

#25 & 26

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

+ W.P.(C) 1156/2008

+ W.P.(C) 1157/2008

ARIF PARDESI

MOHAMMED NAZIR

..... Petitioners

Through: Mr. Mohit D. Rane, Adv. for Ms. Meenakshi
Arora, Adv.

versus

THE SPECIAL DIRECTOR OR ENFORCEMENT Respondent

Through: Mr. Sachin Datta, Adv. for UOI.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

% **30.11.2009**

1. Admit. With the consent of the parties, the matter is heard for final disposal.
2. Learned counsel for the parties state that these Writ Petitions can be disposed of in terms of the order dated 28th April, 2009 passed in Writ Petition No.9367/2007 Maria Henry Mohan Vs. Appellate Tribunal for Foreign Exchange and Anr.
3. The petitioners Mr. Arif Pardesi and Mr. Mohammad Nazir have filed the present Writ petition impugning order dated 24.10.2007 passed by the Appellate Tribunal for Foreign Exchange dismissing and rejecting their applications for dispensation from pre-deposit of penalty amount of Rs. 6,50,000/- and Rs.3,50,000/-, respectively.
4. The petitioners were employees of M/s Motorola Inc., State of Delaware, U.S.A. and on global assignment had worked as an expat employees with Motorola India Ltd. in Delhi, India. The allegations against the petitioners pertain to violation of Section 9 (1) (c) of Foreign Exchange Regulation Act, 1973. It is alleged that payments were made

to the petitioners outside India when the petitioners were working with M/s Motorola India Ltd. This was in violation and contrary to the aforesaid provisions of Foreign Exchange Regulation Act, 1973 as the petitioners were employees working and persons resident in India under section 2 (p) of the aforesaid Act. On the said findings, penalty order has been passed by the adjudicating authority.

5. The appeals filed by the petitioners are pending before the Appellate Tribunal for Foreign Exchange. The petitioners had filed an application seeking exemption from the condition of pre-deposit of penalty amount before hearing of the appeals. Learned Tribunal by the impugned order dated 24.10.2007 has dismissed the said applications holding inter alia that prima facie, the order passed by the adjudicating authority was legal and proper and case of due hardship was not made out.

6. Learned counsel for the petitioners submits that the learned Tribunal has ignored the ratio of the Supreme Court decision in K. Ramullan Vs Commissioner of Income Tax, Cochin, (2000) 8 SCC, page 246 wherein Section 2(p) of Foreign Exchange Regulation Act, 1973 was examined. He relies upon another decision of the Supreme Court in Director of Enforcement Vs Fr. J.M. Stevens, (1998) 3 SCC, 133 wherein again Section 2 (p) of the FERA, 1973 was examined. It is submitted that as per Section 2 (p) the petitioners were not a resident in India and their stay was casual or short and for a fixed period. It was not a stay for an uncertain period.

7. I need not examine this question in great depth and detail at this stage as appeals of the petitioners are pending before the Appellate Tribunal, Foreign Exchange. Petitioner's contention requires consideration and examination by the first appellate authority. At the same time it is admitted that the petitioners are a non-resident and it will be difficult for the Enforcement Directorate to make recovery in case the appeals are dismissed.

8. On the last date of hearing, learned counsel for the petitioners were asked to obtain instructions as to whether Motorola India Ltd. is ready to furnish undertaking to the Adjudicating officer, Enforcement Directorate that in case the penalty amount cannot be recovered from the petitioners, they shall without any demur and protest make payment of the said amounts. Learned counsel for the petitioners have obtained instructions and Motorola India Ltd. is ready to give an undertaking to Adjudicating Officer, Enforcement Directorate that in case penalty amount is confirmed and recoverable and payment is not made by the petitioners, they shall be liable and without any demur and protest make payment of the penalty amount. The counsel for the petitioners, however, submits that

payments if made should not be treated as violation of the Foreign Exchange Management Act, 1999 and this concession and statement does not amount to any admission of fault or violation by Motorola India Ltd.

9. The statement made by counsel for the petitioners on behalf of Motorola India Ltd. is just, fair and is accepted. Accordingly, the impugned order dated 24.10.2007 is set aside. It is directed that the Appellate Tribunal of Foreign Exchange will hear the appeals of the petitioners, without pre-deposit of penalty amount subject to the condition that Motorola India Ltd. will furnish an undertaking to the Adjudicating officer, in terms as indicated above. The aforesaid undertaking will be furnished within a period of three weeks from today.

Writ petitions are disposed of.

SANJIV KHANNA,J

NOVEMBER 30, 2009

J