

(2016) 12 PAT CK 0020

In the Patna High Court

Case No : Letters Patent Appeal No. 1073 of 2016

The East Central Railway

APPELLANT

Vs

Palle Chandrashekhar Reddy

RESPONDENT

Date of Decision : 06-12-2016

Acts Referred:

Citation : (2017) 170 AIC 720

Hon'ble Judges : Hemant Gupta, ACJ. and Dinesh Kumar Singh, J.

Bench : Division Bench

Advocate : Mr. Anil Kumar Sinha and Mr. Abhimanyu Deo, Advocates, for the Appellants; Mr. Umesh Prasad Singh, Sr. Advocate, Mr. Sudhanshu Trivedi, Ms. Surabhi, Manjari Nath and Mr. Rajendra Kumar, Advocates, for the Respondents

Final Decision : Allowed

Judgement

Hemant Gupta, A.C.J. - I.A. No. 5074 of 2016

The application is for condonation of delay of 206 days in filing of appeal against the order passed by the learned single Bench on 9th of September, 2015. The applicant has asserted that certified copy of the impugned order was obtained on 12th of September, 2015 and was sent to Railways, but thereafter the Railways have taken legal opinion from its legal Section and after examining the opinion and sanction from the higher authorities, the appellant has decided to institute the present appeal. It is also pointed out that the appellant has impersonal existence and decision has to be taken at different levels-horizontal and vertical. Consideration at different levels has taken quite some time and that has resulted in delay in filing of the present Letters Patent Appeal.

2. In the counter affidavit filed, it is asserted that the affidavit is false as the appellant has not applied for the certified copy of the order dated 9th of September, 2015 nor any copy was supplied on 12th of September, 2015. In fact, the certified copy was applied for in August, 2016. Therefore, the assertions made by the appellant seeking condonation delay are incorrect. It is also pointed

out that the appeal was filed after the writ applicant filed contempt application. In contempt application, the appellant has taken time, but when faced with contempt, the present appeal has been filed.

3. Learned counsel for the writ applicant further points out that the application for condonation of delay was filed on 16th of July, 2016. Therefore, in terms of Order-XLI, Rule-(3A) of the Code of Civil Procedure, the appeal will be deemed to be presented when the application for condonation of delay was filed.

4. Learned counsel for the appellant points out that, in fact, it was not certified copy of the order which was obtained, but a Web Copy of the order which was obtained on 12th of September, 2015. It is also contended that since the memorandum of appeal was filed on 4th of May, 2016, therefore, the appellant is required to explain the delay in filing of appeal only till that date. It is also pointed out that the office objection that certified copy of the order has to be annexed with the memorandum of appeal is based upon verbal orders of the then Hon"ble Chief Justice. It is contended that since the Letters Patent Appeal is an intra court appeal, there is no requirement of obtaining certified copy of the order. Certified copy of the order is necessary if the appellant is seeking condonation of delay in filing an appeal for seeking exclusion of time taken in obtaining the certified copy.

5. We have heard learned counsel for the parties and find that good and sufficient cause is made out for condonation of delay. Firstly, the objection that there is oral order of the Chief Justice that certified copy of the order has to be attached has no legal basis. An intra court appeal can be preferred without attaching the certified copy of the order as the record of the learned single Bench is before this Court. The Supreme Court in a judgment reported in (1977) 4 SCC 69 (Mahant Bikram Dass Chela v. Financial Commissioner, Revenue, Punjab, Chandigarh & Ors.) has examined as to whether an application for condonation of delay of 40 days for removing the defects is required to be filed or not, has held that it is a rule of procedure which will not defeat the substantive rights of the parties. The Court has observed as under:

"18. The argument proceeds on the assumption that the appeal was presented beyond the period of limitation prescribed for filing Letters Patent Appeals. That is a fallacious assumption. The appeal was presented within 30 days, which is the period of limitation for filing Letters Patent Appeals. There was, however, an irregularity in presenting the appeal, namely, that the appeal was accompanied by only one set of the three items mentioned in Rule 3 of Chapter 2- C which requires that three sets should be filed. Rule- 3, being directory in nature, substantial compliance therewith is enough to meet its requirements. There was, in the instant case, substantial compliance with the rule and therefore, it was erroneous to treat the appeal as being barred by limitation.

22. We hold accordingly that the High Court is wrong in its view that the appeal was barred by time. The memorandum was presented within the prescribed

period of limitation of 30 days and there is no reason why, the irregularity committed in not filing three sets of documents along with the memorandum should not be excused when one complete set was filed with the memorandum and the remaining two sets were filed within a reasonable time thereafter."

6. Still further, the reliance of learned counsel for the respondents on the plea of Order-XLI, Rule-(3A) of the Code of Civil Procedure is not applicable to the writ applications and, consequently, to the Letters Patent Appeals preferred against an order passed by the learned Single Bench. The Code of Civil Procedure is not applicable to the writ proceedings in view of Section 141 of the Code. In a judgment reported as *Puran Singh v. State of Punjab*, (1996) 2 SCC 205, held as under:-

"7. When the High Court exercises extraordinary jurisdiction under Article 226 of the Constitution, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code are to be applied to writ proceedings the very object and purpose is likely to be defeated. According to us, in view of the conflicting opinions expressed by the different courts, Parliament by the aforesaid amending Act introduced the explanation saying that in Section 141 of the Code the expression "proceedings" does not include "any proceedings under Article 226 of the Constitution" and statutorily recognised the views expressed by some of the courts that writ proceedings under Article 226 of the Constitution shall not be deemed to be proceedings within the meaning of Section 141 of the Code. After the introduction of the explanation to Section 141 of the Code, it can be said that when Section 141 provides that the procedure prescribed in the Code in regard to suits shall be followed, as far as it can be made applicable "in all proceedings in any court of civil jurisdiction" it shall not include a proceeding under Article 226 of the Constitution. In this background, according to us, it cannot be held that the provisions contained in Order 22 of the Code are applicable per se to writ proceedings. If even before the introduction of the explanation to Section 141, this Court in the case of *Babubhai v. Nandlal* (SCC Headnote p. 707) had said that the words "as far as it can be made applicable" occurring in Section 141 of the Code made it clear that, in applying the various provisions of the Code to the proceedings other than those of a suit, the court has to take into consideration the nature of those proceedings and the reliefs sought for after introduction of the explanation the writ proceedings have to be excluded from the expression "proceedings" occurring in Section 141 of the Code. If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code "as far as it can be made applicable" to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extraordinary powers by the High Court under Articles 226 and 227 of the Constitution".

7. Thus the procedure that an appeal is to accompany certified copy will not be applicable to a Letters Patent Appeal preferred arising out of an order passed by the Learned Single Judge.

8. The reliance of the learned counsel for the respondents on the judgment of the Supreme Court reported in 2000 (7) SCC 372 (Uday Shankar Triyar v. Ram Kalewar Prasad Singh and another) is of no help to the argument raised as it deals with filing of memorandum of appeal without application for condonation of delay under the Code of Civil Procedure. Once Code of Civil Procedure itself is not applicable to the Letters Patent Appeals arising out of an order passed by the writ Court, such judgment would not have any application.

9. Since no person is personally responsible for decision making in the State Government, delay can be condoned. The question required to be examined is whether there is lack of bona fide in filing of the appeal. Reference may be made to the judgment of the Supreme Court reported in (1998) 7 SCC 128 (N. Balakrishnan v. M. Krishnamurthy) wherein the Hon"ble Court has held as under:

"12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari, AIR 1969 SC 575 and State of W.B. v. Administrator, Howrah Municipality, (1972) 1 SCC 366.

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning delay, the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

10. In view of the facts pleaded in an application, and after hearing learned counsel for the parties, we do not find that there is any lack of bona fide in presentation of the memorandum of appeal after a delay of 206 days.

11. Consequently, we find good and sufficient cause to condone the delay. Delay is thus condoned.

12. I.A. No. 5074 of 2016 is, accordingly, allowed.

L.P.A. No. 1073 of 2016:

13. The challenge in the present Letters Patent Appeal is to an order passed by the learned Single Bench on 9th of September, 2015 whereby, the writ application filed by the writ applicant was allowed and the order dated 30th of January, 2015 and 8th of February, 2015 was set aside and, consequently, direction was issued for crediting the royalty amount already deducted from the writ applicant or to be added in the final bills payable to it.

14. The writ applicant is a contractor who was granted contract for earth work in cutting, filling, compaction, blanketing, turfing, construction of minor bridges and other associated works between Kodarma to Hajipur in connection with construction of new Broad Gauge Line.

15. The Assistant Mining Officer directed the appellant to deduct the royalty out of the bills submitted by the firm. In pursuance of such direction, notice was issued by the appellant for deduction of the royalty.

16. The grievance of the writ applicant is that though the State of Jharkhand has adopted Bihar Minor Mineral Concession Rules, 1972 until it framed its own Rules known as Jharkhand Minor Mineral Concession Rules, 2004, but the Schedule of the said Rules does not prescribe the charging provision in connection with earth as minor mineral. Therefore, there is no provision in the Rule to charge royalty for ordinary earth used for filling or leveling purposes in construction of embankment, road, railways, building as such. Thus the deduction on account of royalty is illegal and liable to be refunded.

17. In view of the said fact, the writ applicant claimed that the royalty deducted from the writ applicant is without authority of law and should be refunded back to the writ applicant.

18. We need not go into the merit of the controversy as to whether the Rules framed by Jharkhand cover the minor mineral, i.e. ordinary earth, or not inasmuch as for the present petition the fact remains that the royalty has been deducted from the payment of the bills paid to the writ applicant. Once the royalty has been deducted by the Railways, the refund of the same will amount to undue enrichment. Such is the judgment of the Supreme Court reported in (1997) 5 SCC 536 (Mafatlal Industries Limited, Ahmedabad etc. etc. v. Union of India etc. etc.) holding to the following effect:

" (ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in Tilokchand

Motichand and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in

such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund".

19. Since the refund of the royalty deducted by the Railways would amount to undue enrichment of the writ applicant, in the absence of any stand of the writ applicant that he has not pass passed the burden of royalty to others, we do not find that there can be any direction for refund of such amount.

20. Consequently, the Letters Patent Appeal is allowed. The order passed by the learned single Bench is set aside. The writ application is dismissed.