

Jurisdiction of Appellate Tribunal to condone delay beyond the date prescribed under FERA: An Analysis

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In a recent judgment, the Supreme Court had considered and decided a question of whether the Appellate Tribunal constituted under the Foreign Exchange Management Act, 1999 (FEMA) was right in rejecting a belated appeal filed under Section 19 of the FEMA, applying the first proviso to Sub-section (2) of Section 52 of the Foreign Exchange Regulation Act, 1973 (FERA) instead of following the proviso to Sub-section (2) of Section 19 of the FEMA in the case of Thirumali Chemicals Ltd. v. Union of India and Others (CA Nos. 3191-3194 of 2011). This article analyses the case and also discusses about the power of Appellate Tribunal to condone delay if the appeal was not filed within the prescribed time limit, provided sufficient cause is shown under FEMA.

1. Introduction

In a recent judgment, the Supreme Court had occasioned to consider a question of whether the Appellate Tribunal constituted under the Foreign Exchange Management Act, 1999 (hereinafter called FEMA) was right in rejecting a belated appeal filed under Section 19 of the FEMA, applying the first proviso to Sub-section (2) of Section 52 of the Foreign Exchange Regulation Act, 1973 (hereinafter called FERA) instead of following the proviso to Sub-section (2) of Section 19 of the FEMA. The Supreme Court held in *Thirumali Chemicals Ltd v. Union of India and Others* (CA Nos. 3191-3194 of 2011) that the Appellate Tribunal can entertain the appeal after the prescribed period of 45 days, if it is satisfied that there was sufficient cause for not filing within the prescribed period and remitted the matter back to the Tribunal for fresh consideration. An attempt has been made hereunder to analyse the significant case.

2. Overview of Facts of the Case

One Thirumalai Chemicals Ltd. had imported several consignments from foreign for home consumption by opening Letters of Credit with ICICI Bank and Standard Chartered Bank, authorised dealers. Subsequently, the said company forwarded Exchange Control Copies of bills of entry to the aforementioned banks, in relation to the above imports. In terms of provisions of Exchange Control Manual, the authorised dealers had to submit the ECC bills of entry as submitted by the company to the Reserve Bank of India. The company was under a *bona fide* impression that the documents submitted by it were forwarded by the authorised dealers to the RBI and the RBI in turn had given due intimation to the Enforcement Directorate. But the Enforcement Directorate

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imposed a total penalty of Rs.9,33,63,453 on the company by passing orders on 27th January, 2004 and the company came to know from those orders that the Directorate had issued four show cause notices dated 14th May, 2002 stated therein that the company had contravened Sections 8(3) and 8(4) of the FERA read with para 7A.20 (Chapter 7) of the Exchange Control Manual and was required to show cause why adjudication proceedings be not initiated against the company under Section 49 of the FEMA for contravention of aforementioned provisions. In the order, it was also indicated that an appeal would lie before the Appellate Tribunal after depositing the amount of penalty within 45 days from the date of service of the order. Then the company approached the authorised dealers and came to know from them that due to inadvertent mistakes of said authorised dealers, bills of entry were not submitted to the RBI in time and, subsequently, the facts were informed by the banks to the RBI. The RBI by its letter dated nil of May 2004 sent by a registered AD informed the Enforcement Directorate that based on the documents and evidence submitted by the company through authorised dealers, deleted the entries from their records and regularised the transactions. The company on 17th May, 2004 requested the Enforcement Directorate to drop the proceedings initiated against the company. After that nothing was heard from the Directorate by the Company and hence the company was constrained to file appeals against those orders on 2nd August, 2004 before the Appellate Tribunal for Foreign Exchange along with an application under Section 5 of the Limitation Act read with Sections 19 and 49(5)(a) of the FEMA for condonation of delay. However, the Tribunal without going into the merits of the case dismissed the appeals on the ground that appeals have been filed after a period of 90 days from the date of receipt of impugned orders which the Tribunal is not empowered to condone the delay. The company aggrieved by the above order preferred Writ Petition before the Bombay High Court for quashing the order dated 25th October, 2007 contending that the Tribunal was not justified in dismissing the appeals on the ground of delay. The Bombay High Court also dismissed all the writ petitions by order dated 24th July, 2008 stating that it would not be appropriate to entertain the petitions as the Parliament has provided that delay beyond a certain period cannot be condoned by the Tribunal or Appellate Authority and the extraordinary jurisdiction of this court under the Constitution cannot be permitted to be used by the Petitioner, who have allowed their ordinary remedy to be barred. Consequently, petitions were rejected. Aggrieved by the order of Bombay High Court, Petitioner filed an appeal before the Supreme Court.

3. Submission of the Parties

It was submitted on behalf of the Appellants that the authorised dealers, i.e. banks had owned up their mistake and had informed to the RBI accordingly and, hence, there was no reason to penalise the company for no fault of it. The Tribunal had committed a mistake in holding that it had no power to condone

the delay beyond 90 days. Even if the Tribunal has no power to condone the delay, the High Court could have entertained the writ petitions under Article 226 of the Indian Constitution when the impugned order of the Tribunal was manifestly illegal.

Appellants further submitted that High Court has the power under Article 226 of the Constitution of India to condone the delay in exercise of its extraordinary jurisdiction and then direct the Tribunal to consider the appeal on merits. In this regard, reference was made to the judgment of the Supreme Court in *Harbanslal Sahnia v. IOC Ltd.*¹ [2003] 2 SCC 107 and *L K Varma v. HMT Ltd.*² [2006] 2 SCC 269.

Whereas the Respondent referred to the first proviso to Sub-section (2) of Section 52 of the FERA and submitted that the Tribunal was justified in holding that it had no power to condone the delay beyond 90 days and the High Court also cannot exercise its extraordinary jurisdiction under Article 226 or 227 of the Constitution of India.

4. Questions Considered by the Court

1. Whether the Tribunal was right in dismissing the appeals preferred under Section 19(1) of the FEMA, by applying the first proviso to Sub-section (2) of Section 52 of the FERA holding that it had no power to condone the delay beyond 90 days from the date on which the order was served on the person committing the contravention.
2. Whether limitation for filing the appeal has to be considered under the proviso to Sub-section (2) of Section 19 of the FEMA or under the first proviso to Sub-section (2) of Section 52 of the FERA?

5. Rulings of the Court

In this case, the Court observed that cause of action arose when the FERA, 1973 was in force, but show cause notices and impugned orders were issued when FEMA was in force and the appeals were also preferred under Sub-section (1) of Section 19 of the FEMA, 1999. The Court further observed that the Tribunal and the High Court proceeded on the premises that since the cause of action arose when FERA was in force the period of limitation for filing an appeal before the Tribunal even after coming into force of FEMA is as provided under the first proviso to Sub-section (2) of Section 52 of the FERA.

The Court examined the scope and ambit of Section 52 of the FERA, Sections 19 and 49 of the FEMA and Section 6 of the General Clauses Act, 1897. Sections 50 and 51 of the FERA were the penal provisions which empowered the authority to impose penalty on persons who had contravened some of the provisions of the Act. An appeal was provided under FERA against the order of adjudication before the Foreign Exchange Regulation Appellate Board under Section 52 of that

¹ Ed.: MANU/SC/0703/2006

² Ed.: MANU/SC/1199/2002

Act within a period of 45 days from the date on which the order was served on the person committing the contravention. The Appellate Board of FERA was repealed by FEMA, which came into force with effect from 1st June, 2000. Chapter IV of the FEMA deals with contravention of penalties. Section 13 of the FEMA empowers the authorised officers to impose penalties for contravention of certain provisions of the Act was also empowered to entertain any appeal after the expiry of the said period of 45 days but not after 90 days from the date on which the order was served on the person if it was satisfied that the person was prevented by sufficient cause in not filing the appeal in time.

The Court made a distinction between the substantive law and procedural law. Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective. Right of appeal conferred under Section 19(1) of the FEMA is therefore a substantive right. The procedure for filing an appeal under Sub-section (2) of Section 19 as also the proviso thereto conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown are procedural rights. The Court also referred to its decisions in *Garikapti Veeaya v. N Subbiah Choudhry*³ AIR 1957 SC 540, *New India Insurance Co. Ltd v. Smt.Shanti Mishra*⁴ [1975] 2 SCC 840, *Hitendra Vishnu Thakur v. State of Maharashtra*⁵ [1994] 4SCC 602, *Shyam Sundar v. Ram Kumar*⁶ [2001] 8 SCC 24.

Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry

³ Ed.: MANU/SC/0008/1957

⁴ Ed.: MANU/SC/0547/1975

⁵ Ed.: MANU/SC/0526/1994

⁶ Ed.: MANU/SC/0405/2001

of the period of limitation, the right to sue comes to an end and if a particular right of action had the Appellate Board under FERA, it may be noted stood dissolved and ceased to function when FEMA was enacted. Therefore, any appeal against the order of the adjudicating officer made under FERA, after FEMA came into force, had to be filed before the Appellate Tribunal constituted under FEMA and not to the Appellate Board under FERA. Section 52(2) can apply only to an appeal to the Appellate Board and not to any Appellate Tribunal. Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of the FERA, as the appeal against such order was to the Appellate Tribunal constituted under FEMA, necessarily Section 19(2) of the FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of the FERA.

Therefore, Section 19(2) of the FEMA and not Section 52(2) of the FERA will apply. As noticed above, under Section 19(2), there is no ceiling in regard to the period of delay that could be condoned by the Appellate Tribunal. If sufficient cause is made out, delay beyond 45 days can also be condoned. The tribunal and the High Court misdirected themselves in assuming that the period of limitation was governed by Section 52(2) of the FERA.

The above discussion will clearly demonstrate that Section 49 of the FEMA does not seek to withdraw or take away the vested right of appeal in cases where proceedings were initiated prior to repeal of the FERA on 1st June, 2000 or after. On a combined reading of Section 49 of the FEMA and Section 6 of the General Clauses Act, it is clear that the procedure prescribed by the FEMA only would be applicable in respect of an appeal filed under the FEMA though cause of action arose under FERA. In fact, the time limit prescribed under FERA was taken away under the proviso to Sub-section (2) of Section 19 and the Tribunal has been conferred with wide powers to condone delay if the appeal is not filed within 45 days prescribed, provided sufficient cause is shown. Therefore, the findings rendered by the Tribunal as well as the High Court that the Tribunal does not have jurisdiction to condone the delay beyond the date prescribed under FERA is not a correct understanding of the law on the subject.

Finally, the Court held the Appellate Tribunal can entertain the appeal after the prescribed period of 45 days if it is satisfied that there was sufficient cause for not filing the appeal within the said period. Therefore the Court inclined to set aside the orders passed by the Tribunal and the High Court and remitted the matter back to the Tribunal for fresh consideration in accordance with law on the basis of the findings recorded.

6. Conclusion

The Supreme Court in the case rightly concluded that on conjoint reading Sections 49 and 6 of the General Clause Act, it is apparently clear that the procedure prescribed in Sub-section (2) of Section 19 only would be applicable in

respect of an appeal preferred before the Appellate Tribunal though the cause of action arose under FERA. The Tribunal and the High Court were not correct in rendering a finding that the Tribunal does not have power to condone the delay beyond the time limit specified under the first proviso to Sub-section (2) of Section 52 of the FERA. The Supreme Court has set aside the orders passed by the Tribunal and the High Court and remitted the matter back to the Tribunal for fresh consideration in terms of findings recorded by the Court.