

SUPREME COURT OF INDIA

Monotosh Saha

Vs.

Special Director, Enforcement Directorate

C.A.No.5188 of 2008

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

21.08.2008

JUDGMENT

Dr. Arijit Pasayat, J.

1. Leave granted.
2. Challenge in this appeal is to the order passed by a Division Bench of the Calcutta High Court dismissing the appeal filed by the appellant under Section 35 of *Foreign Exchange Management Act, 1999* (in short the `Act').
3. Background facts in a nutshell are as follows:

“Memorandum was issued by the Enforcement Directorate, Ministry of Finance. On the basis of certain statements recorded it was indicated therein that M/s Godsons (India) and its proprietor, the present appellant had acquired foreign exchange contravening the provisions of Section 8(1) of the *Foreign Exchange Regulation Act, 1973* (in short the `Foreign Exchange Act') thereby rendering him liable to be proceeded under Section 50 of the Foreign Exchange Act. The memorandum was issued under Rule 3 of the *Adjudication Proceedings and Appeal Rules, 1974* (in short `Adjudication Rules'). The reply to the show cause notice was filed by the appellant. The Special Director, of Foreign Exchange Act passed an order on 13th May, 2005 imposing penalty of Rs.25 lakhs on the appellant. The appellant preferred an appeal before the Appellate Tribunal (Foreign Exchange) (in short the `Tribunal') and filed an application for dispensing with the requirement of pre-deposit. By order dated 7.3.2006 the Tribunal passed an order directing deposit of 60% of the penalty amount for the purpose of entertaining the appeal. An appeal was filed under Section 35 of the Act which came to be dismissed by the High Court holding that no case for hardship was made out either before the Tribunal or before it and, therefore, there was no scope of interference with the order of the Tribunal. However, time permitting the deposit was extended.”

4. In support of the appeal, learned counsel for the appellant submitted that a case for dispensing with pre- deposit was made out. In any event, in compliance with this Court's interim order dated 5.2.2007 the amount of Rs.10, 00,000/- has been deposited with the concerned Directorate.

5. Learned counsel for the respondents on the other hand submitted that the appellant did not make out a case for dispensing with pre-deposit and, therefore, the order of the Tribunal as affirmed by the High Court does not suffer from any infirmity.

6. Principles relating to grant of stay pending disposal of the matters before the concerned forums have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

7. The applicable principles have been set out succinctly in *Siliguri Municipality and Ors. v. Amalendu Das and Ors.*¹ and *M/s Samarias Trading Co. Pvt. Ltd. v. S. Samuel and Ors.*² and *Assistant Collector of Central Excise v. Dunlop India Ltd.*³.

8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake citizens' faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Siliguri Municipality and Dunlop India cases (supra) without analysing factual scenario involved in a particular case.

10. Section 19 of the Act reads as follows:

"19(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."

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.*⁴ 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.

15. The other aspect relates to imposition of condition to safeguard the realization of penalty. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the realization of penalty. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the realization of penalty.

16. The above position was highlighted in *Benara Valves Ltd. and Ors. v. Commissioner of Central Excise and Anr.*⁵. The decision was rendered in relation to Section 35F of the Central Excise Act, 1944 where also identical stipulations exist.

17. In the instant case Tribunal has rightly observed that the rival stands have to be examined in detail with reference to material on record.

18. The only other question that needs to be examined is whether any reduction of the amounts to be deposited as directed by the Tribunal is called for.

19. Undisputedly the appellant had deposited the amount which was directed to be deposited. However, for the balance amount demanded with a view to safeguard the realization of penalty the appellant shall furnish such security as may be stipulated by the Tribunal. On that being done, the appeal shall be heard without requiring further deposit if the appeal is otherwise free from defect.

20. The appeal is disposed of accordingly.

¹(AIR 1984 SC 653)

²(AIR 1985 SC 61)

³(AIR 1985 SC 330)

⁴(AIR 1994 SC 923)

⁵(2006 (13) SCC 347)