

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No. 340/2009

% Judgment delivered on 9th February, 2011

Jitender Kumar Appellant
Through: Mr. Ashutosh Dubey and
Mr. Lov Kumar Sharma,
Advs.

Versus

Union of India & Anr. Respondent

Through: Mr. Sachin Datta and
Mr. Manikya Khanna, Advs.

AND

+ CRL. A. No. 341/2009

Shalini Kumar Appellant
Through: Mr. Ashutosh Dubey and
Mr. Lov Kumar Sharma,
Advs.

Versus

Union of India & Anr. Respondent

Through: Mr. Sachin Datta and
Mr. Manikya Khanna, Advs.

AND

+ CRL. A. No. 342/2009

M/S Opera House Exports Ltd. Appellant
Through: Mr. Ashutosh Dubey and
Mr. Lov Kumar Sharma,
Advs.

Versus

Union of India & Anr. Respondent

Through: Mr. Sachin Datta and
Mr. Manikya Khanna, Advs.

AND

+ CRL. A. No. 343/2009

Sushil Kumar Appellant
Through: Mr. Ashutosh Dubey and
Mr. Lov Kumar Sharma,
Advs.
Versus

Union of India & Anr. Respondent

Through: Mr. Sachin Datta and
Mr. Manikya Khanna, Advs.

AND

+ CRL. A. No. 344/2009

Sanjeev Kumar Sharma Appellant
Through: Mr. Ashutosh Dubey and
Mr. Lov Kumar Sharma,
Advs.
Versus

Union of India & Anr. Respondent

Through: Mr. Sachin Datta and
Mr. Manikya Khanna, Advs.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J.

1. By these appeals appellants have assailed a common
order dated 24th March, 2008 passed by the Appellate Tribunal

for Foreign Exchange (for short hereinafter referred to as “Tribunal”) in Appeal nos. 16/2008 to 20/2008. All the appeals are being disposed of together as not only the facts, but the question of law involved therein is same.

2. Vide order dated 11th October, 2007 adjudicating authority i.e. office of Special Directorate of Enforcement, had held M/s Opera House Exports Ltd. and its directors (appellants) guilty of contravention of provisions of Section 18(2) and 18(3) of the Foreign Exchange Regulation Act, 1973 (for short hereinafter referred to as “FERA”). Penalty of Rs.50 lakhs was imposed on M/S Opera House Exports Ltd. and that of Rs. 5 lakhs each on its directors (appellants before this Court). Appellants being aggrieved by the order of the adjudicating authority preferred appeals under Section 19(2) of the Foreign Exchange Management Act, 1999 (for short hereinafter referred to as “FEMA”) bearing nos. 17/2008, 18/2008, 19/2008 and 20/2008 before the Tribunal. Tribunal has held that since the adjudicating order had been passed under the provisions of Section 51 of the FERA and the penalty was imposed under Section 40 of the FERA, remedy of appeal available to the appellants was under the FERA alone in view of Section 49 (4) of the FEMA. Thus, the appeals were treated under Section 52 of the FERA and dismissed being

barred by time. It was observed that the adjudication order was passed on 11th October, 2007. Appeals were preferred before the Tribunal on 4th February, 2008 i.e. beyond the period of 90 days. Sub-section 2 of Section 52 of the FERA provided that Appellate Forum may entertain any appeal filed after expiry of 45 days but not after 90 days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal against the adjudication order. Accordingly, Tribunal was of the view that it could not have condoned delay beyond the period of 90 days. Since appeals had been preferred beyond the period of 90 days the same were liable to be dismissed. The operative portion of the impugned order reads as under :-

“12. In the light of above discussions, these appeals when filed 90 days from the date of receipt of the impugned order has to be dismissed. This Tribunal is a creature of statute. Therefore, this Tribunal cannot act beyond the statutory provisions. As a result the delay of exceeding period of 90 days cannot be condoned in view of legislative mandate couched in clear language.

13. For the reason stated herein above, these appeals are dismissed. These appeals may be consigned to record room.”

3. In the above facts, the questions of law which needs to be redressed are (a) whether the appeals before the Tribunal against the order of the adjudicating authority dated 11th

October, 2007 had to be treated by the Tribunal under the provisions of FERA or FEMA? (b) Whether Tribunal has power to condone the delay beyond the period of 90 days?

4. FEMA was enacted on 1st June, 2000 as a result whereof, FERA stood repealed. It is an admitted position. Section 49 of FEMA contains several clauses which reads as under :-

“49 (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 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, 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 provision 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.

5. Section 49(1) of the FEMA makes it clear that Appellate Board constituted under the FERA stood abolished with effect from 1st June, 2000, that is, the day FEMA came into force. Sub-section 4 of Section 49 of the FEMA envisages that 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, subject to the provisions of sub-section 3. Sub-section 3 of Section 49 of FEMA provided that 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 FEMA. In other words, sun set period of two years was provided within which cognizance of the offence committed under the repealed act could have been taken by Adjudicating Authority. In case the cognizance of any offence had been taken by the Adjudicating Authority within the sun set period the same was to be governed by the provision of repealed act in view of Sub-section 4 of Section 49 of FEMA. Section 49(5)(b) further provides that 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 the FEMA shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under the FEMA. 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.

6. In **S.K. Mittal and Anr. Vs. Union of India and Anr. 2009 (161) DLT 785**, a Single judge of this court, while deciding the appeals in respect of penalty orders passed under the FERA, but after the repeal of the FERA, has held that the 1974 Rules framed under FERA are applicable to all appeals, even after repeal and enactment of FEMA, when an appeal is filed against an adjudication order passed under FERA. Petitioners in the said case were directed to pay Court Fees on the appeals filed by them as per the provisions of FERA read with the Adjudication Proceedings and Appeal Rules, 1974.

7. In this case memorandum was issued to M/S Opera House Exports Ltd. On 2nd May, 2001 i.e. within sun set period. Order has been passed in the adjudication proceeding on 11th October, 2007 under the FERA after cognizance had been taken under the provisions of FERA. In view of this, the correctness, legality and propriety of the order passed by the adjudicating authority has to be challenged in continuation of the proceeding under the FERA and has to be adjudicated under the provisions of FERA. In view of the cognizance having been taken within the sunset period and the adjudication proceeding carried out under the provisions of FERA,

substantive provisions of FERA would alone be applicable.

Thus, the Tribunal was right in taking a view that the appeal filed before it was to be governed under the provisions of FERA. Question (a) is answered accordingly.

8. At this stage relevant it would be to quote Section 52 of the FERA which reads as follows:-

“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 under section 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 under section 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 subsection (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 subsection (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 under section 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 under section 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

authorized 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.”

(emphasis supplied)

9. A bare perusal of sub-section 2 of Section 52 makes it clear that outer limit for filing an appeal before the Tribunal against the order of Adjudicating Authority is 90 days. Tribunal has no power to condone the delay beyond the period of 90 days. Once legislature has prescribed an outer limit for filing an appeal before the Tribunal the same cannot be extended by taking aid of Section 5 of the Limitation Act. A separate period of limitation is provided for preferring the appeal under the Act as also the period for which delay can be condoned. Thus, Tribunal can condone delay within that extended period if sufficient reasons are found and not beyond that. A learned Single Judge of this Court in **M.K. Suri Vs. Directorate of Enforcement MANU/DE/2939/2009** has held as under :-

“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.”

10. Rule 7(2) of the Employees’ Provident Fund Appellate Tribunal (Procedure) Rules, 1997 (for short hereinafter referred to as the “Rules”) reads as under :-

“Section 7(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal.

Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

Provided further that no appeal by the employer shall be entertained by the Tribunal unless he has deposited with the Tribunal a Demand Draft payable in the Fund and bearing 75% of the amount due from him as determined under Section 7-A.

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 7-O.”

11. A perusal of above rule shows that the same is akin to Section 52 of the FERA. In **Assistant Regional Provident Fund Commissioner Vs. Employees Provident Fund Appellate Tribunal and Ors., 122 (2005) DLT 502**, a Division Bench of this Court has held that when a specific period is provided for preferring an appeal with a further

period of 60 days by way of extended period then that much period alone can be condoned. It was held that Tribunal had no power to condone the delay beyond 120 days which was an outer limit provided under Rule 7(2) of the Rules.

12. In **Commissioner of Sales Tax Vs. Parson Tools and Plant 35 STC 413**, Supreme Court has held that if the legislature in a special statute prescribes a certain period of limitation for filing a particular application there under and provides in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only up to a specified time limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time limit specified in the statute.

13. In **Singh Enterprises Vs. Commissioner of Central Excise Jamshedpur & Ors. (2008) 3 SCC 70**, Supreme Court while considering the provisions of Section 35 of the Central Excise Act, 1944 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 of delay could not be condoned beyond 90 days. While considering the provisions of the aforesaid statute it had

been held that in this special statute there is a complete exclusion of Section 5 of the Limitation Act. Accordingly, question (b) posed above is answered by holding that Tribunal has no power to condone the delay beyond the period of 90 days while dealing appeals under the FERA.

14. For the foregoing reasons, I am of the view that Tribunal was right in declining to entertain the appeals having been filed beyond the period of 90 days from the date of service of adjudication order.

15. All the appeals are dismissed being devoid of merits.

A.K. PATHAK, J.

FEBRUARY 09, 2011/ga