A THIRUMALAI CHEMICALS LIMITED

v.

UNION OF INDIA & ORS.

(Civil Appeal Nos. 3191-3194 of 2011)

APRIL 11, 2011

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[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Foreign Exchange Management Act, 1999 – ss. 19(2) and 49 – Cause of action arose when FERA was in force, but C *show cause notices and impugned orders issued when FEMA was in force – Appeal filed u/s. 19 of FEMA – Rejection of, by Appellate Tribunal constituted under FEMA, applying the first proviso to sub section (2) of s. 52 of FERA instead of following the proviso to sub section (2) to s. 19 of FEMA –* D *Held: Limitation for filing appeal has to be considered u/s. 19(2) of FEMA – Provision relating to limitation is procedural – In absence of any provision to contrary, the law in force on date of initiation of appeal irrespective of the date of accrual of the cause of action for the original order, would govern the* E *period of limitation – 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* F *such order was to the appellate tribunal constituted under FEMA, necessarily s. 19(2) of FEMA alone would apply and it is not possible to import the provisions of s. 52(2) of FERA – Tribunal and High Court misdirected themselves in assuming that the period of limitation was governed by s.* G *52(2) of FERA – 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 – Matter is remitted back to the Tribunal for fresh*

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consideration – Foreign Exchange Regulation Act, 1973 – ss. 52(2), 8(3) and 8(4) – General Clauses Act – s. 6. A

Substantive law and procedural law – Distinction between – Held: Substantive law refers to body of rules that creates, defines and regulates rights and liabilities – 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 – Aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation – Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them – Procedural law is retrospective meaning thereby that it would apply even to acts or transactions under the repealed Act – Right of appeal conferred u/s. 19(1) of FEMA is a substantive right – Procedure for filing an appeal under sub-section (2) of s. 19 as also the proviso to sub-section (2) of s. 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights. B C D

Appellant Company imported various consignments for home consumption and opened letters of credit in the year 1996. Thereafter, the Company forwarded the Exchange Control Copies of bills of entry (ECC-bills of entry) to banks (authorized dealers) for submitting to Reserve Bank of India. The authorized dealers did not forward the ECC bills of entry to RBI. The Directorate of Enforcement passed orders imposing penalty on the Company for contravention of Section 8(3), Section 8(4) of FERA read with sub-sections (3) and (4) of Section 49 of FERA and issued show cause notices to the Company as the Company had failed to furnish the required bills/ information/documents and also held that an appeal would lie before the Appellate Tribunal after depositing the amount of penalty imposed within 45 days from the E F G

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A date on which the order was served. The Company informed the Enforcement Directorate that it was due to the mistake of the authorized dealer that the bills of entry were not forwarded to them in time. Subsequently RBI carried out necessary corrections and deleted the entries
B from their records and regularized the transactions and requested the Directorate of Enforcement to drop the proceedings initiated against the Company. However, the Company did not hear anything from the Directorate, thus, filed appeals against the said orders in 2004 before
C the Appellate Tribunal for Foreign Exchange with an application under Section 5 of the Limitation Act read with Section 19 and Section 49(5) (a) of FEMA for condonation of delay. The Tribunal applying the first proviso to sub section (2) of s. 52 of FERA, dismissed the
D appeals on the ground of delay. The appellant filed writ petitions before the High Court for quashing the order and the same were dismissed. Therefore, the appellant Company filed the instant appeal.

Disposing of the appeals, the Court

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HELD: 1.1 In the instant case, the cause of action arose when Foreign Exchange Regulation Act, 1973 was in force, but show cause notices and impugned orders were issued when Foreign Exchange Management Act,
F 1999 was in force and the appeals were also preferred under sub section (1) of Section 19 of FEMA. [Para 11] [852-G-H; 853-A]

1.2 Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right
G 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
H those rights and liabilities and a machinery for enforcing

them. Right of appeal being a substantive right always acts prospectively. Every statute is 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 would apply even to acts or transactions under the repealed Act. Unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective. [Paras 14 and 16] [855-E-H; 856-D-E]

Garikapati Veeraya vs. N. Subbiah Choudhry and Ors. **AIR 1957 SC 540**; *New India Insurance Company Limited Vs. Smt. Shanti Mishra* **(1975) 2 SCC 840**; *Hitendra Vishnu Thakur and Ors. vs. State of Maharashtra and Ors.* **(1994) 4 SCC 602**; *Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and Ors.* **(1999) 8 SCC 16**; *Shyam Sundar and Ors. vs. Ram Kumar and Anr.* **(2001) 8 SCC 24 – relied on.**

1.3 Right of appeal conferred under Section 19(1) of FEMA is 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. The *proviso* to sub-section (2) of Section 19 operates retrospectively. [Paras 17 and 18] [856-F-H]

1.4 Law of limitation is generally regarded as

A 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 B 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 C 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. D [Para 19] [857-B-D]

THE YDUN (1899) Probate Division p 236; *The King vs. Chandra Dharma* (1905) 2 KB 335; *Yew Bon Tew v. Kenderaan Bas Mara* (1982) 3 All E.R. 833 – referred to.

E *Bennion* on Statutory Interpretation 5th Edn.(2008) 321 – referred to.

1.5 An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is nevertheless a right, even though it arises under an Act F which is procedural and a right which is not to be taken away pleading retrospective operation unless a contrary intention is discernible from the statute. Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention a statute G divesting vested rights is to be construed as prospective. A statute, merely procedural is to be construed as retrospective and a statute while procedural in nature affects vested rights adversely is to be construed as prospective. The manner of filing an appeal, under sub

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section (2) of Section 19 of FEMA and the time within which such an appeal has to be preferred and the power conferred on the Tribunal to condone delay under the proviso to sub-section (2) of Section 19 are matters of procedure and act retrospectively, so as to cover causes of action which arose under FERA. Since the appeal was filed under FEMA with an application for condonation of delay such an appeal has to be considered by the Tribunal under the proviso to sub-section (2) of Section 19 FEMA and if the Company shows sufficient cause for not filing the appeal in time then the Tribunal can condone the delay and entertain the appeal, especially when there is no accrued right to the respondent to plead a time bar. [Para 20] [858-C-H]

Principles of Statutory Interpretation 12th Edition p 541 – referred to.

1.6 The appellate Board under FERA, 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 tribunal 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)

A 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 B 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. Any provision relating to limitation is always regarded as procedural and in the absence of any provision to the C 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, would govern the period of limitation. [Para 25] [864-B-G]

1.7 Section 52(2) can apply only to an appeal to the D 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 E under FEMA, necessarily Section 19(2) of FEMA alone would apply and it is not possible to import the provisions of Section 52(2) of FERA. The concern is with the appeals to the Appellate Tribunal, limitation being a matter of procedure, only that law that is applicable at the time of F filing the appeal, would apply. Therefore, Section 19(2) of FEMA and not Section 52(2) of FERA would apply. 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 G 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. [Para 26] [864-H; 865-A-D]

1.8 Clause (b) of sub-section (5) of Section 49 refers H

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. 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. 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. Therefore, 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. Therefore, the orders passed by the Tribunal and the High Court are set aside and the matter is remitted back to the Tribunal for fresh consideration in accordance with law on the basis of the findings recorded. [Paras 27 to 29] [865-E-H; 866-A-D]

Anant Gopal Sheorey v. State of Bombay **AIR 1958 SC 915;** *Rao Shiv Bahadur Singh and Anr. vs. State of Vindhya*

A *Pradesh* **AIR 1953 SC 394**; *State of Punjab v. Mohar Singh S/o Pratap Singh* **AIR 1955 SC 84**; *T.S. Baliah v. T.S. Rangachari, ITO* **AIR 1969 SC 701**; *Gajraj Singh and Ors. vs. State Transport Appellate Tribunal and Ors.* **(1997) 1 SCC 650**; *Gammon India Ltd. vs. Special Chief Secretary and Ors.*
B **(2006) 3 SCC 354**; *Harbanslal Sahnia and Anr. vs. IOC Ltd. and Ors.* **(2003) 2 SCC 107**; *L.K. Verma vs. HMT Ltd. and Anr.* **(2006) 2 SCC 269 – referred to.**

Case Law Reference:

C	(2003) 2 SCC 107	Referred to	Para 9
	(2006) 2 SCC 269	Referred to	Para 9
	AIR 1957 SC 540	Referred to	Para 15
D	(1975) 2 SCC 840	Referred to	Para 15
	(1994) 4 SCC 602	Referred to	Para 15
	(1999) 8 SCC 16	Referred to	Para 15
	(2001) 8 SCC 24	Referred to	Para 15
E	(1899) Probate Division 236	Referred to	Para 20
	(1905) 2 KB 335	Referred to	Para 20
	(1982) 3 ALLER	Referred to	Para 20
F	AIR 1958 SC 915	Referred to	Para 24
	AIR 1953 SC 394	Referred to	Para 24
	AIR 1955 SC 84	Referred to	Para 24
G	AIR 1969 SC 701	Referred to	Para 24
	(1997) 1 SCC 650	Referred to	Para 24
	(2006) 3 SCC 354	Referred to	Para 24

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3191-3194 of 2011. A

From the Judgment & Order dated 24.07.2008 of the High Court of Judicature at Bombay in Writ Petition Nos. 692, 1528, 1531 & 693 of 2008. B

Mohan Jayakar, Uma, Javaid Muzaffar, Umesh Kumar Khaitan for the Appellant.

Vivek Tankha, ASG, T.V. Ratnam, Rahul Kaushik, B.K. Prasad, Anil Katiyar for the Respondents. C

The Judgment of the Court was delivered by

K. S. RADHAKRISHNAN, J. 1. Leave granted.

2. The question that has come up for consideration in this case is whether the Appellate Tribunal constituted under the Foreign Exchange Management Act 1999 (in short FEMA) was right in rejecting a belated appeal filed under Section 19 of FEMA, applying the first *proviso* to sub section (2) of Section 52 of Foreign Exchange Regulation Act 1973 (in short FERA), instead of following the *proviso* to sub section (2) to Section 19 of FEMA. D E

3. M/s Tirumalai Chemicals Limited (in short 'the Company') had imported various consignments of benezene, orthoxalene etc. for home consumption. For the said purpose, the Company had opened Letters of Credit bearing No.MLCO 4359096 and No.529/960487 on 28.09.96 and 07.08.96 respectively on their bankers ICICI Bank and Standard Chartered Bank (authorized dealers). By letters dated 07.12.96 and 18.01.97 Exchange Control Copies of bills of entry (in short, ECC – bills of entry) in relation to those imports were forwarded by the Company to the above mentioned Banks. As per the provisions of Exchange Control Manual (in short ECM), the F G H

A authorized dealers had to submit the ECC-bills of entry submitted by the importers (the Company) to the Reserve Bank of India (in short RBI). The Company was under the bonafide impression that the documents submitted by it were forwarded by the authorized dealers to the RBI and that the RBI in turn had B given due intimation to the Enforcement Directorate. The Company on 22.04.2004 received a telephonic communication from the office of the 3rd respondent viz., Directorate of Enforcement, stating that it had passed various orders on 27.01.04 imposing a total penalty of Rs.9,33,63,453/- on the C Company on the ground that it had contravened the provisions of Sections 8(3), 8(4) of FERA read with sub-sections (3) and (4) of Section 49 of FEMA. Copies of the orders dated 27.01.04 were then received by the Company on 22.04.04 on request. From those orders the Company came to know that the Directorate of Enforcement had issued four show cause D notices dated 14.05.02 stating that the Company had contravened Section 8(3), Section 8(4) of FERA read with para 7A.20 (Chapter 7) of ECM and was required to show cause why adjudication proceedings be not initiated against the Company under Section 49 of FEMA for contravention of the E above mentioned provisions. Further, it was also stated that the Company had failed to furnish the required bills/information/ documents and did not avail of the opportunity of hearing in spite of notices issued to them on 29.08.02, 27.10.03 and 01.12.03. Orders dated 27.01.04 also indicated that an appeal F would lie before the Appellate Tribunal after depositing the amount of penalty imposed within 45 days from the date on which the order was served. Reference was also made to Section 19 read with Section 49(5)(a) of FEMA.

G 4. The Company on receipt of the above mentioned orders dated 27.01.04 approached the authorized dealers and enquired whether they had forwarded the ECC of bills of entry to the RBI as required under the provisions of ECM. The ICICI Bank vide their letters dated 12.05.04 informed the Company

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that it had received ECC of bills of entry on 20.01.97 with difference of value. The ICICI Bank then forwarded a letter dated 15.05.04 to the RBI seeking its permission to accept the bills of entry stating that the Company had submitted the relevant documents on 20.01.97 with shortfall of value. The Standard Chartered Bank also *vide* their letter dated 12.05.04 informed the RBI that they had also received the Exchange Control Copy of bills of entry for the import in question from the appellant Company on 09.12.96, but due to an inadvertent mistake had reported in their BEF Return that bills of entry were not submitted. The RBI *vide* letter dated nil of May, 2004 sent by registered AD informed the Enforcement Directorate as follows:-

> ".....Please refer to the outstanding entries reported in their respective BEF Statement by the captioned banks in respect of M/s Tirumalai Chemicals Ltd., which was forwarded to you by us. In this connection we advise that, based on the documents and evidence submitted by authorized dealer, we have deleted the entries from our records and regularized the transactions at our end as under :-
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> (i) ICICI Bank confirmed that they had received EC copies of Bill of Entry in respect of the transactions reported at Sr.No.40 and Sr.No.1 of their BEF Statement referred to above and the entry at Sr. No.28 of their BEF Statement was a repetition of entry at Sr.No.40 of the same statement.
>
> (ii) Standard Chartered Bank has also confirmed to us that the relative EC copy of the Bill of Entry in respect of the transaction reported in their BEF Statement was received by them....".

5. The Company had also sent a letter dated 17.05.04 to the Enforcement Directorate stating that it was not due to the mistake of the Company that the ECC of bills of entry were not

A forwarded to the Directorate of Enforcement in time, but due to the mistake of the authorized dealer (Bank). RBI had subsequently carried out necessary corrections and deleted the entries from their records and regularized the transactions and requested to drop the proceedings initiated against the B Company.

6. The Company stated that it was under the bonafide impression that respondents would drop the proceedings since RBI had deleted the entries from the records and informed the same to the Enforcement Directorate but nothing was heard C from the Directorate and hence the Company was constrained to file appeals against those orders on 02.08.04 before the Appellate Tribunal for Foreign Exchange (in short the Tribunal) *vide* Appeal nos. 787, 788, 789 and 790 of 2004 with an application under Section 5 of the Limitation Act read with D Section 19 and Section 49(5) (a) of FEMA for condonation of delay.

7. The Tribunal, however, without going into the merits of the case dismissed the appeals on the ground of delay by its E order dated 25.10.2007. The operative portion of the said order reads as follows:-

> ".....Therefore, these appeals when filed after 90 days from the date of receipt of the order has to be F dismissed and the exceeding period cannot be condoned by this Tribunal because of legislative mandate couched in clear language.
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> For the reasons stated herein above, these appeals are dismissed because these appeals have been filed G after a total period of 90 days from the date of receipt of impugned order beyond which this Tribunal is not empowered to condone the delay."

8. The Company aggrieved by the above mentioned order H preferred writ petitions nos. 692, 1528, 1531 and 693 of 2008

before the Bombay High Court for quashing the order dated 25.10.2007 of the Tribunal as also the order dated 27.01.04 passed by the third respondent contending that the Tribunal was not justified in dismissing the appeals on the ground of delay. The High Court, however, dismissed all the writ petitions by the following order dated 24.07.2008:-

> "There is no dispute that the appeal was filed beyond the period of 90 days. Therefore, the tribunal did not have jurisdiction to condone the delay. The learned counsel, then, submitted that we should consider these petitions as the petitions against the original order.
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> In our opinion, it will not be appropriate to entertain these petitions as petitions against the original order. The Parliament has provided remedy of an appeal against the original order and has provided for period of limitation for filing that appeal. The Parliament has also provided that delay beyond a certain period cannot be condoned by the Tribunal/Appellate authority. The Petitioners have allowed that remedy of appeal to be barred, therefore, now to entertain these petitions as petitions against the original order would amount to permitting the Petitioners to frustrate the scheme of the Legislation. The scheme of the statute is that a challenge to the original order is to be raised by an appeal which is to be filed within a particular period. The extra ordinary jurisdiction of this court under the Constitution cannot be permitted to be used by the Petitioners, who have allowed their ordinary remedy to be barred. Petitions are, therefore, rejected."

9. Mr. Harish Salve, learned senior counsel appearing on behalf of the appellants submitted that the authorized dealer (Bank) had owned up their mistake and had informed the RBI accordingly and hence there was no reason to penalize the Company for no fault of it. Learned counsel also submitted that the Tribunal had committed a mistake in holding that it had no power to condone the delay beyond 90 days. He also submitted

A that even if the Tribunal has no power to condone the delay the High Court could have entertained the writ petitions under Article 226 of the Constitution of India when the impugned order of the Tribunal was manifestly illegal. Learned counsel further submitted that in any view of the matter High Court under Article
B 226 of the Constitution of India has the power to condone delay in exercise of its extra ordinary jurisdiction and then direct the Tribunal to consider the appeal on merits. Reference was made to the judgments of this Court in *Harbanslal Sahnia & Anr. vs. IOC Ltd. & Ors.* (2003) 2 SCC 107, *L.K. Verma vs. HMT Ltd. & Anr.* (2006) 2 SCC 269.
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10. Shri Vivek Tankha, Learned Additional Solicitor General, appearing for the respondents referred to the first proviso to sub section (2) of Section 52 of FERA and submitted that the Tribunal was justified in holding that it had no power to
D condone the delay beyond a period of 90 days. Ld. ASG also submitted that when a party has availed of the statutory remedy of appeal and lost on the ground of delay the High Court can not exercise its extraordinary jurisdiction under Article 226 / 227 of the Constitution of India.

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11. We are in this case called upon to decide the question whether the Tribunal was right in dismissing the appeals preferred under Section 19(1) of FEMA, by applying the first *proviso* to sub section (2)of Section 52 of FERA holding that it
F had no power to condone the delay beyond 90 days from the date on which the order was served on the person committing the contravention. The Tribunal and the High Court proceeded on the premises that since the cause of action arose when FERA was in force the period of limitation for filing an appeal before the Tribunal even after coming into force of FEMA is as
G provided under the first *proviso* to sub section (2) of Section 52 of FERA. Admittedly, in this case the cause of action arose when FERA was in force, but show cause notices and impugned orders were issued when FEMA was in force and the appeals were also preferred under sub section (1) of

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Section 19 of FEMA. Therefore, the important question that arises for consideration is whether limitation for filing the appeal has to be considered under the *proviso* to sub section (2)of Section 19 of FEMA or under the first proviso to sub section (2) of Section 52 of FERA. In order to answer the above question, it is necessary to examine the scope and ambit of Section 52 of FERA, Section 19 , 49 of FEMA and Section 6 of the General Clauses Act, 1897.

12. FERA was enacted to consolidate and amend the law relating to certain payments dealing in foreign exchange and securities, transactions indirectly affecting the foreign exchange and import and export and import of currency, for conservation of foreign exchange resources of the country and proper utilization thereof in the interest of economic development of the country. Sections 50 and 51 of FERA were the penal provisions which empowered the authority to impose penalty on persons who had contravened some of the provisions of the Act. An appeal was provided under FERA against the order of adjudication before the Foreign Exchange Regulation Appellate Board (in short the 'Board') under Section 52 of that Act within a period of 45 days from the date on which the order was served on the person committing the contravention. The Board was also empowered to entertain any appeal after the expiry of the said period of 45 days but not after 90 days from the date on which the order was served on the person if it was satisfied that the person was prevented by sufficient cause in not filing the appeal in time. It is useful to extract that provision for easy reference :-

> **52. Appeal to Appellate Board** —(1) The Central Government may, by notification in the Official Gazette, constitute an Appellate Board to be called the Foreign Exchange Regulation Appellate Board consisting of a Chairman [being a person who has for at least ten years held a civil judicial post or who has been a member of the Central Legal Service (not below Grade I) for at least three

A years or who has been in practice as an advocate for at least ten years] and such number of other members, not exceeding four, to be appointed by the Central Government for hearing appeals against the orders of the adjudicating officer made under Section 51.

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(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 45 days from the date on which the order is served on the person committing the contravention, prefer an C appeal to the Appellate Board:

Provided that the Appellate Board may entertain any appeal after the expiry of the said period of 45 days, but not after 90 days, from the date aforesaid if it is satisfied D 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 E 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.

...."

F 13. FERA was repealed by FEMA which came into force with effect from 01.06.2000. Chapter IV of FEMA deals with contravention of penalties. Section 13 of FEMA empowers the authorized officers to impose penalties for contravention of certain provisions of the Act. Failure to make full payment of G penalty, may attract civil imprisonment subject to the provisions of sub section (2) of Section 19. Chapter V of the Act deals with adjudication and appeal. Section 19 deals with the appeal to the Appellate Tribunal. Sub section (2) of Section 19 says that every appeal under sub-section(1) shall be filed within a H period of 45 days from the date on which the copy of the order

made by the adjudicating authority or the Special Director (Appeals) is received by the aggrieved person. The Appellate Tribunal is also empowered to entertain the appeals filed after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing the appeal within that period. Law is well settled that the manner in which the appeal has to be filed, its form and the period within which the same has to be filed are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. The question is, while dealing with a belated appeal under Section 19(2) of FEMA, the application for condonation of delay has to be dealt with under the first *proviso* to sub- section (2) of Section 52 of FERA or under the *proviso* to sub section (2) of Section 19 of FEMA. For answering that question it is necessary to examine the law on the point.

Substantive and Procedural Law:

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.

A 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 vs. N. Subbiah Choudhry & Ors.* AIR 1957 SC 540, *New India Insurance Company Limited* Vs. *Smt. Shanti Mishra* (1975) B 2 SCC 840, *Hitendra Vishnu Thakur & Ors.* vs. *State of Maharashtra & Ors.* (1994) 4 SCC 602; *Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar & Ors.* (1999) 8 SCC 16; Shyam Sundar & Ors. vs. Ram Kumar & Anr. (2001) 8 SCC 24, has elaborately discussed the scope and ambit of an C 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.

D 16. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its E character, affects vested rights adversely is to be construed as prospective.

17. Right of appeal conferred under Section 19(1) of FEMA is therefore a substantive right. The procedure for filing F 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.

G 18. We have already indicated that the *proviso* to sub-section(2) of Section 19 operates retrospectively, but the question is in that process, whether it impairs or takes away any accrued right, to plead a time bar and on facts whether the Company has lost its right of appeal to the Tribunal under FEMA.

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Law of Limitation

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.

20. Learned author in order to establish the above proposition referred to the decision of the Court of Appeal in *The Ydun* case [THE YDUN (1899) Probate Division at page 236 (The Court of Appeal) where the Court held that the amending legislation dealt with procedure only and therefore applied to all actions whether commenced before or after the passing of the Act and even in respect of previously accrued rights. The principle laid down in '*The Ydun*' was applied in *The King vs. Chandra Dharma* (1905) 2 KB 335 and it was held that if a statute shortening the time within which proceedings can be taken is retrospective then it is impossible to give good reason, why a statute extending the time within which proceedings be taken, should not be held to be retrospective. The Judicial Committee of Privy Council in *Yew Bon Tew v.*

A *Kenderaan Bas Mara* (1982) 3 All E.R. 833, opined that whether statute has retrospective effect, cannot in all cases safely be applied by classifying statute as procedural or substantive and pointed out in certain situation the Court would rule against a retrospective operation. Limitation provisions
B therefore can be procedural in the context of one set of facts but substantive in the context of different set of facts because rights can accrue to both the parties. In such a situation, test is to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and
C obligations. An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is nevertheless a right, even though it arises under an Act which is procedural and a right which is not to be taken away pleading retrospective operation unless a contrary intention is discernible from the
D statute Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention a statute divesting vested rights is to be construed as prospective. A statute, merely procedural is to be construed as retrospective and a statute while procedural in nature affects
E vested rights adversely is to be construed as prospective. The manner of filing an appeal, under sub section (2) of Section 19 of FEMA and the time within which such an appeal has to be preferred and the power conferred on the Tribunal to condone delay under the proviso to sub-section (2) of Section 19 are matters of procedure and act retrospectively, so as to cover
F causes of action which arose under FERA. Since the appeal was filed under FEMA with an application for condonation of delay such an appeal has to be considered by the Tribunal under the proviso to sub-section(2) of Section 19 FEMA and if the Company shows sufficient cause for not filing the appeal
G in time then the Tribunal can condone the delay and entertain the appeal, especially when there is no accrued right to the respondent to plead a time bar. The legal position is summarized thus by Justice G.P. Singh in Principles of Statutory Interpretation (12th Edition-Page 541) thus:-

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"Statutes of Limitation are thus retrospective in so far as they apply to all legal proceedings brought after their operations for enforcing causes of action accrued earlier...." A

21. We may also examine whether Section 49 of FEMA, which is the repealing and saving clause, has in any way taken away the right of appeal under FEMA for cause of action which arose under FERA expressly or by necessary implication and also whether it has any effect on the retrospectivity of the procedural provision under the proviso to sub-section (2) of section 19. For easy reference we may extract Section 49 of FEMA and Section 6 of the General Clauses Act, 1897. B C

"**49. Repeal and Saving** —(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. D

(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. E F

(3) Notwithstanding anything contained in any other laws 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. G

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

A governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal, —

B (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 C 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 provisions of this Act;

D (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;

E (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; F

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.

G (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." H

Section 6 of the General Clauses Act reads as under:-

6. Effect of repeal — Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and

any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

Repealing and saving clause is a residuary provision which envisages that notwithstanding such repeal of FERA there would be application of Section 6 of the General Clauses Act with regard to the effect of repeal which is discernible from sub section (6) of Section 49 of the Act.Sub-section (1) of Section 49 of FEMA states that FERA stands repealed and the

A Appellate Board constituted under sub-section (1) of Section 52 of the said Act stands dissolved. Sub-section (3) of Section 49 incorporates a sunset clause. The said sub-section begins with a non-obstante clause overriding any other enactment and states that no court shall take notice of any contravention under B Section 51 of the repealed Act after the expiry of two years from the date of commencement of FEMA on 1.6.2000. Sub-section (4) of Section 49 stipulates that subject to the provisions of sub-section(3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act C as if that Act had not been repealed.

22. Sub-section (5) of Section 49 of FEMA consists of three clauses (a), (b) and (c). Clause (a) states that anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice D made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed under the repealed act i.e. FERA to the extent they are not inconsistent with the provisions of this Act, are deemed to be E done or taken under the corresponding provisions of this Act. The said provision has the effect of incorporating or making a general declaration that the existing rules, notifications, declarations, authorization and exemptions granted under FERA will continue to apply in spite of repeal of FERA and after F enactment of FEMA as long as they are not in consistent with FEMA. Clause (b) of sub-section (5) of Section 49 states that any appeal preferred before the Appellate Board under sub-section (2) of Section 52 of FERA but not disposed of before the commencement of this Act shall stand transferred to and G shall be disposed of by the Appellate Tribunal constituted under this Act. Sub-section (6) to Section 49 of FEMA deals with the application of Section 6 of the General Clauses Act. The first part of the said sub-section protects the sunset clause and the two year limitation period for commencement of proceedings. H The expression "save as otherwise provided in sub-section (3)"

protects the sunset clause in spite of second portion of sub-Section 6 and the second portion of sub-section (6) of Section 49 expressly makes Section 6 of the General Clauses Act, 1897 applicable in spite of repeal of FERA.

23. Section 6 of the General Clauses Act, 1897 which protects the rights, obligations and actions and liabilities applies in spite of repeal of FERA subject to two years limitation period specified in sub-section (3) of Section 49 for initiation of proceedings. Therefore, in view of Section 6 of the General Clauses Act read with sub-section (3) of Section 49 of FEMA, proceedings for violation of FERA can be instituted within the sunset period of two years with effect from 1.6.2000 till 31.5.2002. But for sub-section(3) there will be no limitation period of two years in view of Section 6 of General Clauses Act, 1897 read with sub-section (4) of Section 49 of FEMA.

24. We have dealt with the above mentioned repeal and saving clause to highlight the application of Section 6 of the General Clauses Act, 1897 which provides that where an Act is repealed then unless a different intention appears, the repeal shall not affect any right or liability acquired or incurred under the repealed enactment or any legal proceeding initiated in respect of such right or liability and the legal proceedings may continue as if the repealing Act has not been passed. The saving clause thus aimed to preserve the legal effect and consequence of things done though those effects and consequences projected at the time when FERA was in force. The scope and ambit of such repeal and saving clauses have been considered by this Court in various decisions. Reference may be made to the decisions of this Court reported in *Anant Gopal Sheorey v. State of Bombay,* AIR 1958 SC 915, *Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh,* AIR 1953 SC 394, *State of Punjab v. Mohar Singh S/o Pratap Singh,* AIR 1955 SC 84, *T.S. Baliah v. T.S. Rangachari, ITO,* AIR 1969 SC 701; *Gajraj Singh & Ors. vs. State Transport*

A *Appellate Tribunal & Ors.* (1997) 1 SCC 650; *Gammon India Ltd. vs. Special Chief Secretary & Ors.* (2006) 3 SCC 354.

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 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 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

A 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
B 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.

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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
D 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.

30. The appeals stand disposed of accordingly.

N.J. Appeals disposed of.