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(2009) 05 DEL CK 0030

In the Delhi High Court

Case No : LPA 222 of 2009 and CM No''s. 7228-30 of 2009

K. Mohammed Imran APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 18-05-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Foreign Exchange Management Act, 1999 — Section 19, 19(1)

Citation : (2009) 05 DEL CK 0030

Hon'ble Judges : A.P. Shah, C.J;Neeraj Kishan Kaul, J

Bench : Division Bench

Advocate : Saurabh Prakash, Mahendra Singh, Nagesh and Vikash Bhatnagar, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

1. The present appeal arises out of the order of the learned single Judge dated 17th April, 2009. The Appellate Tribunal for Foreign Exchange (in short "Tribunal") had disposed of the application of the appellant (original petitioner in the writ petition) for waiver of pre-deposit by partly allowing the same and directing the appellant to pre-deposit 70% of the penalty amount within thirty days. The Assessing Officer had imposed a penalty of Rs. 50,00,000/-. The Tribunal had asked the appellant to make a pre-deposit of Rs. 35,00,000/- as a pre-condition for hearing of his appeal before it.

2. The allegations against the appellant are that he had indulged in hawala transactions along with his brother-in-law of more than Rs. 2 crores. The learned single Judge, after noticing Income Tax returns of the appellant as also immovable property owned by the appellant''s wife, has further reduced the pre-deposit amount to Rs. 10,00,000/- to be paid in two installments as a pre-condition for hearing of the appeal. We see no infirmity in this finding.

3. As held by this Court in the case of Rakesh Kumar Aggarwal Vs. CEGAT, New Delhi, , that while exercising the writ jurisdiction in a matter concerning the

waiver of pre-deposit, the scope for interference is very limited. Unless the order is perverse, unreasonable and/or based on no material, there would be hardly any scope for interference.

4. It is further pertinent to refer to the decision of the Supreme Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, . The Supreme Court in the said matter, while considering the issue of stay/ dispensation of pre-deposit for hearing of an appeal, u/s 35F of the Central Excise Act, 1944, observed that in such matters, though discretion is available, the same has to exercised judicially. Two significant expressions used in Section 35F of the Central Excise Act, 1944, are "undue hardship to such person" and "safeguard the interests of revenue". The aspect of "undue hardship" 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. In Indian conditions, expression "undue hardship" is normally related to economic hardship. "Undue" 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. 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. The other aspect relates to imposition of condition to "safeguard the interest of revenue". It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of revenue.

5. u/s 19 Sub-clause (1) of Foreign Exchange Management Act, 1999, the expressions used are "undue hardship" and "safeguard the realization of penalty". The appellant has been unable to show as to how undue hardship would be caused to him. No case has been made out to warrant any interference by us on the touch stone of fairness, legality and public interest. The learned single Judge has very fairly directed the appellant to make a deposit of Rs. 10,00,000/- in two installments as a pre-condition for hearing the appeal. Neither before the Tribunal nor before the learned Single Judge or in the pleadings before us has the appellant succeeded in making out a case of financial and undue hardship to warrant complete waiver of the requirement of the pre-deposit.

6. As held by the Delhi High Court in Monotash Saha v. Special Director, Enforcement Directorate 2008 (229) ELT 493, while dealing with Section 19 of the Foreign Exchange Management Act, 1999, that "undue hardship" 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. "Undue hardship" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. "Undue hardship"

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is caused when the hardship is not warranted by the circumstances. It was also held in the said judgment that as far as the condition to safeguard the realization of penalty is concerned it is for the Tribunal to impose such conditions as are deemed proper to safeguard the realization of penalty. The Tribunal noticed that confessional statements were made which were subsequently retracted. The Tribunal rightly held that evidentiary value of retracted confessions has to be adjudged after hearing arguments at the time of disposal on merits. The Tribunal also noticed that the appellant had not brought forth clearly its financial position before it.

7. In the present case, clearly the appellant has been unable to make out a case for complete waiver of the pre-deposit. The twin requirements of proviso to Section 19(1) of the Foreign Exchange Management Act, 1999, have not been satisfied to entitle him to complete waiver. The interest of justice would be served by appellant depositing the amount, as directed the learned single Judge.

8. In view of what is stated hereinabove, the appeal is dismissed. All pending applications stand disposed of as well.

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