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IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Foreign Exchange]

ORIGINAL SIDE

FEA/3/2011
IA NO.GA/1/2011 (Old No.GA/812/2011)

P.K. DIDWANIA

-Versus-

THE DY. DIRECTOR, DIRECTORATE OF ENFORCEMENT, GOVT. OF INDIA

BEFORE :
THE HON'BLE JUSTICE DEBANGSU BASAK
And
THE HON'BLE JUSTICE MD. SHABBAR RASHIDI
Date : 11th July, 2023

Appearance :
Mr.Sanjay Bhaumik, Adv.
Mr.A.K. Dey, Adv.
Mr.Bhaskarmay Dey, Adv.
Mr.Vineet Ojha, Adv.
..for the appellant.

Mr.Vipul Kundalia, Adv.
Mr.Arijit Chakraborty, Adv.
....for the ED.

The Court : The appeal is directed against an order dated October 12, 2010 passed in Appeal No.D-09/2010 by the Appellate Tribunal for Foreign Exchange.

Learned advocate appearing for the appellant submits that, the Appellate Tribunal erred in law in dismissing the appeal on the ground of provisions of Section 52 of the Foreign Exchange Management Act, 1999. He submits that, the appeal was directed against an order of adjudication dated January 21, 2000. The appellant received the copy of the order-in-original sometime in 2010 when the order-in-original was served upon the learned advocate for the appellant. Immediately thereafter, the appellant preferred the appeal. The appeal was erroneously dismissed on the ground of Section 52(2) of the FERA Act, 1973. He submits that, the appeal before the Appellate Tribunal was governed by the provisions of the Foreign Exchange Management Act, 1999 in view of Foreign Exchange Regulations Act, 1973 being repealed by the Act of 1999. In support of his contentions, he relies upon 2011 (268) ELT 296 (SC) [Thirumalai Chemicals Ltd. Vs. Union of India].

Learned advocate appearing for the respondent submits that, the appellant was served with the order-in-original at the address where the raid took place. Such address was the residential address of the appellant. The appellant participated in the adjudication proceedings by receiving notices served on the appellant at such address. He submits that, for the first time before the Appellate Authority the appellant claimed that the appellant shifted his residential address. In support of his contentions, the appellant was served with the order-in-original. He produces photocopy of the dispatch register as well as the registration document issued by the Department of Post.

The appellant suffered an order-in-original dated January 21, 2000. The order-in-original records the address at which, the raid took place. The order-in-original also records that, such address was the residential address of the appellant. The order-in-original was dispatched by registered post to the appellant at such address as will appear from the documents produced before the Court. The dispatch was made on March 13, 2000.

Thirumalai Chemicals Ltd. (supra) considers the provisions of the FERA Act, 1973 and the FEMA Act, 1999 with regard to appeal. It is of the following view :

"25. 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 45 days but not beyond 90 days. Under FEMA, an appeal lies to the Appellate Tribunal constituted under the Act and Section 1992) 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. Though both Section 52(2) of FERA and Section 19(2) of FEMA provide a limitation 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. 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, wil 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 1992) 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. 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.*

27. 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 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.

28. 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 1-6-2000 or after. On a combined reading of Section 49 of FEMJA 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 correct understanding of the law on the subject.

29. 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."

The appeal was sought to be filed by the appellant before the Appellate Tribunal, from the order dated January 21, 2000, in 2010. Such appeal was not entertained by the Appellate Tribunal in view of provisions of Section 52(2) of the FERA Act, 1973.

Non-entertainment of the appeal by the Appellate Tribunal on the ground of Section 52(2) of the Act of 1973 was erroneous in view of the ratio laid down in Thirumalai Chemicals Ltd. (supra). However, we find from the materials produced on record that, the appellant was served with the order-in-original dated January 21, 2000 by registered post which was dispatched on March 13, 2000. The appellant is unable to show any reasonable cause as to why, the appellant did not file the appeal within the time prescribed under the Act of 1973. No explanation is put forward under the Act of 1999 for condonation of delay in preferring the appeal.

In such circumstances, we find no merit in the present appeal. Accordingly, the application [GA/1/2011] along with the appeal [FEA/3/2011] stands disposed of without any order as to costs.

(DEBANGSU BASAK, J.)

(MD. SHABBAR RASHIDI, J.)

S.Das/