
(2004) 12 CAL CK 0032

In the Calcutta High Court

Case No : GA No's. 1150 and 2054 of 2004 and CEXA No's. 2 and 8 of 2004

Commissioner of C. Ex.

APPELLANT

Vs

Saktigarh Textile Industries Pvt. Ltd.

RESPONDENT

Date of Decision : 16-12-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Central Excises and Salt Act, 1944 — Section 35(1), 35G, 35G(1), 35G(3), 35H
Civil Procedure Code, 1908 (CPC) — Section 151
Customs Act, 1962 — Section 130(3)
Finance Act, 1999 — Section 35H
Foreign Exchange Management Act, 1999 — Section 35
Foreign Exchange Regulation Act, 1973 — Section 54
Income Tax Act, 1961 — Section 256, 256(2)
Limitation Act, 1908 — Section 5, 5(9)
Limitation Act, 1963 — Section 24, 29(2), 3, 4, 5
Representation of the People Act, 1951 — Section 117, 81, 82, 86
Wealth Tax Act, 1957 — Section 27(2), 35H

Citation : (2005) 188 ELT 8

Hon'ble Judges : R.N. Sinha, J;D.K. Seth, J

Bench : Division Bench

Advocate : Shibdas Banerjee, I.P. Mukherjee and Kalyan Bandopadhyay, for the Appellant;R.K. Dutta, N.K. Chowdhury, Samir Chakraborty and Abhijit Biswas, for the Respondent

Judgement

D.K. Seth, J.—The point raised : Mr. Dutta, learned Counsel for the respondent, has raised a very interesting point on a question of law as to the applicability of Section 5 of the Limitation Act in order to assail the maintainability of the application for condonation of delay in filing the reference.

1.1 He drew our attention to Section 35H of the Central Excise Act, 1944 and points out that this Section 35H was inserted by Finance Act, 1999 replacing the earlier provisions where the period of limitation was less than the period of limitation provided in the amended provision. According to him, the legislature had intended that this extension of period of limitation has to be construed to be

the ultimate period of limitation without any application of Section 5 of the Limitation Act. According to him, when the legislature omitted to provide any power to condone the delay, in that event the provision is to be construed to have impliedly excluded the application of the Limitation Act, as contemplated in Section 29(2) of the Limitation Act.

1.2 He had also pointed out that the jurisdiction conferred on the High Court u/s 35H is an advisory jurisdiction which is neither appellate nor original. Therefore, High Court does not exercise its jurisdiction as a civil court while dealing with reference u/s 35H. If the High Court is not a civil court, in that event, the provisions of the Limitation Act would not apply unless it is specifically made applicable to it. He had further contended that from the scheme of the provisions incorporated through amendments, as it stands today, does not empower the Court to condone the delay in the absence of conferment of specific power in this regard on the High Court u/s 35H which is a special jurisdiction without the trappings of a Civil Court.

1.3 Mr. Dutta had relied on various decisions in support of his contention to which we shall be referring to at appropriate stage.

The point opposed :

2. Mr. Banerjee, learned Counsel, on the other hand, appearing on behalf of the appellant, points out that even though the High Court might exercise advisory jurisdiction u/s 35H but still then it is the High Court which exercise such special jurisdiction. The legislature had chosen a forum. Unless expressly provided in the legislation, it cannot take away the jurisdiction of the High Court, which exists in it. Since in a reference jurisdiction, the High Court has a special kind of jurisdiction of advisory one, it cannot assume the jurisdiction of a civil court and it was so held in various decisions, as rightly contended by Mr. Dutta. But still then its characteristics as a Court cannot be changed by a statutory enactment unless this particular power to condone the delay, which a Court can exercise is taken away by express provision in terms of Section 29(2) of the Limitation Act.

2.1 He also compares Section 35G, the provisions of appeal, where the Court by reason of Sub-section (9) thereof is a High Court within the meaning of the CPC (CPC) so far as it relates to appeals. Section 35H following Section 35G had adopted the identical period of limitation but did not expressly or impliedly excluded the jurisdiction of the High Court in respect of Sections 4 to 24 of the Limitation Act. If it had a different intention, in that event, it would have provided such provision which has since been provided in other enactments where the period of limitation is limited for being condoned on account of delay to a particular extent and not thereafter. The application of Section 29(2) cannot be excluded unless express provision is provided or unless the intention of the legislature is available by implication.

2.2 Mr. Banerjee has also relied on various decisions in support of his contention and distinguished the decisions cited by Mr. Dutta. He has also adopted the

submission of Mr. Samir Chakraborty, learned Counsel, though appearing for the respondent, has in his usual fairness, cited those decisions on which Mr. Banerjee has relied upon. We shall deal with those decisions at appropriate stage.

The fair stand :

3. Mr. Chakraborty, learned Counsel appearing for the respondents in the other appeal, in his usual fairness has attempted to place the correct proposition of law without mincing words and had supported Mr. Banerjee that the High Court has power to condone the delay. He has relied on some decisions to which we shall be referring to at appropriate stage. Reply to support the point raised :

4. Mr. Dutta, in his reply, had pointed out that it has been already held by various decisions including one of this Court by a learned Single Judge in which one of us (D.K. Seth, J.) was a party, to contend that when the High Court has no power to grant stay while exercising jurisdiction of reference, how could it assume the jurisdiction to condone the delay u/s 5 of the Limitation Act. According to him, the High Court cannot exercise the jurisdiction of a civil court while dealing with reference since it is denude of the inherent power contemplated u/s 151 of the CPC. In these circumstances, according to him, the application for condonation of delay is not maintainable.

Finance Bill 1999 : Statement of reasons and object: Nothing indicated :

5. In order to ascertain the intention of the legislature in the process of amendment of Section 35H through the Finance Act, 1999, we had looked into the Finance Bill, 1999 which does not indicate any reason for such amendment which would lead us to hold that the legislature had intended to circumscribe the limitation to an extent to denude the High Court of its power to condone the delay which is otherwise available by reason of the provisions of Section 4 to 24 of the Limitation Act, as contemplated u/s 29(2) thereof. So far as the Finance Bill, 2003 is concerned, it would not be of any relevance since it has not brought about any material change in Section 35H except replacing a particular date. Be that as it may, this Finance Bill, 2003 had also not indicated anything with regard thereto. Thus, it is not possible to ascertain from the statement of reasons and objects of the Finance Bill, 1999 the reason for amendment of Section 35H extending the period of limitation to 180 days.

5.1 In these circumstances, this question has to be dealt with on the basis of the provisions contained in the Central Excise Act, particularly, Section 35H and the Limitation Act having reference to the scheme of the Central Excise Act.

High Court: Reference : Extent of jurisdiction :

6. The first question which we need to ascertain is as to whether the High Court is a civil court when it exercises its jurisdiction in reference u/s 35H. This question had cropped up in many a case before the High Courts and the Supreme Court in relation to the jurisdiction of reference provided in various enactments which are identical with those of Section 35H. The jurisdiction of the

High Court while dealing with the reference in any of the enactments including Section 35H of the Central Excise Act is advisory in nature. It only answers the question of law referred to it. It does not decide the case, which remains to be decided by the Tribunal according to the answer given by the High Court on the question of law referred to it. Thus, the reference jurisdiction is confined only to the giving of advice and it does not stretch to anything else. Thus, the High Court does not exercise its normal jurisdiction, which is otherwise available in it. It has also been held that while exercising jurisdiction in reference, the High Court cannot exercise its inherent power. It was so held in the decision by the learned Single Judge in *Anoop Kumar Vs. Commissioner of Cus. (Prev.)*, that the High Court cannot grant stay while exercising jurisdiction in reference. The proposition is well settled. We had occasion to deal with this question in *C/T, W.B. v. Ruby Traders - ITR 78 of 1995* disposed of by us on 17th September 2004 and *Lalit Mohan Thapar v. CWT (Cal.) -GA No. 835 of 2002. AWT No. 3730 of 1998* disposed of on 23rd July 2004, *CIT, Kolkata v. Tata Tea Ltd. - ITA No. 233 of 2002* disposed of on 17th June 2004 by us, discussing various decisions of the other High Courts and the Apex Court and relying thereupon, we had held that the High Court cannot exercise inherent jurisdiction while dealing with a reference. But still then it is a Court and can exercise such powers ancillary to the exercise of jurisdiction under reference.

6.1 When a forum is selected in an enactment and no procedure is prescribed, especially for the forum, in that event, the forum is supposed to exercise such jurisdiction, which is normally exercised by it. By reason of selection of a forum, the characteristics of the forum cannot be altered or changed; the forum retains its characteristics. If no procedure is prescribed, it is entitled to follow its own procedure or it may prescribe its procedure itself for such purpose. Therefore, such forum will retain its characteristics. It is only the jurisdiction conferred upon it that is detailed and circumscribed and is confined within the jurisdiction conferred upon it. Because, it is so on account of express exclusion of other jurisdiction exercised by the forum and confining the jurisdiction within the scope and ambit that is specifically conferred upon it. When such special jurisdiction is conferred, the same has to be looked into and it has to be found out whether by reason of such conferring of jurisdiction through the enactment the statute has provided expressly or by implication the exclusion of a particular kind of jurisdiction exercisable by such forum. Thus, in our view, the High Court remains a Court within the meaning of civil court, as understood under the provisions of the Limitation Act, though its jurisdiction may be circumscribed only to an advisory nature. It would remain the High Court and would not be converted into a Tribunal. So long the High Court retains its characteristics of a Court, the application of Section 5 of the Limitation Act cannot be excluded unless the statute expressly or by implication excludes the application of Section 29(2) of the Limitation Act.

Whether application of Section 29(2) Limitation Act is excluded :

7. For these reasons, we are now called upon to look into the statute itself to ascertain the extent of the exclusion of the application of Section 29(2) of the Limitation Act in respect of its jurisdiction exercisable u/s 35H of the Central Excise Act. While examining the same, we may examine the scheme of the Act itself. In Section 35H while providing for appeal, same period of limitation has been provided for. Nowhere it has been expressly or impliedly excluded the application of Section 29(2) of the Limitation Act, so far as Section 35G of the Central Excise Act is concerned. On the other hand, by reason of Sub-section (9) of Section 35G of the Central Excise Act, the CPC applies as far as it is applicable to appeal before the High Court. This might be said to be a distinctive feature for distinguishing Section 35G from Section 35H. But then it may also be remembered that Section 35H follows Section 35G and uses identical expression with regard to limitation in Sub-section (1) as those of Sub-section (1) of Section 35G and speaks nothing else. If by reason of the express provision provided in Sub-section (9) when power u/s 35G is exercised by the High Court as a civil court and attracts the application of Section 29(2), then unless there is something expressly or impliedly in Sub-section (1) of Section 35H, the application of Section 29(2) cannot be said to be excluded when it is held to be a Court.

7.1 The answer is to be found out from the four corners of Sub-section (1) of Section 35G. At the same time, we may compare similar provisions in the statute dealing with Revenue Laws operating in the Revenue field.

7.2 Section 54 of the Foreign Exchange Regulation Act, 1973 while providing for appeal to the High Court prescribed that an appeal should not be entertained if filed after the expiry of the stipulated date unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the time stipulated. This provision has since been replaced by Section 35 of the Foreign Exchange Management Act, 1999 (FEMA, 1999) repealing the 1973 Act. While providing the time limit for filing the appeal to the High Court in Section 35, it is provided that the High Court if satisfied that the appellant was prevented by sufficient cause from filing the appeal within the time stipulated may allow it to be filed within a further period not exceeding 60 days. The expression used in Section 35 clearly indicates a special provision of limitation condonable for a further period of 60 days and not beyond.

7.3 Section 256(2) of the Income Tax Act prescribes limitation of six months from refusal by the Appellate Tribunal to make a reference to the High Court for applying to the High Court for reference and leaves the question at that. As such Section 29(2) of the Limitation Act is attracted.

7.4 Section 130(3) of the Customs Act, 1962 provides six months' limitation from service of notice of refusal by the Appellate Tribunal to refer for applying to the High Court for reference. This has since been substituted by Section 112 of Act 27 of 1999 with effect from 11th May 1999 by stipulating the period of 180 days from the date of the order instead of routing the same through the Tribunal

and leaves the question at that. The substitution of 180 days in place of 60 days and six months i.e. 240 (appx.) days is nothing novel. It only recognizes the six months provided in Section 130A prior to its substitution by Act 27 of 1999 as 180 days. Thus, it does not introduce something new, which can be construed to mean that the period was extended from 60 to 180 days in order to preclude application of Section 5 of the Limitation Act.

7.5 Section 35G(1) of the Central Excise Act, as it stood before 1999, provided for reference to the High Court through the Appellate Authority within 60 days extendable upon sufficient cause being shown to a further period not extending 30 days. u/s 35G(3) if appellate authority refused to state the case on an application u/s 35G(1), reference could be applied to the High Court within 6 months from the date on which the notice of refusal was served. While substituting Section 35G by Section 35H of the Central Excise Act with effect from 11th of May 1999 by Section 128 of Act 27 of 1999, the time for making an application to the High Court for reference is stipulated at 180 days. If we take the total period of 60 days of Sub-section (1) and 6 months of Sub-section (3) of Section 35G prior to amendment, the period would be 240 (appx.) days, whereas while substituting Section 35G by Section 35H, the period has been reduced to 180 days for applying for reference to the High Court without being routed through the Appellate Tribunal. Thus, the period has not been enhanced but reduced. In the absence of any express or implied provision, it cannot be said that Section 29(2) of the Limitation Act could be construed to be excluded when it was not so excluded in respect of Section 35G(3) prior to its substitution by Section 35H.

7.6 The above comparative study clearly indicates that where the legislature, as in the case of FEMA 1999, intended to limit the power of condonation of delay, had clearly indicated so, particularly, the period up to which it can be condoned. But the most significant part of it is that the power to condone the delay has not altogether been taken away, though limited to a particular period. Thus, in the absence of any clear or express provision or intendment by implication the application of Section 29(2) of the Limitation Act in relation to Section 35H of the Central Excise Act cannot be excluded.

7.7 In order to hold that the legislature had intended to exclude the application of Section 29(2) of the Limitation Act by implication, it has to be ascertained from the scheme of the Act itself. When both Sections 35G and 35H are preceding and following each other with identical expressions with regard to limitation, it cannot be interpreted differently for Section 35G than that of Section 35H. If it had not excluded in Section 35G, then we cannot presume that the legislature had intended to exclude the same in Section 35H. We may refer to Section 35 of the Foreign Exchange Management Act where the condonation was confined only to a special period and not thereafter as provided in the section itself which by implication exclude the application of Section 29(2).

7.8 The provisions for reference had all along been in the statute. Though the

same is replaced by Section 35H, in the absence of any express provision the application of Section 29(2) of the Limitation Act cannot be excluded when the same was applicable in a reference under the provisions since substituted by Section 35G. The mere extension of the period of limitation in the substituted Section 35H cannot be presumed to be an intention to impliedly exclude the application of Section 29(2) of the Limitation Act which was otherwise applicable to the provisions for reference since been substituted by Section 35G.

7.9 In order to support the above reason, we may rely upon the reasoning given in the decision in *A. Gupta Trust Estate Vs. Commissioner of Wealth-tax*, , by a Division Bench of Gauhati High Court, cited by Mr. Chakraborty and relied upon by Mr. Banerjee wherein similar question was being dealt with in relation to the provisions contained in the Wealth Tax Act, which is a self-contained Code as in the case of the Central Excise Act. In the said case, unlike the provisions of the Central Excise Act, since substituted by Section 35H, the provisions of the Wealth Tax Act, 1957 contained in Sub-section (9) a provision that the Section 5 of the Limitation Act, 1908 (1908 Act) would apply and this Sub-section (9) was deleted after the Limitation Act, 1963 came into force. This deletion was held to have been in consonance with Section 29(2) of the Limitation Act, 1963. Therefore, the silence of the statute with regard to the application of Section 29(2) of the Limitation Act will not exclude its application, which is supposed to apply unless excluded expressly or impliedly.

7.10 The question of limitation by reason of Section 3 applies in all cases before a Court as a matter of procedure and the power to condone is available only to Court and not to Tribunals due to which Section 5 of the 1908 Act is expressly made applicable to the Tribunal in the absence whereof the Tribunal could not assume power u/s 5. But for Courts, Section 5 applies automatically by reason of Section 29(2) unless expressly or impliedly excluded. We may also refer to the decision in *Nihalkaran Vs. Commissioner of Wealth-tax*, of the Madhya Pradesh High Court by a Special Bench, dealing with Wealth Tax Act in relation to application of Section 5 of the Limitation Act. On the same reasoning followed by the Gauhati High Court, the applicability of Section 29(2) in relation to Section 27(2) of the Wealth Tax Act was upheld. We may also refer to *Prem Chand Bansal and Sons Vs. Income Tax Officer*, by the Delhi High Court, dealing with Section 256(2). Relying on the decision in *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker*, , it was held that the application of Section 29(2) cannot be excluded in relation to the jurisdiction exercised by the High Court u/s 256 of the Income Tax Act while referring to the decision in *CIT v. Taylor Instrument Co. (India) Ltd.* - (1992) 64 Taxman 6, by the Delhi High Court.

7.11 Mr. Dutta relied on *Hukumdev Narain Yadav Vs. Lalit Narain Mishra*, in support of his contention. This decision was dealing with Section 29(2) in relation to an election petition, the provisions whereof were held to exclude the application of Section 29(2) in view of Section 86 of the Representation of Peoples Act, 1951 which gives a primary mandate that the High Court shall

dismiss an election petition which does not comply with the provisions of Section 81, 82 or 117 of that Act. In construing the said provision, the Apex Court had held that this was an express provision, which excludes application of Section 29(2) of the Limitation Act. Therefore, the ratio decided in this case would not be of any help for our present purpose to assail the reasoning we have discussed hereinbefore.

7.12 Mr. Dutta then relied upon the decision in *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, . But this decision will not help us in the present case in view of the fact that this case was decided in relation to U.P. Sales Tax Act, 1948 and U.P. Sales Tax Rules in connection with a revision u/s 10 of the Sales Tax Act before the Revisional Authority [Judge (Revisions) Sales Tax] wherein it was held that the Judge (Revisions) Sales Tax, when hears a revision u/s 10 of the U.P. Sales Tax Act, does not act as a Court but only as a Revenue Tribunal though it may be a civil proceeding. Therefore, on facts, the principles laid down therein cannot be relied upon when it comes in relation to a Court.

7.13 The next decision relied upon by *K. Venkateswara Rao and Another Vs. Bekkam Narasimha Reddi and Others*, . This decision is also a decision in relation to the Representation of Peoples Act, 1951 wherein it was held that no more right is given to the High Court to entertain an election petition, which does not comply with the provisions of Sections 81, 82 or 117 of that Act. Section 86 thereof had always been in the statute and the legislature in its wisdom made the observance of certain formalities and provisions obligatory and failure in that respect can only be visited with dismissal of the petition, which clearly excludes (expressly) the application of Section 29(2).

7.14 Mr. Dutta next relied upon the decision in *Commissioner of Income Tax Vs. Bansi Dhar and Sons*, . This decision had dealt with the power to grant stay in exercise of the reference jurisdiction by the High Court. It was not dealing with the question of applicability of Section 29(2) or Section 5 of the Limitation Act. In the said decision, it was held that while exercising reference jurisdiction the High Court exercises an advisory jurisdiction and as such it cannot exercise powers other than those ancillary to the exercise of such power and that the High Court possessed no inherent power to act *ex debito justitiae* while exercising such reference jurisdiction. The proposition is not in dispute. Therefore, this decision is of no help to us. That apart, the ancillary power of the High Court, if understood in the sense as Mr. Dutta wanted us to understand, in that event, it would not include the power to dismiss a reference once presented on the ground of limitation. If it appears to the Court that the reference application is barred by limitation, it is the power ancillary to the exercise of the jurisdiction of reference under which the application could be dismissed on the ground of limitation. Once the ancillary power is available in exercise of jurisdiction under reference to dismiss on the ground of limitation, such ancillary power would also include power to condone the delay unless the application of Section 29(2) is excluded

expressly or impliedly. Once Section 3 of the Limitation Act is applicable. Section 29(2) thereof would automatically apply unless by express or implied provision, its application is excluded.

7.15 Mr. Dutta then relied upon *Union of India Vs. M/s Popular Construction Co.*, . This decision dealt with the provision of the Arbitration Act, 1940. In the said decision, it was held that the proviso to Section 34 thereof merely provides for a period within which the Court should exercise its discretion but that would not be sufficient to exclude Sections 4 to 24 of the Limitation Act because mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5 of the Limitation Act. Relying on *Mangu Ram Vs. Municipal Corporation of Delhi*, , it was held in that decision that it is not essential in a special or local law to, in terms, exclude the provisions of the Limitation Act. It is sufficient if on consideration of the language of its provisions relating to limitation, the intention to exclude can be necessarily implied [*Vidyacharan Shukla Vs. Khubchand Baghel and Others*, ; *Hukumdev Narain Yadav Vs. Lalit Narain Mishra*, - referred to]. When amending Section 34 in the Arbitration and Conciliation Act, 1996 the crucial words "but not thereafter" included in the proviso to Sub-section (3) was held to be an express exclusion within the meaning of Section 29(2) of the Limitation Act. Thus, in the absence of any such express provision in Section 35H of the Central Excise Act, the principle decided in *Popular Construction Co.* (supra) cannot exclude the application of Section 29(2) of the Limitation Act.

7.16 Mr. Dutta then relied upon *Prakash H. Jain Vs. Ms. Marie Fernandes*, . This case was also dealing with the power to condone the delay under Delhi Rent Control Rules by the Rent Controller, which was admittedly not a Court. Therefore, the ratio decided therein would not help us even though it was held therein that there is no such thing as any inherent power of Court to condone delay in filing proceeding before a Court/authority concerned, unless the law warrants and permits it. Therefore, it also subscribes to the view that unless the power is excluded, the Court can exercise such power.

7.17 Mr. Banerjee on the other hand, relied on the decision in *Sakuru Vs. Tanaji*, , paragraph 3 at page 329 since relied upon in *Prakash H. Jain* (supra). In this decision Section 5 of the Limitation Act was made applicable since the authority under the Andhra Pradesh (Telan-gana areas) Tenancy and Agricultural Lands Act, 1950 was held to be a Court.

7.18 From the discussion above, it is crystal clear that the application of Section 29(2) of the Limitation Act cannot be excluded in relation to Section 35H of the Central Excise Act.

Conclusion :

8. While exercising jurisdiction u/s 35H of the Central Excise Act, there seems to be no provision in the statute to exclude impliedly or expressly the application of Section 29(2) of the Limitation Act. On the contrary, a comparative study of the

different fiscal laws as amended and as discussed hereinbefore clearly indicates that the legislature has never intended to exclude the application of Section 29(2) of the Limitation Act in relation to Section 35H of the Central Excise Act.

Order:

9. In the circumstances, the preliminary objection fails and is overruled. The application for condonation of delay is held to be maintainable. Let the application for condonation of delay be listed before the Court for hearing on merit.

9.1 Urgent xerox certified copy shall be made available to both the parties on usual undertaking.

Rajendra Nath Singh, J.

I agree.