

(2014) 03 GUJ CK 0090

In the Gujarat High Court

Case No : Special Civil Application No. 2628 of 2006

K.G. Toshniwal

APPELLANT

Vs

Addl. Director General of Foreign Trade

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35 35B 35EE 35G 35H

Constitution of India, 1950 — Article 226

Contract Act, 1872 — Section 10 11 12 13 14

Foreign Trade (Development and Regulation) Act, 1992 — Section 14 15 15(2) 15(3)

Land Acquisition Act, 1894 — Section 18

Limitation Act, 1963 — Section 10 11 12 13 14

Citation : (2014) 2 GLR 1713

Hon'ble Judges : R.M. Chhaya, J

Bench : Single Bench

Advocate : R.C. Jani, for the Appellant; Anshin H. Desai, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Chhaya, J.—By way of this petition under Article 226 of the Constitution of India, the petitioner has inter alia, prayed as under:- A. admit and allow this petition;

B. issue appropriate writ, order or direction, quashing and setting aside the order dated 21.07.2003 passed in File No. 08/F-5/42/AM02/ECA/550 and order dated 18.01.2005 passed in File No. 11/559/2003-04/ECA. I on the ground of delay of days and the matter is not decided on merit and also the order dated 27.06.2005 passed in File No. 12013/8/2005-ADJ/AC by the respondent-authority and further be pleased to remand the matter and may be pleased to direct the respondent-authority to decide the matter on merit afresh;

C. pending, admission, hearing and final disposal of this petition, the Hon'ble Court may be pleased to direct the respondent not to take away coercive action against the petitioner;

D.

The facts which emerge from the petition are as under:-- 1.1 The petitioner is engaged in the business of import and export. It is the case of the petitioner that the respondent-authority has issued a licence to the petitioner under which the petitioner was required to export the items, which are indicated in the condition sheet for FOB within stipulated time.

1.2 It appears that the petitioner had also filed declaration/undertaking along with application which entails certain export obligation to be undertaken against the licence. As per paragraph-7.24 of the Handbook of procedure, 1997-2002 Volume-1, the petitioner was required to submit relevant evidence to establish that the petitioner has discharged export obligation as per paragraph-7.25 of the handbook. As the petitioner did not produce any evidence or necessary documents to establish that the petitioner has fulfilled the export obligation, the respondent-authority issued a notice dated 08.06.2001 calling upon the petitioner to submit the original licence and DEEC book alongwith the relevant documents.

1.3 It is the case of the petitioner that on making inquiry, the relevant papers were found to be missing/lost and therefore, the petitioner filed a complaint before the police. Pursuant to such complaint, the police authority issued a certificate dated 30.11.2003, wherein advance licence and DEEC book are also included. It further appears that the petitioner applied for duplicate DEEC book of export part on 22.03.2003 by depositing requisite fees.

1.4 It is the case of the petitioner that because of such difficulty, the petitioner could not produce the originals before the respondent-authority. As the petitioner did not comply with the aforesaid notice, the respondent-authority passed order dated 21.07.2003 and the same was communicated to the petitioner. It further appears that the petitioner challenged the same by way of filing an appeal before the appellate authority, which came to be rejected vide order dated 18.01.2005 on the ground of limitation and hence, this petition.

2. Heard Mr. R.C. Jani, learned counsel for the petitioner and Mr. Anshin Desai, learned Senior Central Government counsel for the respondent.

3. Learned counsel for the petitioner has taken this Court through the order-in-origin dated 21.07.2003 (at Annexure-C) as well as order impugned dated 27.06.2005 (at annexure-G) passed by the appellate authority and has raised following contentions:--

(a) That the appellate authority has on technical ground of limitation has not condoned the delay and therefore, the impugned orders are bad and illegal.

(b) That there is no specific bar in Section 15 of the Foreign Trade (Development and Regulation) Act, 1992 ("the Act" for short) and therefore, by virtue of Section 29(2) of the Limitation Act as there is no express bar in the said Act, provisions of Sections 4 to 24 of the Limitation Act would apply and therefore,

the appellate authority ought to have condoned the delay

(c) That the petitioner has meritorious case and therefore, merely on technical ground of filing an appeal after a period of limitation would prejudice the interest of the petitioner and therefore, the appellate authority ought to have condoned the delay.

4. Learned counsel for the petitioner has also relied upon the judgment of this Court passed in First Appeal No. 1241 of 2011 dated 30.11.2011.

5. Per contra, Mr. Anshin Desai, learned Senior Central Government counsel for the respondent-authority has submitted as under:--

(a) That bare reading of Section 15 of the Act does not give any power to the appellate authority to condone the delay beyond period of 30 days.

(b) That licence in question is only for one year and it is not automatically renewable, the applicant, like the petitioner, has to apply for fresh licence every year.

(c) That Section 15(3) of the Act gives finality to the order and therefore, if the power of limitation is read beyond period of 30 days, provisions of Section 15(2) would become redundant.

6. Learned counsel for the respondent-authority has relied upon the judgment of the Apex Court in the case of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, as well as in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others,

No other and further submissions are made by learned counsel for the respective parties.

7. On perusal of the record of this petition as well as the impugned orders, it transpires that as per the conditions of the licence of the policy enunciated by the respondent-authority (Handbook of procedures, 1997-2002 Volume-1), it is incumbent for the licence holder like the present petitioner to complete the export obligation. As per the conditions of the licence, the petitioner was required to fulfill the export obligation to the tune of Rs. 30,07,670/- within a period of 12 months from the date of issue of the licence. It also borne out from the record that as per the condition of licence, the petitioner had also given undertaking for fulfillment of export obligation. It is an admitted position that the petitioner did not submit any details as regards fulfillment of export obligation before the respondent-authority, which culminated into notice dated 08.06.2001.

8. It also provides from the record that the petitioner was given an opportunity of being heard on 26.06.2001. It further appears that by way of reply given on 26.06.2001, the petitioner asked for time till July 2001 to submit original licence and DEEC book along with relevant documents etc. It appears that the petitioner contended before the respondent-authority that the relevant documents were lying with his agent for audit of the customs authority. It further appears from

the record that such request made by the petitioner was considered by the respondent-authority and time upto 31.07.2001 was given to the petitioner. As the same was not adhered to by the petitioner, show-cause notice was issued as provided u/s 14 of the Act on 11.03.2002.

9. In response to said notice, personal hearing was fixed on 02.04.2002, however, the petitioner did not give any reply to the same. It further appears that on 15.07.2002, the respondent-authority gave further time of 15 days and kept the hearing on 02.08.2002.

10. Record further reveals that in response to the same, the petitioner again asked for further time of 15 days vide communication dated 02.08.2002 and the same was granted and the hearing of the show-cause notice was adjourned to 24.09.2002. That the petitioner through his officer attended hearing and reiterated the stand that the licence, DEEC and export documents were in possession of the customs authority, however, no reply was submitted by the petitioner.

11. It further appears that the respondent-authority again informed the petitioner vide communication dated 03.04.2003 asking the petitioner to submit necessary documents within 15 days, as final opportunity. As no reply was filed by the petitioner nor any documents were submitted, even though the ample opportunity was given by the respondent-authority, ultimately, the order-in-origin dated 21.07.2003 came to be passed.

12. On perusal of the said order, it appears that the petitioner did not avail the opportunity of producing necessary and/or required documents to establish that it has fulfilled the export obligations. The said order also recites that the appeal can be preferred within 45 days as provided u/s 15 of the Act.

13. Record further reveals that the order-in-origin dated 21.07.2003 was served upon the petitioner and accordingly, the petitioner an appeal, which was received by the appellate authority on 02.01.2004. The respondent-authority on interpretation of Section 15 of the Act, dismissed the appeal on the ground that the same is beyond the period of limitation.

14. Upon considering the aforesaid position, it would be appropriate to examine the provisions of Section 15 of the Act, which read as under: -

Section-15-Appeal. (1) Any person aggrieved by any decision or order made by the Adjudicating Authority under this Act may prefer an appeal,-- (a) where the decision or order has been made by the Director General, to the Central Government; where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the Adjudicating Authority authorised by the Director General to hear the appeal, within a period of forty-five days from the date on which the decision or order is served on such person: Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring

the appeal within the aforesaid period, allow such appeal to be preferred within a further period of thirty days: Provided further that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of the penalty or redemption charges has been deposited by the appellant: Provided also that, where the Appellate Authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose. (2) The Appellate Authority may, after giving to the appellant a reasonable opportunity of being heard, if he so desires, and after making such further inquiries, if any, as it may consider necessary, make such orders as it thinks fit, confirming, modifying or reversing the decision or order appealed against, or may send back the case with such directions, as It may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:, 182 Provided that an order enhancing or imposing a penalty or redemption charges or confiscating goods of a greater value shall not be made under this section unless the appellant has been given an opportunity of making a representation, and, if he so desires, of being heard in his defence. (3) The order made in appeal by the Appellate Authority shall be final. 15. Bare reading of the aforesaid provisions clearly reveal that the statutory period for preferring an appeal against a decision or order made by the adjudicating authority under this Act is within a period of 45 days from the date on which the decision or order is served upon such person. First Proviso to it, clearly provides that if the appellate authority is satisfied that the appellant was prevented by sufficient cause for preferring the appeal within a period of 45 days, such appeal an be preferred within a further period of 30 days. Sub-section (3) of Section 15 of the Act further provides that the order made in appeal by the appellate authority shall be final. It therefore, provides that the person if aggrieved by any decision or order passed by the adjudicating authority is required to file an appeal within 45 days from the date of the decision or order is served upon such person.

16. Proviso enables the appellate authority to condone the delay, if it is satisfied about the sufficient cause for further period of 30 days. From the memo of appeal, it clearly reveals that the appeal was not within stipulated time. The order-in-origin was passed on 21.07.2003 and the appeal was lodged on 02.01.2004. It is not the case of the petitioner that copy of the order was not served upon the petitioner. Even in appeal memo, only general statement is made in para-9 for condoning the delay and as recorded by the appellate authority, the appeal is filed after expiry of five months.

17. Learned counsel for the respondent-authority has rightly relied upon the judgment of the Apex Court in the case of Commissioner of Customs and Central Excise (supra), wherein the Apex Court has examined the scheme of the Central Excise Act, 1944 and while considering Section 35-H(1) of the said Act for making reference to the High Court has observed thus:--

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 35B 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 35EE 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 35G and reference to the High Court u/s 35H 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.

16. Reliance was placed to Section 5 and Section 29(2) of the Limitation Act which read 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, 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. Savings.--(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).

(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.

18. On consideration of the judgments of the Apex Court in the cases of Union of India Vs. M/s Popular Construction Co., Sharda Devi Vs. State of Bihar, M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, as well as in the case of M.M. Thomas Vs. State of Kerala and Another, the Apex Court has further observed thus:--

30. In the earlier part of our order, we have adverted to Chapter VIA of the Act which provides appeals and revisions to various authorities. Though the Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to Appellate Tribunal. Also an additional period of 90 days in the case of revision by Central Government has been

provided. However, in the case of an appeal to the High Court u/s 35G and reference application to the High Court u/s 35H, the Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibers Ltd., Noida (supra). Commissioner of Customs, Central Excise, Noida is the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference u/s 35H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, concluded that "the High Court was justified in holding that there was no power for condonation of delay in filing reference application.

32. As pointed out earlier, the language used in Sections 35, 35B, 35EE, 35G and 35H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law here in this case is Central Excise Act. The nature of the remedy provided therein are such that the legislature intended it to be a complete Code by itself which alone should govern

the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

36. The scheme of the Central Excise Act, 1944 support the conclusion that the time limit prescribed u/s 35H(1) to make a reference to High Court is absolute and un-extendable by court u/s 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act.

37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under un-amended Section 35H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation.

19. Considering the provision of Section 15 of the Act, the appellate authority had no power to condone the delay beyond period of 30 days. The contention raised by Mr. Jani, learned counsel for the appellant that by virtue of Section 29(2) of the Limitation Act, as there is no specific bar in the said Act and on the contrary, Proviso gives power to condone the delay, the appellate authority had therefore, power to condone further delay even beyond period of 30 days, deserves to be negated. It is no doubt true that the appellate authority if satisfied that there is sufficient cause, can condone the delay but such power is only limited for 30 days and therefore, the appeal if filed beyond period of 75 days, the appellate authority is devoid of any power to condone the delay.

20. In the unreported judgment of this Court rendered in First Appeal No. 1241 of 2011 dated 30.11.2011 is not only on fact of the said case but in light of the judgment of the Apex Court in the case of Commissioner of Customs and Central Excise (supra), this Court is of the opinion that the same would not apply in the instant case.

21. At this juncture, it would be appropriate to refer to the decision of the Apex Court in the case of Popat Bahiru Govardhane etc. Vs. Special Land Acquisition Officer and Another, wherein the Apex Court has considered" the power to condone the delay u/s 18 of the Land Acquisition Act and has observed thus:

16. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law, stands attracted in such a situation. It has consistently been held that, inconvenience is not" a decisive factor to be considered while interpreting a statute. A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation.

22. In the instant case also, law of limitation may adversely and harshly affect the petitioner, however, the appellate authority is empowered to condone the delay only for a period of 30 days, which cannot be extended by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Power to condone the delay that too of the appellate authority is to be construed and interpreted as per the provisions of the Act and no further power of delay can be read into the provision of Section 15 of the Act as canvassed by learned counsel for the petitioner. The principles enunciated by the Apex Court in the case of Commissioner of Customs and Central Excise (*supra*) would equally apply in this case.

23. Order-in-origin clearly reveals that ample opportunity was given to the petitioner which has not been availed for the reasons best known to the petitioner. It is further seen from the order-in-origin that before the respondent-authority, the petitioner submitted that the licence and other relevant documents which required to be submitted, were lying with the customs agent for audit of the customs and thereafter, the petitioner has come out with a case that it was lost/stolen and therefore, has lodged a complaint before the police. Except the bare words that the petitioner has fulfilled the export obligation, nothing is placed even before this Court by the petitioner.

24. In light of the aforesaid, conclusions arrived at by the first authority and the appellate authority are legal and proper and in consonance with the provisions of Section 15 of the Act. Consequently, no interference is called for by this Court in its extraordinary jurisdiction under Article 226 of the Constitution of India.

25. It may be noted that by order dated 05.04.2006, the matter came to be admitted and interim relief in terms of Para-7(C) was granted till the returnable date. Record shows that the same is continued only upto 05.05.2006 and the original record of this petition indicates that thereafter stay is not extended. In light of the aforesaid, the petition fails and is liable to be dismissed and is hereby dismissed. Rule is discharged. As recorded above, interim relief is not extended, however, interim relief, if any, is hereby vacated. Parties to bear their own costs.