REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10301 OF 2011
(Arising out of SLP(C) No.13932 of 2011)

Ketan V. Parekh … Appellant

versus

Special Director, Directorate of Enforcement
and another. … Respondent(s)

With

CIVIL APPEAL NO. 10302 OF 2011
(Arising out of SLP(C) No.13984 of 2011)

Kartik K. Parekh … Appellant

versus

Special Director, Directorate of Enforcement
and another. … Respondent(s)

CIVIL APPEAL NO.10303 OF 2011
(Arising out of SLP(C) No.13988 of 2011)

Panther Fincap and Management Services Ltd. … Appellant

versus

Special Director, Directorate of Enforcement
and another. … Respondent(s)

J U D G M E N T

G. S. Singhvi, J.

1. Leave granted.

2. In these appeals prayer has been made for setting aside the order of the Division Bench of the Bombay High Court whereby the applications filed by the appellants for condonation of delay in filing appeals under Section 35 of the Foreign Exchange Management Act, 1999 (for short, `the Act') were dismissed along with the appeals filed against order dated 2.8.2007 passed by the Appellate Tribunal for Foreign Exchange (for short, `the Appellate Tribunal').

Background facts

3. On an information received from the Reserve Bank of India that M/s. Classic Credit Ltd. and M/s. Panther Fincap and Management Services Ltd. had taken loan of 25 lakh shares each of DSQ Industries Ltd. on 1.3.2011 from M/s. Greenfield Investment Ltd, Mauritius and the Indus Ind Bank Ltd with whom M/s. Greenfield Investment Ltd. was maintaining NRE Account had informed that records did not indicate any such transaction, the Directorate of Enforcement, Mumbai conducted enquiries from different sources including Securities and Exchange Board of India, Shri Ketan Parekh, M/s. Integrated Enterprises (I) Ltd., Chennai and Indsec Securities and Finance Ltd. Thereafter,

show cause notice dated 23.9.2004 was issued to M/s. Greenfield Investments Ltd., Mauritius, Shri Pravin Guwalewala, Mauritius, Smt. Neena Guwalewala, Mauritius, Shri A. K. Sen, Mauritius, M/s. Classic Credit Ltd., Mumbai, M/s. Panther Fincap and Management Services Ltd., Mumbai, Shri Ketan Parekh, Shri Kartik K. Parekh, Shri Kirit Kumar N. Parekh and Shri Navinchandra Parekh for taking action against them for contravention of the provisions of the Act. After hearing the noticees, the Special Director of Enforcement, Mumbai (for short, `the Special Director') passed order dated 30.1.2006 and, whereby he held that some of the noticees had violated Sections 3(d) and 6(3)(e) of the Act and imposed penalty of Rs.40 crores on M/s. Classic Credit Ltd.; Rs.40 crores on M/s. Panther Fincap and Management Services Ltd.; Rs.75 crores on M/s. Greenfield Investments Ltd.; Rs.80 crores on Shri Shri Ketan Parekh; Rs.12 crores on Shri Kartik K. Parekh; Rs.60 crores on Shri Pravin Guwalewala and Rs.20 crores on Shri A.K. Sen with a direction that they shall deposit the amount within 45 days from the date of receipt of the order.

4. The appellants challenged the aforesaid order by filing appeals under Section 19 of the Act. They also filed applications under Rule 10 of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 read with Section 19 (1) of the Act for dispensing with the requirement of

deposit of the amount of penalty. In paragraphs 4 to 8 of the application filed by him, Shri Ketan V. Parekh made the following averments:

> "4. The applicant submits that no case is made out against the applicant as Section 3 (d) of the Act is only attracted in case of a transaction in a foreign currency/foreign security. The appellants case does not attract the provision of Section 3 (d) of the Act.
>
> 5. That impugned order passed by Special Director is liable to be set aside in view of the grounds of appeal and the applicant has every hope of succeeding in the matter. As such the applicant has a very good prima facie case on merits and is likely to succeed in the appeal.
>
> 6. That the applicant is suffering from a grave financial hardship since all his assets including, properties, movable and immovable have been attached by an order of Ld. Debt Recovery Tribunal on 11th April, 2001 (a copy of the order dated 11th April, 2001 is annexed herewith and marked as Annexure B-1). Moreover the applicant/appellant is a notified person and all his assets including, properties, movable and immovable have been attached by the Government of India pursuant to the Notification dated 6th October, 2001. A copy of the Notification dated 6th October, 2001 is attached herewith and marked as Annexure B-2.
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> 7. That the appellant is further suffering due to another order of attachment passed by the Dy. CIT, Central Cir 40 under Section 281B of the Income Tax Act dated 7th April, 2003 whereby accounts of the appellant have been attached. A copy of the order dated 07.04.2003 is attached herewith and marked as Annexure-B3.
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> 8. That by order dated 12th December, 2003 passed by SEBI, the applicant has also been prohibited from carrying out its business activity at buying selling or dealing in securities in any manner directly or indirectly and have also been debarred from associating with the Securities market for the period of

Fourteen years. A copy of the SEBI order dated 12th December, 2003 is annexed herewith and marked as Annexure-B4."

In paragraphs 4 to 10 of his application, Kartik Parekh averred as under:

"4. The applicant submits that no case is made out against the applicant as Section 3 (d) of the Act is only attracted in case of a transaction in a foreign currency/foreign security. The appellants case does not attract the provision of Section 3 (d) of the Act.

5. The applicant submits that the appellant was at a same footing as Mr. Kirit Kumar Parekh and Mr. Naveen Chandra Parekh. While the respondent has exonerated Mr. Kirit Kumar Parekh and Mr. Naveen Chandra Parekh from all offences, he has perversely held the applicant/appellant liable for the offences under the Act.

6. In any event, Mr. Ketan Parekh in his letter to the adjudicating authority has admitted that the control and management of the company fully vested in him and that the applicant is not responsible for the day to day activities of the company and hence cannot be held liable for the alleged contravention of provisions of the Act. In any event, even for the sake of argument it is admitted that the appellant was an executive director of CCL and Panther, unless it can be proven beyond any scope of doubt that the appellant was managing the day to day operations of the aforesaid companies, he cannot be held liable for any offence committed by the Company. The impugned order will be set aside on this ground itself.

7. That impugned order passed by Special Director is liable to be set aside in view of the grounds of appeal and the applicant has every hope of succeeding in the matter. As such the applicant has a very good prima facie case on merits and is likely to succeed in the appeal.

8. That the applicant company is suffering from grave financial hardship since the assets of the applicant/appellant

have been attached pursuant to the order of the Hon'ble Debt Recovery Tribunal, Mumbai dated 11th April, 2001 confirmed on 25th September, 2001 (a copy of the order dated 11th April, 2001 confirmed on 25th September, 2001 is annexed herewith and marked as Annexure B-1).

9. That by order dated 12th December, 2003 passed by SEBI, the appellant has been prohibited from carrying out its business activity of buying, selling or dealing in securities in any manner directly or indirectly and have also been debarred from associating with the Securities market for the period of fourteen years. (A copy of the SEBI order dated 12th December, 2003 is annexed herewith and marked as Annexure-B4."

10. In view of the submissions made above it is respectfully submitted that the applicant/appellant is not in a position to deposit the penalty amount of Rs.12,00,00,000 (Rupees Twelve Crores) imposed in the impugned order. The appellant/applicant has absolutely no means to pay the penalty amount as pre-deposit and such pre-deposit would cause undue hardship to the applicant/appellant."

In the application filed on behalf of M/s. Panther Fincap and Management Services Limited, the following averments were made:

"4. The applicant submits that no case is made out against the applicant as Section 3 (d) of the Act is only attracted in case of a transaction in a foreign currency/foreign security. The appellants case does not attract the provision of Section 3 (d) of the Act.

5. That impugned order passed by Special Director is liable to be set aside in view of the grounds of appeal and the applicant has every hope of succeeding in the matter. As such the applicant has a very good prima facie case on merits and is likely to succeed in the appeal.

> 6. That the applicant is suffering from a grave financial hardship since the accounts of the Company have also been attached by the Income Tax Department under Section 281B of the Income Tax Act by order dated 7th April, 2003 passed by Dy. CIT, Central Cir. 40, Mumbai. Further even the Bank accounts and properties of the promoter and managing director of the Company has also been attached under Section 281B of the Income Tax Act by order dated 7th April, 2003 passed by Dy. CIT, Central Cir. 40, Mumbai (a copy of the order dated 7th April, 2003 is annexed herewith and marked as Annexure B-1).
>
> 7. That by order dated 12th December, 2003 passed by SEBI, the appellant company as well as its promoter have been prohibited from carrying out its business activity of buying, selling or dealing in securities in any manner directly or indirectly and have also been debarred from associating with the Securities market for the period of fourteen years. (A copy of the SEBI order dated 12th December, 2003 is annexed herewith and marked as Annexure-B2.
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> 8. In view of the submissions made above it is respectfully submitted that the applicant/appellant is not in a position to deposit the penalty amount of Rs.40,00,00,000 (Rupees Forty Crores) imposed in the impugned order. The appellant/applicant has absolutely no means to pay the penalty amount as pre-deposit and such pre-deposit would cause undue hardship to the applicant/appellant."

5. After hearing the counsel for the parties, the Appellate Tribunal passed order dated 2.8.2007 and directed the appellants to deposit 50% of the amount of penalty with a stipulation that if they fail to do so, the appeals will be dismissed. The relevant portion of that order is extracted below:

> "Without discussing the merits of these appeals, we are of the view that the adjudication order is not ex facie bad when the

price of the borrowed DSQ shares has not been discharged but is required to be paid by the appellants which normally can be at the place where creditor, i.e. GIL, resides or is engaged in business, i.e. Mauritius. Therefore, allegations of contravention of Section 3(d) cannot be termed as ex facie bad, hence the appellants have no prima facie case. They have many questions to answer. After deciding one factor included in "undue hardship", we proceed to look to the financial position of the appellants. It is the burden on the appellants to disclose correct financial position which in these appeals the appellants have totally failed to disclose. The appellants are not candid enough to bring out their correct financial status. Merely because Directorate of Enforcement has not come out forcefully against the ground of financial disability, this Tribunal cannot believe that appellants, who were roaring in crores at one time, are not in a position to make pre-deposit of the penalty, especially when this Tribunal is simultaneously duty-bound to, as provided in Second Proviso of Section 19 (1) FEM Act, 1999, to ensure recovery of penalty. However, we are conscious that this Tribunal may not unwittingly pass an order whereby injustice can possibly be caused."

(emphasis supplied)

6. Shri Ketan Parekh challenged the aforesaid order in Writ Petition No.8385 of 2007 filed in the Delhi High Court on 13.11.2007. The other two appellants, namely, Kartik K. Parekh and Panthar Fincap and Management Services Ltd. filed Writ Petition Nos. 8231 and 8232 of 2007 on 5.11.2007 and prayed for quashing the order of the Appellate Tribunal. After taking cognizance of the judgment of this Court in Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement (2010) 4 SCC 772, the learned Single

Judge dismissed the writ petitions vide order dated 26.7.2010, the relevant portions of which are extracted below:

> "1. There is a categorical pronouncement on 12th April 2010 by the Supreme Court in Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement (2010) 4 SCC 772 that even an order passed by the Appellate Tribunal in an application seeking dispensation of the pre-deposit of the penalty would be appealable under Section 35 of the Foreign Exchange Management Act 1999 (`FEMA') and that the remedy under Article 226 of the Constitution is not available against such order.
>
> 2. In that view of the matter, the present petitions cannot be entertained by this Court. It is, however, open to the Petitioners to avail of the appropriate remedy in terms of para 45 of the above judgment of the Supreme Court.
>
> 3. The petitions are dismissed."

7. Thereafter, the appellants filed appeals under Section 35 of the Act before the Bombay High Court. They also filed applications for condonation of 1056 days' delay. The Division Bench of the Bombay High Court dismissed the applications for condonation of delay by observing that it does not have the power to entertain an appeal filed beyond 120 days and even though in terms of the liberty given by the Delhi High Court, the appellants could have filed appeals within 30 days, but they failed to do so and, therefore, delay in filing the appeals cannot be condoned.

Arguments

8. Shri Ranjit Kumar, learned senior counsel appearing for the appellants argued that the impugned order is liable to be set aside because while dismissing the applications for condonation of delay, the Division Bench of the High Court did not take cognizance of Section 14 of the Limitation Act, 1963. Learned senior counsel submitted that in terms of that section, entire period during which the writ petitions filed by the appellants remained pending before the Delhi High Court is liable to be excluded while computing the period of limitation and if that is done, the appeals filed under Section 35 cannot be treated as barred by time. Learned senior counsel referred to Section 29(2) of the Limitation Act and the judgments of this Court in State of Goa v. Western Builders (2006) 6 SCC 239, Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others (2008) 7 SCC 169, Coal India Limited and another v. Ujjal Transport Agency and others (2011) 1 SCC 117 and argued that even though the period of limitation prescribed under Section 35 of the Act is different from the period specified in Article 137 of the Schedule appended to the Limitation Act, in the absence of express exclusion of Section 14 of the Limitation Act, the appellants are entitled to seek exclusion of the time spent by them in bona fide prosecution of remedy before a wrong forum. Shri Ranjit Kumar submitted that at the time of filing writ petitions

before the Delhi High Court, all the High Courts were entertaining such petitions and granting relief to the aggrieved parties and it is only after the judgment in Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement (supra) that the High Courts cannot entertain writ petition because of the availability of the statutory remedy of appeal under Section 35 of the Act. Learned senior counsel further submitted that if the period between 7.11.2007, i.e. the date on which the writ petitions were filed before the Delhi High Court and 26.7.2010, i.e. the date on which the same were dismissed is excluded, the appeals filed before the Bombay High Court on 27.8.2010 cannot be treated as barred by time. Learned senior counsel then argued that financial condition of the appellant is extremely precarious and the Appellate Tribunal committed serious error by directing them to deposit 50% of the penalty imposed by the Special Director as a condition for hearing the appeals. He also referred to affidavit dated 10.10.2008 filed by appellant Ketan V. Parekh before the Appellate Tribunal to show that he was declared a notified person in terms of Section 3(2) of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 and all his moveable and immovable properties including bank accounts have been attached and he has been prohibited from operating the same.

9. Shri A. K. Panda, learned senior counsel appearing for the respondents supported the impugned order and argued that the Division Bench of the Bombay High Court did not commit any error by declining the appellants' prayer for condonation of delay because the appeals were filed beyond the maximum period prescribed under Section 35 and the provisions of the Limitation Act cannot be invoked for condonation of delay or for exclusion of the time during which the writ petitions filed by the appellants remained pending before the Delhi High Court. Shri Panda emphasized that even before the judgment of this Court in Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement (supra), the legal position was crystal clear and in terms of Section 35 of the Act an appeal could be filed against any decision or order of the Appellate Tribunal within 60 days from the date of communication of the decision or order and in terms of proviso to that section, the High Court can extend the period by another 60 days and no more. Learned senior counsel then submitted that the appellants cannot invoke Section 14 of the Limitation Act because their action of filing the writ petitions before the Delhi High Court was not bona fide. He pointed out that vide order dated 7.11.2007, the learned Single Judge of the Delhi High Court had accepted the request made by counsel appearing for the appellants and treated the writ petition filed by Kartik K. Parekh as an appeal and similar order appears to have been passed in the case of

M/s. Panther Fincap and Management Services Limited but those orders were subsequently recalled at the instance of the two appellants. Shri Panda submitted that the Appellate Tribunal did not commit any error by directing the appellants to deposit 50% of the penalty imposed by the Special Director because they had been found guilty of clandestine monetary transactions and did not disclose their true financial position. .

The relevant provisions :

10. Section 35 of the Act as also Sections 5, 14 and 29(1) and (2) of the Limitation Act, which have bearing on the decision of the issue raised in the appeals, read as under –

> "35. Appeal to High Court - Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:
>
> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
>
> Explanation.—In this section "High Court" means—
> (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
> (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the

respondents, ordinarily resides or carries on business or personally works for gain."

5. Extension of prescribed period in certain cases - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

14. Exclusion of time of proceeding bona fide in court without jurisdiction - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of the appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1

of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court of other cause of a like nature.

Explanation - For the purpose of this section, -

(a) In excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) Misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

29. Savings - (1) Nothing in this Act shall affect section 25 of the Indian Contract Act,1872. (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

11. The question whether the High Court can entertain an appeal under Section 35 of the Act beyond 120 days does not require much debate and has to be answered against the appellants in view of the law laid down in Union of India v. Popular Construction Co. (2001) 8 SCC 470, Singh Enterprises v. CCE

(2008) 3 SCC 70, Commissioner of Customs, Central Excise v. Punjab Fibres Ltd. (2008) 3 SCC 73, Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others (supra), Commissioner of Customs and Central Excise v. Hongo India Private Limited (2009) 5 SCC 791 and Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission and others (2010) 5 SCC 23.

12. In Hukumdev Narain Yadav v. Lalit Narain Mishra (1974) 2 SCC 133, this Court interpreted Section 29(2) of the Limitation Act in the context of the provisions of the Representation of the People Act, 1951. It was argued that the words "expressly excluded" appearing in Section 29(2) would mean that there must be an explicit mention in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. While rejecting the argument, the three-Judge Bench observed:

> " … what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of those

> provisions or the nature of the subject-matter and scheme of the special law exclude their operation."
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> (emphasis supplied)

13. In Union of India v. Popular Construction Company (supra), this Court considered the question whether Section 5 of the Limitation Act can be invoked for condonation of delay in filing an application under Section 34 of the Arbitration and Conciliation Act, 1996. The two-Judge Bench referred to earlier decisions in Vidyacharan Shukla v. Khubchand Baghel AIR 1964 SC 1099, Hukumdev Narain Yadav v. Lalit Narain Mishra (1974) 2 SCC 133, Mangu Ram v. MCD (1976) 1 SCC 392, Patel Naranbhai Marghabhai v. Dhulabhai Galbabhai (1992) 4 SCC 264 and held:

> "As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result.
>
> Furthermore, Section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award 'in accordance with' sub-section (2) and sub-section (3). Sub-section (2) relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub-section (3) would not be an application 'in

accordance with' that sub-section. Consequently by virtue of Section 34(1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that:

> '36. *Enforcement*.—Where the time for making an application to set aside the arbitral award under Section 34 has expired … the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.'

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to 'proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow' (Section 17). Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the court. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

14. In Singh Enterprises v. CCE (supra), the Court interpreted Section 35 of the Central Excise Act, 1944 which is *pari materia* to Section 35 of the Act and observed:

> "The Commissioner of Central Excise (Appeals) as also the tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short 'the Limitation Act') can be availed for

> condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

15. In Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and others (supra), a three-Judge Bench again considered Section 34(3) of the Arbitration and Conciliation Act, 1996. J.M. Panchal, J., speaking for himself and Balakrishnan, C.J., referred to the relevant provisions and observed:

> "….When any special statute prescribes certain period of limitation as well as provision for extension up to specified time-limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting sub-section (3) of Section 34 of the Act is that the application for

> setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act."

16. In Commissioner of Customs and Central Excise v. Hongo India (P) Ltd. (supra), another three-Judge Bench considered the question whether Section 5 of the Limitation Act can be invoked for condonation of delay in filing an appeal or reference to the High Court, referred to the judgments in Union of India v. Popular Construction Co. (supra), Singh Enterprises v. CCE (supra) and observed –

> "As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days."

17. In Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission (supra), a two-Judge Bench interpreted Section 125 of the Electricity Act, 2003, which is substantially similar to Section 35 of the Act and observed:

> "Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression "within a further period of not exceeding 60 days" in the proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days.
>
> The object underlying establishment of a special adjudicatory forum i.e. the Tribunal to deal with the grievance of any person who may be aggrieved by an order of an adjudicating officer or by an appropriate Commission with a provision for further appeal to this Court and prescription of special limitation for filing appeals under Sections 111 and 125 is to ensure that disputes emanating from the operation and implementation of different provisions of the Electricity Act are expeditiously decided by an expert body and no court, except this Court, may entertain challenge to the decision or order of the Tribunal. The exclusion of the jurisdiction of the civil courts (Section 145) qua an order made by an adjudicating officer is also a pointer in that direction.

> It is thus evident that the Electricity Act is a special legislation within the meaning of Section 29(2) of the Limitation Act, which lays down that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the one prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and provisions contained in Sections 4 to 24 (inclusive) shall apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application unless they are not expressly excluded by the special or local law."

The Court then referred to some of the precedents and held:

> "In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract the applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."

18. The question whether Section 14 of the Limitation Act can be relied upon for excluding the time spent in prosecuting remedy before a wrong forum was considered by a two Judge Bench in State of Goa v. Western Builders (supra) in the context of the provisions contained in Arbitration and Conciliation Act, 1996. The Bench referred to the provisions of the two Acts and observed:

> "There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act

> if the party has been bona fidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, sub-section (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (*sic* not) be read in the Act of 1996, which will advance the cause of justice. If the statute is silent and there is no specific prohibition then the statute should be interpreted which advances the cause of justice."

19. The same issue was again considered by the three-Judge Bench in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department (supra) to which reference has been made hereinabove. After holding that Section 5 of the Limitation Act cannot be invoked for condonation of delay, Panchal, J (speaking for himself and Balakrishnan, C.J.) observed:

"Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an

application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (*sic* of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.

At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be

found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

In his concurring judgment, Raveendran, J. referred to the judgment in State of Goa v. Western Builders (supra) and observed:

"On the other hand, Section 14 contained in Part III of the Limitation Act does not relate to extension of the period of limitation, but relates to exclusion of certain period while computing the period of limitation. Neither sub-section (3) of Section 34 of the AC Act nor any other provision of the AC Act exclude the applicability of Section 14 of the Limitation Act to applications under Section 34(1) of the AC Act. Nor will the proviso to Section 34(3) exclude the application of Section 14, as Section 14 is not a provision for extension of period of limitation, but for exclusion of certain period while computing the period of limitation. Having regard to Section 29(2) of the Limitation Act, Section 14 of that Act will be applicable to an

> application under Section 34(1) of the AC Act. Even when there is cause to apply Section 14, the limitation period continues to be three months and not more, but in computing the limitation period of three months for the application under Section 34(1) of the AC Act, the time during which the applicant was prosecuting such application before the wrong court is excluded, provided the proceeding in the wrong court was prosecuted bona fide, with due diligence. Western Builders therefore lays down the correct legal position."

20. The same view was reiterated in Coal India Limited v. Ujjal Transport Agency (supra).

21. The aforesaid three judgments do support the argument of Shri Ranjit Kumar that even though Section 5 of the Limitation Act cannot be invoked for condonation of delay in filing an appeal under the Act because that would tantamount to amendment of the legislative mandate by which special period of limitation has been prescribed, Section 14 can be invoked in an appropriate case for exclusion of the time during which the aggrieved person may have prosecuted with due diligence remedy before a wrong forum, but on a careful scrutiny of the record of these cases, we are satisfied that Section 14 of the Limitation Act cannot be relied upon for exclusion of the period during which the writ petitions filed by the appellants remained pending before the Delhi High Court. In the applications filed by them before the Bombay High Court, the appellants had sought condonation of 1056 days' delay by stating that after

receiving copy of the order passed by the Appellate Tribunal, they had filed writ petitions before the Delhi High Court, which were disposed of on 26.7.2010 and, thereafter, they filed appeals before the Bombay High Court under Section 35 of the Act. Paragraphs 1, 2 and 3 of the applications for condonation of delay which are identical in all the cases were as under:

> "1. The Appellant above named has preferred an Appeal against the order dated 2nd August 2007 (hereinafter referred to as the "impugned order") passed by the Respondent No.1 against the Appellant above named. The Appellant states that the impugned order was received by the Appellant on 5th October 2007. The Appellant states that there is a delay of 1056 days in filing the above appeal, the reasons for which are being stated in detail hereunder and, therefore, the Appellant above named prays that the delay in filing the present appeal may please be condoned.
>
> 2. RELIEFS SOUGHT :
>
> (a) That this Hon'ble Court be pleased to condoned the delay of 1056 days in filing the said Appeal;
>
> (b) That such further and other reliefs as the facts and circumstances may require.
>
> 3. REASONS FOR THE DELAY :
>
> 3.1 The Appellant declares that there is delay of 1056 days in filing the appeal as prescribed in the Limitation Act, 1963.
>
> 3.2 The Appellant further states that the delay occurred as the Writ Petition was filed before Delhi High Court on 5th November, 2007. The said writ was filed under the provisions of Articles 226 and 227 of the Constitution of India seeking

issuance of a writ order or direction in the nature of Mandamus or any other writ for setting aside the impugned order dated 2nd August, 2007, passed by the Appellate Tribunal for Foreign Exchange under Rule 10 of the Adjudicating Proceedings and Appeal, 2000 for Dispensation. In the said Writ proceedings Hon'ble High Court of Delhi had passed an order on 26th July 2010. Vide the said order dated 26th July, 2010, while relying on the judgment of the Hon'ble Supreme Court, it was held by the Hon'ble Delhi High Court that even an order passed by the Appellate Tribunal in an application seeking dispensation of pre-deposit of the penalty would be appealable under section 35 of the FEMA and that remedy under Article 226 is not available against such an order.

Further, Hon'ble Delhi High Court also held that the present petition cannot be entertained by this Court. It is, however, open to the Appellant's to avail of the appropriate remedy in terms of para 45 of the above judgment of the Supreme Court.

3.3 Hence, pursuant to the said order passed by Hon'ble Delhi High Court the Appellant above named prefers an appeal before this Hon'ble Bombay High Court.

3.4 Under the said circumstances the Appellant most humbly prays that this Hon'ble Court may be pleased to condone the delay.

3.5 It is submitted that the delay, in filing of the present Appeal has not prejudiced the Respondent in any manner, whatsoever, and, therefore, this Hon'ble Court be pleased to condone the said delay.

3.6 It is, further submitted that the delay of 1056 days in filing the present Appeal was bonafide, unintentional and inadvertent."

22. A careful reading of the above reproduced averments shows that there was not even a whisper in the applications field by the appellants that they had

been prosecuting remedy before a wrong forum, i.e. the Delhi High Court with due diligence and in good faith. Not only this, the prayer made in the applications was for condonation of 1056 days' delay and not for exclusion of the time spent in prosecuting the writ petitions before the Delhi High Court. This shows that the appellants were seeking to invoke Section 5 of the Limitation Act, which, as mentioned above, cannot be pressed into service in view of the language of Section 35 of the Act and interpretation of similar provisions by this Court.

23. There is another reason why the benefit of Section 14 of the Limitation Act cannot be extended to the appellants. All of them are well conversant with various statutory provisions including FEMA. One of them was declared a notified person under Section 3(2) of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 and several civil and criminal cases are pending against him. The very fact that they had engaged a group of eminent Advocates to present their cause before the Delhi and the Bombay High Courts shows that they have the assistance of legal experts and this seems to the reason why they invoked the jurisdiction of the Delhi High Court and not of the Bombay High Court despite the fact that they are residents of Bombay and have been contesting other matters including the proceedings pending

before the Special Court at Bombay. It also appears that the appellants were sure that keeping in view their past conduct, the Bombay High Court may not interfere with the order of the Appellate Tribunal. Therefore, they took a chance before the Delhi High Court and succeeded in persuading learned Single Judge of the Court to entertain their prayer for stay of further proceedings before the Appellate Tribunal. The promptness with which the learned senior counsel appearing for appellant – Kartik K. Parekh made a statement before the Delhi High Court on 7.11.2007 that the writ petition may be converted into an appeal and considered on merits is a clear indication of the appellant's unwillingness to avail remedy before the High Court, i.e. the Bombay High Court which had the exclusive jurisdiction to entertain an appeal under Section 35 of the Act. It is not possible to believe that as on 7.11.2007, the appellants and their Advocates were not aware of the judgment of this Court in Ambica Industries v. Commissioner of Central Excise (2007) 6 SCC 769 whereby dismissal of the writ petition by the Delhi High Court on the ground of lack of territorial jurisdiction was confirmed and it was observed that the parties cannot be allowed to indulge in forum shopping. It has not at all surprised us that after having made a prayer that the writ petitions filed by them be treated as appeals under Section 35, two of the appellants filed applications for recall of that order. No doubt, the learned Single Judge accepted their prayer and the Division

Bench confirmed the order of the learned Single Judge but the manner in which the appellants prosecuted the writ petitions before the Delhi High Court leaves no room for doubt that they had done so with the sole object of delaying compliance of the direction given by the Appellate Tribunal and, by no stretch of imagination, it can be said that they were bona fide prosecuting remedy before a wrong forum. Rather, there was total absence of good faith, which is *sine qua non* for invoking Section 14 of the Limitation Act.

24. The issue deserves to be considered from another angle. By taking advantage of the liberty given by the learned Single Judge of the Delhi High Court, the appellants invoked the jurisdiction of the Bombay High Court under Section 35 of the Act. However, while doing so, they violated the time limit specified in order dated 26.7.2010 which, in turn, is based on paragraph 45 of the judgment of this Court in Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement (supra). Indeed, it is not even the case of the appellants that they had filed appeals under Section 35 of the Act within 30 days computed from 26.7.2010. Therefore, the Division Bench of the Bombay High Court rightly observed that even though the issue relating to jurisdiction of the Delhi High Court to grant time to the appellants to file appeals is highly

debatable, the time specified in the order passed by the Delhi High Court cannot be extended.

25. In view of the above discussion, we hold that the impugned order does not suffer from any legal infirmity.

26. Notwithstanding the above conclusion, we have considered the submission of Shri Ranjit Kumar that the appellants are facing huge financial crises and the Appellate Tribunal committed serious error by not entertaining their prayer to dispense with the requirement of deposit of the amount of penalty in its entirety, but have not felt convinced. In our considered view, the appellants miserably failed to make out a case, which could justify an order by the Appellate Tribunal to relieve them of the statutory obligation to deposit the amount of penalty. The appellants have the exclusive knowledge of their financial condition/status and it was their duty to candidly disclose all their assets, movable and immovable including those in respect of which orders of attachment may have been passed by the judicial and quasi judicial forums. However, instead of coming clean, they tried to paint a gloomy picture about their financial position, which the Appellate Tribunal rightly refused to accept. If what was stated in the applications filed by the appellants and affidavit dated 10.10.2008 is correct, then the appellants must be in a state of begging which

not even a man of ordinary prudence will be prepared to accept. To us, it is clear that the appellants deliberately concealed the facts relating to their financial condition. Therefore, the Appellate Tribunal did not commit any error by refusing to entertain their prayer for total exemption.

27. In this context, reference can usefully be made to the judgment of this Court in Benara Values Ltd. v. Commissioner of Central Excise (2006) 13 SCC 347. In that case, a two Judge Bench interpreted Section 35-F of the Central Excise Act, 1944, which is *pari materia* to Section 19(1) of the Act, referred to the judgments in Siliguri Municipality v. Amalendu Das (1984) 2 SCC 436, Samarias Trading Co. (P) Ltd. v. S. Samuel (1984) 4 SCC 666, Commissioner of Central Excise v. Dunlop India Ltd. (1985) 1 SCC 260 and observed:

> "Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.
>
> As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva* v. *State of Karnataka* that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of

> the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.
>
> 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 interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue."

28. The same view was reiterated in Indu Nissan Oxo Chemicals Industries Ltd. v. Union of India (2007) 13 SCC 487 by considering proviso to Section 129-E of the Customs Act, 1962, which is almost identical to Section 19 of the Act.

29. In the result, the appeals are dismissed. Four weeks' further time is allowed to the appellants to comply with the direction given by the Appellate

Tribunal, failing which the appeals filed by them shall stand automatically dismissed. The parties are left to bear their own costs.

……J.
[G.S. Singhvi]

……..J.
[Sudhansu Jyoti Mukhopadhaya]

New Delhi
November 29, 2011.