(2009) 05 DEL CK 0092

In the Delhi High Court

Case No : Criminal Appeal No. 305 of 2007

News Television India Ltd. APPELLANT

Vs

Special Director of Enforcement RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Adjudication Proceedings and Appeal Rules, 1974 — Rule 3
Foreign Exchange Management Act, 1999 — Section 16, 17, 19, 19(2), 49
Foreign Exchange Regulation Act, 1973 — Section 33(2), 49, 50, 51, 52
General Clauses Act, 1897 — Section 6, 6(2), 6(3), 6(4), 6(5)

Citation : (2009) 92 SCL 290

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Siddharth Luthra, Jasmine, Damkewala, Manasi Gupta and Saurabh Seth, for the Appellant;

Judgement

Mool Chand Garg, J.—The short point involved in this matter is that as to whether the impugned judgment and order of the Appellate Authority dated 9-3-2007 while dismissing the appeal only on the ground of limitation which justifies or requires any interference by this Court. Some list of dates are relevant for the purpose of deciding the matter.

-- Date Event -- 1-6-2000 The FERA bill after receiving the assent of the President on 29-12-1999, came into force as FEMA, 1999 repealing FERA, 1973. --

19-11-2001 The RBI addressed a letter to the Director, Enforcement Directorate, FERA/FEMA, directing to conduct investigation against the importers as mentioned in the enclosed List of defaulters, who had failed to submit the documentary evidence of import into India. --

21-12-2001 Asstt. Director, Enforcement Directorate, issued a letter to the

Appellant u/s 33(2) of FERA, 1973 read with Section 49(3) and (4) of FEMA, 1999, thereby directing the Appellant to furnish the documentary proof pertaining to the Date of Import and the Date of submission of Exchange Control Copy of Bill of Entry. -- Dec, 2001 Asstt. Director, Enforcement Directorate addressed a letter to Citi Bank (being the authorized dealer through whom the appellant remitted the amount in foreign exchange) enquiring as to whether the appellant had produced Exchange Control Copy of Bill of Entry before it. -- 20-5-2002 Citi Bank wrote a letter to the Enforcement Directorate informing him that the Appellant had not submitted the bill of entries relating the above-said remittance. -- 29-5-2002 The respondent issued a show-cause notice to the appellant under Rule 3 of the Adjudication Proceedings and Appeal Rules, 1974 read with Section 49(3) and (4) of FEMA, 1999 inter alia asking him to show cause as to why adjudication proceedings u/s 51 of FERA, 1973 read with Section 49(3) and (4) should not be initiated against the Appellant for the contravention of Section 8(3) and (4) read with Section 68 of FERA, 1973 -- 23-9-2003 The respondent without granting a personal hearing passed the order-in-original imposing a penalty of Rs. 1,13,00,000 u/s 50 of FERA, 1973, and further directed to deposit the amount within 45 days. -- 31-8-2004 The appellant filed an appeal before the Appellate Tribunal for Foreign Exchange, being Appeal No. 907/2004 under Section 19 of FEMA, 1999 challenging the order-in-original dated 23-9-2003. -- 18-5-2005 The appellant filed an application for condonation of 47 days delay in filing of the appeal before the Appellate Tribunal. -- 4-8-2005 The Appellate Tribunal after noticing that the appellant had procured a letter from the authorized banker certifying filing of bill of entry and exchange control copy with respect to one transaction, passed an order directing the appellant to make the pre-deposit of 5 per cent of the total amount of penalty within 30 days. -- 29-10-2005 The appellant filed an Additional Affidavit thereby placing on record the documentary proof, i.e., the bill of entries etc. pertaining to the USD 2,30,615 transaction dated 25-9-1998. -- 9-3-2007 The Appellant Tribunal without going into the merits of the case dismissed the appeal on the ground of delay of 50 days. --

2. It is against the order dismissing the appeal, the present appeal has been filed

which the appellant submits has been dismissed only on the ground of delay.

3. The appeal has been filed by the appellant on the following grounds:

(a) u/s 19(2) of the FEMA, 1999, the delay in filing of the appeal before the Appellate Tribunal was condonable.

(b) The Tribunal''s order resulted in giving untrammelled power to the Department since the cognizance being under the new Act or the repealed Act would determine the fate of case by granting or curtailing the limitation.

(c) The appeal was filed under the FEMA, 1999, therefore, the limitation period as mentioned in the FEMA, 1999 would apply.

(d) The order-in-original itself specifically mentioned that appeal would lie before the Appellate Tribunal u/s 19 read with Section 49(5) of the FEMA, 1999.

(e) In view of Section 49(5)(b), the new Act would alone be applicable to all cases which were pending and had not been disposed of.

(f) The procedural law of the new Act would apply to the pending appeals filed under the repealed Act.

(g) The impugned order was against the principles laid down in the cases Premier Limited, (formerly) Premier Automobiles Ltd. Vs. Union of India (UOI) and The Assistant Director, Directorate of Enforcement, and Directorate of Enforcement Vs. The Appellate Tribunal for Foreign Exchange and Others,

(h) The Appellate Tribunal did not go into the merits of case and dismissed the appeal on a mere technical ground of limitation.

(i) The appeal was fit to be converted into revision in order to overcome the hurdle of limitation.

4. The respondents have filed a reply to the appeal and have opposed the delay by alleging that:

(i) Order-in-original had full details of the transaction under Question, therefore, the stand of the appellant that it did not have details of the transactions was not maintainable.

(ii) Adjudication was initiated under the FERA, 1973.

(iii) Appeal before the Appellate Tribunal was in continuation of the adjudication proceedings.

(iv) Offence was committed under the repealed Act.

(v) The order was in consonance with Section 6(e) of the General Clauses Act.

5. Today, no body has appeared on behalf of the respondents to assist this Court.

6. A perusal of the record goes to show that even though the impugned order it

is a longish order, but the crux of the matter is that the appeal has been dismissed on the ground of limitation and the request made by the appellant to treat the appeal as a revision has not been conceded to by the appellate authority. The relevant observations are in paras 14 and 15 of the judgment which are as follows:

14. In the end, we may consider the question with regard to conversion of this appeal to a revision petition in terms of the judgment of Madhya Pradesh High Court in Om Prakash v. Dwarka Prasad AIR 2005 MP. 240. Ld. Senior counsel Sh. Parag Tripathi has led this Tribunal to para 15 of the Report where Hon''ble High Court has summarized the legal position as quoted below:

To meet the ends of justice, revision can be converted into appeal or appeal can be converted into revision while exercising the discretion and if the following norms are fulfilled, then normally order of conversion of revision into appeal or appeal into revision should be passed:

(i) When revision is converted into second appeal, then before passing the order of conversion, it is to be considered whether substantial question of law arises in the said case, if no substantial question of law arises in the case, revision cannot be converted into second appeal.

(ii) Revision can be converted into appeal if same is filed within time and there is no impediment of limitation. Limitation must be construed from the date of filing of the revision petition or appeal. If the revision or appeal so filed was within limitation, for conversion into appeal or revision, it is to be examined that the appeal or revision, as the case may be, so filed, on the date of institution was within the limitation and if so, said permission can be granted.

(iii) There is no period of limitation for applying such conversion, but while exercising the powers of conversion, the Court would keep in mind whether appeal or revision, as the case may be, had been instituted within the period prescribed for such proceedings.

15. From points (ii) and (iii) quoted above, it is amply clear that the appeal whenever converted into revision petition must be filed within limitation period and not beyond that. The conversion method cannot be applied to revive the remedy in favour of an appeal filed after limitation period. Admittedly, the appeal has been filed after expiry of 45 days of limitation with a delay of 50 days. Therefore, this appeal falls totally outside the conversion formulate envisaged by Hon''ble High Court of Madhya Pradesh. Hence, this appeal cannot be converted into a revision petition.

16. For the reasons stated hereinabove, this appeal is rejected and dismissed on the grounds of delay filing by 50 days, much after expiry of outer period of 90 days.

7. Thus, the issue which arises for consideration before this Court is as to whether the appeal filed by the appellant before the First Appellate Authority

which was admittedly barred by limitation could have been entertained by condoning the delay as prayed for or in the alternative to have converted the appeal in a revision.

8. The relevant provisions with respect to delaying of an appeal as per the Foreign Exchange Regulation Act, 1973 (''FERA'') the original Act under which the show-cause notice was issued provides for an appeal u/s 52(2) against an order which is the subject-matter of the appeal can be filed within 45 days from the date on which the order is served on the person who committed the contravention. Section 52 reads as under:

52. Appeal to Appellate Board-(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 two lakhs and fifty thousand rupees.

9. Sub-section (2) of Section 52 goes to show that limitation can be extended for another period of 45 days but not beyond 90 days provided the Appellate Authority is satisfied that the appellant is prevented by sufficient cause from filing the appeal in time.

10. Learned Counsel for the appellant submits that now that FERA has been repealed, the provisions of Foreign Exchange Management Act, 1999 (''FEMA'') are applicable and as per the Section 49 of FEMA certain provisions of FERA are still applicable to some of the proceedings which were initiated at the time when FERA was in operation. My attention has been drawn to Section 49 of the FEMA which is as under:

49. Repeal and saving.-(1) The Foreign Exchange Regulation Act, 1973 (46 of 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, no 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 licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, insofar 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 of 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 within the said period.

(6) Save as otherwise provided in Sub-section (3), the mention of particular matters in Sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeal.

11. Learned Counsel for the appellant submits that since this was not an appeal which was filed under the provisions of FERA till such time the said Act was repealed, the appeal could have been filed only u/s 19 of FEMA which reads as under:

19. Appeal to Appellate Tribunals.-(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:

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 of the appeal within the said period.

(6) 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.

12. It is thus submitted that since this appeal was filed under FEMA and had not been filed under FERA and was not pending disposal before the appellate authority till such time FEMA was repealed is to be governed by Section 19 read with Sections 49 and 52 of the earlier Act but here by virtue of the provisions u/s 19 of FEMA there is a jurisdiction vested in the appellate authority to consider the question of limitation also.

13. Having perused the aforesaid order, it is apparent that the Appellate Authority has not considered the provisions available u/s 19 for condoning the delay even though the appeal in this case was not filed under FERA nor was it

filed before FERA was repealed. Thus, the limitation which was prescribed under FERA was no more applicable to the appeal filed by the appellant in the present case. It is true that the appeal filed by the appellant was beyond limitation, jurisdiction was vested with the Appellate Authority by virtue of Section 19 to consider the issue of condonation. It was for the Appellate Authority to have considered as to whether it is a fit case where the delay should be condoned or not. However, without applying the provisions contained u/s 19 and merely relying upon the earlier provision is of FERA holding that appeal was barred by limitation, it is apparent that the Appellate Authority failed to exercise the jurisdiction vested in it u/s 19 of FEMA and to that extent the order becomes unsustainable.

14. Accordingly, the case, is remanded back to the Appellate Authority to consider the plea of limitation in the light of Section 19 of FEMA. In case the delay is condoned then to hear the matter afresh.

15. The appellant shall, however, keep the Bank Guarantee furnished before the Registrar General of this Court alive till such time the question of condonation of appeal is accepted. In case the delay is not condoned then the respondents would be entitled to get the bank guarantee encashed.

16. The appeal is disposed of accordingly.

