

A MONOTOSH SAHA
v.
SPECIAL DIRECTOR, ENFORCEMENT
DIRECTORATE AND ANR.
(Civil Appeal No. 5188 of 2008)

B AUGUST 21, 2008

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]

C *Foreign Exchange Regulation Act, 1973: s.19(1) –*
Penalty – Pre-deposit of, as condition to hear appeal – Stay
/Dispensation of predeposit – Grant of – Held: While granting
stay, pending disposal of the matters before the concerned
forum, though discretion is available, same has to be
D *exercised judicially – Petitions for stay should not be*
disposed of in routine manner – 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 – Tribunal while
E *dealing with stay application has to consider materials placed*
by assessee relating to undue hardship and also to stipulate
condition as required to safeguard the realization of penalty
– On facts, appellant deposited penalty amount as directed
by this Court – For balance amount demanded, with a view
to safeguard realization of penalty, appellant to furnish such
F *security as may be stipulated by the Tribunal – On that being*
done, appeal be heard without requiring further deposit –
Interim order.

G **The appellant allegedly acquired foreign exchange**
contravening the provisions of s.8(1) of the Foreign
Exchange Regulation Act, 1973 thereby rendering him
liable to be proceeded under s.50 of the Act. After
issuance of show cause notice and receipt of reply, the
Special Director passed an order imposing penalty of

Rs.25 lakhs on the appellant. The appellant filed appeal before the Tribunal and an application for dispensing with the requirement of pre-deposit. The Tribunal passed an order directing deposit of 60% of penalty amount for entertaining the appeal. On appeal, High Court held that no case for hardship was made out either before the Tribunal or before it, therefore there was no scope for interference with the order of Tribunal.

In appeal to this Court, appellant contended that case for dispensing with pre-deposit was made out; and that in compliance with this Court's interim order dated 5.2.2007 the amount of Rs.10,00,000/- was deposited with the concerned Directorate.

Disposing of the appeal, the Court

HELD: 1. While granting stay, pending disposal of the matters before the concerned forum, though discretion is available, same has to be exercised judicially. 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 manner 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. 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. [Para 6 & 8] [448-G, 449-B-D]

Silliguri Municipality and Ors. v. Amalendu Das and Ors. AIR (1984) SC 653; M/s Samarias Trading Co. Pvt. Ltd. v. S. Samuel and Ors. AIR (1985) SC 61; Assistant

A *Collector of Central Excise v. Dunlop India Ltd.* AIR (1985)
SC 330 – relied on.

B 2.1. There are two important expressions in Section
19(1) of the Foreign Exchange Regulation Act, 1973. 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. For a hardship to be ‘undue’ it
must be shown that the particular burden 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. The word “undue”
adds something more than just hardship. It means an
excessive hardship or a hardship greater than the
circumstances warrant. [Paras 12 to 14] [450-D, F-H]

D 2.2. The other aspect relates to imposition of
condition to safeguard the realization of penalty. 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. [Para
15] [450-H, 451-A-B]

F *S. Vasudeva v. State of Karnataka and Ors.* AIR (1994)
SC 923; *Benara Valves Ltd. and Ors. v. Commissioner of
Central Excise and Anr.* (2006) 13 SCC 347 – relied on.

G 3. 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
H otherwise free from defect. [Para 19] [451-E-F]

Case law reference

AIR (1984) SC 653	relied on	para 7	A
AIR (1985) SC 61	relied on	para 7	
AIR (1985) SC 330	relied on	para 7	
AIR (1994) SC 923	relied on	para 12	B
(2006) 13 SCC 347	relied on	para 16	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5188 of 2008

From the final Judgment and Order dated 13.12.2006 of the High Court of Calcutta in E.E.A. No. 3 of 2006 (GA No. 2365 of 2006)

Sushil Kumar Jain, Puneet Jain and Pratibha Jain for the Appellant.

Shweta Garg, B.V. Balaram Das and B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

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.

A 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 *Silliguri Municipality and Ors. v. Amalendu Das and Ors.* (AIR 1984 SC 653) and *M/s Samarias Trading Co. Pvt. Ltd. v. S.*

Samuel and Ors. (AIR 1985 SC 61) and *Assistant Collector of Central Excise v. Dunlop India Ltd.* (AIR 1985 SC 330). A

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. B
C
D

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. E

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: F

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: G
H

A 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
B 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.
C 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
D 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. (AIR 1994 SC
E 923) 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.

F 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
G 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.

H 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.* (2006 (13) SCC 347). 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.

D.G.

Appeal disposed of.