. Shashwat Bansal, Advs. for R-2.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This writ petition was filed impugning the order dated 2nd September, 2005 of the Appellate Tribunal for Foreign Exchange [in Appeal No.1292/2004 preferred by the appellant against the order dated 31st August, 2004 of the Deputy Director, Directorate of Enforcement imposing penalty of Rs.5 lakhs on the petitioner under Sections 8(3), 8(4), 68(1) & (2) and 64(2) of Foreign Exchange Regulation Act, 1973 (FERA)] directing the petitioner to make pre-deposit of penalty amount within a period of eight weeks from that date, as a condition for consideration of the said appeal.

2. The petition came up first before this Court on 26th October, 2005, when while issuing notice thereof, the operation of the impugned order as well as further proceedings before the Appellate Tribunal were stayed. As a result thereof, neither has the petitioner deposited the penalty amount with the respondent in the last ten years nor has the appeal preferred by the petitioner been considered.

3. The counsels have been heard.

4. The counsel for the petitioner has contended:

(i) that though the penalty aforesaid was imposed upon the petitioner under the provisions of FERA but FERA was repealed and with effect from 1st May, 2000 substituted by the Foreign Exchange Management Act, 1999 (FEMA);

(ii) that though under FERA, the remedy of the petitioner against the order of imposition of penalty was before the Appellate Tribunal and before availing which remedy, a pre-deposit would have been required to be made but FEMA provides for a two tier appeal against such orders, if were to be made under FEMA, first before the Special Director and then to the Appellate Tribunal;

(iii) that though according to the petitioner, the order of imposition of penalty was appealable before the Special Director (Appeals) but the adjudicating order having provided that an appeal thereagainst had to be preferred before the Appellate Tribunal, the petitioner could not go before the Special Director (Appeals) and preferred the appeal to the Appellate Tribunal but with a contention that the remedy of appeal was before the Special Director (Appeals) and before whom no condition of pre-deposit was required to be complied with;

(iv) that though the Appellate Tribunal ought to have decided the said issue first and the question of making pre-deposit would have arisen, only if the Appellate Tribunal would have held that no appeal was maintainable before the Special Director (Appeals) and the appeal had to be considered by the Appellate Tribunal only but the Appellate Tribunal without going into the said aspect, required the petitioner to make a pre-deposit of the penalty amount;

(v) that a Division Bench of the High Court of Bombay in ***Premier Limited, (formerly) Premier Automobiles Ltd. Vs. Union of India*** MANU/MH/0408/2006 has held that against the orders of imposition of penalty, even if under FERA, the appeal to the Special Director (Appeals) under FEMA lies.

5. Per contra, the counsel for the respondent No.2 Directorate of Enforcement has referred to ***Thirumalai Chemicals Limited Vs. Union of India*** (2011) 6 SCC 739 to contend that the view taken by the Bombay High Court is not good law, in view of the subsequent judgment of the Supreme Court.

6. The counsel for the petitioner rejoins by contending that the Supreme Court was concerned with the aspect of limitation and not with the aspect of the appellate fora and thus the judgment of the Bombay High Court cannot be said to be no longer good law.

7. I have considered the rival contentions. At the outset, I may state that it is sad that the matter on such an issue has remained pending for the last ten years, resulting in, not only the penalty imposed on the petitioner remaining unrealised but also resulting in the appeal preferred by the petitioner having remained unheard, owing to the interim order in this petition.

8. In my view, the question whether the view of the Bombay High Court has been superseded by the judgment aforesaid of the Supreme Court does not fall for adjudication in the present petition.

9. The present petition is concerned only with the challenge to the order of the Appellate Tribunal directing the petitioner to make a pre-deposit of the penalty amount appealed against in accordance with the statutory provisions. It is the petitioner, who against the order of imposition of penalty, instead of preferring an appeal thereagainst before the Special Director (Appeals), which he claims to be maintainable, approached the Appellate Tribunal. Once the petitioner chose to approach the Appellate Tribunal, it has to be necessarily governed by the statutory conditions of appeal to the Appellate Tribunal and which requires a pre-deposit to be made. The counsel for the petitioner, on enquiry, has fairly admitted that the appeal provisions make no distinction between the challenge made in the appeal on a question of law or of maintainability of appeal or on the quantum of the penalty.

10. The contention of the counsel for the petitioner, that the petitioner was prevented from appealing to the Special Director (Appeals) owing to the

order imposing penalty, prescribing that the appeal thereagainst could be preferred to the Appellate Tribunal, cannot be accepted. If the petitioner felt that an appeal was maintainable before the Special Director (Appeals), the petitioner, as aforesaid, should have preferred that appeal and if that appeal had not been entertained, could have approached this Court for having the said question adjudicated, as was done in the matter aforesaid before the Bombay High Court. The petitioner, as aforesaid, having chosen to approach the Appellate Tribunal, would necessarily have to be governed by the rules thereof.

11. I am therefore of the view that the legal question aforesaid raised by the petitioner does not arise for adjudication in this petition.

12. The counsel for the petitioner has then contended that in view of the aforesaid position, the petitioner ought not to be burdened with the condition of pre-deposit.

13. Though undoubtedly, the Courts in exercise of jurisdiction under Article 226 of the Constitution of India, have in appropriate cases waived partially or wholly the condition of pre-deposit but considering the amount of penalty imposed and the long period of time which has elapsed, I am of

the view that the said considerations are not to be weighed in the present case.

14. The counsel for the respondent No.2 in this regard points out that others against whom penalty was imposed vide the same order, preferred appeals to the Appellate Tribunal and those who were found deserving of waiver of condition of pre-deposit, were given such favour but the petitioner did not make out any such case and rather kept on taking adjournments and sought waiver of pre-deposit only on the aforesaid grounds and which was rejected by the Appellate Tribunal.

15. Accordingly, while dismissing the petition, it is directed that subject to the petitioner making the pre-deposit, as directed by the impugned order, within one month of today, the Appellate Tribunal shall proceed to hear the matter. Needless to state, that if the petitioner fails to make such a pre-deposit, the appeal preferred by the petitioner shall stand dismissed.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 10, 2015
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(**Corrected and released on 25th September, 2015).**