
(2009) 09 BOM CK 0129

In the Bombay High Court

Case No : Company Application No. 843 of 2009 in Company Appeal (L) No. 48 of 2009 in Petitions No's. 44 and 45 of 2007

Smt. Hetal Alpesh Muchhala

APPELLANT

Vs

Adityesh Educational Institute and Others

RESPONDENT

Date of Decision : 17-09-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(3)
Central Excises and Salt Act, 1944 — Section 35, 35(1)
Companies Act, 1956 — Section 10E, 10E(4C), 10E(4D), 10F, 397
Income Tax Act, 1961 — Section 252
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (2009) 152 CompCas 75 : (2009) 4 CompLJ 577

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : Shailesh Shah and Devyani, for the Appellant; Ravi Kadam, Chetan Kapadia, I.J. Nankani, Hujeba Khokhawala, instructed by Nankani and Associates for respondent No. 3, Iqbal Chagla and Pratik Sakseria, instructed by L.J. Law, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Kathawalla, J.—By this company application, the applicant/appellant seeks condonation of delay of 105 days in lodging the company appeal filed u/s 10F of the Companies Act, 1956. The question which arises for determination in this application is whether the provisions of Section 5 of the Limitation Act, 1963, are applicable to an appeal filed u/s 10F of the Companies Act, 1956.

2. Admittedly, a certified copy of the order passed by the Company Law Board dated February 2, 2009 (Smt. Hetal Alpesh Muchhala v. Adityesh Educational Institute P. Ltd. [2009] 149 Comp Cas 241), was received by the applicant on February 16, 2009. However, the company appeal was lodged on July 31, 2009 and the company application seeking condonation of delay in filing the appeal was lodged on August 4, 2009.

3. An affidavit in reply to the said application is filed by respondent No. 3 wherein it is contended by respondent No. 3 that in view of the proviso to Section 10F, the applicant is not entitled to invoke Section 5 of the Limitation Act for preferring an appeal beyond 120 days.

4. Mr. Shailesh Shah, learned advocate appearing for the applicant has submitted that Section 29(2) of the Limitation Act, 1963, provides that:

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 - 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.

5. Mr. Shah has submitted that as provided in Section 29, Section 5 of the Limitation Act, 1963, shall apply to an appeal filed u/s 10F of the Companies Act, 1956, unless its applicability is expressly excluded by the language used in Section 10F. Mr. Shah has further submitted that unlike the wordings used in the proviso to Section 34 of the Arbitration and Conciliation Act, 1996, which can be construed as expressly excluding the applicability of Section 5 of the Limitation Act, 1963, to the filing of an application for setting aside an award, the language used in the proviso to Section 10F of the Companies Act, 1956, cannot be construed as expressly excluding the applicability of Section 5 of the Limitation Act, 1963, to an appeal filed u/s 10F of the Companies Act, 1956.

6. Section 34(3) of the Arbitration and Conciliation Act, 1996 and Section 10F of the Companies Act, 1956, are reproduced hereunder:

Section 34 of the Arbitration and Conciliation Act, 1996:

34(3). An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral Tribunal:

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

Section 10F of the Companies Act, 1956:

10F. Appeals against the order of the Company Law Board.--Any person aggrieved by any decision or order of the Company Law Board (made before the commencement of the Companies (Second Amendment) Act, 2002) may file an appeal to the High Court within sixty days from the date of communication of the

decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

7. According to Mr. Shah, the learned advocate appearing for the applicant/appellant, though the words "but not thereafter" used in the proviso to Section 34 of the Arbitration and Conciliation Act, 1996, can be read and interpreted to understand as expressly excluding the application of Section 5 of the Limitation Act, 1963, to an application for setting aside an award u/s 34 of the Arbitration and Conciliation Act, 1996, the same cannot be said about the words "not exceeding 60 days" used in the proviso to Section 10F of the Companies Act, 1956 and therefore, Section 5 of the Limitation Act, 1963, would be applicable to an appeal filed u/s 10F of the Companies Act, 1956.

8. Mr. Shah has in support of his above submission relied on a decision of this Court in *Echjay Industries P. Ltd. v. Echjay Forgings P. Ltd.* reported in [2004] (Supp.) 2 Bom. CR 394, which at the outset I would like to clarify, will not be of any assistance to Mr. Shah, because the applicability of Section 5 of the Limitation Act, 1963, to Section 10F of the Companies Act, 1956, was not in issue before this Court in the said decision.

9. Mr. Ravi Kadam, the learned senior advocate, appearing for respondent No. 3 in support of his contention that Section 5 of the Limitation Act, 1963, would not be applicable to an appeal filed u/s 10F of the Companies Act, 1956, has relied on a decision of the hon"ble Supreme Court of India, in the case of *Union of India Vs. M/s Popular Construction Co.,* wherein the hon"ble Supreme Court apart from holding that the words "but not thereafter" used in proviso to subsection (3) of Section 34 of the Arbitration and Conciliation Act, 1996, amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, 1963, has also held that express exclusion can also be inferred from the history, scheme and objectives of the Arbitration and Conciliation Act, 1996. The hon"ble Supreme Court after analysing Section 29(2) of the Limitation Act, 1963 and the scheme and object of the Arbitration and Conciliation Act, 1996, has held that Section 5 of the Limitation Act, 1963, is not applicable to proceedings u/s 34 of the Arbitration and Conciliation Act, 1996, for setting aside an arbitral award.

10. Mr. Kadam has submitted that the words "not exceeding 60 days" used in Section 10F of the Companies Act, 1956, implies express exclusion within the meaning of Section 29(2) of the Limitation Act, 1963 and would, therefore, bar the application of Section 5 of the Limitation Act, 1963. Relying on the above decision of the hon"ble Supreme Court in *Union of India v. Popular Construction Co.* (supra), Mr. Kadam has submitted that if this Court proceeds to hold that Section 5 of the Limitation Act, 1963, is applicable to Section 10F of the

Companies Act, 1956, after the period of further 60 days, the words "not exceeding 60 days" used in Section 10F of the Companies Act, 1956, shall be rendered redundant or otiose and an interpretation which renders a word or a phrase in a statutory provision redundant or otiose can never be justified.

11. Mr. Kadam has further relied on a decision of the hon''ble Supreme Court in Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, , wherein the hon''ble Supreme Court has in paragraph 53 of its decision categorically held that the proviso to Section 34(3) of the Arbitration and Conciliation Act, 1996, has the effect of excluding Section 5 of the Limitation Act, 1963. In the said decision, the hon''ble Supreme Court after confirming that in the decision in the case of Union of India v. Popular Construction Co. (supra), a Division Bench of the hon''ble Supreme Court has held that Section 5 of the Limitation Act is not applicable to an application challenging an award u/s 34 of the Arbitration and Conciliation Act, 1996, has proceeded to hold that the said decision cannot be construed to mean a ruling that the provisions of Section 14 of the Limitation Act are also not applicable to an application challenging an award u/s 34 of the Arbitration and Conciliation Act, 1996.

12. Mr. Kadam has further relied on the decision of the Punjab and Haryana High Court in the case of Pazvan Goel v. KMG Milk Food Ltd. reported in [2008] 142 Comp Cas 441, wherein the learned single judge of the Punjab and Haryana High Court has, inter alia, held that the proviso to Section 10F of the Companies Act, 1956, has created an absolute bar for extension of period of limitation beyond sixty days apart from the period of limitation of sixty days prescribed u/s 10F of the Companies Act, 1956. The expression "not exceeding" does not permit any further extension. The true import, purport and construction of the proviso is to restrict the total period of limitation of 120 days, i.e., sixty days principal and sixty days by extension subject to existence of sufficient cause in a given case. Mr. Kadam has, therefore, submitted that Section 5 of the Limitation Act, 1963, is not applicable to Section 10F of the Companies Act, 1956 and therefore, the admitted delay of 45 days, after exhausting the period of 120 days provided u/s 10F of the Companies Act, 1956, cannot be condoned and the application filed by the applicant/appellant seeking condonation of delay deserves to be dismissed.

13. As set out in more detail in the latter part of this order Mr. Kadam also submitted that the legislative intent, behind constitution of the Company Law Board and the insertion of Section 10F of the Companies Act, 1956, further goes to show that the proviso to Section 10F mandatorily prescribes the maximum period to the extent of which delay in filing an appeal u/s 10F is capable of being condoned after which it is not open to this Court to exercise any discretion.

14. Mr. I.M. Chagla, the learned senior advocate appearing for respondents Nos. 4 and 5 reiterated the submissions advanced by Mr. Kadam, appearing on behalf of respondent No. 3 and relied on a decision of the hon''ble Supreme Court of India in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, . In that decision, the question which arose for the determination of the

hon"ble Supreme Court was whether the provisions of Section 5 of the Limitation Act, 1963, would be applicable to Section 35 of the Central Excise Act, 1944. u/s 35 of the Central Excise Act, 1944, an appeal to the Commissioner (Appeals) was permitted by any person aggrieved by any decision or order passed by the Central Excise Officer, lower in rank than the Commissioner of Central Excise within sixty days (within three months from May 1, 2001) from the date of communication to him of such decision or order. Under the proviso to Section 35, the Commissioner (Appeals) was empowered to allow the appellant to present an appeal within a further period of thirty days (three months from May 11, 2001) upon being satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the prescribed period of 60 days. The hon"ble Supreme Court after considering the language of Section 35 of the Central Excise Act, 1944, held that the proviso to Sub-section (1) of Section 35 makes it crystal clear that the appellate authority had no power to allow the appeal to be presented beyond the period of 30 days. The Legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after the expiry of sixty days which is the normal period for preferring an appeal. Therefore, there is a complete exclusion of Section 5 of the Limitation Act and any condonation of delay would render a specific provision providing for limitation rather otiose. The appeal was, therefore, dismissed by the hon"ble Supreme Court.

15. Mr. Chagla has submitted that in the instant case, the appellant was required to file an appeal within sixty days from the receipt of the Company Law Board order, which period could have been extended by a further period of sixty days upon the appellant satisfying the court that she was prevented by sufficient cause from pursuing the appeal within the prescribed time of sixty days. The Legislature by using the words "not exceeding sixty days" has expressly excluded the applicability of Section 5 of the Limitation Act, 1963 and any condonation of delay would render the proviso to Section 10F providing for limitation rather otiose.

16. I have considered, the aforesaid submissions advanced on behalf of the learned advocates appearing for the applicant as well as the respondents, and the decisions of the hon"ble apex court and High Courts cited by them. u/s 34(3) of the Arbitration and Conciliation Act, 1996, an application for setting aside an award is required to be made within 3 months from the date on which the party making such application has received the arbitral award. The proviso to Sub-section (3) of Section 34 upon sufficient cause being made out provides a further period of thirty days but not thereafter. The total time period allowed u/s 34(3) of the Arbitration and Conciliation Act, 1996, to a party to move an application for setting aside of the award is limited to 120 days and not thereafter. Similarly, u/s 10F of the Companies Act, 1956, a party is allowed to file an appeal to the High Court within 60 days from the date of communication of the decision or order of the Company Law Board. Under the proviso to Section 10F of the Companies Act, a party is allowed to file an appeal within a further period not

exceeding 60 days, if the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the initial period of 60 days.

17. Section 29 of the Limitation Act, 1963, is analysed by the hon"ble Supreme Court in its decision in Union of India v. Popular Construction Co. (supra) and it is held that Sections 4 - 24 will apply when:

(1) There is a special or local law which prescribes different period of limitation for any suit, appeal or application; and

(2) The special or local law does not expressly exclude those sections.

18. The hon"ble Supreme Court in paragraph 10 of its decision in Union of India v. Popular Construction Co. (supra) referring to the decision of its Constitution Bench in Vidyacharan Shukla v. Khubchand Baghel reported in AIR 1964 SC 1099, has held:

This decision recognises that it is not essential for the special or local law to, in terms, exclude the provisions of the Limitation Act. It is sufficient if on a consideration of the language of its provisions relating to limitation, the intention to exclude can be necessarily implied...

19. The hon"ble Supreme Court thereafter proceeded to hold that the words "but not thereafter" used in the proviso to Sub-section (3) of Section 34 of the Arbitration and Conciliation Act, 1996, is an express exclusion because of which Section 29 would be made applicable and Section 5 of the Limitation Act, 1963, will not be applicable to Sub-section (3) of Section 34 of the Arbitration and Conciliation Act, 1996.

20. The words used in the proviso to Section 10F of the Companies Act, 1956, are "not exceeding 60 days" thereby clearly prescribing the time limit of only 60 days, in addition to the initial period of 60 days allowed u/s 10F of the Companies Act, 1956, to enable a party to file an appeal. The proviso clearly shows that the power vested in the court to condone delay on sufficient cause being shown is directory and subject to the discretion vested in the court. However, the maximum period to the extent of which such delay is capable of being condoned is mandatorily prescribed and not open to exercise of any discretion. The words "not exceeding" cannot be given any other meaning except "not more than" or "not beyond" or "not thereafter". Therefore, in my view, the words "not exceeding 60 days" would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, 1963 and would therefore bar the application of Section 5 of the Limitation Act to Section 10F of the Companies Act, 1956. To hold that the court could entertain an application to set aside the decision/order passed by the Company Law Board beyond the extended period under the proviso, to Section 10F of the Companies Act, 1956, would render the phrase "not exceeding 60 days" wholly otiose.

21. As held by the Supreme Court in Union of India v. Popular Construction Co. (supra), apart from the language of the provisions/section "express exclusion"

may follow from the scheme and object of the special or local law. Mr. Ravi Kadam, learned senior advocate appearing for respondent No. 3 has submitted and in my view, he is correct in his submission that the legislative intent behind constitution of the Company Law Board and insertion of Section 10F supports the conclusion that the time limit prescribed u/s 10F to file an appeal from the order of the Company Law Board is absolute and unextendable by court u/s 5 of the Limitation Act.

22. The Board of Company Law (i.e., Company Law Board) was first established by the Companies (Amendment) Act, 1963 vide G.S.R. No. 866 dated 1st February, 1964. Subsequently, by the Companies (Amendment) Act, 1974, certain powers which were earlier exercised by the courts were taken away and the powers in relation thereto were vested in the Company Law Board.

23. By the Amendment Act of 1974, Sections (4B), (4C) and (4D) were added to provisions of Section 10F of the Companies Act, 1956. One of the reasons for insertion of the said provisions as given by the Joint Committee of Parliament in paragraph 19 of its Joint Committee Reports was as reproduced hereunder:

In view of the proposal to transfer to the Company Law Board some of the powers which were so long exercised by the courts, the committee feel that the strength of the Company Law Board might be raised to nine so that the matters in relation to which the powers of the court are proposed to be transferred to the Company Law Board might be disposed of expeditiously by one or more Benches formed by the Board. In order to enable the Company Law Board to discharge its quasi-judicial functions, it is also necessary to clothe it with the powers of a civil court to enforce the attendance of witnesses and production of documents, etc., and also to provide for punishment for its contempt.

24. Thereafter, based on the recommendations made by Sachar Committee, by the Companies (Amendment) Act, 1988 (with effect from May 31, 1991), the provisions of Section 10E were once again amended and Section 10F of the Companies Act, 1956, was inserted.

25. Paragraphs 16.8 and 16.11 of the recommendations made by the Sachar Committee which are relevant in this behalf are reproduced hereunder:

There is also the strong feeling, expressed almost without any reservation, by all the organisations and individuals who had submitted their memorandum to the committee or had appeared before it that there is a definite need for a quasi-judicial tribunal, independent of the executive authority of the Central Government, which should not only ensure that the Act is administered in a manner which gives the affected party a right to be heard but also see that the decisions are taken uninfluenced by executive considerations. In the circumstances, what needs to be ensured is an in-built system which combines the application of judicial mind with speed and administrative efficiency, first, in respect of those matters which are at present with the Central Government though delegated to the Company Law Board and, secondly, in respect of such

matters as are statutorily with the Company Law Board.

We, therefore, feel that appropriate solution would lie in statutorily constituting an independent quasi-judicial Company Law Board broadly on the lines of the Income Tax Appellate Tribunal as provided in Section 252 of the Income Tax Act, 1961, with benches permanently located at different regions, including Delhi, so that the matters are heard at places not far removed from the offices of the companies.

26. The recommendations of the Joint Committee of Parliament and the Sachar Committee as set out hereinabove read with the amendments to the provisions of the Companies Act, 1956, in pursuance thereto, establishes that the entire purpose behind setting up of the Company Law Board and vesting it with the powers to exercise a limited jurisdiction in relation to the specified matters was to establish an independent quasi-judicial body which would have an inbuilt system which would combine the application of the judicial mind with speedy and administrative efficiency.

27. The provisions of Sub-sections (4C) to (4D) of Section 10E of the Companies Act, 1956, show that the Company Law Board though equipped with some powers of the civil court, is not the civil court but the Tribunal and is not bound by the provisions of the Code of Civil Procedure, 1908, or the Indian Evidence Act but is required to be guided by the principles of natural justice and is entitled to act in its discretion. Thus, the very purpose of vesting such discretion subject to the principles of natural justice and without the need to comply with the procedural requirements under the Evidence Act or the CPC is to ensure speedy disposal of cases in relation to which the powers have been vested in the Company Law Board.

28. The Companies Act being a special enactment, the Constitution of the Company Law Board as a Special Tribunal is to ensure the matters in relation to certain provisions of the Companies Act, 1956, such as Sections 397 and 398 are decided as expeditiously as possible without being bound by the strict rules of evidence or the provisions of the Code of Civil Procedure, 1908.

29. The Legislature has consciously restricted the right of appeal u/s 10F of the Companies Act, 1956, only to the questions of law so as to ensure that there is as far as possible an early finality to the issues and consequent redressal of grievances. All decisions on the questions of fact as decided by the Company Law Board are final and conclusive. Therefore, any liberal construction of the discretion vested under the proviso to Section 10F would render the provision otiose and defeat the purpose for the establishment of the Special Tribunal (being Company Law Board) for the speedy adjudication of the disputes.

30. The legislative intent as reflected from the amendments to the Companies Act, 1956, resulting in the constitution of the Company Law Board and the insertion of Section 10F providing for a limited appeal make it abundantly clear that the Legislature intended to restrict the power of the court to condone the

delay beyond the period exceeding 60 days and thus prescribed in a mandatory language as under:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

31. Thus, borrowing the language of the hon"ble Supreme Court in *Union of India v. Popular Construction Co.* (supra), if there were any residual doubt on the interpretation of the language used in Section 10F, the legislative intent behind the constitution of the Company Law Board and the object of insertion of Section 10F would resolve the issue involved of curtailment of the court's power with the exclusion of the operation of Section 5 of the Limitation Act, 1963.

32. In view thereof, the scheme of the Companies Act, 1956, as amended from time to time surely supports the curtailment of the court's powers by the exclusion of operation of Section 5 of the Limitation Act, 1963.

33. In the circumstances and for the reasons stated earlier, the question of condoning delay in filing company appeal u/s 10F of the Companies Act, 1956, does not arise and the said application is dismissed.