(2015) 09 CAL CK 0071

In the Calcutta High Court

Case No : W.P. No. 17590 (W) of 2015

Omevati Devi Agarwal	APPELLANT
Vs	
C.E.S.C. Limited and Others	RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21
Electricity Act, 2003 — Section 125, 126, 127, 127(1)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : AIR 2015 Cal 382

Hon'ble Judges : I.P. Mukerji, J.

Bench : Single Bench

Advocate : Sk. Jalauddin, for the Appellant; Madhusudan Saha Roy, for the Respondent

Final Decision : Allowed

Judgement

I.P. Mukerji, J.—The appeal of the petitioner before the Appellate Authority under Section 127 of the Electricity Act, 2003, was delayed by only a few days. It relied upon Section 127(1) of the said Act which provided that any person aggrieved by a final assessment order made under Section 126 of the Act could prefer an appeal within 30 days of that order to the Appellate Authority. Since it was not preferred within this time, the Appellate Authority felt that it had no power to condone the delay and admit it. Hence, by its order dated 30th June 2015, it dismissed the appeal on this technical ground. Therefore, the appeal was dismissed and the case of the petitioner closed before the Appellate Authority without its having to go into the merits of it. Now, the question that arises for consideration in this writ application is whether the said Appellate Authority had the power to condone the delay. Furthermore, does this court, in exercise of its power under 226 of the Constitution of India, have the power to condone the delay and direct the Appellate Authority to hear out the appeal on merits.

2. In answering this question, analysing two provisions of the Limitation Act,

1963 is very necessary. They are Sections 5 and Section 29 .

3. Section 5 provides that the court has the power to condone the delay in filing an appeal or an application.

4. Section 29 of the Limitation Act, provides that where a special period of limitation is provided by the statute expressly excluding the operation of inter alia section 5 , then that section cannot be employed to condone the delay in filing the same.

5. Section 29(2) of the Limitation Act, 1963, is set out hereunder:

"Savings.- (1).............

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.

3............................"

6. I also insert Section 5 of the said Act below.

"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 (5 of 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."

7. Section 127 of the Electricity Act, 2003, inter alia is in the following terms:

"127. Appeal to appellate authority.- (1) Any person aggrieved by a final order made under Section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed. The period of limitation provided for filing an appeal before the Appellate Authority is 30 days from the date of the final assessment made order under Section 126 of the said Act."

8. Except when the statute provides otherwise under section 5 a judicial authority has an unlimited power to condone the delay in preferring an appeal or making an application.

9. In this case the assessment order was made on 31st March, 2015.

10. It was received by the petitioner on 08th April, 2015.

11. On 24th April, 2015 a writ application which was filed by her challenging the final assessment was dismissed.

12. The appeal was lodged before the Appellate Authority on 16th May, 2015.

13. If one counts the time from the date of assessment the appeal was delayed by about 17 days.

14. Now, if one considers the stipulation in Section 29(2) of the Limitation Act, 1963, the Electricity Act 2003, is indeed a special statute. A period of 30 days from the date of assessment to prefer an appeal is provided in Section 127(1) .

15. Going by Section 29(2) , ordinarily, even if a special statute provides for a period of a limitation, it does not automatically exclude the operation of inter alia Section 5 of the Limitation Act. This was recognised by Justice Ruma Pal delivering the judgment of the Supreme Court in Union of India Vs. M/s Popular Construction Co., . The words of the special statute had to expressly exclude the operation of Section 5 of the Limitation Act. In the said case under consideration by the Supreme Court, the Arbitration and Conciliation Act, 1996, had provided a special period of limitation for filing an application to set aside an award. The period of limitation was 90 days. If sufficient cause was shown to me court, it could condone the delay of a further period of 30 days. Then came; the crucial words, "but not thereafter". Justice Pal read this phrase to be a provision expressly excluding the operation of Section 5 .

16. In other words the language of the statute was such that the court did not have any power to condone delay beyond 120 days. Therefore, Section 5 could not be applied.

17. Dr. Madhusudan Sana Roy was very forceful in his submission that in no way the Appellate Authority or the court could condone the delay in filing the appeal. He referred me to the decision in Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others, . This case was concerned with an appeal to the Supreme Court under Section 125 of the Electricity Act, from an order of the Tribunal. It held that the period of 120 days provided in the Act was a special period of limitation excluding the operation of Section 5 of the Limitation Act. The judgment delivered by Mr. Justice Singhvi, had discussed the judgment in Union of India Vs. M/s Popular Construction Co., which was under the Arbitration and Conciliation Act, 1996, Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, concerning the Central Excise Act, 1935 and Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, , concerning the same Act. The latter two decisions analysed the appeal provisions of the Central Excise Act and tried to ascertain the intention of the legislature as to whether the period prescribed in the statute was fixed absolutely or whether the courts or tribunal retained their power to condone the delay.

18. Now, let me come back to Section 127(1) of the Indian Electricity Act.

Ordinarily, the courts retain their power under section 5 of the Limitation Act, 1963, to condone the delay in filing appeals and applications. This power has to be excluded by the express words of the statute. Now, these express words may be in the form of "but not thereafter", "no further", "no more" and so on. Thus, providing a period of limitation in a special statute, does not denude the court of its power under Section 5 .

19. Section 127(1) only stipulates that the appeal before the Appellate Authority had to be filed within 30 days. I do not read in these words any express language or intention on the part of the legislature to exclude the operation of section 5 of the Limitation Act. There is no qualifying phrase like " but not thereafter" as was there in Union of India Vs. M/s Popular Construction Co., . I am fortified in my view by a decision of Mr. Justice Kalyan Jyoti Sengupta in Shree Gopal Engineering Works Limited & Anr. v. CESC Limited & Ors. (with an analogous matters) reported in Shree Gopal Engineering Works Limited and Another Vs. CESC Limited and Others etc., . The court was considering a similar appeal provision in the Indian Electricity Act, 1910 from the determination of Chief Electrical Inspector to the Appellate Authority. His lordship held that Section 5 of the Limitation Act applied.

20. In my opinion, real justice is done between the parties if their case is decided on merits. If an appeal or application is dismissed on the ground of delay, you are dismissing it on a technical ground without going into the merits. The subject matter is left undecided. The Supreme Court cautioned us against this in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, when it said that nobody normally gains by delaying an appeal or application. In fact he runs a "serious risk". Hence the presumption should always be that the judicial authority''s power to condone delay, in appropriate circumstances, is kept intact.

21. Therefore, in my opinion, the order of the Appellate Authority dated 30th June, 2015 did not take into account the law on the subject. It unnecessarily dismissed the appeal by refusing to condone the delay of only a few days. The said order dated 30th June, 2015 is set aside. The Appellate authority is directed to hear out the appeal on merits without insisting on any technicality like delay, limitation etc. and pronounce a reasoned decision after hearing the parties within 12 weeks of communication of this order.

22. This application is allowed to the above extent. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

