

* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 09.01.2014

+ CRL.A. 1254/2010 & Crl.MAs 16637/2010 (stay) & 392/2011
(delay)
RAJ SOLVEX PVT LTD

..... Appellant

Through: Mr. Rajiv Virmani, senior
advocate with Mr. R.K. Handoo,
Advs.

versus

SPECIAL DIRECTOR, ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Sumit Pushkarna, CGSC with
Mr. Ruchir Mishra, SGC, Mr.
Gaurav Sharma and Mr. Mukesh
Kumar Tiwari, Advs.

+ CRL.A. 1255/2010 & Crl.MAs 16639/2010 (stay) & 190/2011
(delay)
PREM KUMAR GUPTA

..... Appellant

Through: Mr. Rajiv Virmani, senior
advocate with Mr. R.K. Handoo,
Advs.

versus

SPECIAL DIRECTOR ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Sumit Pushkarna, CGSC with
Mr. Ruchir Mishra, SGC, Mr.
Gaurav Sharma and Mr. Mukesh
Kumar Tiwari, Advs.

+ CRL.A. 1256/2010 & Crl.MAs 16641/2010 (stay) & 393/2011
(delay)

RAJ KUMAR GUPTA

..... Appellant

Through: Mr. Rajiv Virmani, senior
advocate with Mr. R.K. Handoo,
Advs.

versus

SPECIAL DIRECTOR, ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Sumit Pushkarna, CGSC with
Mr. Ruchir Mishra, SGC, Mr.
Gaurav Sharma and Mr. Mukesh
Kumar Tiwari, Advs.

+ CRL.A. 1257/2010 & Crl.MAs 16643/2010 (stay) & 189/2011
(delay)

MANOJ KUMAR GUPTA

..... Appellant

Through: Mr. Rajiv Virmani, senior
advocate with Mr. R.K. Handoo,
Advs.

versus

SPECIAL DIRECTOR, ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Sumit Pushkarna, CGSC with
Mr. Ruchir Mishra, SGC, Mr.
Gaurav Sharma and Mr. Mukesh
Kumar Tiwari, Advs.

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (Oral)

The appellant in Crl. Appeal No.1254/2010, M/s Raj Solvex Pvt. Limited, was released foreign currency amounting to **US\$ 9,15,058.11**, for import of edible oil by the said company into India. In terms of the requirement prescribed in the Foreign Exchange Control Manual, the appellant company was required to furnish export control copy of the Bill of Entry, within three (3) months from the date of remittance of the foreign exchange, to the bank which had issued the aforesaid foreign exchange. The case of the respondent is that the appellant company failed to submit the Exchange Control Copy of the Bill of Entry to the State Bank of Hyderabad, Chandi Chowk, which was the concerned authorized dealer which had issued the foreign exchange to the appellant company.

2. Section 8(3) and Section 8(4) of the Foreign Exchange Regulation Act, 1973 which has since been repealed reads as under:

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise

than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money-changer.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.”

Section 50 of the aforesaid Act, to the extent it is relevant, provides that if any person contravenes any of the provisions of this Act other than section 13, clause (a) of sub- section (1) of 1 section 18, or section 18A clause (a) of sub- section (1) of section 19 or any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is higher, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this regard by the Central Government.

3. Alleging failure to furnish Exchange Control Copy of the Bill of Entry and thereby contravening Sections 8(3) and 8(4) read with Section 50 of FERA,1973. the Special Director in Enforcement Directorate issued a Memorandum dated 21.5.2002 to the appellant-Company, M/s Raj Solvex Limited as well as its Directors namely P.K. Gupta, Raj Kumar Gupta, Manoj Kumar Gupta and B.S. Gupta required them to show cause as to why adjudicatory proceedings as contemplated under Section 51 of the aforesaid Act read with sub-sections (3) & (4) of

Section 49 of the Foreign Exchange Management Act, 1999 (FEMA) should not be held against them for the aforesaid contraventions.

4. Vide order dated 25.9.2003, the Special Director in Enforcement Directorate, imposed penalty of Rs.3.00 crore on the appellant Company, M/s. Raj Solves Limited, under Section 50 of FERA, 1973 and personal penalty of Rs.75.00 lakh each on its Directors namely P.K. Gupta, Raj Kumar Gupta, Manoj Kumar Gupta and B.S. Gupta. It was noted in the aforesaid order that the show cause notices issued to the noticees were returned undelivered with the remarks “company closed long back” and were served upon Raj Kumar Gupta on 27.7.2002 and Shri Bishal Sarup Gupta, Managing Director of the Company had filed a reply dated 12.8.2002 enclosing therewith photocopies of the Bills of Entry for warehousing and copies of the clearance for home consumption. The Adjudicating Officer also noted that in his letter Shri Bishan Sarup Gupta had stated that the company had submitted the Bills of Entry to the State Bank of Hyderabad and had also enclosed, with his reply, a copy of the letter dated 9.2.2000 addressed to the State Bank of Hyderabad in this regard. However, noticing that no evidence from the bank had been submitted to substantiate the claim of submission of the Bill of Entry to the said bank, penalty as referred above was imposed.

5. On 29.4.2005, the appellants filed an appeal before the Appellate Tribunal for Foreign Exchange under Section 19 of the FEMA, along with an application seeking condonation of delay in filing the said appeal. Vide order dated 5.2.2007 the Appellate Tribunal dismissed the appeal solely on the ground that the period of limitation for filing such an appeal was 45 days from the date of receipt of the order and the said period could be extended only up to a maximum period of 45 days under Section 52(2) of FERA and, therefore, since the appeals had been filed beyond 90 days from the date of receipt of the adjudication order they were liable to be dismissed. Thus, no view on merits of the appeal, was taken by the Appellate Tribunal.

6. Being aggrieved from the aforesaid order passed by the Appellate Tribunal, the appellants filed WP (C) No.3353/2008. The said petition came to be dismissed vide order dated 8.9.2010, in view of the pronouncement of the Apex Court in Rajkumar Shivhari Vs. Assistant Collector, Directorate of Enforcement [(2010) 4 SCC 772], taking the view that an order passed by the Appellate Tribunal could only be challenged by way of an appeal under Section 35 of FEMA and a writ petition under Article 226 of the Constitution of India would not be maintainable to challenge such an order. It was also noted in para 2 of

the order that the Supreme Court had also granted liberty to the petitioner in such cases to file an appeal within 30 days. After the dismissal of the writ petition, these five appeals have been filed by the company and its surviving Directors.

7. The first question which arises for consideration is as to whether the appeals before this Court are barred by limitation prescribed in Section 35 of FEMA or not. The aforesaid Section prescribes a period of 60 days from the communication of the decision of the Appellate Tribunal for filing an appeal to this Court, but this Court can condone the delay in filing an appeal for a further period not exceeding 60 days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the prescribed period. Relying upon the aforesaid provision, it is contended by the learned senior standing counsel that since the order passed by the Appellate Tribunal came to be passed on 05.02.2007, the present appeals having been filed more than three years after the said order, are clearly barred by limitation and this Court is not competent to condone the delay for a period beyond 60 days. In support of his contention, the learned senior standing counsel for the respondent relies upon M/s. Consolidated Engg. Enterprises versus Principal Secy. Irrigation Deptt. & Ors. [2008(6) Scale 748],

Thomas Thomas and another versus The Kottayam Municipality and Another [ILR 2008 (4) Kerala 70], K.C. Sareen versus CBI, Chandigarh [2001 sCC (CrI.) 1186].

8. A perusal of the decision of the Apex Court in Raj Kumar Gupta (supra) would show that while granting liberty to the appellant before it to file an appeal before the appropriate High Court, within the period of 30 days, the Apex Court directed that the Appellate Authority will consider the question of limitation sympathetically, having regard to the provisions of Section 14 of Limitation Act and also having regard to the fact that he was bonafidely pursuing his case under Article 226 of the Constitution before this Court and then before the Apex Court. Thus, the Apex Court granted liberty to the Appellate Tribunal to extend the benefit of Section 14 of Limitation Act to the appellant, on account of his having filed a writ petition under Article 226 of the Constitution and then an appeal before the Apex Court against the order passed in the writ petition. The contention of the learned senior counsel for the appellants is that if benefit of Section 14 of Limitation Act is extended to the appellants, the appeal would be within prescribed period of limitation. In this regard, his submission is that the order passed by the Tribunal was served upon the appellant only on 11.04.2008 and the writ

petition before this Court came to be filed on 28.04.2008, i.e., 17 days after receipt of the order of the Appellate Tribunal and these appeals have been filed 30 days after disposal of the Writ Petition by this Court. His contention is that if benefit of Section 14 of Limitation Act is extended to the appellants on account of their bonafidely pursuing the remedy of the writ petition before this Court, the appeal would be then within limitation since the prescribed period of limitation is 60 days. The learned senior standing counsel, on the other hand, submits that the order passed by the Appellate Tribunal was in the knowledge of the appellants even prior to the date 11.04.2008, as would be evident from an inspection application filed by their counsel before the Appellate Tribunal on 16.11.2007. It is also the submission of the learned senior standing counsel for the respondent that the presence of the learned counsel for the appellant has also been recorded in the order passed by the Appellate Tribunal.

9. As regards the presence of the counsel for the appellants being recorded in the order of the Appellate Tribunal, nothing really turns on that since it is an admitted position that the order was not dictated in an open hearing, was reserved by the Tribunal and came to be announced at a later date. Obviously, when an order is reserved and pronounced at a

later date, the presence recorded in the order is of the counsel who filed/argued the matter and not of the counsel who are present on the date of pronouncement of the order. Therefore, it cannot be said that the counsel for the appellant was present before the Tribunal when the impugned order came to be passed by it.

As regards application dated 16.11.2007 filed by Shri K.K. Jha, advocate on behalf of the appellants, a perusal of the said application would show that the counsel represented Mr Manoj Kumar Gupta, one of the appellants and wanted to know the proceedings of the case since Mr Gupta was not aware of those proceedings and had engaged the counsel on that very day, i.e., 16.11.2007. Therefore, no knowledge of the contents of the said order can be imputed to the appellants from the aforesaid application.

10. Rule 14 of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules 2000 prescribes the mode of service of notices, requisitions or orders passed under the provisions of FEMA and reads as under:-

“Service of notices, requisitions or orders.

A notice, requisition or an order issued under these rules shall be served on any person in the following manner, that is to say,--

(a) by delivering or tendering the notice or requisition or order to that person or his duly authorised person.

(b) by sending the notice or requisition or order to him by registered post with acknowledgment due to the address of his place of residence or his last known place or residence or the place where he carried on, or last carried on, business or personally works or last worked for gain, or

(c) by affixing it on the outer door or some other conspicuous part of the premises in which the person resides or is known to have last resided or carried on business or personally works or last worked for gain and that written report thereof should be witnessed by two persons; or

(d) if the notice or requisition or order cannot be served under Cl. (a) or Cl. (b) or Cl. (c), by publishing in a leading newspaper (both in vernacular and in English) having wide circulation of area or jurisdiction in which the person resides or is known to have last resided or carried on

business or personally works or last worked for gain.”

11. Admittedly, a copy of the impugned order was sent by the office of the Appellate Tribunal to the appellants. The case of the appellants is that the aforesaid copy was received by them on 11.04.2008. They expressly stated so in of the writ petitions which they had filed in this Court. There is a specific averment to this effect in para 18 of the writ petition. In corresponding paragraph of the counter-affidavit to the writ petition, there is no denial of the assertion that the aforesaid order was received by the appellant Shri Raj Kumar Gupta, by post, on 11.04.2008. Moreover, this is not the case of the respondent in any of the proceedings that the aforesaid order of the Tribunal was actually dispatched to the appellants, more than one week or so before 11.04.2008. In fact, the response given by the respondent in the writ petition, the response in these appeals as well as in the response to the application for condonation of delay, the respondents do not even say on which particular date the Tribunal had dispatched the order which Shri Raj Kumar Gupta claims to have received on 11.04.2008. In these circumstances, there would be no reason, not to accept the plea taken by

the appellants that the aforesaid order was received by Shri Raj Kumar Gupta by post only on 11.04.2008.

12. If the benefit of Section 14 of Limitation Act which in view of the decision of the Apex Court in Raj Kumar Shivhare (supra) is available to the appellants, is given for the period during which the writ petition was pending before this Court and the Court proceeds on the basis that the period of limitation for filing an appeal before Appellate Tribunal was to be computed only from 11.04.2008 when the copy of the order dated 05.02.2007 was received by Shri Raj Kumar by post, the present appeal would be well within the prescribed period of limitation.

13. Another important aspect in this case is that in para 2 of the order dated 08.09.2010, this Court noted that the Supreme Court had also granted liberty to the petitioner in such cases to file the appeal within 30 days. In para 3 of the order of this Court, while dismissing of the writ petition, held that it would be open to the petitioner to avail the remedy of an appeal as explained by Supreme Court in para 45 of the judgment in Raj Kumar Shivhare (supra) and urge all the points that the petitioner urges in the writ petition, in the said appeal. Therefore, the appellants would not be unjustified in contending that by way of the order dated 08.09.2010, this Court, following the decision of the Apex Court in Raj

Kumar Shivhare (supra), had granted 30 days time to the appellants before this Court to file an appropriate appeal and since that order was not challenged by the respondents before a superior forum, and computed from the day of the order passed in the writ petition, this appeal is within the time stipulated in the said order, having been filed on 07.10.2010.

14. As regards the decision relied upon by the learned senior standing counsel, they are of no help considering that the benefit of Section 14 of Limitation Act was granted by the Apex Court in the case of Raj Kumar Shivhare (supra) and similar benefit was extended by this Court while dismissing the writ petition of the appellants on 08.09.2010 and also considering that if the period during which the appellants were prosecuting the writ petition in this Court is excluded, the appeals are within limitation as prescribed in Section 35 of FEMA.

15. The question as to whether in view of the provisions of Section 49 of FEMA an appeal filed against an order of adjudication passed after repeal of FERA and after coming into force of FEMA would be governed by the provisions of FERA or FEMA came up for consideration of the Apex Court in Thirumalia Chemicals Limited Vs. Union of India (2011) 6 SCC 739 and the following view was taken:

“42. The appellate Board under FERA, it may be noted stood dissolved and ceased to function when FEMA was enacted. Therefore, any appeal against the order of the adjudicating officer made under FERA, after FEMA came into force, had to be filed before the Appellate Tribunal constituted under FEMA and not to the Appellate Board under FERA. Section 52 of FERA stipulates the limitation for an appeal against the orders of the adjudicating officer to the Appellate Board. It provides the period of limitation as 45 days but the Board may entertain an appeal after the expiry of 45 days but not beyond 90 days.

43. Under FEMA, an appeal lies to the appellate tribunal constituted under that Act and Section 19(2) provides that every appeal shall be filed within 45 days from the date on which a copy of the order of the adjudicating authority is received. The appellate is however empowered to entertain appeals filed after the expiry of 45 days if it is satisfied that there was sufficient cause for the delay in filing the appeal.

44. Though both Section 52(2) of FERA and Section 19(2) of FEMA provide a limitation of 45 days and also give the discretion to the appellate authority to entertain an appeal after the expiry of

45 days, if the appellant was prevented by sufficient cause from filing an appeal in time, the appellate authority under FERA could not condone the delay beyond 45 days whereas under FEMA, if the sufficient cause is made out, the delay can be condoned without any limit.

45. 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.”

16. It would, thus, be seen that if an appeal preferred by the appellants before the Tribunal, it was required to be dealt with under Section 19 of the FEMA and, therefore, the Appellate Tribunal could entertain the appeals, even after the expiry of 45 days from the receipt of the order of the adjudicating authority if it was satisfied that there was sufficient cause for not filing the appeal within the aforesaid 45 days' period. There is no upper cap on the delay which could be condoned by the Appellate Tribunal, in the event of its being satisfied that there was sufficient cause for not filing the appeal within the prescribed period.

17. In view of the authoritative pronouncement of the Apex Court, it can hardly be disputed that the Tribunal ought to have considered the application of the appellants for condonation of delay in filing the appeals on merits instead of dismissing them on the ground that the delay beyond 45 days from the prescribed period could not be condoned by it.

18. Since the Appellate Tribunal has not examined the applications for condonation of delay in filing the appeals on merits, the impugned order dated 5.2.2007 passed by the Appellate Tribunal is hereby set aside and the matter is remanded back to the Tribunal for deciding the application for condonation of delay on merit and in case the delay in

filing the appeals is condoned, the said Tribunal shall also decide the appeals on merit. It shall be open to the parties to urge all the points raised in this writ petition before the Tribunal. The parties shall appear before the Appellate Tribunal on 30.01.2014.

The appeals stand disposed of accordingly.

One copy of this order will be sent by the Registry to the Appellate Tribunal within a week from today.

JANUARY 09, 2014/*rd*

V.K. JAIN, J.