IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Civil Miscellaneous Appeal No.1981 of 2018
and Civil Miscellaneous Petition No.15382 of 2018

M/s Safa Sea Foods,
B-1, New No.32, MMDA Colony,
Arumbakkam,
Chennai-600 106. ... Appellant/Appellant

-vs-

Joint Director,
Directorate of Enforcement,
Chennai Zonal Office,
3rd Floor, C Block,
Murugesa Naicker Complex,
84, Greams Road, Thousand Lights,
Chennai-600 006. ... Respondent/Respondent

Civil Miscellaneous Appeal filed under Section 35 of the Foreign Exchange Management Act, 1999 to set aside the impugned order dated 03.07.2018 in FPA-FB-4KHN/2017 dated 03/07/2018 passed by the Appellate Tribunal, Foreign Exchange Management Act, New Delhi, and grant waiver in favour of the appellant with regard to the entire pre-deposit penalty amount to be paid.

For Appellant : Mr.Raj Jhabakh

For Respondent : M/s.G.Hema,
Central Govt. Standing Counsel

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JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal, filed by the assessee under Section 35 of the Foreign Exchange Management Act, 1999 is directed against the order passed by the Appellate Tribunal, Foreign Exchange Management Act, New Delhi ("the Tribunal" for brevity), dated 03.07.2018.

2.This civil miscellaneous appeal has been filed raising the following substantial questions of law:-

> "(i) Whether in the facts and circumstances of the case, the Hon'ble Tribunal has erred by failing to exercise the jurisdiction granted to it by the proviso to Section 19(1) of the Foreign Exchange Management Act, 1999 allowing waiver of deposit of penalty?
>
> (ii) Whether the Impugned Order of the Hon'ble Tribunal suffers from infirmity because of non-consideration of the case made out by the Appellant in favour of dispensing with the pre-deposit of penalty?
>
> (iii) Whether the Impugned Order of the Hon'ble Tribunal has erred by ignoring the principles laid down by the Supreme Court in the case of Monotosh Saha v. Special Director, Enforcement Directorate and Ors. [(2008) 12 SCC 359]."

3.The appeal before the Tribunal was filed challenging the order of the adjudicating authority, dated 28.11.2016 by which, a penalty of Rs.48,00,000/- was imposed on the appellant. The appellant prayed for an order of stay before the Tribunal and the Tribunal directed the appellant to deposit a sum of Rs.12,00,000/-, which would amount to 25% out of the total amount ordered by the adjudicating authority by way of penalty. The said order was challenged before us and we heard Mr.Raj Jhabakh, learned counsel for the appellant and M/s.Hema, learned Central Government Standing Counsel for the respondent and passed an interim order on 05.09.2018 to the following effect:-

> "We have heard Mr.Raj Kumar Jabakh, learned counsel for the appellant.
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> 2. The appellant, which is a partnership firm, has impugned the order passed by the Appellate Tribunal under the Foreign Exchange Management Act, at New Delhi dated 03.7.2018 in an application filed by the appellant praying for waiver of pre-deposit for being entitled to pursue the appeal filed by the appellant before the Appellate Tribunal challenging the order of the Adjudicating Authority dated 28.11.2016.
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> 3. The learned counsel for the appellant submits that along with the application for waiver, the appellant submitted all the requisite details to prove their financial incapacity and stated that their bank accounts have become inoperative. However, those submissions were not considered by the Appellate Tribunal while disposing of the application for waiver. Again, by

referring to the permission granted by the Reserve Bank of India dated 28.6.2010 in respect of one M/s.Skanda Marines Private Limited, he submits that it is accepted practice in the particular trade and permissions have been granted by the Reserve Bank of India to several others. It is further submitted that the Central Bureau of Investigation had commenced investigation in respect of certain transactions and that the proceedings have also been closed vide closure report before the Principal Special Judge for CBI Cases in Crl.M.P.No.379/2012 in RC.No.24/A/ 2011 dated 20.1.2012.

4. It is also submitted by the learned counsel for the appellant that considering the financial position of the appellant, they will be unable to comply with the direction issued by the Appellate Tribunal, which directed payment of Rs.12 lakhs as against penalty of Rs.48 lakhs, which was imposed by the Adjudicating Authority. It is further submitted that the appellant has a good case on merits before the Appellate Tribunal and in this regard, various grounds raised before the Appellate Tribunal were referred to. It is the submission of the learned counsel for the appellant that they have made out a prima facie case for the grant of an order for waiver, that the balance of convenience is in their favour and that if the appellant is directed to deposit any amount, they will be put to irreparable hardship.

5. We have heard Mrs.G.Hema, learned Central Government Standing Counsel accepting notice for the respondent.

6. The learned Central Government Standing Counsel requires reasonable time to get written instructions from the respondent and states that there are connected matters, which need to be looked into. She would further state that the appellant approached this Court beyond the time limit granted by the Appellate Tribunal to comply with the condition of payment of Rs.12 lakhs.

7. Prima facie, we are of the view that the Appellate Tribunal has not dealt with the financial incapacity of the appellant as pleaded by them nor with regard to the prima facie case, which they sought to focus before the Appellate Tribunal. This Court will consider the submissions on either side after the learned

Central Government Standing Counsel appearing for the respondent obtains full written instructions from her client and if necessary, files an affidavit on behalf of the respondent.

8. However, in the meantime, since there is a likelihood of certain precipitative actions initiated against the appellant, there will be a direction to the appellant to pay a sum of Rs.5,00,000/- (Rupees five lakhs only), as directed by the Adjudicating Authority, by drawing a demand draft in favour of the Drawing and Disbursing Officer, Office of the Joint Director, Directorate of Enforcement, payable at Chennai on or before 28.9.2018. Subject to compliance of the above condition within the time stipulated, there will be a stay of the recovery of further amount as directed to be paid by the Appellate Tribunal. In the event the appellant fails to comply with the above direction within the time stipulated, the benefit of this order will not enure to the appellant and the interim order granted will stand automatically vacated without any further reference to this Court.

9. Office to print the name of the learned Central Government Standing Counsel for the respondent and list the matter on 11.10.2018."

Therefore, the appellant was directed to pay a sum of Rs.5,00,000/- and a time frame was fixed for effecting such payment.

4.The learned counsel for the appellant reported that the condition has been complied with and the same is confirmed by the learned Standing Counsel for the respondent. The Appellate Tribunal has listed the case for hearing on 27.02.2019.

5.Considering the facts and circumstance of the case, we are of the opinion that the direction already given in this appeal, dated 05.09.2018, would safeguard the interest of the Department, since the appeal itself has been directed to be listed by the Appellate Tribunal on 27.02.2019.

6.Thus, for the above reasons, the appeal stands allowed and the order passed by the Tribunal is modified to the effect that the appellant shall pay a sum of Rs.5,00,000/-, which the appellant has already paid. Consequently, the remaining amount of penalty, levied on the appellant, shall remain stayed till the disposal of the appeal by the Appellate Tribunal. No costs.

It is made clear that the appellant should co-operate in the disposal of the appeal before the Appellate Tribunal and if the appellant adopts any dilatory tactics, it is open to the respondent to move the Appellate Tribunal for varying the order. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

abr

To

The Appellate Tribunal, Foreign Exchange Management Act,
Government of India, 4th Floor, Lok Nayak Bhawan,
Khan Market, New Delhi-110 003.

+1cc to M/s.G.Hema, Special Public Prosecutor, sr.no.83767

C.M.A.No.1981 of 2018

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