

(2006) 07 AHC CK 0202

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 66766 of 2005

National Winder

APPELLANT

Vs

The Presiding Officer, Employees Provident Fund Appellate Tribunal, Regional Provident Fund Commissioner, The Employees Provident Fund Organization and State of U.P.

RESPONDENT

Date of Decision : 07-07-2006

Acts Referred:

Advocates Act, 1961 — Section 37, 38, 48AA
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128
Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 — Rule 2(7), 7, 7(2)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 21, 21(1), 21(2), 7(2), 7A
Land Acquisition Act, 1894 — Section 18
Limitation Act, 1963 — Section 1, 10, 11, 12, 13
Penal Code, 1860 (IPC) — Section 193, 196, 228
Uttar Pradesh Motor Vehicles Taxation Act, 1997 — Section 15

Citation : (2006) 07 AHC CK 0202

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Advocate : Umesh Narain Sharma and A.P. Srivastava, for the Appellant; D.M. Chaudhary and Dhananjay Awasthi and S.C., for the Respondent

Final Decision : Disposed Of

Judgement

V.K. Shukla, J.—M/s National Winder through its Managing Director Ravindra Kumar Shah has approached this Court questioning the validity of the order dated 16.07.2004 passed by Regional Provident Fund Commissioner, respondent No. 2 and the order passed by Employee Provident Fund Appellate Tribunal, New Delhi dated 08.09.2005 dismissing the appeal preferred against the same being time barred. Further prayer has been made for not giving effect to the aforesaid two impugned orders and further for not taking coercive measure for recovering the aforesaid amount.

2. Brief facts as it emerges from the writ petition is that petitioner's company is registered under the Indian Companies Act in the name and style of M/s National Winder with its registered office at Pisachmochan Varansi. Petitioner's company is engaged in the business of manufacturing of Fan under the branded name of Cinni Fan. Petitioner's establishment has been registered under Employees Provident Fund and Miscellaneous Provisions Act 1952 (hereinafter called Act 1952) and in lieu of this registration No. 938 has been allotted. Petitioner has contended that on account of closure of Banaras State Bank Limited, Lahurabir, Varanasi, financial transactions of petitioner's establishment was disturbed and further said Banaras State Bank Limited has merged with the Bank of Baroda and petitioner's have been negotiating with the aforesaid Bank for smooth transaction of business. On 22.10.2002 show cause notice was served upon the petitioner for non payment of provident fund dues and non submission of provident fund return. Said notice was followed by another notice dated 18.12.2002 u/s 7A of the Act for the period June 2000 to September 2002. Petitioner has stated that during the course of proceedings u/s 7A of the Act 1952 Act return of the provident fund were submitted and several amounts were deposited with the Employees Provident Fund Organization, Varanasi. Copies of Chalan dated 17.05.2003 to 03.10.2003 has been collectively filed as Annexure No. 3 to the writ petition. Thereafter it has been contended that Assistant Regional Provident Fund Commissioner, Varanasi ex-parte on 16.07.2004 determined quantum of provident fund contribution due for the period September 2001 to September 2003 amounting of Rs. 88,59,792/-. Petitioner has contended that besides communicating order dated 16.07.2004 another letter No. 115747 was sent by Recovery Cell demanding Rs. 3,10,028/-(Three lacs ten thousand twenty eight). Petitioner's has contended that pursuant to the said demand an application alongwith affidavit was filed giving details of deposits made. It has further been contended that thereafter vide letter dated 01.09.2004 Recovery Officer postponed the execution of arrest warrant and time was accorded for depositing the amount. Petitioner has also disclosed that petitioner's Unit is a sick unit and sick period has been extended till 16.12.2004. Petitioner has contended that on 17.09.2004 notice was served for payment of interest and damages and the same was followed by another notice dated 09.12.2004 and on 22.02.2005 entire property of petitioner's establishment was attached by respondent No. 3 claiming payment of Rs. 1,40,53,349/- (One Crore, forty lacs, fifty three thousand, three hundred forty nine) and factory has been locked and sealed. On 24.03.2005 recovery certificate has been issued mentioning aforesaid amount to be recovered as arrears of land revenue through District Magistrate, Chandauli. Said property was to be put for auction and said auction was postponed. Petitioner at the said juncture preferred Civil Misc. Writ Petition No. 51483 of 2005 before this Court with following relief:

(i) to issue an order direction or writ in the nature of certiorari quashing the order dated 28.06.2005 (Annexure 6 to 8) and order dated 22.02.2004 (Annexure-2) to the writ petition.

(ii) to issue an order direction or writ as under the circumstances this Hon''ble Court may deem fit and proper

(iii) to award the cost of the writ petition.

3. On presentation of aforesaid writ petition, this Court on 22.07.2005 passed following order:

Sri Dhananjay Awasthi Advocate has accepted notice on behalf of respondent No. 1 Standing Counsel represents respondent Nos. 2 and 3.

Respondents pray for and are granted two weeks time to file counter affidavit. Rejoinder affidavit may be filed within one week thereafter.

List on 2nd September 2005.

All the consequential action in pursuance of the recovery certificate dated 28th June 2005 shall remain stayed provided (a) petitioner deposits a sum of Rs. 50 lacs on or before 26th July 2005 and further deposits a sum of Rs. 25 lacs on or before 31 August, 2005 (b) Petitioner shall thereafter deposit the remaining total outstanding amount including interest at per the recovery certificate, referred to above, in three equal installments of two months each, commencing from 1st November 2005.

Counsel for the petitioner has made a statement that the conditions imposed herein above shall be carried out in letter and spirit.

In case of default in compliance of any of the conditions mentioned herein above the respondents shall be at liberty to proceed against the petitioner in accordance with law afresh. If the petitioner No. 2 and 3 have already been arrested in pursuance of the said recovery they may be released forthwith.

If admissible under law, the respondent authorities may take all effective steps for sale of the attached property.

Certified copy of the order may be supplied to the counsel for the petitioner today on payment of usual charges.

4. Thereafter an application for modification of the order dated 22.07.2005 was moved by the petitioner so for it related to deposit of Rs. 25 lacs on or before 31.08.2005. On the said modification application, this Court passed following order. Operative part of the order dated 01.09.2005 is being quoted below:

Having regard to the facts and circumstances of the case, the time granted under interim order of this Court date 22.07.2005 for deposit of second installment i.e. Rs. 25 lacs on or before 31st August 2005 is extended up to 15th September 2005. The petitioner undertakes to comply with the remaining part of the directions, as contained in the said order, within the time specified thereunder.

application stands disposed of.

5. Petitioner's claim that they deposited Rs. 50 lacs with the authority concerned and further factory premises continued under attachment. Petitioner has contended that as proceedings undertaken against the petitioner u/s 7A of 1952 Act was not at all in accordance with law and the order dated 16.07.2004 has been arbitrary order, as such appeal was preferred before the Employees Provident Fund Appellate Tribunal, New Delhi alongwith an application u/s 5 of the Limitation Act for condoning the delay. Said appeal had been rejected as time barred on 08.09.2005. At this Juncture Present writ petition has been filed. Thereafter on 12.09.2005 application to withdraw, Civil Misc. Writ Petition No. 51483 of 2005 was moved, however, said petition has been dismissed for want of prosecution by this Court on 24.09.2005.

6. Counter affidavit has been filed and it has been sought to be contended that Appellate Authority has taken rightful view and rightly rejected the appeal as being time barred. It has also been contended the summons were duly issued u/s 7A of 1952 Act and full Opportunity was provided to petitioner and further it is clear that required exercise was not undertaken by the petitioner as such rightful assessment has been done. Proceedings u/s 7A of the 1952 Act are valid proceedings and further provisions of Section 5 of Indian Limitation Act is not at all attracted as the Employee Provident Fund and Miscellaneous Provisions Act, 1952 is a special Act and under Rule 2(7) of the Employees Provident Fund Appellate Tribunal Rules (Procedure) 1997, power and procedure for condonation of delay is given and when the limitation has been provided by the Act itself and even the period of limitation which can be condoned has also been provided for then in this background further condonation of delay is not permissible. It has been contended that dues of Rs. 1,40,53,349/- have already been collected by the petitioner but same has not been deposited by the petitioner. Various notices and summons were sent but petitioner have deliberately not deposited the same.

7. Rejoinder affidavit has been filed and it has been contended that entire proceedings have been undertaken ignoring the chalans which were available on record. In this connection it has been contended that petitioner regularly deposited the employee contribution as well as employer contribution with the administrative charges and inspection charges between June 2000 upto September 2002 regularly. It has further been contended that chalan submitted by the petitioner alongwith return and deposits slip were properly accepted and receipts were issued by the answering-respondent. The order in question has been dubbed exparte order, Statement of chart of Provident Fund has been sought to be appended to show the amount in question has been deposited. In this connection Annexure RA-1, RA-2, RA-3, have been appended to show and substantiate that entire proceedings are exparte and totally without jurisdiction.

8. After pleadings mentioned above have been exchanged, present writ petition is being taken up with the consent of the parties for final hearing and disposal.

9. Sri, A.P. Srivastava, Advocate has entered appearance on behalf of petitioner,

learned Standing Counsel has entered appearance on behalf of State Respondents and for respondents No. 1 to 3 Sri Dhananjay Awasthi has entered appearance.

10. Sri A.P. Srivastava, learned Counsel for the petitioner, has assailed the validity of the decision taken by the authority concerned on following grounds : (i) Appellate Authority has clearly erred in law in rejecting the appeal being time barred whereas valid and genuine ground had been provided for which warranted condonation of delay and treating the appeal as having being filed well within time (ii) Order passed u/s 7A(3-A) of the Act is an order passed without providing any opportunity and same is non-speaking and cryptic order, (iii) Authority concerned has failed to exercise its authority as records have not at all been perused and quantum has been fixed arbitrarily without any basis as such order dated 16.07.2004 is unsustainable and liable to be quashed.

11. Sri Dhananjay Awasthi, Advocate on the other hand countered the said submission by contending that (i) earlier in the past petitioner has approached this Court by means of Civil Misc. Writ Petition 51483 of 2005 and condition imposed in the order passed by this Court has not been complied with and as such no interference be made in the present writ petition, (ii) Employees Provident Fund and Miscellaneous Provisions Act 1952 is special Act wherein specific provision of limitation has been provided for, as such order passed by the Appellate Authority is justifiable order and no interference is warranted by this Court, (iii) Order dated 16.07.2004 is just and valid order, inasmuch as, in spite of repeated opportunity provided for, petitioner has neither produced any document asked for nor any evidence has been led, as such no interference be made and writ petition be dismissed.

12. First question which is being adverted to as raised by Sri Dhananjay Awasthi, Advocate is in regard to the maintainability of the present writ petition, Civil Misc. Writ Petition No. 51483 of 2005 had been filed by the petitioner questioning the validity of the recovery proceedings by means of which property of the petitioner was attached as well as way and manner in which recovery proceedings has been undertaken. As only recovery was subject matter of challenge in the aforesaid writ petition, as such this Court came to the rescue of the petitioner by providing interim protection to the petitioner however petitioner has partly complied with the order by depositing Rs. 50 lacs(fifty lacs) and remaining part of the order has not been complied with. Original interim order passed by this Court on 22.07.2005 clearly gave liberty to the respondents to proceed against the petitioner in accordance with law in case of default of the condition of Interim order. In the said writ petition neither the validity of the order dated 16.07.2004 has been challenged nor order passed by the Appellate Tribunal, has been challenged as such said writ petition will not come in the way of petitioner in questioning the validity of the order dated 16.07.2004 and the order passed by Appellate forum, as such present writ petition is fully competent and maintainable.

13. Now coming to the next question, as to whether appeal which was preferred on behalf of the petitioner has rightly been rejected on the basis that it was filed beyond the period of limitation. At this juncture relevant Rule which covers the field, known as Employee Provident Fund Appellate (Procedure) Tribunal Rules 1997 is being quoted below:

Rule 7- Fee time for filing appeal, deposit of amount due on filing appeal -(1) Every appeal filed with the Registrar shall be accompanied by a fee of Rs Two hundred to be remitted either in the form of crossed demand draft on a nationalized Bank in favour of the Registrar of the Tribunal and payable at the main branch of that bank at the station where the seat of the said Tribunal is situated or remitted through a crossed Indian Postal Order drawn in favour of the Registrar of this Tribunal and payable at the post office of the station where the said Tribunal is situate. (2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification order prefer an appeal to the Tribunal.

Provided that the tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal 75 percent of the amount due from him as determined u/s 7A.

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited u/s 7O.

14. At this stage Section 29(2) of the Indian Limitation Act 1963 is also being quoted below:

Section 29(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 as far as and to the extent to which they are not expressly excluded by such special or local law.

15. A bare perusal of Sub Rule 2 of Rule 7 of Rules 1997 would go to show that from the date of the order within 60 days appeal can be preferred to the Tribunal. Thus, limitation of preferring appeal within sixty days is from the date of order and further Tribunal has been vested with the authority in case it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days. Thus, as per the provisions on the satisfaction being recorded by the

Tribunal period of 60 prescribed for preferring appeal is further liable to be extended for next 60 days. Section 29(2) of Indian Limitation Act provides in no uncertain terms that if 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 provision of Section 3 would apply as if such period were the period prescribed by the schedule and for the purposes of determining any period of limitation prescribed for any suit appeal or application by any special or local law, the provisions contained in Section 1 to 24 shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law.

16. Hon"ble Delhi High Court interpreting these very provisions in the case of Assistant Regional Provident Fund Commissioner, Meerut v. Employees Provident Fund Appellate Tribunal and Ors. reported in 2005 VII AD (Delhi) 155, this judgment has been noted by Appellate Forum has taken the view that the provisions of Employees Provident Fund and Miscellaneous Provisions Act 1952 are under special Act and therein power to condone the delay has already been provided for next 60 days then in that background provisions of Section 29(2) of Indian Limitation Act will not come into play and the applicability of provisions of Section 5 of Indian Limitation Act is clearly ruled out. Relevant paragraphs 11 to 27 of the aforesaid judgment is being quoted below:

11. Rule making authority u/s 21 is entitled to make rules to carry out the provisions of this Act by issuing a notification in the Official Gazette. Sub-clause (b) of Sub Section (2) of Section 21 reads as under:

the form and the manner in which and the time within which an appeal shall be filed before a Tribunal and the fees payable for filing such appeal

12. Rule 7(2) reads as under:

(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification order prefer an appeal to the Tribunal.

Provided that the tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

13. It is in view of the aforesaid provisions, it was contended that the appeal was hopelessly time barred and after the period of 60 days granted for preferring an appeal, if there is delay of 60 days, then such delay can be condoned and no further.

14. The Tribunal expressed an opinion that the power of the Tribunal to condone the delay u/s 5 of the Indian Limitation Act 1963 is not curtailed by the Legislature. It is done by rule making authority which has been authorised to prescribe only limitation for filing an appeal. Therefore, the provisions under the

Employees Provident Funds Appellate Tribunal (Procedure) Rules, 1997, only to condone a delay of 60 days is ultra vires and is void. Therefore, it is held that the Tribunal has jurisdiction to condone any delay, if it is satisfactorily explained. Even on merits the Tribunal held:

it is quite clear that only ownership is condone and that way control of the Directors will also be common but local management and supervisory control and other things necessary for running the factory at Noida are quite distinct and different. Taking of the loan by the employer to set up this factory does not support that the loan has been taken by factory at Bombay. The subsequent borrowing of loans by the appellant has been done against assets of factory at Noida. The borrowing also does not make financial integrality between the two factories. Thus, the factory of independence is confirmed by evidence in this case. Therefore, the factory at Noida cannot be held to be a branch or department of the factory at Bombay and allowed the appeal.

15. Learned Counsel for the Company submitted that Sub-clause (b) of Sub-section (1) of Section 21 provides the rule making authority to prescribe time limit within which an appeal shall be filed before the Tribunal, Legislature only authorized the rule making authority to make a provision for prescribing a period for preferring an appeal however, the rule also provided a further period of 60 days by proviso to Sub-rule (2) of Rule 7 of the Rules. In view of this it was contended that proviso of ultra vires the provisions contained in the Act. It was further submitted that if the proviso is ultra vires the provisions contained in the Act, then the Limitation Act 1963 will apply. In the submission of learned Counsel for the Company, the Tribunal has rightly held that the law of limitation is applicable. It was submitted that Section 7I of the Act, if read it becomes very clear that Sub-section (2) of Section 7I also refers such time within which the appeal is to be filed.

16. The Act is a labour legislation wherein provision is made for provident funds to be deposited by the employer, Section 7D to 7H provide for the Appellate Tribunal, the term of the office of the Presiding Officer of Tribunal, salary, allowances and other terms and conditions of Presiding Officer and the staff of the Tribunal. Section 7I provides for appeals to the Tribunal. The Chapter further provides procedure before the Tribunal assistance of a legal practitioner, right of hearing or rectification of an order, finality of orders of the Tribunal, deposit of amount due on filing an appeal, transfer of cases, the manner of recovery, recovery certificate, validity of the certificate and such other things. It provides penalties, offenses by companies enhanced punishment in certain cases and offences under the Act to be cognizable, It also provides the Court which shall try the offences. Thus, a special mechanism is indicated in the Act itself.

17. With a view to see that the proceedings disposed of as early as possible, it was left by the legislature to fix such time for preferring an appeal. Section 21(2) (b) refers to the time within which an appeal shall be filed and in view of this it was submitted that in absence of any power, it was not open to prescribe a

specific period for condonation of delay in Sub-rule (2) of Rule 7 of the Act in exercise of the powers conferred under Sub-section (1) of Section 21 of the Act.

18. The Legislature left it open to the rule making authority to prescribe time for preferring an appeal. However, at the same time the rule making authority while prescribing the period of limitation for preferring an appeal also provided a period during which if there is a delay, the same can be condoned if the Tribunal is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. However, the limitation was placed that can be done if there is delay of a further period of 60 days.

19. In our opinion, it cannot be said that the rule making authority has exceeded its limit while prescribing the period of limitation. Like the provisions in other statutes of condoning the delay the rule making authority thought it fit to provide some period if there is a sufficient cause and the Tribunal is satisfied that the applicant was prevented from preferring the appeal on such cause to extend the period of limitation. This provision is an enabling provision. It does not take away the right of a person of preferring an appeal but on the contrary it enables a party who could not prefer an appeal within the prescribed period for sufficient reasons. However, at the same time, keeping in mind that the provision is made for a weaker section, depositor must be resolved at the earliest, therefore, restricted the period, i.e. that if the delay is of 60 days then to that extend delay can be condoned. Therefore, in our opinion, the provisions cannot be said to be ultra vires of the provisions of the Act as the provision for condonation of delay is made to help the litigant who might be facing genuine difficulties. It is difficult to say that the proviso to Sub-rule (2) of Rule 7 is bad. If that is declared as bad or ultra vires Section 71 or Section 21(1)(b) of the Act, it can be said that the period of limitation prescribed is bad for want of not providing extended period in case of difficulty.

20. It is required to be noted that in case of *Delta Impex v. Commissioner of Customs* Cus AC No. 9 of 2003 decided on 13/02/2004 this Court had an occasion to examine the question raised by the applicant which reads as under:

Whether the provision of Section 128 of the Customs Act 1962 completely bars the Commissioner (Appeals) from condoning the delay beyond the period of 30 days even in a deserving case and that...made by the Commissioner (Appeals) is it incumbent upon the Tribunal to consider the appeal on merits?

21. There also it was submitted that considering the provisions contained in Section 29(2) of the Indian Limitation Act, 1963 (hereinafter referred to as the Limitation Act) read with Section 5 thereof, irrespective of the fact that the matter was under the Customs Act, the appellate authority ought to have condoned the delay, examined the matter on merits and it could not have dismissed the appeal on the ground that the Commissioner (Appeals) can only condone the delay, if an appeal is presented within a period of 30 days after the statutory period of 60 days in view of Section 128 of the Act.

22. In case of Collector of C.E. Chandigarh v. Doaba Cooperative Sugar Mills 1988 (37) FIT 170 (SC) Supreme Court pointed out that the authorities functioning under the Act are bound by the provision of the Act. If the proceedings are taken under the Act by the Department the provisions of limitation prescribed in the Act will prevail in the Case of Mills India Limited v. Assistant Collector of Customs 1987 (3) FLT 641 (SC) the Court observed that the Customs Authorities acting under the Act were not justified in disallowing the claim as they were bound by the period of limitation provided there in the relevant provisions of the Customs Act 1962.

23. The Court in the aforesaid case pointed out that the period of limitation prescribed by the Act for filing an application being different from the period prescribed under the Limitation Act, by virtue of Section 29(2) of the said Act, it shall be deemed as if the period prescribed by the different Act is the period prescribed by the schedule to the Limitation Act. However, it would be difficult to say that Section 5 of the Limitation Act is intended to be made applicable in view of the proviso to Section 128 of the Customs Act.

24. The Court is required to examine the scheme of the special law and the nature of the remedy provided therein. Considering these aspects, the Court will have to find out whether the Legislature intended to provide a complete code by itself which alone should govern the matters provided by it. On examination of the relevant provisions, if it becomes clear that the provisions of Section 5 of the Limitation Act are necessarily excluded then the said provisions cannot be called in aid to supplement the provisions of the Act. It is open to the Court to examine whether and to what extent the nature of the...in comparison with the scheme of the special law are excluded from operation, when a specific period is provided and a further period of 60 days by way of extended period only then that much period can be condoned.

25. In the instant case a separate period of limitation is provided, as also the period for which delay can be condoned. The legislature was aware about the provisions contained in Section 5 of the Limitation Act, yet with an intention to curb the delay in labour matters, legislature left it to the Rule making authority to make a provision for limitation. Rule making authority under the Statute has specifically provided that after statutory period, if there is delay of 60 days, on showing sufficient grounds for delay of 60 days, that can be condoned. Thus, applicability of Section 5 of the Limitation Act is specifically excluded.

26. The expression expressly excluded in Sub-section (2) of Section 29 of the Limitation Act means an exclusion by express words, i.e. by express reference and not exclusion as a result of logical process of reasoning. In the instant case, there is.... exclusion but it specifically provides a different period of limitation provides a different period of limitation, as also the period during which, if delay has occurred, it could be condoned.

27. With regard to the applicability of Sections 4 to 24 of the Limitation Act

(inclusive) one will have to refer to Sub-section (2) of Section 29 of the Limitation Act 1963? It specifically states that these provisions shall apply only so far as and to the extent to which they are not expressly excluded by special or local law. Reading the language of Rule 7 of the Rules and Section 5 of the Limitation Act it is very clear that extension of time for a period 60 days only can be condoned subject to satisfaction and no beyond that. From an examination of Rule 7 of the Rules, it is very expressly excluded as a specific provision is made in Rule.

17. Learned Counsel for the petitioner for taking contradictory view on the issue has placed reliance on various judgments, which are being looked into:

(i) In the case of Mangu Ram Vs. Municipal Corporation of Delhi, , important departure made by Limitation Act, 1963 qua the provisions of Sub-section (2) of Section 29 was noted by mentioning that provisions of Section 5 was specially made applicable, and the effect of the same was that the period of Limitation prescribed for under special or local law could be extended, if the applicant satisfied that he had sufficient cause for not presenting the application well within limitation. Section 5 would be displaced only when there is express exclusion of the same, and merely because limitation has been provided for and language of the same is peremptory or imperative, same will not automatically displace Section 5. Application prescribed in Sub-section (4) of Section 417, would not be barred, despite the expiration of time limit of sixty days, and Section 5 would be available to the applicant provided he could show that he had sufficient cause of not preferring application within the limit of 60 days prescribed.

(ii) In the case of State of West Bengal and others Vs. Kartick Chandra Das and others, , Hon"ble Apex Court has taken the view that delay in filing letters Patent Appeal against the order of single judge is condonable u/s 5 of Limitation, as there is no express exclusion of Section 5 of Limitation Act in Appellate side Rules of Calcutta High Court, applicable to the area other than the city of Calcutta.

(iii) In the case of U.P. State Electricity Board Lucknow and Ors. v. District Judge, Gorakhpur and Ors. reported in 2003 ALL CJ 320 this Court took the view that under the Payment of Wages Act though it prescribes period for filing the appeal but same is not complete Code in the matter of limitation. In this background it has been concluded that as there is no express provision of exclusion of provision of Section 5 of Limitation Act as such the provisions of Section 5 of the Limitation Act comes into play and same shall be deemed to be supplementing the provisions of Special Act i.e. the Payment of Wages Act.

(iv) In the case Gopal Sardar Vs. Karuna Sardar, Hon"ble Apex Court has considered the drcuinstances, which amounted to "express exclusion" of Section 5 of Limitation Act, by mentioning that even though special law or local law do not state in so many words expressly that Section 5 of the Limitation Act is not

applicable to the proceedings under the Act from the scheme of the Act and having regard to various provisions such express exclusion could be gathered. Thus conscious intentional omission by the Legislature to apply Section 5 of the Limitation Act to the proceeding u/s 8 of the Act, nature of right of preemption and express application of Section 5 of Limitation Act to other provisions under the Act, itself means and amount to "express exclusion" of its satisfying the requirement of Section 29(2) of the Limitation Act. Relevant paragraphs 9 and 10 are being quoted below:

9. An important departure is made in Section 29 Sub-section (2) of the Limitation Act of 1963. Under the Indian Limitation Act 1908 Section 29(2)(b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the application of Section 5 of the Limitation Act was specifically and in dear terms excluded but u/s 29(2) of the present Limitation Act. Section 5 shall apply in case of special or local law to the extent to which it is not expressly excluded by such special or local law. In other words, application of Section 5 of the Limitation Act stands excluded only when it is expressly excluded by the special or local law. The emphasis of the argument by the learned Counsel, who argued for the proposition that Section 5 of the Limitation Act is applicable to an application made for enforcement of rights of pre-emption u/s 8 of the Act was on the ground that the Act has not expressly excluded the application of Section 5 of the Limitation Act.

10. In *Hukumdev Narain Yadav Vs. Lalit Narain Mishra*, a Bench of three learned judges of this Court, dealing with election petition under the Representation of the People Act on the point of limitation for filing an election petition, after examining the provisions of the Representation of the People Act and Section 29(2) of the Limitation Act has held thus; (SCC pp 146-47 para 17)

17. ...Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed u/s 81 of the Act, Section 29(2) would be attached and what we have to determine is whether the provisions of this section are expressly excluded in the case of an election petition. It is 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. As usual the meaning given in the dictionary has been relied upon, but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy 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 view even in case where the special law does not exclude the provisions of Section 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

of the nature of subject-matter and scheme of the special law exclude their operation. The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election which does not comply with the provisions of Sections 81, 82 or 117.

18. None of the judgments cited above by the petitioner will come to the rescue of the petitioner, inasmuch as, in none of the judgment cited above the provisions which were being dealt with there existed akin provisions as it existed under 1997 Rules which provided for that period of the limitation for filing the appeal would be 60 days from the date of order and further said period could be extended further for the period of 60 days provided Tribunal was satisfied that appellant was prevented by sufficient cause from preferring the Appeal within the prescribed period. The Rules framed under the Employees' Provident Funds and Miscellaneous Provisions Act 1952 itself provides limitation of preferring Appeal within 60 days from the date of order and thereafter further authority to condone the delay for further period of 60 days on sufficient cause being disclosed. Validity of the provisions as contained under 1997 Rules prescribing period of limitation and to condone the period in not filing the Appeal in time has not at all been questioned in the prayer part. Provisions of Employees Provident Fund and Misc. Provisions Act 1952 is a Special Act. Under Sub-section (1) of Section 21 of the said Act, Central Government by means of notification in the Official Gazette, entitled to make Rules to carry out the provisions of the said Act. Sub-section (2) of Section 21 while preserving the authority of Central Government to make Rules for carrying out the provisions of this Act, provides for the matter for which Rule can be framed. Amongst such matter Section 21(2)(b) provides for framing of Rule, qua the form and the manner in which and the time within which appeal can be filed before a Tribunal and the fees payable for filing such appeal. Sub-section (3) of Section 21 provides for placement of these Rules, after being made before each House of Parliament. Parliament has the authority to suggest modification in the Rule, or blocking the said Rule. In exercise of this power, Central Government has framed Rules known as, Employee Provident Fund Appellate Tribunal (Procedure) Rules 1997 wherein period of preferring Appeal has been provided for, and further Rule making authority in its wisdom has also chosen to provide period which can be further condoned, provided sufficient cause is furnished for the same. Rule making authority was conscious of Section 5 of the Limitation Act, wherein any amount of delay could be condoned on furnishing sufficient cause, but here the outer limit of the delay which could be condoned on sufficient cause being furnished was prescribed to be sixty days. Here specific period has been provided for, which could be condoned and not beyond the same. This in itself implicits " express exclusion" of Section 5 of Limitation Act in terms of Section 29(2) of the Limitation Act. By no stretch of imagination Section 5 of the Limitation Act can be pressed for further condonation of delay beyond prescribed limit as appellate authority is entitled to

condone the delay of 60 days only and that too on satisfaction of the cause furnished. When specific provision covers the field then general provision cannot be permitted to occupy the field to dilute the specific provisions. Consequently, the appeal is to be filed within 60 days from "the date of order" .

19. "The date of order" has been interpreted by Hon"ble Apex Court in the case of D. Saibaba Vs. Bar Council of India and Another, as meaning the date of communication or knowledge actual or constructive, of the order sought to be reviewed. Relevant extract of the said judgment paragraphs 4 to 14 are being quoted below:

4. By order dated 20.02,2001, the Bar Council of India directed the appellant to surrender the STD booth, presumable forming an opinion that whosoever might be conducting the STD booth actually, yet the booth was allotted in the name of the appellant and the surrender would bring to an end the controversy so far as the appellant's conduct as an advocate is concerned. The appellant sought some time for surrendering the licence of the telephone booth because certain dues were to be realised from customers which would be difficult to do in the event of the business being suddenly discontinued. As the appellant failed to surrender the STD booth, the Bar Council of India passed an order dated 31.03.2001 advising the State Bar Council of India to delete the name of the appellant from the rolls of advocates. On 26.04.2001, the appellant surrendered the booth. The appellant sought for a review of the order of the Bar Council of India based on the subsequent event of the telephone booth having being surrendered. Vide order dated 26.08.2001 the Bar Council of India has rejected the petition for review on the ground that the same was barred by time. As against the order dated 26.08.2001 the appellant has filed appeal by special leave. As against the order dated 31.03.2001 the appellant has filed a statutory appeal u/s 38 of the Advocates Act 1961 and also an appeal by special leave.

5. Section 48AA of the Advocates Act, 1961 reads as under-

48AA Review- The Bar Council of India or any of its committees, other than its disciplinary committee may of its own motion or otherwise review any order, within sixty days of the date of that order, passed by it under this Act.

6. in the opinion of the Bar Council of India the limitation commences from "the date of that order" which is sought to be reviewed. The submission of the review petition was that he could not have sought for review of the order unless the order was communicated to him and therefore the expression "the date of that order" should be construed as meaning the date of communication of the order. The Bar Council of India formed an opinion that there is a lacuna in the provision which cannot be removed by it. The Bar Council in its impugned order compared the provisions of Section 48AA with the provisions contained in Section 37 and 38 of the Act. Section 37 provides for an appeal against an order of the disciplinary committee of the State Bar Council being preferred to the Bar Council of India within 60 days of the "the date of communication of the order" to the

person aggrieved, Section 38 provides for an appeal by an person aggrieved by an order contemplated therein being preferred to the Supreme Court within 60 days of the date on which the order is communicated to him." The opinion formed by the Bar Council is that the employment by Parliament of different phraseology in Section 37 and 38 and Section 48AA is suggestive of the legislative intent that while the limitation for an appeal u/s 37 or 38 is to be calculated from "the date of communication of the order", the limitation for review u/s 48AA commences from "the date of the order" sought to be reviewed and not from the date of communication of the order. The review petition was dismissed as barred by limitation without going into the merits.

7. During the pendency of these appeals the appellant has filed an original petition laying challenge to the constitutional validity of Section 48AA on the ground that the provision (as construed by the Bar Council of India) is unworkable and hence liable to be struck down. The appeals and the civil writ petition were placed for hearing analogously.

8. We have heard learned Counsel for the appellant writ petitioner and respondent Bar Council of India and Smt. D. Anuradha, the complainant. At the hearing of the appeals it was urged that there was a doubt whether the Bar Council of India has committed an arithmetical error in calculating the period of limitation and therefore whether the review petition could at all be held barred by time. So, the learned Counsel for the Bar Council of India sought to support the order dismissing the review petition on the alternative ground that on the language of Section 48AA, the Bar Council of India becomes functus officio on the lapse of 60 days from the date of the order and its jurisdiction to exercise power of review comes to an end, and therefore, also the impugned order dated 26,08,2001 has to be sustained. However, the learned Counsel for the parties agreed that the two questions relating to interpretation of Section 48AA are of frequent occurrence and the Bar Council of India is also feeling difficulty in several cases, and therefore desires both the questions may be answered by the Court. Accordingly the appeals have been heard.

9. So far as the commencement of the period of limitation for filing the review petition is concerned we are clearly of the opinion that the expression "the date of that order" as occurring in Section 48AA has to be construed as meaning the date of communication or knowledge of the order to the review petitioner. Where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided. True the process of interpretation cannot be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law can always be so exercised as to give throb to a sinking heart.

10. An identical point came up for the consideration of this Court in Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, Section

18 of the Land Acquisition Act 1894 contemplates an application seeking reference to the court being filed within six months from the date of Collector's award. It was held that "the date of the award" cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office. It must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position, then placing a literal and mechanical construction on the words "the date of award" occurring in the relevant section would not be appropriate. It is fair and just that a decision is communicated to the party whose rights will ultimately be affected or who will be affected by the decision. The knowledge, either actual or constructive, of the party affected by such a decision, is an essential element which must be satisfied before the decision can be brought into force. Thus, construed, the making of the award cannot consist merely of the physical act of writing an award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. A literal or mechanical way of construing the words "from the date of the Collector's award" was held to be unreasonable. The Court assigned a practical meaning to the expression by holding it as meaning the date when the award is either communicated to the party or is known by him either actually or constructively.

11. The view taken in *Raja Harish Chandra Raj Singh* by a two judge Bench of this Court was affirmed by a three judge Bench of this Court in *State of Punjab Vs. Mst. Qaisar Jehan Begum and Another*, This Court added that the knowledge of the award does not mean a mere knowledge of the fact that an award has been made; the knowledge must relate to the essential contents of the award.

12. In *Assistant Transport Commissioner, Lucknow and Others Vs. Nand Singh*, the question of limitation for filing an appeal u/s 15 of the U.P. Motor Vehicles Taxation Act, 1935 came up for the consideration of this Court. It provides for an appeal being preferred "within thirty days from the date of such order." The taxation officer passed an order on 20.10.1964/24.10.1964 which was received by the person aggrieved on 29.10.1964. The appeal filed by him was within thirty days-the prescribed period of limitation calculated from 29.10.1964, but beyond thirty days of 24.10.1964. It was held that the effective date for calculating the period of limitation was 29.10.1964.

13. In *Raj Kumar Dey and Others Vs. Tarapada Dey and Others*, this Court pressed into service two legal maxims guiding and assisting the court while resolving an issue as to calculation of the period of limitation prescribed, namely (i) the law does not compel a man to do that which he could not possibly perform and (ii) an act of the court shall prejudice no man. These principles support the view taken by us hereinabove. Any view to the contrary would lead to an absurdity and anomaly. An order may be passed without the knowledge of anyone except its author, may be kept in the file and consigned to the record room or the file may lie unattended, unwittingly or by carelessness. In either

case, the remedy against the order would be lost by limitation though the person aggrieved or affected does not even know what order has been passed. Such an interpretation cannot be countenanced.

14. How can a person concerned or a person aggrieved by expected to exercise the right of review conferred by the provision unless the order is communicated to or is known to him either actually or constructively? The words "the date of that order", therefore, mean and must be construed as meaning the date of communication or knowledge, actual or constructive, of the order sought to be reviewed.

20. Following the said interpretation, inevitable conclusion is that for commencement of the period of limitation for filing Appeal u/s 71 of 1952 Act as per procedure prescribed under 1997 Rules, " within 60 days from the date of order" has to be construed "as within sixty days from the date of communication or knowledge of the order, actually or constructively." After expiry of period of sixty days from the date of communication or knowledge of order in case Appeal is to be filed, then sufficient cause will have to be furnished, for condonation of delay in preferring the Appeal, however, this further period cannot be extended for more than sixty days.

21. Appellate Authority has dismissed the appeal as barred by limitation. Appellate Authority has noted in the order that petitioner acquired knowledge of impugned order after receipt of attachment order dated 22.02.2005. Appeal has been filed four months thereafter, thus, Appellate Authority cannot be said to be error in rejecting the Appeal as being barred by limitation.

22. Now coming to the next question which has been raised as to what would be the outcome of the order in case appeal has not been decided on merit and same has been dismissed on the ground of limitation.

23. Hon"ble Apex Court in the case of Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, has already answered this question that an appeal filed alongwith an application for condoning delay dismissed on refusal to condone the delay same is nevertheless a decision in the appeal and thus even if appeal is dismissed on the ground of delay itself it is a decision in appeal. Dismissing the appeal in substance has the affect of confirmation of the order in appeal.

24. After question posed above has been answered the next question to be adverted is that when an appeal has been dismissed on the ground of limitation and earlier order is operating with full effect then what is the remedy available to an incumbent. Dismissing the appeal in substance has the effect of confirmation of order in Appeal. As far as power of judicial review conferred on High Court is concerned even if appeal has been dismissed on the ground of limitation, the power of High Court remains unfettered and unaffected. This Court in exercise its authority of judicial review can always examine the validity of the decision so taken.

25. Scope of Judicial Review and parameters prescribed in this regard has been dealt in extenso by Hon"ble Apex Court in the case of State of U.P. v. Johri Mal reported in 2004 AIR SCW 3888. Relevant paragraphs 24 to 37 are being quoted below:

24. The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions.

25. In Council of Civil Services Unions v. Minister for the Civil Service (1985) AC 374 while extending the scope of judicial review the House of Lords decided that judicial review should not be available if the particular decision under challenge was not justiciable. However, in granting relief the Court shall take into consideration the factors like national security issue. In Constitution Reform in the UK by Dawn Oliver, it is stated at page 210:

In the CCSU case the House of Lords decided that judicial review should not be available if the particular decision under challenge was not justiciable. In effect they respected the political Constitution and deferred to Government in some sensitive areas. In this case the Government was alleging that for them to have consulted the unions before the decision was taken would have provoked industrial action at GCHQ, which would in turn have been damaging to national security. In the view of the House of Lords this made an otherwise reviewable decision not suitable for judicial review - not justiciable. Other decisions taken under the royal prerogative, which the Court indicated would be non-justiciable, included treaty making and foreign affairs. Despite the outcome of the CCSU that the prerogative is in principle reviewable and that were it not for the national security issue the Government should have consulted the unions before imposing these changes was a major step forward in the judicialization of Government action, including the actual conduct of Government, and a step away from the political Constitution.

26. However, we may notice that judicial review was held to be available when justiciability of foreign relations came to be considered in R. (Abbasi) v. Secretary of State for the Foreign and Commonwealth Office and Secretary of State for the Home Department (2002) EWCA Civ 6 November 2002 stating:

Although the statutory context in which Adan was decided was highly material, the passage from Lord Cross' speech in Cattermole supports the view that, albeit that caution must be exercised by this Court when faced with an allegation that a

foreign State is in breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.

27. In *Council of Civil Services Unions v. Minister of Civil Service* the power of judicial review was restricted ordinarily to illegality, irrationality and impropriety stating:

If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.

28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative, The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the supreme lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review Court. The limited scope of judicial review succinctly put are:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasions miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn v. State of Illinois* 1876 (94) US (Supreme Reports) 113).

29. In Wade's Administrative Law, 8th edition at pages 33-35, it is stated;

Review, legality and discretion:

The system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of a decision : is it correct? When subjecting some administrative act or order to judicial review, the Court is concerned with its legality; is it within the limits of the powers granted? On an appeal the question is "right or wrong?" On review the question is "lawful or unlawful?"

Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the Court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary; the Court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This is none-the-less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a minister under some Act, it typically uses its common law power to declare that the Act did not entitle the ministers to do what he did and that he was in some way exceeding or abusing his powers.

Judicial review thus is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the Court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. If the Home Secretary revokes a television licence unlawfully, the Court, may simply declare that the revocation is null and void. Should the case be one involving breach of duty rather than excess of power, the question will be whether the public authority should be ordered to make good a default. Refusal to issue a television licence to someone entitled to have one would be remedied by an order of the Court requiring the issue of the licence. If administrative action is in excess of power (*ultra vires*), the Court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one need pay any attention to it. The minister or tribunal or other authority has in law done nothing, and must make a fresh decision.

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of

illegality, irrationality or procedural impropriety. How far the Court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian Administrative Law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

31. In *Chief Constable of the North Wales Police v. Evans* 1982 (3) All ER 141, the law is stated in the following terms:

...The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court.

32. Prof. Bernard Schwartz in his celebrated book (*Administrative Law*, III Edn. Little Brown Company 1991) dealing with the present status of judicial review in American context, summarized as under:

If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the Courts. That would destroy the values of agencies, created to secure the benefit of special knowledge acquired through continuous administration in the complicated fields. At the same time, Court should not rubber-stamp agencies; the scope of judicial enquiry must not be so restricted that it prevents full enquiry into the action of legality. If that question cannot be properly explored by the Judge, the right to review becomes meaningless.. .in the final analysis, the scope of review depends on the individual Judges estimate of the justice of the case.

33. Prof. Clive Lewis in his book (*Judicial Remedies in Public Law* 1992 Edn. 294).

The Courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction....Earlier cases took a robust line that the law has to be observed and the decision invalidated, what, ever the administrative inconvenience caused. The Courts now-a-days recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the Court's remedial discretion may prove decisive, . . . They may also be influenced to the extent to which the illegality arises from the conduct of the administrative body itself, and their view of that conduct.

34. Grahme Aldous and John Alder in "*Applications for Judicial Review, Law and Practice*" stated thus:

There is a general presumption against ousting the jurisdiction of the Courts, so

that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Unions v. Minister of the Civil Service* this is doubtful. Lords Diplock, Seaman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.

Now on the touch stone of parameters provided for it is to be seen as to whether the authority concerned has exercised its authority in accordance with the law or not or the decision making process is faulty on the face of it.

26. "Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act 1952 being relevant is quoted below:

7-A Determination of money due from employers- (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commission, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may by order, -

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act the Scheme or the Family Pension Scheme or the Insurance Scheme as the case may be.

and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary]

(2) The officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the CPC 1908, for trying a suit in respect of the following matters namely:

(a) enforcing the attendance of any person or examining him on oath requiring the discovery and production of documents

(b) requiring the discovery and production or documents

(c) receiving evidence on affidavit;

(d) issuing commission for the examination of witnesses;

and any such inquiry shall be deemed to be a judicial proceedings within the meaning of Section 193 and 228 and for the purpose of Section 196 of the Indian Penal Code.

(3) No order [***] shall be made under Sub-section (1) unless substituted by Act 33 of 1988 [the employer concerned] is given a reasonable opportunity of representing his case.

inserted by Act 33 of 1988 [(3-A) Where the employer, employee or any other person required to attend the inquiry under Sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report to return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer as the case may be on the basis of the evidence adduced during such inquiry and other documents available on record]

Substituted for Sub-section (4) by Act 33 of 1988 Section 10 (w.e.f. 01.08.1988) [(4) Where an order under Sub-section (1) is passed against an employer exparte he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer. Explanation- Where in appeal has been preferred under this Act against an order passed exparte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the exparte order.

27. A bare perusal of the provision quoted above would go to show that the authority concerned has been enjoined to determine the money due from any employer under any provision of this Act the Scheme or the Family Pension Scheme or the Insurance Scheme as the case may be, and for aforesaid purposes may conduct such inquiry as the authority deems necessary and for the purposes of said inquiry same powers as are vested in a court trying the suit under the CPC 1908, has been vested. Said order cannot be passed unless and until reasonable opportunity of representing case is provided. Sub-section (3-A) of Section 7A of the Act provides that where the employer, employee or any other person required to attend the inquiry Sub-section (1) fails to attend such inquiry without assigning assigning any valid reason or fails to produce any document or to file any report to return when called upon to do so, the officer

conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer as the case may be on the basis of the evidence adduced during such inquiry and other documents available on record.

28. This particular provision has been interpreted by Hon''ble Apex Court in the case of Food Corporation of India Vs. Provident Fund Commissioner and Others, in following manner : Relevant paragraphs 6 to 9 is being quoted below:

6. We have carefully perused the Commissioner's order and also the order of the High Court. The total amount ordered to be payable comes to about Rs. 22,48,000 in respect of the employees of depots namely : Udaipur, Jaipur, Ajmer, Badmer and Sawai, Madhopur. The Commissioner has also directed the Divisional Officer, Jaipur to deposit the provident fund contribution i.e. Rs. 18,72,194 to the Fund being maintained by the trustees of the establishment. It is needed a large amount for the determination of which the Commissioner has only depended upon the lists furnished by the Workers' Union, It is no doubt true that the employer and contractors are both liable to maintain registers in respect of the workers employed. But the Corporation seems depots scattered at different places. It has been requested the Commissioner to summon the contractors to produce the respective lists of workers engaged by them. The Commissioner did not summon the contractors nor the list maintained by them. He has stated that the corporation has failed to produced the evidence.

7. The question, in our opinion is not whether one has failed to produce evidence. The question is whether the Commissioner who is that statutory authority has exercised powers vested in him to college the relevant evidence before determining the amount payable under the said Act.

8. It is of importance to remember that the Commissioner while conducting an inquiry u/s 7A has the same powers as are vested in a Court under the CPC for trying a suit. The Section reads as follows:

7-A Determination of money due from employers- (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commission, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may by order, -

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act the Scheme or the Family Pension Scheme or the Insurance Scheme as the case may be.

and for any of the aforesaid purposes may conduce such inquiry as he may deem necessary]

(2) The officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under

the CPC 1908, for trying a suit in respect of the following matters namely:

- (a) enforcing the attendance of any person or examining him on oath requiring the discovery and production of documents
- (b) requiring the discovery and production of documents
- (c) receiving evidence on affidavit;
- (d) issuing commission for the examination of witnesses;

and any such inquiry shall be deemed to be a judicial proceedings within the meaning of Section 193 and 228 and for the purpose of Section 196 of the Indian Penal Code.

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collect all material before coming to proper conclusion. That is the legal duty of the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

29. The wide amplitude of the authority of the Commissioner has been noted while conducting the enquiry and as per the same Commissioner is obliged to determine the dues which are liable to be paid and before determining exercise has to be carried out for collecting evidence.

30. Now on the touch stone of the aforesaid provisions impugned order dated 16.07.2004 is being looked into. The order in question reveals that various dates had been fixed but no record was produced from the side of the petitioner and adjournment after adjournment has been accorded to representative of the petitioner who had initially appeared on various dates but subsequently he too disappeared. Thus, in the fact of the present case this can be safely presumed to be falling in category of the case wherein employer has failed to appear before the authority without assigning any valid reason and has further failed to produce any document. The authority concerned has to take decision on the basis of evidence adduced in such inquiry and other documents available on record. Here undisputed position is that no evidence has been adduced by the petitioner during such inquiry, however when it is accepted that no evidence has been adduced by the petitioner during such inquiry, then decision has to be taken on the basis of other documents available on record. Contention of the petitioner is that the documents available on record has not at all been perused and no exercise whatsoever has been undertaken in the matter. Impugned order dated 16.07.2004 in question also does not reflect that the record has been perused, inasmuch as, sole basis for proceeding with the matter is that none has turned

up on behalf of the petitioner nor any communication on their behalf has been received and thereafter straight away it has been recorded that the authority finds that employers have not paid P.F. Contribution from March 2002 to April 2003 and July 2003 to Sept. 2003 and employers share for Sept. 2001 to May 2003 and as such he proceeds to determine the dues payable and thereafter dues have been determined. Impugned order as already mentioned does not reflect that the other record has been perused and coupled with this the basis on which aforementioned dues has been computed has also not been disclosed. The order in question falls short of requisite exercise. In case employer was not coming forward then there was ample power to enforce attendance of petitioner. Here authority concerned has not at all exercised authority vested in him before drawing conclusion and further it has been contended before this Court by appending various chalans showing that deposit of various amount has been done towards the said head and said averments have not at all been seriously disputed by the respondents and on the strength of the same it has been contended that in case if the record would have been perused then the result would be otherwise. In the facts of the case, there appears to be substance in the argument advanced.

31. Consequently, order dated 16.07.2004 passed by Regional Provident Fund Commissioner, respondent No. 2 is hereby quashed and matter is remitted back to be decided afresh by the Regional Provident Fund Commissioner, Varanasi within one months from the date of presentation of certified copy of this order. Petitioner shall appear within one week from the date of judgment before the authority concerned. Till the fresh assessment is not done amount in question which has been deposited pursuant to order passed by this Court shall be retained and the order of attachment shall remain in operation.

32. In terms of observations/directions made above present writ petition, is allowed and disposed of.

33. No orders as to cost.