

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

FEMA APPEAL NO. 1 OF 2018

Union of India

.. Appellant

v/s.

Amrutbhai H. Patel

..Respondent

Mr. A.J. Rana, Senior Counsel a/w Mr. D.P. Singh for the appellant
Mr. Umaid Singh Bhati with Mr. Abhimanyu Bhati and Mr. Kuldeep
Khamare for the respondent

**CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.**

DATED : 14th AUGUST, 2018.

P.C.

1. This appeal under Section 35 of the Foreign Exchange Management Act, 1999 (the Act) challenges the order dated 8th November, 2016 passed by the Appellate Tribunal for Foreign Exchange, New Delhi (the Tribunal).

2. On 17th July, 2018 this appeal was admitted on the following question of law :-

“Whether the Tribunal is correct in holding that the delay in filing the appeal before the Tribunal was caused by negligence but not for bonafide reasons, in the absence of an affidavit being filed?”

3. As the controversy appear to be in a narrow compass, the appeal itself was adjourned to 31st July, 2018 for final disposal after giving notice to the respondent. The respondent is represented and opposes the allowing of the appeal at the final hearing.

4. The appellant Union of India had filed an appeal to the Tribunal from an order dated 8th May, 2015 passed by the Special Director (Appeals), Delhi. According to the appellant, there was a delay of 98 days in filing the appeal under Section 19 of the Act before the Tribunal from the order dated 8th May, 2015 of the Special Director (Appeals). Thus, the appeal under Section 19 of the Act was accompanied with an application for condonation of delay in filing the appeal. At the hearing of the application, the Tribunal directed the appellant on numerous occasion i.e. on 22nd December, 2015, 18th February, 2016, 21st April, 2016 and 12th July, 2016 to file affidavit-in-support of its version regarding sufficient cause for the delay in filing the appeal. However, the appellant insisted before the Tribunal that there is no such practice of filing an affidavit and refused to comply with the directions of the Tribunal. This resulted in the impugned order dated 8th November, 2016 being passed rejecting the appellant's application for condonation of delay.

5. Mr. Rana, learned Senior Counsel appearing in support of the appeal very fairly states that the appellant ought to have complied with the directions of the Tribunal and filed an affidavit explaining the delay. On instructions, he states that the appellant would file an affidavit in support of their application for condonation of delay seeks to explain the delay which should be considered by the Tribunal on its own merits. In the above circumstances, he requests that the impugned order dated 8th November, 2016 be set aside and the appeal along with the application for condonation of delay be restored to the Tribunal.

6. On the other hand, Mr. Bhatti, learned Counsel appearing for the respondent assessee submits that the impugned order disposing of the condonation application was not based merely on non-filing of affidavit but also on the Tribunal otherwise finding that no sufficient cause was made out for condonation of delay. It is further submitted that it is a small matter and would entail cost and expenses to the respondents. Therefore, does not warrant restoration of the appeal and the condonation application to the Tribunal for fresh consideration and disposal.

7. We find that the stand of the appellant before the Tribunal to say

the least was most unbecoming on the part of the State. The Tribunal as an adjudicating Authority is entitled to call upon a party to file an affidavit to explain the circumstances which led to the delay whether or not there is a specific provision for filing an affidavit in the Act and / or the Rules framed thereunder. At times, the circumstances for the delay are personal to the person and, therefore, the Tribunal in its discretion may want to be satisfied that the cause made out in the application is supported by a statement made on an affidavit. This is a part of the adjudicatory process and cannot be controlled by implying a bar in the statute to file an affidavit. On reading of the impugned order as a whole, we find that the Tribunal seemed to have been influenced by the fact that inspite of its repeated direction, the affidavit was not filed. In these circumstances, the ends of justice would be met if the appellant files an affidavit as directed by the Tribunal in its interim orders dated 22nd December, 2015, 18th February, 2016 and 12th July, 2016 and makes out a case of cause for the delay in filing the appeal. Needless to state, the respondents would be heard at the condonation of delay application before it is decided on its merits.

8. However, taking into account the manner in which the appellant conducted itself before the Tribunal has lead to unnecessary litigation

and unwarranted inconvenience to the respondents. The fairness shown by Mr. Rana, if shown before the Tribunal would not have led to this appeal. Therefore, it would be appropriate that as a condition precedent for the application for condonation of delay being heard, the appellant would pay the respondents costs quantified at Rs.7,500/- within a period of 30 days from the date this order is uploaded on the High Court Website. In the absence of complying with condition precedent in the above time, the impugned order would stand restored.

9. The Tribunal would take up the condonation application along with the affidavit filed by the appellant in support of the same only after the appellant satisfying the Tribunal of having made a payment of Rs.7,500/- to the respondents herein within the stipulated time.

10. In view of the fact that the issue is being remanded for fresh consideration by the Tribunal on filing of an affidavit by the appellant, the question of law is not being answered at this stage.

11. Accordingly, the appeal is being allowed in the above terms.

(SANDEEP K. SHINDE J.)

(M.S. SANKLECHA, J.)