IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FEMA APPEAL (STAMP) NO.30829 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.31029 OF 2018

M/S Silverline Technologies Limited … Appellant

Vs

Special Director of Enforcement … Respondent

WITH
FEMA APPEAL (STAMP) NO.30797 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.31036 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.30800 OF 2018

K. Kulathu @ Mohan Subramanian … Appellant

Vs

Special Director of Enforcement … Respondent

WITH
FEMA APPEAL (STAMP) NO.30825 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.31032 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.30828 OF 2018

Krishna Kumar Subramanian … Appellant

Vs

Special Director of Enforcement … Respondent

WITH
FEMA APPEAL (STAMP) NO.30831 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.31034 OF 2018
WITH
CIVIL APPLICATION (STAMP) NO.30832 OF 2018

Ravi Subramanian … Appellant

Vs

Special Director of Enforcement … Respondent

Mr.VVLN Shastri a/w Mr.Rajan Pillai i/b Lex India Juris Gujar for the Appellant.

Mr.Vijay Kantharia a/w Mr.D.P. Singh for the Respondent.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

WEDNESDAY, 31st OCTOBER, 2018

P.C. :

1 By these Appeals, the appellants are challenging the orders passed on 30th March, 2009 and 31st January, 2018.

2 The order in original dated 30th March, 2009 adjudicates a notice styled as a 'Show Cause Notice' dated 8th October, 2003 issued to M/S Silverline Technologies Limited, Shri Ravi Subramanian, Chairman, Shri Krishna Kumar Subramanian, Vice

President, Shri K. Kulathu Subramanian @ Mohan Subramanian, a Wholetime Director, for contravention of Section 8 of the Foreign Exchange Management Act, 1999 (for short “the FEMA”) read with Section 42(1) thereof along with Regulation 9 and 13 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 for their failure to take reasonable steps to realise and repatriate to India a sum of US $ 2,24,90,927 and also Rs.66,74,78,440/- within the stipulated time and in the prescribed manner, without the general or special permission of the RBI.

3 This Show Cause Notice was adjudicated and an order in original has been passed in the following terms.

> “As per the SCN, the notice company failed to realize export proceeds to the tune of US$2,24,90,927 and Rs.66,74,78,440. Even though the notice company has claimed to have realized certain amounts, no certificate from the banks have been produced to substantiate the above claim. The noticees have also not produced any evidence indicating the steps taken by them to recover the outstanding. In these circumstances, I am satisfied that the notice company M/s. Silverline Technologies Ltd. And S/Sh. Ravi Subramanian, Chairman, Krishna Kumar Subramanian, Vice President, K K. Kulathu Subramanian @ Mohan Subramanian, Wholetime Director have contravened the provisions of sec. 8 of the FEMA 1999 read with sec. 42(1) of FEMA, 1999 r/w Regulation 9 and 13 of the Foreign Exchange Management (Export of Goods and Services Regulation 2000) as alleged in the SCN to the extent of US$ 2,24,90,927 and Rs.66,74,78,440. I find them guilty of the said contravention and impose the following penalties:

1. M/s. Silverline Technologies Ltd.	Rs.20,00,00,000/- (Rupees Twenty Crores Only)
2. Shri Ravi Subramanian, Chairman	Rs.1,00,00,000/- (Rupees One Crore only)
3. Sh. Krishna Kumar Subramanian Vice President	Rs.1,00,00,000/- (Rupees One Crore only)
4. Sh K. Kulathu Subramanian @ Mohan Subramanian, Director	Rs.50,00,000/- (Rupees Fifty Lakhs only)

While imposing the penalties, I have kept in mind the fact that at the relevant time, there was a global recession especially in the I.T. Sector and the e Commerce and dot.com business has taken a big hit after 9/11 in USA and that there was large scale retrenchment of the work force across the globe especially in I.T. sector.

The penalty of Rs.20,00,00,000/- (Rupees Twenty Crores only) imposed on M/s. Silverline Technologies Ltd., Rs.1,00,00,000/- (Rupees One Crore only) imposed on Sh. Ravi Subramanian, Chairman, Rs.1,00,00,000/- (Rupees One Crore only) imposed on Sh. Krishna Kumar Subramanian, Vice President and Rs.50,00,000/- (Rupees Fifry Lakhs only) imposed on Sh. K. Kulathu Subramanian @ Mohan Subramanian, Wholetime Director should be deposited in the office of Dy. Director, Directorate of Enforcement, Mittal Chambers, IInd floor, Nariman Point, Mumbai-21 by demand draft/ pay order drawn in favour of Drawing & Disbursing Officer, Directorate of Enforcement, Mumbai-21 within forty five days from the date of receipt of this order. While depositing the penalty this adjudication order No. and Date should be quoted clearly."

4 Against this order of adjudication dated 30th March, 2009, the appellate remedy was availed of by approaching the Appellate Tribunal for Foreign Exchange Management, New Delhi.

5 The Appeals were placed before the Appellate Tribunal. After hearing both sides, on 14th July, 2009, the Tribunal held that considering the totality of the factual position, it will be fair and proper to grant dispensation of pre-deposit of penalty to the appellant, who is already declared as insolvent in Appeal No.166 of 2009 and further permit the appellant company and remaining Directors/appellants before us dispensation of 80% penalty. Thereafter the appellant company and other appellants will deposit 20% of the penalty amount either in cash or provide unconditional bank guarantee in favour of the authority. It is in these circumstances that the Tribunal held that the requirement of Section 19(1) and the two provisos below it are satisfied. The Appellate Tribunal clarified that the compliance with this order would enable the appellants to argue their Appeals on merits. In the case of default, each of these Appeals would stand dismissed. The Tribunal passed this order on 14th July, 2009 to deposit this amount. Since

there was a default, the Appeals stood dismissed.

6 An attempt was made to revive these Appeals and by filing applications for restoration. It is common ground that the Tribunal heard such applications and firstly on 8th July, 2016. Once again, time to the appellants to comply with its orders was given. In the event they are complied with, the Tribunal was agreeable to decide the Appeals on merits. In the impugned order of 31st January, 2018, the Tribunal held as under:-

> This Tribunal in the main Appeal No. 165/2009 on 14th July, 2009 directed to the appellant to pay 20 per cent of penalty levied by way of pre-deposit to admit the main appeal. The said order was not complied. The order dated 16th August, 2017 is reproduced hereinbelow:-
>
> > "On 8th July, 2016, the following order was passed.
> >
> > "However, in the interest of justice absolute last opportunity is afforded. Issue notices to the petitioners in the review petition as well as to Ld. Counsel representing the petitioners for the next date of listing. It is made clear in the case on the next date of listing no body appears representing petitioners / appellants, order in accordance with law may be passed. Put upon 10.11.2016".
> > No one appears on behalf of the appellant. Even the review petition is time barred and the same is filed after five years. The same is dismissed.
> > The appeal is also dismissed for non-compliance of directions."

> The fresh application has been filed for recalling the said order. We have asked the appellant that the said order would be recalled if the appellant is prepared to comply with the order dated 14th July, 2009. No positive response was received. The appeal filed by the appellant is dismissed”

7 A bare perusal of this order indicates that though the Appeals were dismissed for non-compliance with the order and directions issued on 14th July, 2009, the Tribunal indulged these appellants enough. This indulgence came in the form of hearing their Review Petitions and giving them an opportunity to show cause as to why this order of 14th July, 2009, which is self-operative, should not be allowed to take effect without the same being recalled or the conditions therein relaxed. On two occasions, the Tribunal found that the appellants and the representatives were absent. Then a fresh application was made for recalling all the earlier orders, but the Tribunal imposed a condition on the appellants that in the event they are still willing to comply the order dated 14th July, 2009, they would be agreeable to restore the Appeals on their file. On finding that there was no response, the Appeals stood dismissed.

8 Such orders of the Tribunal are challenged before us and the only contention raised is that there is a question of law that

arises for our consideration.

9 It is stated that Section 19 of the FEMA provides for an Appeal to the Appellate Tribunal. Thus, the order of the Adjudicating Authority does not gain finality in law as it is capable of being challenged in Appeal. The appellants in that sense complain that the order of the Adjudicating Authority or Special Director is erroneous on facts and law. It should be set aside. Such an opportunity should not be nullified by relying on the proviso and imposing onerous, excessive and exorbitant conditions. The proviso should be interpreted in consonance with the object and purpose of providing an Appeal. Thus, justice should not be denied on hyper technical grounds.

10 With the assistance of the learned advocate appearing for the appellants in each of these Appeals and since the appellants are now apprehending recovery of penalties by recourse to coercive means, we have carefully perused the Appeal Paper Book, including the impugned order. Pertinently Section 19 and to the extent relevant reads as under :-

> "**19. Appeal to Appellate Tribunal.**- (1) Save as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in sub-section(1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal;
>
> Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government.
>
> Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.
>
> (2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed.
>
> Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period."

11 Although sub-section (3) of Section 19 says that on receipt of an Appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such order thereon as it thinks fit, confirming, modifying or setting aside the order appealed against, still by the two provisos, the Tribunal, in cases of Appeals directed against the order

of penalty, can insist that the penalty amount should be deposited with such authorities as being notified by the Central Government. Penalty amount and to the extent specified by the Tribunal should be deposited. In this case, the second proviso was also taken into consideration and given the enormous and huge amount of penalty levied (Rs. 20 crores on the company and Rs.1 Crore each on the other appellants). The Tribunal prescribed a condition of deposit of 20% of the penalty amount as a pre-condition for hearing the Appeals on merits. Such a pre-condition is imminently fair, just and reasonable. It does not deny the appellant a right of appeal as is now projected before us. It ensures that justice would be done as well. Thus, the right of appeal has not been defeated and frustrated and as is now complained. In fact from 14th July, 2009, we have travelled upto 31st October, 2018. Despite this enormous passage of time, the appellants have not complied with this order and the conditions imposed therein. We were prepared to give further time to the appellant to comply with this order, but their counsel argued that they do not have any money. Given their precarious financial position and undue hardship, we must set aside this condition altogether or reduce the amount to a paltry sum of approximately two lakhs.

12 We are unable to agree with him for the simple reason that the Tribunal was ready and willing to hear the restoration application provided a fair stand was taken by the appellants. On such occasions, when the restoration applications of the appellants were placed before the Tribunal, they chose to remain absent. They did not co-operate with the Tribunal. The Tribunal was not obliged to wait for them. Its the appellants who desire another opportunity to have an adjudication on merits. However, their conduct is not consistent and justice cannot be rendered to those who have failed to show their *bona fides* in the instant case. We find that the *bona fides* are totally lacking. The Tribunal has indulged the appellants enough and we do not see the discretion exercised by the Tribunal to be arbitrary or capacious enabling us to entertain these Appeals.

13 As a result of the above discussion, all these Appeals fail. They are dismissed. All the companion applications are also dismissed. There will be no order as to costs.

[B.P. COLABAWALLA, J.] **[S.C. DHARMADHIKARI, J.]**