Collector of Central Excise Vs. Shree Durga Glass (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-12-1986

Reported in : (1986)(8)LC697Tri(Delhi)

Judge : H Chander, G T V.P.

Appellant : Collector of Central Excise

Respondent : Shree Durga Glass (P) Ltd.

Judgement :

1. The Collector of Central Excise, Bhubaneswar has filed five appeals being aggrieved from Order-in-Appeal No. 124-128/OR/85 dated the 5th August, 1985 passed by the Collector (Appeals), Central Excise, Calcutta. Simultaneously, the appellant had also filed five stay applications requesting the operation of the stay of the orders passed by the Collector (Appeals), Central Excise, Calcutta. In column No. 3 of the Memorandum of Appeal, the date of service of the order has been mentioned as the 2nd September 1985. The appellant has also filed live applications for condonation of delay and the applications for condonation of delay were received in the registry on the 31st January, 1986. The applications for condonation of delay are duly supported with a photo copy of the affidavit of Shri B.N. Kavale, Assistant Collector of Central excise, Cuttack.

2. Shri B.R. Tripathi, the learned SDR has appeared on behalf of the applicants, and has pleaded that the delay in the filing of the aforesaid five appeals may be condoned as the appellant was prevented by sufficient cause in the late

submission of the appeal, He has reiterated the facts and the contentions made in the application for condonation of delay. Shri B.R. Tripathi, the learned SDR. has referred to the judgment of the Hon'ble Supreme Court in the case of State of Uttar Pradesh v. Bahadur Singh and Ors. reported in 1983 ECR/1556 D wherein the Hon'ble Supreme Court had held that public interest must be considered before dismissing a delayed petition in which the delay was justifiable. He has referred to another judgment of the Tribunal in the case of Collector of Customs, Bombay v. Godrej Soap Ltd. -Cegat where the Tribunal had condoned the delay. He has also argued that the appellant had sent the appeal per registered post by air mail on the 28th November, 1985 which is very well within the period of limitation as provided in terms of Sub-section (3) of Section 35B of the Central Excises and Salt Act, 1944. He has argued that postal delay is a sufficient cause. Shri B.R. Tripathi, the learned SDR has pleaded that some concession should be given to the Appellant being the Government.

3. Shri A.N. Haksar, the learned Advocate has appeared on behalf of the Respondents. He has stated that the order passed by the Collector (Appeals), Central Excise is dated 5th August, 1985, and the order in appeal was served on the Collector on the 2nd September, 1985, The Collector of Central Excise had given authorisation to the Assistant Collector to file the appeal on the 5th November, 1985 and the authorisation was dispatched on the 22nd November, 1985. Shri Haksar, the learned Advocate has pleaded that the appeal should have been received in the Tribunal by the first day of December, 1985. He has argued that the circumstances mentioned by the appellant in the application for condonation of delay do not lead to the inference that the applicant was prevented by sufficient cause in the late filing of the appeal, and as such the Appellant's prayer for condonation of delay should be rejected.

4. Shri B.R. Tripathi, the learned SDR has again requested the Bench to condone the delay and has pleaded that the appellant was prevented by sufficient cause in the late filing of the appeals.

5. After hearing the arguments of both the sides and going through the facts and circumstances of the case, we would like to reproduce the contents of one of the

applications for condonation of delay:1. The designation and address Collector (Appeals), Central of the authority passing the Ex-cise, Calcutta.

order appealed against2. The number and date of the Order-in-Appeal No. 124-128/OR/ order appealed against.

85 dated 5 8.1985.3. Date of communication of a Received in the Collectorate of copy of the order appealed Central Excise and Customs, Bhubaneswar against.

on 2.9.1985 (which was despatched by the Collectorate of4. Designation and address of Assistant Collector, Central Excise the adjudicating authority and Customs, Cuttack Division, in cases where the order Cuttack-753009 (Orissa).

appealed against is an order5. Address to which notices M/s. Shree Durga Glass (P) Ltd., may be sent to the Respondent. Barang, Cuttack-754005 (Orissa).6. Reasons for condonation of Order-in-Original Nos.

delay in filing the appeal (i) No. 44/23A/17/23/VC/84 alongwith stay application.

29.11.1984. (ii) Order (O) dated 30.12.1984 basing on Order appeal alongwith the stay application was despatched on 27.11.1985 (holiday) and delivered in the G.P.O., Bhubaneswar by Air Mail under Postal Registration Receipt No. 4448 (dated 28.11.1985). The same was sent specifically by Air Mail with the specific apprehension that the receipt of the Appeal in Tribunal might get delayed in transit if despatched by ordinary Registered Post. The connected paper books were subsequently sent which appears to bave been received in the Tribunal on 24.12,1985, i.e within one month and is covered under Rule 16 of CEGAT (Procedure) Rules, 1982.

As per a communication received from the SDR, CEGAT, New Delhi vide F. No. SBA/EX/DA/448/85 dated 15.1.1986 (received in this office on 24.1.1986) it is ascertained that the said appeal alongwith the stay application was received in the CEGAT on 4.12.1985. In this connection, it would be seen that 1.12.1985, which was the date stipulated for filing the appeal happens to be a Sunday (holiday), therefore, next working day i.e. 2.12.1985 should normally be the date for filing the appeal. However, since the appeal alongwith the stay application despatched by

Air Mail on 28.11.1985 were received in CEGAT on 4.12.1985 actually delay is only 2 days, i.e 2.12.1985 and 3 12.1985 and a prayer is hereby made before the Hon'ble CEGAT to condone the delay of 2 days and admit the appeal alongwith the stay application.

An affidavit duly sworn in by the Assistant Collector, Central Excise, Cuttack clearly explaining the date of despatch of the appeal papers is also enclosed herewith.

I, Sri B.N. Kavale, IRS, Assistant Collector, Central Excise and Customs, Cuttack Division, Cuttack hereby solemnly affirm and state as follows: (i) That I am the Assistant Collector, Central Excise and Customs, Cuttack Division, Cuttack and being authorised by the Collector, Central Excise and Customs, Bhubaneswar filed five appeals before the Appellate Tribunal against the appellate order of the Collector (Appeals), Central Excise, Calcutta dated 5 8.1985 passed in appeal Nos. 124-128/OR/85, preferred by M/s Shree Durga Glass (P) Ltd, Barang.

(ii) That the appeal memos were despatched by Air Mail under letter C. Nos. 11686-90, 11681-85, 11691-95, 11696-700, and 11701-05 all dated 27.11.1985 by Regd. Post with A.D. under Regn No. 4448 dated 28.11.1985 from G.P.O., Bhubaneswar.

(iii) That the facts stated above are true to my knowledge based on official records.

6. A simple perusal of the application for condonation of delay and the affidavit shows that the delay in the filing of the appeal is on account of the movement of file from various channels of the Appellant, and the appellant all along was not vigilant in the filing of the appeals within the stipulated period. The judgment of the Hon'ble Supreme Court cited by Shri B.R. Tripathi, the learned SDR does not help him. The facts of the present case before us are different. The matter which was before the Hon'ble Supreme Court was in respect of the filing of the writ petition, under Articles 226 and 227 of the Constitution of India before the Hon'ble High Court. The Hon'ble High Court had rejected the writ petition on the ground that the usual period of limitation was 90 days for filing of the writ petition and, there was delay of 42 days. The Hon'ble Supreme Court had held that no limitation is

provided by the Constitution of India for the filing of writ petition. Para No. 2 of the said judgment is reproduced below: 2. The narrow and only question with which we are concerned in this appeal is, whether the High Court was justified in dismissing a writ petition U/Arts 226 & 227 of the Constitution filed by the State of U.P. on the sole ground that the petition had been filed after a long delay. The High Court observed that the usual term of limitation was 90 days for filing the writ petition and, computing limitation on this basis, held that the petition was delayed by 42 days. Frankly speaking, we know of no such period of limitation prescribed by any statute nor any such provision was brought to our notice. The only known principle is that the court may not examine stale causes as the court helps the vigilant and not the indolent It is a rule devised on the principle of judicial circumspection and has to be applied wisely. And look at the facts-situation. The examination for the delay offered was convincing and acceptable.

Further, the State of UP had preferred a writ petition against the decision of the appellate authority under the UP Agricultural Land Ceiling Law. In the proceedings under such a law there are no two parties as is the case in a litigation between two private parties wherein each would be prosecuting and watching the proceedings regularly. In a proceeding under land ceiling law, the departmental authority has to be apprised of an adverse decision, and further decision has to be taken whether the case is one required to be taken to the higher court. Not that the departmental authorities charged with a duty to implement the law should not be vigilant, but one aspect cannot be over-looked that a departmental authority may delay the moving of the higher court for oblique motives and the public interest may suffer if such cause is thrown out merely on the ground of some delay which is also explainable. These are relevant considerations which must enter a judicial verdict before rejecting such cause on the ground of delay.

7. The Hon'ble Supreme Court had condoned the delay only when the delay was explainable. In the present matter before us, the appellant has not been able to explain the delay. The judgment of the Tribunal cited by the learned departmental representative in the case of Collector of Customs v. Godrej Soap Ltd. does not help him as the facts are different. The Hon'ble Supreme Court in the case of the State of West Bengal v. the Administrator, Howrah Municipality and Ors. had held

that the expression sufficient cause cannot be construed too liberally merely because the party in default is Government. Para No. 27 appearing on page 755 of the said judgment is reproduced below: Mr. D. Mukherji, learned Counsel for the first respondent, is certainly well founded in his contention that the expression "sufficient cause" cannot be construed too liberally, merely because the party in default is the Government. It is no doubt true that whether it is a Government or a private party, the provisions of law applicable are the same, unless the statute itself makes any distinction. But it cannot also be gainsaid that the same consideration that will be shown by courts to a private party when he claims the protection of Section 5 of the Limitation Act should also be available to the State.

8. The Hon'ble Kerala High Court in the case of State of Kerala v.Krishna Kurup Madhya Kurup had held as The State, it is true, is not entitled to special treatment in a court. I respectfully agree with the observations made by a Division Bench of this Court in 1963 Ker. LJ 979 to the effect: The law of limitation operates equally for or against a private individual as also a government. No special individual can be shown to the government which in similar circumstances is not to be shown to an individual suitor. If it is felt that the Government departments delay matters so much that the periods of limitation already prescribed in the Limitation Act viz., 3 months is not long enough for the government of its agents, then the better course is to obtain amendment of the law through the legislature rather than to make an application to the court, invoking its power under Section 5 of the Limitation Act. We are of opinion that such delays in Government offices are no justincation for invoking the power of the court under Section 5 and would not amount to sufficient cause".

Never-theless, we have to take a practical view of the working of government without being unduly indulgent to the slow motion processes of its wheels. (Are we not painfully aware of the public criticism of delays in courts and apprehensive of a possible rebuke, physician, heal thyself?) When an appeal is pending, attention of counsel is usually drawn to the questions arising therein when it is posted for hearing. Quite probably, after the Full Bench decision was reported, the land acquisition appeals affected by that ruling were posted to be disposed ofin its light. Government counsel would then have agreed to the absence of jurisdiction of the

District Court and prayed for the return of the appeal. Meticulously to dissect the period of pendency of the appeal into the pre Full Bench and the post Full Bench sections is to be too artificial. Broadly speaking, there was noremissness in the conduct of the government pleader and none on the part of government.

9. The Hon'ble Supreme Court in the case of Ram Lai and Ors. v. Rewa Coalfield Ltd. had laid down the principles in condoning the delay. Para Nos. 7, 12 and 15 from the said judgment are reproduced as under: 7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal given rise to a right in favour of the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient' cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chathappan ILR 13 Mad. 269.

12. It is however necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the discretionary jurisdiction vested in the Court by Section 5. If sufficient cause is not proved nothing further has to be done, the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while expercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it In this connection, we may point out that

considerations of bona fides or due diligence, are always material and relevant when the court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which full to be decided only under Section 5 without reference to Section 14. In the present case there is no difficulty in holding that the discretion should be exercised in favour of the appellant because apart from the general criticism made against the appellant's lack of diligence during the adduced against it. Indeed, as we have already pointed out, the learned Judicial Commissioner rejected the appellant's application for condonation of delay only on the ground that it was appellant's duty to file the appeal as soon as possible within the period prescribed, and that, in our opinion, is not a valid ground.

15. It appears that the provisions of Section 5 in the present Limitation Act are substantially the same as those in Section 5(b) and Section 5, paragraph 2. of the Limitation Acts of 1871 and 1877 respectively. Section 5A which was added to the Limitation Act of 1877 by the amending Act VI of 1892 dealt with the topic covered by the explanation to Section 5 in the present Act. The explanation provides, inter alia, that the fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of Section 5. The effect of the explanation is that if the party who has applied for extension of period shows that the delay was due to any of the facts mentioned in the explanation that would be treated as sufficient cause, and after it is treated as sufficient cause, the question may then arise whether discretion should be exercised in favour of the party or not. In the cases to which the explanation applies it may be easy for the Court to decide that the discretion should be exercised in favour of the party and delay should be condoned. Even so, the matter is still one of discretion. Under Section 5A of the Act of 1877, however, if the corresponding facts had been provided under the said section there appears to have been no discretion left in the Court because the said Section provided inter alia, that whenever it was shown to the

satisfaction of the Court that an appeal was presented after an expiration of the period of the limitation prescribed owing to the appellant having been misled by any order, practice or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall, for all purposes be deemed to have been presented within the period of limitation prescribed therefore. That, however, is a distinction which is not relevant in the present appeal.

10. The learned departmental representative had also argued that the appellant had despatched the appeal to the Tribunal before the expiry of limitation per registered post. We would like to observe that the appeal was received in the Registry after the expiry of the limitation.

An appeal before the Tribunal has to be filed in terms of the provisions of Rule 6 of the Customs, Excise and Gold (Control) Procedure Rules, 1982. Rule 6 is reproduced as under: 6. Procedure for filing appeals-(1) A memorandum of appeal to the Tribunal shall be in the relevant form and shall be presented by the appellant in person or by an agent to the concerned officer, or sent by registered post addressed to the concerned officer; Provided that the appellant may, in case of urgency or for other sufficient reason, present or send the appeal to the concerned officer of the Bench nearest to him, even though the matter relates to a different Bench; as soon as may be, forward it to the concerned officer of the appropriate Bench.

(2) A memorandum of appeal sent by post under Sub-rule (1) shall be deemed to have been presented to the concerned officer on the date on which it is received in the office of the concerned officer.

Explanation : (1) For purposes of this rule, "form" means a form prescribed for the purpose of presenting an appeal under the Customs (Appeal) Rules, 1982, or the Central Excise Rules, 1944, or as the case may be, the Gold (Control) Appeal Rules, 1982.

(2) In this Rule, "concerned officer" in relation to a Bench means the Registrar, Assistant Registrar or any other officer authorised to receive appeals falling within

the jurisdiction of that Bench as defined by the President from time to time.

11. A simple reading of Rule 6 of the CEGAT Procedure Rules shows that where the appeal is sent per registered post, the date on which it is received in the office of the Registry shall be deemed to be the date of the filing of the appeal. In view of the above discussion, we hold that the appellant was not prevented by sufficient cause in the late filing of the appeals. The above five applications for condonation of delay are rejected.

12. Since we have rejected the appellant's request for condonation of delay in the above captioned five appeals, the above captioned live appeals are dismissed being hit by limitation.

13. The above five stay applications also emerge from these five appeals, the appeals having been dismissed being hit by limitation, the five stay applications are also rejected.

1. I do not agree with the finding and conclusions reached by Brother Harish Chander.

2. The facts of the case and the legal position in the matter has been set out by Brother Harish Chander in his order and I am basing my decision on the same.

3. The delay involved in the receipt of the appeals is two days. The appellants received the impugned order on 2.9.1985 and despatched their appeal by registered post on 28.11.1985 and counting the limitation period from 3.9.1985, the due date for receipt of the same in the Tribunal office was 2.12 1985. The appeal was however, received in the Registry on 4.12.1985. The despatch of the appeal by the appellants by registered post for being filed is allowed under Rule 6 of the Customs, Excise and Gold (Control) Procedure Rules, 1982 whereby an appellant can send the appeals by registered post and the appeal sent by post is deemed to have been presented on the date on which it is received in the office of the concerned officer.

4. The point that arises for consideration is whether the appellant Collector was prevented by sufficient cause from filing the appeal in time. Now what constitutes

sufficient cause depends upon facts and circumstances of each case. In the case before us the appeal was despatched five days before the limitation period ran out but was received in the registry of the Tribunal two days after the expiry of the limitation period. There is no doubt that in case of appeals sent by post it is the responsibility of the appellant to see that the appeal is posted on a date allowing for sufficient time for postal transmission for it to be received before the limitation period runs out Now there is no time schedule set out by the postal authorities as to the time taken for the post to be delivered from the station of despatch to the consignee. Taking into consideration the prevailing mode of carriage of mail by the postal authorities by air and train etc., particularly between major cities, a period of four to five days could be taken to be a reasonable period during which it could be expected that the postal registered letter would be delivered. In the instant case the appellants posted the letter five days before the limitation for filing the appeal expired. It is seen that the applicant Collector allowed reasonably sufficient time for the appeal to be delivered in the Tribunal office in time.State of U.P. v. Bahadur Singh 1983 ECR/1556D (para 6 of judgment of Brother Harish Chander) has stated the principle that Court helps the vigilant and not the indolent. In the instant case I find that the appellant Collector has been vigilant enough and the delay of two days in filing the appeal was on account of transmission by post. No doubt the post office is not the agent of the appellants nor of the Tribunal but the fact remains that the dispatch of appeal by registered post through the medium of post office for being filed in the Tribunal is permitted under the rules.

Having thus permitted the filing of the appeal we have to taken a practical view in the light of the fact as to whether the appellant for the purpose of filing the appeal has done what was within his power to do for due compliance with the requirements of filing the appeal. The answer to that in the present case is in the affirmative in my view. I, therefore, hold that the appellant was prevented by sufficient cause from filing the appeal and I condone the delay in filing the appeal as requested. The condonation of delay application is allowed.