THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

WRIT PETITION No.5588 OF 2006

ORDER:

This writ petition is filed under Article 226 of the Constitution of India assailing the order in DD/-/BZ/HYD/06/(FEMA)/(KN), dated 22.2.2006, in File No.T-4/24-BZ/HYD/2005/DD-VS/FEMA of respondent No.2 whereunder and whereby, the petitioner was found guilty for contravention of the provisions of Section 3(c) of the Foreign Exchange Management Act, 1999 (for short, "FEMA") and consequently, directed to pay penalty of Rs.3,00,000/-.

2. The facts in issue are as under:

On the basis of an information that Shri N.Pandu Ranga, who is the petitioner herein, received payment of Rs.6 lakhs from a person in India, under the instructions of a person residing outside India, he was summoned under Section 37 of FEMA read with Section 131 of the Income Tax Act, 1961. Accordingly, the petitioner appeared before the Assistant Director on 21.07.2005 and gave a statement. In the said statement, the petitioner *interalia* stated that he was running a dry cleaning shop by name "Omsai Top"; that his son Shri Vijay settled in Eastham, 16, Caulfield Road, E6, London and was working in a company for the past 3 – 4 years; that at the time of sending his son abroad, he borrowed amounts in Hyderabad from his friends and relatives; that during the last week of April/1st week of May, 2005, when his son called him on his residential telephone No.55177577, he reminded him of the commitment to repay the loans; that his son informed him that he would make arrangements and call back. Accordingly, during the 2nd week of May, 2005, his son called him again on his residential telephone number and informed him that he has arranged to send Rs.6 lakhs which would be paid to him in Hyderabad by a person after calling him. He also told him that he was also going to give his daughter's name Laxmi and her office telephone number in case he was not available at the residence. In the 3rd week of May, 2005, his daughter Laxmi called him to inform that an unknown person called her on her office telephone and asked about him and that she had given their residential address to the said person, as she did not know anything about the matter at that time. After two or three hours, the unknown person came to his residence and after verifying his name and also his daughter's name, paid him an amount of Rs.6 lakhs in cash and told that the same was being paid under the instructions of Vijay of London. The person who paid the amount was tall, dark and thin and spoke in Hindi. After receiving the amount of Rs.6 lakhs from the said person, he utilized a part of the amount towards repayment of the loans and the remaining amount for the renovation of his house. It was further stated that his daughter is working in LSEC, Hyderabad and has nothing to do with the amount received by him and that except the above amount, he did not receive any other amount. After considering the explanation given by the petitioner, the Deputy Director, Directorate of Enforcement (Foreign Exchange Management Act), Government of India, Bangalore rejected the plea taken by the petitioner and imposed penalty of Rs.3,00,000/-. Challenging the same, the present writ petition is filed.

3. Pending writ petition, the writ petitioner died and his legal representatives are brought on record.

4. Though various grounds are raised more particularly, with regard to the jurisdiction of the authority in passing the impugned order and the missing link of transfer of money by foreign exchange, the learned counsel for the petitioners submits that in view of the objection raised by the learned Standing Counsel for the respondents as to the maintainability of the writ petition, in view of alternate remedy available to the petitioners, the petitioners seek permission to avail the remedy available to them under law. Similar situation came up for consideration before the Apex Court in **United Bank of India vs. Satyawati Tondon and others[1]**. It was a case where the Apex Court was dealing with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, "D.R.T.") and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act"). Though an alternative remedy was available under both the Acts, the aggrieved person approached the High Court directly questioning the orders, which they obtained under Article 226 of the Constitution of India. Dealing with the same, the Apex Court, in para Nos.43, 44, 45, 46 and 55, held as under:

> ***"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees,***

[1] (2010) 8 Supreme Court Cases 110

other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their

constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad (AIR 1969 SC 556), Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

5. Similarly, in a decision reported in **Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement and another**[2], the Apex Court, while dealing with the provisions of FEMA, observed at para Nos.37, 39 and 45 as under:

"37. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the

[2] (2010) 4 Supreme Court Cases 772

Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA.

39. In the instant case none of the aforesaid situations are present. Therefore, principle laid down in Ratan's case (2003)5 SCC 399 applies in the facts and circumstances of this case. If the appellant in this case is allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal under Section 35 of FEMA this will enable him to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fees or deposit of some amount of penalty or fulfillment of some other conditions for entertaining the appeal. (See para 13 at page 408 of the report). It is obvious that a writ court should not encourage the aforesaid trend of by-passing a statutory provision.

45. In view of this Court's jurisdiction under Article 136 of the Constitution, we give liberty to the appellant, if so advised, to file an appeal before an appropriate High Court within the meaning of Explanation to Section 35 of FEMA and if such an appeal is filed within a period of thirty days from today, the appellate forum will consider the question of limitation sympathetically having regard to the provision of Section 14 of the Limitation Act and also having regard to the fact that the appellant was bona fide pursuing his case under Article 226 of the Constitution before the Delhi High Court and then its appeal before this Court."

6. From the judgments referred to above, it is clear that when the statutory alternative remedy of appeal is available, the High Court should not entertain an application under Article 226 of the Constitution of India. When a right or liability is created by the statute, the High Court must insist that before availing remedy under Article 226 of the Constitution of India, a person must exhaust the remedies available under the relevant statute. However, the same is subject to certain exceptions which do not

attract the present case and do not call for interference to the facts of the instant case.

7. Having regard to the above, the writ petition is disposed of directing petitioner Nos.2 to 4, who are the legal representatives of deceased petitioner No.1, to file an appeal before the Special Director (Appeals) under Section 17 of FEMA and if such an appeal is filed within a period of forty five (45) days from today, the appellate Forum shall consider the question of limitation having regard to the provision of Section 14 of the Limitation Act, 1963 and also having regard to the fact that petitioner Nos.2 to 4 were *bona fidely* pursuing their case under Article 226 of the Constitution of India before this Court. Along with the appeal, petitioner Nos.2 to 4 shall also make an application seeking interim order which shall also be dealt with. If an application seeking interim order is filed along with the appeal, the authority shall dispose of the same within a period of six (6) to eight (8) weeks from the date of filing of the said application in accordance with law. Till such time, the interim order passed by this Court shall be in force. There shall be no order as to costs.

8. Miscellaneous Petitions pending, if any, in this Writ Petition shall stand closed.

JUSTICE C.PRAVEEN KUMAR

Date: 8.2.2017
AMD

THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

W.P.No.5588 OF 2006

DATE: 8.2.2017

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