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C.M.A.Nos.2802, 2815,
2812 and 2806 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17-04-2025

CORAM

**THE HONOURABLE MR JUSTICE R. SURESH KUMAR
AND
THE HONOURABLE DR.JUSTICE A.D.MARIA CLETE**

**CMA Nos. 2802, 2815, 2806, 2812 and 2806 of 2024
AND
CMP Nos. 22794,22852, 22755, 22748, 22795
and 22856 OF 2024**

C.M.A.No.2802 of 2024

M/s.Thomas Cook India Limited
Rep. by its Authorised Signatory Mr.Amit
Bhatia No.43/19, 1st Floor, Sivaji Ganesan
Road, T.Nagar, Chennai-600017

... Appellant

Vs

1. The Additional Director
Adjudicating Authority Directorate of
Enforcement Chennai Zone-1, 3rd Floor,
Murugesha Naicker Officer Complex, 84,
Greaves Road, Chennai-600006

2.Shri R.Kumar
The Assistant Director, Directorate of
Enforcement, Directorate of Enforcement
Chennai Zone-1, 3rd Floor, Murugesha
Naicker Officer Complex, 84, Greaves
Road, Chennai-600006

... Respondents



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CMA No. 2815 of 2024

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Amit Bhatia
General Manager and Regional Head,
M/s. Thomas Cook India Ltd.,
No.43/19, 1st Floor, Sivaji Ganesan
Road, T.Nagar, Chennai - 17.

... Appellant

Vs

1. The Joint Director
Adjudicating Authority Directorate of
Enforcement Chennai Zone-1, 3rd
Floor, Murugesha Naicker Officer
Complex, 84, Greaves Road, Chennai-
600006

2.Shri R.Kumar
The Assistant Director, Directorate of
Enforcement, Directorate of
Enforcement Chennai Zone-1, 3rd
Floor, Murugesha Naicker Officer
Complex, 84, Greaves Road, Chennai-
600006

.. Respondents

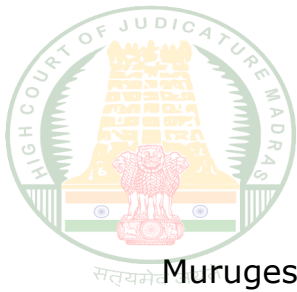
CMA No. 2812 of 2024

Ashwin Savoor
Head-Sales and Operations, M/s Tata Capital
Forex Limited, (Now Thomas Cook (India)
Limited), 11th Floor, Marathon futures, A
Wing NM, Joshi Marg, Lower Parel,
Mumbai-400 013

.. Appellant

Vs

1. The Joint Director
Adjudicating Authority Directorate of
Enforcement Chennai Zone-1, 3rd Floor,



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Murugesha Naicker Officer Complex, 84,
Greens Road, Chennai-600006

2.Shri R.Kumar
The Assistant Director, Directorate of
Enforcement, Directorate of Enforcement
Chennai Zone-1, 3rd Floor, Murugesha
Naicker Officer Complex, 84, Greens Road,
Chennai-600006

... Respondents

CMA No. 2806 of 2024

Tata Capital Forex Limited
(erstwhile known as Mis T.C. Forex
Services Ltd.,) (now Thomas Cook
(India) Ltd., Rep by its Authorized
Signatory, Mr. Ashwin Savoor, G-1,
Apex Plaza, 3, Nungambakkam High
Road, Chennai 6.

... Appellant

Vs

1. The Joint Director
Adjudicating Authority Directorate of
Enforcement Chennai Zone-1, 3rd Floor,
Murugesha Naicker Officer Complex, 84,
Greens Road, Chennai-600006

2.Shri R.Kumar
The Assistant Director, Directorate of
Enforcement, Directorate of Enforcement
Chennai Zone-1, 3rd Floor, Murugesha Naicker
Officer Complex, 84, Greens Road, Chennai-
600006

... Respondent(s)



C.M.A.Nos.2802, 2815,
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PRAYER in CMA No. 2802 of 2024

Civil Miscellaneous Appeal under Section 35 of the Foreign Exchange Management Act, 1999 to call for the records of the Honble Appellate Tribunal under SAFEMA, at New Delhi in relation to its Order dt. 01.05.2024, in MP-FE-775/CHN/2020 in FPA-FE-77/CHN/2020, set aside the same and consequently waive the requirement of pre-deposit under section 19(1) of the Foreign Exchange Management Act, 1999.

PRAYER in CMA No. 2815 of 2024

Civil Miscellaneous Appeal under Section 35 of the Foreign Exchange Management Act, 1999 to call for the records of the Honble Appellate Tribunal under SAFEMA, at New Delhi in relation to its Order dt. 01.05.2024, in MP-FE-776/CHN/2020 in FPA-FE-78/CHN/2020, set aside the same and consequently waive the requirement of pre-deposit under section 19(1) of the Foreign Exchange Management Act, 1999.

PRAYER in CMA No. 2812 of 2024

Civil Miscellaneous Appeal under Section 35 of the Foreign Exchange Management Act, 1999 to call for the records of the Honble Appellate Tribunal under SAFEMA, at New Delhi in relation to its Order dt. 01.05.2024, in MP-FE-779/CHN/2020 in FPA-FE-80/CHN/2020, set aside the same and consequently waive the requirement of pre-deposit under section 19(1) of the Foreign Exchange Management Act, 1999.



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PRAYER in CMA No. 2806 of 2024

Civil Miscellaneous Appeal under Section 35 of the Foreign Exchange Management Act, 1999 to call for the records of the Honble Appellate Tribunal under SAFEMA, at New Delhi in relation to its Order dt. 01.05.2024, in MP-FE-777/CHN/2020 in FPA-FE-79/CHN/2020, set aside the same and consequently waive the requirement of pre-deposit under section 19(1) of the Foreign Exchange Management Act, 1999.

In all C.M.As

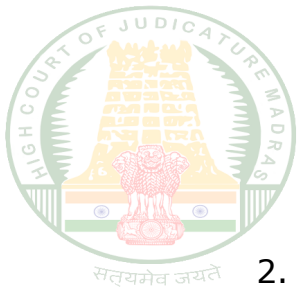
For Appellants : Dr.M.R.Venkatesh
for Mr.Tarun Rao Kallakuru

For Respondents : Mr.N.Ramesh
Special Public Prosecutor
- for Enforcement Directorate

COMMON JUDGMENT

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

Since the issue involved in all the four appeals is inextricably connected with each other, all these appeals were heard together and are disposed of by this common judgment.



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2. As against the order of the adjudicating authority under the Foreign Exchange Management Act, 1999 (In short 'FEMA'), appeals had been filed before the appellate Tribunal under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) at New Delhi, where, the appellants had sought for waiver of pre-deposit of penalty.

3. For better understanding of the case, the facts in C.M.A.No.2802 of 2024 is traversed herein. The adjudicating authority imposed a sum of Rs.3 Crores penalty on M/s.Thomas Cook India Limited / the appellant in C.M.A.No.2802 of 2024 and imposed a penalty of Rs.1.50 Crores on one Mr.Amit Bhatia, who claimed to be the authorised signatory of M/s.Thomas Cook India Limited. Therefore, two separate appeals have been filed, where, such a waiver had been sought for under the second proviso to Section 19(1) of the FEMA.

4. Similar plea is raised in other appeals also. The appellate Tribunal under SAFEMA, having heard both sides, has passed an order stating that, on the facts and circumstances of the case and without going into the merits of the case, the appellants were directed to deposit 20% of the penalty amount as per the order impugned before it in the form of FDR in the name

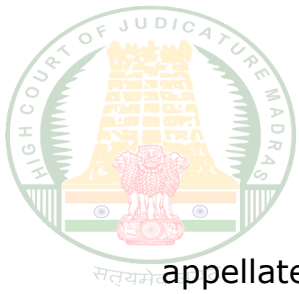


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of the respondent Enforcement Directorate for a period of two years and the said FDR to be renewed after every two years. Similar orders have been passed by the appellate Tribunal in all these cases. Aggrieved over the same, these Civil Miscellaneous Appeals have been directed.

5. Heard Dr.M.R.Venkatesh, learned counsel appearing for the appellants in all these appeals and Mr.N.Ramesh, learned Special Public Prosecutor appearing for the respondent Enforcement Directorate.

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



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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



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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



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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,



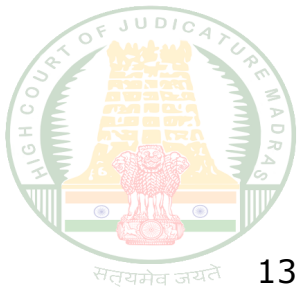
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taking into consideration the facts and circumstances of the case, by using the discretion the Tribunal had already exercised its power by reducing the penalty amount only to 20% instead of 100%. Therefore, such a discretion since has already been 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."



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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



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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



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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.



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20. Resultantly, all these appeals are liable to be dismissed and accordingly the same are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

(R.SURESH KUMAR, J.) (A.D.MARIA CLETE, J.)
17-04-2025

Index:Yes
Speaking order : Yes
Internet:Yes
Neutral Citation:Yes

KST

Note : Issue order copy on 21.04.2025

To

1. The Additional Director
Adjudicating Authority Directorate of
Enforcement Chennai Zone-1, 3rd
Floor, Murugesu Naicker Officer
Complex, 84, Greaves Road, Chennai-
600006

2.Shri R.Kumar
The Assistant Director, Directorate of
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**R.SURESH KUMAR J.
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