

(2011) 01 GUJ CK 0005
In the Gujarat High Court
Case No : Civil Application No. 303 of 2010

State of Gujarat

APPELLANT

Vs

M/s. Rama Newsprint and Papers Ltd.

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(G), 35(H)
Gujarat Value Added Tax Act, 2003 — Section 73, 75, 78, 84
Income Tax Act, 1961 — Section 260(A)
Limitation Act, 1963 — Section 5, 5

Citation : (2011) 1 GLH 333

Hon'ble Judges : Harsha Devani, J; H. B. Antani, J

Bench : Division Bench

Advocate : Maithili Mehta, Assistant Government Pleader, for the Appellant; K. H. Kaji and Mr. Manish K. Kaji, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this application u/s 5 of the Limitation Act, 1963, the applicant - the State of Gujarat seeks condonation of delay of 110 days caused in filing Tax Appeal (Stamp) No.789 of 2010.

2. Vide order dated 16th August, 2010, this Court had issued rule. In response to the notice of rule, the respondent has filed appearance through learned Advocate Mr. Manish K. Kaji and has filed an affidavit in-reply, dealing with the averments made in the application on merits. The respondent has also raised a contention that in the light of the provisions of Section 78 of the Gujarat Value Added Tax Act, 2003 (the Act), the High Court has no power to condone the delay caused in filing a tax appeal and as such, the application deserves to be rejected on this ground alone.

3. Ms. Maithili Mehta, learned Assistant Government Pleader, invited the attention of the Court to the averments made in the application to submit that the delay that has been occasioned in filing the tax appeal has been sufficiently explained

and as such the same requires to be condoned in the interest of justice. It was submitted that the time taken in preferring the appeal is because of the procedure that is required to be followed in the administrative hierarchy which requires the proposal for filing the appeal to be scrutinized at various levels and as such, there was no negligence on the part of the respondent in preferring the tax appeal and that the applicant was bona fide pursuing the remedy of appeal.

4. On the other hand, Mr. Manish K. Kaji, learned Advocate for the respondent raised a preliminary objection to the very maintainability of the application on the ground that the appeal has been preferred u/s 78 of the Act which does not make any provision for condonation of delay and as such, the application is required to be rejected on this ground alone. The learned Advocate placed reliance upon a decision of the Supreme Court in the case of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, wherein the Supreme Court in the context of the provisions of Sections 35G and 35H of the Central Excise Act, 1944, had held that the limitation for preferring an appeal cannot be extended by invoking the provisions of Section 5 of the Limitation Act. Reliance was placed upon a decision of the Bombay High Court in the case of The Commissioner of Income Tax Vs. Grasim Industries Limited, wherein the Court while examining the provisions of Section 260A of the Income Tax Act, 1961, had held that the said provisions being in pari materia with Sections 35G and 35H of the Central Excise Act, 1944, the High Court had no power to condone the delay. Strong reliance was placed upon a decision of the Punjab and Haryana High Court in the case of State of Punjab and another v. Shreyans Industries Ltd. 2010 29 VST 474 (PandH), wherein the Court in the context of the provisions of Section 68(2)(a) of the Punjab Value Added Tax Act (8 of 2005), had held that in the light of the reasoning adopted by the Supreme Court in the case of Commissioner of Customs and Central Excise v. Hongo India (supra), the High Court had no power to condone the delay u/s 5 of the Limitation Act.

5. Referring to the provisions of Section 78 of the Act, it was submitted that the said Section does not provide for condonation of delay for filing an appeal to the High Court. Attention was also invited to the provisions of Section 84 of the Act, which provides for extension of the period of limitation in certain cases, to submit that though the said Section makes provision for admitting any appeal or cross objections after the period of limitation, the same only empowers the Tribunal to admit an application u/s 75 or Section 78 of the Act. That the said provision does not enact that the High Court has the power to admit any appeal after the period of limitation and as such, the High Court does not have any power to condone the delay that has been caused in preferring a tax appeal u/s 78 of the Act.

6. It was further submitted that even on merits, the application does not deserve to be entertained inasmuch as the applicant has failed to properly explain the delay of 110 days that had been caused in filing the tax appeal, and as such, even on this count, the application is required to be rejected.

7. Dealing with the contentions as regards applicability of Section 5 of the

Limitation Act, Ms. Maithili Mehta, learned Assistant Government Pleader invited attention to the provisions of Section 78 of the Act, which makes provision for "Appeal to High Court". Referring to sub-Section (7) thereof, it was submitted that the same provides that in respect of matters not provided in the Section, the provisions of the Code of Civil Procedure, 1908 (the Code), which applies to the Second Appeal to the High Court u/s 100 of the Code shall, so far as may be, apply to the Second Appeal under the Section. It was, accordingly, submitted that the provisions of the Code as applicable to Second Appeals to the High Court would apply to an appeal u/s 78 of the Act.

8. Referring to Order XLII of the Code, it was pointed out that rule 1 thereof provides that the rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees. Referring to rule 3(A) of Order XLI of the Code, it was pointed out that the same makes provision for condonation of delay in presenting an appeal after the period of limitation specified therefor. It was, accordingly, submitted that in the light of the provisions of Section 78 of the Act read with Section 100 and Orders XLI and XLII of the Code, it is apparent that the High Court has the power to condone the delay that has occasioned in preferring tax appeal u/s 78 of the Act. It was, accordingly, submitted that the objection raised to the maintainability of the application is misconceived and that the High Court has the power to condone the delay by invoking the provisions of Section 5 of the Limitation Act in the light of the provisions of sub-Section (7) of Section 78 of the Act.

9. In the light of the aforesaid facts and contentions, the question that-arises for consideration is as to whether Section 5 of the Limitation Act is applicable to an appeal filed in the High Court u/s 78 of the Act or as to whether there is any power vested in the High Court under the provisions of the Gujarat Value Added Tax Act for condoning the delay caused in filing an appeal u/s 78 of the Act.

10. In this regard, it may be germane to refer to certain statutory provisions. Section 78 of the Act, insofar as the same is relevant for the present purpose, reads thus:

[78] Appeal to High Court.

[1] An appeal shall lie to the High Court from Court every order passed in appeal by the Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

[2] xxx

[3] xxx

[6] An appeal under this Section may be filed within ninety days from the date of communication of the order of the Tribunal and shall be accompanied with a fee of rupees two hundred.

[7] In respect of such matters not provided in this Section, the provisions of

Code of Civil Procedure, 1908, which applies to the Second Appeal to High Court u/s 100 of the said Code shall, so far as may be, apply to the Second Appeal under this Section.

11. On a plain reading of Section 78 of the Act, it is apparent that subsection (6) thereof provides for preferring an appeal within ninety days from the date of communication of the order of the Tribunal. The language employed in the provision is an appeal under the Section may be filed within ninety days. The expression used is "may" and not "shall", hence, prima facie, it appears that the provision is directory rather than mandatory in nature. Sub-Section (7) of Section 78 of the Act provides that in respect of such matters not provided under the Section, the provisions of Code of Civil Procedure, 1908, which applies to the Second Appeal to High Court u/s 100 of the said Code shall, so far as may be, apply to the Second Appeal under this Section. Thus, the said provision provides that the provisions of the CPC as applicable to Second Appeals to High Court u/s 100 of the Code shall apply to Second Appeals u/s 78 in respect of such matters not provided under the Section. Section 100 of the Code provides for Second Appeals to the High Court, where the High Court is satisfied that the case involves a substantial question of law. The procedural provisions in respect of Second Appeal are provided under Order XLII of the Code, which deals with appeals from appellate decrees. Sub-rule (1) of Order XLII of the Code provides that rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees. Rule 3(A) of Order XLI provides that when an appeal is presented after the expiry of the period of limitation specified thereof, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring appeal within such period. Sub-rule (2) thereof provides that if the Court sees no reason to reject the application without issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be. Thus, rule 3(A) of Order XLI of the Code specifically provides for condoning the delay in case an appeal is presented after the period of limitation when the Court is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

12. As noted hereinabove, sub-Section (7) of Section 78 of the Act opens with the words "In respect of such matters not provided in this Section". On a plain reading of the said expression, it is apparent that the provisions of Second Appeal u/s 100 of the Code shall apply in respect of such matters which are not provided u/s 78 of the Act. Thus, since Section 78 of the Act does not make any provision in the matter of condonation of delay, the provisions of Section 100 of the Code which would include provisions of Order XLII of the Code, would be applicable and the provisions of rule 3(A) of Order XLI which provides for condoning the delay where sufficient cause is made out, would also be applicable. In the circumstances, the contention that there is no provision for condoning the delay in case where an appeal is filed u/s 78 of the Act does not

merit acceptance.

13. The question is also required to be examined from another angle. Section 84 of the Act, which provides for "Extension of limitation in certain cases", reads as follows :-

[84] Extension of period of limitation in certain cases.

An Appellate Authority may admit any appeal or permit the filing of a memorandum of cross objections u/s 73 and the Tribunal may admit an application u/s 75 or u/s 78 after the period of limitation laid down in the said Sections, if the appellant or the applicant satisfies the Appellate Authority or the Tribunal, as the case may be, that he had sufficient cause for not preferring the appeal or filing a memorandum of cross objections or making the application, within such period.

14. Thus, Section 84 of the Act provides for admitting any appeal or permitting filing of memorandum of cross objection u/s 73 of the Act by the Appellate Authority and admitting of an application u/s 75 or Section 78 by the Tribunal after the period of limitation laid down under the said Sections, if the appellant or the applicant satisfies the Appellate Authority or the Tribunal, as the case may be, that he had sufficient cause for not preferring the appeal or filing the memorandum of cross objections or making application within such period. Thus, Section 84 of the Act provides for extension of period of limitation in relation to any appeal or cross objections u/s 73, and applications under Sections 75 and 78 of the Act.

15. Section 73 of the Act provides for an appeal from every original order, not being an order mentioned in Section 74, passed under the Act or the rules, shall lie, (a) if the order is made by an Assistant Commissioner or Commercial Tax Officer or any other officer subordinate thereto, to the Deputy Commissioner, (b) if the order is made by a Deputy Commissioner, to the Joint Commissioner; (c) if the order is made by a Joint Commissioner, Additional Commissioner or Commissioner, to the Tribunal. Thus, the appeals u/s 73 of the Act shall lie to the Deputy Commissioner, to the Joint Commissioner or to the Tribunal, as the case may be, depending upon the authority whose order is subject matter of appeal.

16. Section 75 of the Act makes provisions for revision by the Commissioner of his own motion within three years or on an application made to him and by the Tribunal on an application made to it against the order of the Commissioner as provided under the said Section. Section 78 of the Act makes provision for appeal to High Court.

17. On a close reading of Section 84 of the Act, it appears that there are certain lacunas in the drafting of the said provision. As noted hereinabove. Section 73 provides for appeal to the Appellate Authority as well as the Tribunal; Section 75 provides for revision by the Commissioner as well as the Tribunal whereas Section 78 provides for appeal to the High Court. However, Section 84 speaks of

admitting an appeal or cross objection u/s 73 by the Appellate Authority and admitting an application u/s 75 or 78 by the Tribunal after the period of limitation. Thus, though Section 73 or Section 75 provide for an appeal and revision both to the Commissioner and the Tribunal, Section 84 of the Act provides for extension of limitation in case of an appeal to the Appellate Authority u/s 73 and application to the Tribunal u/s 75 and 78 of the Act. As noted hereinabove, Section 78 of the Act does not provide for making any application to the Tribunal but provides for appeal to the High Court.

18. Sub-Section (3) of Section 73 of the Act provides that subject to the provisions of Section 84, no appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against. Thus all appeals u/s 73 of the Act, whether to the Appellate Authority or the Tribunal are subject to Section 84 of the Act. But from the language of Section 84, it appears as if the same applies only in respect of appeals to the Appellate Authority u/s 73 of the Act.

19. As noticed above, Section 84 specifically provides for admitting an application u/s 78 of the Act by the Tribunal after the prescribed period of limitation. Whereas, Section 78 of the Act provides for appeal (not application) to the High Court. No power is vested in the Tribunal u/s 78 of the Act. Thus, if Section 84 of the Act is construed literally, the same results into an absurdity, inasmuch as the words Section 78 are rendered meaningless. It appears that though the intention of the legislature was to make the provisions of Section 84 applicable to appeals to the High Court u/s 78 of the Act, due to some error on the part of the draftsman, the words "the High Court may admit an appeal" have been accidentally omitted before the words "under Section 78". Since Section 78 has in fact been included in Section 84 of the Act, unless such an interpretation is adopted, namely, that the legislature has through inadvertent error, left out the words "the High Court may admit an appeal" in the said provisions, the words "under Section 78 of the Act" would become meaningless. Though it is not permissible to read words in a statute which are not there, but where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words. In the present case, unless the words "and the High Court may admit an appeal" are read to be existing before the words "under Section 78", the words "under Section 78" would lose all meaning. In the circumstances, adopting a purposive interpretation, the words "the High Court may admit an appeal" have to be read into Section 84 of the Act.

20. The Supreme Court in the case of Surjit Singh Kalra Vs. Union of India (UOI) and Another, has held thus:-

19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which

deprives certain existing words of all meaning, it is permissible to supply the words" (Craies Statute Law, 7th edn., p. 109). Similar are the observations in *Hameedia Hardware Stores v. B. Mohan Lal Sowcar* where it was observed that the Court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the Court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. (See: *Sirajul Haq Khan v. Sunni Central Board of Waqf.*)

21. Thus, reconciling the relevant provisions, it is apparent that Section 84 of the Act provides for extension of period of limitation even in respect of appeal to the High Court u/s 78 of the Act.

22. In *Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd.*, the Supreme Court reiterated the aforesaid view and held thus:-

52. No doubt ordinarily the literal rule of interpretation should be followed, and hence the Court should neither add nor delete words in a statute. However, in exceptional cases this can be done where not doing so would deprive certain existing words in a statute of all meaning, or some part of the statute may become absurd.

53. In the chapter on "Exceptional Construction" in his book on Interpretation of Statutes, Maxwell writes:

WHERE the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience Or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning.

54. Thus, in *Surjit Singh Kalra v. Union of India* this Court has observed that sometimes Courts can supply words which have been accidentally omitted.

55. In *G.P. Singh's Principles of Statutory Interpretation*, 9th Edn., 2004 at pp. 71-74 several decisions of this Court and foreign Courts have been referred to where the Court has added words to a statute (though cautioning that normally this should not be done).

23. In the light of the aforesaid discussion, the contention raised on behalf of the respondent that the High Court has no power to condone the delay in respect of

an appeal preferred u/s 78 of the Act, does not merit acceptance and is, accordingly, rejected.

24. Insofar as the reasons stated for the delay caused in filing the appeal are concerned, it is apparent that the delay has been occasioned on account of procedural delay which is inherent in most matters which are filed by the Government, namely, various stages at which the approval is required for the purpose of filing appeal. The apex Court in case of State of Haryana Vs. Chandra Mani and others, held thus:-

It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the State - are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the "same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the Governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit.

25. In Union Public Service Commission Vs. Hiranyalal Dev and Others, the Supreme Court held that no general principle saving the party from all mistakes of its Counsel could be laid. The expression "sufficient cause" must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. In litigations to which Government is a party, there is yet another aspect which, perhaps, cannot be ignored. If appeals brought by Government are lost for such defaults, no person is individually affected; but what, in the ultimate analysis, suffers is public

interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals. The law of limitation is no doubt, the same for a private citizen as for Governmental authorities. Government, like any other litigant must take responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it. It was, therefore, held that in assessing what constitutes sufficient cause for purposes of Section 5, it might, perhaps, be somewhat unrealistic to exclude from the consideration that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Government decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red-tape in the process of their making. A certain amount of latitude is, therefore not impermissible. It is rightly said that those who bear responsibility of Government must have "a little play at the joints". Due recognition of these limitations on Governmental functioning - of course, within reasonable limits - is necessary if the judicial approach is not to be rendered unrealistic. It would, perhaps, be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of Governmental functioning is procedural delay incidental to the decision-making process. The delay of over one year was accordingly condoned.

26. Examining the facts of the present case in the light of the principles enunciated in the above referred decisions, this Court is of the view that the applicant has sufficiently explained the delay that has been caused in preferring the tax appeal and that there is no willful negligence on the part of the applicant, nor has the applicant ever given up the cause. In the circumstances, the delay caused in filing the appeal deserves to be condoned.

27. For the foregoing reasons, the application succeeds and is, accordingly, allowed. The delay of 110 days caused in filing Tax Appeal (Stamp) No.789 of 2010 is hereby condoned. Rule is made absolute, accordingly, with no order as to costs.