Rajkumar Shivhare Vs. Union of India

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Court : Mumbai

Decided On : Jul-06-2011

Judge : D.Y.Chandrachud; Anoop V. Mohta , Jj.

Acts : Foreign Exchange Management Act, 1999 - Section 35, 3(C) ; Limitation Act, 1963 - Section 14, 29(2); Constitution of India - Article 226

Appeal No. : CIVIL APPLICATION NO. 169 OF 2010 IN FERA APPEAL (STAMP) NO. 12870 OF 2010

Appellant : Rajkumar Shivhare

Respondent : Union of India

Advocate for Def. : Mr. R. V Desai; Mr. M.S. Bhardwaj, Advs.

Advocate for Pet/Ap. : Mr. Girish R. Agrawal; Mr. B. Sheshagopalan, Advs.

Judgement :

1 The issue which arises before the Court in these proceedings is whether an Appellant who files an appeal before the High Court under Section 35 of the Foreign Exchange Management Act, 1999 can seek an exclusion of time under Section 14 of the Limitation Act, 1963.

2 A notice to show cause was issued to the Appellant on 12 January 2005 under Section 3(C) of the Foreign Exchange Management Act, 1999 ("the FEMA"). Upon

adjudication, a penalty was imposed on the Appellant under Section 13(2) by an order dated 29 February 2008. The Appellant moved the Appellate Tribunal constituted under Section 19. The Tribunal dismissed an application for dispensing with a pre-deposit of the penalty by its order dated 17 July 2008. The Appellant thereupon instituted proceedings under Article 226 of the Constitution before the Delhi High Court. The Delhi High Court dismissed the Petition by a judgment dated 24 September 2008 holding that it had no territorial jurisdiction and that by virtue of the provisions of Section 35, it was not entertaining the Petition. In appeal, the Supreme Court by its judgment dated 12 April 2010 held that an appeal under Section 35 can be preferred against any order or decision of the Appellate Tribunal which should mean all decisions or orders of the Tribunal. The Supreme Court rejected the contention that an Appeal under Section 35 can be filed only from a final order or judgment of the Tribunal and not from an interlocutory order. While dismissing the Appeal preferred by the Appellant, the Supreme Court observed thus :

> **"In view of this Court's jurisdiction under Article 136 of the Constitution, we give liberty to the appellant, if so advised, to file an appeal before an appropriate High Court within the meaning of Explanation to Section 35 of FEMA and if such an appeal is filed within a period of thirty days from today, the appellate forum will consider the question of limitation sympathetically having regard to the provision of Section 14 of the Limitation Act and also having regard to the fact that the appellant was bona fide pursuing his case under Article 226 of the Constitution before the Delhi High Court and then its appeal before this Court."**

3 After the judgment of the Supreme Court was delivered on 12 April 2010, the Appellant lodged an Appeal before this Court under Section 35 on 7 May 2010. In the Civil Application, the Appellant seeks the exclusion of time taken in pursuing the proceedings initiated before the Delhi High Court and before the Supreme Court.

4 Counsel appearing on behalf of the Appellant submitted that the observations contained in the judgment of the Supreme Court would indicate that the provisions of Section 14 of the Limitation Act, 1963 would apply. Since the Appellant was bona fide pursuing his case under Article 226 of the Constitution before the Delhi High Court and then its Appeal before the Supreme Court, the time taken in those proceedings would according to the Appellant have to be excluded.

5 On the other hand, it has been urged on behalf of the Respondents that under Section 35 an Appeal before the High Court has to be filed within sixty days from the date of the communication of the decision or order of the Appellate Tribunal to him and the High Court is empowered by the proviso to condone a delay of a period not exceeding sixty days if it is satisfied that the Appellant was prevented by sufficient cause from filing the Appeal within a period of sixty days. Hence, it was urged that since a specific period of limitation has been prescribed by the Foreign Exchange Management Act, 1999 for filing an appeal before the High Court, the provision of Section 14 of the Limitation Act, 1963 would not be attracted.

6 Section 35 of the FEMA stipulates that any person aggrieved by any decision or order of the Appellate Tribunal may file an Appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him, on any question of law arising out of such order. Under the proviso, the High Court is empowered, if it is satisfied that the Appellant was prevented by a sufficient cause from filing the appeal within the said period, to allow it to be filed within a further period not exceeding sixty days. Parliament has unequivocally spelt out its intent that while the period of limitation for filing an Appeal before the High Court is sixty days from the date of the communication of the decision or order of the Tribunal, the High Court is vested with the jurisdiction to condone a delay of a period not exceeding sixty days for sufficient cause. Since the FEMA constitutes special legislation on the subject, the limitation prescribed for filing an Appeal before the High Court and the provision made in Section 35 on the extent of the power of the High Court to condone delay would prevail. In view of the proviso to Section 35, the High Court has no jurisdiction to condone the delay in filing an Appeal beyond what is stipulated in the proviso. The issue,

however, that falls for determination in these proceedings is whether the provisions of Section 14 of the Limitation Act, 1963 would apply in relation to an Appeal before the High Court under Section 35 of the FEMA.

7 Section 29(2) of the Limitation Act, 1963 prescribes that where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the time prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purposes of determining the period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Now Section 35 of the FEMA provides firstly, a specific period of limitation of sixty days for filing an Appeal before the High Court. Secondly, Section 35 empowers the High Court to allow the Appeal to be filed within a further period not exceeding sixty days if it is satisfied that the Appellant was prevented by a sufficient cause from filing the Appeal within the original period of sixty days. In view of this provision, section 5 of the Limitation Act, 1963 would not empower the High Court to condone the delay for a period in excess of what is stipulated by the proviso to Section 35. Section 14 of the Limitation Act, 1963, however, does not provide for an extension of the period of limitation. Section 14 deals with the exclusion of time taken in a proceeding bona fide in a Court without jurisdiction. Section 14 of the Limitation Act, 1963 does not extend the period of limitation but relates to the exclusion of a certain period while computing the period of limitation. Undoubtedly the provisions of Section 5 of the Limitation Act, 1963 would stand excluded and the power of the High Court to condone a delay occasioned beyond the period specified by the proviso to Section 35 would be excluded by virtue of the specific statutory provision. But merely because the provision of Section 5 of the Limitation Act, 1963 are rendered inapplicable that would not result in an inference that the provisions of Section 14 would not apply. That is simply because Section 14 is not a provision which confers upon the Court a power to condone the delay for sufficient cause but a provision by which a certain period has to be excluded in computing the period of limitation. Hence, there is absolutely no reason or justification for the Court to infer that Section 14 of the Limitation Act, 1963 cannot be applied in relation to the

proceedings before the High Court in an Appeal under Section 35 of the FEMA. Section 35 of the FEMA does not in any event expressly exclude the application of Section 14 of the Limitation Act, 1963.

8 In arriving at this conclusion, we are fortified by the judgment of a Bench of three Judges of the Supreme Court in Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department1. Section 34 of the Arbitration and Conciliation Act, 1996 specifies that an application for setting aside an arbitral award may not be made after three months have elapsed from the date on which the party making that application had received that arbitral 1 2008(7) SCC 169 award. Under the proviso, if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of thirty days but not thereafter. The issue which arose before the Supreme Court was whether the Limitation Act, 1963 was inapplicable to a proceeding in Court under the Arbitration and Conciliation Act and, even if the Limitation Act, 1963 is applicable, whether the applicability of section 14 is excluded to proceedings under Section 34 (1) of the Arbitration and Conciliation Act, 1996. At this stage, it would be necessary to note that Section 43(1) of the Arbitration & Conciliation Act, 1996 specifically provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. The Supreme Court held on a review of the provisions of the Act of 1996, that there is no provision in that Act which excludes the applicability of the provisions of Section 14 of the Limitation Act, 1963 to an application submitted under Section 34 of the Arbitration and Conciliation Act, 1996. On the contrary, the provision of Section 43 made the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. In a judgment delivered by Mr. Justice Panchal on behalf of His Lordship and the learned Chief Justice, it was observed that the intention of the legislature in enacting sub section (3) of section 34 was that an application for setting aside an award should be made within three months which period could further be extended on sufficient cause being shown by another period of thirty days, but not thereafter. Hence, section 5 of the Limitation Act, 1963 would stand excluded. However, merely because Section 5 was excluded, that would not lead to the conclusion that Section 14 would not be applicable. Holding that Section 14 of the Limitation Act, 1963 would

be applicable, the learned Judge observed thus :

> **"22 The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the Court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect or procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded."**

In his concurring judgment, Mr. Justice R.V. Raveendran held that the proviso to Section 34(3) is a provision relating to the extension of the period of limitation; and since it differs from section 5 of the Limitation Act in regard to the period of extension, the proviso to section 34(3) would have the effect of excluding section 5 of the Limitation Act. However, Section 14 of the Limitation Act does not relate to the extension of the period of limitation but relates to the exclusion of a certain period while computing the period of limitation. Consequently, the proviso to Section 34(3) was held not to exclude the application of Section 14.

9 In a recent judgment of the Supreme Court in Coal India Ltd. v. Ujjal Transport Agency,2 the Supreme Court has held that when an application for setting aside an award under Section 34 of the 2 2011 (3) Mh. L.J. 41 Arbitration and Conciliation Act, 1996 is filed, the provisions of Section 14 of the Limitation Act, 1963 would be applicable. Hence, the period during which the applicant was pursuing a proceeding before the wrong forum bona fide would have to be excluded.

10 Applying the same principle, it is evident that Section 35 of the FEMA makes a special provision to the effect that an appeal before the High Court can be filed within a period of sixty days from the date of the communication of the decision or order of the Appellate Tribunal. The proviso to section 35 legislates a provision which is different from that contained in section 5 of the Limitation Act, 1963. Consequently, section 5 of the Limitation Act, 1963 would stand excluded in its application to an appeal before the High Court under Section 35 of the FEMA. However, Section 14 of the Limitation Act, 1963 does not provide for extension of the period of limitation. There is no provision in the FEMA which excludes the application of section 14 of the Limitation Act. Where the conditions which are spelt out in section 14 of the Limitation Act are fulfilled, an exclusion of the period provided for therein, would be warranted in determining as to whether the appeal under section 35 of the FEMA is within limitation.

11 Before Section 14 of the Limitation Act, 1963 can be applied, the ingredients which have been spelt out therein must be demonstrated to exist. Those ingredients have been enunciated in the judgment of the Supreme Court in

Consolidated Engineering Enterprises as follows:

> **"(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;**
>
> **(2) The prior proceedings had been prosecuted with the diligence and in good faith;**
>
> **(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;**
>
> **(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;**
>
> **(5) Both the proceedings are in a Court."**

12 In the present case, the Supreme Court has in its judgment dated 12 April 2010 held that the Appellant was bona fide pursuing his case under Article 226 of the Constitution first before the Delhi High Court and thereupon in appeal before the Supreme Court. The Tribunal rejected the application filed by the Appellant for dispensing with the condition of pre-deposit by its judgment dated 17 April 2008. In para 5 of the Civil Application, it has been stated that the Appellant received a copy of the order of the Tribunal on 4 August 2008. Counsel for the applicant states that the Appellant filed a Petition before the Delhi High Court under Article 226 of the Constitution on 3 September 2008. The Petition was dismissed on 24 September, 2008. The Appellant is stated to have filed a Special Leave Petition before the Supreme Court on 27 November 2008 which was dismissed by a judgment dated 12 April 2010.

13 After excluding the period between 3 September 2008 (the date of the filing of the Petition in the Delhi High Court) and 24 September 2008 (the date of the judgment of the Delhi High Court), and the period between 27 November 2008 (the date of the filing of the Special Leave Petition) and 12 April 2010 (the date of the judgment of the Supreme Court), the appeal lodged before this Court was after 118 days of the order of the Tribunal as set out in the chart hereinbelow:

CHART

Sr.No. Particular Date Days 1 Date of order of ATFE, New Delhi 17/07/08 2 Date of receipt of the above order 14/08/08 3 Date of filing of Writ Petition in Delhi 03/09/08 29 days High Court 4 Date of Judgment of Delhi High Court 24/09/08 5 Date of filing of Special Leave Petition 27/11/08 64 days 6 Date of Judgment of Supreme Court 12/04/10 7 Date of filing FERA Appeal in Bombay 07/05/10 25 days High Court Total Days 118 days In the circumstances, the appeal has been filed within the maximum period of 120 days. Sufficient ground for condoning the delay of sixty days within the meaning of the proviso to Section 35 has been made out in the Civil Application.

14 In the circumstances, we dispose of the Civil Application by condoning the delay. The Appeal shall now be placed on Board for admission.