

Enforcement Directorate Vs. M/S. Morgan Industries Ltd.

Enforcement Directorate Vs. M/S. Morgan Industries Ltd.

SooperKanoon Citation : sooperkanoon.com/1136594

Court : Delhi

Decided On : Apr-03-2014

Judge : S. P. Garg

Appellant : Enforcement Directorate

Respondent : M/S. Morgan Industries Ltd.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI DECIDED ON :

3. d APRIL, 2014 + CRL.A. 1503/2011 ENFORCEMENT DIRECTORATE Through : Appellant Mrs. Rajdipa Behura, Advocate. VERSUS M/S. MORGAN INDUSTRIES LTD. Respondent Through : Mr.Muneesh Malhotra, Advocate with Mr.Vikram V.Minhas, Advocate. CORAM: HON'BLE MR. JUSTICE S.P.GARG S.P.GARG, J.

1. Crl.A.1503/2011 has been preferred under Section 54 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as FERA) against the final order dated 21.08.2009 of Appellate Tribunal for Foreign Exchange, New Delhi in Appeal No.610/2003. The Appellate Tribunal allowed appeal of the respondent and quashed the adjudication order dated 28.10.2003. CRL.M.A.18825/2011 (delay) in CRL.A. 1503/2011 2. The application has been moved for condonation of delay of 775 days in filing the appeal.

3. Learned counsel for the appellant (Enforcement Directorate) urged that the Appellate Tribunal's order dated 21.08.2009 was communicated to the office of the Enforcement Directorate on 17.09.2009. The decision to file appeal was taken at various levels which consumed valuable time. There was no intentional delay on the part of the appellant.

4. I have considered the submissions of the appellant and have examined the record. Apparently, the present appeal has been filed after an inordinate delay of 775 days. Section 35 of FEMA permits the appeal to be filed within 60 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. The proviso authorises High Courts to extend the appeal to be filed within next 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal. Since the impugned order was passed by the Appellate Tribunal constituted under FEMA, in my view, the provisions of Section 35 of the FEMA are attracted and the period of limitation for filing the appeal cannot be extended beyond 120 days.

5. In *Thirumalai Chemicals Limited vs. Union of India (UOI) & ors.*, 2011 (6) SCC739 the Supreme Court held :

14. Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

15. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to few of those decisions. This Court in *Garikapati Veeraya v. N. Subbiah Choudhry and Ors.* AIR 1957 SC540 *New India Insurance Company Limited v. Smt. Shanti Mishra* (1975) 2 SCC840 *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (1994) 4 SCC602 *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and Ors.* (1999) 8 SCC16 *Shyam Sundar and Ors. v. Ram Kumar and Anr.* (2001) 8 SCC24 has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

17. Right of appeal conferred under Section 19(1) of FEMA is therefore a substantive right. The procedure for filing an appeal under Sub-section (2) of Section 19 as also the proviso to Sub-section (2) of Section 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights.

6. It further held :

19. Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and if a particular right of action had become time barred under the earlier statute of limitation the right is not revived by the provision of the latest statute. Statutes of limitation are thus retrospective insofar as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier, but they are prospective in the sense that neither have the effect of reviving the right of action which is already barred on the date of their coming into operation, nor do they have effect of extinguishing a right of action subsisting on that date. Bennion on Statutory Interpretation 5th Edn.(2008) Page 321 while dealing with retrospective operation of procedural provisions has stated that provisions laying down limitation periods

fall into a special category and opined that although prima facie procedural, they are capable of effectively depriving persons of accrued rights and therefore they need be approached with caution.

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 of 45 days but not beyond 90 days. 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. 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. 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. 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 Subsection (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.

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 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.

7. In Union of India vs. Ashok J.Ramsinghani, 2011 (4) ALLMR45 the Bombay High Court held :

16. We find it difficult to accept the above contentions. The legislature while repealing FERA and replacing it with FEMA has expressly dissolved the first appellate authority, namely the Appellate Board. Thus, on commencement of FEMA, the first appellate forum prescribed under FERA namely, the Appellate Board is expressly abolished. As a result, after commencement of FEMA, appeals against adjudication orders passed under FERA had to be filed before the appellate authorities under FEMA, namely Special Director (Appeals) / Appellate Tribunal, as the case may be. The legislature further provides under Section 49(5)(b) of FEMA that appeals pending before the Appellate Board on the date of commencement of FEMA shall be transferred to the Appellate Tribunal constituted under FEMA. Thus, on commencement of FEMA, appeal against the adjudication order passed under FERA would be maintainable before the appellate authorities constituted under FEMA within the period of limitation prescribed under FEMA. In other words, appeals against adjudication orders passed under FERA or FEMA after the commencement of FEMA, have to be filed before the appellate authorities constituted under FEMA within the period of limitation prescribed for filing appeals before the appellate authorities constituted under FEMA.

8. Undoubtedly, Section 54 FERA permits an appeal to be filed to the High Court within 60 days. The proviso clearly prescribes that the High Court shall not entertain any appeal under Section 54 if it is filed after the expiry of 60 days of the date of communication of the decision or order of Appellate Tribunal unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time. Even if provisions of Section 54 are taken into consideration, there is no sufficient ground made out by the appellant to file the appeal after an inordinate delay of 775 days. The delay has not been explained. The reasons given by the appellant for delay in filing the appeal do not constitute sufficient cause. Rather it reveals that there was inaction and negligence on the part of the various officers. Nothing has been explained in the application as to at what specific level the delay to take decision occurred and what was its duration. Each days delay has not been explained. There was slackness on the part of the

appellant to take remedial steps. Delay cannot be condoned as a matter of routine as vested right accrues in favour of the opposite party and benefit of such right cannot be disturbed lightly.

9. In Directorate of Enforcement vs. Renu Vij, (Crl.A.No.1231/2011) decided on 30.09.2011 and Directorate of Enforcement vs. Harmit Singh & Anr., (Crl.A.No.276/2012) decided on February 28, 2013, this Court in similar circumstances declined to condone the delay of 507 days & 832 days, respectively, in filing the appeals from the date of final order.

10. In view of the aforestated reasons, I find no merit in the application of the appellant seeking condonation of delay in filing the appeal. Accordingly, the application for condonation of delay is dismissed. CRL.A. 1503/2011 12. In view of the order passed in Crl.M.A.18825/2011, the appeal is dismissed. (S.P.GARG)
JUDGE APRIL03 2014/tr

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com