

Electrofronts Vs. Union of India (Uoi)

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Court : Mumbai

Decided On : Jul-02-2003

Reported in : 2004(1)ALLMR788; 2003(162)ELT1182(Bom)

Judge : V.C. Daga and ;J.P. Devadhar, JJ.

Acts : Limitation Act; [Central Excise Act, 1944](#) - Sections 35

Appeal No. : Writ Petition No. 940 of 2003

Appellant : Electrofronts

Respondent : Union of India (Uoi)

Advocate for Def. : H.V. Mehta, Adv., i/b., T.C. Kaushik, Adv.

Advocate for Pet/Ap. : Tarun Gulati and ;M.M. Merchant, Adv.

Disposition : Petition allowed

Judgement :

V.C. Daga, J.

1. The source of this petition is the order dated 16-10-2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (W. R. Bench), Mumbai ('CEGAT' for short) - Respondent No. 2, confirming the order passed by the Commissioner of Customs (Appeals), Mumbai - respondent No. 3, dated 30th

October, 2001, refusing to condone delay in presenting the appeal against the order-in-original passed by the respondent No. 4, dated 18th February, 1999, said to have been received on 20th March, 2003.

The Facts:

2. The factual score depicts that on 1st August, 1994, the Central Excise Department issued a show cause notice to the 1st petitioner calling upon them to show cause; why duty amount of Rs. 4,80,788.00 should not be recovered from them on account of change in classification of the items manufactured by it as well as why the seized goods should not be confiscated. Further, petitioner Nos. 1 and 2 were also called upon to show cause why penalty should not be imposed upon them under Rules 173Q and 209A of the Central Excise Rules, 1944. The petitioners filed their reply to the show cause notice on 18th February, 1999. The Respondent No. 4 after due enquiry confirmed the show cause notice and confiscated seized goods with an option to the petitioners to redeem the same on payment of redemption fine of Rs. 10,000/-. Respondent No. 4 also imposed a fine of Rs. 50,000/- on petitioner No. 1 and Rs. 20,000/- on petitioner No. 2.

3. The petitioners received order passed by respondent No. 4 dated 18th February, 1999 on 20th March, 2001. At that time, the statutory period within which the petitioners could file an appeal to respondent No. 3 was three months from the date of receipt of the order, thus, the petitioners could file an appeal on or before 20th June, 2001. Further, respondent No. 3 was empowered under the proviso to Section 35 of the [Central Excise Act, 1944](#) ('the Act' for short) to condone the delay in filing an appeal up to a further period of 3 months from the date of order. Placed in plain words delay up to 3 months could be condoned by the Commissioner (Appeals) subject to satisfaction about establishment of sufficient cause for not filing appeal within time.

4. On 11th May, 2001 the Finance Bill, 2001 received the President's assent and became the Finance Act, 2001. The Finance Act, 2001; by Section 127 amended Section 35 of the Central Excise Act by reducing the period within which the appeal could be filed, from the order of Respondent No. 4 to respondent No. 3. The period came to be reduced from three months to sixty days. Further, the

power to condone the delay also came to be restricted for a further period of thirty days compared to the earlier provision providing for three months. In other words, by amendment the period for filing appeals was curtailed to two months; whereas power to condone delay was curtailed to 30 days.

5. On account of some misunderstanding the petitioners could not file appeals against the order of respondent No. 4 dated 18th February, 2002 (received on 20th March, 2001) within the prescribed period of limitation. The appeals were filed on 16th July, 2001 along with applications for condonation of delay of 27 days (each) in filing appeals.

6. Respondent No. 3 vide order dated 30th October, 2001 dismissed petitioners' appeals without even considering the applications seeking condonation of delay in preferring appeals holding that delay for more than thirty days in filing the appeal cannot be condoned for want of power.

7. Being aggrieved by the above order dated 30th October, 2001 of the respondent No. 3, the petitioners preferred appeals to the the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai ('the CEGAT' for short), the respondent No. 2. Respondent No. 2 by its order dated 16th October, 2001 dismissed the petitioners appeal holding that the reduced period for filing an appeal which came into force on 11th May, 2001 by virtue of amendment to Section 35 would apply even to orders passed prior to that date. Holding this view, respondent No. 2 dismissed the appeal upholding the order of respondent No. 3.

8. Being aggrieved by the aforesaid order passed by the CEGAT, the respondent No. 2, petitioners have filed this petition under Article 226 of the Constitution of India for the reliefs sought therein.

Petitioners' submissions:

9. The petitioners submit that the order of the respondent No. 3 dated 30th October, 2001 and judgment dated 16th October, 2002 passed by respondent No. 2 are without jurisdiction, bad in law and contrary to the provisions of Section 35 of the Act. According to the petitioners, it is a well settled position in law that

amendment to a statute can only be prospective unless the same has been specifically made retrospective by express words or by implication.

10. The petitioners submit that the amendment to Section 35 of the Act took place only when the Parliament passed the above Finance Bill and the President has given his assent to it on 11th May, 2001. The period of sixty days as substituted in Section 35 of the Act would apply only with effect from 11th May, 2001 and could not be applied to the orders passed prior to 11th May, 2001.

11. The petitioners urge that in the present case, the orders of the Respondent No. 4 were received by them on 20th March, 2001 and on that date they were entitled to file appeals within three months since the date of that order being the date of communication or knowledge of the order sought to be appealed against as laid down in *D. Saibaba v. Bar Council of India*, : [2003]3SCR1209 . According to the petitioners, they could file appeals on or before 20th June, 2001, In the present case, appeals were filed on 16th June, 2001. According to the petitioners, though there was a delay of about 27 days in filing appeals it was well within the powers and jurisdiction of respondent No. 3 to consider the prayers made in that behalf and condone delay subject to due satisfaction about existence of sufficient cause for not filing appeals in time.

12. The petitioners further submit that in terms of Section 6 of the General Clauses Act, 1897, substitution of any enactment neither affected their right or privilege or right to legal remedy to enforce their right or privilege acquired by them under the repealed enactment. It was open for them to continue or institute a legal proceeding as if the repealed Act had not been passed. In the circumstances, it is urged that the amendment to Section 35 of the Act by the Finance Act, 2001 has no effect taking away the accrued right of the petitioners to file appeal within three months from the receipt of the order with a prayer for condonation of delay of about 27 days.

13. In the submission of the petitioners, amendment made to Section 35 cannot be said to be mere procedural in nature; as it admittedly takes away an accrued right to file appeals within three months from the date of order. Petitioners submit that respondent Nos. 2 and 3 thus committed an error going to the root of the matter by

holding that the amendment to Section 35 of the Act by Finance Act, 2001 is retrospective in nature and would apply even to the orders passed prior to 11th May, 2001.

14. The petitioners further urged that respondent Nos. 2 and 3 were obliged to follow the decision of the Supreme Court in the case of *New India Assurance Company v. Smt. Shanti Mishra* - : [1976]2SCR266 wherein it was held thus:

'even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally, the law of limitation which is in vogue on the date of the commencement of the action governs it but there are certain exceptions to this principle in new law of limitation providing the longer period cannot revive, a dead remedy nor, can it suddenly extinguish vested right of action by providing for a shorter period of limitation.'

In the submission of the petitioners, the respondent Nos. 2 and 3, on the basis of the above, ought to have considered the application filed by the petitioners seeking condonation of delay on its own merits.

15. According to the petitioners, respondent Nos. 2 and 3 erroneously applied amended Section 35 of the Act and erroneously refused to consider and deal with petitioners' applications for condonation of delay from order of respondent No. 4, which has resulted in confirming orders on merits. Thus, the petitioners were deprived of their statutory right of appeal. In the circumstances, petitioners submit that the impugned orders are liable to be quashed and set aside and their petition is liable to be allowed.

Per contra:

16. Shri R. V. Desai, learned Counsel, appearing for the Revenue contended that the rules of limitation are *prima facie*, rules of procedure and do not create any legal right in favour of any person nor do they create any cause of action but simply prescribes that the remedy can be exercised only up to a certain period and not subsequently. According to Shri Desai, no person can have vested right in any course of procedure. The legislature by an amendment has shortened the period

of limitation. While shortening the period of limitation the legislature neither provided for any saving clause nor is there any interval between the publication of law, and its coming into force as such amended provision operated with the assent of the President on 11th May, 2001. He submits that the petitioners had time to file appeal before the Commissioner (Appeals) within a period of 60 days, but they chose to file appeal only on 16th July, 2001 as such appeals were beyond limitation and the appellate authority had no power to condone delay beyond 30 days.

17. The learned Counsel for the respondents further contends that the law of limitation is a procedural law and the amendment which deals with the procedure is the exception to general rule that the operation of a statute is always prospective because no one can claim any vested right in any form or procedure. He, therefore, submits that the amendment to Section 35 is retrospective in nature.

18. Shri Desai, learned Counsel, for Revenue further contended that the Commissioner (Appeals) by his order dated 30-10-2001 rejected both appeals holding that in normal course the petitioners ought to have filed the appeal on or before 18-5-2001 i.e. within 60 days. The extension of 30 days could have been granted subject to establishment of any unavoidable circumstances. However, in the present case, the appeals were filed on 15-7-2001 which were delayed by 57 days. The delay being beyond consideration zone of 30 days, could not have been condoned in view of the provision of amended Section 35 of the Act. Shri Desai, in the above premises, reiterates that the law of limitation being procedural law, the provision existing on the date of filing of the appeals applies to it. He, therefore, submits that, the orders impugned in the petition are in accordance with law as such, the petition is liable to be dismissed with costs.

The issue:

19. The only substantive issue which needs to be considered is : whether or not the appeals filed by the petitioners, challenging the order of the respondent No. 4, the Adjudicating Authority were to be governed by the unamended provision of Section 35 of the Act. In other words, the question needs to be answered is : whether the amended Section 35 of the Act is prospective or retrospective in

nature.

Structure of amendment provision:

20. Before we deal with the aforesaid issue and rival contentions, it is appropriate to first consider the structure of the provisions applicable in the present case. The main ground of challenge since centres around the amended provisions of Section 35 of the Act amended by the Finance Act, 2001, the text of it is reproduced hereinbelow:

Unamended Sec. 35 Amended Sec. 35

Appeals to Commissioner (Appeals) - (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner (Appeals) [hereafter in this Chapter referred to as the Commissioner (Appeals)] within three months from the date of communication to him of such decision or order : Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months/ al-tow it to be presented within a further period of three months.

Appeal to Commissioner (Appeals) - (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a Commissioner of Central Excise may appeal to the Commissioner (Appeals) [hereafter in this Chapter referred to as the Commissioner (Appeals)] within sixty days from the date of communication to him of such decision or order : Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a period of thirty days.

The comparison between the unamended and amended Section 35 of the Act would demonstrate that three months period, which was available for filing appeal, from the order referred to therein came to be reduced to 60 days and power to condone delay by the Commissioner (Appeals) came to be curtailed to 30 days

which was three months under the unamended Section 35.

Considerations:

21. Having heard the rival parties and having examined amended provisions of Section 35 of the Act, it appears that by resorting to legislative device, by virtue of Section 127 of the Finance Act, 2001, Section 35 of the Act came to be amended as indicated hereinabove.

22. The question is whether amendment did or did not take away the right of the petitioners to file appeal within 3 months. The question needs to be resolved applying the well recognised rules of interpretation of amending statute. Applying the well settled rules of interpretation it is necessary to find out whether amendment in question is prospective or retrospective in nature.

In Maxwell on the Interpretation of Statutes, 12th Edn., the statement of law in this regard as stated thus :

'Perhaps no rule of construction is more firmly established than thus that a prospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only'. The rule has, in fact, two aspects, for it, involves another and subordinate rule, to the effect that a statute is not to be construed so as to have greater respective operation than its language renders necessary.'

The Apex Court in Anant Gopal Sheorey v. The State of Bombay, : 1958 CriLJ1429 , in Para 4 has observed as under:

'The question that arises for decision is whether to a pending prosecution the provisions of the amended Code, have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which

the case is pending and if by an act of Parliament the mode of procedure is altered he has no other right than to proceed according to altered mode. See Maxwell on Interpretation of Statutes on P. 225 Colonial Sugar Refining Co. Ltd. v. Irving 1985 AC 369 (A). In other words, a change in the law of procedure operates retrospectively and unlike the law relating vested right is not only prospective.'

On the aforesaid principle, a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective. No person has a vested right in any course of procedure. He has only right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered then he has no other right than to proceed according to altered mode.

23. As indicated above, Statutes of limitation are regarded as procedural and the law of limitation which applies to a suit is the law in force at the date of institution of the suit irrespective of the date of accrual of the cause of action. The object of statute of limitation is not to create any right but to prescribe periods within which legal proceedings may be instituted for enforcement of rights which exist under the substantive law. But with the expiry of period of limitation, the right of suit comes to an end. Therefore, if a particular right of action had become barred under the earlier Limitation Act, the right is not revived by later Limitation Act, even if it provides a larger period of limitation than that provided in the earlier Act. If the right to execute decree or judgment gets barred under the earlier Act, the right is not revived by a later Act. When the later Act provides for a shorter period of limitation than that provided by the earlier Act, a right of suit which is subsisting according to the earlier Act when the later Act comes into operation, will not be taken to be extinguished. In the case of *New India Assurance Co. v. Shanti Misra* : [1976]2SCR266 the Apex Court held that amending Act of Limitation could not destroy the plaintiff's right, which existed when Act came into force in the following words:

'Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally, the law of limitation which is

in vogue on the date of the commencement of the action governs it but there are certain exceptions to this principle is new law of limitation providing the longer period cannot revive a dead remedy nor it suddenly extinguish vested right of action providing for a shorter period of limitation.'

24. The Apex Court in the case of H.V. Thakur v. State of Maharashtra, : 1995 CriLJ517 laid down the ambit and scope of an amending Act and its retrospective operation as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment whereas a statute which merely affects procedure, unless a construction is textually impossible, is presumed to be retrospective in its application, should be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to form and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every right has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations to impose new duties in respect of duties already accomplished.

25. From the aforesaid various decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a Court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the appellant in an appeal are determined under the law in force on the date of the suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of the parties are concerned, they remain

unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective expressly or by necessary intendment. We are further of the view that there is presumption against the retrospective operation of a statute and further a statute is not to be construed to have greater retrospective operation than its language renders necessary, but an amending Act which affects procedure is presumed to be retrospective, unless the amending Act provides otherwise.

26. We have carefully looked into amended Section 35 amended by Amending Act of 2001 but do not find it either expressly or by necessary implication retrospective in operation. Section 35 prior to its amendment or subject thereto is identical except that of limitation providing for appeal and power to condone delay for maximum period in presenting appeal. Hence, in order to find out whether the period of limitation provided for enforcement of appellate remedy is in a sense procedural or a part of any procedure by Which right of appeal may be enforced, reference to the scheme of the section will not make any difference. Section 35 provides for important statutory right of appeal to the Commissioner (Appeals). Every such appeal has to be filed within the prescribed period of limitation. Under unamended section it was 3 months (now sixty days). Filing of appeal within a period of limitation is essential. The right of appeal is subject to its enforcement within the prescribed period of limitation. Section 35 imposes specific period of limitation upon such right of appeal. The compliance of conditions of section is essential. Section imposes limitation upon such statutory right of appeal. The compliance with the requisite period of limitation provided is essential to the enforcement of right of appeal. The appeal must be filed within the prescribed period of limitation from the date of the order. After the expiry of time limit provided under the section right of appeal is not only time-barred but it stands extinguished subject to power of condonation of delay to a maximum period provided in the proviso to Section 35 of the Act. Thus, the right of appeal is only enforceable to use the words of the original Act' may appeal to the within three months'. In other words, no right of appeal shall exist after three months. (of course subject to condonation of delay for further 3 months only). Unless right of appeal is exercised strictly in terms

of Section 35 the right of appeal shall get extinguished. If that be so, the limitation provided under unamended Section 35 was a inseparable part of the substantive right of appeal provided by the section. Thus, amended Section 35 in absence of anything in it to show that it is retrospective, does not affect the right of the parties which has accrued to them on the date of passing of the order-in-original by the adjudicating authority.

27. Assuming, contrary to the above opinion expressed, that the requirement that appeal must be filed within 3 months subject to getting delay condoned for a further maximum period of 3 months, does not take away the substantive right of appeal but merely bars the remedy, even then, the Revenue is not in a better position. Where the question arises whether a statute has a retrospective operation, it is usual to divide statute into two classes, the one where the new statute affects only the existing practice and procedure of the Courts for enforcing such rights. The distinction between the two kinds of statutes was explained by Dixon, J. (as he then was) in *Kraljevic v. Lake View and Star Ltd.* (1945) 70 C. L. R. 647. It is observed:

'The presumptive rule of construction is against reading a statute in such a way as to change accrued rights title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided, are not be disturbed by a general law governing further rights and liabilities unless the law so intends, appears with reasonable certainty. But, when the alteration in the law relates to the mode in which rights and liabilities are to be enforced or realized, there is no reason to presume that it was not intended to apply to rights and liabilities already existing and its application in reference to them will depend rather upon its particular character and the substantial effect that such an operation would produce.' (1945) 70 S. L. R.

Statute of limitation is often classed as procedural statute. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of cases can be considered. An existing statute of limitation may be

altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst the person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly, if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different consideration could arise. The cause of action which can be enforced as a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantial rights.

28. As indicated hereinabove, the litigant has a substantive right of appeal, law providing that right cannot be said to be mere procedural law. On the canvas of the aforesaid settled principle of law, in the present case, as indicated hereinabove, amendment to Section 35 is not merely procedural but it takes away substantive right of the parties to file appeal once the period of limitation is lost of course subject to right to claim condonation of delay for a specified period, the outer limit of which is provided in the proviso to the said section. Once that outer limit is over the right of appeal is lost. After expiry of the period for appeal right stands extinguished. We thus hold that the amendment to Section 35 of the Act has no retrospective effect. The appeals preferred by the petitioners were unaffected by change in law as it related to determination of substantive rights of the parties and the same were required to be decided in the light of law of appeal as it existed on the date of order-in-original. Petitioners, therefore, were entitled to file appeals within months from the date of the order and well within their rights to apply to the Commissioner (Appeals) to allow them to present appeal within a further period of 3 months subject to condonation of delay for the reasons disclosed. As such, the appellate authority, the respondent No. 3 ought to have considered the appeals on the basis of unamended Section 35. In this view of the finding reached by us, order of the Commissioner (Appeals) and confirmation

thereof by the CEGAT cannot be sustained. The same stands set aside.

29. Having said so, we are of the opinion that instead of remanding the matter to the Commissioner (Appeals) for consideration of the applications seeking condonation of delay in filing appeals, we think it proper to condone delay in presenting appeals and remand this matter to the Commissioner (Appeals), respondent No. 3 with direction to decide both appeal on their own merits in accordance with law as expeditiously as possible, at any rate, within six months from the date of receipt of writ of this order from this Court.

30. In the result, petition is allowed. Rule is made absolute in terms of prayer Clauses (a) and (b) with no order as to costs.

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