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

+ LPA 152/2017

Pronounced on: 22nd March, 2017

SUKH RAM

..... Appellants

Through: Mr.Kirti Uppal, Sr.Adv. with Mr.Ajay Laroia, Ms.Sahiba Pantel, Ms.Sumati Sharma, Mr.Siddharth Chopra, Ms.Meenakshi, Advs.

Versus

DIRECTORATE OF ENFORCEMENT & ANR Respondents

Through: Mr.Anurag Ahluwalia, CGSC with Ms.Nisha Sharma, Mr.Bhav Rarora, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

Ms.G.ROHINI, CHIEF JUSTICE

C.M.No.8530/2017(exemptions)

Allowed, subject to all just exceptions.

C.M.No.8531/2017(delay of 4 days in refilling)

Heard.

In view of the facts and circumstances explained in the application, the delay in re-filing the appeal papers is condoned and the application is disposed of.

C.M.No.8528/2017(to condone the delay of 201 days in filing)

Heard.

It is pleaded that the appellant/applicant, who is 91 year old and is suffering from various health ailments was held up in his native place Mandi (Himachal Pradesh) and, therefore, the appeal could not be filed within time. No doubt there was a long delay of about 200 days but having observed the appellant, who was present in the Court when the matter was heard, we do not find any justifiable reason to disbelieve the plea of his advance age and health conditions. Hence, we consider it appropriate to condone the delay subject to the condition of the appellant/applicant depositing a sum of Rs.5,000/- to the Delhi State Legal Services Authority within two weeks from today.

The application is accordingly disposed of.

LPA 152/2017

1. The unsuccessful petitioner in W.P.(C) No.5536/2016 is the appellant before us.
2. The said writ petition was filed challenging the order dated 08.09.2015 of the Adjudicating Officer, Directorate of Enforcement imposing a penalty of Rs.1 crore under Section 49(3) and (4) of the Foreign Exchange Management Act, 1999 for contravention of the provisions of Section 9(1)(b) and Section 72(i)(c) of Foreign Exchange Regulation Act, 1973.
3. The learned Single Judge declined to entertain the writ petition on the ground that an alternative efficacious remedy of appeal is available against the impugned order under Section 17 of the Foreign Exchange Management Act, 1999 (for short 'FEMA').

4. Assailing the said order, it is contended by Sh.Kirti Uppal, the learned Senior Counsel appearing for the appellant/writ petitioner that the order dated 08.09.2015 of the Adjudicating Officer being in violation of the principles of natural justice, the availability of alternative remedy is not a bar to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. It is sought to be explained by the learned Senior Counsel that in spite of numerous written requests made by the appellant, no opportunity was provided by the Adjudicating Officer to cross-examine the sole witness whose uncorroborated bald statement has been made basis for the impugned order dated 08.09.2015 imposing the penalty of Rs.1 crore.

5. We have also heard Sh.Anurag Ahluwalia, the learned Standing Counsel for Central Government appearing for the respondents.

6. The learned Single Judge dismissed the writ petition placing reliance upon the decision of the Supreme Court in ***Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement & Anr.; 2010 (4) SCC 772.***

7. In ***Raj Kumar Shivhare (Supra)*** an order was passed under the provisions of the FEMA, 1999 imposing the penalty of Rs.2 crores against which the appellant therein preferred an appeal before the Appellate Tribunal. However, the Appellate Tribunal refused to dispense with the pre-deposit of penalty and accordingly the application for dispensation of pre-deposit of penalty was dismissed and he was permitted to deposit the full amount of penalty within 30 days. The writ petition filed against the said order in the High Court of Delhi was dismissed on the ground that it lacked territorial jurisdiction. When the matter was carried to the Supreme Court, the very maintainability of the writ petition was questioned against the order

of a Tribunal in view of Section 35 of FEMA which provides for an appeal to High Court against any decision or order of the Appellate Tribunal on any question of law arising out of such order. While observing that the liability of the appellant is not created under any common law principle but it is clearly statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA subject to the limitation contained therein, it was held by the Supreme Court that even if High Court had territorial jurisdiction, it should not have entertained a writ petition which impugns an order of a Tribunal when such an order on a question of law is appealable before the High Court under Section 35 of FEMA.

8. However, in later part of the judgment while referring to the contention on behalf of the respondents that no writ petition can be maintained when the statute itself prescribes the remedy of appeal, it was made clear by the Supreme Court as under:-

"38. Learned counsel for the respondents relied on a judgment of this Court in *Seth Chand Ratan vs. Pandit Durga Prasad (D) By Lrs. and Ors.* - (2003) 5 SCC 399: (AIR 2003 SC 2736) : 2003 AIR SCW 3078). Learned counsel relied on paragraph (13) of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a Statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such

cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief.

39. In the instant case none of the aforesaid situations are present. Therefore, principle laid down in the Ratan's case (supra) 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.”

9. As we could see in ***Raj Kumar Shivhare (Supra)*** the challenge was not on the ground of lack of jurisdiction or violation of principles of natural justice. In the facts and circumstances of the said case, it was concluded that the writ petition cannot be entertained in the light of statutory remedy of appeal. However, in para-38 it was reiterated that in cases of complete lack of jurisdiction or violation of Rules of Natural Justice, notwithstanding the existence of alternative remedy, the High Court can exercise its jurisdiction to grant relief.

10. Therefore, it appears to us that the reliance upon ***Raj Kumar Shivhare (Supra)*** is misplaced. Having regard to the specific case of the writ petitioner/appellant herein that the impugned order was in violation of the principles of natural justice, in our considered view dismissal of the writ petition at the threshold solely on the ground of availability of alternative remedy is not warranted.

11. Accordingly, the order under appeal is set aside and the writ petition is restored to file for consideration afresh in the light of the observations made above.

12. W.P.(C) No.5536/2016 be listed before the Roster Bench on 27.03.2017.

13. The appeal is accordingly disposed of.

CHIEF JUSTICE

SANGITA DHINGRA SEHGAL, J

MARCH 22, 2017

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