

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

+ **Crl.Appeal No. 99/2008**

% Date of Decision : 25.4.2008

B.K. Pramanik Appellant
Through: Dr. Jose P. Verghese, Advocate

versus

Union of India & Ors. Respondents
Through: Ms. Rajdipa Behura, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

VIPIN SANGHI, J. (Oral)

1. This appeal is directed against the order dated 25.9.2007 passed by the Appellate Tribunal for Foreign Exchange in Appeal No.429-432/1992 whereby the appeals filed by the appellant against the order dated 24.8.1992 passed by the Special Director, Enforcement Directorate were dismissed.

2. In relation to certain entries pertaining to foreign remittance received during the period 1977-1987, certain

proceedings were initiated against the appellant and order dated 24.8.1992 came to be passed by the Director, Enforcement Directorate levying penalties on the various persons and entities amount to Rs.8lakhs. Against the said order the appellant preferred an appeal before Foreign Exchange Regulation Appellate Board under Section 52 of the Foreign Exchange Regulation Act, 1972 (FERA). This appeal remained pending and in the meantime on 1.6.2000 the FERA was repealed and replaced by the Foreign Exchange Management Act, 1999 (FEMA). Section 49 of the FEMA is material and reads as follows:

49.Repeal and saving- (1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under subsection (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.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anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.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, authorisation or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far 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."

3. As would evident from the aforesaid provision, the

Appellate Board constituted under Subsection (1) of Section 52 of FERA stood dissolved. Under Subsection (4) of Section 49 of FEMA, offences committed under the repealed Act i.e. FERA, are to continue to be governed by the provisions of FERA, as if that Act has not been repealed. Under Subsection 5(b) of Section 49 of FEMA, any appeal preferred before the Appellate Board under Subsection (2) of Section 52 of the repealed Act, which has not been disposed of before the commencement of FEMA, stands transferred to, and shall and required to be disposed of by the Appellate Tribunal constituted under FEMA. Under Clause (c) of Subsection (5) of Section 49 of FEMA, any appeal or any decision of the Appellate Board constituted under FERA and passed under Sections 52(4) of FERA, if not filed before the commencement of FEMA, could be filed before the High Court within a period of 60 days of such commencement.

4. It would, therefore, be seen that in the facts of the present case Subsection 5(b) of Section 49 of FEMA is attracted since the appeal filed by the appellant was pending before the Appellate Board under Section 52(2) of FERA, and was accordingly disposed of by the Appellate Tribunal constituted under FEMA.

5. The appellant has filed the present appeal invoking Section 54 of the repealed Act FERA, on his understanding that his rights of appeal as available under FERA is preserved by virtue of

Section 49(4) of FEMA. On the other hand, submission of learned counsel for the respondent is that the present appeal ought to have been preferred under Section 35 of FEMA, since it is an order passed by the Appellate Tribunal constituted under FEMA, and therefore the said appeal lies under Section 35 of FEMA. When the matter came up before this Court yesterday, it was pointed out to learned counsel for the appellant that irrespective of the fact whether the appeal is considered as one under Section 54 of FERA, or under Section 35 of FEMA, prima facie, it appears to the Court that this Court would have no territorial jurisdiction to entertain the said appeal in view of the explanation contained in both the aforesaid provisions whereby the High Court has, inter alia, been defined to mean "*The High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain*". This definition of 'High Court' is common to Section 54 of the repealed Act as well as Section 35 of FEMA. Admittedly, the appellant is ordinarily residing at, and carrying on his business and personally working for gain at Bangalore. In view of the aforesaid position the matter was adjourned for today to enable the parties to address their arguments on the aspect of the Territorial Jurisdiction of this Court to entertain the present appeal.

6. Submission of learned counsel for the appellant, contrary to its conduct in styling its appeal as under Section 54 of

FERA, is that the present appeal is in fact one preferred under Section 49 of FEMA. He submits that this is not an appeal preferred under Section 54 of FERA or Section 35 of FEMA. He submits that Section 49(4) only preserves the substantive rights of the parties under FERA where under the offences are alleged to have committed prior to the repeal of FERA, and there is no preservation of the procedural rights. He submits that the right of appeal is a procedural right. He also submits that the present appeal cannot be considered as one under Section 35 of FEMA. His submission is that by virtue of Subsection (6) of Section 49 of FEMA, the right to appeal available to the appellant is a common law right which he chooses to call a “deemed appeal” since Section 49(6) specifically states that mention of particular matters in Subsection (2), (4) and (5) of Section 49 of FEMA shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act. Section 6 of the General Clauses Act reads as follows:

“6. Effect of repeal.- 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, 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 so 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.”

7. The further submission of learned counsel for the appellant is that since the erstwhile Appellate Board under FERA and the Appellate Tribunal under FEMA continue to deal with the offences committed under the repealed Act and have their seat in Delhi, the immediate cause of action for filing the present “deemed appeal” has arisen at New Delhi and, therefore, this Court has jurisdiction to entertain the present appeal. He relies on the decision of the Supreme Court in ***Lt. Col. Khajoor Singh v. Union of India & Anr.*** AIR 1961 SC 532 wherein it was held that the seat of Government of India is in New Delhi, and the Central Government, as such, is located in New Delhi and the absence of a provision in the Constitution to this effect can make no difference to this position. He further submits that the 15th amendment to the Constitution was necessitated to remove a different anomaly as stated in the judgment in paragraphs

15 and 16 of the majority view, where the Supreme Court had dealt with the issue whether there was any scope in introducing the concept of cause of action as being the basis of the exercise of jurisdiction under Article 226 of the Constitution of India.

8. On the other hand learned counsel for the respondent submitted that the present appeal could not be maintained under Section 54 of FERA. Her submission is that the same can be maintained only under Section 35 of FEMA. In support of her submission she relies on the decision of Kerala High Court in ***Directorate of Enforcement v. Veerankutty*** [2004] 55 SCL 677(KER) decided on 14.10.2003 on the aspect of lack of jurisdiction of this Court to entertain the present appeal. She also relies on a decision of this Court in Crl.A. No.582/2007 ***Narender Goel & Ors. vs. Union of India*** wherein this Court had held while dealing with Section 54 of FERA, that the appeal lies to the High Court within the jurisdiction of which the aggrieved party i.e. the appellant ordinarily resides or carries on business, or personally works for gain.

9. Having considered the rival submissions, I am of the view that this Court has no jurisdiction to entertain the present appeal and since, admittedly, the appellant is ordinarily residing and carrying on his business and personally working for gain in Bangalore. The submission of the appellant to somehow maintain the present appeal

before this court by terming the present appeal as a “deemed appeal” is not only contrary to the stand taken by the appellant while preferring the appeal, which was claimed to be under Section 54 of FERA, but even otherwise is wholly without any force. Admittedly, the appeal preferred by the appellant before Appellate Board under Section 52(2) of FERA was pending when FERA was repealed and FEMA was enacted on 1.6.2000. Since the Appellate Board stood dissolved by virtue of Section 49(1) of FEMA, the said appeal stood transferred to the Appellate Tribunal by virtue of Section 49(5)(b) of FEMA. That is how the Appellate Tribunal has decided the appeal filed by the appellant before the Appellate Board (under FERA) and passed the impugned order. It is not the appellant's case that the said order has been passed by the Appellate Tribunal without jurisdiction. What Section 49(4) provides that the offences committed under the repealed Act i.e. FERA, shall continue to be governed by the said Act as if the Act had not been repealed. Consequently, so far as the determination of inter se rights/obligation of the parties in relation to the alleged offence is concerned, the same shall continue to be governed by FERA.

10. Whether or not the right of appeal under Section 54 of FERA to the High Court is saved by Section 49(4) of FEMA is an issue, which though arises for consideration, need not detain me in view of the fact that, in either case, i.e. whether the right of appeal is

relatable to Section 54 of FERA or to Section 35 of FEMA, the definition of the term 'High Court', which has jurisdiction to entertain the appeal is the 'High' Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain. I am, therefore, not expressing any opinion on the issue whether the appeal against the impugned order passed by the Appellate Tribunal would lie under Section 54 of FERA or Section 35 of FEMA.

11. However, there is no merit in the submission of the appellant that the said appeal is a "deemed appeal" which neither falls under Section 54 of FERA or Section 35 of FEMA. Section 6 of the General Clauses Act, inter alia, states that the repeal of any Central Act by another Central Act, unless a different intention appears shall not affect any remedy in respect of any such right which was acquired, accrued or incurred under the repealed enactment. Therefore the right of appeal against the impugned order would be available either under Section 54 of FERA or Section 35 of FEMA depending on whether "a different intention appears" from the provisions of FEMA, and there is nothing to suggest that a common law right or "deemed appeal" is vested in the appellant under Section 49 of FEMA which could be preferred before this court on the ground that the cause of action has arisen within the jurisdiction of this Court as the Appellate Tribunal has passed the

impugned order in Delhi.

12. The submission of the appellant based on the decision in **Lt. Col. Khajoor Singh** (supra) is of no avail, since both Sections 54 of FERA and 35 of FEMA specifically defined the 'High Court' before the appeal can be preferred. The present is not a writ proceeding under Article 226 of the Constitution of India, but a statutory right which has been invoked by the appellant. This Court in **Narender Goel** (supra) has already interpreted the explanation defining the term 'High Court' to be found in Section 54 of FERA which, as aforesaid, is identically defined under Section 35 of FEMA as well.

13. The Court distinguished the decision of the High Court of Bombay in **K.N. Mehra Vs. Directorate of Enforcement** 1957 Company Cases 820. The relevant extract from the decision of this Court in **Narender Goel** (supra) reads as follows:

“3. A bare reading of the above provision would show that the High court within the meaning of Section 54 where an appeal lies is a High Court within jurisdiction of which aggrieved party i.e. appellant ordinarily resides or carries on business or personally works for gain. There is no ambiguity in the definition of 'High Court' as given in this Section. None of the appellants resides within the jurisdiction of this Court nor work for gain nor it is alleged that any of the appellants work for gain in Delhi. This appeal, therefore, would not lie before this Court but shall lie before High Court of Mumbai. The question of jurisdiction arose in K.N. Mehta vs. Directorate of

Enforcement 1957 Company Cases 820 as well. In that case, the appellant, who was earlier residing within the jurisdiction of Bombay High Court had left India and was no longer living in India. He filed an appeal before Delhi High Court against the order of Bombay High Court. This court observed that explanation need not be literally interpreted and if literal interpretation is done that the appeal of a person who comes on a visit to India as a tourist and is held guilty under the provisions of the Act would not be maintainable in any High Court because he would not be a resident or carrying on business or work for gain within jurisdiction of any High Court in India. Having regard to the fact that the appellant had left India and was settled abroad and also having regard to the fact that since the time of appeal in 1975, no objection was taken for 7 years by the Directorate regarding jurisdiction, this Court held that it had jurisdiction to hear the appeal. However, in the instant case, the appellants are residents of Mumbai. They ordinarily reside in Mumbai and the High Court who has the jurisdiction shall be the High Court of Bombay. This Court has no jurisdiction to entertain this appeal. This appeal, therefore, be returned for being filed before the Court concerned."

14. In view of the aforesaid I reject this appeal with liberty to the appellant to present the same before concerned High Court.

15. Parties are left to bear their own costs.

April 25, 2008
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VIPIN SANGHI, J.