

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 20.07.2018

CORAM :

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No. 2717 of 2016

Union of India,
Represented by
The Director of Enforcement,
Directorate of Enforcement,
Government of India,
6th Floor, Lok Nayak Bhawan,
Khan Market,
New Delhi - 110 003. ... Appellant /Appellant

Vs.

1.A.M.S.Ahamed Maulana
2.The Special Director (Appeals) (SZ) FEMA,
Government of India,
Ministry of Finance,
121, Mahatma Gandhi Road,
Chennai - 600 034. ... Respondents/Respondents

Prayer : This Civil Miscellaneous appeal is filed under section 35 of Foreign Exchange Management Act, 1999, against the order passed by the Appellate Tribunal for Foreign Exchange, New Delhi in Appeal No.50 of 2011 dated 18.07.2016 against the Order in Appeal passed by Special Director (Appeals)SZ Chennai dated 07/10/2010 in Order in Appeal No.SD(A)CHE/06-07/54 which was in turn filed challenging the Order in Adjudication Order (Original No.DD/MAS/39/2006 (SS) dated 22/05/2006 passed by Deputy Director, Adjudicating Authority.

For Appellant : M/s.Geetha for M/s. G.Hema
for M/s. Rajnish Pathiyil

For Respondents : Mr.S.Palanikumar for R1

JUDGMENT

SUBRAMONIUM PRASAD, J.

The instant Civil Miscellaneous Appeal challenging the order in appeal No.50 of 2011 passed by the Appellate Tribunal for Foreign Exchange, New Delhi. The Tribunal has rejected the appeal on the ground that the department has not shown sufficient cause for condoning the delay of 165 days in preferring the appeal to the Tribunal.

2.The facts leading to the instant appeal are as under :-

(a) On information, the residence premises of the respondent A.M.S.Ahamed Maulana was searched on 06.11.2002 by the Officers of the Enforcement Wing, Chennai under Section 37 of the Foreign Exchange Management Act, 1999 and certain documents were recovered.

(b) The respondent No.1 in his statement dated 06.11.2002 stated that his brother-in-law (wife's sister's husband) was residing in his house and he was engaged in receiving Foreign Exchange and making payment as per the instructions of one Maraicaair a person staying in Singapore. His brother-in-law (actually Co-brother) left for Singapore and the respondent agreed to carry out the job of disbursement of money. He received a sum of Rs.75 lakhs and disbursed the same to several persons.

(c) Charge was framed against the respondent No.1 that he violating various provisions of Foreign Exchange of Maintenance Act, 1999 (herein after called FEMA).

(d) Show cause notice was issued as to why adjudicating proceeding as claimed under Section 16 of FEMA should not be initiated against him for the said contraventions of various provisions of FEMA. Reply was filed by the respondent.

(e) The adjudicating authority came to a conclusion that the respondent No.1 had acted in contravention under Section 3(c) of FEMA and held that the respondent No.1 was guilty of the charge has framed against him. The penalty of Rs.10 lakhs was levied for the respondent.

(f) The respondent took the matter in appeal before the Special Director (Appeals), (SZ) FEMA. The Appellate Authority allowed the appeal stating that there is no discussion in order of the Adjudicating Authority as to how under Section 3(c) of FEMA is proved, more particularly in the absence of any

investigation as to the existence of the said Maraicaair. The Appellate Authority held that the adjudicating authority presumed the existence of Maraicaair based on the retracted statements. The adjudicating authority held that the receipt of Rs.75 lakhs from the said Maraicaair cannot be established unless and until it is corroborated by evidence regarding existence of Maraicaair. The adjudicating authority was of the opinion that retracted statement alone cannot be the basis of proving the existence of a person out side India and receipt of payment from the person out side India whose existence is not established.

5.The Union of India has challenged the order of the Appellate Authority, by filing an appeal under Section 19(1) of FEMA Section 19(1) (2) which read as under:-

"(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."

6.There was a delay of 165 days in filing the appeal and therefore the memorandum of appeal was accompanied by an application for the condoning the delay. Relevant portions of the application for condonation of delay reads as under:-

"2.The Appellant submits that the judgment and order was passed by the learned Special Director (Appeals) S.Z. Chennai on 07.10.2010 in favour of the present respondent. The said order was received by the Zonal Office of the appellant on 20.10.2010 Chennai. A copy of the same was sent to Delhi Office for examination and legal opinion as to whether the above judgment is to be challenged further or not. The said decision is taken, by the Director of Enforcement Government of India, New Delhi on the basis of recommendations made by the committee on 31.01.2011. Thereafter it was decided to file an

appeal under Section 19(1) of Foreign Exchange Management Act, 1999 against Order No.SD (A0/CHE/06-07/54 dated 07.10.2010 before the Hon'ble A.T.F.E. New Delhi.

3. Thereafter Deputy Director, Chennai was requested to prepare and an appeal and forward Original Certified Copy of the Order along with a set of documents in the form of paper book on 28.02.2011 and 17.03.2011. The Deputy Director of Enforcement, Chennai forwarded certified copy of the order of the Special Director (Appeals) S.Z., Chennai and the same is received in Delhi Office on 23.03.2011 for filing an appeal. The appellant submits that the delay is of 121 days . The delay is unintentional and bonafide. The appellant submits that there is every chance to succeed in the and if the delay is not condoned the revenue will cause great financial loss of about Rs.10 lakhs. Therefore, in the interest of justice, the delay may kindly be condoned and the matter be heard on its merits."

7. The Tribunal dismissed the application for condonation of delay and resultantly the appeal. This order refusing to condone the delay and consequent of the appeal is sought to be challenged in this instant Civil Miscellaneous Appeal under Section 35 of FEMA.

8. Heard the learned counsel for the Union of India and the respondent.

9. The learned counsel for the Union of India has vehemently contended that the reasons for the delay have been explained properly and the interest of justice lies in condoning the delay. The learned counsel contended that the delay primarily occurred due to the movement of files in the department. The learned counsel for the petitioner would rely on the judgment of the Apex Court in the case of Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others reported in (1987) 2 SCC 107 and in the case of State of Nagaland Vs. Lipok AO and others reported in AIR 2005 (SC) 2191. The learned counsel for the Union of India submitted that sufficient cause had been shown in the application for condonation of delay and that the Tribunal ought to have condoned the delay. On the other hand, the learned counsel for the respondent would support the impugned judgment.

10. It is well settled that it is not the number of days of delay but the reason for the delay that has to be condoned. If sufficient cause is shown then even substantial delay can be

condoned but if no cause is shown then even small delay cannot be condoned. No hard and fast Rule has been or can be laid down for deciding a application for condonation of delay. The Tribunal has observed as under:-

"The appeal was filed on 04.04.2011 with a delay of approximately one hundred and sixty-five days against the order dated 07.10.2010 passed by the Special Director (Appeals) without showing "sufficient cause". Hence, is liable to be dismissed for the following reasons that there is categorical admission that the order of the Special Director (Appeals) was received on 20.10.2010. Decision to file is taken by the Director on 31.01.2011 when the time limit of 45 days expired on 05.12.2010, after more than 100 days from the date of receipt of the order. After taking decision on 31.01.2011, appeal is filed on 04.04.2011, after more than 64 days. A reading of the condonation of delay application, not explaining day to day delay, not showing sufficient cause, proves deliberate delay, not condonable by the Tribunal. It is further submitted that the appeal ought to have been filed on 05.12.2010, within 45 days from the date of receipt of the order, filed on 04.04.2011. There is no explanation for the 100 days i.e. 20.10.2010 to 31.01.2011 and for 64 days, i.e., 31.01.2011 to 04.04.2011."

11. A perusal of the Tribunal would also that opportunity had been given to the Union of India to file better affidavit to give the explanation for condonation of delay, but in spite of being afforded opportunity, affidavit explaining the delay has not been filed. The Tribunal therefore held that no reason has been given to condone the delay. A perusal of the application for the condonation of delay filed before the Tribunal shows that the order of Appellate Authority was passed on 07.10.2010. The time limit laid down under Section 19 of FEMA expired on 05.12.2010. The decision to file the appeal was taken by the Director only on 31.01.2011. No reason has been given to explain for taking the decision between 05.12.2010 and 31.01.2011 has been given. After the decision to file the appeal was taken on 31.01.2011 no reason has been given as to why the appeal was filed only on 04.04.2011. The Department ought to have given some explanation regarding the delay and the failure to file better affidavit even after being afforded an opportunities to explain the delay. The Apex Court in the case of Office of the Chief Post Master General vs. Living Media India Ltd., reported in 2012 3 SCC 563 has observed as under:-

" 26. In spite of affording another opportunity to file better affidavit by placing adequate material, neither the Department nor person-in-charge has filed any explanation for not applying the certified copy within the prescribed period. The other dates mentioned in the affidavit which we have already extracted, clearly show that there was delay at every stage and except mentioning the dates of receipt of the file and the decision taken, there is no explanation as to why such delay had occasioned. Though it was stated by the Department that the delay was due to unavoidable circumstances and genuine difficulties, the fact remains that from day one the Department or the person/persons concerned have not evinced diligence in prosecuting the matter to this Court by taking appropriate steps.

27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bone fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural

red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

12. Similarly, the Apex Court in the case of Union of India Vs. Tata Yodogawa Ltd., reported in 1988(38) E.L.T. 739 (S.C.) has observed as under:-

" 4.From 26.12.1986 to 10.02.1987 to 24.03.1987 there is no cogent and possible explanation it may be mentioned that the special leave petition was actually filed on 23.03.1987. There is no whisper to explain what "legal problems in filing the special leave petition arose" it appears to us that no attempt has been made to explain this delay. In that view of the matter we gave further opportunity to the petitioners to file additional affidavit explaining the cause, if any, for this delay. It is further stated in the rejoinder affidavit to the counter affidavit on behalf of the Respondents that "such delay is always beyond the control of especially in Government matters as the file has to be routed through several Sections of the Department". We are aware of the fact that the Government being impersonal takes longer time than the private Bodies or the individuals. Even giving that latitude, there must be some way or attempt to explain the cause for such delay. As stated from the facts narrated herein before there is no sufficient cause to explain the delay. Hence, the application for condonation of delay is dismissed."

13. A perusal of the application before the Tribunal does not give sufficient cause as to why delay should be condoned, except simply stating that the impugned order was received on 20.10.2010 and the decision to file an appeal was taken on 31.10.2011, and further papers were sent on 17.03.2011 and received in Delhi on 23.03.2011 and the appeal was on 04.04.2011. Nothing else has been mentioned in the application. No reason has been given explaining "the delay" in taking the decision to file the appeal, sending files to Delhi, and the delay between the receipt of the papers in Delhi and filing of the appeal before the Tribunal. In the absence of any explanation either before the Tribunal or in the High Court

delay in filing the appeal before the Tribunal cannot be condoned. The Civil Miscellaneous Appeal is therefore dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

gsp

To

- 1.The Appellate Tribunal for Foreign Exchange,
New Delhi.
- 2.The Special Director (Appeals)
No.121, Mahatma Gandhi Road,
South Zone, Madras-34.
- 3.The Deputy Director,
Chennai-34.

C.M.A.No.2717 of 2016

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