

The Commissioner of Central Excise Vs. Shree Rubber Plast Co. Pvt. Ltd.

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Court : Mumbai

Decided On : Dec-19-2008

Reported in : 2009(2)BomCR53; 2009(111)BomLR585; (2009)221CTR(Bom)652; 2009(234)ELT33(Bom); [2009]16STJ355; [2009]20STT9

Judge : S. Radhakrishnan, ;V.C. Daga and ;J.H. Bhatia, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 35G and 35G(9); [Limitation Act 1963](#) - Sections 3, 4 to 24, 29 and 29(2); [Customs Act, 1962](#) - Sections 130; Rent Act - Sections 13(4) and 18; Limitation Act, 1908; Code of Civil Procedure (CPC) ; Income Tax Act - Sections 260A

Appeal No. : Notice of Motion Nos. 1485 in Cexal Nos. 88, 3108/2008 in Cexal No. 166/2008 and 3111/2008 in Cuapp

Appellant : The Commissioner of Central Excise;The Commissioner of Service Tax;The Commissioner of Customs

Respondent : Shree Rubber Plast Co. Pvt. Ltd.;siemens Nixdorf Information Systems Ltd.;jewel Tech (i) Pvt. Ltd.

Advocate for Def. : Jas Sanghvi, Adv. i/b., PDS Legal in Notice of Motion Nos. 2869 and 2970/2008 in Cexal No. 143 and 144/2008 and Notice of Motion No. 3119/2008 in Cuappl No. 84/2008, ;Madhur Baya and ;Vikram Nankani,

Advocate for Pet/Ap. : R.V. Desai and ;A.S. Rao, Advs., i/b., Rutuja Ambekar, Adv. in Notice of Motion No. 1485/2008 in Cexal No. 88/2008, ;R.V. Desai and

;A.S. Rao, Advs., i/b., K.R. Chaudhary, Adv. in Notice of Motion No

Judgement :

S. Radhakrishnan J.

1. All the above matters have been referred to us by the Hon'ble the Chief Justice, in view of conflicting decisions of two Division Benches on the issue of whether this Court is empowered to condone the delay in filing the Appeals under Section 35G of the [Central Excise Act, 1944](#) which are filed beyond the prescribed period of 180 days.

2. One Division Bench in the case of Commissioner of Customs v. Sujog Fine Chemicals (India) Ltd. (hereinafter referred to as Sujog Fine Chemicals case for brevity sake), by a Judgment and order dated 13th August, 2008 held that in the light of Section 29(2) of [Limitation Act 1963](#), in any Appeal filed under Section 130 of the [Customs Act, 1962](#), this Court is empowered under Section 5 of the Limitation Act, 1963 to condone the delay.

3. Whereas another Division Bench in a group of cases in Commissioner of Central Excise v. Shruti Colorants Ltd. (hereinafter referred to as Shruti Colorants Limited case for brevity sake), by a Judgment and order dated 29th August, 2008 involving Appeals under Section 35G of the [Central Excise Act, 1944](#) held that this Court is not empowered to condone the delay taking recourse to Section 5 of the Limitation Act, 1963.

4. Right at the outset, it is stated that the wordings in both Section 130 of [Customs Act, 1962](#) and Section 35G of [Central Excise Act, 1944](#) with regard to filing of appeals in this Court and the period of limitation of 180 days are identical.

Section 130 of the [Customs Act, 1962](#)

130. Appeal to High Court -

(1) ..

(2) Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this subsection shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Customs or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section.

Section 35G of the [Central Excise Act, 1944](#)

35G. Appeal to High Court -

(1) ...

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this subsection shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section.

5. Section 29 of Limitation Act, 1963 envisages 'Savings'. Sub -section 29(2) thereof reads thus:

29(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 - 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

6. The Hon'ble Supreme Court in the case of Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker : AIR 1995 SC2272 , has considered in depth the scope and ambit of Section 29(2) of Limitation Act, 1963, and has observed in paragraph Nos. 8, 9, 10, 11 & 15 as under:

(8) ... When the aforesaid well settled tests for deciding whether an authority is a court or not are applied to the powers and functions of the appellate authority constituted under Section 18 of the Rent Act, it becomes obvious that all the aforesaid essential trappings to constitute such an authority as a court are found to be present. In fact, Mr. Nariman learned Counsel for Respondent also fairly stated that these appellate authorities would be courts and would not be *persona designata*. But in his submission as they are not civil courts constituted and functioning under the Civil Procedure Code as such they are outside the sweep of Section 29(2) of the Limitation Act. It is, therefore, necessary for us to turn to the aforesaid provision of the Limitation Act. It reads as under:

S. 29(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 - 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law. A mere look at the aforesaid provision shows for its applicability to the facts of a given case and for importing the machinery of the provisions containing Sections 4 - 24 of the Limitation Act the following two requirements have to be satisfied by the authority invoking the said provision. (i) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application. (ii) The said prescription of period of limitation under such special or local law should be different from the period prescribed by the schedule to the Limitation Act.

(9) If the aforesaid two requirements are satisfied the consequences contemplated by Section 29(2) would automatically follow. These consequences are as under:

(i) In such a case Section 3 of the Limitation Act would apply as if the period prescribed by the special or local law was the period prescribed by the schedule.

(ii) For determining any period of limitation prescribed by such special or local law for a suit, appeal or application all the provisions containing Sections 4 - 24 (inclusive) would apply insofar as and to the extent to which they are not expressly excluded by such special or local law.

(10) ... It is now well settled that 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. As laid down by a majority decision of the Constitution bench of this Court in the case of *Vidyacharan Shukla v. Khubchand Baghel* : [1964]6SCR129 . When the first schedule of the Limitation Act prescribes no time limit for a particular appeal, but the special law prescribes a time limit for it, it can be said that under the first schedule of the Limitation Act all appeal can be filed at any time, but the special law by limiting it provides for a different period. While the former permits the filing of an appeal at any time, the latter limits it to be filed within the prescribed period. It is, therefore, different from that prescribed in the former and 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.

(11) It is also obvious that once the aforesaid two conditions are satisfied Section 29(2) on its own force will get attracted to appeals filed before appellate authority under Section 18 of the Rent Act. When Section 29(2) applies to appeals under Section .18 of the Rent Act, for computing the period of limitation prescribed for appeals under that Section, all the provisions of Sections 4 - 24 of the Limitation Act would apply. Section 5 being one of them would therefore get attracted. It is also obvious that there is no express exclusion anywhere in the Rent Act taking out the applicability of Section 5 of the Limitation Act to appeals filed before appellate authority under Section 18 of the Act. Consequently, all the legal requirements for applicability of Section 5 of the Limitation Act to such appeals in

the light of Section 29(2) of Limitation Act can be said to have been satisfied.

(15) After repealing of Indian Limitation Act 1908 and its replacement by the present Limitation Act of 1963 a fundamental change was made in Section 29(2). The present Section 29(2) as already extracted earlier clearly indicates that once the requisite conditions for its applicability to given proceedings under special or local law are attracted the provisions contained in Sections 4 - 24 both inclusive would get attracted which obviously would bring in Section 5 which also shall apply to such proceedings unless applicability of any of the aforesaid Sections of the Limitation Act is expressly excluded by such special or local law. By this change it is not necessary to expressly state in a special law that the provisions contained in Section 5 of the Limitation Act shall apply to the determination of the period under it. By the general provision contained in Section 29(2) this provision is made applicable to the periods prescribed under the special laws. An express mention in the special law is necessary only for any exclusion. It is in 1965 the provision contained in old Section 31 was omitted. It becomes therefore apparent that on a conjoint reading of Section 29(2) of Limitation Act of 1963 and Section 18 of the Rent Act of 1965, provisions of Section 5 would automatically get attracted to those proceedings, as there is nothing in the Rent Act of 1965 expressly excluding the applicability of Section 5 of the Limitation Act to appeals under Section 18 of the Rent Act.

7. Similarly, the Hon'ble Supreme Court in the case of State of West Bengal and Ors. v. Kartick Chandra Das and Ors. : AIR 1996 SC2437 , while analysing the scope of Section 29(2) of Limitation Act, 1963, in paragraph No. 7 of the judgment has observed as under:- (7) In consequence, by operation of Section 29(2) read with Section 3 of the Limitation Act, limitation stands prescribed as a special law under Section 19 of the Contempt of Courts Act and limitation in filing Letters Patent Appeal stands attracted. In consequence, Sections 4 - 24 of the Limitation Act stands attracted to Letters Patent appeal insofar as and to the extent to which they are not expressly excluded either by special or local law. Since the rules made on the appellate side, either for entertaining the appeals under Clause 15 of the Letters Patent or appeals arising under the contempt of courts, had not expressly excluded, Section 5 of the Limitation Act becomes applicable. We hold

that Section 5 of the Limitation Act does apply to the appeals filed against the order of the learned Single Judge for the enforcement by way of a contempt. The High Court, therefore, was not right in holding that Section 5 of the Limitation Act does not apply. The delay stands condoned. Since the High Court had not dealt with the matter on merits, we decline to express any opinion on merits. The case stands remitted to the Division Bench for decision on merits.

8. The Division Bench in Shruti Colorants Limited case has strongly relied on the following two Supreme Court Judgments while coming to the conclusion that while entertaining the Appeals under Section 35G of the Central Excise Act, this Court is not empowered to have recourse to Section 5 of the Limitation Act, 1963. The two judgments are (i) Commissioner of Customs v. Punjab Fibres Limited : 2008(223)ELT337(SC) , (ii) Nasiruddin and Ors. v. Sita Ram Agarwal : [2003]1SCR634 .

9. In the matter before the Hon'ble Supreme Court in the case of Commissioner of Customs v. Punjab Fibres Limited, there was no argument with regard to the real scope of Section 29(2) of the Limitation Act, 1963.

10. In the above case of Commissioner of Customs v. Punjab Fibres Limited, the concept that Civil Court always has inherent right to condone the delay as per Section 5 of Limitation Act, unless expressly excluded as mentioned in Section 29(2) of Limitation Act, was not even argued. It is vital to note that Section 35G(9) of Central Excise Act, specifically mentions Code of Civil Procedure 1908 will apply with regard to the Appeals filed in the High Court.

11. Similarly, in Nasiruddin's case the Hon'ble Supreme Court was dealing with a matter arising out of Rent Act. The Supreme Court held that the issue of deposit by the tenant within 15 days is not an application within the meaning of Section 5 of the Limitation Act. The Court also further observed that the deposit does not require any application, therefore the provisions of Section 5 cannot be extended where the default takes place in complying with an order under Sub-section (4) of Section 13 of the Rent Act. The Court also went on to observe that for filing an application after the expiry of the period prescribed under the Limitation Act or anyother special statute a cause of action must arise. Compliance of an order

passed by a Court of law in terms of a statutory provision does not give rise to a cause of action. In the light of the above circumstances, various observations are made by the Supreme Court which will not apply in the instant cases.

12. Another Full Bench Judgment of our High Court in the case of Commissioner of Income Tax v. Velingkar Brothers : [2007]289ITR382(Bom) , has considered the issue of applicability of Section 5 of the Limitation Act in an Appeal under the Income Tax Act, 1961 before the High Court, which shall be filed within one hundred and twenty days. In the said judgment, paragraphs 11 and 13 read as under:

(11) In the present case, the real question is whether the provisions contained in Section 260A exclude the provisions of Section 5 of the Limitation Act by necessary implication. This question has to be seen in the light of the submissions advanced by the senior counsel for the assessee that the IT Act is a code in itself and Section 260A is exhaustive of the matters dealt with therein. It is true that the IT Act forms a code complete in itself but what is important is that the question of exclusion of the provision of the Limitation Act must be separately considered with reference to different provisions of the special Act and not in connection with the provisions of a special Act as a whole. Seen thus, we find that Section 260A itself provides that the provisions of the CPC relating to appeals, as far as possible, are applicable to the appeals under Section 260A. It would mean that Section 260A is not exhaustive of all the facets, aspects and matters with regard to the appeals under Section 260A. We have to look beyond Section 260A relating to appeals filed thereunder with regard to various aspects as provided in the CPC relating to appeals. How can it be said then that Section 260A forms a code complete in itself and is exhaustive of the matters relating to appeals filed under the said provision. Mr. S.K. Kakodkar, the senior counsel for the assessee contended that merely because the provision has been made in Sub-sub (7) of Section 260A that the provisions of CPC relating to appeals are made applicable to appeals under Section 260A (as far as possible) would not mean that Section 260A is not a code in itself. According to him, instead of specifying the provisions relating to appeal as provided in the CPC, the legislature has incorporated the said provisions by enacting Sub-sub (7). The submission of Mr. S.K. Kakodkar does not impress us.

Rather it seems to us that the legislature did not intend to make the provision of Section 260A watertight. The exclusion of the provisions of Sections 4 - 24 of the Limitation Act as provided in Section 29(2) cannot be lightly inferred. Implied exclusion is not readily inferred. To infer the exclusion of Section 5 of the Limitation Act, 1963, by necessary implication, the language of Section 260A must suggest that the provision contained therein is mandatory and compulsive and, though not expressly stated, the legislature intended unequivocally that the provisions of Section 5 of the Limitation Act are impliedly excluded.

(13) That the legislature has used the words 'shall be filed' in Sub-sub (2) means that the limitation for filing the appeal is as provided therein but that does not make Section 29(2) of the Limitation Act, 1963 inapplicable. The High Court being the superior Court, the power to condone the delay in filing the appeal must be read to be existent, more so by virtue of Section 29(2) of the Limitation Act, unless there is clear indication of its exclusion by implication. The use of the word 'shall' and the longer period of limitation (120 days) are not indicators of such exclusion. Nor from the position that Section 260A is silent about applicability of Section 29(2), any justifiable inference can be drawn for inapplicability of that provision. What is obvious need not be stated and, therefore, legislature may have thought fit that it was not necessary to express specifically about the power of the High Court to condone the delay in view of existence of Section 29(2). When the statute is silent, the presumption is not drawn automatically about the exclusion of Section 29(2) or for that matter Section 5 of the Limitation Act. In our thoughtful consideration of the whole matter, there is nothing to indicate that the application of Section 29(2) is excluded except providing a special limitation. Section 260A does not necessarily imply the exclusion of Sections 4 - 24 of the Limitation Act.

13. After analysing the aspect in depth, the Full Bench, clearly came to a conclusion that in such Appeals, the High Court is empowered to have recourse to Section 5 of the Limitation Act.

14. Unfortunately the two judgments of the Supreme Court in the case of Mukri Gopalan and also of Kartik Chandra Das were not brought to the notice of the Division Bench which decided the Shruti Colorants Case. In fact the above two

judgments of the Supreme Court deal with the scope and purport of Section 29(2) of Limitation Act exhaustively, clearly holding that unless expressly excluded, civil courts are empowered to have recourse to Section 5 of Limitation Act to condone the delay.

15. Similarly, unfortunately even the Full Bench Judgment of our Court in the case of Commissioner of Income Tax v. Velingkar Brothers was not brought to the notice of the above Division Bench which dealt with the case of Shruti Colorants case. In fact in that case the expression Appeal 'shall' be filed within 120 days was interpreted to mean that it did not take away the Court's power to condone delay having recourse to Section 5 of the Limitation Act.

16. The Full Bench in the above judgment went on to hold that the exclusion of the provisions of Sections 4 - 24 of the Limitation Act as provided in Section 29(2) cannot be lightly inferred. The Court also held that implied exclusion is not to be readily inferred.

17. The Full Bench in the above judgment in Paragraph No. 13 has again categorically reiterated that the legislature has used the words 'shall be filed' in Sub-section (2) means that the limitation for filing the appeal is as provided therein but that does not make Section 29(2) of the [Limitation Act 1963](#) inapplicable.

18. The Full Bench again observed that the High Court being the Superior Court, the power to condone the delay in filing the appeal must be read to be existent, more so by virtue of Section 29(2) of Limitation Act, unless there is a clear indication of its exclusion by implication.

19. The Full Bench also held that the word 'shall' and the longer period of limitation (120 days) were not indicators of such exclusion.

20. Another vital aspect to be noted is that Section 35G is silent about the applicability of Section 29(2) will not justifiably lead to an inference about the inapplicability of that provision. This was the view of the Full Bench while dealing with an Appeal to High Court under Section 260A of the Income Tax Act.

21. In that behalf, the above Full Bench has observed to the effect that what is obvious need not be stated and therefore, legislature may have thought fit that it was not necessary to express specifically about the power of High Court to condone the delay in view of existence of Section 29(2) of Limitation Act.

22. The Full Bench also has rightly observed that when a statute is silent, the presumption is not drawn automatically about the exclusion of Section 29(2) or for that matter Section 5 of the Limitation Act.

23. As laid down by the Hon'ble Supreme Court in Mukri Gopalan's case, for the applicability of Section 4 - 24 of Limitation Act, the following three conditions must be satisfied:

- (i) There must be prescribed period of limitation under any special or local law;
- (ii) The said prescription of period of limitation should be different from that of the period prescribed by the Schedule of the Limitation Act.
- (iii) Application should be before a Civil Court.

24. Section 35G of the Central Excise Act, satisfies all the above three conditions.

25. Mukri Gopalan's case categorically states that if the above requirements are satisfied, the consequences contemplated under Section 29(2) would automatically follow.

26. In Mukri Gopalan's case, it was found that there was no express exclusion anywhere in the Rent Act, taking out the applicability of Section 5 of Limitation Act. In the present case also there is no express exclusion of Section 5 of Limitation Act in Section 35G of Central Excise Act, and the same cannot be lightly implied or inferred.

27. In Mukri Gopalan's case, it is categorically stated that it is not necessary to expressly state in a special law that the provisions of Section 5 of Limitation Act shall apply.

28. In Mukri Gopalan's case the Hon'ble Supreme Court categorically states that an express mention in the special law is necessary only for any exclusion.

29. Similarly, the Hon'ble Supreme Court again reiterated in Kartick Chandra's case that Sections 4 - 24 of Limitation Act, stands attracted in so far as and to the extent to which they are not expressly excluded either by special or local law.

30. In the light of the above, we are in agreement with the view expressed in Sujog Fine Chemicals case, and hold that Section 5 of Limitation Act will be applicable to Appeals filed under Section 35G of the [Central Excise Act, 1944](#).

31. Hence the above Appeals stand restored to file. The Notices of Motion for condonation of delay be placed before appropriate Division for consideration in accordance with law on its own merit.

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