

(2000) 03 GAU CK 0034
In the Gauhati High Court
Case No : Writ Petition (C) No. 1225 of 2000

Joy Mohan Mallik and Others

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 27-03-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Illegal Migrants (Determination by Tribunals) Act, 1983 — Section 10, 12, 3, 8(1)
Limitation Act, 1963 — Section 15(9), 5

Citation : (2001) 1 GLT 544

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : P.K. Goswami, for the Appellant; N. Devi Sarma, CGSC, for the Respondent

Final Decision : Allowed

Judgement

D.N. Chowdhury, J.—Petitioner No. 1 and 2 are the husband and wife and Petitioner No. 3 is their daughter. All the aforementioned Petitioners were declared to be "illegal migrants" within the meaning of Section 3(c)(i) of the Illegal Migrants (Determination by Tribunals) Act, 1983 (hereinafter referred as the Act) upon a reference u/s 8(1) of the said Act by the court of illegal Migrants (Determination) Tribunals, Lakhimpur vide order dated 4.7.88. The aforesaid adjudication was made by the said tribunal ex parte. Before the tribunal the Respondents examined PW 1 J Doley, the Enquiry Officer who stated to have recorded the statement of the Petitioner No. 2 and also further recorded that she could not produce any document regarding her citizenship. The judgment and order does not indicate as to whether his enquiry report was even proved before the tribunal. The Tribunal, however, passed an ex parte order holding these three Petitioners as illegal migrants and reference was answered accordingly. The Petitioners preferred appeal before the Appellate Tribunal and the Appellate Tribunal did not enter into the merits and dismissed the appeal at the threshold on the ground of limitation vide order dated 11.10.99. As per the order of the

Appellate Tribunal an application u/s 5 of the Limitation Act was made before the Appellate Tribunal for condonation of delay wherein it was indicated that no notice or information was provided to the Appellants during the pendency of the case in the lower Tribunal and order was passed ex parte and that the Appellants were aware about the order only on 9.5.99 when the police visited their house for deportation. From the statement of the learned Tribunal it further transpires that copy of the judgment of the lower Tribunal was ready for delivery on 10.5.99 and the Appellants took delivery of the copy of the judgment on 14.5.99 and presented the appeal on 23.6.99. That, appeal was to be filed within 30 days from the date of receipt of the copy of the judgment. The Appellants received the copy of the judgment on 14.5.99. The Appellants did not file the appeal within 30 days from the date of obtaining the copy. Therefore, it was time barred. Before the tribunal the learned Counsel for the Appellants submitted that on account of wrong advice about the period of limitation the appeal was not preferred within 30 days. The Appellate Tribunal referring to the condonation petition did not find any averment to that extent in the application for condonation of delay. The Tribunal accordingly held that in the absence of any such averment in the application for condonation of delay it cannot be said that the Appellants were diligent in filing the appeal or that any ground has been made out for condonation of delay. The appeal was accordingly dismissed. Hence the writ petition.

2. In the writ petition the Petitioner stated that his father Late Adhar Biswas was a permanent resident of Village Bejibari of Laluk Mouza in the district of Lakhimpur. He was enrolled as a voter of Naobaicha Legislative Assembly Constituency No. 112 for the year 1965 and in the electoral roll his number was at Sl. 42 against House No. 17. A true copy of the voters list is annexed with the writ petition. The Petitioners also annexed a certificate of the Gaonburah of Village Nizlaluk certifying that Petitioner No. 2 was married to one Jaimohan Mallik, a permanent resident of village Bejibari, Laluk in the year 1966 and is a permanent resident of that locality. In addition the testimony of Headmaster of Bejibari Primary School dated 20.1.68 is also annexed stating thereunder that Petitioner No. 2 Smti Bichitra Kumari Biswas was a student of the Bejibari Primary School and she had completed her study in the school on 31.12.1967. Referring to the aforesaid facts Mr. P.K. Goswami, learned Counsel for the Petitioner submitted that prima facie these three Petitioners cannot be said to be illegal migrants. At any rate the Petitioner could make out that they are not illegal migrants warranting expulsion from India as illegal migrants. The learned Counsel submitted that justice was denied to the Petitioners by the First Tribunal by not affording reasonable opportunity to submit representation with regard to the averments made in the reference and defend their case lawfully. The first Tribunal, contended the learned Counsel, passed his order in a most mechanical fashion throwing to the winds the rule of principle of natural justice. The learned Counsel further submitted that the finding of the learned first Tribunal cannot Ors. wise also be sustained on the materials on record and if an opportunity is

provided to the Petitioners as per law the Petitioners would be able to vindicate their rights. The learned Counsel assailed the impugned order of the learned Appellate Tribunal as arbitrary, capricious that suffers from the vice of mechanical exercise of power. The learned Counsel submitted that the Act in question armed the Tribunal to admit an appeal after the expiry of the period of limitation under Sub-section (9) of Section 15. The power conferred with the tribunal is a power to render justice and at any rate to avoid injustice. The learned Counsel submitted that proviso to Sub-section (9) of Section 15 no doubt was a matter within the area of discretion of the Tribunal but that discretion is to be exercised meaningfully, justly and reasonably.

3. Mrs. N. Devi Sarma, learned Central Govt. Standing Counsel seriously opposed the petition and submitted that both the Tribunals acted lawfully and within its competence and, therefore, question of interference by this Court under Article 226 of the Constitution does not arise. The learned Standing Counsel submitted that it was the Appellant who defaulted to appear before the first Tribunal despite notices were issued. Since the Petitioners failed to avail the opportunity provided to it they cannot now come around and allege that there was denial of opportunity. In the case in hand opportunity was given and Petitioners failed to avail the opportunity submitted Mrs. N. Devi Sarma. Referring to the order of the learned Appellate Tribunal the learned Counsel submitted that statute has provided a period of limitation and if the appeal is not presented within time prescribed then the question of entertaining the appeal does not arise unless the party that appeals succeed in satisfying the court for not preferring the appeal within the period, by sufficient cause. The learned Counsel submitted that there was no sufficient cause and accordingly the learned Tribunal rightly dismissed the appeal as time barred. Lastly the learned Central Govt. Standing Counsel submitted that the learned Appellate Tribunal exercised the discretion which cannot be said to be arbitrary and in the circumstances question of exercising jurisdiction by this Court by way of a writ petition does not arise.

4. Admittedly, the Tribunal adjudicated the reference ex parte. The decision of the tribunal to hold a person as an illegal migrant enables the Central Govt. to expel such person. Such order has serious ramifications affecting the life and livelihood of such person. Considering all the aspects of the matter the statute provide the procedural safeguards in Section 10 itself more particularly in Section 10 and 12. Here is a case where the Petitioners have alleged that procedural safeguards were denied to them. None of the Tribunals below had the occasion to deal with this aspect of the matter. The appellate Tribunal dismissed the appeal on very technical ground. Sub-section (9) of Section 15 no doubt prescribe the period of limitation for preferring an appeal but the same provision also empower the Appellate Tribunal to accept an appeal after expiry of the aforesaid period. A discretion is conferred on the authority to condone the delay. Rules of limitations prescribed by a statute has its own importance. Such limitations are prescribed so that the parties do not sit over the oar and delay a proceeding. The statute, therefore, prescribed a point of limitation. The law of limitation is based on a

public policy that is enshrined in the maxim "interest reipublicae ut sit finis litium" (It concerns the state that there be an end of lawsuits. It is for the general welfare that a period be put to litigation). The whole object of prescribing period of limitation needs to avoid undue delay in a proceeding and to see that the parties move promptly for remedial measure. But at the same time one cannot overlook the meaning and object of providing appeal to enable the party to redress his grievances and recoup the legal injury so suffered. In the process of litigation there may be some laches on the part of the litigant concerned. Delay in each case is not fatal. The door of justice should not be slammed on the cause of delay alone of the explanation furnished is not manifestly malicious or that delay was caused deliberately to secure undue advantage. The court should lean in favour of a litigant by extending the liberal interpretation. The power of condonation of delay is no doubt discretionary but that discretion has to be exercised justly, lawfully and fairly and not mechanically or perfunctorily. The discretion exercised is to be measured in the touch stone of justice. In this context one should also keep in mind the accepted principle of statutory interpretation that comprehend the policy of law which in turn is based on public policy. Rule binds and the principle guides "Principiorum non est ratio" (No argument is required to prove fundamental rules). Then a statute incorporates a rule it makes that rule conclusive in relation to the purpose of the Act, where it attracts a principle it provides the scope of flexibility in application. A legal principle confers a right in the sense that a litigant can claim that the court shall take into account any relevant principle. A norm or standards is to be observed. The paramount aim of legal policy is to do justice and the court assumes that Legislature does not intend injustice. There is one more facet of the legal policy which comprehends that the law should be just and decision of the court should further the ends of justice. The court while considering the law in relation to the facts is to balance the opposing constructions of the statute in giving effect to the legislative intention. In such a situation the court will naturally proceed with the thesis that the law should be just. The court is to avoid the construction that leads to injustice. Legislature is presumed to intend to act justly and reasonably IRC v. Hincny 1960 AC 748 (768), Mengin v. IRC 1971 AC 739 (746), Nothman v. London Borough Barner 1979 (1) All ER 142 (148). At any rate courts are always anxious to see that there is no failure of justice. The learned Appellate Tribunal invariably acted intransigently in dismissing the appeal without addressing to the core issue concerning the human rights of the party. The primary function of the justice delivery system is to adjudicate the dispute justice, fairly and lawfully between the parties and to advance substantial justice. A good cause does not become a bad cause merely on the ground that the person did not approach the court within the prescribed limit. The rule of limitation is not be read to undermine the right of the parties. It is to be read meaningfully, keeping a right balance of the right consideration. The Appellate authority is bestowed with the discretion to admit an appeal after the expiry of the prescribed period only when "it is satisfied that the Appellant was prevented by sufficient cause from preferring the appeal within the said period". The said discretion is lawful

discretion. What is arbitrary and discriminatory is not law full discretion." Discretion is a science or understanding to discern between falsity and truth, between equity and colourable glosses and pretences, and has to do according to their wills and private affections", where the power is exercised unreasonably without taking into consideration the relevant consideration that is an abuse of power and the action of the authority will be ultra-vires of the statute and therefore unlawful. It would be pertinent to recall here the well known statement of Lord Greene MR. in *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* reported in (1947) 2 All ER 680--

...It is true that the discretion must be exercised reasonably. Now what that does mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretion of ten used the word unreasonable in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion, must so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, to be acting "unreasonably". Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority, *Warrington, L.J. in Short v. Poole Corporation* (1926) Ch. D 66 (91) : 135 LT 110 gave the example of red haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In an Ors. it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and in fact, all these run into one another.

The circumstances, mentioned above, the spirit and policy of relevant statute, viz the Act in question were not given proper weight and consideration by the learned Appellate Tribunal. I am therefore in the circumstances inclined to hold that the learned Appellate Tribunal missed the point which affected its decision making process. Under these circumstances the impugned order of the appellate authority cannot be sustained and the same is liable to be set aside. Accordingly the impugned order dated 11.10.99 passed by the learned Appellate Tribunal in IMDT Appeal No. 4/99 is set aside.

5. In normal course the matter is required to be remanded to the Appellate Tribunal to exercise the discretion lawfully and adjudicate the appeal on merit. It is, however, a case in which the learned Illegal Migrant (Determination) Tribunal, Lakhimpur decided the case ex-parte. In the circumstances, it cannot be said to be just and reasonable. The principles of Natural Justice is embedded in the statute and under the statutory scheme it is/was incumbent upon the Tribunal to provide an opportunity to the Petitioners to submit representation u/s 10 of the Act. The ex parte order dated 4.7.99 passed by the Illegal Migrants (Determination) Tribunal, Lakhimpur in IMDT case No. 267/87 in the circumstances is therefore unsustainable and liable to be set aside and is

therefore set aside. The Petitioners are ordered to appear before the Illegal Migrant (Determination) Tribunal, Lakhimpur at North Lakhimpur within a month from receipt of the certified copy of this order. The Tribunal shall thereafter serve furnish on the persons the, copies of the reference enabling them to submit their defence/representation with regard to the averments made in the reference and to produce any such evidence in support of their defence. The learned Tribunal shall dispose the reference as per law and pass necessary orders thereunder.

6. The writ petition is allowed to the extent indicated above. There shall, however, be no order as to costs.