BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.09.2023

CORAM:

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
AND
THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

C.M.A.(MD)No.989 of 2016
and CMP(MD).No.8875 of 2016

Raymond ...Appellant

Vs.

1.The Appellate Tribunal for
Foreign Exchange
Janpath Bhavan
4th Floor, B Wing
Janpath, New Delhi 110 001

2.The Special Director of Enforcement
Enforcement Directorate
6th Floor, Lok Nayak Bhavan
Khan Market, New Delhi 110 003 ...Respondents

PRAYER:- Civil Miscellaneous Appeal filed under Section 35 of Foreign Exchange Management Act, to call for the records pertaining to the order passed by the first respondent dated 09.05.2008 (made in Appeal No.265 of 2003) whereby a condition of pre deposit of 40% of penalty amount has been imposed and set aside the same.

For Appellant	:Mr.K.Sharan For M/s.Veera Associates
For R1	:Mr.K.Govindarajan Deputy Solicitor General of India
For R2	:Mr.R.Vijayarajan

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JUDGMENT

(Judgment of the Court was delivered by **DR.ANITA SUMANTH, J.)**

This Civil Miscellaneous Appeal has been filed challenging an interim order passed by the Appellate Tribunal for Foreign Exchange on 09.05.2008. Seeing as more than 15 years has elapsed from the date of the order, we enquired whether the appeal was still pending and are informed that the appeal, numbered as Appeal No.265 of 2003, is pending on account of pendency of this Civil Miscellaneous Appeal.

2.The appellant has filed the above said appeal challenging an order passed by the second respondent, the Special Director of Enforcement dated 14.07.2003. The appellant was the proprietor of one

M/s.EI Shaddai Enterprises, engaged in the export of chillies, onions, potatoes, rice, salt and other condiments.

3.A show cause notice has been issued for contravention of Section 18(2) of the Foreign Exchange Regulation Act, 1973 (in short 'FERA') read with various notifications and Section 18(3) of FERA for failure to realize export proceeds to the tune of US $ 2,03,925/-. This amount represented consideration towards exports made during the period July to November 1999.

4.A second show cause notice was issued under the provisions of Section 8 of Foreign Exchange Management Act, 1999 (in short 'FEMA') read with relevant Regulations for failure to realize and take reasonable steps towards realizing export proceeds amounting to US $ 18,17,346/- for exports made during the period from 01.12.1999 to 13.04.2000 and other connected allegations.

5.The show cause notices had been consequential to information received with regard to exports made to M/s.Nithan Trading Company and M/s.Vasanna Impex in Colombo. In the statements recorded by the authorities, the appellant had admitted the dues as receivable from the purchasers in Colombo.

6.In the order in original, the authority proceeds on the basis that timely steps had not been taken by the Appellant to secure the extension of time for realization of the amount from RBI and neither had the delay in collection been reported to the authorized dealers or the RBI in time. In 2001, at the time when the investigation was on-going, no legal proceedings had been initiated as against the buyers for recovery of receipts in respect of the pending bills.

7.The enquiry made with the authorized dealers, Tamil Nadu Mercantile Bank, also revealed that the matter had not been referred to RBI and that proper procedure had not been followed by the appellant with regard to the submission of documentation in relation to the export transactions.

8.After soliciting the response of the appellant, the authority concludes that the charges laid under two show cause notices were proved and that the noticee was guilty of the contraventions thereunder.

Penalties of Rs.8,00,000/- and Rs.1,20,00,000/- were levied in respect of the two show cause notices.

9.It is as against the above order levying penalty that an appeal has been filed before the Tribunal. Section 19 of the FEMA requires the appellant to deposit the entirety of the disputed amounts as a pre-condition to maintain the appeal before the Tribunal. The second proviso under Section 18 of the FEMA vests authority in the Appellate Tribunal to dispense with the pre-deposit if the Tribunal were of the opinion that such deposit would cause undue hardship to the appellant.

10.Accordingly, the appellant had filed a Miscellaneous Application before the Tribunal on 25.08.2003 pleading undue hardship. The reasons spelt out in the condonation application are three fold

(i) that it was facing proceedings by the Tamil Nadu Industrial Investment Corporation Limited for recovery of a sum of Rs.1,15,83,803.25 for a loan availed for construction of mechanised sailing vessel

(ii) appellant did not own any other immovable asset or any other asset, for that matter, to enable the deposit of the penalty and

(iii) that it was in appeal before the Srilankan Supreme Court challenging the order passed by the Provincial Commercial High Court, Colombo dismissing its suits against the purchaser for recovery. It was only on completion of that litigation, that it would, if at all, have sufficient liquidity to meet any portion of the demand raised.

11.On the last issue, the appellant had, in 2003, filed suits before the Commercial Court in Srilanka seeking recovery of the amount stated to be due from the buyers from Colombo. Those suits came to be dismissed by a judgment of the Commercial Court in Case No.HC (Civil) 216 of 2003 dated 13.10.2006 on the bar of limitation. As against that decision, the appellant filed an appeal in Appeal No.37 of 2006 which is being periodically heard by the Supreme Court.

12.The learned counsel for the appellant would inform the Bench that the appeal was last heard on 25.09.2023 and it was at the stage of filing of written submission. He urges that the order of the Tribunal has not taken note of the undue hardship that faces the appellant, and ought to have waived the pre-deposit.

13.The Tribunal has recorded the relevant facts in the impugned order, and has waived 60% of the total penalty of Rs.1.28 crores, calling upon the appellant to deposit only 40% thereof, for which a period of 30 days was granted. The appeal was liable to be dismissed if the condition was not complied by then.

14.The learned counsel for the appellant has relied upon a judgement of the Supreme Court in *Monotosh Saha Vs.Special Director, Enforcement Directorate and another* (2008 12 SCC 359) where the challenge was to an order passed by the Calcutta High Court rejecting an order passed by the Tribunal, directing pre-deposit. The Court refers to its judgments in *Siliguri Municipality Vs. Amalendu Das* (1984 2 SCC 436), *Samarias Trading Co.(P) Ltd.., Vs. S.Samuel* (1984 4 SCC 666) *and CCE Vs.Dunlop India Ltd* (1985 1 SCC 260) wherein the principles for grant of stay have been discussed.

15.The Court also refers to the judgments in *S.Vasudeva Vs. State of Karnataka (*1993 3 SCC 467*)* and *Benara Valves Ltd., Vs. CCF*

(2006 13 SCC 347) for the manner in which a prayer for undue hardship must be understood and interpreted.

16.That appellant had, in compliance with the order of the Hon'ble Supreme Court pending SLP, remitted an amount of Rs.10,00,000/- with the concerned authority. In fine, the Court takes note of the aforesaid deposit, directs the appellant to furnish further security as may be stipulated by that Tribunal, and upon compliance with such condition, directs that the appeal may be heard.

17.In the present case, the issue relates to a plea for full waiver of mandatory, statutory pre-deposit and non-compliance with an interim order of the Tribunal. The Tribunal has, in waiving 60% of the penalty, and directing deposit of only 40%, taken note of all contentions of the Appellant, including the hardship projected. In fine, a balance has been struck and the Appellant directed to remit only 40% of the penalty, bearing in mind the interest of the State as well.

18.Taking a cue from the order in the case of *Monotosh Saha*, we made a similar offer to the appellant to remit at least a portion of the amount in order that we may consider directing the Tribunal to hear the appeal. Learned counsel, upon instructions, is categoric that no amount of the penalty can be remitted, as the appellant has absolutely no available resources.

19.In *Nimesh Suchde Prop.Siddharth Polymers,* the Delhi High Court, on the facts of that case, and taking note of judgment in *Monothosh Saha* felt, prima facie, that the appellant had satisfied the condition of undue hardship. The question that arose related to the valuation of a consignment for the purpose of levy of import duty.

20.The appellant had sought waiver of pre deposit and that request had been dismissed directing deposit within 30 days, premised upon the finding that the goods imported, were higher in value than disclosed. A Single Judge of the Delhi High Court confirmed the order of the Tribunal as against which, an appeal had been filed.

21.The Division Bench considered the plea of waiver in light of Sections 8(3) and 8(4) of the FERA, that imposed restrictions on dealing with foreign exchange. The Adjudicating Officer while invoking

Sections 8(3) and 8(4) of the FERA was expected to examine the matter independently and arrive at a conclusion in the matter.

22.In that case, the Officer had merely relied on the order passed by the Customs Authority which, in turn, had been based on the premise that the import was without a valid import license. The Bench noted that no independent finding had been rendered by the Authority in regard to the finding of undervaluation rendered by the Customs Officer which was a pre-requisite while invoking Sections 8(3) and 8(4) of the FERA.

23.Mere reference to an order passed by the Customs Authority would not suffice. It was on the above facts that the Bench concluded that the dismissal of request of dispensation of pre deposit had not been decided in proper light by the Tribunal. The facts of this case are not analogous to the case of *Siddharth Polymers* and hence do not advance the case of the Appellant.

24.We do not find any extenuating circumstances warranting interference in the discretionary order passed by the Tribunal. In fact, the

Tribunal has itself waived 60% of the penalty based on the plea of financial stringency put forth by the petitioner. We find very little justification to interfere in the discretion exercised by the Tribunal as it not shown to be perverse in any way.

25.The order of the Tribunal is confirmed and this Civil Miscellaneous Appeal is dismissed. Since the appeal is stated to be listed on 05.10.2023, the appellant is permitted to remit the amount by then, to condition of which the Tribunal will proceed with the appeal. No costs. Consequently, connected miscellaneous petition is closed.

[A.S.M.J.,] & [R.V.J.,]
26.09.2023

NCC :Yes/No
Index :Yes/No
Internet :Yes
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To

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3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

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