

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1451-1455 OF 2014
(arising out of SLP(Crl.) Nos.4742-4746 of 2011)

M/s Opera House Exports Ltd. Etc. & ORS. ... APPELLANTS

VERSUS

Union of India & Anr. Etc. ... RESPONDENTS

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Leave granted.

2. These appeals are directed against the common judgment dated 9th February, 2011 passed by the High Court of Delhi at New Delhi in Criminal Appeal No.342 of 2009 etc. By the impugned judgment, the High Court dismissed the appeals preferred by the appellants herein and upheld the order passed by the Appellate Tribunal for Foreign Exchange (hereinafter referred to as the, 'Tribunal') on the ground that the appeals were filed beyond the period of 90 days from the date of service of adjudication order.

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Neeta Sapra
Date: 2014.07.14

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Reason:

The factual matrix of the case is as follows:

The State Bank of India, Okhla Industrial Area, New Delhi by

its XOS statement dated 21.01.1995 disclosed that the

appellant-M/s Opera House Exports Ltd., D-12/2, Okhla Industrial

Area, Phase-II, New Delhi (hereinafter referred to as the,

'Company') did not realize substantial amount of its export bills

and that the bills pending realization were for the period 1991 to

1994. Since it was found that there was a prima facie case of

violation of Section 18(2) & 18 (3) of the FERA by the Company,

the respondent initiated inquiries against the Company with regard to the export bills pending realization, reasons for pendency and steps taken for realizing the said bills. During the course of investigation, a directive u/s 33(2) of FERA was issued to the Company on 23.02.1996 in response to which the Company requested for time till 14.04.1996 for furnishing the requisite details. It was alleged that since no reply was furnished by the Company even by the said date summons was issued to the Directors of the Company on 16.05.1996, which also evoked no response from the Company. Summons was, therefore, issued to the Managing Director of the Company for his appearance on 10.09.1996. Since there was no compliance of the same, another summons was issued for his appearance on 30.09.1996. In response to the said summons, Mr. Sushil Kumar, Managing Director of the Company vide letter dated 28.09.1996, authorized Mrs. Rakesh Verma, General Manager (Finance) and Mr. Y.K. Jha, Manager (Export) to represent him in the matter. On 30.09.1996 Smt. Rakesh Verma, General Manager (Finance) attended the Directorate's Office and her statement was

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recorded u/s 40 of the FERA. She explained the matter and also furnished copy of a letter dated 30.04.1996 from the State Bank of India (For short, 'SBI'), confirming realization of an amount of Rs.9,72,203/- pertaining to the exports made during the period 1992-1995.

Thereafter, summons was issued to Mr. Sushil Kumar again u/s 40 of the FERA for appearance on 19.08.1999. The Company vide letter dated 19.08.1999 informed that Mr. Sushil Kumar had resigned from the post of Managing Director and Mr. Jitinder Kumar Sharma had taken over as Managing Director. The appellant vide letter dated 27.03.2000 again requested RBI to write off and to issue necessary instruction to SBI. Thereafter summons were again issued u/s 40 of the FERA on 17.07.2000 to three Directors of the Company asking them to appear on 30.07.2000. Simultaneously, enquiries u/s 33 (2) of FERA were also made with the authorized dealers-SBI, Phase-II, Okhla Industrial Area, New Delhi. The Bank

vide letter dated 30.08.2000 submitted details of the export bills pending realization together with copies of relevant GR's. It was alleged that number of opportunities had been provided to the Company and its representatives to appear personally and explain the reasons for the outstanding export bills, steps taken for realization of the pending proceeds etc. But the Company did not avail those opportunities and failed to furnish any information.

The SBI, Okhla Industrial Area, New Delhi by its XOS

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statement dated 30.08.2000 revealed that US\$ 109353.88, Italian

Lira 5952000, DM.2738842.85, FR.F.573129, UK Pounds 3302 and

CHF.4354 equivalent to Rs.1,38,09,274/- was pending realization on account of exports made by the Company during the period from 1991 to 1998. The Company was given number of opportunities but did not furnish any evidence or explanations for having taken any steps

for realization of the said export bills. Further, no

correspondence was furnished for having taken any steps for

obtaining extension from RBI for delay in realization of the

proceeds. It was, therefore, found that the Company had

contravened the provisions of Section 18(2) read with Central

Government Notification Nos.F.I/67/EC/73-1&3, both dated 1.1.1974

and Section 18(3) of the FERA. Directors of the Company were found

to have contravened the aforesaid provisions of the FERA.

Memorandum No.T-4/32-D/2001 was, therefore, issued to the

Company on 2.05.2001 for contravention of Section 18(2) read with

Central Government Notification No.F.I/67/EC/73-1&3, both dated

1.01.1974 and Section 18(3) of the FERA. A number of Directors of

the Company were charged for said contraventions of the FERA.

The Company filed interim reply dated 2.06.2001 and submitted that it was one of the leading exporters of high fashion readymade

garments and it had exported garments worth more than R s.235

crores during the last 8 years of business.

The Company accepted

that small amounts were pending realization in respect of exports

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made to various buyers. It was also submitted that the percentage of outstanding claims was negligible on comparing with the total exports made. The Company explained the detailed steps taken by it towards realization of proceeds.

4. After personal hearing, the Enforcement Directorate passed the adjudication order on 11.10.2007 and held that the charges of contravention of the provisions of Section 18(2) of the FERA read with Central Government Notification Nos.F-1/67/EC/73-1 & 3 both dated 1.01.1974 and Section 18(3) of the FERA attributed against the Company was well founded and established with material evidence substantiating the charges. The Adjudicating Authority further imposed penalties on a number of Directors of the Company.

5. According to the company, it being aggrieved by the aforesaid adjudication order immediately approached Mr. Vinod Sabhrawal, Advocate for filing an appeal before the Tribunal. It was in mid of January, 2008 when the appellant asked for a copy of the appeal, the appellant got to know that the appeal was not filed because of pre-occupation of Advocate due to his wife's illness i.e. cancer. Thereafter, the appeals were prepared and filed by him before the Tribunal along with an application for condonation of delay of about 40 days in filing the appeal, which occurred on account of unavoidable and unforeseen circumstances. The Tribunal dismissed the appeal on account of delay.

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6. Against the said dismissal of appeal, the Company filed appeals before the High Court of Delhi at New Delhi bearing Criminal Appeal Nos.340, 341, 342, 343 and 344 of 2009. The High Court by its order dated 22.4.2010 admitted the matters and issued notice. Thereafter, the High Court by impugned common judgment dated 9th February, 2011 dismissed the same on the ground of limitation. Hence, this appeal.

7. The Tribunal was of the opinion that in view of sub Section (2) of Section 52 of the FERA, the delay beyond the period of 90 days cannot be condoned. The Tribunal dismissed the appeal with following observation:

"12. In the light of above discussions, these appeals when filed 90 days from the date of receipt of the impugned order has to be dismissed. The Tribunal is a creature of statute. Therefore, this Tribunal cannot act beyond the statutory provisions. As a result the delay of exceeding period of 90 days cannot be condoned in view of legislative mandate couched in clear language."

8. The High Court in an appeal filed by the appellants framed the following issues:

"3. In the above facts, the questions of law which needs to be redressed are (a) whether the appeals before the Tribunal against the order of the adjudicating authority dated 11th October, 2007 had to be treated by the Tribunal under the provisions of FERA or FEMA? (b) whether Tribunal has power to condone the delay beyond the period of 90 days.?"

Referring to sub Section (4) of Section 49 of FEMA, the High Court held:

"7. In this case memorandum was issued to M/S Opera

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House Exports Ltd. On 2nd May, 2001 i.e. within sunset period. Order has been passed in the adjudication proceeding on 11th October, 2007 under the FERA after cognizance had been taken under the provisions of FERA. In view of this, the correctness, legality and propriety of the order passed by the adjudicating authority has to be challenged in continuation of the proceeding under the FERA and has to be adjudicated under the provisions of FERA. In view of the cognizance having been taken within the sunset period and the adjudication proceeding carried out under the provisions of FERA, substantive provisions of FERA would alone be applicable. Thus, the Tribunal was right in taking a view that the appeal filed before it was to be governed under the provisions of FERA. Question (a) is answered accordingly."

9. The FEMA was given effect from 1.06.2000 as a result whereof FERA stood repealed. Section 49 of FEMA reads as under:

"49 (1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under sub- section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim

any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall

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continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal,-

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provision of this Act;

(b) any appeal preferred to the Appellate Board under sub-section (2) of section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act;

(c) every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52 of the repealed Act shall, if not filed before the commencement of this Act, be filed before the High Court within a period of sixty days of such commencement:

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) Save as otherwise provided in sub-section (3), the mention of particular matters in sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

10. Sub Section (1) of Section 49 of FEMA makes it clear that the Appellate Board constituted under FERA stood abolished w.e.f.

1.6.2000 i.e. the day FEMA came into force.

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Sub Section (3) of Section 49 of FEMA prohibits the Courts from taking cognizance of an offence under the repealed Act (FERA) and also prohibits the Adjudication Officer from taking notice of any contravention u/s 51 of the repealed Act (FERA) after the

expiry of a period of 2 years from the date of the commencement of the Act.

However, as per sub Section (4) of Section 49, subject to the provisions of sub Section (3) all the offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act (FERA) as if that Act had not been repealed.

Sub Section 5 (b) of Section 49 further provides that any appeal preferred to the Appellate Board under sub Section (2) of Section 52 of the repealed Act but not disposed of before the commencement of FEMA shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under the FEMA.

Sub Section (6) of Section 49 also specifies that the general application of Section 6 of the General Clauses Act, 1897 save as otherwise in sub Section (3) would not be affected. Section 6 of the General Clauses Act provides for a protection to any right, privilege, obligation or liability acquired or accrued under the enactment which has been repealed.

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11. The main question that arises for consideration in these appeals is whether for the purpose of counting delay in appeals against orders of adjudicating officer to the Appellate Board, the provisions of Foreign Exchange Regulation Act, 1973 (for short, 'FERA') or Foreign Exchange Management Act, 1999 (for short, 'FEMA') shall apply.

12. Similar question was considered by this Court in Thirumalai Chemicals Limited v. Union of India and others, (2011) 6 SCC 739. In the said case, cause of action arose when FERA (repealed Act) was in force. Show cause notices were issued and penalty was imposed when FEMA was in force. Against the same an appeal was preferred by the appellant. In the said case, the appellant Company preferred an appeal u/s 19(2) of FEMA against imposition of penalty, after about 185 days of imposition of penalty along with application for condonation of delay under proviso to sub

Section 19(2) of FEMA. This Court noticed that u/s 52 (2) FERA (repealed Act), a delay upto 90 days only was permissible whereas under Section 19(2) proviso of FEMA there is upper limit for condonation of delay was not prescribed. This Court held:

"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 1-6-2000 or after. On a combined reading of Section 49 of FEMA and Section 6 of the General Clauses Act, it is clear that the procedure prescribed by FEMA only would be applicable in respect of an appeal filed

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under FEMA though the 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."

13. In view of decision of this Court in Thirumalai Chemicals Limited v. Union of India and others (supra) the impugned judgment passed by the Tribunal as affirmed by the High Court cannot be upheld and is fit to be set aside.

14. Even otherwise appeal preferred by appellant before the Tribunal was not barred by limitation.

15. Section 52 of FERA deals with appeal to Appellate Board. Sub Section (2) therein prescribes period of limitation and reads as under:

"52. Appeal to Appellate Board-(1) . . .

(2) Any person aggrieved by such order may, on payment of such fee as may be prescribed and after depositing

the sum imposed by way of penalty under section 50 and within forty- five days from the date on which the order is served on the person committing the contravention, prefer an appeal to the Appellate Board:

Provided that the Appellate Board may entertain any appeal after the expiry of the said period of forty-five days, but not after ninety days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time:

Provided further that where the Appellate Board is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, in its own discretion, dispense with such a deposit either unconditionally or subject to such conditions as it may deem fit. . . ."

From the aforesaid provisions it is clear that appeal against order u/s 51 can be filed within 45 days from the date on which the order is served on the person. The Appellate Board is also empowered under proviso to sub Section (2) of Section 52 to entertain any appeal even after expiry of that period of 45 days but not after 90 days, from the date aforesaid subject to satisfaction that the appellant was prevented by sufficient cause from filing the appeal in time.

16. The impugned order was passed by the Adjudicating Authority on 11.08.2007. It is pleaded on behalf of the appellant and was not disputed by respondents that the said adjudication order was served on the appellant on 25.10.2007. Delay in filing appeal can be computed as follows:

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From the date of receipt (25.10.2007) of Adjudication order dated 11.10.2007	
October, 2007	06
November, 2007	30
December, 2007	31
January, 2008	22
Appeal filed on 22.1.2008	
Total No.of days	89

Therefore, we hold that even u/s 52 of FERA the Appellate Board was empowered to condone the delay, as the appeal was filed before 90 days and not later than 90 days.

17. For the reasons aforesaid, we have no other option but to set

aside the impugned judgment dated 9th February, 2011 passed by the High Court and the order dated 24 th March, 2008 passed by the Tribunal. The case is remitted back to the Tribunal to decide the same on merit.

18. The appeals are allowed with aforesaid observations and directions. No costs.

.....J.

(SUDHANSU JYOTI MUKHOPADHAYA)

.....J.

(V. GOPALA GOWDA)

NEW DELHI,
JULY 14, 2014.

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ITEM NO.1
(For Judgment)

COURT NO.5

SECTION II

S U P R E M E C O U R T O F
RECORD OF PROCEEDINGS

I N D I A

SLP(Cr1.) No(s). 4742-4746/2011

M/S.OPERA HOUSE EXPORTS LTD.ETC.

Appellant(s)

VERSUS

UNION OF INDIA & ANR.ETC.

Respondent(s)

Date : 14/07/2014 These petitioners were called on for pronouncement of Judgment today.

For Appellant(s)

Mr. P. N. Puri ,Adv.

For Respondent(s)

Mr. B. Krishna Prasad ,Adv.

UPON hearing the counsel the Court made the following

O R D E R

Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya pronounced the reportable judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice V. Gopala Gowda.

The appeals are allowed with no costs in terms of the signed reportable judgment.

(Neeta)
Sr. P.A.

(Usha Sharma)
Court Master

(Signed reportable judgment is placed on the file)