

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 10<sup>th</sup> July, 2014

+CRL.A. 1263/2011

ENFORCEMENT DIRECTORATE

..... Appellant

Through: Ms. Rajdipa Behura with Mrs.  
Monica Gupta, Advs.

versus

AMERICAN EXPRESS BANK & ORS. .... Respondents

Through: Mr. Rajeev K. Virmani, Senior  
Advocate with Mr. Ashish Kothari,  
Advs. For R-3  
Mr. Kartik Bajpai, Adv. for R-2  
Ms. Jagriti Ahuja, Adv. for R-1

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

### J U D G M E N T

: SUNITA GUPTA, J. (Oral)

Crl. MA 12158/2011 (for condonation of delay of 119 days)

1. By virtue of this application, the appellant seeks to condone the delay of 119 days in filing the accompanying appeal *inter alia* on the ground that the criminal appeal has been filed by the appellant under Section 54 of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA") against the order dated 31.01.2011 passed by the learned Appellate Tribunal for Foreign Exchange in Appeal No.03/07, 6/07 and 34/07 filed by the respondents. The certified copy of the impugned order dated 31.01.2011 was received on 04.04.2011. The collective decision

was required to be taken in the government departments at various levels, therefore, valuable time was consumed. As such, it was prayed that delay in filing the appeal be condoned.

2. The application has been contested by the respondents no.2 and 3, who have filed their separate replies.

3. Mr. Rajeev K. Virmani, learned senior counsel for respondent no.3 submitted that the present appeal though styled as one under Section 54 of FERA, could only be filed under Section 35 of FEMA. The appeal under Section 54 of FERA can be filed before the High Court only against an order or decision of the Appellate Board constituted under Section 52 of FEMA. The Appellate Board was dissolved with effect from 01.06.2000 by virtue of Section 49(1), FERA. Any appeal filed against the order of Appellate Tribunal for Foreign Exchange constituted under Section 18 of FEMA would be governed by the procedure prescribed under FEMA and not FERA. Reliance was placed on ***Union of India, through the Directorate of Enforcement vs. Ashok J. Ramsinghani*** (2011) 107 SCL 335 (Bom.) where it was observed:

*“....In the present case, the appeal filed in this court is against the order passed by the Appellate Tribunal and not against the order passed by the Appellate Board. There is no provision under FEMA to treat the order passed by the Appellate Tribunal to be the order passed by the Appellate Board. Therefore, the argument that the appeal filed against the order of the Appellate Tribunal should be treated as an appeal filed under Section 54 of FERA cannot be accepted, because, appeal under Section 54 of FERA was maintainable against a decision or order passed by the Appellate Board under Section 52 of FERA and in the*

*present case there is no order passed by the Appellate Board and consequently there is no question of filing the appeal under Section 54 of FERA."*

4. It was further submitted that since the appeal has to be filed under Section 35 of FEMA, the limitation prescribed under Section 35 of FEMA will apply. Reliance was placed on the law laid down by the Hon'ble Supreme Court in ***Thirumalai Chemicals Ltd. v Union of India*** (2011) 6 SCC 739, where it was observed:

*"The question we have already pointed out is whether Section 52(2) of FERA or Section 19(2) of FEMA will govern the appeal. As noticed above, any provision relating to limitation is always regarded as procedural and in the absence of any provision to the contrary, the law in force on the date of the institution of the appeal, irrespective of the date of accrual of the cause of action for the original order, will govern the period of limitation. Section 52(2) can apply only to an appeal to the appellate Board and not to any appellate tribunal. Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily Section 19(2) of FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of FERA.*

*"As we are not concerned with the appeals to Appellate Board, but appeals to the Appellate Tribunal, limitation being a matter of procedure, only that law that is applicable at the time of filing the appeal, would apply. Therefore, Section 19(2) of FEMA and not Section 52(2) of FERA will apply.*

*"The above discussion will clearly demonstrate that Section 49 of FEMA does not seek to withdraw or take away the vested right of appeal in cases where proceedings were initiated prior to repeal of FERA on 01.06.2000 or after. On a combined reading of Section 49 of FEMA and Section 6 of General Clauses Act, it is clear that the procedure prescribed by FEMA only would be applicable in respect of*

*an appeal filed under FEMA though cause of action arose under FERA.”*

5. The learned senior counsel further submitted that Section 19 of FEMA provides for appeals to the Appellate Tribunal and Section 19(2) that provides for limitation of 45 days for appeals, enables the Tribunal to condone any delay beyond the period of 45 days, without any upper limit, whereas Section 35 of FEMA of FEMA providing for appeals to the High Court provides for a limitation of 60 days, and puts an upper limit of 60 days up to which delay can be condoned. The present appeal admittedly has been filed after delay of 119 days which cannot be condoned. Reliance was placed on *Union of India, through the Directorate of Enforcement (supra)* wherein it was held as under:

*“As noted earlier Section 52 of FERA related to filing an appeal before Appellate Board. Admittedly, the Appellate Board stood dissolved on commencement of FEMA and, hence, there was no question of filing any appeal before the Appellate Board after the commencement of FEMA. Therefore, though the Respondent had stated that the appeal has been filed under Section 52 of FERA, it must be held that the appeal filed by the Respondent before the Appellate Tribunal was liable to be treated to have been filed under Section 19 of FEMA and not under Section 52 of FERA. Further appeal against the decision of the Appellate Tribunal would be before the High Court under Section 35 of FEMA. If the appeal against the decision of the Appellate Tribunal is filed in the High Court beyond the period of limitation prescribed under Section 35 of FEMA, then the High Court cannot condone the delay and consequently the appeal would be time barred.”*

6. Reliance was also placed on *State of U.P. v Phota and etc* AIR 1991 Allahabad 229 for contending that merely because the appellant is a

government authority, this does not mean that any latitude is required to be conferred on them. The law of limitation is same for a private citizen as well as for the governmental authority and the government like any other litigant must take responsibility for the acts and omissions of its officer.

7. In this case, the Allahabad High Court referred to the decision of the Supreme Court rendered in ***G. Rame Gowda v. S.L.A.O., Bangalore*** AIR 1987 SC 1353 wherein it was observed and held as under:

*“16. The law of limitation is intended to provide some sort of discipline in proceedings before the Court. The very fact that this law prescribes certain fixed period for doing certain things itself means that the legislative intention is to enforce discipline in Court affairs which cannot be left to the personal whims of a person or to his convenience. Certain discipline is therefore, inherent in every concept of the law of limitation and this can offer no ground for grudge to any one, much less, the State. If State actions are weighted by cumbersome beurocratic procedures, the private individual also may suffer from paucity of hands and funds. If law expects a person to leave his business, cultivation or service alone in order to approach the Courts in time, why cannot the State, with its large work force and immense resources, cannot be expected to do so? All that is required is a properly coordinated action. If sufficient time-bound guidelines are laid down this work can be accomplished within time. The problem only is that more the Courts become liberal the more the Government become complacent. This must stop and the Courts will have to take notice of this casualness which is creeping into the functioning of the Government, particularly in the law Department. It is a matter of regret that those who must know the law should seem to be so ignorant about its rigours and requirements. The Government should now wake up soon and devise some methodology to see that papers for appeals are processed quickly and vigorously at all stages and scope for delay minimised to the bare minimum.”*

8. After referring to various other decisions, the legal position was

culled out as under:

*(i) State and the private individual both stand on the same footing and should be treated alike. In the case of the State however, while construing the cause shown the court should be alive to the impersonal nature of State machinery loaded as it is with inherited bureaucratic methodology inspired with note-making, file-pushing, and passing on the buck ethos. Thus some delay may be inevitable and this should receive a more liberal consideration and is not to be viewed in a pedantic manner.*

*(ii) Approach in considering the cause shown should be such which would advance the cause of substantial justice rather than throttle it.*

*(iii) The party which seeks condonation must also bear the burden of showing that despite all necessary steps being taken to file the appeal within time it failed due to cause beyond its control. There must be absence of negligence or inaction and also no lack of bona fide, should be attributable to it.*

*(iv) Only on crossing these hurdles can an application for condonation succeed. However, each case deserves to be decided on its own facts and circumstances and no strait jacket formula can be prescribed.*

9. Reliance was also placed on an order passed by the Coordinate Bench in Criminal Appeal No.1018 of 2008 ***Union of India v M/s ESS AAR Exports and others*** where in similar circumstances, the appeal was dismissed being time-barred.

10. Having concluded on what should be the approach in considering the application for condonation of delay, let us advert to the application in hand.

11. A perusal of the application moved by the appellant seeking condonation of delay in filing the criminal appeal goes to show that in paragraphs 2, 3 and 4, following explanation has been offered for the delay of 119 days in filing the appeal:

*"2. That the certified copy of the impugned order dated*

*31.01.2011 was received on dated 04.04.2011 by the appellant and the same was placed in the file maintained by the appellant.*

*3. That it is humbly submitted that the decision of the department does not rest on single individual officer but the same is required to be decided on the basis of deep examination and long deliberation from one officer to another. In order to examine the matter at length, the original records of the case they are also required to be consulted, which require further time.*

*4. It is further submitted that in the government departments collective decision is to be taken at various levels after crossing various hurdles and intersections, therefore, the valuable time is consumed."*

12. The averments made in the application reflects that the explanation is wholly inadequate and unsatisfactory.

13. Besides the same, although the application has been moved under Section 482 Cr.PC read with Section 5 of the Limitation Act, but the relevant provision of law applicable in the instant case is Section 35 of FEMA which reads as under:

*"35. Appeal to High Court. 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 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."*

14. Under Section 35 of FEMA, appeal against the decision or order of

the Appellate Tribunal may be filed in the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such order. Proviso to Section 35 of FEMA makes it clear that the High Court if satisfied that the Appellant was prevented by sufficient cause from filing the appeal within 60 days, may allow it to be filed within a further period not exceeding sixty days. Thus, under Section 35 of FEMA, appeal against the decision or order of the Appellate Tribunal would lie before the High Court provided the appeal is filed within a period of 60 days, extendable by a further period not exceeding 60 days if the High Court is satisfied that sufficient cause prevented the filing of the appeal within the prescribed period. To put it simply, any appeal filed before the High Court under Section 35 of FEMA beyond 120 days would be time barred.

15. Interpreting similar provisions contained in the Central Excise Act, 1944, the Apex Court in the case of *M/s. Singh Enterprises v CCE* reported in 221 ELT 163 (SC) held that where the statute bars appeal beyond sixty days, the Court cannot condone the delay and entertain the appeal filed beyond sixty days.

16. In the instant case, appeal has been filed after 179 days. Even if it is assumed that certified copy of the impugned order dated 31.01.2011 was received on 04.04.2011 by the appellant and that period has to be excluded from consideration even then, there is a delay of 119 days, which cannot be condoned.

17. The application for condonation of delay is accordingly dismissed.

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18. Since the Crl. MA 12158/2011 has been dismissed, the appeal is also dismissed. Pending application, if any, also stands disposed of.

(SUNITA GUPTA)  
JUDGE

JULY 10, 2014  
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