

Devendra

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

FEMA APPEAL NO. 3 OF 2016

Devendra Mulchanddas Jariwala

..Appellant

V/s.

The Additional Director,
Additional Directorate of Enforcement

..Respondent

Mr. Prakash Shah a/w Jas Sanghavi i/b PDS Legal for the Appellant.

Mr. Prashant P. Jadhav for the Respondent.

**CORAM : A.S. OKA &
RIYAZ I. CHAGLA, JJ.**

DATE : 8TH AUGUST, 2017

P.C.

1. Heard the learned Counsel appearing for the Appellant. An Appeal is preferred by the Appellant before the Appellant Tribunal for Foreign Exchange, wherein the Appellant has taken exception to adjudication order dated 30th January 2013 passed by the Additional Director of Enforcement. By the said order, penalty of Rs.1 crore has been imposed on the Appellant. By the impugned order, application made by the Appellant for waiver of pre-deposit of the penalty amount and stay of the adjudication order has been disposed of by the Appellant Tribunal. The Appellant Tribunal directed the Appellant to deposit 10% of the amount of total penalty imposed against him and to furnish reliable security of

30% of the amount of total penalty imposed against the Appellant.

2. The learned Counsel appearing for the Appellant invited our attention to the findings recorded in paragraph 8 of the impugned order, wherein the Appellate Tribunal has held that the Appellant has an arguable case. He relied upon a decision of a Division Bench of this Court in the case of *Vaseem Iqbal Kapadia V/s. Union of India*¹. He submits that this Division Bench has held that once the Appellate Tribunal finds that the case is made out in the Appeal was arguable and in-depth consideration of grounds is necessary, there is no justification for imposing any such condition and therefore 100% waiver ought to be granted. He also relied upon a decision of the Apex Court in the case of *Mehsana Dist. Co-op. Milk P.U. Ltd. V/s. Union of India*². He submitted that same law has been laid down by the Apex Court while dealing with an Appeal under Section 35F of the Central Excise Act, 1944.

3. We have given careful consideration to the submissions. We have perused the decision of the Division Bench in the case of Vaseem Iqbal Kapadia, paragraph 3 of the said decision reads thus:

“In the order under challenge at more places than one the Tribunal has observed that the main appeal arising out of the adjudication dated 22-1-2010 and the subsequent addendum dated 15-2-2010 raises several questions of facts and law. After noting the rival contentions, the Tribunal in paragraph 7 has observed that no final view can be expressed at the stage of grant of stay but the grounds would require in-depth consideration. Apart from the violation of principles of natural justice, the other

1 2015 (323) E.L.T. 353 (Bom.)

2 2003 (154) E.L.T. 347 (S.C.)

aspects on merits also require deeper scrutiny. The Tribunal has observed that it is convinced that the appellant has an arguable case. In the circumstances, we do not think why the conditional order was passed. The direction to deposit 10% of the total amount of penalty and to furnish bank guarantee for the balance 90% of the sum adjudicated and demanded, in effect and in substance means denial of stay. This is clear from the conditions that have been imposed. Once the case is arguable and the Tribunal is required to consider several grounds and in-depth, then we do not see justification for imposition of such conditions.”

4. Thus, in the case before the Division Bench, the Tribunal had directed deposit of 10% of the total amount of penalty. In addition, the Appellant was directed to furnish bank guarantee for the balance 90% of the sum adjudicated and demanded. The Division Bench was of the view that, the said order in substance means complete denial of stay as the direction was to deposit 100% amount (10% actually deposit and 90% in the form of a bank guarantee). Thereafter, the Division Bench proceeded to observe that once the case is found to be arguable and the Appellate Tribunal is required to consider several grounds, there was no justification for imposing of such condition. Thus, the finding rendered by the Division Bench is purely in the facts of the case before it, wherein direction was to deposit 10% of the penalty and to furnish bank guarantee for entire remaining penalty amount.

5. The decision of the Apex Court in the case of Mehsana Dist. Co-op. Milk P.U. Ltd. does not lay down as a proposition of law that in each case where Appellate Tribunal finds that the case is arguable, 100% waiver

from pre-deposit has to be granted.

6. We have perused the impugned judgment. In paragraph 7 of the impugned judgment, the Appellate Tribunal has observed that some of the issues require in-depth scrutiny. In paragraph 8 and 9, the Appellate Tribunal has observed thus:

“8. In view of the above discussions and without expressing any opinion on the merits of the case, at this stage we are convinced that the applicant/appellant has an arguable case. In view of the case laws, Benara Valves Ltd. Vs Commissioner of Central Excise, (2006) 13 SCC 347, Manotosh Saha Vs. Special Director, Enforcement Directorate, (2008) 12 SCC 359 and Nimesh Suchde Prop. Sidharth Polymers Vs. Union of India, (2001) 107 S C L 183 (Delhi). We are of the view that it will be fair, just and proper that the applicant/appellant be allowed partial waiver as no case of complete waiver is made out.

9. Taking into consideration the above mentioned facts and the case laws, we are of the view that the ends of justice will be met, if the applicant/appellant is directed to deposit 10% of the amount of total penalty imposed against him through the Impugned Order within 30 days from the date of the communication of this order and further to furnish reliable security for 30% of the amount of total penalty imposed against the applicant/appellant within the same period”

7. After recording a findings that arguable case has been made out, the Appellate Tribunal has exercised discretion and has observed that it will be fair, just and proper to allow partial waiver as no case for grant of complete waiver is made out. In the facts of the case, the deposit of only

10% of the total penalty amount has been ordered. There is not even a direction to furnish a bank guarantee. The direction is to furnish only a reliable security for 30% of the amount of penalty imposed against the Appellant.

8. In our view, the Tribunal has properly exercised the discretion vested in it while considering the application for waiver as well as for grant of stay. We find absolutely no error in the view taken by the Appellate Tribunal. Accordingly we dismiss the Appeal with no order as to costs. We make it clear that we have made no adjudication on the merits of the pending Appeal.

(RIYAZ I CHAGLA J)

(A.S. OKA, J)