

State of Assam and ors. Vs. Naresh Chandra Das and anr.

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Court : Guwahati

Decided On : Aug-19-1981

Judge : K.M. Lahiri and T.C. Das, JJ.

Acts : Gauhati High Court Rules - Rule 2; [Limitation Act, 1963](#) - Sections 5 and 29(2) - Schedule - Article 117; [Constitution of India](#) - Articles 225, 372 and 372(1); [Government of India Act, 1935](#); India Provisional Constitution (Amendment) Order, 1948; Assam High Court Order, 1948; Code of Civil Procedure (CPC) - Sections 141; Code of Criminal Procedure (CrPC)

Appeal No. : Civil Misc. Case No. 22 of 1981 in W.A. (T) 144 of 1981

Appellant : State of Assam and ors.

Respondent : Naresh Chandra Das and anr.

Advocate for Def. : B.K. Das, B.C. Das and B. Banerjee, Adv.

Advocate for Pet/Ap. : Govt. Adv.

Prior history : Lahiri, J. 1. This is an application Under Section 5 of the Indian Limitation Act. 1963, for short 'the Act'. Based on the following premises, Mr. B. K. Das, learned counsel has propounded that Section 5 of 'the Act' is not applicable in writ appeals filed under Rule 2 of the Gauhati High Court Rules and the application merits summary rejection :-- (I) The set of Rules framed by the High Court and styled as 'The Rules of the Gauhati High Court', for short 'the Rules', is not a law as it ha

Judgement :

Lahiri, J.

1. This is an application Under Section 5 of the Indian Limitation Act. 1963, for short 'the Act'. Based on the following premises, Mr. B. K. Das, learned counsel has propounded that Section 5 of 'the Act' is not applicable in writ appeals filed under Rule 2 of the Gauhati High Court Rules and the application merits summary rejection :--

(I) The set of Rules framed by the High Court and styled as 'The Rules of the Gauhati High Court', for short 'the Rules', is not a law as it has not been made by the Legislature;

(II) Assuming that it is a 'Law' it does not fall within the ambit of 'special law' referred in Section 29 (2) of the Limitation Act, 1953;

(III) Rule 2 of 'the Rules' has not only created the right of writ appeal against the decision of a single Judge but it has also prescribed the period of limitation as 30 days which is the same as prescribed in Article 117 of 'the Act' for appeals to the High Court from the same Court Therefore. Rule 2 does not prescribe a period of limitation different from the period prescribed by the Schedule of 'the Act'. As such, Section 29 (2) forbids application of Sections 4 to 24 of 'the Act' -- these are applicable only when a special law prescribes a period of limitation 'different from the period prescribed by the Schedule';

(IV) As 'the Rules' form a complete Code the provisions of Section 5

of 'the Act' are not applicable in writ appeal under Rule 2 of 'the Rules'; and.

(V) Rule 2, by necessary implication excludes the application of Sections 4 to 24 of 'the Act' in writ appeals.

To bear up the first two contentions the learned counsel has relied on *Mukund Mahto v. Niranjana Chakravarty*, AIR 1934 Patna 353 and *Bangalore Municipal Corporation v. T. S. Setty*. AIR 1955 Mys. 110. In support of the third and fourth

contentions reliance was placed on Kaushalya Rani v. Gopal Singh, AIR 1964 SC 260. Hukumdev Narain v. Lalit Narain, AIR 1974 SC 480, and. Hari Shanker Tripathi v. Shiv Harsh, (1976) 1 SCC 897 were placed to buttress the last contention.

2. We have heard the learned counsel for the parties. In our opinion, at this stage, we should not give any importance to the contentions of the State that the appeal involves substantial questions of constitutional law or the impugned judgment has declared two clauses of the Assam Paddy & Rice Procurement (Licensing & Levy) Order, 1980 ultra vires or public interest and equitable distribution of supply of commodities essential to the life of the community demand hearing and disposal of the writ appeals. The questions posed by Mr. Das relate to the jurisdiction of the Court to entertain an application Under Section 5 of 'the Act' and the same must be disposed uninfluenced by any other consideration.

3. We extract the intrinsic laws pertinent to resolve the debates at the bar. Section 29 (2) of 'the Act' reads as follows:--

'29 (1) *****

(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 Sec_ 3 shall apply

as if such period were the period pre

scribed 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.'

We also extract the third proviso to Rule 2 of Chapter V (A) of 'the Rules':

'2. *****

Provided further that the appeal shall lie to a Division Bench from the decision of single Judge if filed within 30 days of the said decision.'

4. Let us now take up the first two contentions. Though the legal theories or the science of law may not find it easy to define 'a law' as distinguished from executive orders, its main features are well recognised. Broadly stated, a law is a body of rules laid down for determining legal rights and legal obligations which are recognised by Courts. The expression 'special law', in Section 29 (2) of 'the Act' has not been defined in 'the Act' or in the General Clauses Act. The classification of laws into general, special or personal is a classification based on the extent of their operation. A general law applies to the whole community. Salmond on Jurisprudence says that the general law consists of general or ordinary law of the land and 'the special law' consists of certain other bodies of legal rules which are so special and exceptional in their natural sources or application that it is convenient to treat them as standing outside the general and ordinary law, as derogating from or supplementing them in special cases, but not forming a constituent part of it. The chief forms of 'special law' standing outside the general law of the land are local laws and other laws mentioned by Salmond's 'Jurisprudence' page 88 (11th Edn.). Special law means a law which is not applicable generally but which applies to a particular or specified subject or class of subjects.

5. Mr. Das has strenuously contended that the High Court Rules is not a law as it has been made by the judiciary and not by a legislative body. The learned counsel submits that the rules are akin to bye-laws.

The Assam High Court was established for the erstwhile province of Assam by the Assam High Court Order 1948 in exercise of the power Under Section 229 (1),

[Government of India Act, 1935](#), as adopted by the India Provisional Constitution (Amendment) Order, 1948, by the Governor General. Clause 6 of the Order provides that 'subject to the order' the law in force immediately before the prescribed day (5-4-1948) with respect to practice and procedure in the High Court in Calcutta shall, with the necessary modifications, apply in relation to the High Court of Assam, and accordingly the High Court shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the prescribed day exercised by the High Court of Calcutta'. After the establishment of the High Court on April 5, 1948, this Court followed the Rules of the High Court of Judicature at Fort William in Bengal, as far as they were applicable to all proceedings in the jurisdiction of this Court, by virtue of the Assam High Court Order, 1948. Thereafter many rules were made, amended, added and superseded by the Rules issued by this court under the powers vested in it by Article 225 of the Constitution. They were issued in the form of correction slips and published in the Official Gazettes. Thereafter all the rules were rearranged, revised, shaped and styled as 'The Rules of the High Court of Judicature in Assam at Gauhati.' They were duly published in a book form in the year 1955, and were published in the Assam Gazette, Part 11-B of 1955 at pages 45, 313, 379, 413, 785 etc. The Rules were framed by the High Court, an authority empowered by the Government of India Act. 1935 and the India Provisional Constitution (Amendment) Order, 1948 coupled with the Assam High Court Order. 1948. In Article 225 of the Constitution, jurisdiction of the existing High Court and the laws administered in any existing High Court and all powers to make rules, which the High Court had immediately before the commencement of the Constitution were preserved and this Article along with Article 372(1) saved the Rules made by the High Court which were in existence at the commencement of the Constitution. The rule-making power of a High Court, which existed at the commencement of the Constitution can be exercised with much vigour and force after the commencement of the Constitution. However, the rules made by the High Court would cease to have effect if the appropriate legislature makes any law on the subject. It follows, therefore, that the present set of Rules is framed by the High Court in exercise of its legislative power conferred on it by Article 225 of the Constitution. The legal rights and legal obligations of the litigants are governed by

'the Rules' and the High Court itself is not above 'the Rules'. It is a 'special law' enacted for application in special cases in

special circumstances and not the general rules of law applicable generally to all cases with which 'the general law deals'. We find no difficulty in arriving at the conclusion that the set of Rules, at present styled as 'The Gauhati High Court Rules', for short 'the Rules', is a special law.

However, let us examine the decisions relied on by the learned counsel. He has relied on *Mukund Mahto* (AIR 1934 Patna 353) (supra) and *Bangalore Municipal Corporation* (AIR 1955 Mys 110) (supra), *Bangalore Municipal Corporation* is not a case in point. Therein, the moot question was whether Rule 147 of the Municipal Account Manual was a law. It was held the rules were neither framed under the Mysore Municipality Act nor could they be termed as bye-laws duly passed by the Municipal Councillors. The learned single Judge held that the Manual was made by the Government in a conference for use of the various Councillors in the State. It follows, therefore, that the manual was neither a creature of statute nor a bye-law framed under the authority of any law. In the instant case, the rules have been framed by the High Court under Article 225 of the Constitution. Therefore, we hold that the decision is not a case in point. The learned counsel heavily relied on *Mukund Mahto* (supra) where the Patna High Court held that the High Court Rules framed under Letters Patent were not legislative enactment and, therefore, the rules were not law. The Patna High Court followed the dictum enunciated in *Abdul Gunny v. I. M. Russell*, AIR 1930 Rang 228 (FB) that the expressions 'special law or local law' could not be applied to rules framed by the High Court under the Letters Patent as the Letters Patent constituted neither a special law nor a local law but they were a charter from the Crown. On the premise, it was also held that the Code of Civil Procedure was a general law 'pari materia' with the Limitation Act. Therefore, the High Courts concluded that the Rules were similar ,to bye-law and were neither subordinate nor domestic enactments. With all respects we are unable to accept the reasoning or the conclusions reached by the learned Judges as correct. The Letters Patent are not a Charter granted by the Crown in the exercise of the Royal Prerogative, independent of and apart

from the authority of Parliament. They were a Charter issued directly under the power delegated to the King by the Act of Parliament. Clause 27 of the Letters Patent authorised the High-Court to make rules and orders for regulating the practice of the Court and for other purposes specified therein. By virtue of the power so conferred the High Court framed Rule 4 which prescribed a period of 30 days for preferring appeals under Clause 10, Letters Patent. These rules are statutory rules and have the same binding force as an enactment of the legislature itself. We are of the opinion that the rules framed under Clause 27, Letters Patent under the authority delegated to it by the Crown who, in turn, acted under the powers conferred on him by the Act of Parliament are a special law. For the foregoing reasons we cannot accept the view expressed in Abdul Ganny (supra) and Mukund Mahto (supra). Controversy over the issue has been resolved by the Supreme Court in *Union of India v. Ram Kanwar*, AIR 1962 SC 247 where Rule 4 of (Punjab) High Court Rules framed under the Letters patent, came up for interpretation. The question was whether Rule 4 was a special law. On close scrutiny of the Letters Patent, their Lordships held that Rule 4 was framed by the High Court in exercise of the legislative power conferred upon it under Clause 27, Letters Patent. It has been held that Rule 4 is a law made in respect of special cases covered by it and is a special law within a meaning of Section 29 (2) of the Limitation Act. The Supreme Court held that Clause 27 authorised the High Court to make Rules prescribing the period of limitation for a Letters Patent appeal against an order of a single Judge and by virtue of Clause 37, the said rule is subject to the provisions of the Limitation Act, but Limitation Act itself saves the operation of the said Rule. It has been ruled that Rule 4 applies to those appeals referred therein, whereas Article 151 of the Lim. Act, 1908 (now Article 117 of 'the Act with some modification) would govern appeals not covered by Rule 4. In view of the law laid down by the Supreme Court in *Ram Kanwar* (supra), we are constrained to reject the first two contentions of the learned counsel for the opposite parties.

6. Article 225 of the Constitution confers the same powers and jurisdic-

tion to the existing High Courts as they possessed immediately before the commencement of the Constitution. The power that was conferred on the High

Courts by Section 108, Government of India Act, 1915 still subsists. It has not been affected in any manner whatsoever either by the [Government of India Act, 1935](#) or by the [Constitution of India](#). On the other hand, it has been kept alive and reaffirmed with greater vim and vigour. The High Courts enjoy the same unfettered power, as they had enjoyed under Section 108 of the Government of India Act, 1915, of making rules and providing whether an appeal has to be heard by one Judge or more Judges. Therefore, 'the Rules' framed by the Gauhati High Court under Article 225 of the Constitution are special laws within the meaning of Section 29 (2) of the Limitation Act, 1963.

7. The third contention is that the period of limitation prescribed for writ appeals, under Rule 2 of 'the Rules' is not different from the period prescribed for preferring appeal under Article 117 of 'the Act'. Therefore, Section 29 (2) is not attracted. As alluded, the Rules have been framed under Article 225 of the Constitution. Article 372(1) read with Article 225 saves the High Court Rules which were in existence at the commencement of the Constitution. The rules have the force of law unless ultra vires the enactment under which they were made, namely, the Government of India Act, 1915 and 1935 or the Constitution. The rules made by the High Court are subject to the provisions of any law of the appropriate legislature. Rule 2 of the Rules has prescribed a special period of limitation for writ appeals. Article 117 of 'the Act', in our opinion, does not apply to Writ Appeals under Rule 2. The rule is subject to provisions of the Limitation Act but the Limitation Act itself saves the operation of the said Rule. Rule 2 applies to a Writ Appeal whereas Article 117 governs appeals not covered by Rule 2. Therefore, the Rules of limitation prescribed in Rule 2 is positively subject to the Lim. Act, 1963 and the provision of 'the Act' shall be applicable in Writ Appeals as well. A similar question came up in *Union of India v. Ram Kanwar* (AIR 1962 SC 247) (supra) as to the effect of Rule 4 of the 'the Rules' framed under Clause 27 of the Letters Patent and the Supreme Court held that Rule 4 applied to those Rules referred therein and Article 115 of the old Act (now Article 117) governed appeals not covered by Rule 4. Their Lordships held that the provisions of Section 5 of the [Limitation Act, 1963](#) applied in an appeal under Rule 4. As such, we are constrained to hold that the provisions of Section 5 of the Lim, Act, 1963 are applicable in writ appeals prescribed under Rule 2 of 'the Rules.'

We feel that when Article 225 of the Constitution itself lays down that the rules framed by the High Court shall be subject to the Acts of the Legislature, the provisions of the [Limitation Act, 1963](#) are squarely applicable in writ appeals under Rule 2.

Be that as it may, we find that Rule 2 prescribes a period of Limitation different from Article 117 of 'the Act'. The period of limitation may be different under different circumstances, say if the special or local law modifies or alters a period of limitation prescribed by the Schedule or if it differs from the period of limitation fixed for various appeals under the Limitation Act. If the Schedule to the Act omits to lay down any period of limitation for a particular appeal and the special law provides a period of limitation then to that extent the special law is different from the Limitation Act. In our opinion, Article 117 does not prescribe any period of limitation for a writ appeal. Writ appeal was created for the first time by Rule 2 and the period of limitation was prescribed therefor. Therefore, Article 117 does not lay down any period of limitation for writ appeals. In prescribing a period of limitation in Rule 2, the High Court has prescribed a period of limitation different from the period prescribed by the Schedule. We are of the opinion that the combined effect of Rule 2 of 'the Rules' and Article 117 of the Act' is that Rule 2 applies exclusively to writ appeals whereas Article 117 governs appeals other than writ appeals.

8. We may look at the matter from a different angle. A writ application is not a suit as defined in Section 2 (b) of 'the Act.' It is also not a civil proceeding governed by the Civil P. C. S. 141 of 'the Code' clearly states that a writ proceeding is not a civil proceeding. Article 117 and the preceding Articles 114 to 116 make it clear that the appeals contemplated under Article 117 are appeals arising out of a civil proceeding or criminal proceeding. A writ application cannot be termed as civil proceedings or criminal proceedings within the meaning of the Civil P. C. or the Criminal P. C. Writ application is not a 'suit' as defined in Section 2 (1) of 'the Act.' A Writ Application is a kind of extraordinary proceeding. Appeals from such proceedings do not attract Article 117 of 'the Act,' so the High Court while, creating writ appeals had to prescribe the period of limitation therefor. Therefore, we hold that the special law prescribes a special period of limitation for special contingency not included in Article 117 of 'the Act,' as such the period of limitation prescribed in

Rule 2 is different from that of Article 117 and as such the provisions of Section 29 (2) of the Act are squarely applicable in writ appeals.

The ratio of the decision in Kaushalya Rani (AIR 1964 SC 2601 (supra)) relied by the opposite parties have no application in cases governed by the [Limitation Act, 1963](#). There is an important departure in the Act in so far as the provision contained in Section 29 (2) is concerned. Clause (b) of Sub-section (2) of Section 29 of the Old Act provided that for the purpose of determining any period of limitation prescribed for any suit, appeal etc. by any special or local law the provisions of other than those contained in Sections 4, 9 to 18 and 22 would not apply. Shortly put the applicability of Section 5 was in clear and specific terms excluded by Clause (b) of Section 29 (2) of the 'old Act'. Whereas Section 29 (2) of 'the Act' enacts that the provisions of Sections 4 to 24, which include Section 5, shall apply in so far as and to the extent to which they are not expressly excluded by special or local law. Since under 'the Act,' Section 5 is specifically made applicable by Section 29 (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if sufficient cause for not presenting the application can be shown by the applicant, it is only if the special or local law expressly excludes the applicability of Section 5, that it would stand displaced. This is the law as explained by the Supreme Court in Mangu Ram v. Municipal Corporation of Delhi, AIR 1976 SC 105 (on page 108). In the instant case Rule 2 has not expressly excluded the applicability of Section 5, so the said Section shall apply with equal vim and vigour in writ appeals as well. In the result, the third contention of the opposite parties fails.

9. Now let us turn to the contentions IV & V. It has been contended on the authority of the decision in Hukumdev Narain (AIR 1974 SC 480) (supra) and Hari Shanker (1976-1 SCC 897) (supra) that Rule 2 of 'the Rules' is a complete Code, it provides the right of appeal and prescribes the period of limitation for writ appeals and there is no scope for application of 'the Act.' By necessary intendment the provisions of Sections 4 to 24 have been excluded. In support of the contention the learned counsel heavily relied on the aforesaid decisions of the Supreme Court.

It has been urged that the language of Rule 2. 'the appeal shall be..... if

filed within 30 days of the said decision,' is peremptory or imperative and thereby excludes the applicability of Sections 4 to 24 of 'the Act' We would just refer the observations of Bhagwati, J in *Mangu Ram* (AIR 1976 SC 105) (supra) to show that the question posed has been resolved by the Supreme Court (at pp. 108-9) :--

'It is true that the language of is

mandatory and compulsive, in that it provides in no uncertain terms that no application shall be entertained

by the High Court after the expiry of sixty days..... But that would be the

language of every provision prescribing a period of limitation Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5.'

The observations are sufficient to meet the first part of the contentions.

The reasons why the Supreme Court held in the aforesaid decision that Sections 5 and 29 (2) of the Limitation Act were not applicable in election petitions

is not far to seek. The Indian Limitation Act applies to all civil proceedings and some special criminal proceedings which can be taken in a court of law unless the application thereof has been excluded by any enactment -- the extent of such application is governed by Section 29 (2) of 'the Act' The Act does not apply to election proceedings as the Representation of the People Act, 1951, for short 'the R. P. Act' is a complete and self-contained Code which does not admit of the introduction of the principles or the provision of law contained in 'the Act' Even when the special law

does not exclude the provisions of Sections 4 to 24 of 'the 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 the scheme of the special law exclude the provisions of Sections 4 to 24. The provisions of Section 3 of 'the Act' that suit instituted after the prescribed period

shall be dismissed are provided in Section 86 of 'the R. P. Act', which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81, 82 or 117, If non-compliance with the provisions of Sections 82 and 117 which are mandatory, merits dismissal of an election petition under Section 86 (1), the presentation of an election petition within the period prescribed in Section 81 would be equally mandatory and non-compliance must visit with the penalty of dismissal. This is the scheme of 'the R. P. Act.' Further, proviso to the repealed Section 85 of 'the R.P. Act' had conferred, on persons challenging an election, the benefits similar to the provisions of Section 5 of the Limitation Act. The proviso was repealed and the benefits conferred were withdrawn. Though Parliament has made amendments to the R. P. Act, it did not reintroduce any provision like the proviso to the repealed Section 85 of 'the R. P. Act.' The intention of Parliament is clear that it did not desire delays to occur in the disposal of election petitions or their trial. For these reasons the Supreme Court has held in *Hukumdev Narain* (supra) and *Hari Shanker* (supra) that the provisions of Section 5 is inapplicable in election petitions or trials.

In Rule 2 we do not find any provision to dismiss the Writ Appeals as provided in Section 3 of 'the Act' or in Section 86 of 'the R. P. Act.' There is no question of grant of rights like Section 5 of 'the Act' and withdrawal thereof It is not possible to hold that Rule 2 is a complete Code. In the result, we are constrained, to hold that the principles enunciated in the decisions referred are inapplicable in the present case.

10. It is pertinent to note that while interpreting the provisions of Section 116A(2) of 'the R. P. Act' the Supreme Court has held in *Vidyacharan Shukla v. Khubchand Baghel*, AIR 1964 SC 1099, (supra) that Section 116-A(2) has provided

for appeals by fiction and equated them with appeals filed under the Code of Civil Procedure in the matter of exercise of powers, jurisdiction and authority as well as in the matter of procedure to be followed from the date of receipt of the appeal to its final disposal. Therefore, the section has been held to be 'a special law' prescribing a period of limitation different from the period prescribed in the

Schedule to 'the Act,' within the meaning of Section 29 (2) of 'the Act' and the provision of Section 12 of 'the Act' is applicable in such appeals. It has been ruled that 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 a limitation to a particular proceeding under 'the Act.'

For the foregoing reasons we hold that the provisions of Section 29 (2) are attracted in writ appeal filed under Rule 2 of the Rules and the court has jurisdiction to entertain an application Under Section 5, Limitation Act in Writ Appeal under Rule 2 of the Rules.'

11. Now, let us consider whether the claim for extension of time made Under Section 5 of the 'the Act' should not be allowed! on the facts and circumstances of the case. The principles for extension of time Under Section 5 of 'the Act' may be summed up as follows :--

(a) The party seeking relief has to satisfy the court that he had sufficient cause for not preferring the appeal etc. within the prescribed time; (b) the explanation has to cover the entire period of delay (c) A litigant should not be easily permitted to take away a right which has accrued to his adversary by lapse of time; (d) the proof of sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. After sufficient cause is shown then the court has to enquire, whether in its discretion it should condone the delay: (e) The discretion conferred on the court is a judicial discretion and must be exercised to advance substantial justice: (f) No liberal view should be taken merely because the defaulting party is Govt.; (g) Even sheer indifference of the Advocate cannot stand in the way of condoning the delay when there is no laches on the part of the litigant, (h) When there is remiss on the part of the Advocate, the

missions come up for consideration whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way.

12. The Civil Rule was disposed on 10-4-1981. Admittedly the appeal was presented on 25-6-1981, beyond the period of 30 days prescribed under Rule 2 of

'the Rules.' The statement of facts narrated in the application Under Section 5 of the Act' may be summed up thus :--

On 10-4-1981 the Civil Rule was disposed. The then Sr. Govt. Advocate informed the appellants about the order and his office was instructed to apply for the certified copy of the judgment. On 20-4-1981, an application was filed to obtain copy the requisites for the copy were furnished, on the notified date. The copy was made ready on 5-5-1981 and it was taken on 7-5-1981. However, in the meantime, the term of the office of the then Sr. Govt. Advocate Shri P. K. Barua expired on 30-4-1981. In the afternoon, he handed over the charge of his office to the Junior Government Advocate. By an order dated 15-5-1981. the Government appointed Shri Anileswar Sarma as Senior Government Advocate who took over charge On 27-5-1981 but submitted his resignation on 1-6-1981 which was accepted on 8-6-1981. Shri Sarma handed over charge of the office on 9-6-1981. By an order dated 15-6-1981, the Government authorised the Junior Government Advocate to officiate as Senior Government Advocate till other arrangements were made. It has been affirmed by the Head Assistant of the office of the Senior Government Advocate and Mr. D. N. Choudhury, the present senior Government Advocate that according to established practice and procedure prevailing in the office the certified copy of the judgment with the connected case records (the brief) were placed on the table of the Senior Government Advocate. It has been specifically stated by the learned Senior Government Advocate that on 7-5-1981 the certified copy of the judgment and the records were placed on the table of the Senior Government Advocate. It has been stated that the records were placed along with many other case records on the table of the Senior Government Advocate. It has been stated that during the period of switch and shift, the case records kept

on the table of the Senior Government Advocate, were mislaid and lost track of. In spite of the best efforts they could not be tracked down or uncovered. After a thorough rummage the records were located on 23-6-1981 amongst heap of disposed case records. On discovery, the judgment was typed memo was dictated and the appeal was made ready on 24-6-1981 (afternoon) and the writ appeal was presented on 25-6-1981. As directed by a Bench of this Court, the learned Senior Government Advocate, the present incumbent, has sworn an affidavit in support of

the averments made in the application Under Section 5 of 'the Act.' He has sworn the affidavit and confirmed the statements as correct. As such, we find that there was a delay of 9 days for making application for copies and about 2 days in taking copy of the judgment from the office. In all, eleven days were spent in between the date of judgment and taking of the certified copy. It has been asserted in clear terms that the records were placed on the table of the Senior Government Advocate on 7-5-1981 and they were mislaid and remained untraced till 23-6-81, There is no delay in preparation of the memo of appeal and presentation thereof. As such if we hold that in fact the case records were mislaid in the office of the Senior Government Advocate and were tracked down only on 23-6-1981. as stated by the petitioners, there is a good case for extension of time Under Section 5 of 'the Act.'

It is apparent that since 30-4-1981 till the present incumbent took over the charge of the office as Senior Government Advocate on 15-6-1981, there were many switches and shifts. The term of one Senior Government Advocate expired and the other resigned. It is stated that during this period the records were found missing. It has been stated that they were found along with heap of disposed of cases. The Civil Rule was disposed on 10-4-1981. As such, it was not unnatural for any office assistant, during the period of transition, to place the disposed of case amongst other disposed of cases. Therefore, the explanation rings true. It is hardly possible to reject the sworn statements of the learned Senior Government Advocate and his office Assistant. We hold that the misplacement of the records in the manner alleged in the petition is a sufficient cause to condone the delay during the period commencing from 7-5-81 to 23-6-81. The learned Senior Government Advocate has put forward the explanation for the delay covering the entire period. Such misplacement of records in an office dealing with a number of cases it cannot be said to be unnatural and unusual event. The statement of facts stated by the learned Senior Government Advocate has not been questioned by Mr. B. K. Das, counsel for the opposite parties. Under the circumstances, we are constrained to hold that the explanation offered by the petitioner is true and the entire period of delay has been properly explained. This apart there is no remiss on the part of the litigants. Assuming that there was any negligence on the part of any officer or employee in the office of the Senior Government Advocate, the litigants cannot be

penalised for the neglect or indifference of their employees. It is impossible to hold that it was a device to cover an ulterior purpose. The appeal involves substantial questions of law. Two pertinent clauses of the Assam Paddy and Rice (Licensing & Levy) Order, 1980 as well as a notification issued by a competent authority were declared ultra vires by the learned single Judge. The petitioners have no other remedy but to appeal against the order 'to bring into life the provision of the Order.' We have considered this aspect of the case as well while considering the prayer of the petitioners.

Upon the whole, we hold that the application Under Section 5 was maintainable and the petitioners were entitled to extension of time as they had sufficient cause for not preferring the appeal within the prescribed period. These were the reasons for which we extended the period and condoned the delay and allowed the petition by our order dated 11-8-81, There will be no order as to costs.

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