

(2012) 06 CAL CK 0080

In the Calcutta High Court

Case No : F.E.A. 2 of 2003 G.A. No. 3594 of 2003

Union of India

APPELLANT

Vs

Jagadish Prasad Jalan Nandalal

RESPONDENT

Date of Decision : 20-06-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Foreign Exchange Management Act, 1999 — Section 18, 19, 35, 49, 49(5)
Foreign Exchange Regulation Act, 1973 — Section 52, 52(2), 54
General Clauses Act, 1897 — Section 6, 6(c)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14, 14

Citation : (2012) 3 CALLT 257 : (2012) 4 CHN 1 : (2012) 111 CLA 106 : (2012) 286 ELT 525 : (2013) 2 RCR(Civil) 245

Hon'ble Judges : Sengupta, J; Pinaki Chandra Ghose, J; Biswanath Somadder, J

Bench : Full Bench

Advocate : Sibdas Banerjee, Mr. S.B. Saraf, for the Appellant; Anjan Kr. Mukherjee, B.P. Jana, Ashok Kr. Pandey and Mr. Nirmal Kr. Chowdhury, for the Respondent

Judgement

K. J. Sengupta, J.—All the aforesaid three matters have been placed for hearing before this Bench only on the point, which is common in all these matters, whether the aforesaid appeals preferred to this Court under the Foreign Exchange Management Act, 1999 (hereinafter referred to as FEMA) against the judgment and order of the learned Appellate Tribunal, can be entertained for hearing condoning delay, taking recourse to the power of this Court u/s 52(2) proviso of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as FERA). A Division Bench of this Court, while entertaining the applications for condonation of delay filed in connection with FEA 4 of 2003 and FEA 1 of 2004, could not agree with the views taken by another Division Bench of this Court Hon'ble Justice M.H.S. Ansari (as His Lordship then was) and Hon'ble Justice Soumita Pal in Their Lordships judgment dated 31st March, 2004, while deciding a number of matters involving identical point.

2. The earlier Division Bench in the case of Union of India and Anr. vs M/s. SMP Exports Pvt. Ltd. and Ors. and other three matters, held that Court's power to condone delay against the judgment and order of the Appellate Tribunal is governed by the provision of section 35 read with proviso of FEMA, even if the appeal has been preferred in relation to contravention of any provision of FERA after repeal.

3. From the records, it appears that in all the aforesaid three appeals, indisputably, the proceedings were initiated under the provisions of FERA and order of adjudication was also passed under the said Act. Even the appeals were also preferred thereafter during subsistence of FERA. During pendency of these appeals, FEMA came into operation on and from 1st June, 2000 on repealing of the FERA. Naturally, by virtue of clause (b) of Section 5 of Section 49 of the FEMA all those appeals which were pending before the Appellate Board, stood transferred to the Appellate Tribunal. All the appeals were disposed of by the Appellate Tribunal constituted under the provisions of FEMA and then appeals were preferred before this Court beyond the stipulated period of not only initial period of sixty days but also further period of sixty days, which is the maximum one, permissible u/s 35 of the FEMA.

4. The referring Division Bench held that the power of the High Court to condone delay as permissible under the FERA from the decision of the Appellate Board on commencement of FEMA can be applied, even if the said Act has been repealed, by virtue of the express provision of Section 49(6) of FEMA read with section 6(c) of the General Clauses Act, 1897. In view of divergent views no decision could be taken and the referring Bench directed the matters to be placed before the Hon'ble Chief Justice for re-consideration of the matter by constituting Larger Bench. That is how the matters are being heard by this Bench.

5. Mr. Sibdas Banerjee, learned Senior Advocate, appearing in support of the appellant, Union of India, submits referring to provisions of Section 6 of the General Clauses Act, vis-?-vis Section 49 of the FEMA and Sections 52 and 54 of the FERA, that the power of this Court to condone delay has to be exercised resorting to the provisions of Section 54 read with proviso of FERA. In other words, the Court can condone delay under the aforesaid provisions for unlimited days as opposed to the corresponding provision of Section 35 of FEMA.

6. To amplify his argument, he contends that right of appeal accrues to the party when initial is continuation of the original proceedings. This substantive right cannot be taken away by subsequent enactment. He however, conceded, that in the event it is held that the right to apply for condonation of delay in preferring appeal is not substantive one, the same is a procedural right, certainly the present provisions of FEMA in connection with preferring appeal to this Court against the order of the Appellate Tribunal, would be applicable. He has referred to the following decisions of the Supreme Court in this context:

Jayantilal Amrathlal Vs. The Union of India (UOI),

7. His further contention is that right of appeal conferred u/s 54 of FERA is a substantive right and that entitles a person to prefer appeal within the period limited and even beyond that subject to satisfaction of the Court that the appellant was prevented by sufficient cause in preferring appeal within the prescribed time limit. The right to get the delay condoned, is substantive one and the same otherwise occurs by virtue of provisions of Section 29(2) of Limitation Act, unless applicability thereof is excluded by express and clear intention by the language used in the legislation. He submits that Section 35 of FEMA has not excluded expressly applicability of the provision of Section 5 of the Limitation Act as mentioned in Section 29(2) of the Act and it would be clear from the expression used in sub-sections (3) and (4) read with sub-section (5), clauses (b) and (c) and the proviso and sub-section (6) of Section 49 of FEMA. The legislature has never intended to deny the right of defence which accrued to the appellant under the FERA. Even sub-section (5) clause (c) and proviso of Section 49 of the FEMA indicates preservation of provision of condonation of delay of earlier Act in preferring appeal against order passed by the Tribunal. If it is so, in that event, similar benefit cannot be taken away in respect of orders from appeals since been transferred from the Board to the Tribunal which would create an anomalous situation.

8. Mr. Anjan Kumar Mukherjee, learned Senior Advocate, appearing for the respondent in one of the appeals usefully and briefly submits that admittedly all the appeals have been preferred from the order of the Appellate Tribunal constituted u/s 18 of the FEMA. When any appeal is preferred u/s 19 of the FEMA to the Appellate Tribunal and decision is rendered by this Appellate authority, the same is legally recognised and accepted, irrespective of the date and forum of initiation.

9. According to him, there is no existence of the Appellate Board which was constituted under the FERA, since dissolved, under the present enactment. Hence question of preferring appeal against it does not and cannot arise. He contends that provision for preferring appeal, consequently power for condonation of delay of any unlimited period in connection with appeal which could be preferred against the decision of the Appellate Board under the FERA and this power of condonation of delay is not available in view of repealing of FERA. The FEMA came into force in 1999 and all these appeals have been disposed of by the Tribunal and appeal is sought to be preferred against the decision of the Appellate Tribunal. Therefore, power of this Court has to be exercised under the present provision of FEMA.

10. He has drawn a distinction between the right to file appeal and the right to file belated when the proceedings starts. But right of filing a belated appeal is not a substantive right and it does not start when the proceedings start.

11. He further contends that the law of condonation of delay is governed when the delay occurs and the provisions for condonation of delay will be governed by the law in force when the delay occurs. Liberty to apply for right is not an

accrued right. In fact, power of condonation of delay is a discretionary power of the Court and it is not a right for an aggrieved person to file a belated appeal. u/s 35 of FEMA, departure has been made from the FERA with regard to condonation of delay. The High Court cannot condone delay under the aforesaid section beyond the period of sixty days. FEMA being a special Act and the language mentioned in Section 35 therein is such that the provisions of Sections 4 to 24 of the Limitation Act has been excluded. In support of his aforesaid submission, he has referred to the following decisions of the Supreme Court:

1. Vinod Gurudas Raikar Vs. National Insurance Co. Ltd. and others,
- 2 Union of India Vs. M/s Popular Construction Co.,
3. Unreported decision of Supreme Court in connection with Civil Appeal No. 1939 of 2009, arising out of SLP No. 14467 of 2007 (Commissioner of Customs and Central Excise vs M/s. Hongo India (P) Ltd. and Anr.,
- 4.(Ketan V. Parekh vs Special Director, Directorate of Enforcement. 2012 (275) E.L.T. 3 (S.C.)

12. Mr. Mukherjee then contends that Section 6 of the General Clauses Act is of no help in this show any contrary intention to such application and this can only be ascertained from all the relevant provisions of the relevant Act. To support the aforesaid legal proposition, he has referred to certain decisions :

- i) AIR 1997 SC 412 (Gajraj Singh -vs.- The State Transport Appellate Tribunal & ors.)
- ii) 2008 (223) ELT 337 (Commissioner of Cus.,C. EX., Mumbai -vs.- Punjab Fibres Ltd.)

14. Learned Counsel for the respondents in other appeals have supported the basic argument of Mr. Mukherjee, appearing for the respondent in appeal concerned. However, in addition to what Mr. Mukherjee cited, further decision of Bombay High Court reported in Union of India (UOI) Vs. Ashok J. Ramsinghani, was cited and it was contended that the High Court has no power to condone delay exceeding 120 days u/s 35 of the FEMA.

15. After hearing Mr. Banerjee, Mr. Mukherjee and other learned Counsels for the respondents in other appeals and also minutely reading the judgment of the referring Division Bench and also that of the earlier Division Bench, it appears to us that the only point requires our consideration is whether saving provision of Section 49 of FEMA with particular reference to sub-sections (3), (4) and (6), the appellate provision of FERA with regard to condonation of delay, can be applied in this appeal before us.

16. It cannot be disputed nor the Court can entertain any argument that these appeals can be treated to be appeal against the decision of the Appellate Board constituted under the FERA which stood dissolved. These appeals without any dispute and demur have to be held to have been preferred against the decision

of the Appellate Tribunal that has been constituted under the FEMA. It is true that the appeals were originally filed under the FERA and the same were pending when the present Act came into operation. Fate of pending appeal has been measured in clause (b) sub-section (5) of Section 49 of FEMA, which we reproduce appropriately :

Section 49(5)(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.

17. In the body of the FEMA, there has been no provision and cannot be any provision to prefer any appeal against the decision of the Appellate Board constituted under FERA after FEMA has been brought into existence with dissolution of Board. Hence, going by the plain language of the provisions of Section 35 of FEMA, under which an appeal has to be preferred is set out below:

Section 35:

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.

18. From the language of the proviso, it is clear that the power of condonation of delay by the High Court is restricted to only sixty days and not beyond the same. The language is indicator to hold decisively that the provision of Section 5 of the Limitation Act being one of the sources of power of Court to condone delay for unlimited period, has been excluded by the special enactment. According to us, this special statute is a self-contained code as far as dispute resolution mechanism is concerned, and for the purpose of condonation of delay, the provision of Limitation Act, 1963 is not required to be referred nor relied on. Section 35 of FEMA itself is the source and is the only source for which no other provision is required to be pressed into operation.

18. Core contention is whether for the purpose of condonation of delay, power of Court to condone unlimited period as is available in Section 5 of the Limitation Act, in a fit case, can be applied under relevant provision of present Act as it was in the corresponding provision of FERA. It is settled by the Supreme Court in a number of decisions dealing with various enactments that the nature of language mentioned in the statute is an indicator to hold that the special statute has expressly excluded the provisions of Section 5 of Limitation Act.

20. In our view, the language mentioned in Section 29(2) does not require that the special statute should provide expressly and with certain language that such and such section is expressly excluded. The substance of the language mentioned in the statute concerned is good enough to conclude that effect thereof is nothing but exclusionary. In this connection, Mr. Mukherjee has usefully drawn our attention to the decision of Supreme Court in the case of Union of India Vs. M/s Popular Construction Co.,

21. In paragraph 10 of the report, while accepting the earlier decision of Supreme Court in the case of Hukumdev Narain Yadav Vs. Lalit Narain Mishra, the Apex Court in the context of section 34 of the Arbitration and Conciliation Act, 1996 has viewed as follows :

This decision recognises that it is not essential for the special or local law to, in terms, exclude the provisions of the Limitation Act. It is sufficient if on a consideration of the language of its provisions relating to limitation, the intention to exclude can be necessarily implied.

22. Again in paragraph 13 of the report, it is to be found as follows:

Apart from the language "express exclusion" may follow from the scheme and object of the special or local law.

23. While respectfully following the aforesaid legal principle, we find that the language mentioned in the provision of Section 35 of the FEMA with the phrases "allowed to be filed within a further period not exceeding sixty days" is clearly expressive of the intention of the legislature to exclude the provisions of Section 5 of the Limitation Act, or for that matter, any provision for any period exceeding sixty days.

24. We are unable to accept the contention of Mr. Banerjee, as rightly argued by Mr. Mukherjee, that the right to prefer appeal beyond the stipulated period, has been taken away by the FEMA by restricting the power of Court to condone delay only for the period of sixty days in contrast to the earlier power to condone delay for unlimited period. We find considerable force in the submission of Mr. Mukherjee that right of appeal has not been taken away by the FEMA, only right to get delay condoned for unlimited period is curtailed. We think right to appeal is one thing and right to apply for condonation of delay in preferring an appeal is another. Two things cannot be equated for reasons mentioned little later.

25. We however accept Mr. Banerjee's contention that right to prefer appeal under the statute within the period of limitation is undoubtedly substantive right and such right cannot be taken away by amendment of the Act concerned or by separate enactment on the same subject and it is well established by the judicial pronouncement, as would be found from the old decisions of Supreme Court, referred to above viz Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others,

26. However, if the appeal is sought to be filed after the prescribed period of

limitation, then such a right cannot be said to be an absolutely substantive right and this right once a substantive one becomes contingent, as the same being dependant upon mercy of the Court. If it is looked in different angle, the right of the appellant, so long the period of limitation is not over, remains a substantive right created by the statute; but once the period of limitation expires, new right of claiming finality of judgment and order sought to be impugned accrues in favour of the adversary viz. the respondent, and such right can be taken away or destroyed, so accrues by efflux of time, only in exercise of judicious discretion of Court on sufficient cause being established.

27. We are of the view that when any relief is sought basing on any concession or discretion of Court, it cannot be a matter of right nor a matter of course and, as such, it cannot be said to be a substantive right at the first instance. Therefore, according to us, right to apply for condonation of delay is procedural right, unlike the right to file a suit even beyond the period of limitation establishing the fact which entitles the plaintiff to get exclusion of time as mentioned in Sections 14, 15, 16 and 17 of the Limitation Act. In this connection fairly recent Supreme Court pronouncement in case of Thirumalai Chemicals Limited Vs. Union of India (UOI) and Others, may be referred to. Portion of paragraph 14 of the report is apt to be quoted for reliance-

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

28. It would appear from the language mentioned in the aforesaid sections that once the fact constituting the situation for exclusion is established, it becomes a matter of right; in other words, a substantive right to get the benefit of exclusion. Our legal views is supported by the observation of Supreme Court in the case of Ketan V. Parekh Vs. Special Director, Directorate of Enforcement and Another,

29. While considering the aspect of applicability of Section 6 of the General Clauses Act, we think this provision has no general and sweeping application. The applicability thereof is clearly conditional, that is apparent from the section itself, which is quoted hereunder:

Section 6:

Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, (emphasis supplied) the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment as repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

30. We are of the opinion, as appropriately pointed out by Mr. Mukherjee that governing factor to apply the provision of Section 6 of the G.C. Act is whether upon reading entire Act, different intention appears or not. For this purpose, we at the first instance read the provision of Section 54 with the proviso thereof in the FERA which clearly indicate the mind of the legislature that High Court was empowered to condone delay for unlimited period, and in fact, such intention in relation to the FERA is also reiterated and/or reflected in the FEMA also as it could be found from clauses (b), (c) and proviso of sub-section (5) of Section 49 of FEMA, and the same are reproduced hereunder:

Section 49(5), clause (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.

Clause (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.

(emphasis supplied by us)

31. We find, in case of appeal against the decision of the Appellate Tribunal under FEMA, the Court has been empowered to condone delay for a maximum period of sixty days and this power is so rigid apparently that we without any difficulty conclude the legislature has expressed different intention making provision for power of condonation of delay.

32. The contention of Mr. Banerjee that since occurrence of the alleged violation of FERA took place when the FEMA was not in operation, initiation of the

proceedings under the FERA has to be continued with the right of appeal, under the provision of former enactment by virtue of sub-section (4) of Section 49 of FEMA, is not acceptable to this Court as this has to be read subject to the provision of sub-section (3) of Section 49 of the said Act. Sub-section (3) of Section 49 of FEMA is reproduced below :

Section 49, sub-section (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.

33. Therefore, the aforesaid sub-section is clearly hinting to reach conclusion that even the effect of FERA is not extendable under any circumstances for a period of more than two years from the date of commencement of this Act. These appeals were sought to be presented in this Court long after two years. Therefore, the provision of Section 49 sub-section (4) is also not helpful. In any event the said section does not mention about appeal. All the aforesaid provisions clearly indicate different intention of the legislature reflected in the special statute as mentioned in Section 6 of the General Clauses Act.

34. The Supreme Court in the case of Gajraj Singh -vs- The State Transport Appellate Tribunal and Ors. reported in AIR 1997 SC 412, in paragraph 25 has observed regarding the legal position as to the effect of Section 6 of the General Clauses Act. We could do no better than to reproduce the language of the Apex Court.

When there is a repeal and simultaneous re-enactment, Section 6 of the GC Act would apply to such a case unless contrary intention can be gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and re-enactment is to obliterate the Repealed Act and to get rid of certain obsolete matters.

35. In the case of Vinod Gurudas Raikar -vs- National Insurance Co. Ltd. and Ors., reported in AIR 1991 SC 2156, applicability and effect of Section 6 of the General Clauses Act has also been reiterated almost in the same line however with different language. In paragraph 5 of the report it has been stated that if the right of appeal is preserved in the subsequent enactment on the same subject, the provision relating to condonation of delay will not be saved by applying Section 6 of the General Clauses Act.

36. In view of the aforesaid discussion, we are unable to accept the contention of Mr. Banerjee. We, therefore, hold that the application u/s 5 of the Limitation Act for condonation of delay for a period exceeding sixty days, as mentioned in the proviso of Section 6 of the General Clauses Act, is not entertainable. In other words, the High Court cannot condone delay for a single day exceeding sixty days, as mentioned in the said section, simply because, the High Court is not conferred with such power. If there is no power question of granting relief does not arise. In any event we fail to understand why Section 5 of Limitation Act is required to be applied, as specific and separate power of High Court to condone delay both under repealed Act and present Act has been conferred. It would however been relevant had both the statutes remain silent absolutely on this aspect.

37. Therefore, we with respect express our inability to accept the views of the referring Division Bench, and we hold that the views taken by the earlier Division Bench is the correct position of law. The reference is answered accordingly. Now, we send back all the matters before the appropriate Bench to deal with the application for condonation of delay, taking note of our aforesaid observations.

(Pinaki Chandra Ghose, J.)

38. I agree.

(Kalyan Jyoti Sengupta, J.)

39. I agree.