

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

% *Judgment Reserved on: 16th November, 2009*
Judgment Delivered on: 19th November, 2009

+ **CRL.A. 460/2008 & CrI.M.A.6384/2008**

M.K.SURI Appellant
Through: Mr.Rohit P.Ranjan, Adv.

versus

DIRECTORATE OF ENFORCEMENT
..... Respondent
Through: Ms.Rajdipa Behura, Adv.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. Present appeal has been filed under Section 35 of the Foreign Exchange Management Act 1999 (hereinafter referred to as the FEMA). It has impugned the order of the Appellate Tribunal for Foreign Exchange dated 26.3.2008.

2. The Adjudicating Authority i.e. the office of the Deputy Director on 30.3.2005 had held the petitioner M.K.Suri, proprietor of M/s Amit Export guilty of contravention of the provisions of Section 18(2) and 18(3) of the Foreign Exchange Regulation Act 1973

(hereinafter referred to as the FERA). A penalty of Rs.2,50,000/- had been imposed upon him. While passing the said order sub-clause (iii) of page 1 read as follows :-

“(iii) An appeal against this order shall lie with the Appellate Tribunal of Foreign Exchange, Ministry of Law, Justice & Company Affairs, Government of India, 4th floor, ‘B’ Wing, Janpath (Indian Oil) Bhawan, Janpath, New Delhi-110001, after depositing the amount of penalty imposed, within 45 days from the date on which this order is served (Refer Section 19 read with Section 49(5) (a) of the Foreign Exchange Management Act, 1999.)”

3. Appeal against the impugned order was thereafter preferred before the Appellate Authority i.e. the Appellate Tribunal for Foreign Exchange. Vide order dated 26.3.2008 while confirming the penalty of Rs.2,50,000/- imposed upon the petitioner the said appeal had been dismissed inter alia on the following ground:-

i. This appeal is admittedly filed after a delay of one 118 days on 6th September 2005 against an adjudication order received on 30.3.05. This Tribunal is not allowed to condone delay beyond 45 days by 1st Proviso of Section 52(2) FER Act 1973.

ii. As this appeal has been filed after expiry of 90 days from the admitted date of service on the appellant, hence, this appeal is required to be dismissed because the delay of more than 90 days cannot be condoned even on sufficient cause as per the legislative scheme. This Tribunal is empowered to grant condonation upon showing of sufficient cause upto 45 days and not beyond that. Therefore, this appeal is liable to be dismissed because the appeal have been filed after an inordinate delay much beyond 90 days with factual

delay of 73 days. An order of dismissal of this appeal is accordingly passed.

4. It is clear that it was on the ground of limitation alone that the Appellate Tribunal had not entertained this appeal against the Adjudicating Order.

5. The short submission which has to be considered by this court is :-

Whether the correctness and legality of the order of the Adjudicating Authority dated 30.3.2005 which had become the subject matter of an appeal before the Appellate Tribunal has to be examined under the provisions of the FERA or the FEMA?

6. Admittedly the FEMA was enacted on 1.6.2000; the FERA stood repealed. It is submitted on behalf of the petitioner that after the repeal of the FERA the Appellate Board constituted under Section 52(1) of the said Act stood dissolved; meaning thereby that there was no Appellate Board after 31.5.2002 i.e. the sunset period of two years to be counted from 1.6.2000 in terms of Section 49 of the FEMA which contains the saving clause. Thereafter appeals had to be filed before the Appellate Tribunal which had been constituted under the FEMA and the correctness and the legality of the order under challenge i.e. the order dated 30.3.2005, on which date the FERA stood repealed has to be with reference to the FEMA alone. There is no scope for the application of the provisions of the FERA as it has been repealed for all purposes; this is also clear from

the order of the Adjudicating Authority dated 30.3.2005 which had directed the petitioner to prefer the appeal before the Appellate Tribunal with reference to Section 19 and Section 49 (5) of the FEMA. It is submitted that under the provisions of the FEMA, there is a stipulation that the Appellate Tribunal will not hear an appeal against the Adjudicating Order unless a pre-deposit of an amount of Rs.10,000/- has been made. It is stated that because of financial constraint the petitioner could not immediately comply with that order and it had taken him sometime to gather this amount of Rs.10,000/- which now stand deposited but this was the reason why there was a delay in preferring the appeal before the Appellate Tribunal. It is stated that under Section 19(2) of the FEMA the period for filing an appeal against the order of the Adjudicating Authority is 45 days but the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was a sufficient cause for not filing the appeal within the period. It is submitted that the Appellate Tribunal has arbitrarily and summarily dismissed the appeal of the petitioner without examining as to whether there was any sufficient cause for condoning the delay or not; the Appellate Authority has illegally applied the provisions of Section 52 of the FERA which is not the applicable provision; the applicability of the FERA is negated; it is the provisions of the FEMA which would have been applicable. The Appellate Tribunal had also failed to consider that the GR forms for

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which the penalty had been imposed had been waived off by the Reserve Bank of India. In this view of the matter the Appellate Tribunal having rejected the appeal of the petitioner without going into these arguments has committed a gross illegality; impugned order is liable to be set aside.

7. This argument has been opposed by the learned counsel for the Enforcement Directorate. It is submitted that the appeal against the Adjudicating Authority, although presupposes a condition i.e. of a pre-deposit penalty of Rs.10,000/- which is the fee prescribed under the FEMA, before an appeal can be filed, yet the correctness and legality of the order of the Adjudicating Authority has to be adjudged in the context of the provisions of the FERA and this is clear from the plain reading of the newly promulgated Act. Saving clause is contained in Section 49 of the FEMA. It is submitted that the FERA had also presupposed a condition that a fee of Rs.750/- has to be deposited before an appeal could be filed against the order of the Adjudicating Authority before Appellate Board; FEMA has only enhanced this amount from Rs.750/- to Rs.10,000/-. Section 49 of the FEMA clearly states that any appeal preferred to the Appellate Board under Section 52 (2) of the repealed Act i.e. of the FERA shall be disposed of by the Appellate Tribunal constituted under this Act and that is the Appellate Tribunal constituted under the FEMA; yet the correctness and legality of the Adjudicating Order has to be considered under the

provisions of the FERA i.e. the statute under which the proceedings had been initiated. Further under Section 52(2) of the FERA there a stringent condition and an outer limit of 90 days in filing an appeal against the order of the Adjudicating Authority; this appeal was admittedly filed after a delay of 118 days which period cannot be extended in any manner.

8. Arguments have been heard and record has been perused.

9. Section 49 of the FEMA reads as follows:-

Repeal and saving

49. (1) The Foreign Exchange Regulation Act, 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 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 license, permission, authorization 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-section (2), (4) and (5) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

10. It is clear from Section 49(1) that the Appellate Board constituted under the FERA stood abolished with effect from 1.6.2000. Under sub-clause (4) of the said Act an offence committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act has not been repealed; this was subject to the provisions of Sub-section-3. Sub-section-3 states that 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. This Sub-section clearly speaks of the taking of the

cognizance of the offence under the repealed Act which can at best be within the sun set period of two years from the date of the commencement of the FEMA i.e. cognizance can be taken of an offence under the FERA only up to 31.5.2002 and not later. This sub-clause is inapplicable; and admittedly so; the said sub-clause restricts the application of the FERA only on the taking of the cognizance of an offence under the repealed Act. In the instant case the show cause notice/memorandum No.T-4/43-DZ/2000/DD(VS) is dated 30.6.2000; on this date it was the FERA which was in operation; cognizance already having been taken the applicability of the Section 49 (3) of the FEMA is excluded. This argument has also not been pressed. Section 49 (5)(b) provides that an appeal pending before the Appellate Board shall be transferred to the Appellate Tribunal; the Appellate Board was constituted under the FERA; the appeal pending before the Appellate Board i.e. before the FERA in terms of this Sub-clause would be transferred and disposed of by the Appellate Tribunal constituted under the new Act i.e. the Tribunal constituted under the FEMA.

11. Sub-section (6) of Section 49 also specifies that the general application of Section (6) of the General Clauses Act 1987 save as provided in Sub-section(3) would not be effected. Section 6 of the General Clauses Act provides for a protection to any right, privilege,

obligation or liability acquired or accrued under any enactments which had been repealed.

12. In the instant case the order has been passed in the adjudication proceedings on 30.3.2005, under the FERA after cognizance had been taken under the provisions of the FERA. Thereafter the appeal filed against the adjudication order was under Section 19 of the FEMA. Date of filing of this appeal is 2.9.2005. This is obviously for the reason that at this stage the Appellate Board constituted under the FERA had stood dissolved and Appellate Tribunal constituted under the FEMA had taken over; however the correctness, legality and the propriety of the order passed by the Adjudicating Authority being a continuation of the proceedings under the FERA has necessarily to be adjudged under the provisions of the FERA itself; the substantive provisions of the FERA would apply.

13. Under Section 52 of the FERA, it is clear that the outer limit for filing an appeal is 90 days; beyond the period of 90 days the Court has no power to condone the delay. The Appellate Tribunal on 26.3.2005, had rightly dismissed the appeal on this ground by invoking Section 52 (2) of the FERA holding that the delay of 118 days could not be condoned; the outer limit being 90 days. The said order calls for no interference.

14. In (2008) 3 SCC 70 Singh Enterprises vs. Commissioner of Central Excise Jamshedpur & Ors. while considering the provisions

of Section 35 of the Central Excise Act 1944 it held been held that the said provision of law stipulates a period of 60 days for filing an appeal; under the proviso another 30 days can be added to this period; the delay in filing the appeal can be condoned after the expiry of the 60 days yet the period the delay could not be condoned beyond 90 days. While considering the provisions of the aforestated statute it had been held that in this special statute there is a complete exclusion of Section 5 of the Limitation Act.

15. In the instant case also the provisions of Section 52(2) read with the provisions of the FERA which is also a legislation dealing with economic offences, clearly stipulates that any person aggrieved by an order of the Adjudicating Authority may appeal to the Appellate Board within a period of 45 days; the Appellate Board may entertain the appeal after the expiry of 45 days but not beyond 90 days. This is the outer limit and a mandate. Application of Section 5 of the Limitation Act is excluded.

16. The order of the Appellate Tribunal dated 26.3.2008 calls for no interference. Appeal is dismissed.

(INDERMEET KAUR)
JUDGE

19th November, 2009
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