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Court : Mumbai

Decided On : Apr-26-2012

Judge : Dr.D.Y.Chandrachud; Mrs. Mridula Bhatkar, Jj.

Acts : [Foreign Exchange Management Act 1999](#) - Sections 19(1), 35, 3(c);
Constitution Of India - Article 226

Appeal No. : F.E.R.A. APPEAL NO.18 OF 2012, APPEAL NO.172 OF 2008

Appellant : Rajkumar Shivhare

Respondent : Union of India

Advocate for Pet/Ap. : Mr. Subhash Jha, Adv.

Judgement :

1. This Appeal arises from an order of the Appellate Tribunal for Foreign Exchange on an application for waiver of pre-deposit made to the Tribunal under the provisions of Section 19(1) of the [Foreign Exchange Management Act 1999](#). The Appeal before this Court arises under Section 35 on a question of law. Though several questions have been framed in the Memo of Appeal, counsel appearing on behalf of the Appellant states that question (e) as raised would be comprehensive enough to govern the submissions which are urged in the Appeal. That question reads as follows :

"Whether in the facts and circumstances of the case, the Tribunal is right in dismissing the stay Petition for waiver of pre-deposit of penalty in FEMA appeal without properly appreciating the strong prima facie case, violation of principle of natural justice and undue hardship despite bringing out the same on the basis of documents filed along with stay petition in Appeal."

2. The Appeal is admitted on the aforesaid question and with the consent of learned counsel appearing on behalf of the Appellant and the Respondent is taken up for hearing and final disposal.

3. The Appellant was proceeded against for a violation of the provisions of Section 3(c) of the FEMA. The allegation in the notice to show was that the Appellant together with another person, Sunil Rai, unauthorizedly received payments amounting to Rs.5 Crores on the instructions of persons resident outside India. The residential premises of the Appellant and the co-noticee were searched on 19 and 20 February 2003 on information received to the effect that they were involved in illegal betting on cricket matches during the ICC World Cup Tournament of 2003. The search of the business premises resulted in the seizure of documents, audio cassettes, telephones, recording equipment and a computer hard disk amongst other incriminating material. Eight statements of the Appellant were recorded between 19 February 2003 and 8 April 2003. The Special Director in the Enforcement Directorate passed a final order of adjudication on 29 February 2008 holding the Appellant and his co-noticee guilty of the charge of having breached the provisions of Section 3(c). A penalty of Rs.2 Crores was imposed on the Appellant and of Rs.1 Crore on the co-noticee. The Appellant has filed an appeal before the Appellate Tribunal. On an application for the waiver of the requirement of pre-deposit under Section 19, the Tribunal has directed the Appellant to deposit the entire amount of the penalty of Rs.2 Crores. The Appellant had initially filed a petition under Article 226 of the Constitution before the Delhi High Court to challenge the order of the Appellate Tribunal. The Delhi High Court dismissed the petition on 24 September 2008. The order of the Delhi High Court was carried in appeal in the Supreme Court. The Supreme Court dismissed the appeal on 12 April 2010 holding that ordinarily a writ petition would not be maintainable to challenge an order of the Tribunal. The Appellant was, however, granted liberty to

file an appeal before the appropriate High Court under Section 35. The Supreme Court also directed that if such an appeal was to be filed within 35 days, the Appellate forum would consider the question of limitation sympathetically having regard to the provisions of Section 14 of the Limitation Act 1963 and having regard to the fact that the Appellant was bonafide pursuing his case under Article 226 of the Constitution before the Delhi High Court. Following the decision of the Supreme Court a civil application was filed before this Court which was allowed by a Division Bench of this Court by a judgment dated 6 July 2011. This Court was of the view that the Appellant would be entitled to the benefit of the provisions of Section 14 of the Limitation Act 1963 and since he was bonafide pursuing his case under Article 226 first before the Delhi High Court and thereupon in appeal before the Supreme Court, that period would have to be excluded. Excluding that period, the Court held that there were sufficient grounds for condoning the delay which was within the statutory period, to the extent of which delay can be condoned under the proviso to Section 35. The Appeal has now been listed and the issue before the Court is whether, within the parameters that are set out in Section 35 of the FEMA, a case has been made out by the Appellant.

4. The order of adjudication that has been passed by the Special Director adverts to the following circumstances :

i) Eight statements of the Appellant were recorded by the Enforcement Directorate. In those statements, the Appellant gave a detailed account of the fact that between 1992 to 2002 he was in Dubai and engaged in the betting business and since February 2003 he was carrying on his own cricket betting business from the premises that were searched. From 9 February 2003, according to the Appellant, he was receiving bets for the ICC World Cup Tournament. The Appellant admitted that he had 70 to 80 regular clients, some of whom were residing in Dubai and Jakarta. The amounts of the bets were received through hawala channels and the profits which were earned by the persons residing outside India were also remitted through hawala channels. The Dubai business of the Appellant was being looked after by his relative Jitendra Shivhare who was receiving and making payments to the clients of the Appellant. The '+' sign in the accounts meant that the Appellant had to receive money, whereas the '-' sign meant that he had to pay money. The

Appellant stated that during the previous two to three months, he had called for and received through hawala about Rs.23 lacs from Dubai and that he had received an amount of Rs.5 Crores as bets through hawala from Dubai and Jakarta. The Appellant furnished the names of his overseas clients;

ii) While explaining the seized items, equipments and documents, the Appellant stated that the audio cassettes contained the recording of the bets placed in a particular match and the documents constituted the record of those bets. The party-wise accounts were available in the hard disk of the computer seized from the premises. The data relating to the calls received, dialed and missed was available on the mobile phones which came to be seized;

iii) The co-noticee admitted that he was a partner of the Appellant in the illegal cricket betting business and that the Appellant was making and receiving payments in Dubai through his associate. Both the Appellant and the co-noticee were travelling to Dubai.

5. The Special Director held that (a) The statements of the Appellant recorded on eight different occasions contained a detailed account of the betting business;

(b) The statements of the Appellant were corroborated by the detailed accounts he was maintaining in his computer;

(c) The statement of the co-noticee also corroborated the statements of the Appellant;

(d) The allegation that the statements had been recorded under coercion was made for the first time in the interim reply dated 8 June 2005 filed almost two years and two months after the last statement which was recorded on 8 April 2003;

(e) The printouts of the accounts were taken from the computer hard disk of the Appellant under a Panchanama which was recorded in his presence. The entries in the accounts indicated in detail accounts pertaining to bets placed in respect of cricket matches between various cricket playing nations. On this basis the Special Director held that the statement of the Appellant that he had received an amount of Rs.5 Crores by way of hawala from Dubai and Jakarta was liable to be

accepted. The Special Director rejected the plea that the Appellant should be allowed to cross examine a woman client of the Appellant based in Dubai who was alleged to have placed certain bets and whose account was alleged to have been settled by the purchase of goods in Dubai for presentation to the wife of the Appellant. On this ground the penalty has been affirmed. The Appellate Tribunal while disposing of the application for pre-deposit placed reliance on the admissional statement of the Appellant. The Tribunal after considering the submissions was of the view that the impugned order could not be regarded as ex-facie illegal. No specific material was produced before the Tribunal in support of the plea of financial hardship. On this ground, the application was dismissed.

6. Counsel appearing on behalf of the Appellant submitted that -

(i) The direction to deposit the full amount of the penalty of Rs.2 Crores is disproportionate and arbitrary and virtually deprives the Appellant of the right of appeal before the Tribunal;

(ii) As and by way of a prima facie case the Appellant would submit that -

(a) The provisions of the FEMA would not be attracted since there is no basis to provide a link between the telephone numbers retrieved from the records of the Appellant with the alleged receipt of monies from abroad;

(b) The Appellant was denied the right of cross examination of one of the witnesses whose statement was recorded by the Enforcement Directorate;

(iii) The aspect of financial hardship has not been considered by the Tribunal.

7. On the other hand, counsel appearing on behalf of the Revenue submitted that -

(i) The deposit of the full amount of penalty is the norm, while a waiver of deposit is the exception which has to be made out on the basis of a case of undue hardship which would include both a prima facie case and financial hardship;

(ii) The Special Director could have been justified in relying solely on the statement of the Appellant in view of the law laid down by the Supreme Court in K.I. Pavunny V. Assistant Collector¹;

(iii) In the present case besides the eight statements of the Appellant, there

1 (1997) 3 SCC 721.

is independent material by way of corroboration consisting of the confirmed accounts which were retrieved from the hard disk seized from the Appellant; the records of the mobile calls made and the statement of the co-noticee. Hence, it was urged that no question of law would arise for consideration of this Court.

8. Under the first proviso to Section 19(1) of the FEMA, the person appealing to the Tribunal against an order passed by the adjudicating authority levying any penalty, is as a mandate of law required to deposit the amount of the penalty while filing the appeal. Under the second proviso, the Appellate Tribunal is empowered to dispense with the condition of deposit, subject to such conditions as it may deem fit to impose so as to safeguard the realization of the penalty, if it is of the opinion that the deposit of the penalty may cause undue hardship. Now it is a settled position of law that the expression 'undue hardship' would comprehend both the element of a prima facie case and of financial hardship. Both those elements have a material bearing on the decision of the Appellate Tribunal on whether a waiver of pre-deposit should be granted. As held by the Supreme Court in its decision in *Union of India v. Jesus Sales Corporation* 2 while construing the provisions of Section 4-M of the Imports and Exports (Control) Act 1947 the normal rule is that before filing an appeal or before the appeal is heard, the appellant must deposit the amount which he has been directed to deposit towards penalty. An order of dispensation is an exception to the requirement of deposit. At the same time, when a discretion is conferred by the statute upon the Tribunal to dispense with the requirement of deposit, the exercise of the discretion is not unfettered but has to be along judicially recognized principles. That is why when the statute uses the expression 'undue hardship', that must comprehend both the question as to whether the Appellant has made out a prima facie case and whether the requirement of pre-deposit would cause undue financial hardship. The Tribunal at the stage of evaluating a prima facie case is not required to go into a consideration in detail of the evidence which can only be at the hearing of the appellate proceedings.

Similarly, on the issue of financial hardship the onus lies on the Appellant to produce documentary material before the Tribunal to establish its case.

9. In the present case, the statements of the Appellant were recorded on eight different occasions. Prima facie, the statements contained a detailed account of the nature of the betting business which was carried out by the Appellant and contained a quantification of the amount of Rs.5 Crores received by him through hawala channels. The statements, as the adjudicating officer recorded, were sought to be challenged in terms of their authenticity for the first time well over two years after the last of those statements was recorded. The alleged retraction prima facie therefore is an after thought. Besides the statements of the Appellant, however, documentary material consisting of the accounts was seized from the hard disk of the computer which was retrieved during the course of the search. Apart from this, the search revealed mobile phones and recording equipment containing the telephone numbers from which bets were received and placed. The statement of the co-noticee who was a partner in the betting business was also recorded. These statements could clearly be relied upon by the adjudicating officer having regard to the law laid down by the Supreme Court in *K.I. Pavunny v. Assistant Collector* (supra). Insofar as the defence of the Appellant is concerned, the principal challenge is on the ground that there was no independent corroborative evidence and that the Appellant was not permitted to cross examine one Ms. Malti Makhijani, an alleged client based in Dubai who had placed bets with the Appellant. The Special Director had not considered it appropriate to allow the Appellant to cross examine the aforesaid witness stating that the statement was put to the Appellant who had been given an opportunity to make his comment and to make submissions. The point, however, is as to whether apart from the statement, there would be sufficient material against the Appellant. Prima facie, it would appear to be so even on a reading of the order passed by the Special Director. Be that as it may, we have taken due note of the submission urged on behalf of the Appellant that apart from the bare statement of the Appellant quantifying the amount received as Rs.5 Crores, the department would have to correlate the amount reflected in the accounts and in the computerized statement to

evaluate the exact amount that may be involved in the betting transactions. In this respect the Court must also be mindful of the fact that such transactions which are mostly clandestine in nature take place under the cloak of secrecy and it is the person involved in the transaction who has knowledge of the detailed facts pertaining to them. Looked at from the entirety of the material available on the record, we are of the view that no case was made out by the Appellant for a complete waiver of the requirement of pre-deposit under the second proviso to sub section (1) of Section

19. Since the Appellant is entitled to file an appeal, on facts and law before the Tribunal, and considering the nature of the defence which is sought to be raised, we are of the view that some modification of the order passed by the Appellate Tribunal would be warranted.

10 We are of the view, having heard counsel appearing on behalf of the Appellant and the learned senior counsel appearing on behalf of the Respondent on the quantum of deposit that a direction to the Appellant to deposit 60% of the penalty as quantified would meet the ends of justice. The Tribunal by its decision which was rendered on 17 July 2008 had directed the Appellant to deposit the penalty within thirty days failing which it was stated that the Appeal would stand dismissed. Thereafter as we have noted earlier, the Appellant had filed writ proceedings before the Delhi High Court and in an appeal therefrom to the Supreme Court where the Supreme Court held that ordinarily a writ petition against the order of the Tribunal on an application for waiver of pre-deposit would not be maintainable. In terms of the liberty granted by the Supreme Court the present appeal was filed. The appeal was filed under Section 35. Having regard to all these facts and circumstances, we are of the view that an extension of time should be granted to the Appellant to effect deposit. We accordingly grant time for making a deposit in terms of the present order within a period of four weeks from today. The question of law which has been framed shall accordingly stand answered in terms of the aforesaid directions.

11. We clarify that all the observations contained in this order are confined to the disposal of the application for pre-deposit and shall not come in the way of an

independent evaluation of the merits of the rival contentions in the appeal.

The Appeal is accordingly disposed of.

There shall be no order as to costs.

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