SUPREME COURT OF INDIA

Raj Kumar Shivhare

Vs.

Asst.Dir.Directorate of Enfort.

C.A.No.3221 of 2010

(G.S. Singhvi and Asok Kumar Ganguly JJ.)

12.04.2010

JUDGEMENT

A.K.Ganguly, J.

1. Leave granted.

2. This appeal arises out of the Division Bench judgment of the High Court of Delhi in WP No. 6527/2008 filed by the appellant-Rajkumar Shivhare.

3. A Writ Petition was filed challenging the order dated 17.7.2008 of the Appellate Tribunal for Foreign Exchange, Janpath, New Delhi, (hereinafter `the Tribunal'), on various grounds with which this 1 Court is not concerned. By that order, the Tribunal refused to dispense with the pre-deposit of penalty by the appellant and the concluding portion of that order is:

> "...Therefore, the application for dispensation of pre-deposit of penalty is dismissed and rejected but the appellant is permitted to deposit full amount of penalty within thirty days from the date of receipt of the order failing which the appeal will be dismissed on this ground alone. The appeal is fixed for hearing on 4th September, 2008."

4. The facts of the case in brief are as follows:

> "The appellant, along with another person, were issued a notice dated 12.1.2005 under Section 3(c) of the Foreign Exchange Management Act, 1999 (FEMA) for receiving unauthorized payments worth Rs.5 crores under instructions from persons living outside India in connection with his illegal cricket betting operation. He was also asked to explain why the amount of Rs.1 lac, confiscated during search from his residence, should not be credited to the account of the Central Government under Section 13(2) of FEMA, 1999."

5. As the charges were proved against him, a penalty of Rs.2 crores was imposed on him and the confiscated money was disposed of according to Section 13(2) vide order dated 29.02.2008.

6. On appeal to the Appellate Tribunal under Section 19(2) of the Act, the Tribunal passed the order dated 17.7.2008, the concluding portion whereof is quoted above.

7. Then, a writ petition came to be filed challenging the order dated 17.7.2008.

8. The High Court, without going into the merits of the petition, accepted the preliminary objection raised by the respondent that the High Court of Delhi did not have territorial jurisdiction to decide the matter. High Court of Delhi rejected the writ petition on that ground and gave liberty to approach the appropriate High court.

9. While dismissing the writ petition, on the ground that it lacked territorial jurisdiction, the High Court relied on the decision of this Court rendered in *Ambica Industries vs. Commissioner of Central Excise*[1], on the interpretation of Section 35 of FEMA.

10. The High Court in its judgment gave the following reasoning:

> "The position is analogous to that of the Union Government. The statement that the Union Government is located throughout every part of Indian Territory and hence can be sued in any Court of the country, brooks no cavil.
>
> This does not, however, inexorably lead to the consequence that a litigant can pick and choose between any Court as per his caprice and convenience..."

11. It held that in exercising its powers under Article 226, a High Court must consider that the person, Authority or Government is located within its territories or a significant part of the cause of action has arisen within its territories. It referred to Ambica Industries (supra) again where this Court held that ".....the aggrieved person is treated to be the dominus litis, as a result whereof, he elects to file the appeal before one or the other High Court, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of a High Court does not extend beyond its territorial jurisdiction and the decision of one High Court would not be a binding precedent for other High Courts or courts or tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play.

> "An assessee, affected by an order of assessment made at Bombay, may invoke the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay. ...

> It would also give rise to the problem of forum shopping. ....For example, an assessee affected by an assessment order in Bombay may invoke the jurisdiction of the Delhi High Court to take advantage of the law laid down by it which may be contrary to the judgments of the High Court of Bombay."

12. High Court also relied on the Explanation (a) to Section 35 of FEMA, which states that "High Court", to which an appeal from an order of the Appellate Tribunal under Section 35 of the Act lies, means "the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain".

13. Though High Court dismissed the writ petition on the issue of territorial jurisdiction, it missed a rather fundamental issue which is discussed hereunder.

14. At the commencement of the hearing, this Court questioned the very maintainability of the Writ Petition against an order of the Tribunal in view of the provisions of Section 35 of FEMA.

15. The Learned Counsel for the appellant sought to answer this query by contending that (a) the remedy under Section 35 of FEMA is only against a final order, (b) this question was not raised before the High Court, (c) the writ jurisdiction of the High Court is part of the basic structure of the Constitution and such jurisdiction cannot be ousted in view of Section 35 of FEMA, (d) all the High Courts in India, are entertaining writ petitions challenging an interim order passed by such Tribunals.

16. In our judgment, none of the answers given by the learned counsel are tenable for the reasons discussed below.

17. FEMA is a complete Code in itself. The long title of FEMA would indicate that the same is an "Act to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India".

18. The Act has seven Chapters and 49 Sections and out of which, Chapter V, which deals with adjudication and Appeal, contains detailed provisions starting from Sections 16 to 35, thus spanning 20 Sections.

> "A rule styled as the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 have been framed in exercise of powers under Section 46 read with sub-section (1) of Section 16, sub-section (3) of Section 17 and sub-section (2) of Section 19 of FEMA."

19. It is thus clear that Chapter V of FEMA, read with the aforesaid rules, provides a complete network of provisions adequately structuring the rights and remedies available to a person who is aggrieved by any adjudication under FEMA.

20. The statutory scheme under Section 34 of FEMA is to exclude the jurisdiction of the Civil Court in express terms. Section 35, which calls for interpretation in this case, runs as follows:

> "35. Appeal to the High Court.-Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:
>
> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
>
> Explanation.-In this section "High Court" means - (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain."

21. A reading of Section 35 makes it clear that jurisdiction has been clearly conferred on the High Court to entertain an appeal within 60 days from `any decision or order of the appellate authority'.

> But such appeal has to be on a question of law.

22. The proviso empowers the High Court to entertain such an appeal after 60 days provided the High Court is satisfied that the appellant was prevented by sufficient cause from appealing earlier.

23. The argument that under Section 35 only appeals from final order can be filed has been advanced on a misconception of the clear provision of the Section itself. The Section clearly says that from `any decision or order' of the Appellate Tribunal, appeal can be filed to the High Court on a question of law.

24. The word `any' in this context would mean `all'. We are of this opinion in view of the fact that this Section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of Statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by Statute, as it is barred here under Section 34 of FEMA, is an inherent right (See Section 9 of the Civil Procedure Code) but a right of appeal is always conferred by Statute. While conferring such right Statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are

to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by this Court on the basis of an interpretative exercise. Under Section 35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from `any' `order' or `decision' of the Appellate Tribunal. Of course such appeal will have to be on a question of law. In this context the word `any' would mean `all'.

25. Justice Chitty in Beckett vs. Sutton (51 Law Journal 1882 Chancery Division 432) had to interpret "any decree or order" in Section 1 of the Trustee Extension Act, 1852 and His Lordship held:- "..the words of the section are as wide as possible, and appear to me to apply adopting the language the Legislature has used - to "any decree or order" by which the Court directs a sale".

26. The word `any dispute' is somewhat akin to `any order' or `any decision'. Any dispute, occurring in Section 51 of Arbitration Act 1975, has been interpreted to have a wide meaning to cover all situations where one party makes a request or demand and which is refused by the other party [See *Ellerine Bros (Pty) Ltd and another vs. Klinger*[2]].

27. Justice Bachawat, while in Calcutta High Court, in the case of *Satyanarain Biswanath vs. Harakchand Rupchand*[3] interpreted the word `any' in Rule 10 of Bengal Chamber of Commerce, Rules of the Tribunal of Arbitration. Construing the said rule, the learned Judge held that the word `any' in Rule 10 means one or more out of several and includes all and while doing so the learned Judge relied on an old decision of the Calcutta High court in the case of *Jokhiram Kaya vs. Ganshamdas Kedarnath*[4]. This Court is in respectful agreement with the aforesaid view of the learned Judge.

28. In Black's Law Dictionary the word `any' has been explained as having a `diversity of meaning' and may be "employed to indicate all and every as well as some or one and its meaning in a given Statute depends upon the context and subject matter of Statute". The aforesaid meaning given to the word `any' has been accepted by this Court in *Lucknow Development Authority vs. M.K. Gupta*[5]. While construing the expression "service of any description" under Section 2(o) of Consumer Protection Act, 1986 this Court held that the meaning of the word `any' depends upon the context and the subject matter of the Statute and held that the word `any' in Section 2(o) has been used in wider sense extending from one to all (para 4 at page 793 of the report). In the instant case also when a right is conferred on a person aggrieved to file appeal from `any' order or decision of the Tribunal, there is no reason, in the absence of a contrary statutory intent, to give it a restricted meaning.

29.Therefore, in our judgment in Section 35 of FEMA, any `order' or `decision' of the Appellate Tribunal would mean all decisions or orders of the Appellate Tribunal and all such decisions or orders are, subject to limitation, appealable to the High Court on a question of law.

30.In a case where right of appeal is limited only from a final order or judgment and not from interlocutory order, the Statute creating such right makes it clear [See Section 19 of the Family Courts Act, 1984] which is set out below:

> "(19). Appeal (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.
>
> (2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):
>
> PROVIDED that nothing in this sub- section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991] (3) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment or order of a Family Court." (Emphasis supplied)

31. Similarly, under Section 104 of the Code of Civil Procedure read with Order XLIII Rule 1 thereof, it has been indicated from which interlocutory order an appeal will lie. But it has been made clear that no Second Appeal from such order will lie [See Section 104 Sub-section (2) of the Code].

> "But in Debt Recovery Tribunal Act, as in FEMA, an appeal lies from an interlocutory order and this has been made clear in Section 20(1) of the Act."

32. By referring to the aforesaid schemes under different Statutes, this Court wants to underline that the right of appeal, being always a creature of a Statute, its nature, ambit and width has to be determined from the Statute itself. When the language of the Statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same.

33. The argument that writ jurisdiction of the High Court under Article 226 of the Constitution is a basic feature of the Constitution and cannot be ousted by Parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in *L. Chandra Kumar vs. Union of India and others*[6]. However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre-deposit of penalty by the Appellate Tribunal.

34. When a statutory forum is created by law for redressal of grievance and that too in a fiscal Statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go bye by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating the aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

35. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since High Court itself is the appellate forum.

36. Reference may be made to the Constitution Bench decision of this Court rendered in Thansingh Nathmal and others vs. The Superintendent of Taxes, Dhubri, reported in AIR 1964 SC 1419, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self imposed limitation, this Court went on to explain:

> "The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."
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> (Emphasis added)

37. The decision in Thansingh (supra) is still holding the field.

38. Again in *Titaghur Paper Mills Co. Ltd. and another vs. State of Orissa and another*[7] in the background of taxation laws, a three judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In paragraph 11, at page 607 of the report, this Court laid down:

> "It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Water Works Co. v. Hawkesford*[8] in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute.... But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it...the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to." The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd.*[9] and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant and Co.*[10] *and Secretary of State v. Mask and Co.*[11]. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

39. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein.

"A writ petition in the facts of this case is therefore clearly not maintainable. Again another Constitution Bench of this Court in *Mafatlal Industries Ltd. and others vs. Union of India and other*[12], speaking through Justice B.P. Jeevan Reddy, delivering the majority judgment, and dealing with a case of refund of Central Excise Duty held:

"So far as the jurisdiction of the High Court under Article 226 -- or for that matter, the jurisdiction of this Court under Article 32 -- is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment" (para 77 page 607 of the report).

40. In the concluding portion of the judgment it was further held:

"The power under Article 226 is conceived to serve the ends of law and not to transgress them" [Para 108 (x), p. 635]."

41. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA.

42. Learned counsel for the respondents relied on a judgment of this Court in *Seth Chand Ratan vs. Pandit Durga Prasad (D) By Lrs. and Ors.*[13]. Learned counsel relied on paragraph (13) of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a Statute, which itself prescribes the remedy or procedure for enforcing

the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution.

> "However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief."

43. In the instant case none of the aforesaid situations are present.

44. Therefore, principle laid down in the Ratan's case (supra) applies in the facts and circumstances of this case. If the appellant in this case is allowed to file a writ petition despite the existence of an efficacious remedy by way of appeal under Section 35 of FEMA this will enable him to defeat the provisions of the Statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fees or deposit of some amount of penalty or fulfillment of some other conditions for entertaining the appeal. (See para 13 at page 408 of the report). It is obvious that a writ court should not encourage the aforesaid trend of by-passing a statutory provision.

45. Learned counsel for the appellant relied on a decision of this Court in *Monotosh Saha vs. Special Director, Enforcement Directorate and Anr.*[14]. That was a decision entirely on different facts. In that decision Saha preferred an appeal before the appellate tribunal with a request for dispensing with requirement of pre-deposit, but the tribunal directed the deposit of 60% of the penalty amount before entertaining the appeal. When an appeal was preferred before the High Court under Section 35 of the FEMA, the same was dismissed by the High Court holding that no case for hardship was made out either before the tribunal or before it. In the background of those facts, this Court observed that since pursuant to this Court's interim order Rs.10 lacs have been deposited with the Directorate, the appellant was directed to furnish further such security as may be stipulated by the tribunal and directed that on such deposit tribunal is to hear the appeal without requiring further deposit.

46. It is obvious from the aforesaid discussion that in Monotosh Saha (supra) proper procedure was followed by filing an appeal under Section 35. On that this Court made certain observations. The said decision is, therefore, not relevant to the facts and circumstances of the case in hand.

47. Learned counsel for the appellant also relied on a decision of this Court in *Kusum Ingots and Alloys Ltd. vs. Union of India and Anr.*[15]. That was a decision on the question of "part of the cause of action" under Article 226 (2) of the Constitution. Since this Court is of the opinion that the writ petition itself is not maintainable for the reasons discussed above, the question of part of cause of action is not relevant. So the aforesaid decision is not attracted to the points in issue in this case.

48. The decision in Ambica Industries (supra) is also on the question of part of cause of action under Article 226 (2) of the Constitution of India. For the aforesaid reasons, the decision in Ambica Industries (supra) is not of much relevance in the facts of the case in hand.

49. For the reasons discussed above, this Court is of the opinion a writ petition is not ordinarily maintainable to challenge an order of the Tribunal.

> "We, therefore, dismiss the appeal, of course for reasons which are different from the ones given by the High Court in dismissing the writ petition."

50.In view of this Court's jurisdiction under Article 136 of the Constitution, we give liberty to the appellant, if so advised, to file an appeal before an appropriate High Court within the meaning of Explanation to Section 35 of FEMA and if such an appeal is filed within a period of thirty days from today, the appellate forum will consider the question of limitation sympathetically having regard to the provision of Section 14 of the Limitation Act and also having regard to the fact that the appellant was bona-fide pursuing his case under Article 226 of the Constitution before the Delhi High Court and then its appeal before this Court.

51. With the aforesaid direction, the appeal is dismissed. The parties are left to bear their own costs.

[1] *(2007) (6) SCC 769* [2] *1982 (2) AER 737* [3] *AIR 1955 Calcutta 225*
[4] *AIR 1921 Cal 244 at page 246* [5] *(AIR) 1994 SC 787* [6] *(1997) 3 SCC 261*
[7] *AIR 1983 SC 603* [8] *[1859] 6 C.B (NS) 336 at page 356* [9] *[1919] AC 368*
[10] *[1935] AC 532* [11] *AIR 1940 PC 105* [12] *(1997) 5 SCC 536*
[13] *(2003) 5 SCC 399* [14] *(2008) 12 SCC 359* [15] *(2004) 6 SCC 254*