

(2014) 02 BOM CK 0081
In the Bombay High Court
Case No : Writ Petition No. 662 of 2013

Rhea Distilleries

APPELLANT

Vs

Commissioner of Excise

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35
Constitution of India, 1950 — Article 227
Goa Excise Duty Act, 1964 — Section 16(1), 20, 40, 41
Limitation Act, 1963 — Section 10, 10, 11, 11, 12, 12

Citation : (2014) 4 BomCR 358 : (2014) 5 MhLj 639

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : Y.V. Nadkarni and N. Noronha, Advocate for the Appellant; D. Lawande, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

U.V. Bakre, J.—Heard Mr. Nadkarni, learned Counsel appearing on behalf of the petitioner and Mr. Lawande, learned Government Advocate appearing on behalf of the respondent No. 2. Rule. Rule is made returnable forthwith. By consent, heard forthwith.

2. By this petition filed under Article 227 of the Constitution of India, the petitioner has taken exception to the order dated 31/1/2013 passed by the Chief Secretary, Government of Goa in Appeal No. 16/2011 and has prayed to allow the application dated 31/10/2011 for condonation of delay filed by the petitioner.

3. On 24/4/2000, licence for manufacturing of Malt Spirit, Grain Spirit and Grape Spirit was issued by respondent No. 1 to the petitioner. On 1/7/2009, Superintendent of Excise directed the Excise Inspector to inform the petitioner to pay separate licence fees on manufacturing of grain spirit for the year 2009-2010 and also to collect the licence fees on manufacture of grain spirit with effect from 2001-2002 to 2008-2009. Respondent No. 1 issued show cause notice dated

2/6/2010 to the petitioner in the exercise of powers u/s 16(1) of the Goa Excise Duty Act, 1964 ("the Act"), as to why the licences should not be cancelled for violation of the Act and Rules, made thereunder as stated in the notice. The petitioner filed reply dated 11/6/2010 to the said show cause notice. Respondent No. 1, vide order dated 28/6/2010, in exercise of powers u/s 20 of the Act, directed the petitioner to pay licence fees separately from 2000-2001 to 2010-2011 plus fine of 2% per year on the said licence fees. Against the said order dated 28/6/2010 of respondent No. 1, the petitioner filed appeal to the respondent No. 2, on or about 31/10/2011, as the Chief Secretary is stipulated as the Appellate Authority u/s 40 of the Act. Section 40 of the Act prescribes a limitation period of 90 days for filing of appeal. The petitioner had received the order dated 28/6/2010 passed by respondent No. 1 as on 1/7/2010. Since there was delay of about 396 days in filing the appeal, the petitioner filed an application for condonation of delay u/s 5 of the Limitation Act, 1963. By order dated 31/1/2013, respondent No. 2 dismissed the said application for condonation of delay and consequently, also dismissed the appeal filed by the petitioner. The said order dated 31/1/2013 is impugned in the present petition.

4. At the outset, Mr. Lawande, learned Government Advocate appearing on behalf of respondent No. 2 took a preliminary objection that there is no provision in the Act for condonation of delay in filing appeal u/s 40 of the Act. In this regard, Mr. Nadkarni, learned Counsel appearing on behalf of the appellant invited my attention to section 29(2) of the Limitation Act, 1963 and submitted that on account of this provision, sections 4 to 24 (inclusive) of the Limitation Act, apply to the Act. He pointed out that section 40 of the Act which provides for appeals, neither expressly nor impliedly excludes the application of sections 4 to 24 of the Limitation Act. In this regard, learned Counsel relied upon *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker*, He submitted that respondent No. 2 in the order has not held that section 5 of the Limitation Act is not applicable. He pointed out that respondent No. 2 had disposed of the application for condonation of delay on merits. He, therefore, submitted that section 5 of the Limitation Act applies to the said appeal. He then submitted that in the application for condonation of delay, the petitioner had minutely given reasons which caused the delay and according to him, there was no reason for respondent No. 2 to have rejected the said grounds. He relied upon the judgment of the Apex Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy*, He, therefore, urged that sufficient cause was shown for delay and, therefore, the impugned order dismissing the application for condonation of delay and consequently the appeal, is arbitrary and perverse and cannot sustain.

5. On the contrary, Mr. Lawande, learned Government Advocate submitted that section 40 of the Act specifically says that a person may file appeal against the decision or order made by the Commissioner, within 90 days from the date of the order, to the Chief Secretary. He pointed out that the said provision does not provide for any condonation of delay after 90 days. He submitted that section 29(2) of the Limitation Act applies inter alia to an appeal for which under Special

or Local law, a period of limitation different from the period prescribed by the schedule is prescribed. He invited my attention to the schedule to the Limitation Act which insofar as appeals are concerned mentions about appeal only under the Code of Criminal Procedure and the Code of Civil Procedure. He, therefore, submitted that section 29(2) of the Limitation Act is not applicable to the present case. He relied upon (i) Commnr. of Customs, Central Excise, Noida Vs. Punjab Fibres Ltd., Noida, and (ii) The Commissioner of Central Excise Vs. Shri Arun Haridas Ashar also partner of Metro Furnishing and Others On merits, the learned Government Advocate submitted that no sufficient cause for condonation of delay was shown and, therefore, the impugned order does not call for interference in the exercise of powers under Article 227 of the Constitution.

6. I have perused the entire material on record and have considered the submissions made on behalf of the parties and have also considered the judgment cited by them.

7. The first question that arises for consideration is whether section 5 of the Limitation Act applies to appeals u/s 40 of the Act.

8. As rightly submitted by the learned Counsel appearing on behalf of the petitioner, respondent No. 2 has nowhere in the impugned order held that section 5 of the Limitation Act does not apply to an appeal u/s 40 of the Act. Respondent No. 2 has otherwise decided the application for condonation of delay on merits.

9. Section 40 of the Act lays down as under:

40. Appeals.--Any person deeming himself aggrieved by any decision or order passed under this Act or the rules made thereunder by any Excise Officer other than the Commissioner may, within ninety days from the date of such decision or order, appeal against such decision or order, to the Commissioner; and where the decision or order is passed by the Commissioner including the order passed in revision u/s 41 the appeal shall lie to the Chief Secretary. In disposing of the appeal the Commissioner or the Chief Secretary, as the case may be, may, after giving reasonable opportunity of being heard:--

(a) confirm the decision or order appealed against; or

(b) reduce, enhance or annul any amount involved in the decision or order appealed against; or

(c) pass such other orders as he may think fit.

10. As seen from the above provision of section 40 of the Act, it can be understood that it does not in itself provide for condonation of delay in filing the appeal beyond 90 days from the date of the order. However, the fact also remains that the said section 40 of the Act does not expressly exclude the application of the provisions of the Limitation Act to appeals. Section 29(2) of the Limitation Act, 1963 provides as under:

S. 29(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.

11. Admittedly, the Act is a Special Act or Local law. u/s 40 of the Act, there is a provision for period of limitation in connection with the appeal. The said prescription of period of limitation u/s 40 of the Act is different from the period prescribed by schedule to the Limitation Act for appeals. Section 5 of the Limitation Act has not been expressly excluded by the Act. In the case of "Mukri Gopalan" (supra), Section 18 of the Kerala Buildings (Lease and Rent Control) Act, 1965 was in question. Said section 18 of the Kerala Rent Act provides as under:

18. Appeal. - (1)(a) The Government may, by general or special order notified in the Gazette, confer on such officers and authorities not below the rank of a Subordinate Judge the powers of appellate authorities for the purpose of this Act in such areas or in such classes of cases as may be specified in the order.

(b) Any person aggrieved by an order passed by the Rent Control Court, may, within thirty days from the date of such order, prefer an appeal in writing to the Appellate Authority having jurisdiction. In computing the thirty days aforesaid, the time taken to obtain a certified copy of the order appealed against shall be excluded.

(2) On such appeal being preferred, the Appellate Authority may order stay of further proceedings in the matter pending decision on the appeal.

(3) The Appellate Authority shall send for the records of the case from the Rent Control Court and after giving the parties an opportunity of being heard and, if necessary, after making such further inquiry as it thinks fit either directly or through the Rent Control. Court, shall decide the appeal.

Explanation:-The Appellate Authority may, while confirming the order of eviction passed by the Rent Control Court, grant an extension of time to the tenant for putting the landlord in possession of the building.

(4) The Appellate Authority shall have all the powers of the Rent Control Court including the fixing of arrears of rent.

(5) The decision of the Appellate Authority, and subject to such decision, an order of the Rent Control Court shall be final and shall not be liable to be called in question in any Court of law, except as provided in section 20.

12. In the case of "Mukri Gopalan" (supra), the period prescribed for filing appeal

to the Appellate Authority under the said section 18 of the Kerala Rent Act was 30 days from the date of the order. Said section 18 of also did not contain any provision of condonation of delay. So also, it did not expressly exclude the application of the Limitation Act. The Hon''ble Supreme Court has held that the Appellate Authority constituted u/s 18 of the Kerala Rent Act functions as a Court and the period of limitation prescribed therein u/s 18 governing appeals by aggrieved parties will be computed keeping in view the provisions of sections 4 to 24 of the Limitation Act, 1963. Thus, the contention of the learned Government Advocate that for application of section 29(2) of the Limitation Act, the appeals should be either under the Code of Criminal Procedure or under the Code of Civil Procedure, bears no substance.

13. The Apex Court in the case of Mukri Gopalan (supra), has observed that the two requirements of section 29(2) of the Limitation Act, which have to be specified by the Authority invoking the said provision, are: (i) there must be a provision for period of limitation under any Special or Local law in connection with any suit, appeal or application; (ii) the said prescription of period of limitation under such Special or Local law should be different from the period prescribed by the schedule to the Limitation Act. The Apex Court held thus:

10. In the light of the aforesaid analysis of the relevant clauses of section 29(2) of the Limitation Act, let us see whether section 18 of the Rent Act providing for a statutory appeal to the Appellate Authority satisfies the aforesaid twin conditions for attracting the applicability of section 29(2) of the Limitation Act. It cannot be disputed that Kerala Rent Act is a special Act or a local law. It also cannot be disputed that it prescribes for appeal u/s 18 a period of limitation which is different from the period prescribed by the schedule as the schedule to the Limitation Act does not contemplate any period of limitation for filing appeal before the Appellate Authority u/s 18 of the Rent Act or in other words it prescribes nil period of limitation for such an appeal. It is now well settled that a situation wherein a period of limitation is prescribed by a special or local law for an appeal or application and for which there is no provision made in the schedule to the Act, the second condition for attracting section 29(2) would get satisfied. As laid down by a majority decision of the Constitution Bench of this Court in the case of Vidyacharan Shukla Vs. Khubchand Baghel and Others, when the first schedule of the Limitation Act prescribes no time limit for a particular appeal, but the special law prescribes a time limit for it, it can be said that under the first schedule of the Limitation Act all appeals can be filed at any time, but the special law by limiting it provides for a different period, while the former permits the filing of an appeal at any time, the latter limits it to be filed within the prescribed period. It is therefore, different from that prescribed in the former and thus section 29(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act.

11. It is also obvious that once the aforesaid two conditions are satisfied section

29(2) on its own force will get attracted to appeals filed before Appellate Authority u/s 18 of the Rent Act. When section 29(2) applies to appeals u/s 18 of the Rent Act, for computing the period of limitation prescribed for appeals under that section, all the provisions of sections 4 to 24 of the Limitation Act would apply. Section 5 being one of them would therefore get attracted. It is also obvious that there is no express exclusion anywhere in the Rent Act taking out the applicability of section 5 of the Limitation Act to appeals filed before Appellate Authority u/s 18 of the Act. Consequently, all the legal requirements for applicability of section 5 of the Limitation Act to such appeals in the light of section 29(2) of Limitation Act can be said to have been satisfied. That was the view taken by the minority decision of the learned single Judge of Kerala High Court in Jokkim Fernandez Vs. Amina Kunhi Umma, The majority did not agree on account of its wrong supposition that Appellate Authority functioning u/s 18 of the Rent Act is a persona designata. Once that presumption is found to be erroneous as discussed by us earlier, it becomes at once clear that minority view in the said decision was the correct view and the majority view was an erroneous view.

16. Mr. Nariman, learned Counsel for respondent tried to salvage the situation by submitting that even if conditions for applicability of section 29(2) get satisfied, section 29(2) itself will not apply to them unless it is held that the Appellate Authority functioning as a Court was constituted under the Civil Procedure Code. He contended that unless such courts functioning under special law or local law are constituted under the Civil Procedure Code, section 29(a) cannot apply to them. This submission is required to be stated to be rejected as it would amount to moving in a circle. If according to Mr. Nariman section 29(2) can apply to only those courts which are constituted under the CPC then the entire scheme of Limitation Act from sections 3 to 24 onwards would apply to proceedings of such courts on its own force and in that eventuality provisions contained in section 29(2) for applying sections 4 to 24 of Limitation Act, 1963 to such Court proceedings would be rendered otiose and redundant Mr. Nariman tried to get out of this situation by submitting that because of provisions of first part of section 29(2), section 3 of the Limitation Act, 1963 is treated to have applied to the periods of limitation prescribed by such special or local law by a deeming fiction. There may be situations wherein even courts constituted under special or local law which are governed by CPC may have prescribed period of limitation for suit, appeal or application under such special or local law and for which provision might not have been made under schedule to the Limitation Act and only for such courts an express provision has to be made for applying sections 4 to 24 of the Limitation Act as found in second part of section 29(2) but for which such a machinery may not be available for computing such periods of limitation even though by a legal fiction section 3 of the Limitation Act would apply. It is difficult to countenance this submission. The express language of section 29(2) clearly indicates that such special or local law must provide for period of limitation for suit, appeal or application entertainable under such laws and for computing

period of limitation under such special or local law the Legislature has made available the machinery of sections 4 to 24 inclusive as found in Limitation Act. Nowhere it is indicated that as per section 29(2) the courts functioning under such special or local law must be governed whole hog by Civil Procedure Code.

14. In the case of "Commissioner of Customs, Central Excise, Noida" (supra), it was found that the first proviso to section 35 of the Central Excise Act, 1944 provided that the appeal has to be preferred within three months from the date of communication to the party, of the decision or order and if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he could allow it to be presented within the further period of 30 days. In other words, the above clearly showed that the appeal had to be filed within 60 days, but in terms of the proviso, further 30 days of time can be granted by the Appellate Authority to entertain the appeal. It was found that the proviso to sub-section (1) of section 35 made it crystal clear that the Appellate Authority had no power to allow the appeal to be presented beyond the period of 30 days. Therefore, there was complete exclusion of section 5 of the Limitation Act. The Hon'ble Supreme Court, therefore, held that the High Court was justified in holding that there was no power for condonation of delay in filing Reference Application. The provision of section 40 of the Act is totally different and hence, the above decision is not applicable to the present case.

15. In the case of "Commissioner of Central Excise" (supra), a Division Bench of this Court, in the face of the judgment of the Supreme Court in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, and secondly, in the case of Prakash H. Jain Vs. Ms. Marie Fernandes, has taken a view that in the absence of statutory provision for condonation of delay, recourse to inherent power would not be permissible. However, it has been further observed that an exception to the aforementioned rule is in matters where the Special Act sets out a self-contained Code, the applicability of the General Law Procedure would be impliedly excluded. Thus, the above judgment in no way assists the case of respondent No. 2.

16. It is, therefore, clear that by doctrine of "implied exclusion", section 5 of the Limitation Act is applicable in the present case. Once it is held that section 5 of the Limitation is applicable to appeals u/s 40 of the Act, the next question to be considered is whether the petitioner has shown sufficient cause for delay.

17. Respondent No. 2 has observed that the appeal as well as the application for condonation of delay has been signed by Reddzar Dwight Henriques, whereas the appellant-Partnership Firm was represented by its Managing Partner Shri Reagan Henriques before the Excise Commissioner. He held that family quarrels and disputes amongst the partners of the Partnership are silly excuses and cannot constitute sufficient cause for condonation of delay. Respondent No. 2 held that from the application itself, it is very clear that the Partnership Firm had knowledge of the impugned order and, if it was aggrieved by the impugned

order, it should have filed an application within the time period. The above observation of respondent No. 2 does not appeal to my mind. It may be that Partnership Firm is juridical person, however, that would not mean that the Firm would have personal knowledge of the impugned order. It would certainly be the partners, who could have the knowledge of the order. In the application for condonation of delay, which was filed by Shri Redzzar Dwight Henriques, it was clearly stated that in September, 2010, a grave and bitter family dispute arose between the members of the petitioner's family and the relations and ties of Shri Reagan Henriques were strained with other Partners of the Firm leading to dissolution and reconstitution of the Partnership. It was further alleged that in the meantime, while the family dispute was being settled, the partner Shri Reagan Henriques, who was entangled in the family dispute, failed to pursue the matter concerning the impugned order. It was specifically stated in this application that around end of March, 2011, the family dispute was settled and the Partnership Firm of the applicant was reconstituted on 1/4/2011. The petitioner had further stated that it was only when the Assistant Commissioner of Excise visited the unit of the petitioner on 27/9/2011, that the other partners learnt about the existence of the impugned order dated 28/6/2010 after the enquiries were made with the partner Shri Reagan Henriques, who was unable to say anything except that he had paid three installments under protest and thereafter, was unable to follow up with the same on account of overwhelming nature of the family dispute. It was stated in the application that thereafter, without any further delay, the petitioner consulted the Lawyer and preferred the appeal. In my considered view, more than sufficient cause has been shown by the petitioner which resulted in unintentional belated filing of the appeal.

18. In the case of "N. Balkrishnan" (supra), it has been held that the words "sufficient cause" should be construed liberally and that acceptability of explanation for the delay is the sole criterion and that the length of delay is not relevant. It has been held that in the absence of anything showing malafide or deliberate delay as a dilatory tactic, the courts should normally condone the delay. It has been held that the object of fixing time limit is not meant to destroy the rights. A preliminary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. It has been held that there is no presumption that delay in approaching the Court is always deliberate. It is, therefore, well settled that the words "sufficient cause" u/s 5 of the Limitation Act should receive liberal consideration so as to advance substantial justice.

19. In all the circumstances above, I am of the view that sufficient case was shown by the petitioner and, therefore, respondent No. 2 ought to have allowed the application for condonation of delay. The impugned order is, therefore, arbitrary and perverse and calls for interference of this Court in exercise of power under Article 227 of the Constitution.

20. In the result, the petition is allowed. (a) The impugned order dated 31/1/2013 passed by respondent No. 2 in appeal No. 16/2011 is quashed and set

aside.

(b) The application dated 31/10/2011 filed by the petitioner for condonation of delay is allowed.

(c) Respondent No. 2 shall hear the appeal No. 16/2011 on merits and shall dispose of the same, in accordance with law.

(d) Parties to appear before respondent No. 2 on 18/3/2014 at 11.00 a.m.

(e) Rule is made absolute in the aforesaid terms.

The petition stands disposed of accordingly.