

Thomas Thomas and anr. Vs. the Kottayam Municipality and anr.

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Court : Kerala

Decided On : Aug-28-2008

Reported in : 2008(3)KLJ482

Judge : Antony Dominic, J.

Acts : Central Excise Act; [Finance Act, 1994](#) - Sections 85(3); ; Limitation Act - Sections 5, 29(2) and 34; Municipalities Act - Sections 406(3); Tamilnadu General Sales Tax Act, 1959; [Constitution of India](#) - Articles 142 and 226

Appeal No. : WP(C) No. 24656/2008

Appellant : Thomas Thomas and anr.

Respondent : The Kottayam Municipality and anr.

Advocate for Def. : Siby Mathew and; A.A. Mohammed, Advs.

Advocate for Pet/Ap. : Denizen Komath and; Sherry J. Thomas, Advs.

Disposition : Appeal dismissed

Judgement :

Antony Dominic, J.

1. The challenge in this writ petition is against Ext. P13(a) order, by which Ext. P13 application filed by the petitioner for condoning 141 days delay in filing an appeal

was rejected by the Tribunal for Local Self Government Institutions.

2. Facts of the case are that the petitioners filed an application for a building permit and at that stage they were issued Exts.P3 and P4 notices of demolition. Appeal before the Tribunal for Local Self Government Institution was disposed of setting aside Exts. P3 and P4 and directing that fresh orders be passed. Petitioners submits that in pursuance to the appellate order, Ext. P5 was issued under Section 406(3) of the Municipalities Act and again the petitioners filed Ext.P6 appeal. The Tribunal set aside Ext. P5 reserving liberty to the respondent to pass fresh orders in the matter. Thereafter Exi.P8 notice was issued by the Municipality, in response to which Ext.P9 objection was filed. However, by Ext. P10 petitioners were ordered to demolish the structure.

3. The petitioners submit that they pursued the matter with the Municipality by filing Ext. P 11 representation praying for recalling Ext P10 as their request was not considered, they approached this Court by filing WP(C) No. 23287/2008. When that writ petition came up for admission before this Court on 4.8.2008, it was disposed of by Ext. P12 judgment, holding that the remedy of the petitioner is to file an appeal before the Tribunal. Accordingly, the writ petition was dismissed without prejudice to the right of the petitioner to file appeal as provided under the Municipality Act.

4. Petitioner submits that in pursuance to the said judgment, they filed Ext. P13 appeal dated 11.8.2008, along with I.a. No. 845/2008, an application for condonation of delay of 141 days. The Tribunal considered I.A. No. 845/2008 and dismissed the same by Ext. P13(a) order dated 11.8.2008 on the ground that the power of the Tribunal to condone the delay in terms of Rule of the Tribunal Rules 8 was limited to one month. Seeking to quash Ext. P 10 and P13(a) and to direct respondent to refrain from initiating proceedings against the structure mentioned in Ext. P 10, that this writ petition is filed.

5. The counsel for the petitioner submits that, though under the proviso to Rule 8 of the Tribunal rules, the power conferred on the Tribunal to condone the delay is confined to a period of one month, it is well within the power of this Court under Article 226 of the Constitution to consider the explanation offered for the delay and

either to the validity of Ext. P10 in the writ petition or direct that the delay in filing appeal to condoned and the appeal be considered on merits. For drawing support to this contention of the learned Counsel for the petitioners, the judgment of the Apex Court in the case of ITC v. Union of India : (1998)8SCC601 and Singh Enterprises v. Commissioner of Central Excise : 2008(221)ELT163(SC) are relied.

6. On the other hand standing counsel for the Municipality submits that once the statutory period of limitation has expired, neither the Tribunal can condone the delay nor can this Court, invoking its extraordinary powers under Article 226 of the [Constitution of India](#), direct that the delay be condoned and thus render the provision in the statute otiose.

In support of this contention, counsel for the Municipality referred to the judgments in Assistant Commissioner of Central Excise v. Krishna Poduval : 2005(4)KLT947 , Krishnan T. and Anr. v. State of Kerala and Ors. 2007(1) ILR 233 and also the Apex Court judgment in Hatti Gold Mines Co. Ltd. v. Vinay Heavy Equipments : (2008)7SCC169 .

7. I have considered the submissions made by both sides. In the ITC case, the Supreme Court has permitted the appellant therein to file an appeal even beyond the period of limitation prescribed in the statute. However, reading of the judgment shows that it was taking note of the peculiar facts of the case and clarifying that it was to do justice between the parties that the Apex Court had issued such a direction. This evidently is a judgment rendered by the Apex Court invoking the power under Article 142 of the Constitution, which power is not conferred on the High Court. That apart, in Singh Enterprises v. Commissioner of Central Excises : 2008(221)ELT163(SC) referred to above, the Supreme Court did not follow the ITC judgment and para '10' to the extent relevant, reads as under:

ITC case was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the cause shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. The will be no

order as to costs.

(emphasis supplied)

Therefore, it is obvious that the ITC case did not lay down any legal principle to be adopted as a precedent to be followed and therefore this judgment, does not improve the case of the petitioner in any manner.

8. The judgment in Asst. Commissioner of Central Excise v. Krishna Poduval : 2005(4)KLT947 , was a case arising under the Central Excise Act. The statute prescribed the period of limitation and also restricted the power of the appellate authority to condone the delay. As in this case, an appeal was filed belatedly and since the delay sought to be condoned was beyond the permissible period, delay was declined to be condoned and consequently the appeal was rejected. The order was challenged before this Court and this Court entertained the writ petition on merits and examined the validity of the order passed by the departmental authorities and granted relief to the petitioner.

9. Against the judgment of the learned single Judge appeal filed by the Department and in paras 7 and 8 of the judgment, it has been held as follows.

7. At the outset we may state that in so far as the respondents have not taken up the original orders imposing penalty in appeals before the appellate authority within the maximum period prescribed under Section 85(3) of the [Finance Act, 1994](#), they cannot get the appeals revived and heard on merit by resorting to the discretionary remedy before this Court under Article 226 of the [Constitution of India](#). Once the period of limitation has run itself out and the appellate authority does not have power to condone the delay in filing the appeals beyond the maximum period prescribed under the Act, the remedies of the appellants come to an end just like in the case of a time barred suit and the respondents cannot, by invoking the discretionary remedy under the extraordinary jurisdiction of this Court under Article 226 of the [Constitution of India](#), resurrect cause of action and require this Court to consider their contentions against the original orders on merit. That would amount to defeat the very law of limitation which we are not expected to do under Article 226. If we are to entertain the contentions of the respondents on

merits, that would amount to negating the law of limitation which we have no jurisdiction to do under Article 226 and which may even lead to anomalous results. We are not satisfied that the jurisdiction of this Court under Article 226 of the [Constitution of India](#) is so wide as to resurrect a cause of action which has become unenforceable on account of the law of limitation. Further, we are of the firm opinion that the jurisdiction under Article 226 of the [Constitution of India](#) cannot be invoked against express statutory provisions, however harsh the effect of the provisions may be on an assessee or litigant.

8. The learned Counsel for the respondents has cited before us a decision of the Madras High Court in *Maheswary Fire Work Industries v. Commercial Tax Officer and Ors.* reported in 12 STC 272, which held that 'although', as far as the appellate authority is concerned under the Tamilnadu General Sales Tax Act, 1959, its jurisdiction and power to condone delay is limited to a period of 30 days, the limitation cannot be made application to the High Court while exercising jurisdiction under Article 226 of the [Constitution of India](#)'. With great respect, we are unable to persuade ourselves to agree with the said decision which does not also contain any reasoning for holding so. According to us, all the remedies of the respondents have come to an end when their appeals were dismissed by the commissioner of Central Excise (Appeals) on the ground of limitation. Even the further appellate authority or this Court does not have the jurisdiction to entertain the claim on merits disregarding the limitation or condoning the delay. In any event, the appellants have not pleaded any extraordinary circumstances warranting interference, even if we had the jurisdiction to do so.

10. This judgment of the Division Bench has been followed by the Division Bench in the case of *Krishnan T. and Anr. v. State of Kerala and Ors.* ILR 2007 (1) Kerala 233, wherein para 7, it has been held as follows.

Counsel for the appellant however, submitted that though the Government have rejected the appeal on the ground of delay this Court under Article 226 of the [Constitution of India](#) can entertain the writ petition in the interests of justice. We have already held in *Abel's case* that a party cannot invoke the provisions of Article 226 so as to bypass a statutory remedy, especially when no power is

conferred on the statutory authority to condone the delay. This legal position has been approved by this Court in Assistant Commissioner of Central Excise v. Krishna Poduval where this Court held that once the period of limitation has run itself out and the appellate authority does not have the power to condone the delay in filing the appeals beyond the maximum period prescribed under the Act, the remedies come to an end just like in the case of a time barred suit and cannot, by invoking the discretionary remedy under Article 226 of the [Constitution of India](#), resurrect unenforceable cause of action.

11. From the aforesaid judgments it is clear that once the statutory period of limitation has expired, the party loses its right of appeal. Thereafter it is not open to him to invoke the power of this Court under Article 226 of the Constitution and bypass the statutory restrictions and get the delay condoned or to have the matter examined by this Court. Admittedly proviso to Rule 8(3) authorises the Tribunal to condone delay of only one month if it is satisfied that there is sufficient reason for the delay. The power conferred on the Tribunal being restricted, in my view, the above two judgments of this Court gives a complete answer to the contentions of the petitioner.

12. As rightly contended by the counsel for the Municipality if a special statute has prescribed a period of limitation, to that extent, the provisions of the Limitation Act will stand excluded as provided in Section 29(2) of the Limitation Act. This contention of the learned Counsel for the Municipality is fully supported by the judgment of the Apex Court in 2008 (7) SCC 169 and para 10 to the extent relevant, reads as under.

When any special statute prescribes certain period of limitation as well as provision for extension upto specified time limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail and to that extent the provisions of the Limitation Act shall stand excluded. As the intention of the legislature in enacting Sub-section (3) of Section 34 of the Act is that the application for setting aside the award should be made within three months and the period can be further extended on sufficient cause being shown by another period of 30 days but not thereafter, this Court is of the opinion that the

provisions of Section 5 of the Limitation Act would not be applicable because the applicability of Section 5 of the Limitation Act stands excluded because of the provisions of Section 29(2) of the Limitation Act.

(emphasis supplied)

13. Counsel for the petitioner also relied on the decision reported in Pushpakaran v. Union of India 2008 (1) KLT 161. That was a case arising under the Railway Claims Tribunal (Procedure) Rules, 1989. However, on going through the Rules, it is seen that unlike Rule 8 of the Tribunal Rules, where the maximum condonable period is one month, no such limitation is provided for in Rule 18 of the Rules referred to above, which came up for consideration of the Division Bench in the above case. In view of this factual difference this judgment of the Division Bench does not help the petitioner.

14. Therefore the contentions raised by the counsel for the Municipality deserves acceptance and the writ petition is only to be dismissed.

Writ Petition fails and is dismissed.

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