

(2010) 06 GAU CK 0001

In the Gauhati High Court

Case No : Misc Case No. 1238 of 2009 in MFA No. 62 of 2010

Union of India (UOI)

APPELLANT

Vs

Jasiruddin Talukdar

RESPONDENT

Date of Decision : 03-06-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35(1), 35H(1)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 3A
Income Tax Act, 1961 — Section 260A, 260A(7)
Limitation Act, 1963 — Article 116, 14, 15, 16, 4
Railway Claims Tribunal Act, 1987 — Section 13, 14, 17, 17(1), 21

Citation : (2011) 2 GLT 497 : (2011) 2 TAC 813

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Advocate : U.K. Nair, S. Sarma, P.C. Bora, B. Devi and H.K. Das, for the Appellant; A. Goyal, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—The common question that arises for adjudication in these batch of cases is that whether the provision of Section 5 of the Limitation Act is applicable to condone the delay in filing an appeal u/s 28 of the Railway Claims Tribunal Act, 1987, As agreed to by the learned Counsels, the common and identical question having arisen for decision, nil the cases are heard analogously and is being disposed of by this common judgment.

2. I have heard Mr. U.K. Nair, and Mr. S.S. Sarma, learned Counsels appearing for the Appellant/Petitioners and Mr. H.P. Barman and Mr. A. Goyal, learned Counsel appearing for some of the Respondent.

3. As a lead case, the facts as available in Misc. Case No. 1238/09 which is filed for condoning the delay of 472 days in filing the connected. MFA No. 62/10 are being taken note of. In the connected appeal, the applicant/Petitioner has challenged the legality and validity of the judgment and order dated 21.7.2007

passed in Original Application No. 136/05 as well as the order dated 25.7.2008 dismissing the Review Application No. 4/07 (OA No. 136/06) by the learned Railway Claims Tribunal, Guwahati. All the appeals are filed by the Union of India u/s 23 of the Railway Claims Tribunal Act, 1987 Corrected vide order dated 13.12.2010. challenging the respective awards passed by the tribunal against the Appellant.

3A. Since there has been delay of 422 days in filing the appeal, an application for condoning the delay u/s 5 of the Limitation Act, has been filed by the applicant/Petitioner, which is separately registered as Misc. Case No. 1238/09.

4. The Respondents objected the prayer for condonation of delay submitting, inter alia, that such a power to condone the delay is not available to the appellate court more particularly the provision of Section 5 of the Limitation Act not having been made applicable, the miscellaneous cases as well as the connected appeal are liable to be dismissed as barred by limitation.

5. Learned Counsel for the Petitioner submits that under Sub-section 1 of the Section 23 of the Act, the High Court is prescribed as the appellate forum to file an appeal against the judgment of the claims tribunal and as such provision contained under Order 41, CPC and the relevant High Court Rules regulating an appeal filed in the High Court would be applicable. Since the appeals are not filed within the prescribed period of limitation as contained in Section 23(3) of the Act, the provisions of Order 41 of CPC would come into force and accordingly in terms of Order 41, Rule 3A of CPC the applicant/Petitioner is entitled to file application for condonation of delay in filing the connected appeals. It is further contended that since the Claims Tribunal is not a court within the provisions of Limitation Act, a specific provision u/s 17(2) of the Act has made of condonation of delay on showing sufficient cause filing the application. Although there is no such specific provision empowering the appellate court to condone the delay, such power is available under provision of Order 41 of the Code of Civil Procedure. The further contention of the learned Counsel is that the provisions of Section 29(2) of the Limitation Act would be applicable and accordingly the benefit of Section 5 would also be applicable to the Petitioner.

6. In support of his submissions, following decisions are relied upon by the learned Counsel for the applicant/Petitioners -

(i) National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee),

(ii) All India Station Masters" and Assistant Station Masters" Association, Delhi and Others Vs. General Manager, Central Railway and Others,

(iii) Birla Cement Works Vs. G.M., Western Railways, and another,

(iv) Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker,

(v) Commissioner of Excise and Central Excise v. Hongo India (P.) Ltd. and Anr.

(2009) 5 SCC 791.

(vi) Gopal Sardar Vs. Karuna Sardar,

7. The submissions made by the learned Counsel for the applicant/Petitioner have been stiffly resisted by the Respondents counsels. The contentions of the learned Counsel are that the Railway Claims Tribunal Act, 1987 not having provided any power to the court to condone the delay in filing an appeal against an award passed by the Claims Tribunal, the application seeking condonation of delay in filing the appeal needs to be rejected. It is further contended that merely prescribing the High Court as the appellate forum to file appeal, the provisions of the Limitation Act would not confer such power to condone the delay unless such power is specifically provided under Railway Claims Tribunal Act under which right to file an appeal is provided.

The provisions of Order 41 Rule 3A is only a procedural one without providing such substantive power to condone the delay in respect of an appeal filed under a statute other than covered by Code of Civil Procedure.

Learned Counsels further contend that the Legislature in its wisdom has thought it fit not to provide any power to condone the delay in filing an appeal against a decision of the claims tribunal taking note of the fact that there is the necessity of speedy and early adjudication of the railway claims there could not be my manner doubt of inapplicability of the provisions of Section 5, of the Limitation Act, particularly looking into the object of the Act, That apart, under the provisions of Section 29(2) of the Limitation Act, there being different period of limitation prescribed the Special Act, viz., the Railway Claims Tribunal Act, necessity to dispose the claims as expeditiously as possible, the Legislature consciously voided to provide any power to condone the delay. Consequently, the petitions are liable to be rejected.

8. Mr. A. Goyal, learned Counsel for the Respondents has referred the following decisions of the Apex Court in support of his contention:

(a) Birla Cement Works Vs. G.M., Western Railways, and another,

(b) Union of India Vs. M/s Popular Construction Co.,

(c) Fairgrowth Investments Ltd. Vs. The Custodian,

(d) Hukumdev Narain Yadav Vs. Lalit Narain Mishra,

9. I have given my anxious consideration to the submissions made by the learned Counsel for the parties. In order to answer the submissions made by the learned Counsel for the parties, let us discuss the relevant provisions of Railway Claims Tribunal Act, 1987 including its object and scope.

10. The Railway Claims Tribunal Act, 1987 ("the Act") was enacted by the Parliament for the purpose of dealing with claims for damage, compensations or loss suffered by the claimant on account of the accident involving a passenger

train as well as for loss of the goods booked with the railways and are not satisfied with the decisions of the railway administration. As the litigation in the courts of law and before the Claims Commissioners is very protracted, it has been decided to set up a specialized Tribunal for speedy adjudication of such claims. The setting up of such a Claims Tribunal with Benches in different parts of the country with judicial and technical members, would produce much relief to the rail-users by way of expeditious payment of compensation to the victims of rail accidents and to those whose goods are lost or damaged in rail transit. The Claims Tribunal would also expedite settlement of disputes regarding refund of fares and freight charges and reduce the burden on the various civil courts in the country, thereby giving them more time to decide other cases speedily. With the aforesaid objectives, the act was legislated.

11. Section 3 of the Act provides for establishment of Railway Claims Tribunal. Jurisdiction, powers and authority of the Claims Tribunal are provided under Chapter-III in Sections 13, 14 and 15. Section 16 provides that a person seeking any relief in respect of any claim, can make an application to the claims Tribunal in prescribed form and be accompanied by necessary documents or other evidence and such fee, etc., as may be provided. Section 17 provides for the period of limitation prescribed for filing such claims; unless such application is made within three years from the date on the intimation of claim has been preferred u/s 78-B of the Act, the petition would not be entertained. Section 17(2) provides that such claim application may be entertained after the period specified in Sub-section (1), if the applicant satisfies the Claims Tribunal that he had sufficient cause for not making the application within the period prescribed. Section 19 recognizes the right of legal representation and presenting officers before the Tribunal by the contesting parties. Section 21 provides for making of the decisions. Chapter-V provides for appeals u/s 23 of the Act.

12. For our ready reference, the provision of Section 23 is quoted hereinbelow:

23 Appeals- (1) Save as provided in Sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or in any other law, an appeal shall lie from every order, not being an interlocutory order, of the Claims Tribunal, to the High Court having jurisdiction over the place where the Bench is located.

(2) No appeal shall lie from an order passed by the Claims Tribunal with the consent of the parties.

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of order appealed against.

13. Survey of the different provisions of the Act, shows that the Legislature has provided the power to condone the delay in filing the application before the Tribunal u/s 17 of the Act, if sufficient cause is shown by the applicant for not preferring the claim within the period of limitation. But no such power is provided in respect of preferring an appeal and the legislative mandate as contained in

Section 28(3) of the Act is that the appeal preferred against the decisions rendered by the Claims Tribunal is to be filed within 90 days from the date of order. The purpose of establishment of the claims tribunal is for speedy and early disposal of the claim cases.

14. On the face of the aforesaid legal provisions, it is to be seen whether there is any power provided to this Court to condone the delay in filing the appeal under the provision of the relevant laws as prayed for by the Appellant/Petitioner.

15. In terms of the provision contained u/s 23(1) of the Act, there is no dispute relating to the jurisdictional authority of the High Court to decide such an appeal against the order of the tribunal. Neither the Act nor the Rules framed thereunder has prescribed any procedure for filing the appeal the method of dealing with the appeal after it is filed. In such a situation the procedure would be guided by Order 41 of the Code of Civil Procedure.

16. Order 41, Rule 3A of the CPC provides that if an appeal is presented after the expiry of the period of limitation specified, therefor, it should be accompanied by an application supported by affidavit setting forth the facts on which the Appellant relies on to satisfy the court that he had sufficient cause for not preferring the appeal within such period. The substantive right to file the appeal against an order of the tribunal is provided u/s 23 of the Act which also prescribes the period of limitation for filing appeal as 90 days. It is true that procedural provisions for dealing with an appeal are not prescribed under the Act or Rules and as such the procedure prescribed under Order 41 in dealing such appeal would be followed but that does not mean that if substantive Act conferring right of appeal does not provide any power to condone the delay in filing the appeal, it is difficult, to contend that the same can be done taking aid of the provisions of Order 41, Rule 3A of Code of Civil Procedure.

17. The object of Order 41, Rule 3A is considered by the Apex Court in the case of State of M.P. and Another Vs. Pradeep Kumar and Another, wherein the Apex Court held inter alia, that the object of enacting Rule 3A in Order 41 of the Code seems to be twofold, First is, to inform the Appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay Second is, to communicate to the Respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. The Apex Court also found that barring the above objects, the Rule is not found to be intended to operate as unremediably or irredeemably fatal against the Appellant if the memorandum is not accompanied by any such application at the first instance. In the event of filling any appeal which is filed beyond limitation period, the Appellant is to file application for condonation of delay. But such right to file an application for condonation of delay must be emanated from the Substantive Act.

18. Referring to the decision rendered by the Apex Court, in the case of National

Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), Mr. Nair contends that while the appeal is required to be filed as per procedure prescribed by the High Court under Rule 3A of Order 41, the Petitioner is entitled to file an application for condonation of delay and in the event of filing such application it should be adjudicated on merit. I find that the ratio of the aforesaid decision is not extended to such an extent.

In the aforesaid case, the Apex Court held that ordinarily after an appeal reaches the High Court, it has to be determined according to the rules of practice and procedure of that court and in accordance with the provisions of the Charter under which that court is constituted and which confers on it power in respect of the method and manner of exercising that jurisdiction.

19. The object of Order 41, Rule 3A has been clearly stated by the Apex Court in *Pradeep Kumar* (supra) as indicated above. In fact, such a argument made before a Division Bench of this Court in the case of *Commissioner of income tax v. Williamson Tea (Assam) Ltd.* (2010) 1 GLR 57 has been rejected after consideration; the Division Bench held as follows:

16 On a plain reading of the said rule it is obvious that the Rule does not provide for any legal authority to condone the delay in preferring the appeal but prescribes the procedure where an appeal is presented beyond the period of limitation. The underlying presumption under Rule 3A is that the High Court entertaining the appeal u/s 100 or 96 or other court entertaining appeals u/s 96 has the requisite legal authority of condoning the delay in presenting the appeal, a presumption based on the express language of Section 5 read with Part II of the First Schedule to the Limitation Act. Therefore, the submission of the learned Counsel for the applicant that Sub-section (7) of Section 260A of the income tax Act read with Rule 3A, Order 41 of the CPC authorizes this Court to condone the delay in presentation of an appeal u/s 260A of the income tax Act in an appropriate case, cannot be accepted.

That was a case where an appeal u/s 260A of the income tax was filed by the revenue which was also required to be decided as per Rules prescribed by the High Court.

20. On the same ground the decision referred by *All India Station Masters' and Assistant Station Masters' Association, Delhi and Others Vs. General Manager, Central Railway and Others*, do not come in aid of the applicant/Petitioner.

21. The learned Counsel for the applicant/Petitioner strenuously urged that these batch of petitions would be covered under the provisions of Section 29(2) of the Limitation Act. For the purpose of applicability of Section 29(2) of the Limitation Act, 1963, the following two requirements are required to be satisfied by the applicant:

(i) there must be a provision of prescribing a period of limitation under a special or local law in connection with such order for appeal,

(ii) the said prescription of period of limitation should be different from the period prescribed by the Schedule of Limitation Act.

In the event the aforesaid two requirements are satisfied the consequence as contemplated in Section 29(2) are as under:

(i) In such a case Section there has different period of limitation prescribed under special or local law.

(ii) For determining any period of limitation prescribed by such special or local law for such appeal or application, the provisions contained in Section 4 to 24 of the Act would apply in so far as, and to the extent to which they are not expressly excluded by such special or local law.

22. Considering the submissions of the learned Counsel for the applicant/Petitioner, it is to be found that even under Article 116 of the Limitation Act, the period of limitation in filing an appeal to the High Court is from any decree or order is 90 days. The period of limitation under the Limitation Act and as prescribed u/s 23 of the Railway Claims Tribunal Act are the same and not different. That apart, the Railway Claims Tribunal Act is a special law made for specific purposes and objects.

23. The Railway Claims Tribunal is a special tribunal constituted under a special statute. In the event of exercising any power to condone the delay and for that purpose to entertain any application for condonation, the procedure provided under the special statute is to be followed and such power must be required to be specifically conferred by the statute itself.

24. The Apex Court while dealing with such a case under Central Excise Act, 1944 in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, has negntod the contention of the Appellant praying for condonation of the delay in filing the appeal u/s 35 of the Central Excise Act, 1944, holding as follows:

6. At this juncture, it is relevant to take note of Section 35 of the Act which reads as follows:

35. Appeals to Commissioner (Appeals) - (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) [hereafter in this Chapter referred to as the Commissioner (Appeals)] 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 u further period of thirty days.

(2) Every appeal under this section shall be in the prescribed form and shall be

verified in the prescribed manner.

7. It is to be noted that the periods "sixty days" and "thirty days" have been substituted for "within three months" by Act 14 of 2001, with effect from 11.5.2001.

8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the limitation Act, 1963 ("the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the Appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days" time can be granted by the appellate authority to entertain the appeal. The proviso to Sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were, therefore, justified in holding that there was no power to condone the delay after the expiry of 30 days period.

25. Similar view has been taken by the Apex Court in the case of Commissioner of Customs, Central Excise v. Excise India (P.) Ltd. and Anr. (2009) 5 SCC 791 wherein the Apex Court held that in order to consider the applicability of the provision contained in Section 29(2) of the Limitation Act, what is to be determined is whether the provisions of the Limitation Act are expressly excluded. The scheme of the special law and the nature of the remedy provided, therein is such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided for by it. Even in a case where the special law does not exclude the provisions of Section 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, is 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. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed u/s 35H(1) to make a reference to the

High Court absolute and unextendable by a court u/s 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 Limitation Act.

26. In the case of Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker, , relying on the provisions of Kerala Rent Control Act, the Apex Court held that the Kerala Rent Act is a special Act or a local law which proscribes the period of the limitation for appeal u/s 18 a period of limitation which is different from the period prescribed by the Schedule, as the Schedule to the Limitation Act does not contemplate any period limitation for filing appeal before the appellate authority u/s 18 of the Rent Act or in other words it prescribes nil period of limitation for such an appeal. A situation wherein a period of limitation is prescribed by a special or local law for an appeal or application and for which there is no provision made in the Schedule to the Act, the second condition for attracting Section 29(2) would get satisfied. Thus, Section 29(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act.

27. In the instant, case, however, the period of limitation prescribed under the Railway Claims Tribunal Act and under the Limitation Act for filing an appeal before the High Court and application before the" appellate authority is seine, i.e., 90 days. As indicated hereinabove the legislative enacted the Act with the specific object of speedy adjudication of the claim cases by setting forth railway tribunal, Section 17 of the Act empower to the tribunal to condone the delay in filing the application in the event of showing sufficient cause for not making the application within the prescribed period. However, no such right has been recognized in case of filing an appeal. The Legislature certainly being conscious of the relevant facts and considering the object of the Act did note [make] Corrected vide order dated 13.12.3010 any provision for condonation of delay in filing the appeal, Accordingly, the provision of Section 29(2) of the Act is held to be not applicable in the instant care.

28. An appeal is a creature of the statute. Unless there is statutory right of an appeal, no appeal lies. Accordingly, the necessary period of limitation prescribed or fixed for fling the appeal would also be required to be followed as per mandate of the statute itself. As because the procedure of filing and disposal is contemplated to be done under the provision of Order 41, Rule 1, CPC but that would not confer the power to condone the delay in filing the appeal by filing necessary application for condonation of delay. For such purpose, the Appellant must look to the provisions of the Act itself which confers the right of appeal.

29. If certain such special statutes like Workmen's Compensation Act, 1951, Consumer Protection Act, 1956 and Motor Vehicles Act, 1988, are surveyed, it is found that while making provisions for filing appeal against the order/award passed by the authority, the Legislature provided the power to condone the delay

in filing an appeal so prescribed which is manifestly absent in the Railway Claims Tribunal Act, 1987, which is also an indicative of the fact that the Legislature consciously omitted to provide in case of an appeal filed u/s 23 of the Railway Claims Tribunal Act.

30. Therefore, considering all these aspects and the various provisions of the Act, the court is of the opinion that Legislature has intended to exclude the provision of Section 5 of the Limitation Act or to provide power to condone the delay in filing the appeal against an award of the Railway Claims Tribunal. The expressed intention of the Legislature is not entitled to substitute by the court. Where a power is required to be exercised by a certain authority in certain way, it should be exercised in that manner or not at all, and all other modes of performances are necessarily forbidden. (Ref. Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others, . Further, it would also not proper for the court to direct the authority to act in contravention of the provision of law and direction beyond the provision of the statute would be destructive of the Rule of law.

In the case of Shri Mandir Sita Ramji Vs. Lt. Governor of Delhi and Others, the Apex Court held that when a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the judges cannot afford to be wiser.

31 For all the discussions made hereinabove, I do not find that the statute has provided any power to this Court for condoning the delay in filing the appeal u/s 23 of the Railway Claims Tribunal Act, 1987.

32. Consequently, this miscellaneous application praying for condonation of delay in filing the connected appeal stands dismissed.

33. No costs.