
(2014) 10 AP CK 0106

In the Andhra Pradesh High Court

Case No : Central Excise Appeals 48 of 2008

The Commissioner of Central Excise

APPELLANT

Vs

Cairn Energy India Pvt. Limited

RESPONDENT

Date of Decision : 08-10-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34
Central Excises and Salt Act, 1944 — Section 35, 35(1), 35B, 35B(3), 35EE
Limitation Act, 1963 — Section 10, 11, 12, 13, 14, 14
Representation of the People Act, 1951 — Section 116A, 98, 99

Citation : (2015) 5 ALT 292 : (2015) 316 ELT 612 : (2015) 49 GST 395

Hon'ble Judges : L.N. Reddy, J; Challa Kodanda Ram, J

Bench : Division Bench

Advocate : P.S.P Suresh Kumar, S.C, Advocate for the Appellant; R. Radha Krishna Reddy, Advocate for the Respondent

Judgement

L. Narasimha Reddy, J.—This appeal is preferred by the State under Section 35-G of the Central Excise Act, 1944 (for short "the Act") feeling aggrieved by the order, dated 01.08.2007 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (for short "the Tribunal") in Appeal No. E/224/07. It raises certain questions of general importance. The facts, that gave rise to the filing of this appeal, are as follows:

2. The respondent is a manufacturer of goods, which are subjected to payment of excise duty and cess. In relation to its obligation to pay the cess on the manufactured goods, the original authority passed an order, dated 23.03.2006 raising a demand for Rs. 19,96,410/- and interest under Section 11AB of the Act. A copy of the order was furnished to the respondent on 09.05.2006. Aggrieved by that, the respondent filed an appeal before the Tribunal. The Tribunal rejected (obviously returned) the appeal through its order, dated 28.09.2006 on the ground that it is to be presented before the Commissioner (Appeals) and not the Tribunal. Thereupon, the respondent filed an appeal before the Commissioner (appeals) on 09.10.2006. The Commissioner, however, passed an order, dated

17.11.2006 refusing to entertain the appeal on the ground that it is barred by limitation. Aggrieved by that, the respondent filed Appeal No. E/224/07 before the Tribunal. The appeal was allowed, taking the view that the respondent was entitled to the benefit under Section 14 of the Limitation Act, vis-a-vis the period, which was spent in pursuing the remedy before the Tribunal. The said order is challenged in this Central Excise Appeal.

3. Sri P.S.P. Suresh Kumar, learned Standing Counsel for the Central Excise Department submits that Section 35 of the Act is a self-contained code, insofar as limitation for filing of appeals is concerned, and that Sections 4 to 24 of the Limitation Act stand excluded, in relation to the proceedings thereunder and that the view taken by the Tribunal is contrary not only to the specific provisions of law but also to the binding precedents. He further submits that Section 35 of the Act does not only prescribe the period of limitation but also the extent to which the delay can be condoned and since the respondent preferred the appeal beyond the period of original limitation, as well the extendible time there was no way, the appeal could have been entertained. He relied upon the judgments of the Hon''ble Supreme Court in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, , Commissioner of Customs and Central Excise vs. Hongo India Private Limited and another (2009) 5 Supreme Court Cases 791 and Amchong Tea Estate vs. Union of India (2010) 15 Supreme Court Cases 139.

4. Sri R. Radha Krishna Reddy, learned counsel for the respondent, on the other hand, submits that there is no provision under the Act, which has the effect of excluding the applicability of the Limitation Act referable to Section 29(2) thereof and in that view of the matter, the appeal ought to have been entertained by the Commissioner. He submits that even if, for any reason, Section 5 of the Limitation Act is held to be inapplicable to the proceedings under Section 35 of the Act, the situation is squarely covered by Section 14 of the Limitation Act. He contends that the appeal was presented within the stipulated time before the Tribunal and since it was found to be not the proper Forum, the appeal was presented shortly thereafter before the Commissioner. According to the learned counsel, if the time, during which the remedy was pursued before the Tribunal is excluded, the appeal stood presented within the limitation before the Commissioner. Relying upon the judgments of the Hon''ble Supreme Court in Union of India Vs. M/s Popular Construction Co., and Vidyacharan Shukla Vs. Khubchand Baghel and Others, , learned counsel submits that the view taken by the Tribunal is correct.

5. The dates that are relevant for the purpose of this case have already been mentioned in the preceding paragraphs. The respondent suffered an order in the hands of the original authority on 23.03.2006 and soon after he was furnished a copy thereof, he presented the appeal before the Tribunal, under the impression that it is the proper Forum. It was only on 28.09.2006, that the Tribunal informed the respondent that it has to avail the remedy before the Commissioner (Appeals). Accordingly the appeal was presented on 09.10.2006. The

Commissioner however computed the limitation from the date of furnishing of the copy i.e., 09.05.2006 upto the date of presentation of appeal before him i.e. 09.10.2006 and took the view that the appeal is barred by limitation, even if the benefit of period stipulated under the proviso to Section 35(1) of the Act is extended. Section 35(1) of the Act reads:

35. Appeals to Commissioner (Appeal):- (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals) hereinafter in this Chapter referred to as the Commissioner (Appeal) within sixty days from the date of the communication to him of such decision or order.

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]

6. Here itself, it is essential to take note of the fact that the limitation for presentation of an appeal before the Tribunal under Section 35B(3) of the Act is three months from the date of order. Though the record is not clear in this behalf, it appears that the respondent presented the appeal before the Tribunal at the first instance, within 60 days. On being informed that the appeal lies to the Commissioner (Appeals), it was presented there on 09.10.2006. By that time, 5 months i.e. 150 days computed from the date of furnishing of the order expired. The Commissioner took the view that the appeal must be presented within 60 days and since there is delay of 92 days, it cannot be entertained. No effort was made to exclude the period, during which the matter was pending before the Tribunal, much less the benefit under Section 14 of the Limitation Act was extended.

7. The question as to whether the Commissioner (Appeals) or the Tribunal or the High Court are conferred with the power to condone the delay in presentation of the appeals before them under the relevant provisions of the Act, was the subject matter of several judgments before the Hon"ble Supreme Court. Before referring to the relevant precedents, the lack of uniformity in the Act itself, in this regard needs to be taken note of. In respect of appeals under Section 35 of the Act to be presented before the Commissioner, the original period of limitation is stipulated as 60 days and the Commissioner is conferred with the power to condone delay, to the extent of 30 days. As regards the appeals to the Tribunal, the original period of limitation is 90 days under Section 35B(3) of the Act and the proviso thereto confers power on the Tribunal to condone the delay without any restriction whatever. So far as the appeals to the High Court are concerned, Section 35G of the Act stipulates 180 days as limitation and does not provide for condonation of any delay, whatever. It is in this background, that the judgments rendered by the Hon"ble Supreme Court need to be understood.

8. In Hongo India Private Limited's case (supra), the question was as to whether the High Court has the power to condone the delay at all in the appeals preferred under Section 35G of the Act. Their Lordships took the view that Section 5 of the Limitation Act stands excluded in relation to the proceedings under the Act. The relevant paragraphs of the judgment read:

32. As pointed out earlier, the language used in Sections 35, 35B, 35EE, 35G and 35H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate, authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law here in this case is Central Excise Act. The nature of the remedy provided therein are such that the legislature intended it to be a complete Code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act,

therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time limit prescribed under Section 35H(1) to make a reference to High Court is absolute and unextendable by court under Section 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act.

9. Almost on the same lines is the judgment of the Supreme Court in *Singh Enterprises's case* (supra). In *Amchong Tea Estate's case* (supra), their Lordships have just followed the judgment in *Hongo India Private United's case* (supra). In none of these precedents, the question as to whether Section 14 of the Limitation Act stood excluded vis-a-vis the proceedings under the Act, was considered, obviously because there was no occasion for that.

10. There is a radical difference between the general purport of the Limitation Act, 1908 on the one hand and that of the Limitation Act, 1963 on the other hand. In the former, the provisions of Sections 4 to 24 did not apply to the proceedings under the enactments, which stipulated a different period of limitation, unless they are specifically made applicable by those very enactments. In contrast, the Limitation Act 1963 contains Sections 29(2), which reads as under:

"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. From this, it becomes clear that it is only when the special enactments contain a provision, expressly excluding the applicability of Sections 4 to 24 that they stand excluded and not otherwise. The question as to when the provisions of the Limitation Act can be said to have been excluded fell for consideration before the Hon"ble Supreme Court in *Vidyacharan Shukla's case* (supra). Section 116-A of the Representation of Peoples Act, 1951 stipulated the period of limitation other than the one mentioned in the Limitation Act. A plea was raised that the provisions of Limitation Act stand excluded vis-a-vis the proceedings under the Representation of Peoples Act. Dealing with that contention, their Lordships held:

"27. It was then said that Section 116-A of the Act provided an exhaustive and exclusive code of limitation for the purpose of appeals against orders of tribunals

and reliance is placed on the proviso to sub-section (3) of that section, which reads.

"Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the Tribunal under Section 98 or Section 99.

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period."

The contention is that sub-section (3) of Section 116-A of the Act not only provides a period of limitation for such an appeal, but also the circumstances under which the delay can be excused, indicating thereby that the general provisions of the Limitation Act are excluded. There are two answers to this argument. Firstly, Section 29(2)(a) of the Limitation Act speaks of express exclusion but there is no express exclusion in sub-section (3) of Section 116-A of the Act; secondly, the proviso from which an implied exclusion is sought to be drawn does not lead to any such necessary implication."

12. An important distinction needs to be kept in mind in the context of the limitation. The Limitation Act as well as the special enactments stipulate the period not only for the original proceedings, but also for appeals and applications. If the limitation is for presentation of original proceedings, the question of condonation of any delay even for the best of the reasons, does not arise. However, latitude is shown by the Parliament itself, in respect of limitation for filing of appeals and other miscellaneous proceedings. Obviously because an appeal is treated as continuation of original proceedings, provision is made for condonation of delay in pursuing such remedies, subject however to the satisfaction of the Court or Forum.

13. The second point of distinction, which needs to be kept in mind, is the one between the condonation of delay on the one hand and exclusion of period spent in pursuing the remedy before a wrong Forum, on the other hand. The first is covered by Section 5, which occurs in Part II of the Limitation Act and the second is dealt with under various provisions under Chapter III of that enactment. While condonation is invariably in respect of the proceedings, which are not original in nature, exclusion of time takes in its fold the original proceedings as well as the appellate proceedings. Further, the condonation of delay is in the discretion of the Court or Forum, whereas exclusion of time under Section 14 is a mandate under law, without leaving any scope for subjectivity.

14. In Hongo India Private Limited's case (supra), reference was made to the judgment of the Supreme Court in Popular Construction Co.'s case (supra).-That was a case, which arose under Section 34 of the Arbitration and Conciliation Act, dealing with the presentation of application for setting aside the award. The provision stipulated limitation of 3 months for presentation of such applications. The proviso to Section (3) thereof conferred power on the Court to condone the delay to the extent of 30 days. Sub-section (3) thereof reads:

34. Application for setting aside arbitral award.--(1)-(2) * * *

(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 under Section 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."

15. Firstly, the application of Section 5 of the Limitation Act could not have been claimed as a matter of right in respect of an O.P. filed under Section 34 of the Arbitration and Conciliation Act. The reason is that it partakes the character of an original suit. Secondly, the inclusion of the words "but not thereafter" kept the matter beyond any pale of doubt that, whatever be the reason, the application cannot be entertained beyond the period of 90+30 days. The importance, which their Lordships added to that expression, is evident from the following discussion:

"Had the proviso to Section 34 merely provided for a period within which the court could exercise its discretion, that would not have been sufficient to exclude Sections 4 to 24 of the Limitation Act because "mere provision of a period of limitation in however peremptory or imperative language is not sufficient to displace the applicability of Section 5."

16. There is no indication in the precedents relied upon by the learned counsel for the appellant that the ratio mentioned above is watered down in any manner. The scope of applicability of Section 14 of the Limitation Act to the proceedings under the Act was never in doubt. The record of this case clearly discloses that if the period during which the proceedings were pending before the Tribunal at the first instance the appeal would be within limitation when presented before the Commissioner. The Tribunal made a specific reference to Section 14 of the Limitation Act. We do not find any basis to interfere with the passed by the Tribunal.

17. We therefore dismiss the appeal.

18. The miscellaneous petition filed in this appeal shall also stand disposed of. There shall be no order as to costs.