HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

DIVISION BENCH: **HON'BLE MR. JUSTICE S. C. SHARMA &**
HON'BLE MR. JUSTICE ALOK VERMA

Writ Petition No.4144/2017

District Central Co-op. Bank Ltd., Raisen

Versus

Union of India

Mr. Ashish Goyal, learned counsel for the petitioner.
Ms. Veena Mandlik, learned counsel for the respondent.

O R D E R
(Delivered on this **09th October, 2017**)

As per S. C. Sharma, J:-

The petitioner before this Court, District Central Co-operative Bank Limited, District Raisen through its Manager, has filed present petition being aggrieved by order dated 23/12/2016 passed in M. A. No.79/IND/2016 assessment year 2010-11.

02- The facts of the case reveal that the assessee has filed an application under Section 254(2) of the Income Tax Act, 1961 stating that he was not able to attend the date of hearing in respect of his appeal preferred before the Tribunal as the authorized representative of the assessee was not well.

03- The facts of the case further reveal that in respect of assessee's appeal an *ex-parte order was passed on 25/08/2015* and a miscellaneous application was preferred under Section 254(2) of the Income Tax Act, 1961 on 23/08/2016. The same has been dismissed as it was preferred after expiry of six months on account of the fact that Section 254(2) provides for a

limitation of six months.

04- The undisputed fact reveals that at the time an *ex-parte order was passed in assessee's main appeal, the* limitation prescribed under Section 254(2) was four years and the assessee was under an expression as the limitation is four years his application under Section 254(2) of the Income Tax Act, 1961 was within limitation. To the assessee misfortune, Section 254(2) was amended w.e.f. 01/06/2016.

05- Section 254(2) of the Act of 1961 prior to the amendment reads as under:-

> **"254(2)** The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer:
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> Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard
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> [Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.]**"**

Section 254(2) of the Act of 1961 after amendment reads as under:-

> **"254(2)** The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer:
>
> Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard

> [Provided further that any application filed by the assessee in this sub-section on or after the 1st day of October, 1998, shall be accompanied by a fee of fifty rupees.]"

06- Meaning thereby, the period of limitation for which the assessee was entitled i.e. four years was curtailed to six months by virtue of the amendment in Section 254(2) of the Income Tax Act, which came into force w.e.f. 01/06/2016 and the existing right of the petitioner was extinguished.

07- The apex Court in the case of **M. P. Steel Corporation Vs. Commissioner of Central Excise** reported in **(2015) 7 SCC 58** has considered the issue relating to amendment in respect of limitation and has also taken into account the applicability of such statutes with retrospective effect. The Hon'ble Justice Rohinton Fali Nariman in the aforesaid landmark judgment in paragraphs No.53 to 62 has held as under:-

> "53. Shri A.K. Sanghi, learned senior counsel appearing on behalf of the revenue, has strongly contended before us that the present appeal must attract the limitation period as on the date of its filing. That being so, it is clear that the present appeal having been filed before CESTAT only on 23.5.2003, it is Section 128 post amendment that would apply and therefore the maximum period available to the appellant would be 60 plus 30 days. Even if time taken in the abortive proceedings is to be excluded, the appeal filed will be out of time being beyond the aforesaid period.
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> 54. It is settled law that periods of limitation are procedural in nature and would ordinarily be applied retrospectively. This, however, is subject to a rider. In New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840, this Court held:
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> > "5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well- established proposition that such a change of law operates retrospectively and the person has to go to the new

forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective."

55. In answering a question which arose under Section 110A of the Motor Vehicles Act, this Court held:

"7....."(1) Time for the purpose of filing the application under Section 110-A did not start running before the constitution of the tribunal. Time had started running for the filing of the suit but before it had expired the forum was changed. And for the purpose of the changed forum, time could not be deemed to have started running before a remedy of going to the new forum is made available.

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

56. This statement of the law was referred to with approval in Vinod Gurudas Raikar v. National Insurance Co. Ltd., (1991) 4 SCC 333 as follows:-

"7. It is true that the appellant earlier could file an application even more than six months after the expiry of the period of limitation, but can this be treated to be a right which the appellant had acquired. The answer is in the negative. The claim to compensation which the appellant was entitled to, by reason of the accident was certainly enforceable as a right. So far the period of limitation for commencing a legal proceeding is concerned, it is adjectival in nature, and has to be governed by the new Act – subject to two conditions. If under the repealing Act the remedy suddenly stands barred as a result of a shorter period of limitation, the same cannot be held to govern the case, otherwise the result will be to deprive the suitor of an accrued right. The second exception is where the new enactment leaves the

> claimant with such a short period for commencing the legal proceeding so as to make it unpractical for him to avail of the remedy. This principle has been followed by this Court in many cases and by way of illustration we would like to mention New India Insurance Co. Ltd. v.Smt Shanti Misra [(1975) 2 SCC 840 : (1976) 2 SCR 266] . The husband of the respondent in that case died in an accident in 1966. A period of two years was available to the respondent for instituting a suit for recovery of damages. In March, 1967 the Claims Tribunal under Section 110 of the Motor Vehicles Act, 1939 was constituted, barring the jurisdiction of the civil court and prescribed 60 days as the period of limitation. The respondent filed the application in July, 1967. It was held that not having filed a suit before March, 1967 the only remedy of the respondent was by way of an application before the Tribunal. So far the period of limitation was concerned, it was observed that a new law of limitation providing for a shorter period cannot certainly extinguish a vested right of action. In view of the change of the law it was held that the application could be filed within a reasonable time after the constitution of the Tribunal; and, that the time of about four months taken by the respondent in approaching the Tribunal after its constitution, could be held to be either reasonable time or the delay of about two months could be condoned under the proviso to Section 110- A(3)."

Both these judgments were referred to and followed in Union of India v. Harnam Singh, (1993) 2 SCC 162, see para 12.

57. The aforesaid principle is also contained in Section 30(a) of the Limitation Act, 1963.

> "30. Provision for suits, etc., for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908.—Notwithstanding anything contained in this Act,—
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> (a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of [seven years] next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:"

58. The reason for the said principle is not far to seek. Though periods of limitation, being procedural law, are to be applied retrospectively, yet if a shorter period of limitation is

provided by a later amendment to a statute, such period would render the vested right of action contained in the statute nugatory as such right of action would now become time barred under the amended provision.

59. This aspect of the matter is brought out rather well in Thirumalai Chemicals Ltd. v. Union of India, (2011) 6 SCC 739 as follows:

> "22. 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.
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> Substantive and procedural law
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> 23. Substantive law refers to a 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 is prospective unless it is expressly or by necessary implication made to have retrospective operation.
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> 24. 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 an 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.
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> 25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in Garikapati Veeraya v. N. Subbiah Choudhry [AIR 1957 SC 540] , New India

> Insurance Co. Ltd. v. Shanti Misra [(1975) 2 SCC 840], Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] , Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar [(1999) 8 SCC 16] and Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24] , has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that 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.
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> 26. 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 character, affects vested rights adversely is to be construed as prospective."

60. This judgment was strongly relied upon by Shri A.K. Sanghi for the proposition that the law in force on the date of the institution of an appeal, irrespective of the date of accrual of the cause of action for filing an appeal, will govern the period of limitation. Ordinarily, this may well be the case. As has been noticed above, periods of limitation being procedural in nature would apply retrospectively. On the facts in the judgment in the Thirumalai case, it was held that the repealed provision contained in the Foreign Exchange Regulation Act, namely, Section 52 would not apply to an appeal filed long after 1.6.2000 when the Foreign Exchange Management Act came into force, repealing the Foreign Exchange Regulation Act. It is significant to note that Section 52(2) of the repealed Act provided a period of limitation of 45 plus 45 days and no more whereas Section 19(2) of FEMA provided for 45 days with no cap thereafter provided sufficient cause to condone delay is shown. On facts, in that case, the appeal was held to be properly instituted under Section 19, which as has been stated earlier, had no cap to condonation of delay. It was, therefore, held that the Appellate Tribunal in that case could entertain the appeal even after the period of 90 days had expired provided sufficient cause for the delay was made out.

61. The present case stands on a slightly different footing. The abortive appeal had been filed against orders passed in March- April, 1992. The present appeal was filed under Section 128, which Section continues on the statute book till date. Before its amendment in 2001, it provided a maximum

period of 180 days within which an appeal could be filed. Time began to run on 3.4.1992 under Section 128 pre amendment when the appellant received the order of the Superintendent of Customs intimating it about an order passed by the Collector of Customs on 25.3.1992. Under Section 128 as it then stood a person aggrieved by a decision or order passed by a Superintendent of Customs could appeal to the Collector (Appeals) within three months from the date of communication to him of such decision or order. On the principles contained in Section 14 of the Limitation Act the time taken in prosecuting an abortive proceeding would have to be excluded as the appellant was prosecuting bona fide with due diligence the appeal before CEGAT which was allowed in its favour by CEGAT on 23.6.1998. The Department preferred an appeal against the said order sometime in the year 2000 which appeal was decided in their favour by this court only on 12.3.2003 by which CEGAT's order was set aside on the ground that CEGAT had no jurisdiction to entertain such appeal. The time taken from 12.3.2003 to 23.5.2003, on which date the present appeal was filed before the Commissioner (Appeals) would be within the period of 180 days provided by the pre amended Section 128, when added to the time taken between 3.4.1992 and 22.6.1992. The amended Section 128 has now reduced this period, with effect from 2001, to 60 days plus 30 days, which is 90 days. The order that is challenged in the present case was passed before 2001. The right of appeal within a period of 180 days (which includes the discretionary period of 90 days) from the date of the said order was a right which vested in the appellant. A shadow was cast by the abortive appeal from 1992 right upto 2003. This shadow was lifted when it became clear that the proceeding filed in1992 was a proceeding before the wrong forum. The vested right of appeal within the period of 180 days had not yet got over. Upon the lifting of the shadow, a certain residuary period within which a proper appeal could be filed still remained. That period would continue to be within the period of 180 days notwithstanding the amendment made in 2001 as otherwise the right to appeal itself would vanish given the shorter period of limitation provided by Section 128 after 2001.

62. We, therefore, set aside the order dated 25.2.2004 and remand the case to CESTAT for a decision on merits. The appeal is allowed in the aforesaid terms. There will be no order as to costs.We, therefore, set aside the order dated 25.2.2004 and remand the case to CESTAT for a decision on merits. The appeal is allowed in the aforesaid terms. There will be no order as to costs."

08- Keeping in view the judgment referred by their

lordships in the aforesaid case and the judgment delivered by their lordships in the **M.P. Steel Corporation (Supra)**, in the present case also the new law of limitation providing a shorter period cannot certainly extinguish a vested right of action.

09- The amendment has been made effective virtually in case of assessee with retrospective effect though the amendment does not show that it is applicable with retrospective effect, however, the existing right has been extinguished with retrospective effect in case of the assessee.

10- In the considered opinion of this Court, the legislature should have granted some time to the assessees who could have filed an appeal within a period of four years and the same has not been done till the amendment came into force extinguishing the right to file an appeal.

11- In the considered opinion of this Court, application preferred by the assessee should not have been dismissed by the Tribunal on account of the amendment which has reduced the period of limitation of four years to six months.

12- Resultantly, the impugned order passed by the respondent on 23/12/2016 is hereby quashed and the writ petition stands allowed. The Income Tax Appellate Tribunal is directed to decide the application preferred under Section 254(2) on merits within a period of three months from the date of receipt of certified copy of this order. The parties shall appear before the Tribunal on 30th of October, 2017.

Certified Copy as per rules.

(S. C. SHARMA) (ALOK VERMA)

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