
(2015) 07 JH CK 0117

In the Jharkhand High Court

Case No : Writ Petition (T) No. 6259 of 2014

Dilip Kumar Jaiswal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 2
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128
Finance Act, 1994 — Section 35, 75, 77, 85, 85(3A)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14, 14

Citation : (2015) 07 JH CK 0117

Hon'ble Judges : Dhirubhai Naranbhai Patel, J; Ratnaker Bhengra, J

Bench : Division Bench

Advocate : S.K. Verma, for the Appellant; Ratnesh Kumar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J—Instant writ petition has been preferred against the order dated 16th October, 2014 passed by Commissioner (Appeals) in Appeal Nos. 107 to 114/RAN/2014 whereby the appeals preferred by the appellants, including this petitioner, have been dismissed mainly on the ground that these appeals have been preferred beyond the period of condonable delay.

2. Counsel for the petitioner submitted that petitioner has filed a writ petition (T) No. 7713 of 2013 on 17th December, 2013 before this Court against the order in original dated 31st December, 2012 passed by Additional Commissioner of Central Excise, Ranchi which was dismissed on 25th March, 2014. Previously another party had preferred a writ petition in which intervention application was preferred by this petitioner in writ petition (T) No. 1263 of 2013 along with other writ petitioners. These batch of writ petitions were disposed of by this Court vide order dated 3rd September, 2013 and, therefore, appeals were preferred against the order in original passed by Additional Commissioner, Central Excise, Ranchi

by the petitioners claiming benefit of Section 14 of the Limitation Act of 1963, to exclude the time consumed in disposal of the writ petition before this Court in computation of the delay. Counsel for the petitioner has relied upon the decision rendered by the Hon"ble Supreme Court reported in Ketan V. Parekh Vs. Special Director, Directorate of Enforcement and Another, AIR 2012 SC 683 : (2012) 108 CLA 1 : (2012) 275 ELT 3 : (2012) 1 RCR(Civil) 234 : (2011) 13 SCALE 240 : (2011) 110 SCL 724 : (2012) 28 STR 195 : (2012) 1 UJ 143 : (2012) AIRSCW 822 : (2011) 8 Supreme 239 as also relied upon the decision rendered by Hon"ble Supreme Court reported in Coal India Limited and Another Vs. Ujjal Transport Agency and Others, AIR 2011 SC 503 : (2011) 100 CLA 484 : (2010) 11 JT 321 : (2010) 11 SCALE 162 : (2011) 1 SCC 117 . Counsel for the petitioner has also relied upon the decision of Hon"ble Gujrat High Court reported in Adani Enterprises Ltd. Vs. Union of India, (2012) 286 ELT 676 : (2013) 19 GSTR 24 . On the basis of these decisions it is submitted that Section 14(2) of the Limitation Act 1963 is applicable for condonation of delay by the Commissioner (Appeals). This aspect of the matter has not been properly appreciated by the Commissioner (Appeals) and, therefore, this petition has been preferred. It has been submitted that delay may be condoned which is approximately of 16 months and the matter may be remanded to the Commissioner (Appeals) for its decision on merits.

3. Counsel for the respondents has submitted that no error has been committed by Commissioner(Appeals) while dismissing the appeals preferred by the petitioners of Appeal Nos. 107 to 114/RAN/2014 as delay was not condonable under section 85(3A) of the Finance Act, 1994. It has further been submitted by counsel appearing on behalf of Union of India that it has specifically been mentioned in the order in original passed by Additional Commissioner Central Excise, Ranchi dated 31st December, 2012 that demand of service tax has been affirmed against this petitioner as well as interest under section 75 of the Finance Act, 1994 has also been affirmed. There was violation of certain circulars and rules of the Finance Act, 1994. Penalty was also affirmed under Section 77 of the Finance Act, 1994. Thus, there was no ambiguity at all. So far as liability of this petitioner is concerned in the order in original passed by Additional Commissioner, Central Excise, Ranchi this petitioner could have prefer appeal within 60 days+30 days maximum otherwise, if the appeal is preferred beyond ninety days the delay is not condonable in view of the decision rendered by Hon"ble Supreme Court reported in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, (2008) 1 CLT 709 : (2008) 1 CTC 707 : (2008) 124 ECC 1 : (2008) 150 ECR 1 : (2008) 221 ELT 163 : (2007) 14 SCALE 610 : (2008) 3 SCC 70 : (2008) 12 VST 542 : (2008) AIRSCW 1461 : (2007) 8 Supreme 533 . Counsel for the respondents has also relied upon decisions rendered by Hon"ble Bombay High Court in writ petition No. 1830 of 2013 with writ petition (Civil) No. 3419 of 2014 decided on 24th December, 2014. It is further submitted by learned counsel for the respondent-Union of India that though order in original was passed on 31st December, 2012 which clearly

affirms the demand notice issued upon this petitioner including interest and penalty, this petitioner preferred a writ petition before this Court being W.P. (T) No. 7713 of 2013 on 17th December, 2013 which was dismissed vide order dated 25th March, 2014. Thus, no benefit of Section 14(2) of the Limitation Act, 1963 can be given to this petitioner. As such, no error has been committed by the Commissioner (Appeals) in not condoning the delay. Even otherwise also, as submitted by the counsel for the respondent-Union of India that prima-facie Section 14 of the Limitation Act 1963 is not applicable because there was no want of jurisdiction where the writ petition was preferred. Normally, the assesses are taking a chance by filing a matter directly in the High Court which is always at the peril and risk of the petitioner, specially when delay is not condonable. This petitioner is not exception to "chance taking petitioner." This aspects of the matter have been taken care of by deciding the matters in terms of reported decisions as stated hereinabove. Hence, this writ petition may not be entertained by this Court.

4. Having heard counsel for both sides and looking to the facts and circumstances of the case we see no reason to entertain this writ petition mainly on the following facts and reasons:-

(i) Order in original was passed by Additional Commissioner Central Excise on 31st December, 2012 which is appellable under section 85(3-A) of the Finance Act, 1994. The period of limitation is sixty days. Delay can be condoned by Commissioner (Appeals) if there are reasonable reasons. But Commissioner (Appeals) have no power, jurisdiction and authority to condone the delay beyond thirty days. In the facts of the present case, as stated by the counsel for the petitioner total delay is approximately sixteen months. The appeal was preferred after sixteen months from the date of which the order in original was passed.

For ready reference Section 85 of the Finance Act, 1994 reads as under:

"85. Appeals to the [Commissioner] of Central Excise (Appeals)- [(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the [Principal Commissioner of Central Excise or Commissioner of Central Excise], may appeal to the Commissioner of Central Excise (Appeals)]

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of [such adjudicating authority], relating to service tax, interest or penalty under this Chapter [made before the date on which the Finance Bill, 2012 receives the assent of the President]: Provided that the [Commissioner] of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

[(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month].

(4) The [Commissioner] of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the [Commissioner] of Central Excise (appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the [Central Excises Act, 1944] (1 of 1944)."

(Emphasis supplied)

In view of the aforesaid decision and Section 85(3A) of the Finance Act, 1994 no error has been committed by the Commissioner (Appeal) in not condoning the delay because it was beyond the period of condonable delay.

(ii) It has been held by Hon"ble Supreme Court in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, (2008) 1 CLT 709 : (2008) 1 CTC 707 : (2008) 124 ECC 1 : (2008) 150 ECR 1 : (2008) 221 ELT 163 : (2007) 14 SCALE 610 : (2008) 3 SCC 70 : (2008) 12 VST 542 : (2008) AIRSCW 1461 : (2007) 8 Supreme 533 in Paragraph No. 3 to 10 which reads as under:

"3. The Division Bench noted that since the Commissioner had no power of condonation beyond the statutorily prescribed period, therefore, the writ petition was without merit. Before the high Court reliance was placed on a decision of this Court in ITC Ltd. V. Union of India to contend that the high Court had the power to condone the delay. This stand was not accepted by the High Court.

4. In support of the appeal, learned counsel for the appellant submitted that even if it is conceded for the sake of argument that the Commissioner had no power to condone the delay, yet the High Court in exercise of power conferred under Article 226 of the Constitution of India can condone the delay. It is stated that the power in this regard is untrammelled by any statutory provision.

5. Learned counsel for the respondents on the other hand supported the orders of the Commissioner and the High Court.

6. At this juncture, it is relevant to take note of Section 35 of the Act which reads as follows:

"35. Appeals to Commissioner(Appeals).- (1) any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) [hereinafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner."

7. It is to be noted that the periods "sixty days" and "thirty days" have been substituted for "within three months" and "three months" by Act 14 of 2001, with effect from 11-5-2001.

8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days" time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days" period.

9. Learned counsel for the appellant has emphasized on certain decisions, more particularly, ITC case to contend that the high Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.

10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to reason. ITC case was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs.

(Emphasis supplied)

(iii) Looking to Section 14 of the Limitation Act, 1963 the said Section is also not applicable in the facts of the present case because the Writ Petition (T) No. 7713 of 2013 was preferred by this petitioner before this Court on 17th December, 2013 which was dismissed vide order dated 25th March, 2014. Thus, writ petition which was also preferred after the limitation period was over for preferring appeal u/s. 85(3A) of the Finance Act, 1994.

(iv) Looking to the order in original dated 31st December, 2012 passed by Additional Commissioner, Central Excise the demand notice issued upon this petitioner was affirmed, without any ambiguity. Order for interest was also passed and order for penalty was also imposed Under Section 77 of the Finance Act, 1994. Thus appeal should have been preferred by this petitioner as provided in the Finance Act, 1994.

(v) There is tendency of those persons who are liable to make payment of the tax+interest+penalty to take a chance before this Court. This "chance taking petitioner" has filed a writ petition before this Court at his own peril and risk because some times it takes time for final adjudication of the writ and on another hand the period of limitation has already been started. It ought to be kept in mind by this type of "chance taking petitioner" that they should simultaneously prefer statutory appeals also so that whenever there are such type of clauses that limitation cannot be condoned beyond the period of thirty days the appeal may not be dismissed for want of condonation of delay. The petitioner is lethargic, but, certainly not an ignorant person and is knowing all fine niceties of

law. Vigilant petitioner should have file their appeal within the limitation period or at least within condonable delay period.

(vi) Section 14 of the Limitation Act, 1963 reads as under:-

"14. Exclusion of time of proceeding bona fide in court without jurisdiction:-

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature."

As stated herein above writ petition was preferred on 17th December, 2013 whereas order in original is dated 31st December, 2012. Therefore, the benefit of section 14 of the Limitation Act cannot be extended to this petitioner.

vi) There is one more reason not to give benefit of Section 14 of the Limitation Act, 1963 to this petitioner as because Section 14 of the Limitation Act, 1963 is applicable only when the proceeding is bona fide in the court without jurisdiction.

The provision of Section 14 has been enacted only for the reason when there is total lack of jurisdiction the benefit can be given to the party who is preferring appeal at the slightly belated stage.

(vii) Looking to the decision rendered by Hon'ble Bombay High Court in the writ petition No. 1830 of 2013 with Writ Petition (Civil) No. 3419 of 2014 the judgment and order dated 24th December, 2014, Para 30, 33 and 44 reads as under:-

"30) We have already held that by sub-section (2) of section 29 of the Limitation Act, 1963 and applying it to the facts of the present case, sections 4 to 24 (inclusive) of the Limitation Act, 1963 have limited application to the proceedings and particularly Appeals under section 128 of the Customs Act, 1962. The third assumption on which we proceed is that sub-section (2) of section 14 of the

Limitation Act, 1963 applies to Appeals as well. We are not impressed by Mr. Dhond's placing reliance on the judgment of the Hon'ble Supreme Court in the case of Ketan V. Parekh Vs. Special Director, Directorate of Enforcement and Another, AIR 2012 SC 683 : (2012) 108 CLA 1 : (2012) 275 ELT 3 : (2012) 1 RCR(Civil) 234 : (2011) 13 SCALE 240 : (2011) 110 SCL 724 : (2012) 28 STR 195 : (2012) 1 UJ 143 : (2012) AIRSCW 822 : (2011) 8 Supreme 239 . We have perused this judgment very carefully and minutely.

33) We are unable to agree with Mr. Dhond that this judgment would enable us to conclude that section 14 of the Limitation Act, 1963 can be invoked by the Petitioner to get over the outer limit or restriction in sub-section (1) of section 128 of the Customs Act, 1962. In fact, all the judgments that have been referred by the Hon'ble Supreme Court take the view that there was no power to condone the delay after expiry of the prescribed period. In that regard, the Hon'ble Supreme Court has, in para 21, referred to a judgment delivered by it in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, (2008) 1 CLT 709 : (2008) 1 CTC 707 : (2008) 124 ECC 1 : (2008) 150 ECR 1 : (2008) 221 ELT 163 : (2007) 14 SCALE 610 : (2008) 3 SCC 70 : (2008) 12 VST 542 : (2008) AIRSCW 1461 : (2007) 8 Supreme 533 . In para 22, the Hon'ble Supreme Court referred to a three Judge Bench decision in the case of Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, (2008) 2 ARBLR 139 : (2008) 3 CLT 244 : (2009) 3 CompLJ 203 : (2008) 5 CTC 741 : (2008) 6 JT 22 : (2008) 6 SCALE 748 : (2008) 7 SCC 169 . In para 23 it specifically referred to two Judgments delivered by it, first in the case of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, (2009) 223 CTR 225 : (2009) 163 ECR 199 : (2009) 236 ELT 417 : (2009) 315 ITR 449 : (2009) 7 JT 83 : (2009) 4 SCALE 374 : (2009) 4 SCR 1197 : (2009) 21 STT 90 : (2009) 3 UJ 1555 : (2009) 24 VST 298 and second in the case of Union of India Vs. M/s Popular Construction Co., (2001) 8 AD 297 : AIR 2001 SC 4010 : (2002) 1 CompLJ 46 : (2001) 8 JT 271 : (2001) 6 SCALE 657 : (2001) 8 SCC 470 : (2002) 1 UJ 4 : (2001) AIRSCW 3994 : (2001) 7 Supreme 354 . None of these decisions have been held to be laying down any proposition or principle of law, which has been pressed into service by Mr. Dhond before us. In fact, there is nothing in these Judgments which would enable us to hold that the Petitioner can invoke section 14(2) of the Limitation Act, 1963, to extend the period stipulated in sub-section (1) of section 128 of the Customs Act, 1962. Therefore, the observations in para 30 of the Judgment in the case of Ketan Parekh (Supra) cannot be seen in isolation or de hors the previous previous observations and conclusions therein.

44) Thus, the Hon'ble Supreme Court held in the case of Mohinder Singh (supra) that once limitation starts running, till its running is stopped by an order of the competent Civil Court or competent Authority, it cannot stop. It overruled the earlier Judgment in the case of P.K. Kutty Anuja Raja and another Vs. State of Kerala and another, (1996) 1 AD 1062 : AIR 1996 SC 2212 : (1996) 63 ECR 521 : (1996) 2 JT 167 : (1996) 2 SCALE 14 : (1996) 2 SCC 496 : (1996) 1 SCR

1147 : (1996) 1 UJ 753 only because no argument was advanced as regards the applicability of doctrine of merger. The Hon''ble Supreme Court entertained the SLP and granted leave to Appeal as also stay. The time spent in prosecuting the proceedings before the Hon''ble Supreme Court and which is bona fide was permitted to be excluded. Pertinently, the test laid down is applicable in a case where a Appeal is filed that being a continuation of the lis, its pendency can be relied upon the claim the benefit. A Writ Petition's pendency will not stand on the same footing always. If the time has not stopped running, then, none of the principles relied upon by the Petitioner will assist it. As we have noted above, in this case, Writ Petition was pending in this Court, but neither it was entertained nor any interim relief was granted, leave alone admitting it. If the Petitioner decides not to approach the appropriate, correct or right Forum, but tries to bypass it by filing a Writ Petition and allows the time to run, then it cannot request this Court in its discretionary and equitable jurisdiction to set right a wrong, for which it is itself responsible. In other words, the Petitioner is trying to take advantage of its own wrong committed earlier in approaching this Court, though knowing fully well that it had refused to exercise jurisdiction, because the alternate efficacious remedy of Appeal to the Commissioner of Customs was provided by law. The Petitioner did not take steps to file such an Appeal even during the pendency of the Writ Petition and allowed the time to run. In these circumstances, we cannot extend any benefit, as that would allow the Petitioner to take advantage of its own wrong. As a result of the above discussion, the Writ Petition fails. Rule is discharged. There would be no order as to costs. In the view we have taken, we do not decide the other controversy as to whether disposal of a Writ Petition on the ground that the order on Petitioner's earlier Writ Petition No. 1705 of 2011 would mean there was a defect of jurisdiction or other cause of like nature denoting that for that reason this Court was unable to entertain it."

5. We are in full agreement with the ratio decidendi propounded by the Hon''ble Bombay High Court.

6. In the aforesaid facts and reasons, we find that no error has been committed by the Commissioner (Appeals) in passing order dated 16th October, 2014 in Appeal Nos. 107-114/RAN/2014. Hence, there being no substance, this writ petition is hereby dismissed.