

(2008) 02 BOM CK 0102

In the Bombay High Court

Case No : Writ Petition No. 2382 of 2007

Sunderlal Laxman Mahyavanshi

APPELLANT

Vs

N.T.C. (MN) Ltd. and Another

RESPONDENT

Date of Decision : 14-02-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 41 Rule 13, Order 41 Rule 3A, 115
Industrial Court Regulations, 1975 — Regulation 101, 5, 5A
Payment of Gratuity (Central) Rules, 1972 — Rule 16(1), 18
Payment of Gratuity Act, 1972 — Section 7(5), 7(7)

Citation : (2008) 4 BomCR 678 : (2008) 110 BOMLR 1159 : (2008) 118 FLR 1140 : (2008) 3 LLJ 196

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : V.P. Vaidya, instructed by P.M. Patel, for the Appellant; V.M. Parkar, for the Respondent

Judgement

A.M. Khanwilkar, J.—Heard Counsel for the Parties.

2. Rule. Rule made returnable forthwith. As short question is involved, in terms of the Order dated 20th December, 2007, hearing of the Petition proceeds forthwith, by consent.

3. This Petition takes exception to the Judgment and Order passed by the Appellate Authority under the Payment of Gratuity Act dated 22nd March, 2007 in Application No. M-26/2005-PG-Appeal. By this Order, the Appellate Authority has summarily rejected the Appeal preferred by the Petitioner for the sole reason that the said Appeal when presented by the Petitioner was not accompanied by the Application for condonation of delay, which was mandatory. The relevant facts for considering the point in issue are as follows.

4. An order was passed by the Controlling authority on 20th April, 2005, copy

whereof was received by the Petitioner on 5th May, 2005. Thereafter, the Petitioner proceeded to file the Appeal against the said decision only on 16th August, 2005. It is common ground that the Appeal was not accompanied by an Application of condonation of delay. That application came to be filed only on 9th February, 2007, after the Respondent had raised objection regarding the maintainability of the said Appeal. In this backdrop, the question that has been addressed by the Court below is, whether it is mandatory to file application for condonation of delay alongwith the Appeal, when the Appeal is presented before the Appellate Authority. The Appellate Authority has accepted the stand of the Respondent that as the Appeal presented by the Petitioner was not accompanied by an application for condonation of delay, the same was not maintainable and could not have been entertained at all-that being the mandatory requirement, the Court proceeded to dismiss the Appeal summarily. While taking the view that it was mandatory to file application for condonation of delay alongwith the Appeal when the same was presented, the Court below has referred to the provisions of Section 7(7) of the Payment of Gratuity Act, 1972. Besides, the Court below has placed reliance on the decision of our High Court in the case of Metal Box India Ltd. Vs. B.R. Rangari, Asst. Commissioner of Labour and Others, The correctness of the said view is put in issue in the present Petition.

5. After having considered the rival submissions, I have no hesitation in accepting the argument of the Petitioner that the Court below committed manifest error in relying on the second proviso below subsection (7) of Section 7 to hold that it was mandatory to file application for condonation of delay alongwith the Appeal. It is rightly contended that the second proviso below Section 7(7) pertains to requirement of predeposit before the appeal is admitted, which has no application to requirement of filing an application for condonation of delay alongwith the appeal itself.

6. For the sake of convenience Section 7(5) and 7(7) of the Act are reproduced hereunder, which are of some relevance:

7(5) For the purpose of conducting an inquiry under Sub-section (4), the controlling authority shall have the same powers as are vested in a court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:

- (a) enforcing the attendance of any person or examining him on oath;
- (b) requiring the discovery production of documents; and
- (c) receiving affidavits; evidence on
- (d) issuing commissions for examination of witnesses.

7(6) ...

7(7) Any person aggrieved by an order under Sub-section (4) may, within sixty days from the date of the receipt of the Order, prefer an appeal to the

appropriate Government or such other authority as may be specified by the appropriate Government in this behalf;

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days;

[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under Sub-section (4), or deposits with the appellate authority such amount]

7. Besides the aforesaid provisions, it will be useful to refer to Rule 18 of the Payment of Gratuity Rules, which reads thus:

18. Appeal-(1) The Memorandum of appeal under Sub-section (7) of Section 7 of the Act shall be submitted to the appellate authority with a copy thereof to the opposite party and the controlling authority either through delivery in person or under registered post acknowledgement due.

(2) The Memorandum of appeal shall contain the facts of the case, the decision of the controlling authority, the grounds of appeal and the relief sought.

(3) There shall be appended to the Memorandum of appeal a certified copy of the finding of the controlling authority and direction for payment of gratuity.

(4) On receipt of the copy of Memorandum of appeal, the controlling authority shall forward records of the case to the appellate authority.

(5) Within 14 days of the receipt of the copy of the Memorandum of appeal, the opposite party shall submit his comments of each paragraph of the memorandum with additional pleas, if any, to the appellate authority with a copy to the appellant.

(6) The appellate authority shall record its decision after giving the parties to the appeal a reasonable opportunity of being heard. A copy of the decision shall be given to the parties to the appeal and a copy thereof shall be sent to the controlling authority returning his records of the case.

(7) The controlling authority shall, on receipt of the decision of the appellate authority, make necessary entry in the records of the case maintained in Form Q under Sub-rule (1) of rule 16.

8. On plain language of Section 7, in particular, Section 7(5) or 7(7) and for that matter Rule 18 of the Rules, it is obvious that the legislature has not expressly provided for the requirement of filing an application for condonation of delay alongwith the Appeal in cases where such appeal is filed beyond the period of limitation. Significantly, the express provision such as second proviso below

Section 7(7) in relation to requirement of predeposit before admitting the appeal, is conspicuously absent in so far as the necessity of filing an application for condonation of delay alongwith the appeal itself, in cases where the appeal is filed after the period of limitation. Thus understood, there is no reason to assume that if the Appeal filed beyond limitation is not accompanied by an application for condonation of delay, the same would not be maintainable, as has been held by the Appellate Authority in this case.

9. To get over this position, Counsel for the Respondent placed reliance on the provisions in the Code of Civil Procedure, in particular, Order 41 Rule 3-A of C.P.C. which reads thus:

41[(3-A). Application for condonation of delay.-

(1) When an appeal is presented after the expiry of the period of limitation specified therefor, 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 the appeal within such period.

(2) If the Court sees no reason to reject the application without the 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.

(3) Where an application has been made under Sub-rule(1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal]

10. In the first place, by virtue of Section 7(5), the provisions of the Code are applicable only in relation to matters specified therein. According to the learned Counsel, the provision in the Gratuity Act in particular Section 7(5), does not per se exclude the application of Order 41 Rule (3A) of CPC to the proceedings under the Act. Suffice it to observe that the Gratuity Act neither provides for express provision such as Order 41 Rule 3(A) of C.P.C. in relation to appeals to be filed under this enactment, nor there is any indication that the stated provision of the Code or requirement spelt out therein be read into the provisions of the Gratuity Act.

11. Counsel for the Respondent was then at pains to rely on the exposition of the Apex Court in the case of I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., , in particular, paragraph-10 and 12 thereof. However, what has been overlooked is that in the said decision, the Apex Court was called upon to consider the principal question as to whether revision u/s 115 of the CPC lies to the High Court against the Order made by the Civil Court in an appeal preferred u/s 37 of the Arbitration and Conciliation Act, 1996. In the context of that issue, the Apex Court, in paragraph-10, has opined that it is true that in the said Act application of the Code is not specifically provided for but what is to be noted: Is

there an express prohibition against the application of the Code to a proceeding arising out of the Act before a Civil Court? It then proceeded to observe that so far as Act of 1996 is concerned, there was nothing to indicate that there was an express provision against the application of provisions of the Code of Civil Procedure. Relying on this observations, learned Counsel for the Respondent would contend that there is no reason to assume that the principle underlying provisions of Order 41 Rule 3A of CPC has been expressly excluded by the Gratuity Act of 1972. If so, the view taken by the Appellate Authority that the appeal as presented beyond the period of limitation, unaccompanied by application for condonation of delay, cannot be entertained; and such appeal requires to be rejected summarily, is the correct view.

12. This argument though attractive does not commend to me. Notably, the issue before the Apex Court was that of availability of remedy of revision before the High Court in absence of express provision. By interpretative process the Apex Court has held that such remedy is inherently available, unless expressly barred. The observation in the said decision which is for giving purposive interpretation cannot be applied to the situation on hand so as to hold that the remedy of appeal is lost in relation to appeal barred by limitation if the same is presented unaccompanied by an application for condonation of delay, having regard to the object of the enactment on hand. Be that as it may, although there is no express provision to exclude the application of principle underlying Order 41 Rule 3A of C.P.Code, however, having regard to the scheme of the Act on hand, in particular, presence of express provision such as second proviso below subsection (7) of Section 7 relating to requirement of predeposit before admitting the appeal, it can be assumed that the legislature consciously made no provision for presenting the appeal alongwith an application for condonation of delay as a precondition in respect of appeal filed beyond the period of limitation. If the legislature had so intended, would have introduced suitable provision in the first proviso below subsection (7) or in Rule 18. However, that is conspicuously absent. If the argument of the Respondent was to be accepted, that would result in rewriting the provisions of the Payment of Gratuity Act and the Rule made thereunder.

13. Besides, the Petitioner has rightly pressed into service the dictum of our High Court in the case of Shankar Mahadeo Charpe v. S.S.H. Qazi and Ors. 1984 L.I.C. 948. In that case, the Court was called upon to consider similar contention, albeit in the context of provisions of Maharashtra Recognition Trade Union and Prevention of Unfair Labour Practices Act. Significantly, in proceedings under the said enactment, to which Regulation 101 of the Industrial Court Regulations apply, it expressly provides that the complaint if filed beyond 90 days shall be accompanied with separate application for condonation of delay. In spite of such an express provision, this Court, considering the avowed object of the enactment, proceeded to hold as follows:

5. In my view, the contention raised by the learned Counsel for the petitioner has to be upheld, Procedure is handmaid of justice and not its master. Procedural

provisions, therefore, should not be construed strictly so as to defeat or to preclude the determination on merits of the causes of the litigants on the basis of the technicalities of the procedural law. Reading regulation 101 along with the regulations 5 and 5A, it is clear that the provisions of regulation 101 are directory in nature. Normally, it is expected under regulation 101 that a separate application for condonation of delay should be filed along with the complaint but the same cannot be a hard and fast rule because there may be circumstances in which an occasion to file an application for condonation of delay may arise at a later stage, particularly when it is not revealed at the time of filing the complaint that the complaint is barred by time. It must, therefore, be held that compliance with the filing of a separate application along with the complaint in regulation 101 is not mandatory. The very fact that the Court has the power to grant time to remedy the defect found on examination and verification of the complaint, viz., non filing of a separate application for condonation of delay in the instant case, as provided in regulation 5A (a), cuts against the construction that the said provisions in regulation 101 is mandatory.

6. It is true that the word used is "shall" in regulation 101. It is well settled that the use of the word "shall" in a statute does not mean that in every case the provision is mandatory. No general rule can be paid down to find out whether a particular provision of a statute using the word "shall" is mandatory or directory because the determination of the said question depends, upon the facts of each case and in particular on a consideration of the purpose and object of the enactment. The purpose for which the provision has been made, the object to be attained, the intention of the legislature in making the provision, the serious inconvenience or injustice which may result in treating the provision one way or the other, the relation of the provision to other consideration which may arise on the facts of any particular case are some of the relevant factors to be taken into consideration, to determine whether a particular provision is mandatory or directory. The two main considerations for regarding the rule as directory are (i) absence of any provision for the contingency of any particular rule not being complied with or followed, and (ii) serious general inconvenience or prejudice to the general public would result if the act in question is declared invalid for non-compliance with the particular rule.

The principle underlying the said decision will apply on all fours to the case on hand, moreso when Section 7(7) read with Rule 18 makes no express provision of filing of application for condonation of delay alongwith the appeal when presented. Reliance has also been placed on the decision of the Apex Court in the case of Maharashtra State Co-op. Cotton Growers Marketing Federation v. Shripati Pandurang Khade and Ors. 1989 I CLR 144 with specific reference to the exposition in paragraph-9 of the said decision which reads thus:

(9) With regard to the question of limitation, the Industrial Tribunal seems to think that as the appointment letters bear some dates in October, 1984, the period of limitation will be computed from the respective dates of the

appointment letters. It has been assumed by the Industrial Tribunal that the respondents came to know that they were being appointed as seasonal employees on the respective dates of their appointment letters. There is, however, no material on records to show on what dates the appointment letter were served on the respondents. In other words, there is nothing to show when the respondents received the appointment letters. In the circumstances, the Industrial Court was not at all justified in holding that the complaints filed by the respondents were barred by limitation. Even assuming that the complaints were barred by limitation, as held by the Industrial Court, the Industrial Court should have given an opportunity to the respondents for explaining the delay. No such opportunity has been given to the respondents. Accordingly, we are unable to subscribe to the view of the Industrial Court that the complaints filed by the respondents were barred by limitation.

14. Relying on the underscored observation, it was rightly contended on behalf of the Petitioner that the Apex Court proceeded on the assumption that even if the complaint was not filed within limitation and were not to be accompanied by an Application for condonation of delay, the Industrial Court was obliged to give opportunity to the parties for explaining the delay. That presupposes that such explanation can be offered by way of application filed posterior to the institution of the complaint. The same principle shall apply *proprio vigore* to the provision under consideration namely Section 7(7) of the Gratuity Act read with Rule 18.

15. That takes me to the decision relied upon by the Labour Court to answer the issue against the Petitioner, in the case of Metal Box India(Supra). The lower Court has referred to the observations in paragraph-16 and 17 of the said decision. In that case, the Court was called upon to consider as to whether it had "power to condone the delay beyond 120 days" provided by the Act. That was the core issue addressed in the said Judgment. Obviously, therefore, observation in the said Judgment which weighed with the appellate authority, in my opinion, is inapposite for construction of Section 7(7) of the Act r/w. Rule 18 in the context of the issue that arises for consideration.

16. Taking any view of the matter, in my opinion, the appellate authority has committed manifest error to hold that the appeal presented by the Petitioner ought to have accompanied with the application for condonation of delay. In absence whereof, the same was not maintainable and ought to be dismissed summarily.

17. Counsel for the Respondent would next contend that the Petitioner, in the application for condonation of delay as filed, has not made out any sufficient cause for not filing the appeal immediately after receiving the certified copy on 5th May, 2005. Instead, the Appeal was presented on 16th August, 2005 and that the application for condonation of delay was filed only on 9th February, 2007. Indubitably, the appellate authority has not examined the issue of sufficient cause made out by the Petitioner at all. It was however, pleased to dismiss the appeal at the threshold on the sole reasoning that the petitioner

having failed to file application for condonation of delay, accompanied with the appeal which was barred by limitation, the appeal ought to be summarily dismissed as not maintainable. The appropriate course in such a situation, to my mind, is to set aside the impugned order and instead relegate the parties before the appellate authority so as to consider the issue as to whether the Petitioner has made out sufficient cause for condoning the delay in filing of the appeal. That aspect will have to be considered on its own merits in accordance with the law.

18. Accordingly, this Petition succeeds. The impugned Judgment and Order is set aside and instead the appeal as well as application for condonation of delay filed in the said appeal by the Petitioner, both are restored to the file of the Appellate Authority to its original number. The Appellate Authority in the first instance shall decide the application for condonation of delay on its own merits limited to the question whether the Petitioner has made out sufficient cause for condonation of delay. In the event, the appellate authority were to accept the explanation offered by the Petitioner and condone the delay in filing the appeal, shall then proceed to consider the appeal on its own merits in accordance with the law. In the event the explanation offered by the petitioner for condonation of delay in filing appeal was held to be not sufficient or satisfactory, for which reason the application will have to be rejected, it would necessarily follow that the appeal would stand terminated for want of condonation of delay.

19. Parties shall appear before the Appellate Authority on 10th March, 2008 at 11 a.m. on which date the Appellate Authority may proceed with the hearing of the application for condonation of delay or assign some other date, as may be convenient to it while ensuring that the said application is decided not latter than 30th April, 2008.

20. Accordingly, Petition disposed off on the above terms. No order as to cost.