

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2343 OF 2007

Dabhol Power Company

....Petitioner

V/s.

Union of India & Ors.

...Respondents

Mr. Rohan Sathaye a/w Mr. Guru Shanmugam i/b M & M Legal Ventures for
Petitioner

Mr. Parag A Vyas a/w Ms Karuna Yadav for Respondent Nos.1 to 4

CORAM : K.R. SHRIRAM &
A.S. DOCTOR, JJ
DATED : 28th JULY 2022

PC. :

1 Paragraph 23 of the impugned order dated 21st August 2007 reads as
under:

“23. For the reasons stated hereinabove, these appeals are dismissed on the grounds of limitation because these appeals are preferred after an inordinate delay of more than 90 days which cannot be condoned under the Section 52(2) Foreign Exchange Regulation Act, 1973.”

2 Apex Court in ***Thirumalai Chemicals Ltd. Vs. Union of India & Ors.***¹
after holding that a limitation provision is procedural, held that 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

1. (2011) 6 Supreme Court Cases 739

19(2) of FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of FERA. The Appellate Board stood dissolved and ceased to function when FEMA was enacted. Apex Court held that Section 52(2) can apply only to an appeal to the Appellate Board and not to any Appellate Tribunal. Paragraphs 42 to 49 of *Thirumalai Chemicals Ltd.* (*Supra*) read as under:

“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. 26. 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.

46. 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. As noticed above, under Section 19(2), there is no ceiling in regard to the period of delay that could be condoned by the appellate tribunal. If sufficient cause is made out, delay beyond 45 days can also be condoned. The tribunal and the High Court misdirected themselves in assuming that the period of limitation was governed by Section 52(2) of FERA.

47. We have already indicated that clause (b) of sub-section (5) of Section 49 refers to appeal preferred and pending before the Appellate Board under FERA at the time of repeal. The said clause does not specifically refer to appeals preferred against adjudication orders passed under FEMA with reference to causes of action which arose under FERA. We have already noticed the right of appeal under FEMA has already been saved in respect of cause of action which arose under FERA however subject to the proviso to sub-section (2) of Section 19, in the case of belated appeals.

48. 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. In fact, the time limit prescribed under FERA was taken away under the proviso to sub-section (2) of Section 19 and the Tribunal has been conferred with wide powers to condone delay if the appeal is not filed within forty-five days prescribed, provided sufficient cause is shown. Therefore, the findings rendered by the Tribunal as well as the High Court that the Tribunal does not have jurisdiction to condone the delay beyond the date prescribed under FERA is not a correct understanding of the law on the subject.

49. We, therefore, hold that the Appellate Tribunal can entertain the appeal after the prescribed period of 45 days if it is satisfied, that there was sufficient cause for not filing the appeal within the said period. We are therefore inclined to set aside the orders passed by the Tribunal and the High Court and remit the matter back to the Tribunal for fresh consideration in accordance with law on the basis of the findings recorded by us. We order accordingly.”

3 In the circumstances, impugned order dated 21st August 2007 is hereby quashed and set aside. The matter is remanded to the Appellate Tribunal, constituted under FEMA to consider petitioner's application for condonation of delay and if the delay is condoned, then to dispose the appeal on merits.

4 At this stage, Mr. Sathaye submitted that there is no member, who is appointed by the Government in the Tribunal and states that even the Apex Court in Special Leave Petition No.7551 of 2002 in its order dated 19th July 2022, had expressed disappointment in Government not constituting the Tribunal. We do not wish to get into that issue but at the same time, it is fair that no coercive steps shall be taken against petitioner until the Tribunal is constituted / members to the Tribunal are appointed and petitioner's appeal which is remanded now, is taken up for consideration. Therefore, interim relief that was granted by order dated 27th March 2008 would continue until petitioner's application for condonation of delay is taken up for consideration. Interim relief granted on 27th March 2008 reads as under:

“(e) that pending the hearing and final disposal of this petition, the respondents, their agents, servants and subordinates be restrained by an order of injunction of this Hon'ble Court from taking any action in furtherance or pursuance of the impugned orders dated 20th April 2005 and 29th April 2005 (Exhibits K and L hereto) and the impugned Demand Notice dated 8th March 2006 (Exhibit G hereto).”

5 We hasten to add we have not expressed any opinion on the merits of the matter.

6 Petition disposed with no order as to costs.

(A. S. DOCTOR, J.)

(K.R. SHRIRAM, J.)