IN THE HIGH Court OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

FEMA APPEAL NO. 4 OF 2016

Union of India. ... Appellant.
V/s.
Shri Yogesh Mehta and another. ... Respondent.

WITH
FEMA APPEAL NO. 5 OF 2016

Union of India. ... Appellant.
V/s.
Sh. Hemal Thakkar. ... Respondent.

Mr. Parag Vyas a/w. Mr. D. P. Singh and Mr. Pranil Sonawane for the appellant in both appeals.

Mr. B. Sheshagopalan i/b. Mr. Sachin S. Padaye for the respondent in FEMA/4/2016.

Mr. Arun Mehta a/w. Ms. Sampada Khanolkar i/b. Aksar Law for the Respondent in FEMA/5/2016.

CORAM : A.S.OKA AND A.K.MENON, JJ.

DATE : 13th/14th November 2017.

<u>ORAL JUDGMENT</u> : (Per A.S.Oka, J.)

1. The submissions of the learned counsel were heard on the earlier

date. For the sake of convenience, with a view to understand the controversy, we refer to the facts of Appeal No.4/2016. The issue involved in both the Appeals is of maintainability of revision applications filed by the Enforcement Directorate of the appellant before the Appellate Tribunal for Foreign Exchange (for short "Appellate Tribunal"). On 31st May 2002, the Special Director of Enforcement issued a memorandum against the respondents. The first respondent was charged with the contravention of Section 9(1)(f)(i) of the Foreign Exchange Regulation Act, 1973 (for short "FERA"). The second respondent was charged under sub-section (2) of Section 64 of FERA for aiding and abetting in the said transaction.

2. On the basis of a show-cause-notice, an adjudication was made by the Special Director of Enforcement. By an order dated 17th June 2010, the Special Director of Enforcement dropped all the charges against the respondents. Being aggrieved and dissatisfied by the said order, the appellant purported to file a revision application before the Appellate Tribunal established under section 18 of the Foreign Exchange Management Act, 1999 (for short "FEMA"). We may note that FEMA

came into force from 1st June 2000. By virtue of sub-section (1) of Section 49 of FEMA, FERA was repealed. Sub-section (1) further provides that the Appellate Board constituted under FERA shall stand dissolved.

3. By the impugned order, the Appellate Tribunal, after considering the provisions of FERA and FEMA came to the conclusion that after the repeal of FERA, the revision application filed by the appellant was not maintainable in law. In the impugned order subject matter of Appeal No. 5 of 2016, a similar view has been taken by the Appellate Tribunal.

4. The learned counsel appearing for the appellant has taken us through the relevant provisions of both FERA and FEMA. He invited our attention to the provision of sub-section (4) of section 52 of the FERA which confers a power on the Appellate Board established under the FERA to call for record and proceedings for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Officer section 50 read with Section 51 of FERA. He invited our attention to Section 49 of the FEMA by which FERA was repealed. In particular, he

invited our attention to sub-section (3) of section 49 which starts a with non-obstante clause. He submitted that even after repeal of FERA, sub-section (3) of section 49 of FEMA allows the Competent Court to take cognizance of an offence under FERA and an Adjudicating Officer to take notice of any contravention under Section 51 of FERA, provided cognizance or notice, as the case may be, is taken within a period of two years from the date on which FERA is repealed and FEMA came into force. He pointed out that an action was initiated against the respondents on the basis of the memorandum dated 31st May 2002 and the order of adjudication was made on 17th June 2010. Inviting our attention to sub-section (5) of section 49 of FEMA, he pointed out that any appeal pending before the Appellate Board under FERA on the date of repeal of FERA is required to be transferred to the Appellate Tribunal constituted under FEMA. He pointed out that the very fact that sub-section (3) of Section 49 of FEMA permits an action to be taken on account of violation of FERA within a period of two years from the date of its repeal shows that even the remedy of a revision under sub-section (4) of Section 52 of FERA is protected. He also relied upon Section 6 of the General Clauses Act, 1897 (for short “General Clauses Act”). He submitted that sub-section (6) of

Section 49 of FEMA specifically provides that in relation to the matters provided in sub-sections (2), (4) and (5) of Section 49, applicability of Section 6 of the General Clauses Act is not excluded. Inviting our attention to Section 6 of the General Clauses Act, the learned counsel appearing for the appellant would submit that the remedy of revision under FEMA is protected.

5. He invited our attention to the decision of the Apex Court in the case of ***Ispat Industries Ltd. v. Commissioner of Customs, Mumbai***[1]. Without prejudice to his earlier contentions, he submitted that Mimansa principle of interpretation will have to be applied in the present case. He submitted that applicability of Mimansa principles is approved by the Apex Court in the case of ***Ispat Industries*** (supra). He submitted that applying Mimansa principle, the revision application preferred by the appellant ought to have been entertained by the Appellate Tribunal constituted under FEMA as the appellant cannot be rendered without a remedy. He also relied upon an extract of a commentary on Rule of interpretation dealing with the Mimansa principles. The learned counsel appearing for

1 2006 (202) ELT (SC)

the appellant also relied upon another decision of the Apex Court in the case of ***Craft Interiors Pvt.Ltd. v. Commissioner of C.Ex., Bangalore***[2].

6. The learned counsel appearing for the respondent supported the impugned judgment and order. He submitted that the remedy of revision is by way of procedure and it is never as a matter of right. He relied upon the decision of the Apex Court in the case of ***Shiv Shakti Coop. Housing Society v. Swaraj Developers***[3].

7. We have carefully considered the submissions.

Sub-section (4) of section 52 of FERA read thus:

> **52. Appeal to Appellate Board.-** ….. ….. …..
> (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 case as it thinks fit."

Repeal and saving Section being Section 49 of FEMA reads thus:

> "**49. Repeal and saving.-** (1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under sub-section

2 2006 (203) ELT 529 (SC)
3 (2003) 6 SCC 659

(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 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."

Sub-section (6) of Section 19 of FEMA confers powers on the Appellate Tribunal to call for the records of a proceeding for examining legality, propriety and correctness of any order made by the Adjudicating Authority under section 16 of FEMA.

8. In the present case, notice of contravention of Section 51 of FERA was taken by the Adjudicating officer within two years from the date of the repeal of FERA.

9. Before we deal with the submissions, we must note the distinction between an appeal and a revision. A full bench of this Court in the case of

Bhartiben Shah vs. Gracy Thomas and Others[4] had an occasion to deal with this aspect. In paragraph 14, the full bench of this Court held thus :

> *"While provisions conferring appellate jurisdiction (in narrower sense) on a superior Court are treated as conferring right of appeal on an aggrieved litigant, the provisions conferring revisional jurisdiction on a superior Court are not treated as conferring a right of revision on the litigant. Revisional jurisdiction is treated as supervisory jurisdiction with power of superintendence to be exercised in the discretion of the Superior Court. That is why sub-section (1) of section 34 provides that an appeal shall lie from a decree or order made by the Court of Small Causes to a Bench of two Judges of the said Court but sub-section (4) of the same section (like section 115 of the CPC) does not say that a revision shall lie from an order of the Small Causes Court. Section 34(4), like section 115 of Civil Procedure Code merely enables the superior Court to call for the record of a subordinate Court and make such orders in the case as the revisional Court thinks fit in cases of error of the nature contemplated under the provision and subject to other limitations contained in the provision. Even though the revisional power of the High Court may be exercised either suo motu or when a jurisdiction is invoked by a litigant,*

4 2013 SCC OnLine Bom 98

> *nevertheless, revisional jurisdiction is quite different in quality, content and nature from appellate jurisdiction. While a person who institutes a suit has a vested right of appeal as per the law on the date of institution, he has no vested right of revision since revision is not a continuation of suit and relates to procedural law. [District Judge Jabalpur v. Krishna Deo Singh, 1995 AIHC 2404, M. P. High Court as cited in "Code of Civil Procedure" by Justice C. K. Thakker, 2002 Edition, Vol. 2, pp.652-653, 665].* *(underlines supplied)*

10. The full Bench has made a distinction between appellate jurisdiction and revisional jurisdiction. It is held that provisions conferring appellate jurisdiction on a Superior Court are treated as conferring a right of appeal on an aggrieved litigant as distinct from the provisions conferring revisional jurisdiction on a superior Court. The provisions conferring revisional jurisdiction are not treated as conferring a right of revision on the litigant. Revisional jurisdiction is some sort of a supervisory jurisdiction. It is to be exercised at the discretion of the Superior Court. This discussion is in the context of the fact that there are catena of decisions which hold that a right of appeal is vested in a litigant on the day on which a lis is filed. A remedy of revision is thus never as a matter of right.

11. Now coming back to the repealing Section which is Section 49 of FEMA, emphasis is laid by the learned Counsel for the appellant on sub-section (3). There may be cases where there is a violation of FERA a day or few days prior to its repeal. Sub-Section(3) of Section 49 is an enabling provision which says that within a period of two years from the date of commencement of FEMA, it is open for the Court to take cognizance of an offence under FERA and it is open for Adjudicating Officer to take a notice of any contravention under Section 51 of FERA. Sub-Section 3 of Section 49 has nothing to do with the remedy of either an appeal or a revision. Clause (b) of Sub-Section 5 of Section 49 is a pointer. It provides that if any appeal preferred before the Appellate Board constituted under FERA is pending on the date of its repeal, the said appeal shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under FEMA. Clause (c) of Sub-Section 5 of Section 49 of FEMA provides that if any appeal is disposed of by Appellate Board under the repealed Act before its repeal and if an appeal is not filed against the decision before the commencement of FEMA, within 60 days from the date of commencement, an appeal can be filed in this Court. The appeal provided under the FERA which is protected under clause (c) is an

appeal against the order passed prior to the repeal of FERA. Therefore, sub-section (5) of Section 49 deals with two situations on the date of repeal of FERA. One is of a pending appeal before the Appellate Board under the repealed Act and the other is of an order made under repealed Act which is not appealed against till the date of repeal. The legislature in its wisdom has not chosen to make any such provision concerning the remedy of revision.

12. Under Sub-Section (6) of Section 49 of FEMA, it is provided that mentioning 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. On this aspect, the learned Counsel appearing for the respondent relied upon a decision of the Apex Court in the case of *Shiv Shakti Co-op Housing Society (supra)* wherein the Apex Court was dealing with the amendment carried out to Section 115 of the Code of Civil Procedure,1908 by the Act 46 of 1999. By the amendment, the scope of revisional powers vested in this Court under session was curtailed as indicated in the said decision. While dealing with the amended Section 115, the Apex Court has dealt with an argument based on Section 6 of the

General Clauses Act. The argument before the Apex Court was that the remedy provided under the un-amended Section was saved by virtue of Section 6 of the General Clauses Act. In paragraph 33 of the decision, the Apex Court held thus :

> *"Section 6 of the General Clauses Act has no application because there is no substantive vested right available to a party seeking revision under Section 115 of the Code. In Kolhapur Canesugar Works Ltd. vs. Union of India it was observed that if a provision of statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, there is no scope for granting it afterwards. There is modification of this position by application of Section 6 of the General Clauses Act or by making special provisions. Operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in the statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall continue but a fresh proceeding for the same purpose may be initiated under the new provision.* *(underline supplied)*

In the said decision, the Apex Court relied upon its earlier decision in the case of ***Kolhapur Canesugar Works Ltd. vs. Union of India***[5] in which the Apex Court had an occasion to consider Section 6 of the General Clauses Act. The Apex Court in so many words held that in a case where a provision of a Statute is unconditionally omitted without a saving clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the legislature was that pending proceedings shall continue but fresh proceedings for the same purpose may be initiated under the new provisions.

13. Though the pending appeals under the FERA before the Appellate Board are saved by FEMA by providing for its transfer to the Appellate Tribunal constituted under FEMA, the Legislature has not chosen to save even the pending revision applications. In a case where adjudication is initiated under Sub-Section (3) of Section 49 after the repeal of FERA, the remedy of an appeal against order of adjudication under the repealed Act is not saved. Under FEMA,there is a provision of revision under Sub-Section (6) of Section 19, but the revisional powers have been entrusted to the Appellate Tribunal constituted under FEMA and the power is

5 (2000) 2 SCC 536 : air 2000 SC 811

confined to the order of the Adjudicating Authority under Section 16 of FEMA.

14. In these two appeals, Revisional jurisdiction under the FERA was sought to be invoked after the date of its repeal. For the reasons which are recorded above, we concur with the ultimate conclusion drawn by the Appellate Tribunal that the Revision Applications preferred by the Appellant were not maintainable.

15. One argument which remains to be dealt with is based on Mimansa principles referred by the Apex Court in its two decisions. In the facts of the present case, the appellant is not without a remedy in the sense that a recourse can be taken to the remedies under the Constitution of India. The principle which governs Mimansa interpretation is that if a word or sentence purporting to express a subordinate idea clashes with the principal idea, the former must be adjusted to the latter or must be dis-regarded altogether. Where there is a conflict between the object and material, the object is to prevail the material being subordinate to the object. Learned Counsel appearing for the appellant laid emphasis on the Mimansa principles by submitting that in absence of prescribed material, a

substitute can be used.

16. We fail to understand how Mimansa principles can advance the cause of the appellant any further. In the present case, we are dealing with the revisional jurisdiction. As in case of an appeal, a revision is always creation of a Statute. There is no inherent power vesting in any appellate authority or superior authority to exercise the power of revision. Moreover, the remedy of revision is never as matter of right. Mimansa principles will not revive a non-existing remedy of revision. Therefore, we cannot accept the submission made by the learned Counsel appearing for the appellant based on Mimansa principles. Even if we apply Mimansa principles, it is impossible to accept the submission that a remedy of revision under the repealed Act was available to the appellant. Hence, we see no merit in the appeals. Appeals and Civil Applications are dismissed. However, the remedy of the Appellant is kept open.

(A.K.MENON, J.) **(A.S.OKA, J.)**