

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA 157/2009 & CM Nos. 5272 & 5274 of 2009**

PRIYA SHAH ..... Appellant  
Through: Mr. R.K. Handoo and  
Mr. Manish Shukla, Advocates.

versus

ENFORCEMENT DIRECTORATE NEW DELHI ..... Respondent  
Through: Mr. Vineet Malhotra, Advocate.

**CORAM:**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL**

**O R D E R**  
**25.05.2009**

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1. The appellant (original petitioner in the writ petition) in the present appeal is aggrieved by the impugned order dated 10<sup>th</sup> February, 2009, whereby the learned single Judge has only partially waived the amount that the appellant was required to deposit towards pre-deposit for his appeal to be heard.

2. The allegations of the respondent Enforcement Directorate were that the appellant was guilty of contravention of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA'), particularly Section 8 (1). Apparently her father, Late Satnam Shah opened accounts in Swiss Banks as also in the Midland Bank, (later 'HSBC'), in the U.K. According to the Enforcement Department, the appellant was the joint holder of one account and also was under a duty upon the death of her father in terms of Section 8 (1) of FERA to repatriate

the funds in the account to India through banking channels. The adjudicating authority had imposed a penalty of Rs.2.75 crores stating that the appellant had not complied with the duty cast on her to follow the procedure prescribed by FERA and the concerned notifications issued in that regard.

3. The appellant had urged before the Appellate Tribunal that the amount directed to be paid as pre-deposit would result in undue hardship since the appellant had a very meager source of income. The appellant had also relied on her income-tax returns for the said purpose. It is the contention of the appellant that she had made out a case for undue hardship to be entitled to the relief under proviso to Section 19 sub-clause (1) of the Foreign Exchange Management Act, 1999 (hereinafter referred to as 'FEMA').

4. To be entitled to the benefit of the proviso to Section 19(1) of FEMA, the applicant must make out a case that the deposit of the penalty would cause undue hardship to such person and in such circumstances, the Appellate Tribunal may dispense with such deposit subject to special conditions as it may deem fit to impose so as to safeguard the realization of penalty.

5. The Supreme Court in ***Monotash Saha vs. Special Director, Enforcement Directorate, 2008 (12) SCC 359***, observed 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" 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.

6. In the present case, no material has been produced or brought to our notice to establish that the appellant actually operated the account in question. In fact, the adjudicating authority in its order dated 7<sup>th</sup> July, 2008, in para-49 observed as follows:-

"49. All considered, I find that the charges of contravention of Section 8(1), 14 and 19(1)(e) of the FERA attributed against the noticee are on sound footing and supported by the facts and evidences like documents received from HSBC Bank (Formerly, Midland Bank Ltd.), St. Clements Danes branch, London and Credit Suisse bank, Geneva. Before the death of her father, the noticee was co-owner of the assets. However, after the death of her father Shri Satnam Shah on 6.12.2000, in her capacity as beneficiary to the foreign currency accounts and authorized person in respect of the shares held/owned by her father, she became absolute owner of the funds lying to the credit of those accounts and the shares held by her father. The fact that Ms. Priya Shah was a co-signatory to the bank accounts and also documents in respect of holding the shares and was beneficiary to the said assets are proved by records and admitted by her in her statement. When the noticee was cited as beneficiary to the

accounts and the shares in the banks' records, I find that the question as to whether Shri Satnam Shah had left any 'will' indicating as to whom the assets owned by him would be given after his death is not relevant at all. **Had the noticee produced any such 'will' showing that the funds lying in the subject bank accounts and the shares are assigned to another person, no doubt, the story would have been different. Having not produced any such document, the absolute ownership of the funds and the shares had passed on to Ms. Priya Shah, noticee after 6.12.2000, the date of death of her father. I, therefore, find that the charges of contravention of Sections 8(1), 14 and 19(1)(e) of the FERA, 1973 attributed against the noticee in the SCN under consideration had been proved.** After becoming owner of the funds and securities on death of Shri Satnam Shah (her father), she was under a legal obligation to close the foreign currency accounts and bring the funds lying in the credit of those accounts to India through banking channels. Another course of action could have been to declare the accounts to the RBI and act according to the directions given by the RBI. Similar is the case with the shares also. She should have taken necessary permission from the RBI for holding such shares after becoming owner thereof or she should have disposed of the shares and repatriated the proceeds to India through banking channels. Having failed to accomplish any of the legal requirements, the charges of contravention of Sections 14 and 19(1)(e) of the FERA, 1973 attributed against her stood proved."

*(emphasis supplied)*

7. Thus, even as per the adjudicating authority, had the appellant produced any will showing that the funds lying in the said bank accounts and shares were assigned to another person, the story would have been different. In view of this finding and the fact that no material has been placed before us to establish that the appellant had actually operated or was operating the account, we are of the opinion that this is a fit case for waiver of deposit of penalty as a pre-

condition for hearing the appeal under Section 19 sub-clause (1) of FEMA.

8. As held by the Delhi High Court in ***Ess Ess Metals Enterprises vs. CEGAT, 2003 (158) ELT 810***, that while considering an application for dispensing with the deposit, the appellate authority is not required to embark upon detailed enquiry to find out whether the stand of the appellant is on a strong footing or not. What is required to be considered at that juncture is as to whether the appellant has made out a prima facie case in his favor; the balance of convenience qua the deposit or otherwise lies in whose favor and whether the deposit of the duty demanded is likely to cause undue hardship to the appellant.

9. In the present case, the amount in the said bank accounts also stands frozen. Further no material has been placed before us to show that the appellant had actually operated the said account. In fact, as per the adjudicating authority itself had the appellant succeeded in showing that there was a will in existence as per which the funds in the accounts had been assigned to another person, the story would have been different. In view of this, we are of the view that the appellant has succeeded in making out a *prima facie* case in its favour and the balance of convenience qua the deposit lies in the appellant's favour and insistence on the deposit of the same at this stage would cause undue hardship to the appellant. Accordingly, we set aside the order of the Appellate Tribunal dated 7<sup>th</sup> November,

2008 and the impugned order of the learned single Judge dated 10<sup>th</sup> February, 2009 and grant waiver of pre-deposit of penalty amount as a pre-condition for hearing of the appeal of the appellant under Section 19(1) of FEMA. The matter is accordingly remanded back to the Appellate Tribunal for Foreign Exchange for adjudication of the appeal filed by the appellant under Section 19 sub-clause (1) of FEMA without insistence on deposit of penalty under Section 19(1) of FEMA. The appeal is accordingly allowed. It is ordered accordingly. All pending application stand disposed of as well. Any observation made by us in this order will not be taken as an expression of our view on the merits of the matter.

**CHIEF JUSTICE**

**NEERAJ KISHAN KAUL, J.**

**MAY 25, 2009**  
**sb**