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**(1979) 12 BOM CK 0002**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 854 of 1976**

Usman Yusuf Kamani

APPELLANT

Vs

Foreign Exchange Regulation Appellate Board, New Delhi and  
others

RESPONDENT

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**Date of Decision :** 06-12-1979

**Acts Referred:**

Bombay Police Act, 1951 — Section 142, 57  
Criminal Procedure Code, 1973 (CrPC) — Section 116(c), 342  
Foreign Exchange Regulation Act, 1973 — Section 23  
General Clauses Act, 1897 — Section 6

**Citation :** (1980) MhLj 316

**Hon'ble Judges :** V.S. Kotwal, J

**Bench :** Single Bench

**Advocate :** J.A. Barday, for the Appellant; R.T. Walawalkar, Public Prosecutor, for the Respondent

**Final Decision :** Dismissed

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## Judgement

V.S. Kotwal, J.

[ After Stating the facts and the contentions raised in paragraphs 1 to 7, the judgment proceeds.]

8. Some uncontroverted factors can be catalogued. The appellant was prosecuted for having infringed the provisions of section 5 (1) (c) of the said Act in respect of two items, viz. Rs. 66,000 pertaining to the attempted payment and Rs. 50,000 for the actual payment. Two show cause notices were issued to him in respect of the said two items, one being on the 14th of May 1973 pertaining to the amount of Rs. 66,000, while the other on the 12th of September 1978 relating to Rs. 50,000. The appellant was called upon to show cause as to why an adjudication proceeding u/s 23D of the old Act should not be initiated against him. The appellant replied to both these notices making out certain defences and thus wanted to show cause against the impugned action. After considering the

said replies, adjudication proceedings under the relevant provisions of the old Act were initiated and were in progress. The appellant appeared in person and thereafter he was represented by a counsel. He submitted his written statement and raised several contentions on merits. The proceeding was adjourned from time to time and ultimately it was held that the appellant was guilty for the infringement of section 5(1) (c) read with section 23D of the old Act. Consequently, a penalty of Rs. 10,000 was imposed on him and in addition thereto, there followed an order of confiscation to the Central Government of an amount of Rs. 66,000. The appellant was completely exonerated of the second item pertaining to Rs. 50,000. The penalty amount was directed to be deposited within 45 days in the Bombay office. This order was passed by the Additional Director on the 2nd of August 1974.

9. According to the appellant, though the order was passed on the 2nd of August 1974, it was actually received on the 12th of August 1974. Further, the said order was received not by himself personally but by his wife when he was out of station. According to the appellant, he came to know about the said order for the first time in the first week of September 1974. According to the appellant further, he had an attack of typhoid and was confined to bed. It is only in December 1974 that he had fully recovered and he preferred an appeal to the Appellate Board on the 18th of December 1974 which was received by the Appellate Board on the 21st December 1974. This part of the appellant's case does not fall in the category of uncontroverted factors, inasmuch as these are the matters of defence. If those are excluded, then the fact remains that the order of the Director was passed on the 2nd of August 1974, while the appeal was received by the Appellate Board on the 21st of December 1974 and the appeal memo bears the date as the 18th of December 1974.

10. If, therefore, the appellant's claim in defence about the various dates on which certain events happened is excluded, then the appeal is admittedly filed beyond a period of 90 days, the two termini being the 2nd of August 1974 and the 21st of December 1974. This would be equally so even if some days are excluded after passing of the order and its receipt by the appellant, as, on his own admission, it was received at his residence on the 12th of August 1974. Similarly, a few days will have to be excluded as being the transit period for the appeal to reach the Appellate Board and according to the appellant and the memorandum of appeal, the appeal was despatched on the 18th of December 1974. Therefore, even if these two dates are considered, viz. the 12th of August 1974 and the 18th of December 1974, the appeal is filed beyond 90 days. This conclusion would remain in tact even assuming that the appellant was confined to bed on account of ailment. That will be a matter only to decide whether he had a sufficient cause for the delay and that would not make any difference in the dates. However, in my opinion, the question as to whether the appellant had a sufficient cause, on the basis of which the delay could be condoned when the appeal is filed beyond 90 days does not survive in view of the clear provisions and the dictionary of the various judicial pronouncements.

11. The old Act of 1947 was repealed and the new Act of 1973 came into force from the 1st of January 1974. Admittedly, the order was passed after the 1st of January 1974, it being on the 2nd of August 1974. This would, therefore, mean that the impugned order was passed by the Additional Director only when the old Act was repealed and the new Act was in force. Section 52 of the new Act relates to appeal to Appellate Board. Sub-section (2) of the said section is relevant for the purpose of this proceeding and, therefore, it can be quoted with advantage :

Any person aggrieved by such order may, 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?.

It would thus be clear that under the provisions contained in section 52 of the new Act, any person aggrieved by the order of the Directorate has to file an appeal to the Board within 45 days from the date, on which the order is served on him. The order is admittedly served on the 12th of August 1974, though the appellant might be temporarily absent from the house. Even assuming otherwise, on the admission of the appellant, he had the knowledge of the existence of the said order, which was accepted by his wife while he was out of station for the first time in the first week of September 1974. Therefore, even assuming that the order was served on the appellant in the first week of September 1974--though there is no evidence in that behalf -- still the appeal was filed on the 18th of December 1974 and, therefore, it was beyond 45 days. The proviso to sub-section (2) stipulates that the Board has an authority to entertain an appeal, though filed after 45 days but not after a period of 90 days, subject, of course, to the relevant provision of the appellant satisfying that he had sufficient cause for the said delay. Therefore, even if either of the two dates are considered, viz. the 12th of August 1974 or the first week of September 1974, the fact remains that the appeal was filed on 18th of December 1974 and in either event it was beyond a period of 90 days, though I must observe that the correct date would be the 12th of August 1974, as the service can be said to be effective on that very date.

12. Correspondingly, provisions of section 23E of the old Act can be considered. Section 23E of the said Act relates to appeals to the Board and sub-section (2) envisages that any person aggrieved by the said order may file appeal to the Board within 45 days from the date, on which the order is sent to him. Proviso

(a) to the said sub section (2) of section 23E stipulates that the Appellate Board may entertain an appeal even after the expiry of the said period of 45 days, if, of course, it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. The said proviso stops at that. It would, therefore, be clear that under the old Act, the proviso did not restrict the outer limit for condoning the delay and in other words, under the old Act, even if the appeal was filed any time after 45 days, and not necessarily within 90 days, even then the Appellate Board had a discretion to condone the delay if it was satisfied about the sufficiency of the cause.

13. Relying on this provision of the old Act, Mr. Barday submitted that he could convince the Appellate Board that he had sufficient cause, as his claim was supported by the medical evidence and, therefore, the Appellate Board had enough discretion to entertain the appeal, even though it was filed beyond 90 days. This submission flows from the footing that the provisions of the old Act apply, even though the order was passed when the new Act came into force. This is the basic fallacy that is being committed by the learned counsel for the appellant. In my opinion, it would be manifest that the provisions contained in section 53 of the new Act only would come into play and in that event, a discretion is vested in the Appellate Board to condone delay from 45 days to 90 days and thereafter that discretion is taken away. The learned counsel submitted that the substantive right is being affected by the repealing provisions and, therefore, from that point of view, it should not be held to be retrospective. I am afraid, such an interpretation is not permissible at all. The manner of filing an appeal, its forum and the period within which such an appeal can be filed are all obviously a matter of procedural law not involving any substantive right as such. If it was a matter where the right to appeal was wiped out, then it could be said with some force that the substantive right was affected. In other words, a party may have a right to appeal which can be called as a substantive right, but it cannot be said with equal force with regard to the period of limitation prescribed for filing such an appeal. In other words, therefore, the right to appeal may be a substantive right, but the procedure for filing the appeal including the period of limitation can never be called as a substantive right but is only a procedural law. The accused, therefore, cannot claim any vested right in dictating that he should be governed by the old provisions pertaining to the period of limitation. It is now settled that a procedural law is always retrospective, meaning thereby that as on and from the 1st of January 1974, the acts committed prior to that will be governed by the new procedure prescribed under the new Act. This would, therefore, mean that an act committed prior to the 1st of January 1974 will be subject to the provisions contained in section 52 of the new Act vis a-vis the filing of the appeal, it is also clear that by the said repeal, section 23E and its subsection (2) both come to an end and those cannot be revived. In addition thereto, it is significant to note that admittedly the impugned order was passed only when the new Act came into force. This would further reinforce my conclusion that the provisions contained in section 52 of the new Act only will

come into operation and the provisions contained in section 23E of the old Act will have no existence.

14. Section 81 of the new Act which is the residuary provision envisages that notwithstanding such repeal of the old Act, there would be application of section 6 of the General Clauses Act with regard to the effect of the repeal. This is clearly mentioned in sub-section (3) of section 81. This means that the provisions of section 6 of the General Clauses Act, if are not inconsistent, would apply. Clause (e) of section 6 of the said Act contemplates that any investigation, legal proceeding or remedy would not be affected by the repeal and that the same can be instituted, continued or enforced. It is true that the concluding portion of section 6 contains the wording as "as if the repealing Act had not been passed." However, the Supreme Court had an occasion to consider a similar provision contained in section 116 (c) of the Code of Criminal Procedure by reason of the amendment in *Anant Gopal Sheorey Vs. The State of Bombay*, . It was then observed that the said words, which are identical to the concluding words in section 6, do not preclude the application of the procedure of the repealing Act and that these words have a limited purpose, viz. to secure the enforcement of the rights and liabilities arising prior to the repeal by proceeding instituted after the repeal and they do not prevent to coming into force of the repealing Act. This would, therefore, furnish an effective answer as regards the interpretation of this concluding portion of section 6 of the General Clauses Act. As regards the other clauses of section 6, the same were considered in *P. N. Balasubramanian v. Union of India* A I R 1975 Del 258, wherein it was observed that in contrast to other clauses, clause (e) deals with pending and future investigations and legal proceedings and that while clauses (b), (c) and (d) deal with substantive matters like rights and liabilities, clause (e) deals only with procedural matters such as the institution and continuation of the investigations and the proceedings. It was also observed that the object of section 6 is to save the rights and liabilities, which have already accrued. It was further indicated that clause (e) does not refer to acts completed in the past, but it simply says that the repeal shall not affect any investigation or legal proceeding in respect of such past rights and liabilities and that its object is to enable such investigation or legal proceeding to be continued (if pending) or to be instituted for the first time after the repealing Act has come into force. It was further in terms observed as:

There is nothing in the language of clause (e) and the concluding words of section 6 to show that the procedure laid down in the repealed Act was continued in force even after the repeal, unless the continuation or institution of an investigation or a legal proceeding for the enforcement of past rights and liabilities would be contrary to the procedure laid down in the repealing Act.

It would thus be clear that on a combined reading of section 81 of the new Act and section 6 of the General Clauses Act, the procedure as prescribed under the new Act only would be applicable and the procedure prescribed under the old Act has no relevance at all.

15. In *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, , it has been stated that no right is bestowed on the accused to claim a trial by a particular procedure and that he must submit to the procedure that is in force at the relevant time. In *Anant Gopal Sheorey v. State of Bombay (supra)*, there was amendment to section 342 and the added section is 342-A of the Code of Criminal Procedure. The accused contended that when the trial commenced, the new Act came into force and, therefore, he was entitled to examine himself on oath as contemplated by section 342-A of the Code of Criminal Procedure. This was rejected by the trial Court and the High Court, though the Supreme Court upheld the contention and while doing so, it was observed as:

No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.

In *The State of Maharashtra Vs. Vishnu Ramchandra*, , an externment order was passed u/s 57 of the Bombay Police Act and the accused was prosecuted u/s 142 of the Bombay Police Act for breach of the said order. The antecedents of the accused with reference to his previous convictions were considered, though it was argued that it was not a procedural law and as such was not retrospective. However, the Supreme Court observed as:

Penal statutes which create new offences are always prospective. But penal statutes which create disabilities or statutes which create no new punishment but authorise some action based on past conduct may be interpreted retrospectively when there is a clear intendment that they are to be applied to past events. Again, an Act designed to protect the public against acts of a harmful character may be construed retrospectively, if the language admits of such an interpretation, even though it may equally have a prospective meaning.

In *Tikaram & Sons v. Cammr., Sales Tax*, U. P. A I R 1968 S C 12867 as also in *State of Madras Vs. Lateef Hamid and Co.*, , it was clearly observed that there is no vested right accrued to the accused in the matter of procedure prescribed under the Act.

In the latter case, Sales Tax Act of 1939 was repealed and substituted by 1959 Act and it was canvassed that the assessee should be dealt with under the provisions of the old Act. While repelling the said argument, it was observed as :

No assessee has any vested right in the procedure prescribed under the 1939 Act. So long as the new procedure laid down in the 1959 Act does not interfere with any of his vested rights, an assessee has no right to claim that his case must be dealt with under the provisions of the repealed Act.

In *P. N. Balasubramanian v Union of India (supra)*, the contention vis-a-vis the

provisions of section 6 of the General Clauses Act has been considered and I have dealt with the same. It would be clear that the investigation or the remedy is continued and it does not prevent the application of the procedure under the new Act and it has been specifically observed that the procedure as laid down in the repealed Act comes to an end and is substituted by the procedure laid down under the repealing Act and clause (e) of section 6 which is more relevant and germane deals with the procedural matters such as the institution and continuation of investigations and proceedings. In addition thereto, it was also observed as:

The general rule is that the procedure laid down in the repealing Act is applicable to the proceedings which arise out of transactions which took place under the repealed Act. This general rule has not been rebutted by anything contained in section 6 of the General Clauses Act. Nor is there anything in the provisions of the repealing Act which militates against it. -----The procedural enactment is----- retrospective in the sense that no one has a vested right in procedure. Therefore, when an existing statute is repealed by another statute the proceedings which arise out of acts committed when the repealed statute was in force is governed by the repealing statute.

That was also a case under the Foreign Exchange Regulation Act and the effect of the repeal of the 1947 Act by the 1973 Act was considered and all similar contentions raised on behalf of the defence were repealed after taking a resume of certain cases.

16. The question of the provisions relating to limitation being a procedural law has been in terms enunciated by the Supreme Court in A.S. Krishnappa Chettiar and Others Vs. Nachiappa Chettiar and Others, , wherein it has been observed as :

The Limitation Act "is a piece of adjective or procedural law and not of substantive law. Rules of procedure, what ever they may be, are to be applied only to matters to which they are made applicable by the Legislature expressly or by necessary implication.?"

It is one thing to say that an individual has a vested right to file an appeal which can be treated as a substantive right, which can never be denied to the litigant. But it is entirely a different thing to say that the litigant, while pursuing such a substantive right, can dictate that he can choose his own forum and the procedure. In other words, the right to file an appeal can be said to be a substantive or a vested right, though the procedure for filing the appeal can always be said to be only procedural law and from this conclusion there does not appear to be any escape.

17. It is not necessary to multiply this aspect by reproducing some other decisions, as the ratio is common. It is thus manifest that in a matter like the one at hand, it is out and out a procedural matter involving no substantive right as such and further the accused has no vested right and, therefore, cannot have

a choice in selecting the forum or the procedure. But in other words, he has got to submit himself to the procedure that is prevailing under the existing law and one cannot take recourse to the provisions contained in the old Act which has been repealed. The Appellate Board rightly observed that rules of limitation as distinct from rules of prescription are regarded and classified as matters pertaining to the procedure of the Courts. The Appellate Board, therefore, was thoroughly justified in taking the view that this being a matter of procedural law, the provisions contained in section 52 are operative and the provisions contained in section 23E of the repealed Act having no existence at all are thoroughly irrelevant and cannot be considered for any purpose. Once that premises is accepted, then the inevitable must follow. Under the provisions of section 52, the period prescribed for filing an appeal is 45 days and in a discretion is vested in the appellate authority to extend the said period. But there is a limitation on the outer terminus, inasmuch as the appellate authority can condone the delay upto a period of 90 days and it is therefore that no discretion has been vested in the appellate authority. As stated at the outset, on facts even if the appellant's explanation and the dates mentioned by him are accepted, the fact remains almost outstanding that the appeal was filed obviously beyond a period of 90 days and, therefore, from any point of view, the appeal was beyond time. The appellate authority could have condoned the delay only upto 90 days and consequently, the appellate authority was justified in observing that it had no jurisdiction even to entertain an application condonation of delay. The result in such cases may cause hardship to the litigants, inasmuch as in a proper case a litigant may have a justifiable and sufficient cause for filing an appeal even beyond the prescribed period of 90 days. In fact, in the instant case also, the Appellate Board has indicated that the appellant was prevented from filing the appeal within the prescribed period of limitation on account of his ailment, yet the law must take its course and a hard case can never be allowed to make into a good law. The provisions of section 52 pertaining to limitation have got to be strictly construed in the context of the ratio of several decisions, to which I have already made a reference. The other side of the point also cannot be overlooked. Normally, at least 45 days' period has been given for the filing of the appeal and it is thereafter extended upto 90 days being within the discretion of the appellate authority and, therefore, the Legislature intends that the litigants should not be lethargic in prosecuting their remedy of filing an appeal and it is in the fitness of things which cannot be said to cause any hardship as such that at some stage and at some point a line has got to be drawn. From that point of view, in my opinion, the provisions contained in section 52 cannot be said to be that stringent.

18. No decisions are cited at the Bar to run counter to the ratios, which have been enunciated in the decisions, which I have referred to above. In fact, it has almost been conceded that the question of limitation in the matter of filing of appeal can be treated as procedural law. Apart from such concession, the dictum of the law is very clear. If that be so, then it must follow as a logical corollary

that the appellant must submit himself to the period of limitation as prescribed u/s 52 (2) read with its proviso of the new Act and cannot have any recourse to section 23E of the old Act, which has no existence as on and from the 1st of January 1974, on which day the repealing Act came into force. The appeal is, therefore, obviously beyond time and there is no jurisdiction vested in the Appellate Board even to entertain an application for condonation of delay, notwithstanding the fact that the appellant may have a sufficient cause in that behalf.

19. Mr. Barday submitted that in the impugned order passed by the Directorate it was stipulated and made known to the appellant that an appeal against that order would lie to the Chairman, Foreign Exchange Regulation Appellate Board at New Delhi, after depositing the sum imposed by way of penalty u/s 23 of the Foreign Exchange Regulation Act within 45 days of the date of issue of this order. On the basis of this stray sentence in the order, Mr. Barday tried to build his own superstructure submitting that even the Directorate informed him that an appeal lay u/s 23E of the old Act. In my opinion, that would hardly make a difference and a wrong label annexed by the authority cannot change the complexion of the settled law. It also cannot be overlooked that the period of limitation that was indicated in the said order was also to the tune of 45 days. It appears that only incidentally the appellant was made aware that he had a right to file an appeal within 45 days and, therefore, mentioning of section 23E of the old Act and a non-mention of section 52 of the new Act would hardly make any difference.

20. It may incidentally be observed that as on and from the 1st of January 1974 the new Act of 1973 came into force and thereby the old Act was completely repealed and, therefore, section 23E had no existence at all. It is also worth noting that it is not as if that the act complained of was an offence under the old Act but was not an offence under the new Act. But on the contrary, it equally continued to be an offence under the new Act. This is very relevant. In addition thereto, it also cannot be overlooked that the impugned order was passed by the Directorate on the 2nd of August 1974, i.e. obviously after the coming into operation of the new Act.

21. Therefore, viewed from any angle, there is no escape from the conclusion that the appeal was obviously beyond the period of limitation; that the provisions of section 52 (2) of the new Act only are applicable and thereby the appellate authority had no jurisdiction to condone the delay beyond the period of 90 days; and lastly that this is only by way of a procedural law giving no option to the accused to submit himself to the procedure under the new Act. In this view of the matter, the order passed by the Chairman of the Appellate Board is not open to any exception as such and deserves to be upheld.

22. In the result, the appeal is dismissed. The order dated the 24th of June 1976 passed by the learned Chairman, Foreign Exchange Regulation Appellate Board in Appeal No. 559 of 1974 dismissing the appellant's appeal on the preliminary question about the same being barred by limitation is upheld.