(2009) 04 GUJ CK 0013

In the Gujarat High Court

Case No : S.C.A. No. 11121 of 2008

Backbone Projects Ltd. APPELLANT

Vs

Yogesh Bhavchandbhai Gadhiya and Others RESPONDENT

Date of Decision : 01-04-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(1)
Constitution of India, 1950 — Article 226
Payment of Gratuity Act, 1972 — Section 7(7)

Citation : (2010) 125 FLR 145 : (2009) 4 LLJ 783

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Dipak R. Dave, for the Appellant; Shashikant S. Gade, for the Respondent

Final Decision : Allowed

Judgement

K.M. Thaker, J.—Heard Mr. Dave, learned advocate for petitioner and Mr. Shashikant Gade, learned advocate for respondent No. 1.

2. Rule. Mr. Shashikant Gade, learned advocate waives service of notice of Rule on behalf of respondent No. 1. With the consent of the learned advocates appearing for the respective parties, the matter is taken up for final hearing and disposed of to-day.

3. In this petition, petitioner has brought under challenge order dated April 24, 2008 passed by appellate authority under the provisions of Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") and also the order dated April 30, 2007 passed by the competent authority under the Act.

4. By impugned order dated April 30, 2007, the controlling authority directed the petitioner herein to pay Rs. 52,836/- towards gratuity to the respondent in present petition with interest at the rate of 10% to be calculated from July 1, 2004. Aggrieved by the said order dated April 30, 2007, petitioner herein, though

belatedly, approached the appellate authority by way of an appeal and challenged the said order dated April 30, 2007. The appellate authority by order dated April 24, 2008 rejected the appeal only on the ground that the appeal was inordinately delayed and the appellate authority did not have power to condone the delay caused in filing the appeal. Aggrieved by the said order, the petitioner is before this Court.

5. It emerges from the record that the respondent herein upon being aggrieved due to inaction of the petitioner regarding his claim for gratuity, filed an application before the controlling authority and claimed the payment towards gratuity. The said application was registered as Gratuity Application No. 8/2007. After hearing the parties the controlling authority passed the impugned order dated April 30, 2007.

6. It is the case of the petitioner that due to, certain reasons beyond its control, the petitioner for quite sometime was not aware about the fact that such an order was passed by the Controlling authority and after it became aware about the order, some delay was caused in filing the, appeal, however the circumstances were beyond its control. The petitioner claims that it would have been possible for the petitioner to satisfy the appellate authority about the reasons and the justification in support of its request to, condone the delay if opportunity of hearing had been granted. However the appellate authority passed an order dated April 24, 2008 without affording any opportunity of hearing to the petitioner.

7. Shri Dave, learned advocate has raised a grievance against the order passed by the controlling authority and he tried to assail the said orders on various grounds including the contention that the respondent was guilty of fraud with the petitioner-company.

8. Shri Shashikant Gade, learned advocate has opposed the contention of the petitioner against the order passed by the controlling authority and also disputed the allegation about fraud. In view of the fact that the statute provides for statutory alternative remedy and in view of the fact that the petitioner has in fact tried to avail the alternative remedy, this Court is not inclined to enter into the disputes regarding the legality and propriety of the order passed by the controlling authority.

9. So far as the appeal is concerned, Shri Dave submitted that the impugned order dated April 24, 2008 has been passed without affording any opportunity of hearing to the petitioner and therefore the order is in violation of principles of natural justice. He also submitted that if the appellate authority had afforded opportunity of hearing, the petitioner could have explained the reasons for delay and justification for condonation of delay. He further submitted that before preferring the appeal the petitioner had filed review application and considering the time from the date of the order passed in review application, there would not be any delay. The said review application was, Shri Dave submitted, dismissed as

not maintainable by the controlling authority.

10. Shri Dave, in light of such position, submitted that considering the date of the order passed by the controlling authority and the provisions u/s 7(7) of the Act, the delay in preferring the appeal would come to around 9 to 10 months. He, therefore, submitted that in view of the provisions under the Act, the appellate authority would not be in a position to condone the said delay since such power of the appellate authority is circumscribed and the appellate authority can condone delay only for a period of another 60 days after expiry of limitation prescribed under the Act. He therefore, requested that considering the facts of the case, the Court may direct the authority to decide the appeal on merits.

11. In view of the facts which emerge from the record of the petition, there is no dispute about the fact that the petitioner herein has already filed an appeal against the order of the controlling authority and the said appeal has been dismissed on the ground that it was time barred. There is also no dispute about the fact that the delay of almost 9 to 10 months has occurred before the appeal came to be filed. Besides this, there is also no dispute about the fact that the petitioner herein has deposited the amount decreed by the controlling authority. The petitioner has, in the petition and subsequent rejoinder affidavit, mentioned certain reasons about the delay caused in filing the appeal. Considering the submissions made at the Bar by Shri Dave and the averments made in the application as well as rejoinder affidavit, prima facie case for condonation of delay has been made out. However, in view of the provisions under the Act, the appellate authority would not be in a position to condone delay for more than 60 days after the prescribed period of limitation. This Court has, in the judgment and order dated February 24, 2009 in Special Civil Application No. 8985/2008 held as follows:

In this regard reference can be made to the'' judgment of Hon''ble Division Bench in the case between D.R. Industries Ltd. and Anr. v. Union of India and Ors. (2008) 3 GLH 662 wherein Hon''ble Division Bench, while considering the provisions under Central Excise Act, 1944 wherein the appellate authority is conferred with power to condone delay for maximum thirty days after expiry of statutory period of sixty days for preferring appeal, has, in paragraph Nos. 18 and 19, observed and held that-

18. We, therefore, do not find any merit in any of the contentions raised on behalf of the petitioners for challenging the constitutional validity of the proviso to Sub-section (1) of Section 35 of the Central Excise Act, 1944 in so far as the Parliament has provided for the limitation period of 60 days for filing an appeal before the Commissioner (Appeals) and insofar the power to condone the delay 4 conferred on the Commissioner (Appeals) is only for a period of 30 days after expiry of the limitation period of 60 days.

19. As regards the contention that there may be extraordinary cases where

assessee may 4 not be in a position to challenge the order of the adjudicating authority before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order, we are of the view that in such extraordinary cases where an assessee can show extraordinary circumstances explaining the delay and also gross injustice done by the adjudicating authority, the assessee may invoke the writ jurisdiction of this Court. Hence, in cases where the assessees have suffered gross injustice and they could not file appeals before the Commissioner (Appeals) within a period of 90 days from the date 01 communication of the order-in-original on account of 1 circumstances beyond their control, such assessees can invoke the powers of this Court under Article 226 of the Constitution but, of course, not as a matter of right.

(18) Thus so far as the order of appellate authority is concerned, no fault with the said order can be found. The appellate authority could not have condoned delay beyond 60 days inasmuch as the authority''s power is circumscribed by the provisions of the statute.

(19) However, considering the facts and circumstances of the present case and upon being satisfied about the justification for condoning delay, more particularly in light of the fact that the petitioner has already paid Rs. 3,14,000/- towards gratuity and the dispute is only with regard to difference, this Court is of the view that the delay caused in preferring appeal deserves to be condoned but at the same time respondent ought to be compensated. The respondent has already paid an amount of Rs. 3,14,000/- toward gratuity....

(20) Under the circumstances, the order of the appellate authority is set aside on the condition that the petitioner shall pay Rs. 3,500/- towards cost to the respondent. Such an amount shall be paid to the respondent within 15 days. The petitioner shall also deposit as required by provision under the Act the decreetal amount with the controlling authority within 15 days....

12. Considering the aforesaid position and also considering the fact that if the petitioner fails in the appeal then the respondent shall get interest for the intervening period and appellate authority may also impose appropriate cost to compensate the delay. Upon taking into consideration the reasons urged by the petitioner, it is appropriate and justified that the delay caused in filing the appeal may be condoned and the petitioner may be afforded opportunity to prosecute the appeal on merits. This is subject to the petitioner paying appropriate costs, as per the appellate authority''s order, to the respondent, on this count. However, the amount of cost shall be determined by the appellate authority keeping in mind the aforesaid judgment and order of this Court in S.C.A. No. 8985/2008 wherein; direction/order as to cost is passed. It deserves to be mentioned that the reasons and justification urged by Shri Dave during the hearing and those mentioned in the petition and the rejoinder affidavit, have not been disputed by the respondent either in the reply affidavit or during the submissions.

13. Considering the facts and circumstances of the case, the delay caused in

preferring the appeal is hereby condoned.

The order dated April 24, 2008 passed by the appellate authority is set aside. The matter is remanded to the appellate authority for considering the petitioner''s appeal against the order dated April 30, 2007 passed by the controlling authority on merits after hearing the petitioner and the respondent herein. It is however, clarified that it would be open for the respondent to oppose the appeal on all grounds available in law including the objection on the point of delay so as to urge that challenge against the order is not justified or that if amounts to waiver etc., after such a long period. However it would not be open to the respondent to oppose the appeal on the ground that it is time barred as the same has been condoned by this Court.

14. With the aforesaid clarifications and directions, the petition is allowed to the aforesaid extent. Rule is made absolute to the aforesaid extent. Costs as per the order by appellate authority.

