
(1991) 02 DEL CK 0014

In the Delhi High Court

Case No : Letters Patent Appeal No. 71 of 1990

Jyotsna Holding Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 06-02-1991

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 8(1)
Limitation Act, 1963 — Section 5

Citation : (1991) 43 DLT 747

Hon'ble Judges : Sagar Chand Jain, J;N.N. Goswamy, J

Bench : Division Bench

Advocate : P.V. Kapur, Ashok Mukhotey, Sat Pal, Meena Chaudhary and P.K. Bahl, for the Appellant;

Judgement

Goswamy, J.

(1) This appeal will also dispose of Letters Patent Appeal No. 70 of 1990 as both the appeals involve common questions of fact and law. These appeals are directed against the orders dated 28th September, 1990 passed by the learned Single Judge of this Court whereby the applications of the respondents u/s 54 of the Foreign Exchange Regulations Act, 1973 (hereinafter called "FERA") were allowed and the delay in filing the appeals was condoned. It would be sufficient to give in brief the facts in M/s. Jyotsna Holding Private Ltd. v. Union of India, that is Letters Patent Appeal No. 71 of 1990 as the arguments were advanced in this appeal by counsel for the parties.

(2) The appellant company was appointed for rendering consultancy service to M/s. sumitomo Corporation, Japan (hereinafter referred to as "SC") in the matter of supplies contemplated to be made by SC to M/s. Oil and Natural Gas Commission/ Gas Authority of India Ltd. Two agreements dated 30th August, 1984 and 5th December, 1984 were executed between the appellant company and SC. The appellant company was entitled to receive consultancy fee from SC. The consultancy fee was to be remitted in Japanese Yens to the account of Bank of

Credit & Commerce International, London on account of Eljay Consultants Incorporated. The agreement also provided that in case the contract is cancelled partially or wholly due to reasons other than the fault of Sc the consultancy fee paid by Sc to the appellant company corresponding to the cancellation amount will be paid back by the appellant company to SC. From the information gathered through the Income Tax Department it was revealed that income approximately to the tune of Rs. 6.35 crores was earned by the appellant company by way of consultancy fee in terms of the two agreements and the Sc had remitted the amount in Us Dollars to the Bank of Credit & Commerce International, London in account of "Lijay" and that these amounts were repatriated to India through banking channels in September 1987.

(3) On 23.9.1988 show cause notice was issued to the appellant company by respondent No. I wherein it was alleged that the appellant and its Directors were guilty of violating Sections 8(1). 14 and 47(1) of FERA. The notice was duly replied on 5.10.1988 and the allegations were denied. In adjudication proceedings the Special Director observed that the circumstances rule out the possibility of the existence of mensrea or the guilty intention on the part of the company or its Directors. All the same he held that there was technical breach of Sections 8(1). 14 and 47(1) of FERA. He exonerated the Directors of the company but imposed penalty on the appellant company. In appeal before the Board, the Board accepted the plea of the appellant company to the effect that the amounts (foreign exchange) could not immediately be remitted in terms of the agreement as there was a possibility of the same being repaid to Sc and was repatriated at the earliest opportunity. It was an admitted fact that the entire foreign exchange earned by the appellant company stood repatriated to India about a year prior to the issue of show cause notice. The Board took into consideration all these factors and came to the conclusion that there was no breach or violation of the aforesaid provisions of Fera and consequently allowed the appeal by order dated 17th July, 1989. The order was communicated to the respondents which was admittedly received on 21st July, 1989.

(4) u/s 54 of Fera an appeal is competent to this Court and it is provided that the Court shall not entertain any appeal if it is filed after the expiry of 60 days of the day of communication of the decision or order of the Appellate Board unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal. The limitation for filing the appeal was thus to expire on or around 21st September, 1989. The noting in the file disclosed that a conscious decision was taken by the respondents on 8th September 1989, that is, within the period of limitation that since the case did not involve any question of law, it was not a fit case for filing appeal to the High Court u/s 54 of FERA.

(5) The appeal was however filed in this Court on 16th January, 1990. Along with the appeal filed in this Court on 16th January, 1990 an application u/s 5 of the Limitation Act read with Section 482 of the Criminal Procedure Code and Section 54 of Fera was also filed for condensation of 122 days delay. It was stated in the

application that the order of the Appellate Board was received by the then Director of Enforcement on 21st July, 1989 and it was examined by the Director of Enforcement who was of the opinion that the impugned order did not involve any question of law and, Therefore, an appeal against the same does not lie and as such it need not to be filed. It was further stated that during the last session of Parliament the matter came up for discussion in Parliament in or around the last week of December 1989 and the matter was reconsidered by the Government and it was decided on 28th December, 1989 to obtain the advice of the Law Ministry and act accordingly. Consequently the matter was referred to the Law Ministry for its opinion and the Law Ministry opined that questions of law were involved and the appeal should be filed. Thus, it was prayed that the delay of 122 days in filing the appeal be condoned.

(6) The aforesaid application for condensation of delay was opposed by the appellant company on various grounds. It was pleaded in the reply that the change of decision to file an appeal was at best a change, of opinion and could not be regarded as sufficient cause within the meaning of Section 54 of EFRA. The judgment of the Supreme Court in case of Ajit Singh Thakur Singh and Another Vs. State of Gujarat, was also relied upon.

(7) It appears that on noticing the contentions in the reply filed by the appellant company the respondents completely changed their stand in the rejoinder affidavit and a new case was set up alleging bad faith in respect of earlier decision dated 8th September, 1989 not to file the appeal. It was further pleaded that the question arose in the Parliament and some discussions in the Parliament were also referred to. The affidavit in rejoinder was sworn by Mr. T.G. Joseph. In the sur-rejoinder it was pleaded to the effect that Mr. T.G. Joseph was not even competent to swear the affidavit since he joined the Foreign Exchange Department only in the middle of January 1990 and as such the question of bad faith could not possibly be to his knowledge. In view of this objection a further affidavit was filed by Mr. S.P.S. Pundir in support of the rejoinder. It is interesting to notice that the rejoinder affidavit which is divided in three parts deals with the bad faith in part 1. The affidavit of Mr. S.P.S. Pundir is to the effect that parts 2 and 3 are true to his knowledge. As regards part I he deposed that bad faith can be inferred from the Parliamentary proceedings and the public interest involved in the case. This is only an inference and no personal knowledge. Obviously Mr. Pundir could not say anything further since it was on the basis of his note when a decision was taken not to file the appeal on 8th September, 1989. He was the very officer who had submitted the report indicating that the appeal should not be filed.

(8) Before the learned Single Judge strong reliance was placed by the appellant on the decision, of Ajit Singh Thakur Singh and Another Vs. State of Gujarat, . In that case the accused had been acquitted and the State Government initially took a decision not to file an appeal and allowed the period of limitation to lapse. However, on a revision petition having been filed by the complainant the High

Court observed that it was a fit case where the State should have filed the appeal. On taking note of the observations of the High Court the State Government filed the appeal Along with the application for condensation of delay The High Court condoned the delay. "The Supreme Court reversed that decision and it would be useful to quote paragraph 6 of the report :

"At the outset, it is urged by learned counsel for the appellants that the High Court erred in condoning the delay in filing the appeal, and the appeal should have been dismissed as barred by limitation! We have examined the facts carefully. It appears that initially the State Government took a decision not to file an appeal and it allowed the period of limitation to lapse. Subsequently, on certain observations made by the High Court while considering a revision petition by Bhulabhai that it was a fit case where the State Government should file an appeal and on notice being issued by the High Court to the State Government in the matter, the appeal was filed. It was filed three months after limitation had expired. A faint attempt was made to sho. v that when the initial decision was taken not to file an appeal all the papers had not been considered by the department concerned but we are not impressed by that allegation. The truth appears to be that the appeal was not filed at first because the State Government saw no case on the merits for an appeal, and it was filed only because the High Court had observed-and that was long after limitation had expired-that the case was fit for appeal by the State Government. Now, it is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause. There may be events of circumstances subsequent to the expiry of limitation which may further delay the fili Abare reading of the afore said paragraph ng of the appeal. But that the limitation has been allowed to expire without the appeal being filed must be traced to a cause arising within the period of limitation. In the present case, there was no such cause, and the High Court erred in condoning the delay."

(9) Abarereadingoftheaforesaidparagraph spell out, (i) when the State Government allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstance arising before the limitation expired it was not possible to file the appeal within time, (ii). no event or circumstance arising after the expiry of limitation can constitute sufficient cause though there may be events or circumstances subsequent to the expiry of limitation which may further delay the filing of the appeal, but when the limitation has been allowed to expire without the appeal being filed must be traced to a cause arising within the period of limitation, (iii) the truth appear to be that the appeal was not filed at first because the State Government saw no case on the. merits for an appeal and it was filed only because the High Court had observed. The learned Single Judge

distinguished the aforesaid judgment and observed :

"The Supreme Court was not considering the plea of bad faith as is being contended here. If bad faith is shown in the decision of not filing the appeal then the question whether the earlier decision was conscious or not would be irrelevant. An act tainted with bad faith is no act in the eyes of law. It cannot be held that because a conscious decision was taken not to file an appeal delay cannot be condoned under any circumstances, it would also be necessary to examine the aspect of public interest. That was not the point urged before the Supreme Court in "the said decision."

Thus, the learned Single Judge seems to have gone by the plea of bad faith and in addition of public interest. As regards the bad faith it has to be seen that the application for condensation of delay as originally filed does not even mention the words bad faith and the same cannot be inferred from any other paragraph of the application. No doubt it is true that bad faith has been alleged in the rejoinder but that only seems to be after thought an imaginary and in order to distinguish the aforesaid Judgment of their Lordships of the Supreme Court. We sent for original file where the initial decision was taken and the revised decision was taken. We went through the entire file page by page. The entire file does not talk of bad faith and there is no suggestion in the file which can lead to the allegation of bad faith. We do not understand as to how these pleadings were brought in without there being material on the file. The learned counsel for the respondents had to concede that the file was silent and no body had talked about the bad faith even when the matter was reconsidered and an appeal was filed In the rejoinder affidavit as we have already indicated the plea of bad faith was taken in the first part of the rejoinder. The first part was not supported by the affidavit of the concerned officer, that is, Mr. Pundir except by drawing an inference from the Parliamentary discussion and the amount of foreign exchange involved. It has completely been overlooked that the entire foreign exchange stood repatriated to India atleast a year prior to the issue of show cause notice and the Board had accepted the Explanation of the appellant company for the delay in repatriating the amount. The Board had specifically recording the finding that there was no breach or violation of the provisions of Fera In these circumstances we fail to understand as to what public interest was involved and how could the earlier decision be said to be in bad faith. There seems to be substance in the contention of the learned counsel for the appellant that the decision was changed because the Government had changed at the centre The by itself in our opinion cannot be said to be sufficient cause. In fact the provisions of Section 54 of Fera are more stringent than Section 5 of the Limitation Act. u/s 54 it has to be shown that the appellant was prevented by sufficient cause from filing the appeal in time. In our opinion no such sufficient cause has been shown because the file only discloses a mere change of opinion which has been held to be not a sufficient cause.

(10) Reliance was placed by the learned counsel on "G Ramerowda Major & Ors.

v. Special Land Acquisition Officer, Bangalore", (1988)2 Scc 111 It was held in that case that each case had to be considered on its own mere and further that the Court had to take into consideration the functioning of the Government which has procedural red tape and some latitude should have for the same. This judgment does not help the respondents in any- manner be- cause what was held is that it takes time before the Government could take" decision regarding filing of the appeal. In the present case the decision had bee taken not to file the appeal within the period of limitation and the decision changed much after the expiry of the period of limitation.

(11) After giving our careful consideration to the entire facts of the case we are of the opinion that the matter is squarely covered by the decision of the Lordships of the Supreme Court in Ajit Singh Tahkur Singh (supra). Even if assume and take into consideration the allegations of bad faith, the same ha not been substantiated. Only allegations are that the discussion in Parliament took place and, Therefore, it was presumed that the decision was in bad fa Bad faith has not been attributed - to any individual or any other concerned person in the Government. The allegations are only general. By How it is ? settled thit the burden of establishing malafides or bad faith is very heavy the person alleging the same. It was held in E.P. Royappa Vs. State of Tamil Nadu and Another, that allegations of mala fides are often more easily than prove, and the very seriousness of such allegations demands proof of high order of credibility. As we have already stated that the allegation are only general in nature and the same have in no way been substantiated.

(12) Before we part with this appeal we would also like to deal with the maintainability of the Letters Patent Appeal though the learned counsel for respondent did not seriously oppose the maintainability. The appeals High Court u/s 54 of FBRA were filed against the adjudication and cannot possibly be should to be criminal proceedings. The difficulty only because according to the practice of this Court such appeals are labelled as criminal appeals. By now it is well settled that mere label is not conclusive. It has to bs seen as to whether the proceedings are criminal, quasi-criminal or civil. What is excluded by clause 15 of Bombay Letters Patent and clause 10 of Punjab Letters Patent as applicable to Delhi, are criminal proceedings. The proceedings before the adjudication authorities as we have already said are not criminal proceedings and as such are squarely covered by clause 10 of the Letters Patent. lit was also not disputed that in other High Courts such as in Bombay High Court the appeals are labelled as civil appeals and it is only in this Court that it is labelled as a criminal appeal. Consequently we hold that the Letters Patent Appeals are maintainable.

(13) For the reasons recorded above the appeals are allowed and the impugned orders passed by the learned Single Judge are set aside. The consequence would be that the appeals being Criminal Appeal No. 12 and 13 of 1990 would stand dismissed as barred by limitation. There will be no order as to costs.