M/s. Raj Chemicals Vs Union of India and Others

Writ Petition No. 1252 of 2011

Court: Bombay High Court

Date of Decision: March 15, 2012

Acts Referred:
Central Excise Rules, 2002 â€" Rule 18#Central Excises and Salt Act, 1944 â€" Section 35, 35(1), 35(H)(1), 35C, 35H#CENVAT (Credit) Rules, 2004 â€" Rule 5#Constitution of India, 1950 â€" Article 226, 227#Customs Act, 1962 â€" Section 27#Limitation Act, 1963 â€" Section 10, 11, 12, 13, 14

Citation: (2012) 4 ALLMR 433 : (2012) 190 ECR 321 : (2013) 287 ELT 145

Hon'ble Judges: M.S. Sanklecha, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: Kamal Bulchandani instructed by Kamal and Co, for the Appellant; R. Ashokan with Mr. Jitendra B. Mishra, for the Respondent

Final Decision: Dismissed

Judgement

Dr. D.Y. Chandrachud, J.
In these proceedings under Article 226 of the Constitution, the Petitioner has sought a direction from this Court

to condone the delay in filing an appeal against an order dated 5 March 2010 of the Assistant Commissioner, Central Excise, Navi Mumbai. An

appeal lies against the order of the Assistant Commissioner to the Commissioner of Central Excise (Appeals), but no appeal was filed within the

period of limitation prescribed by Section 35 of the Central Excise Act, 1944. The submission of the Petitioner is that in exercise of the powers

conferred by Section 5 of the Limitation Act, 1963, it would be open to this Court while exercising its jurisdiction under Article 226 of the

Constitution to condone the delay, even though it is beyond the period prescribed by Section 35 of the Central Excise Act, 1944. Alternatively, it

has been prayed that the order of the Assistant Commissioner, dismissing the rebate applications may be made subject to the outcome of the

Revision Application filed by the Petitioner before the Government of India. By his order dated 5 March 2010, the Assistant Commissioner,

Central Excise, rejected seven rebate applications filed by the Petitioner under Rule 18 of the Central Excise Rules, 2002. The adjudicating

authority allowed the recredit of Central Excise duty amounting to Rs. 15.48 lakhs debited through the Cenvat credit account of the Petitioner. The

Petitioner was granted liberty to file refund applications under Rule 5 of the Cenvat Credit Rules, 2004.

2. Section 35 of the Central Excise Act, 1944 provides that any person aggrieved by a decision or order of a Central Excise Officer, lower in rank

than a Commissioner, may appeal to the Commissioner of Central Excise (Appeals) within sixty days from the date of the communication of the

order. Under the proviso, the Commissioner (Appeals) is empowered, if he is satisfied that the appellant was prevented by sufficient cause from

presenting the appeal within the aforesaid period of sixty days, to allow it to be presented within a further period of thirty days. The submission of

the Petitioner is that notwithstanding the fact that the Legislature under the proviso to Subsection (1) of Section 35 has laid down an outer limit of a

further period of thirty days, beyond the original period of sixty days, for condonation of delay, this does not oust the power of the Court u/s 5 of

the Limitation Act, 1963. In support, Counsel submitted that u/s 29 of the Limitation Act, 1963, the provisions of Sections 4 to 24 are to apply to

the period of limitation prescribed for any suit, appeal or application under a special or local law only in so far as, and to the extent to which they

are not expressly excluded by such special or local law. The submission is that in order that there should be an express exclusion, there must be an

absolute embargo placed by the express words of the statute excluding the application of Section 5 of the Limitation Act, 1963.

3. We are unable to accept the contention. Subsection (2) of Section 29 of the Limitation Act provides as follows:

(2) 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.

4. The Central Excise Act, 1944 is a special Act governing the levy, collection and recovery of Central Excise duty on goods manufactured or

produced in India. In Subsection (1) of Section 35, the Legislature has mandated that an appeal before the Commissioner of Appeals has to be

filed within sixty days from the date of the communication of the order. Under the proviso, the Commissioner (Appeals) is permitted to allow the

appeal to be filed within a further period of thirty days on sufficient cause being shown to his satisfaction. In other words, the clear intent of

Parliament was that the power to condone the delay can be exercised only subject to sufficient cause being shown and to an extent of an outer limit of thirty days beyond the period of sixty days prescribed for filing of an appeal. Now, it is well settled that while construing whether the special

law, within the meaning of Section 29(2) of the Limitation Act, 1963 expressly excludes the provisions of Sections 4 to 24 of the Limitation Act,

1963, regard must be had to the over all scheme of the Act. Where the scheme of the Act indicates that the Legislature intended that an Appellate

Authority should entertain an appeal by condoning a delay upto a certain period, that would evince a clear intent to exclude the provisions of

Section 5 of the Limitation Act, 1963. In the present case, the clear provision is that an appeal has to be filed within sixty days and beyond that a

delay upto thirty days can be condoned. The delay in excess of thirty days cannot be condoned by taking recourse to the provisions of Section 5

of the Limitation Act which would stand expressly excluded within the meaning of Section 29(2). The High Court, in the exercise of its jurisdiction

under Article 226 of the Constitution, cannot permit or direct an infraction by the authorities created by a statute of the provisions of the statute

under which they are constituted. When a period of limitation is prescribed for filing of an appeal and the extent of the power to condone the delay

is also prescribed by the statute, the exercise of the writ jurisdiction under Article 226 of the Constitution would clearly be not warranted to direct

the adjudicatory or appellate authority to breach the provision for limitation.

5. This principle was laid down in the judgment of the Supreme Court in Union of India and Another Vs. Kirloskar Pneumatic Company Limited,

While construing the provisions of Section 27 of the Customs Act, 1962, the Supreme Court noted that a claim for refund could be made only in

accordance with the provisions of that Section which inter alia included a period of limitation mentioned therein. In that context, the Supreme Court

held as follows :

Yet the question is whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory

provision. We do not think it is, even while acting under Article 226 of the Constitution. The power conferred by Article 226/227 is designed to

effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot

be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act,

cannot be directed to ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not

bound by the said provisions but the authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its

power under Article 226 or the power of a civil court. No such delegation or conferment can ever be conceived.

6. In a more recent judgment of the Supreme Court in Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, the

provisions of Section 35H(1) of the Central Excise Act, 1944 prior to its amendment came up for consideration before the Supreme Court. The

issue was whether a delay beyond the prescribed period could be condoned in exercise of the power of Section 5 of the Limitation Act, 1963.

Under the provisions of Section 35H, as they then stood before the amendment, the Commissioner or other party could, within a period of 180

days of the date upon which he is served with a notice of an order u/s 35C, direct the Tribunal to refer to the High Court any question of law

arising from such order of the Tribunal. The Supreme Court held that the language used in other provisions of the Act makes the position clear that

the legislature intended the appellate authority to entertain the appeal by condoning the delay only upto thirty days after expiry of sixty days which

is the preliminary limitation period for preferring an appeal. Hence, the Supreme Court ruled that in the absence of any clause permitting condoning

of the delay by showing sufficient cause after the prescribed period, there is a complete exclusion of Section 5 of the Limitation Act, 1963. The

submission before the Supreme Court in regard to Section 29(2) was 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. While

dealing with the submission, the Supreme Court observed as follows:

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. The scheme of the Central Excise Act,

1944 support the conclusion that the time limit prescribed u/s 35H(1) to make a reference to High Court is absolute and unextendable by 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 Act.

Counsel appearing on behalf of the Petitioner submits that unlike Section 35H which provided an absolute period of limitation of 180 days, Section

35 to which the present Petition relates, does provide a power to condone a delay beyond sixty days though upto an extent of thirty days. Hence,

it was sought to be urged that there was no absolute bar to take recourse to the provisions of Section 5 of the Limitation Act, 1963. The

submission cannot be accepted. Once the legislature has laid down a period within which an appeal has to be filed and has prescribed the extent to

which a delay beyond that period can be condoned, recourse to the provisions of Section 5 of the Limitation Act, 1963 would stand "" expressly

excluded"" within the meaning of Section 29(2) of the Limitation Act, 1963. Accepting the submission of the Petitioner would completely defeat the

scheme of the Central Excise Act, 1944. In any event, the High Court in the exercise of its jurisdiction under Article 226 of the Constitution cannot

issue a direction which would command the authorities constituted under the Act to bypass or breach the provisions made in the statute. The

Petitioner not having filed an appeal against the order of the Assistant Commissioner, dated 5 March 2010 within limitation, this Court would not

be justified in entertaining the petition and directing the Commissioner (Appeals) to condone the delay. In that view of the matter, it would not also

be proper for this Court to grant the alternate prayer. For these reasons, the petition is not maintainable and is accordingly dismissed.