

(2014) 04 CAL CK 0085
In the Calcutta High Court
Case No : W.P. No. 188 of 2005

Subir Goel

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128, 35
Limitation Act, 1963 — Section 5

Citation : (2014) 308 ELT 680

Hon'ble Judges : Sambuddha Chakrabarti, J

Bench : Single Bench

Advocate : Sourabh Banerjee and Ms. Sucharita Biswas, Advocate for the Appellant; R. Bharadwaj and Mr. K.K. Maiti, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Sambuddha Chakrabarti, J.—The Court: The immediate occasion for passing the order impugned in the writ petition was a direction by this court in a writ petition filed in the year 2003. A learned single judge of this court by an order dated August 16, 2004 had inter alia directed the respondent no. 5 to the said writ petition to consider and dispose of the representation of the petitioner within a period of four weeks from the date of the communication of the order after giving the petitioner an opportunity of being heard. The said respondent was also directed to pass a reasoned order.

2. The grievance of the petitioner in the earlier writ petition, as it appears from the said order, was that in spite of submission of the relevant documents including the shipping bills and other necessary certificates no step had been taken by the respondents authorities for release of the drawback amount to the petitioner.

3. In compliance with the said order the respondent no. 4 herein by a communication dated September 17, 2004 had inter alia informed the

petitioner's firm that in spite of several summons the firm was not co-operating with the authorities. He expressed his doubt about the existence of the firm which, according to him, warranted an investigation of agreement paper recording change of proprietorship from M/s. Surajbhan to the petitioner. He, therefore, requested the firm to co-operate with the department for the completion of the investigation and once no objection recording release of drawback was received from the Special Investigation Branch only the Drawback Department would be in a position to release the drawback and thus the representation made by the petitioner was disposed of.

4. This had left the petitioner aggrieved and his challenge to the same is by way of the present writ petition.

5. For our purpose no detailed examination of the factual aspects is called for. Suffice it to say, however, that the petitioner is an exporter of readymade garments and in the year 2000 made shipment of a large quantity of garments in 44 consignments from the Kolkata Port. The export is covered by the Duty Drawback Scheme under the Customs Act. According to the petitioner his total claim against Duty Drawback for those consignments approximately amounted to Rs. 42 lacs. The petitioner alleges that for a very long time he did not hear anything from the respondents in respect of his claim. Very belatedly he started receiving some communications from the respondents authorities asking him to supply several documents. Summons were also issued against him. He says that he had submitted all the relevant documents but unnecessary demand from the respondents continued and in the process there was an inordinate delay in making payment of the drawback amount.

6. The petitioner has criticized this inaction on the part of the Customs authorities as harassing as well as contrary to the policy of the Central Board of Excise and Customs. He has referred to certain documents and public notice in terms of which the drawback claims are supposed to be paid within 24 hours. This impelled him to file the first writ petition which has been disposed of in the manner as mentioned earlier and the compliance of the direction passed by a learned single judge of this Court is the order impugned in the writ petition.

7. There are various grounds of challenge to the order-non-application of mind, reiteration of the earlier stand, absence of independent finding, non-consideration of the claim of the petitioner in terms of the order passed by the learned single judge, etc.

8. A more specific point of attack by the petitioner is that after about three years the respondents came up with the plea that the bank realization certificates submitted by the exporter are not genuine. He says that the firm was previously owned by Surajbhan and was taken over by the present petitioner on March 21, 2002. He has suspected some serious foul play against him by the department. During his several visits to the authorities such a question was never raised by the officials. He further insists that in terms of the outer limit of the period by

which the drawback amount is required to be released rules out the necessity of filing a bank realization certificate.

9. Subsequent to the order impugned in the writ petition was passed the authorities had again issued a summons, dated December 10, 2004 asking the petitioner to produce a certificate of change of name of the bank realization and for some other documents which the petitioner says was submitted long ago.

10. Thus, the petitioner has inter alia prayed for a writ in the nature of Mandamus for quashing and setting aside the order impugned in the writ petition and to release the drawback amount along with interest and for other reliefs.

11. The respondents in spite of being given repeated opportunities did not file any affidavit-in-opposition though such direction was passed by a learned single judge as early as on February 7, 2005.

12. Although there is no denial of the allegations and statements made by the petitioner the parties had filed their respective written notes of submissions. The only point taken by the respondents in their note of submission, apart from quoting a portion of the order impugned in the writ petition, is the point of limitation.

13. According to the respondents against the order passed by the respondent no. 4 the petitioner could have filed an appeal u/s 128 of the Customs Act. But instead of filing an appeal the petitioner has filed the writ petition beyond the statutory period of limitation of filing an appeal. The respondents' logic is that according to Section 128 of the Customs Act the Commissioner of Appeals cannot entertain an appeal beyond a period of 90 days in total which, in the present case, expired on December 19, 2004 and the petitioner has filed the writ petition about a month thereafter rendering the same to be barred by limitation. In further elaboration of this stand the respondents have contended that filing of writ petition after the expiry of the period of limitation vitiates the intention of Parliament.

14. I for one do not find much justification in the stand taken by the respondents. The law on the point is well-settled. For filing an application under Article 226 of the Constitution there is no fixed period of limitation and as such neither the Limitation Act nor the time limits fixed in the schedule to the Act can be made rigorously applicable to a writ proceeding. The court over the years have only insisted that the conduct of the petitioner must not be blameworthy and there has not been any unnecessary or inordinate delay in approaching the court. A writ proceeding being outside the rigours of various periods of limitation is to be tested by the conduct of the party at whose instance it has been filed. While a court does not encourage a stale claim is to be adjudged after an inordinate delay it does not also lean in favour of curtailing a man's fundamental or statutory right by importing the concept of limitation with reference to the statutory period fixed for filing an appeal.

15. In *Chandra Bhushan and Another Vs. Deputy Director of Consolidation (Regional), U.P. and Others*, a five Judge bench of the Supreme Court had occasion to consider the view taken by and the practice followed by one of the High Courts that the period of 90 days which was the period fixed for appeals to High Court should be taken as the period for an application for the issue of a writ of Certiorari and that time could be extended only when circumstances of a special nature were shown to have existed. The Supreme Court very unambiguously held that in the absence of any statutory rule the period prescribed for preferring an appeal to the High Court is only a rough measure. In each case the preliminary question was whether the petitioner had been guilty of laches or undue delay. A rule of practice, the Supreme Court observed, cannot prescribe a binding rule of limitation. It was further observed in the said case that the High Court had in fact exalted the rule of practice into a rule of limitation and in the facts of that case while allowing the appeal the Supreme Court further observed that apart from the ground that the petition was not presented within 90 days there was nothing to indicate that the appellants in that case were guilty of laches or undue delay.

16. Such view has been judicially well-settled and oft-repeated. If any further reference is necessary reliance may be placed on the case of *Smt. Sudama Devi Vs. Commissioner and Others*, where also the Supreme Court had reiterated that so far as a writ petition was concerned there could be no hard and first rule of 90 days by way of a period of limitation. The general rule of laches alone could be applied setting aside the judgment of the concerned High Court from which the appeal was filed. It was held that the view taken by the High Court that the writ petition was beyond time was not correct inasmuch as the High Court had proceeded on the assumption that there was a period of limitation of 90 days and unless sufficient cause was shown as contemplated in Section 5 of the Limitation Act a writ petition filed after the expiration of 90 days was liable to be rejected. The Supreme Court observed:

This assumption is wholly unjustified. There is no period of limitation prescribed by any law for filing writ petition under Article 226 of the Constitution. It is in fact doubtful whether any such period of limitation can be prescribed by law. In any event, one thing is clear and beyond doubt, that no such period of limitation can be laid down either under rules made by the High Court or by practice. In every case it would have to be decided on the facts and circumstances, whether the petitioner is guilty of laches and that would have to be done without taking into account any specific period as a period of limitation. There may be cases where even short delay may be fatal. While there may be cases where even a long delay may not be evidence of laches on the part of the petitioner.

17. The judgments cited by the respondents in the case of *Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others*, is on the face of it not applicable to the facts and circumstances of the case. There the challenge was to the order passed by a Division Bench of a High Court dismissing the writ petition

filed by the appellant. The subject-matter of challenge was an order passed by the Commissioner (Appeals), Central Excise and Service Tax dismissing the appellant's appeal only on the grounds that it was filed 21 months after the date of service of the original order and the appellate authority had no power to condone the delay after 90 days which was prescribed for filing the statutory appeal. The Supreme Court after considering the provisions of Section 35 of the concerned Act held that the Commissioner of Central Excise (Appeals) was vested with the jurisdiction to condone the delay as provided in the concerned statute. Thus the issue before the Supreme Court in that case was whether the Commissioner was justified in rejecting the appeal filed beyond the prescribed time limit as provided in the relevant statute.

18. The petitioner on his part had argued that the order impugned in the writ petition cannot be made applicable to the facts of the present case. According to the petitioner Section 128 of the Customs Act applies to a person aggrieved by a decision or order passed under the Customs Act by an officer of Customs lower in rank than Collector of Customs. Only then the question of filing an appeal to the designated authority arises. Since the order passed by the respondent no. 4 was pursuant to the direction of a learned single judge of this court it cannot be said to be an order passed under the relevant Act. As a matter of fact the petitioner was given an opportunity of being heard only because the court had directed the concerned respondent so to do as such exercise of power by the respondent no. 4 must be deemed to be pursuant to the direction given by the Supreme Court and not in ordinary course passed under the Act.

19. That apart courts have frowned upon the practice of the respondents to take the point of limitation without touching on the merit of the case. In the case of Madras Port Trust Vs. Hymanshu International by its Proprietor V. Venkatadri (Dead) by L.R.s, the only question that cropped up for consideration before the Supreme Court by special leave was whether the claim of the respondent for refund of a certain sum was barred by Section 110 of the Madras Port Trust Act. The Supreme Court held:

The principle of limitation base of this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice take up such a plea to defeat a claim of the citizen. It is high time that Governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claim of citizens and do what is fair and just to the citizens. Of course, if a Government or a public authority take up a technical plea, the court is to decide it and after the plea is well-founded, it has to be upheld by the court. But what we feel is that such a plea should not ordinarily be taken up by a Government or a public authority unless of course the claim is not well-founded and by reason of delay in filing it the evidence for the purpose of resisting such a claim has become unavailable.

20. The disentitling features as mentioned in that case being wholly absent in the

present case the principle laid down in it must be held to be applicable to the facts of the case and I do not buy the practice of merely taking such a misconceived technical plea without filing an affidavit to the writ petition.

21. Thus, there appears to be sufficient justification in the uncontroverted allegation made by the petitioner that the respondents were under an obligation to consider the whole case independently and to come to a finding. The order complained of does not really reflect any independent application of mind.

22. The petitioner has also given a list of the steps taken by him after taking over the proprietary right of the firm. The list is lengthy and uncontested. If they are uncontested law requires that the correctness of the statements made therein must be deemed to have been admitted by the respondents by the very well-settled principles of doctrine of non-traverse which also squarely applies to a writ petition.

23. That apart the communication in the penultimate paragraph of the order impugned that the Drawback department would be in a position to release the amount once no objection regarding release of drawback was received by Special Investigation Branch runs counter to the spirit of the order passed by this court. This court had very specifically directed the respondent no. 5 to the earlier writ petition to consider the representation of the petitioner dated June 21, 2003 and to pass a reasoned order thereon. Whereas the order passed by the respondent no. 4 cannot after all be said to be an order disposing of the petitioner's representation, notwithstanding what it might have claimed in the last sentence.

24. A more pertinent grievance has been made by the petitioner that the investigation for the last 13 years is almost a never-ending process. Thus the authorities have not been able to gather any evidence against the petitioner in spite of the stand taken by them.

25. In such view of it I set aside the order dated September 17, 2004 passed by the respondent no. 4 and direct the appropriate authority to consider and dispose of the petitioner's claim for Duty drawback within a period of three weeks from the date of the communication of the order. The petitioner is directed to co-operate with the respondents. In case, the respondent is of the view that there is no disentitling factor against the petitioner the appropriate authority shall release the drawback amount as claimed by the petitioner within the said period along with an interest at the rate of 10 per cent from the date it actually fell due till the date of actual payment. In view of unusual longevity of the case I further direct the respondent authorities to treat the timeframe as peremptory.

26. The writ petition is thus disposed of.

27. There shall, however, be no order as to costs.

28. Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.