
(2011) 03 GUJ CK 0169
In the Gujarat High Court
Case No : S.C.A. No. 83 2011 with 84 2011

Bharat Ukaji

APPELLANT

Vs

Arvind Mills Ltd.

RESPONDENT

Date of Decision : 04-03-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35(H), 35B, 35C, 35EE
Constitution of India, 1950 — Article 214, 226, 227
Industrial Disputes (Gujarat) Rules, 1966 — Rule 26A, 26A(1), 26A(2), 26B
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Payment of Gratuity Act, 1972 — Section 7(4), 7(6), 7(7)

Citation : (2012) 2 LLJ 47

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : U.T. Mishra, for the Appellant; DG Chauhan, for the Respondent

Final Decision : Dismissed

Judgement

Justice H.K. Rathod

1. Heard learned advocate Mr. U.T. Mishra for petitioner and learned advocate Mr. D.G. Chauhan for respondent in both petitions. Both petitions are having similar facts and petitioner in both petitions has challenged order passed by Industrial Court in Appeal (IC) NO.49 of 2008 and 50 of 2008 dated 8.9.2010 where appeal which was preferred by respondent Company has been allowed and order passed by Labour Court in Misc. Application Nos.214/2004 and 215/2004, dated 30.9.2008, Exh.8, has been set aside.

2. Brief facts of both petitions are that the service of workman-petitioner was terminated on 12.8.1991. Therefore, T. Application was preferred by workman which was withdrawn on 6.6.1996 by advocate of workman without consulting the petitioner. Therefore, application was made by workman before Labour Court for restoration of T. Application with a prayer to condone delay in filing such application for restoration. Therefore, by order dated 30.9.2008, Labour Court,

Ahmedabad has restored both T. Application which orders were challenged by respondent Company before Industrial Court in both Appeals which came to be allowed. Therefore, that orders are challenged in both petitions by petitioner-workmen.

3. It is necessary to note that T. Application No.512 of 1991 was preferred by Dahyabhai Maganbhai and T. Application No.451 of 1991 was preferred by Bharat Ukaji. Aforesaid T. Applications which were preferred by respective petitioner against termination which came to be withdrawn because of the fact that matter has been settled out side the Court between parties and therefore, such pursis was filed with signature of workman / advocate on 6.6.21996 and on 19.6.1996, accordingly, withdrawal application has been allowed by Labour Court and on 24.6.1996, a detailed order has been passed upon Exh.7 / Exh.16 by Labour Court, Ahmedabad granting permission to workman to withdraw T. application which was preferred by respective petitioner and then, after a period of 8 years, Misc. Application was filed by workman in the year 2004 with a prayer to condone the delay which was allowed by Labour Court on 30.9.2008. According to case of workman, this application was withdrawn by Union without consultation to workman and therefore, such withdrawal allowed in absence of workman is required to be set aside and main T. Application is required to be restored. For that before Labour Court, workman was examined and ultimately, Labour Court has considered original papers of T. Application filed by workman and after verifying original case papers and considering oral evidence of workman led in T. Application, Labour Court has come to conclusion that withdrawal pursis does bear signature of workman and therefore, Labour Court has set aside order of withdrawal and restored T. Application preferred by workman in both cases. Thereafter, Industrial Court in appeal come to conclusion considering delay of 8 years in tiling such application and also considering provisions of Section 118 (B) of BIR Act and in case if matter has been decided in absence of either party, then such ex-party order is required to be considered by Labour Court and in such circumstances, Labour Court can pass appropriate orders upon application which was made by concerned employee / employer. But Industrial Court has come to conclusion that such application is required to be filed within 30 days from date of receiving copy of such order passed by labour Court. Therefore, delay of 8 years not properly explained by workman and no sufficient cause has been shown by workman and there was no reason / rational has been justified by workman to remain 8 years without knowledge of such orders and come to conclusion that workman is not entitled benefit of condonation of delay of 8 years and therefore, order passed by Labour Court on 30.9.2008 has been set aside.

4. Learned advocate Mr. U.T. Mishra has raised almost same contentions before this Court that withdrawal pursis is not signed by workman but, it has been signed by advocate / Union representative and in fact, there was no settlement arrived between parties and therefore, restoration was rightly allowed while condoning delay of 8 years. He submitted that Industrial Court has committed

gross error in setting aside order passed by Labour Court dated 30.9.2008. He relied upon decision of Apex Court reported in AIR 1998 SC 1353 and decision of this Court rendered in SCA No.7774 of 1990 dated 4.5.2000 and also decision of Supreme Court reported in Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, and decision of this Court in SCA No. 11214 of 2008 dated 13.5.2009.

5. Learned advocate Mr. D.G. Chauhan appearing on behalf of respondent company submitted that once withdrawal pursis has been tiled by workman or his advocate or union representative and upon that, order has been passed by Labour Court allowing withdrawal of such application on the basis of settlement arrived at between parties, then Labour Court has no jurisdiction to restore T. Application because there is no such provision made under provisions of BIR Act, which permits workman to file such application for restoration of T. Application. He submitted that in case of ex-parte order passed by Labour Court / Industrial Court u/s 118 (B) of BIR Act, power is given to same Court to set aside ex-parte order if application is preferred within 30 days from knowledge of such order passed by Labour Court. He also raised contention that before Labour Court in restoration application, Union representative was not examined by workman and also advocate who signed such pursis also not examined and once withdrawal application is allowed by Labour Court, then, Labour Court is become functus officio and has no jurisdiction to allow such kind of application because for that there is no provision made in Section 118 (B) of BIR Act. He submitted that it is not the case of workman before Labour Court that it was a fraud committed by company with workman. He also submitted that in case if any mis-representation is made by advocate of workman, then they should have to take action against such Advocate or union representative. He submitted that Industrial Court has rightly examined issue on delay and no sufficient cause has been shown by workman for condonation of 8 years delay and there was no sufficient cause established by workman. Therefore. Industrial Court while deciding appeal in both cases has not committed any error which requires interference by this Court.

6. I have considered submissions made by both learned advocates and decisions which have been relied by learned advocate Mr. Mishra. Learned advocate Mr. Pradip Jhaveri has appeared on behalf of workman before Labour Court in both T. Applications and withdrawal application is also preferred by learned advocate Mr. Pradip Jhaveri and at that occasion, learned advocate Mr. R.P. Patel remained present before Labour Court on behalf of respondent company. The Labour Court while passing order on 30.9.2008 not decided main question as to whether 8 years has been sufficiently explained by workman or not and whether any sufficient cause has been established by workman or not. Merely withdrawal pursis is not signed by workman is not enough to restore T. Application. Therefore, this aspect has been properly dealt with by Industrial Court and Industrial Court has rightly come to conclusion that delay is not sufficiently explained and there is no sufficient cause is established by workman and such kind of application is required to be filed within 30 days which was not filed and

therefore, according to my opinion, once T. Application is withdrawn by workman or his advocate while filing withdrawal pursis before Labour Court and upon which, once Labour Court has allowed withdrawal, such order cannot consider to be ex-parte order passed by Labour Court. There is no contention raised by workman that such withdrawal pursis has been filed by advocate without his knowledge and while committing fraud with him. The delay of 8 years remained unexplained because observations made by Industrial Court is perfectly justified that there is no provision made in Section 118 (B) of BIR Act which permits Labour Court to condone delay beyond 30 days because there is no separate provision is made in Section 118 (B) of BIR Act, because in absence of provisions to condone the delay while considering application made u/s 118 (B) of BIR Act, Industrial Court has perfectly justified it for setting aside order passed by labour Court in both cases dated 30.9.2008. It is very difficult to believe that for a period of 8 years, the workman totally remained unaware about withdrawal of such application. The Industrial Court has given detailed reasons in support of its conclusion and according to my opinion, Industrial Court in both cases not committed any error which requires interference by this Court while exercising power under Article 227 of the Constitution of India. Therefore, contentions raised by learned advocate Mr. U.T. Mishra in both cases on behalf of workman, cannot be accepted and Industrial Court in both cases rightly decided appeal and also rightly allowed it while setting aside order passed by Labour Court dated 30.9.2008. Therefore, no interference is required by this Court while exercising power under Article 227 of the Constitution of India. This Court is having very limited jurisdiction and cannot act as an appellate authority. This view has been taken by Apex Court in case of Jai Singh & Ors. v. Municipal Corporation of Delhi and Anr. With Municipal Corporation of Delhi v. Sh. Jai Singh and Ors., LNIND 2010 SC 910 : (2011) 1 MLJ 153. Relevant para 25 of said judgment is quoted as under:

"25. Undoubtedly, the High Court has the power to reach injustice whenever, wherever found. The scope and ambit of Article 227 of the Constitution of India had been discussed in the case of M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., wherein it was observed as follows:

"The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this

article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

In our opinion, the High Court committed a serious error of jurisdiction in entertaining the writ petition filed by MCD under Article 227 of the Constitution of India in the peculiar circumstances of this case. The decision to exercise jurisdiction had to be taken in accordance with the accepted norms of care, caution, circumspection. The issue herein only related to a tenancy and subletting. There was no lis relating to the ownership of the land on which the superstructure or the demised premises had been constructed. The whole issue of ownership of plot of land No:2, Block-B, transport area of Jhandewalan Estate, Desh Bandhu Gupta Road, Karol Bagh, New Delhi is the subject matter of a civil suit being Suit No: 361 of 1980 in the High Court of Delhi. The High Court, therefore, ought not to have given any opinion on the question of ownership."

7.1. In *MA Azim v. Maharashtra State Road Transport Corporation*, LNIND 2010 AUG 392 : 2011-III-LLJ-367, it has been observed by Bombay High Court as under in para 11 and 12 at pp. 373 & 374 of LLJ:

"11. At this stage, it would be appropriate to refer to few important judgments of Hon"ble Supreme Court and this Court laying down therein the scope to entertain petition under of Article 226 and 227 of the Constitution of India. The Hon"ble Supreme Court in a case of *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, in para No. 30 held thus:-

30. The powers of judicial interference under Art. 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Art. 226 of the Constitution. Under Art. 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Art. 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

Yet in another case, in a case of *Surya Dev Rai Vs. Ram Chander Rai and Others*, the Hon"ble Supreme in its conclusion held:-v.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

And in a case of Babu Lal S/o. Navalmal Pipada v. Dropadbai W/o. Manohar Gore & Others, this Court has held thus:

One cannot be oblivious of the parameters required to be observed for the purpose of exercising supervisory jurisdiction under Article 227 of the Constitution of India. Unless it is demonstrated that the impugned judgment suffers from vice of perversity, arbitrariness or is rendered without considering material evidence or is rendered on the basis of no material interference with the finding of Courts/Tribunals is impermissible. The writ jurisdiction cannot be invoked for reappreciating of the evidence or for the purpose of rectification of minor errors committed by the Tribunals. Unless it is demonstrated that the view taken by the MRT is per se against the settled principles of law, it is difficult to interfere with the findings recorded by the Tribunals below.

12. Therefore, it is clear from the pronouncements of Supreme Court and this Court which are referred supra that the Writ Jurisdiction cannot be invoked for reappreciating the evidence or for the purpose of rectification a minor errors committed by the Tribunals. Supervisory jurisdiction under Article 227 cannot be invoked unless it is demonstrated that the impugned judgments suffers from the vice of perversity, arbitrariness or is rendered without considering material evidence or is rendered on the basis of no material evidence or is rendered on

the basis of no material, interference with the findings of Courts/Tribunals is impermissible. Therefore, in light of above, it is relevant to summarized here in below the findings recorded by the Labour Court on the basis of evidence brought on record by the parties."

7. In view of above discussion and observations made by Apex Court and Bombay High Court, according to my opinion, no error found apparent on face of record has been committed by Industrial Court (See: Gujarat Water Resources Development Corporation Ltd. v. Baldevji Mohanji Solanki reported in 2006 (2) GLH 472 LNIND 2006 GUJ 198 : 2006-IV-LU-908 (NOC) Gujarat High Court), wherein 4 years delay not condoned in filing petition before this Court and therefore it would not require any interference of this court in exercise of powers under Article 227 of Constitution of India. Therefore, contentions raised by learned advocate Mr. Mishra for petitioner cannot be accepted. The decisions which are relied on and referred in present case by learned advocate Mr. Mishra are not applicable to facts of present case. Same are, therefore, rejected.

8.1 The Section 118 (B) of BIR Act is quoted as under:

"118(B) (1) Where in any proceeding before the Industrial Court or a Labour Court, if either party in spite of notice of hearing having been duly served on it, does not appear when the matter is called on for hearing, the Court may either adjourn the hearing of the matter to a subsequent date or proceed ex-parte and make such award,

(2) where any award, order or decision is made ex-parte under sub-section (1) the aggrieved party may, within thirty days of the receipt of a copy thereof, make an application to the Court, to set aside such award, order or decisions. If the Industrial Court or Labour Court is satisfied that there was sufficient cause for non appearance of the aggrieved party, it may set aside the award, order or decision so made and \\ shall appoint a date for proceeding with the matter:

Provided that no award, order or decision shall be set aside on any such application as aforesaid, unless notice thereof has been served on the opposite party."

8.2 While considering provisions of Section 118 (B) of BIR Act, wherein there is no separate provision made which gives power to Labour Court and Industrial Court to condone delay, if restoration application is made beyond 30 days from date of receiving / knowledge of order under challenge. There, Labour Court / Industrial Court become functus officio after completion Of 30 days from receiving order and no power to condone delay or entertain such restoration application u/s 118 (B) of BIR Act from date of receiving copy of such order. The BIR Act being special State legislature. In Section 118 (B) of BIR Act, there is no provision to file application beyond 30 days as prescribed in statute. Rule 26A of Industrial Disputes Rules, 1966 provides similar situation to file application to set aside ex-parte order / award within 30 days from date of award / order is received by concerned party. But in which specific provision made to entertain

application if it is filed beyond period of 30 days and Labour Court / Industrial Tribunal has power to condone delay. But same provision is not made in Section 118 (B) of BIR Act. Rule 26(A) and (B) of Industrial Disputes Rules, 1966 are quoted as under:

"26(A) Setting aside *ex parte* Orders, Awards and Reports -(1) On an application made within thirty days from the date, knowledge of an *ex-parte* order, award or report by the party concerned, the Board, Court, Labour Court or Tribunal or Arbitrator may, for sufficient cause, set aside, after notice to the opposite party, such order, award or report as the case may be;

(2) The Board, Court, Labour Court or Tribunal or Arbitrator may, on sufficient cause being shown, extend the period referred to in Sub-Rule (1);

(3) An application under sub-rule(1) shall be supported by an affidavit.

26(B) Stay of operations of Awards: -The Labour Court, Tribunal or Arbitrator shall have the power to stay the operation of an award, conditionally or otherwise in appropriate cases, until the application for setting aside *ex-parte* orders is disposed off finally."

8.3 In other words, there is no provision in the Payment of Gratuity Act, 1972 u/s 7(7) where appeal is required to be filed within 60 days and further 60 days for condonation of delay. Means beyond 120 days appellate authority has no jurisdiction to condone further delay. That view is taken in case of *Pharma Base India Pvt. Ltd., Mumbai v. State of Maharashtra & Anr.*, reported in LNIND 2008 BOM 1070 : 2009-II-LLJ-458 (Bombay) (Division Bench). Similarly, in *Central Excise Act, 1944*, in case of *(Commissioner of Customs and Central Excise v. Hongo India Pvt. Ltd. & Anr)*, reported in 2009 5 SCC 791 : LNIND 2009 SC 696 wherein it is held that High Court has no power to condone delay beyond period specified in Section 35 (H) of Central Excise Act. Section 29(2) of Limitation Act, 1963 not applicable. Section 35 (H) of Central Excise Act is quoted is under:

" Section 35 (H) - Application to the High Court - (J) The Commissioner of Central Excise or the other part may, within one hundred and eighty days of the date upon which he is served with notice of an order u/s 35 (C) passed before the 1st day of July,2003 (not being an order relating, among other things, for the determination of any question having a relation to the rate of duty or excise or to the value of goods for purposes of assessment), by application in the prescribed form accompanied where application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.

(2) The Commissioner of Central Excise or the other party applying to the High Court under sub-section (1) shall clearly state the question of law which he seeks to be referred to the High Court and shall also specify the paragraph in the order of the Appellate Tribunal relevant to the question sought to be referred.

(3) On receipt of notice that the application has been made under sub-section

(1), the person against whom such application has been made, may, notwithstanding that he may not have filed such application, file, within forty five days of the receipt of the notice, a memorandum of cross objections verified in the prescribed manner against any part of the order in relation to which an application for reference has been made and such a memorandum shall be disposed by the High Court as if it were an application presented within the time specified in sub-section (1).

(3A) The High Court may admit an application or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (1) or sub-section (3), if it is satisfied that there was sufficient cause for not filing the same within that period.

(4) If, on an application made under sub-section (1), the High Court directs the appellate Tribunal to refer the question of law raised in the application, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such direction, draw up a statement of the case and refer it to the High Court."

8.4 Section 7(7) of the Payment of Gratuity Act, 1972 is relevant, therefore, quoted as under:

"7(7) Any person aggrieved by an order under sub-section(4) may, within sixty days from the date of receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that that appellate was prevented by sufficient cause from preferring the appeal within the said period or sixty days, extend the said period by a further period of 60 days:

[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellate either produces a certificate of the controlling authority to the effect that appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section(4), or deposits with the appellate authority such amount.]"

8.5 The Bombay High Court has taken similar view in case of Pharma Base India Pvt. Ltd., Mumbai v. State of Maharashtra & Anr., reported in (supra) (Bombay) (Division Bench). Relevant observations are in Para. 11 and 12 which are quoted as under:

"11. In the background of above legal provisions, now let us consider the facts of the present case. There is no dispute of the fact that the petitioner received copy of the order of controlling authority on October, 27, 2006. There is also no dispute that petitioner applied for the certified copy and received the same on November 10, 2006. In view of the provisions of subsection 6 of Section 7, limitation would start to run from the date of receipt of the order and in this case limitation would start from October 27, 2007. We do not find any substances in

the contention of the learned counsel appearing for the petitioner that limitation would start to run from the date of receipt of the certified copy. The petitioner from October 27, 2006 to November 10, 2006 did not apply for certified copy. For the first time the certified copy was applied on November 10, 2006 and the same was delivered to him on the same day. Therefore, at the most one day can be excluded which required to obtain certified copy while computing of period of limitation of either 60 days or further extended period of 60 days. The petitioner sent appeal by speed post which was received by the office of the appellate authority on December 13, 2006. However, alongwith this appeal, petitioner neither produced the certificate of the controlling authority to the effect that they have deposited with them an amount equal to the gratuity required to be deposited under sub- section 4 of Section 7 nor deposited such amount with the appellate authority. In our view, if the petitioner wanted to challenge the order of controlling authority, in that case, he was duty bound to produce the certificate or deposit the amount as the case may be, at the time of preferring an appeal. Though the above dates show that the petitioners preferred an appeal within a period of 120 days, mandatory deposit as contemplated under second proviso of Section 7(7) was not made within a period of 120 days. There is no dispute that this deposit was made by the petitioner on March 12, 2007. Precondition of deposit at the time of preferring an Appeal being mandatory, we are of the view that it is to be presumed that the petitioner filed Appeal only on March 12, 2007.

12. Since the petitioner received copy of order of the controlling authority on October 27, 2006, his appeal is beyond the period of 120 days, even if it granted the benefit of exclusion of time required for obtaining certified copies. The issue before the Division Bench in *J.L. Morrison India Ltd. v. Deputy Commissioner of Labour and Others* (supra) was whether the Appellate Authority under the Payment of Gratuity Act, 1972 can entertain the Appeal beyond 120 days from the date of receipt of the order? After examining several judgments including that of Apex Court, Division Bench concluded that the Appellate Authority under the said Act cannot entertain the Appeal beyond 120 days from the date of receipt of the order. The Division Bench also held that Section 5 of the Limitation Act would have no application, in this regard. In the facts and circumstances mentioned above, we are of the clear view that the appellate authority as well as the learned Single Judge of this Court rightly upheld the respondent No.2's preliminary objection regarding maintainability of the Appeal and there is no reason to interfere in the said findings."

8.6 The Apex Court has taken similar view in case of *Central Excise Act, 1944*, in case of *Commissioner of Customs and Central Excise v. Hongo India Pvt. Ltd. & Anr.*, reported in (supra). Relevant observations are in Para. 10 to 15 which are quoted as under:

"10. Admittedly in all these matters, the Commissioner of Customs & Central Excise approached the High Court by way of reference application beyond the prescribed period of 180 days. The High Court of Allahabad, with reference to the

scheme of the Act and in the absence of specific provision for applying Section 5 of the Limitation Act, took note of other provisions i.e., Sections 35, 35 B and 35EE, which enable the other authorities to condone the delay if sufficient cause was shown, accordingly, dismissed the reference application filed by the Commissioner of Central Excise on the ground of limitation.

11. Now let us consider whether Section 5 of the Limitation Act is applicable in respect of reference application filed in the High Court u/s 35 H of the unamended Act.

12. Mr. Parag P. Tripathi, learned Additional Solicitor General, appearing for the appellant contended that in view of the fact that the High Court has all inherent and plenary power, is competent to consider the delay even after the prescribed period under the Act. He further contended that in the absence of specific prohibition in the Act for condoning delay particularly in Section 35 H in lieu of Section 29(2) of the Limitation Act, Section 5 of the Limitation Act is applicable and the High Court ought to have exercised its power by condoning the delay. He initially contended that since Section 35 H speaks about the substantial question of public importance, even the delay, if any, has to be condoned.

13. On the other hand, learned counsel appearing for the respondents supporting the stand taken by the High Court submitted that the Central Excise Act is a self-contained Act and a Code by itself and in the absence of specific provision enabling the High Court to exercise its power by condoning the delay, the High Court is justified in refusing to entertain the reference application of the Excise Department filed beyond the prescribed period. He also contended that in the light of the scheme of the Act and of the fact that sufficient period, i.e., 180 days, has been provided for the Commissioner as well as the other party for making reference to the High Court, the legislative intent has to be respected.

14. Article 214 of the Constitution of India makes it clear that there shall be a High Court for each State and Art. 215 states that every High Court shall be a court of record and shall have all the powers including the power to punish for contempt of itself. Though we have adverted to Section 35 H in the earlier part of our order, it is better to extract sub-section (1) which is relevant and we are concerned with in these appeals:

"35H. Application to High Court - (I) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order u/s 35 C passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal."

Except providing a period of 180 days for filing reference application to the High

Court, there is no other clause for condoning the delay if reference is made beyond the said prescribed period.

15. We have already pointed out that in the case of appeal to the Commissioner, Section 35 provides 60 days time and in addition to the same, Commissioner has power to condone the delay up to 30 days, if sufficient cause is shown. Likewise, Section 35 B provides 90 days time for filing appeal to the Appellate Tribunal and sub-section (5) therein enables the Appellate Tribunal to condone the delay irrespective of the number of days, if sufficient cause is shown. Likewise, Section 35 EE which provides 90 days time for filing revision by the Central Government and, proviso to the same enables the revisional authority to condone the delay for a further period of 90 days, if sufficient cause is shown, whereas in the case of appeal to the High Court u/s 35 G and reference to the High Court u/s 35 H of the Act, total period of 180 days has been provided for availing the remedy of appeal and the reference. However, there is no further clause empowering the High Court to condone the delay after the period of 180 days."

8.7 This Court has also decided similar aspect in case of Indian Red-Cross Society v. Vidyaben H. Vyas, reported in LNIND 2003 GUJ 357 : 2004-I-LLJ-802 (Guj). Relevant observations of aforesaid decision are in Para. 15, 16 and 17, which are quoted as underatpp.812, 813 & 814 of LLJ:

"15. Whether appeal before the appellate authority under the Payment of Gratuity Act, 1972 is competent after the total period of 120 days is over from the date of order passed by the controlling authority u/s 7 sub- Section 7 of the Act. Whether Limitation Act is applicable to the proceedings before the appellate authority under the Act. This question has been examined by the Andhra Pradesh High Court in the case of Warangal District Co-operative Society Ltd. v. Appellate Authority Under Payment of Gratuity Act, " 1972 and Others 2002-III-LLJ-616. The relevant discussion made in paragraphs 10 and 11 are quoted as under at pp. 618 & 619:

10.Sovereign Legislature (Parliament) is competent to create such legal fictitious as the one created u/s 29(2) of the Limitation Act and also competent to prescribe the limitation of such fictions.

11. However, the difficulty in this case is that the limitation prescribed under the Payment of Gratuity Act, once again an enactment made by Parliament is only 60 days for the purpose of preferring an appeal. Under the proviso to Section 7, sub-section (7), the appellate authority is empowered to "extend the period" of limitation by another sixty days. In other words, the appellate authority is empowered to condone the delay to upper limit of another sixty cays beyond the prescribed period of limitation. No doubt, the Payment of Gratuity Act does not expressly exclude the operation of the Limitation Act, but the fact remains that the Payment of Gratuity Act is of the year 1972 where the Limitation Act is of the year 1963. The settled principle of interpretation of statutes is that if there are two mandates by the Sovereign Legislature, the later of the two shall prevail.

Therefore, the fact that there was no express exclusion of Section 5 of the limitation under the Payment of Gratuity Act makes no difference while construing the scope of the power of the appellate authority constituted under the Payment of Gratuity Act, to condone the delay in preferring the appeals, the legal position enunciated by the supreme Court in *Shantilal M. Bhayani v. Shanti Bai* (supra), in my view, must be understood in the context of the Limitation Act, 1963, and the special period of limitation, prescribed in any other special or local law prior to the date of the enactment of the Limitation Act. It is worthwhile mentioning that the Tamil Nadu Buildings (Lease and Rent Control) Act, which is the subject matter of the issue before the Supreme Court in the above case was of the year 1960.

16. The question is whether u/s 7 sub- Section 7 of the Act without depositing the amount as ordered by the controlling authority whether appeal can be maintainable before the appellate authority under the Payment of Gratuity Act, 1972 or not. This question is also examined by the Madras High Court in the case of *Special Officer, Special officer, Kanniyakumari District Co-operative Printing Works Ltd., Thuckalay v. Appellate Authority under Payment of Gratuity Act, Tirunelveli and Others*, 2001-1-LLJ-1078. The relevant discussion made in paragraph 2 is quoted as under at pp. 1079 & 1080:

After hearing learned counsel for both sides, I am of the view that the writ petition deserves to be dismissed for the reasons stated hereunder. Second proviso to sub-section (7) of Section 7 of the Act reads as under:

"Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of receipt of order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal..."

A reading of the second proviso makes it clear that in order to entertain an appeal by an employer under the said provision, the deposit of the amount ordered by the Controlling Authority is mandatory, sub-section (7) stipulates that any person aggrieved by an order made u/s 4 can prefer the appeal within 60 days and the first proviso to sub-section (7) provides for further period of 60 days within which if the appeal had been tiled with sufficient explanation for not preferring the appeal within the first period of 60 days, the appeal could be entertained. But in either case, if the deposit of the amount ordered by the Controlling Authority is not made as provided under the second proviso to sub-section (7) or the first proviso to the sub-section, there would be no scope for the first respondent to entertain the appeal. Admittedly, the petitioner has not

deposited the amount ordered by the Controlling Authority within the said period of 120 days as provided under sub-section (7). On the other hand, it is established beyond doubt that the deposit was made nearly one year and seven months after the date of receipt of the order of the Controlling Authority. The first respondent therefore rightly rejected the appeal on that sole ground that the appeal had been filed beyond the period prescribed under the provisions of the Act. When the appeal was not filed in the manner in which it ought to have been filed, it cannot be held that even if the memorandum of appeal grounds had been filed within the stipulated time without necessary deposit to be made under the second proviso to Section 7(7), the appeal was filed within time. When statute has prescribed a specific period and also made it mandatory for the party intending to prefer an appeal against the order of the Controlling Authority that along with the appeal the proof for deposit of the amount ordered by the Controlling Authority should be enclosed, it is incumbent on the party concerned to comply with the said provision in letter and spirit in order to make him eligible to be heard by the Appellate Authority. When the petitioner failed to comply with the mandatory provision, he cannot be heard to complain against the action of the statutory authority functioning under the Act. In such circumstances, the order of the first respondent in rejecting the appeal which was admittedly not filed in the manner prescribed under the relevant provision, there is no scope for interfering with the said order of the first respondent. Therefore the writ petition fails and the same is dismissed. Same question has been examined by Madras High Court again in the case of Management of Christian Medical College And Hospital v. Deputy Commissioner of Labour (Appeals) And Another, 2001-I-LLJ-1674. The relevant discussion made in paragraphs 10 and 11 is quoted as under at p. 1677:

10. The interpretation sought to be placed on the second proviso to Section 7(7) if it is to be sustained as contended by counsel for the writ petitioner, the same will defeat the very object of the statutory provision. Identical provisions had been repeatedly upheld and in this case there is no challenge to the Constitutional validity of the proviso. There is no basis or justification or reason to restrict the meaning of the expression "amount of gratuity required to be deposited under sub-section(4)" of Section 7 to sub-section (4)(a) alone. Such a construction will defeat the very object of the enactment, a social legislation.

11. If the Legislature intended to restrict the pre-deposit to clause (a) of sub-section (4) of Section 7, then it would have been provided that the required amount to be deposited under clause (a) of sub-section (4). This is not the statutory provision. Further, if such a contention is to be accepted, the object of legislation, which has provided for a mandatory provision to deposit the amount, as determined by the controlling authority before filing an appeal, would be defeated. The intention and object of the legislation is also very clear and the second proviso has been introduced with the object of making pre-deposit of the amount determined by the controlling authority as pre-requisite under sub-section (7) of Section 7.

Further, in terms of clause (a) of sub section (4) of Section 7 the deposit is a voluntary deposit by the employer at the threshold, where the employer comes forward with a deposit. Such is not the contingency provided for in respect of other clauses in sub-section (4) of Section 7 of the Act.

17. The Division Bench of Calcutta High Court, Andhra Pradesh High Court and Madras High Court has come to the conclusion that limitation is not applicable to the appellate authority being an executive authority vested with quasi-judicial powers and therefore Section 5 to 25 of the Limitation Act do not apply to the persona designata or administrative authorities. There are further provisions made in Section 7 sub-section (7) that no appeal by an employer shall be admitted unless at the time of preferring an appeal, the appellant either produces certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposited with the appellate authority such amount. Undisputedly, the said proviso of Section 7 sub-section (7) has not been complied with by the petitioner at the time of filing the appeal before the appellate authority. Therefore, considering this entire aspect of the matter and contentions which have been raised by learned advocate Mr. K.M. Thakkar on behalf of the petitioner-Society cannot be accepted and, looking to the statutory provisions made under the Act, which have not been fulfilled by the petitioner-Society and, in view of the observations made by the Apex Court in case of State of Punjab (supra) establishment is not having limited meaning it has wide meaning as interpreted by the Apex Court. It includes non-commercial establishments also. Therefore, after considering these observations made by the Apex Court as well as the Division Bench of the Calcutta High Court and the decision of the Division Bench of this Court which apparently is not applicable to the facts of the present case which is not related to the subject matter of gratuity and, therefore, according to my opinion, the controlling authority had not committed any error. There is no procedural irregularity committed by either of the authorities including the appellate authority. On the contrary both the authorities have acted within the jurisdiction and with the provisions of the Payment of Gratuity Act, 1972. There is no procedural irregularity committed by either of the authorities. The reasons given by both the authorities are based on oral as well as documentary evidence produced before them. The finding given by both the authorities is not baseless and perverse. There is no error of law committed by both the controlling authorities."

8.8 Therefore, BIR Act, 1946 being special statute, there is no provision made in Section 118 (B) to entertain application beyond prescribed period of 30 days. Then Section 5 and 29 (2) of Limitation Act, 1963 not applicable. Sections 5 and 29 (2) of the Limitation Act are quoted as under:

" 5. Extension of prescribed period in certain cases:-

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be

admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

29(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

8.9 Hence, Labour Court has condoned delay of 8 years without jurisdiction and contrary to provisions of Section 118 (B) which has been rightly set aside by the Industrial Court in appeal. For that, no error is committed by Industrial Court.

8.10 There is no provision which can give power to Labour Court / Industrial Court to interfere in withdrawal order passed by it. This order passed in presence of advocate of petitioner. Therefore, it cannot be considered to be ex-parte order, so Section 118 (B) of BIR Act is not applicable. Even though Labour Court has committed gross error which has been rightly corrected. For that, no error is committed by Industrial Court, Ahmedabad. Hence, there is no substance in both petitions and same are required to be dismissed. Accordingly, both petitions are dismissed. No costs.