



WEB COPY



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17-09-2025

CORAM

**THE HONOURABLE MR JUSTICE R. SURESH KUMAR
AND
THE HONOURABLE MR.JUSTICE HEMANT CHANDANGOUDAR**

**CMA No. 2309 of 2025
and
CMP No. 19583 of 2025**

1. Shri.Mallikarjunan nair @ Arjun Nair
Proprietor, M/s.Hindustan Hair
Products Pvt Ltd.,
No.144, Lamech Street, Janaki Nagar,
Valasaravakkam, Chennai - 600 087.

Appellant(s)

Vs

1. Union of India
Represented by Additional Director,
Directorate of Enforcement,
Southern Regional Office, IIIrd Floor,
Murugesan Complex, No.84,
Greens Road, Chennai - 600 006.

2.Shri Mallikaarjuna Nair @ Arjun Nair
Proprietor of M/s.Pallika Global Co.,
128-129, A.R.Street, Janaki Nagar,
Valasaravakkam, Chennai - 600 087.

3.M/s. Hindustan Hair Products Pvt Ltd.,
144, Lamech Street, Janaki Nagar,
Valasaravakkam, Chennai - 87.

Respondent(s)

PRAYER: Civil Miscellaneous Appeal filed under Section 35 of the Foreign Exchange Management Act, to set aside the order passed in MP-FE-158/2024 (Pre-deposit) in FPA -FE-95/CHN/2019, on the file of Appellate Tribunal under SAFEMA at New Delhi/ the 1st Respondent herein.



For Appellant(s): Mr.M.Velmurugan
for Mr.S.Arivazhagan

For Respondent(s): Mr.N.Ramesh,
Special Public Prosecutor for R1

JUDGMENT

(Judgment of the Court was made by R.Suresh Kumar J.)

This Civil Miscellaneous Appeal has been directed against the order passed on 09.01.2025 made in MP-FE-158/2024 (Pre-deposit) in FPA-FE-95/CHN/2019, on the file of Appellate Tribunal under SAFEMA at New Delhi.

2.Against the appellant and others adjudication proceedings were initiated by the Special Director, Directorate of Enforcement, Chennai and it was concluded by an order dated 16.10.2019, whereby, penalty has been imposed in respect of the appellant and others.

3.Insofar as the present appellant is concerned penalty to the extent of Rs.9,85,30,000/- was imposed by the adjudicating authority.

4.Like that various amounts of penalties have been imposed to other persons also. As against the said order passed by the appellate authority, the appellant and others preferred an appeal before the Tribunal where as per Section 19 of the FEMA Act, the amount shall be deposited as a pre-deposit in



order to waive such pre-deposit of penalty. Two instant applications were filed including the one filed by the appellant seeking for such waiver of pre-deposit of penalty. Those waiver applications having been considered, the Tribunal by exercising its discretion under the second proviso to Section 19 (5) of the Act has directed to make a pre-deposit of penalty of Rs.98,50,000/- being the 10% of the penalty awarded by the adjudicating authority.

5.This order passed by the Tribunal directing the appellant to pay only 10% of the amount imposed by the authority by way of penalty as a pre-deposit to entertain the appeal by the Tribunal has now been questioned in the present appeal.

6.Mr.M.Velmurugan, learned counsel representing Mr.S.Arivazhagan, learned counsel for the appellant would submit that under Section 19 (1) of the Act, any aggrieved person against the order passed by the adjudicating authority may prefer an appeal to the appellate Tribunal. However, in the first proviso, at the time of filing the appeal against the order passed by the adjudicating authority levying any penalty deposit, the amount of such penalty must be deposited with such authority as may be notified by the Central Government. He would also invite our attention that under second proviso to Section 19 (1), in any particular case, if the appellate Tribunal is of the opinion that deposit of the penalty would cause undue hardship to a person, the appellate Tribunal may

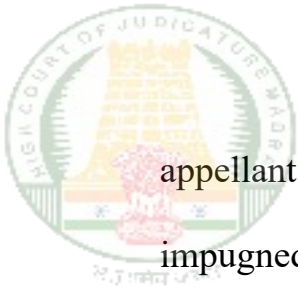


dispense with such deposit subject to the condition as it may deem fit to impose so as to safe guard the realization of penalty.

WEB COPY

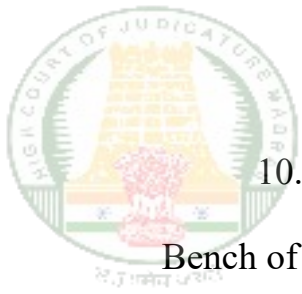
7.Relying upon the second proviso to Section 19 (1) of the Act, learned counsel appearing for the appellant would contend that if there has been any undue hardship is placed before the Tribunal, the Tribunal by exercising its power as well as its discretion under the second proviso to Section 19 of the Act can completely waive such a pre-deposit condition imposed under the first proviso to Section 19.

8.In this context, he would further submit that as far as the appellant is concerned, his properties have been already attached in a related income tax proceedings and all his bank accounts have been freezed and therefore, his business and other activities have been completely crippled for the past about six years. When that being so, the appellant is not in a position to make out any money even to comply the directions given by the Tribunal through the impugned order to pay 10% of the penalty amount to the extent of Rs.98,50,000/-. If these kind of situations are available to any appellant, that can easily fit under the definition of undue hardship and when such an undue hardship is explained by the appellant, that ought to have been accepted by the Tribunal and under the second proviso to Section 19 of the Act, a complete waiver should have been allowed by the Tribunal insofar as the case of the



appellant is concerned. Therefore, the directions given by the Tribunal in the impugned order directing the appellant to pay or deposit a sum of Rs.98,50,000/- being 10% of the penalty amount as a pre-deposit to entertain the appeal would run contra to the purpose of the second proviso to Section 19 in the given facts and circumstances of the case and therefore, the learned counsel appearing for the appellant seeks indulgence of this court.

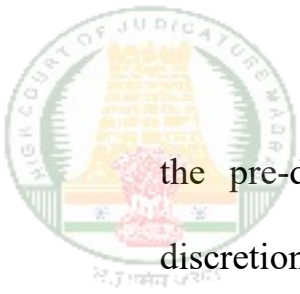
9.However, Mr.N.Ramesh, the learned Special Public Prosecutor for the first respondent would contend that insofar as the order passed by the adjudicating authority is concerned, if it is appealed under Section 19 of the Act as has been mandated in the first proviso to Section 19, the appeal shall be entertained only on deposit of the penalty amount with such authority as notified by the Central Government. Therefore, it is mandated under the first proviso to Section 19 that the pre-deposit of the penalty amount is a condition precedent for entertaining the appeal. Only in exceptional cases or in exceptional circumstances, the Tribunal or appellate authority can exercise its discretion to modify the order of the adjudicating authority insofar as the quantum of penalty is concerned to be deposited as a pre-deposit. Therefore, there is absolutely no scope for complete waiver of the deposit even under the second proviso to Section 19 (1) of the Act, he contended.



10. The learned counsel has heavily relied upon the order of the Division Bench of this Court, where one of us (R. SURESH KUMAR, J) is a party, ***dated 17.04.2025 made in C.M.A No.2802 of 2024 etc batch*** in the matter of ***M/s.Thomas Cook India Limited Vs. The Additional Director, Adjudicating Authority Directorate of Enforcement Chennai, Zone 1, and one another,*** where exactly the issue raised in the present appeal has already been engaged by the Division Bench and an exhaustive decision has been made, where how such a discretion can be exercised by the appellate authority as Tribunal. In the light of the language being used by the legislature in both the proviso i.e., the first and second proviso of Section 19 (1) of the Act, the learned Special Public Prosecutor for the first respondent would submit that merely 10% of the penalty since has been directed to be paid as a pre-deposit that itself is a complete exercising of discretion of the Tribunal beyond which the appellant cannot expect anymore indulgence either in the hands of the Tribunal or before this Court. Hence, the learned counsel seeks dismissal of this appeal.

11. We have considered the said rival submissions made by the learned counsel appearing for both sides and have perused the materials placed before this Court.

12. The present appeal has not been made against the final order in the main appeal that was filed before the Tribunal. It is only against the waiver of



the pre-deposit application, where the Tribunal in fact has exercised its discretion under the second proviso to section 19 (1) of the Act.

13. For ready reference, the relevant portion of Section 19 (1) with proviso is extracted herein,

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:

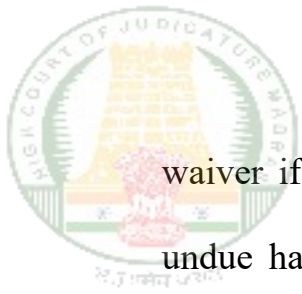
Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realization of penalty.



14. Section 19 (1) is the enabling provision to make an appeal by any aggrieved person against the order passed by the adjudicating authority other than those referred to in Section 17(1). The first proviso makes it clear and mandated that by filing such an appeal, the penalty amount made by the adjudicating authority shall be deposited by the appellant with such authority as may be notified by the Central Government. Therefore, the language used in the first proviso with the word 'shall' denotes that mandatorily the entire penalty amount shall be deposited as pre-deposit.

15. But at the same time, if we look at the language used in second proviso to Section 19 (1), it would say that if 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 the condition as it may deem fit so as to safeguard the realisation of the penalty.

16. Here the word 'may' has been employed, which means, the discretion of the Tribunal or the appellate authority, if it is exercised under the second proviso to Section 19 (1), it may dispense with such deposit if, in the opinion of the Tribunal that there has been an undue hardship on the part of the appellant and even in that case, such a dispensing with shall be subject to such conditions as the Tribunal may deem fit to impose. Therefore, first, it is the discretion of the appellate authority to give such a pre-deposit waiver, but the pre-deposit



waiver if at all is given by the Tribunal or the appellate authority in case of undue hardship, even then such kind of dispensing can be done only on the basis of certain conditions to be imposed.

17. Here in the case in hand, the Tribunal having exercised its discretion has only directed the appellant to deposit 10% of the penalty amount as adjudicated by the adjudicating authority as a pre-deposit. This very minimum amount of 10% of the penalty itself is a concession that has been given by exercising the power of discretion of the Tribunal and it can very well be fit in under the caption that it is subject to the condition as it may deem fit. One of such conditions, if it is imposed that only 10% or 20% of the penalty amount alone can be deposited as a pre-deposit, that itself is a condition in lieu of dispensing with the entire penalty amount being deposited as pre-deposit in view of the language used in the first proviso. Otherwise, the first proviso since it is mandated that while entertaining an appeal, the party or the person shall deposit the entire penalty amount as a pre-deposit would become otiose and such kind of meaning or pedantic interpretation cannot be given to the second proviso as projected by the learned counsel appearing for the appellant to state that by exercising the power of the Tribunal under the second proviso if the Tribunal satisfy that there is undue hardship on the part of the appellant and while exercising the discretion of the Tribunal, the entire pre-deposit shall be waived in total. If such a interpretation is given that would destroy the very



purpose of the first proviso and the said interpretation sought to be given by the appellant cannot be granted.

WEB COPY

18. In this context, in fact in the said judgment in *M/s. Thomas Cook India Limited* cited supra, the Division Bench has discussed this issue to some extent and for the ready reference, the relevant portion of the Judgment of the Division Bench is extracted herein,

6. Learned counsel for the appellants pointed out that, insofar as the merits of the case is concerned, a notice in fact had been issued by the adjudicating authority during March 2020, which was the peak period of COVID-19 situation. Thereafter, further opportunity was mentioned to be given, however such an opportunity had not been given and without giving any such opportunity, final orders were passed by the adjudicating authority. Therefore he would contend that, had there been a full opportunity given to the appellants, the case would have been projected in proper perspective and there could not have been any room for losing the case before the adjudicating authority. Hence, it is the ultimate contention of the learned counsel for the appellants that if those cases are heard on merits by the appellate Tribunal, certainly the cases would go in favour of the appellants alone. Therefore, the



discretion as has been provided under the second proviso to Section 19(1) could have been fully utilized and exercised by the appellate Tribunal and by thus, they could have waived the entire pre-deposit of the penalty. However, this plea has not been considered in proper perspective by the Tribunal and hence they have approached this Court.

7. That apart, the learned counsel for the appellant has relied upon a decision of the Delhi High Court in the case of “Nimesh Suchde Prop. M/s.Siddharth Polymers -vs- Union of India and Others” dated 22.07.2009 made in L.P.A.No.203 of 2009 and C.M.No.6626 of 2009, where he relies upon the following paragraph.

“ 7. While dealing with cases of waiver of pre-deposit under Section 19 of FEMA, the Supreme Court in the case of Monotosh Saha vs. Special Director, Enforcement Directorate and Anr., reported in 2008(11) SCALE 603 has observed as under:

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the realization of penalty". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the realization of penalty have to be kept in view.



12. *As noted above there are two important expressions in Section 19(1). One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.*

13. *For a hardship to be 'undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.*

14. *The word "undue adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant."*

8. *Relying upon the said paragraph of the Delhi High Court decision, the learned counsel appearing for the appellants would canvass the point that, there are two important expressions in Section 19(1). The first one is 'undue hardship'. Insofar as 'undue hardship' is concerned, it is*



normally related to economic hardship and therefore if such an economic hardship is pleaded, for which if substantial materials were placed before the Court, it must consider that the litigant was in really undue hardship. Therefore, such a discretion of waiving the pre-deposit of the penalty could be exercised. However, on those guidelines as has been mentioned in the said judgment since the Tribunal has not exercised its discretion under the second proviso to Section 19, the order impugned is liable to be interfered with. Therefore, the learned counsel for the appellants seeks the indulgence of this Court.

9. On the other hand, Mr.N.Ramesh learned Special Public Prosecutor for Enforcement Directorate would contend that, the first proviso to Section 19(1) makes it mandatory that there shall be a pre-deposit and only on that condition, the appeal would be entertained. Under the second proviso, it is only the discretion of the Tribunal to waive such pre-deposit.

10. Therefore, while exercising the discretion under the second proviso to Section 19(1), depending upon the circumstances of the case, such a discretion would be exercised by the Tribunal and here in the case in hand, taking into consideration the facts and circumstances of the case, by using



the discretion the Tribunal had already exercised its power by reducing the penalty amount only to 20% instead of 100%. Therefore, such a discretion since has already been exercised by the Tribunal to the maximum extent, it cannot be found fault with and absolutely there is no scope for interference in the order impugned, he contended.

11. We have heard the submissions made by the learned counsel for both sides and have perused the materials placed on record.

12. The only question to be considered here is that, whether the Tribunal has exercised its discretion in the context of second proviso to Section 19(1) of the Act. The language used in the first proviso to Section 19(1) reads as follows:

"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."

13. Here, the word "shall" has been used by the legislature. Thereby, it has become mandatory that, whenever such appeals are filed against the levying of penalty, the penalty amount shall be



deposited as directed by the authority.

14. However, the language used by the legislature in the second proviso states that,

" 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. "

15. Only in that context, the Delhi High Court judgment also has to be looked into. If we look at the judgment of the Delhi High Court cited supra, it in fact promotes the case of the respondent Enforcement Directorate and not the case of the appellants. The two ingredients, which have been mentioned in the second proviso as stated in the said judgment is (i) undue hardship and (ii) so as to safeguard the realization of penalty. Here, in order to safeguard the realization of penalty, the discretion to be used has to be restricted to that extent that too only on the basis of undue hardship, which must be in the opinion of the Tribunal. In the order impugned here, it has been clearly stated that, considering the facts and circumstances of the case the Tribunal, by exercising its discretion has reduced the pre-deposit of penalty to only 20% ie.,



1/5th of the penalty amount. That itself is a great relief that has been given by way of exercise of discretion under the second proviso to Section 19(1) of the Act.

16. It is further to be noted that, once the legislature fixes the discretion to any authority, it is to the satisfaction of that authority it should exercise such discretion. Moreover, the words used in the second proviso to Section 19(1) also states that 'the appellate Tribunal is of the opinion'. It means, if the Tribunal forms an opinion that some discretion has to be exercised in a particular case, then only such a discretion has to be used.

17. Therefore, with regard the question of forming an opinion, it is fully left to the discretion of the Tribunal. Whether such opinion that the Tribunal had formed was based on the merits of case, cannot be gone into by sitting over on appeal by this Court and therefore, ultimately such kind of discretion if it is exercised by the original authority to whom such power of discretion is vested, it normally would not be touched upon by the appellate forums.

18. Here in the case in hand, in fact the Tribunal has exercised its discretion by reducing the pre-deposit of penalty only to 20%. Therefore, it is a case where the Tribunal, after having formed



an opinion based on the facts and circumstances of the case, has reduced the pre-deposit of penalty to only 20%. Hence, it cannot be stated that the Tribunal has not exercised its discretion under Second proviso to Section 19(1) of the Act.

19. Moreover, the imposition of penalty is also for the purpose of safeguarding the realization of penalty as, that also has to be taken into account. Therefore, by striking a balance between 'undue hardship' and 'safeguarding the realization of penalty', in between the two, the discretion of the Tribunal has to be exercised. Such a discretion cannot be exercised in the manner expected by the litigant in any lis. Since the discretionary power vested under the second proviso to Section 19(1) of the Act to the Tribunal has been exercised properly in this case, we do not find any reason to interfere with the same.

19. In the case cited supra, in fact the Tribunal by exercising its discretion directed in that case to deposit 20% of the penalty as a pre-deposit. Even in respect of the said directions, when the appeal was filed, the Division Bench after having discussed the provisions, especially, Section 19 including proviso 1 & 2 has held that the question of forming an opinion is concerned, it is fully left to the discretion of the Tribunal, whether such opinion the Tribunal had formed based on the merits of the case cannot be gone into by this Court and therefore,



ultimately, such kind of discretion, if it is exercised by the original authority to whom such power of discretion is vested, normally would not be touched upon by the appellate Court.

20. We are in complete agreement with the said view already been expressed by the Division Bench in *M/s. Thomas Cook India Limited* cited supra.

21. In present case also, the Tribunal already exercised its discretion under second proviso to Section 19(1) of the Act, thereby, only 10% of the penalty was directed to be deposited as a pre-deposit. Therefore, beyond such a discretion having exercised by the Tribunal, the appellant cannot expect for a complete waiver i.e., zero pre-deposit of the penalty.

22. Insofar as the undue hardship as has been projected by the learned counsel appearing for the appellant is concerned, the very same undue hardship having been considered, the Tribunal since has exercised its powers, the question of going beyond what has been decided by the Tribunal in the circumstances of the case also does not arise.

23. In that view of the matter, we are not inclined to entertain this appeal and in the result, the appeal is liable to be dismissed and accordingly, it is



dismissed. However, there shall be no order as to costs. Consequently,
connected miscellaneous petition is closed.

WEB COPY

[R.S.K., J.] [H.C., J.]
17-09-2025

Index:Yes/No
Speaking/Non-speaking order
Internet:Yes
Neutral Citation:Yes/No
sli

To

1. Union of India
Represented by Additional Director,
Directorate of Enforcement,
Southern Regional Office, IIIrd Floor,
Murugesan Complex, No.84,
Greens Road, Chennai - 600 006.

2.Shri Mallikaarjuna Nair @ Arjun Nair
Proprietor of M/s.Pallika Global Co.,
128-129, A.R.Street, Janaki Nagar,
Valasaravakkam, Chennai - 600 087.

3.M/s. Hindustan Hair Products Pvt Ltd.,
144, Lamech Street, Janaki Nagar,
Valasaravakkam, Chennai - 87.



WEB COPY

20/20

CMA No. 2309 of 2



**R.SURESH KUMAR J.
AND
HEMANT CHANDANGOUDAR J.**

sli

**CMA No. 2309 of 2025
and CMP No. 19583 of 2025**

17-09-2025