

(2009) 02 DEL CK 0125

In the Delhi High Court

Case No : Criminal Appeal No. 1060 of 2008

Shri V.K. Modi

APPELLANT

Vs

The Director, Enforcement Directorate and Another

RESPONDENT

Date of Decision : 09-02-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35G, 35L
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 136, 14, 15, 16, 226
Customs Act, 1962 — Section 128(2), 129A(1), 129B, 130, 130E
Foreign Exchange Management Act, 1999 — Section 16, 17, 17(1), 19, 19(1)
Foreign Exchange Regulation Act, 1973 — Section 50, 51, 52, 52(1), 52(2)
General Clauses Act, 1897 — Section 6
Income Tax Act, 1961 — Section 251(1), 251(2), 253(1), 254, 256
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 3(1)

Citation : (2009) 02 DEL CK 0125

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : L.P. Dhir, for the Appellant; Vineet Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—This order shall dispose of three appeals filed by the appellant u/s 54 of the FERA 1973 r/w Section 35 of FEMA 1999, assailing the order passed by the Appellate Tribunal Foreign Exchange, New Delhi u/s 19(1) of FEMA. Crl. Appeal No. 1059/2008 has been preferred by the company M/s. Modi Rubbers Ltd. while Crl. Appeal No. 1060/2008 and Crl. Appeal No. 1061/2008 have been preferred by the Directors of the said company.

2. All these appellants had filed appeals before the Appellate Tribunal u/s 19(1) of the Foreign Exchange Management Act challenging the order dated 9.11.2004 passed by the adjudicatory authority whereby the penalty of Rs. 1 crore was imposed on the company M/s. Modi Rubbers Ltd. for violating the provisions of Section 8(3) r/w Section 8(4) of FERA, 1973 r/w para 7A, 20(i) of the ECM 1995 r/w Section 68(1) of the FERA and Section 49 (3) and (4) of the Foreign

Exchange Management Act, and penalty of Rs. 5 lacs each on the individual was imposed on the directors u/s 50 of the said Act.

3. Brief facts as set out by the appellants in the present appeals are as under: That M/s Modi Rubber Ltd. (MRL for short) was established in the year 1971. It acquired the latest technology and despite recession in tyre industry, made exports of its well known products to USA, Australia, Italy and Germany etc. It won 'CAPEXIL' Award for a record 11 times and also won "National Productivity Award". In 1995-96 its turnover was Rs. 1020 Crores of which FOB value of exports was Rs. 105.89 Crores, in 1996-97 it was Rs. 128.99 crores, whereas in 1997-98 it was Rs. 101.39 crores. It imported goods and raw material in 1992-93 and 1996-97 etc. and duly submitted each one of the requisite documents for the actual imports in all cases, including the abovementioned items. As a law abiding corporate citizen, it met with all its legal obligations as per the procedure laid down, to the authorized dealers/banks in good time as required by Para 7A.20 of RBI Exchange Control Manual, 1993. However, it seems somehow that the authorized dealers (American Express and Citibank, in these cases) were inadvertently not able to handle the import documents as required by Para 7A.21 and failed to pass on the documents to RBI which resulted in RBI reporting the 18 so-called items of defaults to the Enforcement Directorate as per the Annexure to Show Cause Notice. The learned Adjudication Officer issued Memorandum dated 29.5.2002 to the appellant and inter alia to its two Directors Shri V.K. Modi and Dr. B.K. Modi charging them all with failure to furnish Exchange Control Copy of the Bills of Entries including items No. 3,4,5,6 & 7 of the Annexure, as proof of confirmation of having imported the goods for which the said amounts were released to the company and held that the company and its aforesaid two directors appear to have contravened the provisions of Section 8(3) and 8(4) read with Section 68(1) of FERA read with Para 7 A 20(i) of Exchange Control Manual and initiated adjudication proceedings u/s 50 of FERA in respect of 18 items. Unfortunately, MRL fell on bad days and simmering labour problem and financial crunch resulted in volcanic labour strike on 7.8.2001 whereby its Plant, Accounts Department and Offices came to be closed. Since then it does not have access to its old records, and the new skeleton staff knows nothing of old records. Its net worth got eroded and it was registered as sick industrial company u/s 3(1)(o) of Sick Industrial Companies (Special Provisions) Act (SICA for short) with Board for Industrial & Financial Reconstruction (BIFR for short).

4. The impugned adjudication proceedings have taken place under the shadow of these adverse constraints.

5. In response to Show Cause Notice issued by Special Director of Enforcement, the MRL submitted requisite documents including Bills of Entry for 16 months, 1 more Bill of Entry was also acceptable to the Special Director. By letter dated 30.06.1993 the MRL proved before the incumbent Special Director that the item Nos. 3,4,5 and 6 (American Express) were duly explained to the Bank and

Original Bills of Entry were submitted to the Bank. MRL had filed the quadruplicate Bills of Entry in original in respect of all these 4 items vide letter dated 30.06.1993 and also clarified once again by letter dated 30.07.1998. Reference to letter dated 28.10.2003 from American Express to Modi Rubber Ltd. confirms this position. All these documents were placed before the Ld. Special Director but in spite of this conclusive evidence, he was still not satisfied. MRL had been pursuing with the two Banks. Ultimately, American Express Bank sent in letter dated 9.12.2004 to Reserve Bank of India (RBI : for short) enclosing all the requisite documentary evidence, requesting the RBI to regularize the outstanding bills of Entries (for items No.3,4,5 & 6) and delete them from BEF Part-II. In other words, all the four entries No. 3,4,5 & 6 listed for default are now deleted with the Bank or would be deleted with the RBI from BEF Part-II. Similarly in the case of item No.7 (Citibank), the details were submitted through two Bills of Entry for Ex- Bond Clearance for Home Consumption ? one for US \$15,000 and other for US\$ 10,000. MRL had placed on record copies of the 2 bills of Entry for Ex-Bond Clearance for Home Consumption, first for US\$15,000 and the other for US\$10,000 evidencing that goods were imported in December, 1996 and Customs duty were paid. Incidentally, the MRL has been able to persuade Citibank to send the requisite documents to RBI which they have done by letter dated 9.12.2004 enclosing copies of the Debit Advice, Bills of Lading, Certificate of Origin, C.A.s Certificate and Bill of Entry and Certificate of Origin with Sworn Affidavit etc. etc. for the approval of the RBI, to regularize this particular entry No. 7 for US\$25,000.

6. The learned Special Director, Respondent No.2 levied penalties of Rs. 1 Crore on the Company and Rs. 5 Lacs each on its two directors. Aggrieved with the order of Special Director, the appellant company and its Directors preferred appeal to the Appellate Tribunal . Tribunal vide impugned order dated 15.9.2008 remanded back the matter to the Special Director. Aggrieved with the said order, the appellants preferred the present appeals.

7. As would be seen from the above facts, the learned Appellate Tribunal has given the directions to the learned adjudicatory officer to examine the matter afresh to ascertain the veracity of the claims of the appellants. The learned Appellate Tribunal also gave directions for setting aside of the order of the adjudicatory authority with liberty to the appellant to file further proofs/evidence in support of their case. Directions were also given by the Tribunal to the learned adjudicatory authority to give fresh hearing and to decide the matter within a period of six months. This order of remand is under challenge in these appeals.

8. Mr. Vineet Malhotra, counsel for the respondent took preliminary objection to the maintainability of these appeals on the ground that the Appellate Tribunal has yet not passed any order on merits and has merely remanded the appeals filed by the appellants for fresh consideration by the adjudicatory authority, therefore, such order of remand being totally inconsequential does not merit any interference by this Court. Mr. L.P. Dhir, counsel for the appellants refuting such

submissions of the counsel for the respondent submitted that no such power of remand vests with the Appellate Tribunal exercising powers u/s 52(3) of the FERA, and therefore, the order of remand being per se illegal merited rejection from this Court. In support of his arguments counsel for the appellant contended that plain, simple and literal interpretation of Section 52(3) of FERA would show that no such power of remand has been conferred on the Appellate Board and the only power given to the Appellate Board is either to confirm the order of the adjudicatory authority, modify such an order or set aside the order appealed against. The contention of the counsel for the appellant is that when the legislature never intended to give such power to the Appellate Board, then the power of remand cannot be read into the said statutory provision which is plain and unambiguous. In support of his arguments counsel for the appellant placed reliance on the judgment of Apex Court reported in Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others, especially paras 17 and 29 of the said judgment. Both the paras are reproduced as under:

17. Right of appeal is statutory. Right of appeal inhered in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed in *State of Kerala v. K.M. Charia Abdulla and Co.* the distinction between right of appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the Appellate Authority and it has the power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four Judge Bench in *Hari Shankar v. Rao Girdhari Lal Chowdhury* that the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code of CPC to hold that the High Court.s powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone.

29. "Appeal", is defined in the Oxford Dictionary, Vol. 1, p. 398, as the transference of a case from an inferior to a higher court or tribunal in the hope of reversing or modifying the decision of the former. In the Law Dictionary by Sweet, the term 'appeal' is defined as a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court or Court of Appeal, and it is added that the term, therefore, includes, in addition to the proceedings specifically so called, the cases stated for the opinion of the

Queen's Bench Division and the Court of Crown Cases reserved, and proceedings in error. In the Law Dictionary by Bouvier an appeal is defined as the removal of a case from a court of inferior to one of superior jurisdiction for the purpose of obtaining a review and retrial, and it is explained that in its technical sense it differs from a writ of error in this, that it subjects both the law and the facts to a review and retrial, while the latter is a common law process which involves matter of law only for re-examination; it is added, however, that the term ? appeal? is used in a comprehensive sense so as to include both what is described technically as an appeal and also the common law writ of error. As Mr Justice Subramania Ayyar observes in *Chappan v. Moidin Kutti* ILR at p. 80, the two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior court and the power, on the part of the former, to review decisions of the latter.

9. Counsel for the appellant also relied upon the decision of the Constitutional Bench reported as *L. Chandra Kumar Vs. Union of India and others*, to buttress his argument that such power of remand has consciously not been conferred by the legislators on these tribunals as these tribunals have failed to inspire confidence of the public. Special attention of this Court was drawn to following paras of the said judgment.

89. In the years that have passed since the Report of the Malimath Committee was delivered, the pendency in the High Courts has substantially increased and we are of the view that its recommendation is not suited to our present context. That the various Tribunals have not performed up to the expectations is a self-evident and widely acknowledged truth. However, to draw an inference that their unsatisfactory performance points to their being founded on a fundamentally unsound principle would not be correct. The reasons for which the Tribunals were constituted still persist; indeed, those reasons have become even more pronounced in our times. We have already indicated that our constitutional scheme permits the setting up of such Tribunals. However, drastic measures may have to be resorted to in order to elevate their standards to ensure that they stand up to constitutional scrutiny in the discharge of the power of judicial review conferred upon them.

90. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Articles 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even

in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent statutes, by way of an appeal by special leave under Article 136 of the Constitution, is too costly and inaccessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a first appellate court. We have already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of the Tribunals under Article 227 of the Constitution. In *R.K. Jain*, after taking note of these facts, it was suggested that the possibility of an appeal from the Tribunal on questions of law to a Division Bench of a High Court within whose territorial jurisdiction the Tribunal falls, be pursued. It appears that no follow-up action has been taken pursuant to the suggestion. Such a measure would have improved matters considerably. Having regard to both the aforesaid contentions, we hold that all decisions of Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Courts writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls.

92. We may add here that under the existing system, direct appeals have been provided from the decisions of all Tribunals to the Supreme Court under Article 136 of the Constitution. In view of our above-mentioned observations, this situation will also stand modified. In the view that we have taken, no appeal from the decision of a Tribunal will directly lie before the Supreme Court under Article 136 of the Constitution; but instead, the aggrieved party will be entitled to move the High Court under Articles 226/227 of the Constitution and from the decision of the Division Bench of the High Court the aggrieved party could move this Court under Article 136 of the Constitution.

93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

94. The directions issued by us in respect of making the decisions of Tribunals amenable to scrutiny before a Division Bench of the respective High Courts will, however, come into effect prospectively i.e. will apply to decisions rendered hereafter. To maintain the sanctity of judicial proceedings, we have invoked the doctrine of prospective overruling so as not to disturb the procedure in relation to decisions already rendered.

95. We are also required to address the issue of the competence of those who man the Tribunals and the question of who is to exercise administrative supervision over them. It has been urged that only those who have had judicial experience should be appointed to such Tribunals. In the case of Administrative Tribunals, it has been pointed out that the Administrative Members who have been appointed have little or no experience in adjudicating such disputes; the Malimath Committee has noted that at times IPS Officers have been appointed to these Tribunals. It is stated that in the short tenures that these Administrative Members are on the Tribunal, they are unable to attain enough experience in adjudication and in cases where they do acquire the ability, it is invariably on the eve of the expiry of their tenures. For these reasons, it has been urged that the appointment of Administrative Members to Administrative Tribunals be stopped. We find it difficult to accept such a contention. It must be remembered that the setting up of these Tribunals is founded on the premise that specialist bodies comprising both trained administrators and those with judicial experience would,

by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. It was expected that a judicious mix of Judicial Members and those with grassroot experience would best serve this purpose. To hold that the Tribunal should consist only of Judicial Members would attack the primary basis of the theory pursuant to which they have been constituted. Since the Selection Committee is now headed by a Judge of the Supreme Court, nominated by the Chief Justice of India, we have reason to believe that the Committee would take care to ensure that Administrative Members are chosen from amongst those who have some background to deal with such cases.

96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is no authority charged with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem. We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory jurisdiction. If the idea is to divest the High Courts of their onerous burdens, then adding to their supervisory functions cannot, in any manner, be of assistance to them. The situation at present is that different Tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some Tribunals have been created pursuant to Central Legislations and some others have been created by State Legislations. However, even in the case of Tribunals created by parliamentary legislations, there is no uniformity in administration. We are of the view that, until a wholly independent agency for the administration of all such Tribunals can be set up, it is desirable that all such Tribunals should be, as far as possible, under a single nodal ministry which will be in a position to oversee the working of these Tribunals. For a number of reasons that Ministry should appropriately be the Ministry of Law. It would be open for the Ministry, in its turn, to appoint an independent supervisory body to oversee the working of the Tribunals. This will ensure that if the President or Chairperson of the Tribunal is for some reason unable to take sufficient interest in the working of the Tribunal, the entire system will not languish and the ultimate consumer of justice will not suffer. The creation of a single umbrella organisation will, in our view, remove many of the ills of the present system. If the need arises, there can be separate umbrella organisations at the Central and the State levels. Such a supervisory authority must try to ensure that the independence of the members of all such Tribunals is maintained. To that extent, the procedure for the selection of the members of the Tribunals, the manner in which funds are allocated for the functioning of the Tribunals and all other consequential details will have to be clearly spelt out.

10. Counsel for the petitioner further strengthened his arguments by comparing similar provisions under the Central Excise Act, Customs Act, 1962 and the

Income Tax Act, 1961. The contention of the counsel for the petitioner is that under the Central Excise Act, the Appellate Tribunal has been vested with the power to refer the case back to the authority and same is the position under the Customs Act 1962 and while the Appellate Tribunal under the Income Tax Act has been given powers to pass such orders as it may think fit after opportunity of hearing is given to the parties in appeal for benefit. The relevant provisions of these statutes are referred as under:

Central Excise Act

35C. Orders of Appellate Tribunal.--

(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal : Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) The Appellate Tribunal shall send a copy of every order passed under this section to the Commissioner of Central Excise and the other party to the appeal.

(4) Save as provided in Section 35G or Section 35L, orders passed by the Appellate Tribunal on appeal shall be final.

Customs Act, 1962

Section 129B. Orders of Appellate Tribunal.

(1) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

[(1A) The Appellate Tribunal may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing : Provided that no such adjournment shall be granted more than three times to a party during

hearing of the appeal.]

(2) The Appellate Tribunal may, at any time within [six months] from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1) and shall make such amendments if the mistake is brought to its notice by the [Commissioner of Customs] or the other party to the appeal:

Provided that an amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

[(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed : Provided that where an order of stay is made in any proceeding relating to an appeal filed under Sub-section (1) of Section 129A, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order : Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.]

(3) The Appellate Tribunal shall send a copy of every order passed under this section to the [Commissioner of Customs] and the other party to the appeal.

(4) Save as otherwise provided in Section 130 or Section 130E, orders passed by the Appellate Tribunal on appeal shall be final.

Income Tax Act, 1961

Section 254

Orders of Appellate Tribunal.

(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1) and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer : Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard : Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.

(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under Sub-section (1) of Section 253.

(2B) The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Commissioner.

(4) Save as provided in Section 256 or Section 260A, orders passed by the Appellate Tribunal on appeal shall be final.

11. The contention of the counsel for the petitioner is that no such power has been conferred upon the Appellate Tribunal under Foreign Exchange Regulation Act, by the legislature and therefore, the order passed by the Appellate Tribunal remanding the matter back to the adjudicatory authority is ex-facie illegal and liable to be set aside.

12. Refuting the said submissions made by the counsel for the appellant, Mr. Vineet Malhotra, counsel for the respondent submitted that all the three appeals were filed by the appellant u/s 19 r/w Section 49(5) of Foreign Exchange Management Act, 1999 against the order of the Special Director dated 9.11.2004 imposing a penalty of Rs.1,00,00,000/- on M/s. Modi Rubber Ltd. and Rs. 5,00,000/- each on the two directors. The contention of the counsel for the respondent is that after the repeal of Foreign Exchange Regulation Act these appeals filed by the appellant are governed by Section 49(5) (a) and (b) of the Foreign Exchange Management Act, 1999 and not under the repealed Act of FERA. Elaborating his argument further, the counsel contended that all these appeals were filed by the appellants u/s 19 of the FEMA 1999 and subsection (3) of Section 19 gives ample powers to the appellate tribunals to remand the matter in the given facts of a particular case. Laying much emphasis on the words "as it thinks fit" in Sub-section (3) of Section 19 of FEMA 1999 the counsel submitted that same words have been used even u/s 35(c) of the Central Excise Act, 1994, u/s 254 of the Income Tax Act, 1961 as well as u/s 129-B of the Customs Act, 1962 dealing with the powers of the appellate tribunal. Counsel for the respondent also placed reliance on the judgment of the Apex Court reported in Union of India and Others Vs. Umesh Dhaimode,

13. I have heard learned Counsel for the parties at considerable length and gone through the record.

14. Vide order dated 15.9.2008 the Ld. Appellate Tribunal remanded back all these three appeals for fresh consideration by the Adjudicating Officer with the liberty to the appellants to file further proof/evidence. The operative para of the said order of the Appellate Tribunal is reproduced as under:

In the circumstances, it is felt that nothing will aim if the matter is examined by the Ld. Adjudicating Officer afresh to ascertain the veracity of the claim of the

appellants. Accordingly, the impugned order is set aside but these appeals are remanded back for fresh consideration by the adjudicating officer with liberty to the appellants to file further proof/evidence. We direct the appellants to be present before the Ld. Adjudicating Officer on 3.12.2008. the Ld. Adjudicating Officer may hear the parties on the same day or fix some other convenient day. We hope that the Ld. Adjudicating Officer will complete the examination of the matters remanded back within six months thereafter.

15. The above said order was passed by the Appellate Tribunal keeping in view the stand taken by the appellants that the Ld. Special Director had passed the ex-parte order dated 9.11.2004 leveling penalty of Rs. 1 crore on M/s Modi Rubber Ltd. and Rs. 5 lakhs each on the two Directors of the said company. The main contention raised by the appellants before the Appellate Tribunal was that the appellant had actually imported goods and materials in respect of the 18 items mentioned by the Department in the Annexure to the show cause notice complaining violation on the part of the appellants to submit necessary documentary evidence regarding the import of goods into India for which necessary remittances were sent abroad through the authorized dealers. The contention raised by the appellants before the appellate tribunal was that conclusive evidence with regards to import of goods and material in respect of item Nos. 3,4,5,6 & 7 of the Annexure to the show cause notice dated 29.5.2008 were sufficiently placed on record but the same was ignored by the Special Director while passing the ex- parte order. Paras 4 and 8 of the impugned order of the Appellate Tribunal wherein such a contention was raised by the counsel for the appellant is reproduced as under:

Shri L.P. Dhr, Ld. Advocate filed the written submission which is taken on record. It is argued that out of the 18 remittances mentioned in the Memo. Dated 29.5.2002, the appellants have been wrongly held guilty in respect of 5 remittances. According to Shri L.P. Dhir, Ld. Advocate out of the 5 remittances, 4 remittances mentioned at S. No.3, 4, 5 & 6 relate to American Express Bank, New Delhi. The appellant submitted quadruplicate copy of bills of entry of the said S. No.3, 4, 5 & 6 along with bills of entry relating to other 13 imports its authorized dealer on 30.06.1993. The authorized dealer by accepting the said bills of entry acknowledged the said letter placed at page- 28 of the appeal papers. As regards the remaining remittance mentioned at S. No.7 of the said Memo dated 29.05.2005, Shri L.P. Dhir, Ld. Advocate argued that the appellant company submitted the original exchange control copy of bill of entry to Citi Bank N.A. New Delhi. The said authorized dealer, however, failed to cooperate by furnishing acknowledgement of receiving the exchange control copy in respect of said S. No.7. In the instant case, Shri L.P. Dhir, Ld. Advocate for the appellants firstly led us to copies of bills of entry at pages-35 & 36 of the appeal papers showing imports of certain goods worth US \$ 25,000 i.e. the amount mentioned at S. No. 7 of Annexure to the Memo. He then led us to copies of Bills of Entry in respect of S. No. 3, 4, 5 & 6 of Annexure to the Memo placed at pages 31 to 34 of the appeal papers.

? The said submissions of the Appellants weighed with the appellate tribunal and considering the fact that since the appellants could not bring all these facts on record to the knowledge of the Special Director on account of their being ex-parte, therefore, to give a fresh opportunity to the appellants to first bring to the knowledge of the adjudicating officer necessary proofs with regard to the import of the goods of all the items in respect of which the violation was held to have been committed by the appellants, the appellate tribunal in its judicial wisdom thought fit to set aside the order passed by the Adjudicating Authority and remanded the matter for fresh consideration with further liberty given to the appellants to file further proof/evidence. The appellate tribunal felt that after remand the adjudicating officer would be able ascertain the veracity of the claim of the appellants afresh to reach at a conclusive finding with regard to the import of the goods in respect of the items for which the violation of the relevant provisions was found on the part of the appellants.

16. This order of remand is now under challenge by the appellants and the grievance raised by the appellants in all the present appeals is that the appellate authority was not legally competent to remand the matters back to the adjudicating authority for fresh adjudication but should have decided the appeals after taking into consideration the entire material which was placed on record by the appellants. This plea has been raised by the appellants on the ground that the appellate authority is not empowered to remand the matter under the Statute, particularly, the relevant provision i.e. Section 52(3) of FERA does not vest the appellate authority with any such powers to remand the matter back to the Adjudicating Authority. As per counsel for the appellant, the appeals filed by the appellants would be governed by Section 52 of the Foreign Exchange Regulation Act and not by Section 19 of the FEMA on account of the fact that the alleged violations pertain to the period when FERA was in force. The main thrust of the counsel for the appellant was that as per Sub-section (3) of Section 52 of the FERA the Appellate Authority has been given the powers either to confirm, modify or set aside the order in appeal against the order of Adjudicating Authority and the language used in the Section clearly does not vest any such power on the Appellate Tribunal to remand the matter back to an Adjudicating Authority while, on the other hand, the contention raised by the counsel for the respondent is that the appeals filed by the appellants would only be governed u/s 19 of the FEMA after repeal of FERA and not under Sub-section (3) of Section 52 and the Appellate Authority is fully empowered to remand the matter back as would be clearly borne out by the language used in Section 19(3) of the FEMA which empowers the Appellate Tribunal to pass such orders as it thinks fit.

17. To examine the existing legal position, it would be appropriate to reproduce Section 52 of the Foreign Exchange Regulations Act and Sections 19 & 49 of the Foreign Exchange Management Act, 1999 as under:

Section 52. Appeal to Appellate Board

52. 1. The Central Government may, by notification in the Official Gazette,

constitute an Appellate Board to be called the Foreign Exchange Regulation Appellate Board consisting of a Chairman [being a person who has for at least ten years held a civil judicial post or who has been a member of the Central Legal Service (not below Grade I) for at least three years or who has been in practice as an advocate for at least ten years] and such number of other members, not exceeding four, to be appointed by the Central Government for hearing appeals against the orders of the adjudicating officer made u/s 51.

2. Any person aggrieved by such order may, on payment of such fee as may be prescribed and after depositing the sum imposed by way of penalty u/s 50 and within forty-five days from the date on which the order is served on the person committing the contravention, prefer an appeal to the Appellate Board:

Provided that the Appellate Board may entertain any appeal after the expiry of the said period of forty-five days, but not after ninety days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time

Provided further that where the Appellate Board is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, in its own discretion, dispense with such a deposit either unconditionally or subject to such conditions as it may deem fit.

3. On receipt of an appeal under Sub-section (2), the Appellate Board may, after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against and the decision of the Appellate Board shall, subject to the provisions of Section 54, be final and if the sum deposited by way of penalty under Sub-section (2) exceeds the amount directed to be paid by the Appellate Board, the excess amount shall be refunded.

4. The Appellate Board may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer u/s 50 read with Section 51 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceeding and make such order in the case as it thinks fit.

5. No order of the adjudicating officer made u/s 50 read with Section 51 shall be varied by the Appellate Board so as to prejudicially affect any person without giving such person a reasonable opportunity for making a representation in the matter; and subject thereto, the Appellate Board shall follow such procedure, in respect of the proceedings before it, as may be prescribed.

6. The powers and functions of the Appellate Board may be exercised and discharged by Benches consisting of two members and constituted by the Chairman of the Appellate Board: Provided that if the members of the Bench differ on any point or points, they shall state the point or points on which they differ and refer the same to a third member (to be specified by the Chairman) for hearing on such point or points and such point or points shall be decided according to the opinion of that member: Provided further that it shall be

competent for the Chairman or any other member of the Appellate Board authorised by the Chairman in this behalf to exercise the powers and discharge the functions of the Appellate Board in respect of any appeal against an order imposing a penalty of an amount not exceeding Rupees two lakhs and fifty thousand.

The Foreign Exchange Management ACT, 1999

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.

(2) Every appeal under Sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed :

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under Sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be.

(5) The appeal filed before the Appellate Tribunal under Sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

(6) Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing off the appeal within the said period. The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority u/s 16 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

Repeal and saving

49. (1) The Foreign Exchange Regulation Act, 1973 is hereby repealed and the Appellate Board constituted under Sub-section (1) of Section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other law for the time being in force, nor court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention u/s 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of Sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,-

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) any appeal preferred to the Appellate Board under Sub-section (2) of Section 52 of the repealed Act but not disposed off before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

(c) every appeal from any decision or order of the appellate Board under Sub-section (3) or Sub-section (4) of Section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a

period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal with the said period.

(6) Save as otherwise provided in Sub-section (3), the mention of particular matters in Sub-section (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

18. Under the Foreign Exchange Regulations Act the appeal against the order of the Adjudicating Authority could be preferred before the Appellate Board u/s 52(3). On receipt of such an appeal the Appellate Board after holding a proper enquiry as it deems fit, either can confirm the order of the adjudicating authority or to modify or set aside the same subject to the provisions of Section 54 of the FERA which deals with the right of an aggrieved party to file appeal before the High Court. The order so passed by the Appellate Board was to become final between the parties. Under the Foreign Exchange and Management Act, 1999 the analogous provision dealing with such exercise of powers of appeal finds place in Section 19(3) and perusal of both these provisions i.e. 52(3) FERA and 19(3) FEMA would clearly show that there is a drastic change in the use of some expressions. Besides the fact that in place of "Appellate Board". The Appellate Tribunal. so established by the Central Government finds place, where the appeal could be maintained against the order of the Adjudicating Authority other than those orders where the remedy to file an appeal is available to the Special Director (Appeals) u/s 17 of FEMA Act. The power of the Appellate Tribunal has clearly been widened with the use of the words "pass such orders as it thinks fit." in Section 19(3) of the FEMA, 1999. The contention of the counsel for the appellants is that u/s 52(3) of the FERA one does not find mention of the said expressions and therefore, the Appellate Board after holding any such enquiry as it deems fit was legally bound to decide the appeal one way or the other in the modes prescribed under the Section i.e. either by confirming the order of the Adjudicating Authority or modifying such an order or by setting aside the order but the power to remand the matter did not vest with the Appellate Board. As a corollary to the said argument the counsel for the appellants also submitted that no tribunal can exercise such power of remand unless specifically vested in such an authority under the Statute. The counsel for the appellants has also drawn a distinction between the powers of the judicial review exercised by the High Court under Article 226 of the Constitution of India which are wide enough to include the power to remand the matter unlike the powers of the Tribunal to be strictly exercised under the relevant provisions of the particular statute or enactment.

19. In my considered view every Appellate Authority exercising judicial or quasi-judicial powers vests with the inherent powers to remand a matter. The rule of inherent powers has its source in the maxim "Quodlibet alicui concedit, concedere videtur id sine quo ipsa, esse non potest" which means that when the

law gives anything to anyone, it gives also all those things without which the thing itself could not exist. At the same time the inherent powers do not confer an arbitrary jurisdiction upon the appellate authority to act according to whim or caprice. The said powers have to be exercised sparingly, with circumspection & in the rarest of rare cases. Such powers should be exercised to pass orders to prevent abuse of process of Court or to secure the ends of justice. The power to remand back the matter can be read into Section 52(3) of FERA. The word remand. means to remit back a matter. It is only when any Appellate Authority finds that due to any reasons the full facts could not be gone into by the Adjudicating Authority due to one or the other reasons which could be, either one of the parties was ex-parte or because the department did not place the entire material on record and such material being of vital importance to ultimately influence the decision one way or the other, in given facts of the case is fully competent to remand the matter back to the Adjudicating Authority. It is, however, made clear that incidental power to remand, is only an exception and should be sparingly used when it is not possible to dispose of the appeal for want of relevant evidence, lack of finding or investigation warranted by the circumstances of the case. In any event of the matter, that is not a question here as admittedly the appellants had filed an appeal u/s 19 of the FEMA 1999 and Section 19(3) of the said Act clearly vests the power to Appellate Tribunal to pass such orders on the order of the Adjudicating Authority as it thinks fit and there cannot be an iota of doubt that power to pass such order includes the incidental power to remand the matter to the Adjudicating Authority. In the case of Union of India and Others Vs. Umesh Dhaimode, while dealing with such similar provision of the Customs Act the Apex Court clearly held that the Appellate Authority under the Customs Act u/s 128(2) of the Customs Act (as it then stood) was fully vested with the power to pass such order which includes the power to remand the matter. The relevant para of the said decision is referred as under:

The then Judicial Commissioner, Goa, Daman and Diu, took the view that Section 128(2) of the Customs Act, 1962, as it then read, did not vest the appellate authority with the power to remand. Accordingly, he set aside such order and the Revenue is in appeal.

As the order under appeal itself notes, the aforesaid provision vested the appellate authority with powers to pass such order as it deemed fit confirming, modifying or annulling the decision appealed against. An order of remand necessarily annuls the decision which is under appeal before the appellate authority. The appellate authority is also invested with the power to pass such order as it deems fit. Both these portions of the aforesaid provision, read together, necessarily imply that the appellate authority has the power to set aside the decision which is under appeal before it and to remand the matter to the authority below for fresh decision.

20. Similarly in another matter reported in Commissioner of Income Tax, Shillong

Vs. Assam Travels Shipping Service, Dibrugarh, the Apex Court upheld the power of the Tribunal to make an order of remand in certain situations being well settled. Para 6 of the said decision is reproduced as under:

6. The expression as it thinks fit is wide enough to include the power of remand to the authority competent to make the requisite order in accordance with law in such a case even though the Tribunal itself could not have made the order enhancing the amount of penalty. The power of the Appellate Assistant Commissioner u/s 251(1)(b) includes the power even to enhance the penalty subject to the requirement of Sub-section (2) of Section 251 of reasonable opportunity of showing cause against such enhancement being given to the appellant assessee. This could have been done in the assessee's appeal itself filed in the present case. The power of the Tribunal to make an order of remand in such a situation is well settled.¹

7. This being the position in law the Tribunal was not justified in taking the view that it had no other alternative except to affirm the order of the Appellate Assistant Commissioner cancelling even the lesser penalty imposed by the Income Tax Officer. In view of Section 251(1)(b) of the Act it is also clear that the Appellate Assistant Commissioner was wrong in taking the view that he had no power to enhance the penalty in accordance with law on reaching the conclusion that the computation of penalty made by the Income Tax Officer was illegal, and that he could only cancel even the lesser penalty which had been imposed by the Income Tax Officer. It has now to be seen whether the question of law referred to the High Court u/s 256(1) of the Act covered this aspect.

21. In my view, therefore, the power to remand is an important postulate of any authority exercising appellate jurisdiction and such a power is a necessary concomitant of the powers of the Appellate Authority to do complete justice between the parties in the absence of which the power to be exercised by the Appellate Authority would become illusory and ineffective. The very existence of the Appellate Jurisdiction obliges the Authority exercising the Appellate Boards powers to discharge its jurisdiction fully and effectively and in the given set of facts the appellate authority can always remand the matter back for proper and effective decision by the Authority of the first instance who for some reasons or in the absence of complete material before it failed to return a proper finding.

22. The judgments relied upon by the counsel for the appellants are not applicable in the facts of the present case and therefore are of no assistance to the appellants.

23. The other argument of the counsel for the appellants that appeal of the appellants would be governed by the old Act is equally misplaced as Section 49(1) of the FEMA clearly states that Appellate Board constituted under the FERA Sub section (1) of Section 52 of FERA shall stand dissolved and Sub Section 49(5) (b) of the FEMA further states that all the appeals preferred to the Appellate Court under Sub-section (2) of the repealed Act shall stand transferred to the

Appellate Tribunal constituted under FEMA if the same were not disposed of before the commencement of FEMA and in the facts of the present case admittedly, all the three appeals were preferred by the appellants u/s 19 of Foreign Exchange Management Act, 1999. The Appeals filed by the appellant are thus governed by Section 19 of the FEMA and not by Section 52(3) of the FERA. As far as Sub-section (4) of Section 49 of the FEMA is concerned, there cannot be any doubt that Sub-section (3) of Section 49 of FEMA as far as commission of offence is concerned the same shall continue to be governed by the provisions of the repealed Act and this position is not in dispute as the alleged offences in the present case were committed by the appellants when the FERA was in force.

24. In view of the above decision, I do not find that there is any merit in the present appeals.

25. Dismissed.