IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9115 of 2024

==

Vishal Kumar Gupta, (Proprietor of M/S Arya Enterprises) Son of Bharat Jee @ Bharat, Resident of Kagaji Mahalla, Brahmsthan More, Siwan, Bihar-841226.

... ... Petitioner/s

Versus

1. Union of India through the Secretary, Department of Revenue, Government of India, New Delhi.
2. The Secretary, Department of Revenue, Government of India, New Delhi.
3. The Principal Commissioner of Central Goods and Service Tax, 4th Floor, C.R. Building (Annexe), Bir Chand Patel Path, Patna-800001
4. The Commissioner of Central Tax, 4th Floor, C.R. Building (Annexe), Bir Chand Patel Path, Patna-800001.
5. The Joint Commissioner of State Tax, Circle Siwan, Saran, Bihar.
6. The State Tax Appellat Authority, Saran Division, Chapra
7. The Additional Commissioner of State Tax on behalf of the State Tax Appellat Authority, Saran Division, Chapra

... ... Respondent/s

==

Appearance :

For the Petitioner/s	:	Mr. Ravi Prakash, Advocate
For the Respondent/s	:	Dr. K.N. Singh, ASG
		Mr. Anshuman Singh, Sr. SC, CGST & CX
For the State	:	Mr. Vivek Prasad, GP-7

==

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 21-06-2024

The writ petition is filed against the appellate order dated 29.04.2024, Annexure-P/3, which rejected the appeal on the ground of delay. The appeal was from Annexure-P-1 order of assessment passed on 20.09.2023.

2. Section 107 of the Bihar Goods and Services Tax

Act, 2017 (for brevity "BGST Act") permits an appeal to be filed within three months and also apply for delay condonation with satisfactory reasons within a further period of one month; which delay the Appellate Authority is empowered to condone if satisfied with the reasons stated.

3. The order impugned in the appeal was dated 20.09.2023. An appeal could have been preferred on or before 19.12.2023 and also filed with delay before 18.01.2024. The appeal is said to have been filed only on 31.03.2024, after more than two months from the date on which even the period for delay condonation, as per the statute expired.

4. The learned counsel for the petitioner produced a decision of the Division Bench of the High Court of Calcutta dated 01.12.2023 passed in **M.A.T. 81 of 2022 and other analogous cases (S.K. Chakraborty & Sons v. Union of India & Ors.)**, wherein Section 107 of the West Bengal Goods and Services Tax Act, 2017; which provision is *in pari materia* with the Bihar Goods and Services Tax Act, 2017 (for brevity 'the Act of 2017') was considered. Therein after considering the decisions of the Hon'ble Supreme Court in **New India Assurance Company Limited v. Hilli Multipurpose Cold Storage Private Limited [(2020) 5 SCC 757]**, **Superintending Engineer/Dehar Power House Circle Bhakra Beas Management Board (PW) Slapper v. Excise and Taxation**

Officer [(2020) 17 SCC 692] and **Assistant Commissioner (CT) LTU, Kakinada v. Glaxo Smith Kline Consumer Health Care Limited [(2020) 19 SCC 681]**, held that since there is no express exclusion of Section 5 of the Limitation Act; it would stand attracted. It was declared that there is power in the appellate authority to extend the period for filing the appeal even beyond the further period provided of one month; after the limitation period of three months, and condone the delay occasioned invoking the power under Section 5 of the Limitation Act.

5. The decision of the Calcutta High Court, we remind ourselves is not a binding precedent and has only a persuasive effect. We have carefully looked at the decisions of the Hon'ble Supreme Court cited by the High Court; which are binding on us.

6. In **New India Assurance Company Limited** (supra), a Constitution Bench of five Judges considered the provisions of Section 13(2)(a) of the Consumer Protection Act, 1986, which provided for the opposite party to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum. It was held that the intention of the legislature was that the opposite party would get a time of thirty days and an additional fifteen days at the discretion of the Forum, to file

its response and no further discretion of granting time beyond forty-five days is intended under the Act. Distinguishing the provision from Order 8 Rule 1 of the CPC, it was held that sub clause (ii) of Section 13(2)(b) also provided for the consequence of failure to file such response, which was to proceed ex-parte on the basis of evidence brought in by the complainant.

7. In **Superintending Engineer/Dehar Power House Circle** (supra), the delay considered was under the Himachal Pradesh Value Added Tax Act. In the provision for appeal under Section 45 of that Act, an appeal was to be filed within sixty days or within such extended period as the appellate authority may allow as per sub-section (4), for reasons to be recorded in writing. A *suo motu* revision by the Commissioner, under Section 46(1) could be within five years and a challenge from that order, to the Tribunal, could be made within sixty days. The challenge to the order of the Tribunal under Section 48(1), by way of a revision to the High Court was within ninety days of the communication of the order. Section 48 did not expressly exclude the Limitation Act and since Section 45(4) expressly made applicable the principles of Section 5 of the Limitation Act; it was held, the scheme of the Act permitted condonation of delay for any period and Section 5 of the Limitation Act is not excluded. It is relying on the above three Judges Bench decision, which was of a higher numerical strength than

Assistant Commissioner (CT) LTU (supra) that the learned Division Bench of the Calcutta High Court passed the aforecited decision.

8. **Assistant Commissioner (CT) LTU, Kakinada** (supra), considered the specific question of the power to be exercised under Articles 226 and 32 of the Constitution, wherein it was categorically declared that the writ jurisdiction cannot be exercised in a manner undermining or defeating the applicable statutory regime. The power of the appellate authority to condone delay under the Andhra Pradesh Value Added Tax Act, 2005 was under consideration, wherein the time for filing a statutory appeal was thirty days from the date on which the order or proceeding was served on the assessee and within a further period of thirty days; with an application to condone the delay, which power was conferred on the appellate authority. It was held that the Appellate Authority was not empowered to condone the delay beyond the aggregate period of sixty days from the date of order or service of proceeding on the assessee; as the case may be. The Hon'ble Supreme Court also considered the question as to whether the Apex Court or the High Court ought to entertain a challenge to the assessment order on the sole ground that the statutory remedy of appeal against the order stood foreclosed by the laws of limitation. The question was answered in the negative and it was held that even under Article

142 of the Constitution of India, it is one thing to say that "prohibitions or limitations in a statute" cannot come in the way and it is quite a different thing to say that while exercising jurisdiction under Article 142, the Supreme Court can altogether ignore the substantive provisions of a statute dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in that statute. It was held "*indubitably, the powers of the High Court under Article 226 of the Constitution of India are wide, but certainly not wider than the plenary powers bestowed on the Supreme Court under Article 142 of the Constitution* (*sic* para-16*)*". It was also held in para-18 that "*what the Supreme Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is not fathomable as to how the High Court can take a different approach in the matter, in reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by the Supreme Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution."(sic)*

9. We have to notice a subtle distinction in the provisions dealt with in **Superintending Engineer/Dehar Power House Circle** and **Assistant Commissioner (CT) LTU, Kakinada** (both supra). In **Superintending Engineer/Dehar Power House Circle**, there was no specification of the further

period within which a delayed appeal could be filed and it was looking at the statutory scheme, discernible from the various provisions relating to initiation of appeals and revisions, that Section 5 of the Limitation Act was held to be attracted. In this context, we have to necessarily refer to the decision of another co-ordinate Bench (three Judges) in **Commissioner of Customs and Central Excise v. Hongo India (P) Limited [(2009) 5 SCC 791]**, which considered the provisions of the Central Excise Act. **Superintending Engineer/Dehar Power House Circle**, considering the provisions of the H.P. VAT Act, found the scheme of that Act to be materially different from the Central Excise Act; to distinguish **Hongo India (P) Limited**.

10. **Hongo India (P) Limited** (supra) considered the power to condone the delay beyond the period specified in Section 35-H of the Central Excise Act. As per the provision, application for references to the High Court ought to be made within 180 days from the date of communication of the decision or order. Considering whether the provisions of the Limitation Act stands excluded; the Hon'ble Supreme Court looked at the scheme of the special law i.e. the Central Excise Act. It was held that "*even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those*

provisions or the nature of the subject-matter and the scheme of the special law exclude their operation" (*sic*). The applicability of the provisions of the Limitation Act, hence, had to be judged from the terms of the special law and not merely based on the Limitation Act.

11. Looking at the Central Excise Act, **Hongo India (P) Limited** (supra), found that under Section 35, an appeal to the Commissioner and under Section 35B, an appeal to the Appellate Tribunal were to be preferred within sixty days and three months respectively from the date of the communication of the order, with an express provision to condone the delay of thirty days in the former and any time beyond the prescribed period, if there is sufficient cause shown in the latter case. Section 35EE; provided for a revision to be preferred within three months from the date of communication, with further power conferred on the revisional authority to condone the delay for a further period of ninety days, if sufficient cause is shown. However, Section 35G providing an appeal to the High Court and Section 35H which speaks of an application for reference to the High Court requires such proceeding to be initiated within a period of 180 days with no provision to extend the period of limitation or condonation of delay. The Hon'ble Supreme Court held that the scheme of the Excise Act made the position clear that whenever the legislature intended an

authority, tribunal or court, to entertain the appeal by condoning the delay occasioned, the same was specifically provided. Hence, when there is a provision which only specifies the period in which the proceeding has to be initiated; in the absence of any clause permitting the condonation of delay for sufficient cause shown, then there is complete exclusion of the Limitation Act.

12. In this context, we also have to refer to a decision of another three Judges Bench in **Hukumdev Narayan Yadav v. Lalit Narain Mishra [(1974) 2 SCC 133]** far earlier in time to the above cited decisions. Therein the question was whether the limitation in presenting an election petition could be extended and the delay occasioned condoned. The respondent was declared elected on 02.02.1972 and the election petition was filed on 20.03.1972. The election petition was dismissed as delayed since Section 81 of the Representation of the People Act, 1951, provided that *inter alia* it had to be filed within a period of forty-five days from the date of the election of the returned candidate. The election petition was filed on 20.03.1972 since the 18^{th} and 19^{th} day of March were Saturday and Sunday. On Saturday, the Judges do not sit and Sunday is a holiday for the Court and the contention was that Section 10 of the General Clauses Act could be availed. It was also contended that even otherwise Section 5 of the Limitation Act is applicable. On the first question, which

is not relevant in the present case, it was found that though the Judges were not sitting, the Rules of the Patna High Court permitted the election petition to be moved before the Registrar. Having held so, the question as to whether Section 5 of the Limitation Act would apply was elaborately considered, with reference to Section 29(2) of the Limitation Act as has been done by the High Court of Calcutta. It was held so in para-17.

> *"17**.** Though Section 29(2) of the Limitation Act has been made applicable to appeals both under the Act as well as under the Code of Criminal Procedure, no case has been brought to our notice where Section 29(2) has been made applicable to an election petition filed under Section 81 of the Act by virtue of which either Sections 4, 5 or 12 of the Limitation Act has been attracted. Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed under Section 81 of the Act, Section 29(2) would be attracted, and what we have to determine is whether the provisions of this Section are expressly excluded in the case of an election petition.* ***It is contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied upon, but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions***

it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. *The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. It will be seen that Section 81 is not the only Section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under Section 81 it should equally apply to Sections 82 and 117 because under Section 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to Section 81. Again Section 6 of the Limitation Act which provides for the extension of the period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to an election petition. Similarly, Sections 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filing of election petitions and their trial."*

[*emphasis supplied by us with the underlining*]

Under the R.P. Act, if the provisions of Section 81 are not complied with, Section 86 mandates that the High Court shall dismiss the petition; which was found to be an exclusion of Section 5 of the Limitation Act.

13. The principles as discernible from the aforesaid indicates various situations and contingencies under which the applicability of Section 5 of the Limitation Act is to be looked into. In **Hukumdev Narayan Yadav** (supra), the special statute, the R.P. Act, contained a provision which mandated that the High Court shall dismiss the election petition, if the provisions of Section 81 were not complied with. In Section 81 there was a stipulation that an election petition shall be filed within a period of forty-five days from the date of the election of the returned candidate. In **New India Assurance Company Limited** (supra), the special statute, the Consumer Protection Act, provided a specific time period for responding to the complaint and further provided a period of fifteen days; which further period was to be granted at the discretion of the District Forum. Any failure to respond within such extended time would invite the consequence of an ex-parte decision based on the evidence adduced by the complainant. In both these situations, the Hon'ble Supreme Court; respectively a three Judges Bench and a five Judges Bench found that the provision is mandatory and

not directory. In the former case, there is express exclusion of Section 5 of the Limitation Act and the latter, the provision was found to be different from Order 8 Rule 1 of the CPC.

14. In **Hongo India (P) Limited** (supra), the provisions of the statute, the Central Excise Act, providing for different periods for different proceedings were examined to find that wherever the legislature intended empowerment of the authority to condone delay; it was specifically done. It was in that circumstance, the grant of a larger period for filing an appeal or revision before the High Court was held to exclude the provision under Section 5 of the Limitation Act; as evident from the statutory scheme. In **Superintending Engineer/Dehar Power House Circle** (supra), the scheme of the statute as coming out from the various provisions dealing with appeals, revisions and so on, under the H.P. VAT Act, were taken as an indication of the intention of the legislature to make applicable Section 5 of the Limitation Act.

15. The principles that can be culled out from the binding precedents are dependent upon the language used in the statute, which throws light on the statutory scheme. When there is a period provided for initiating a proceeding and it is also provided that the authority/tribunal/court before which a proceeding is to be initiated would have the power to condone the delay if sufficient cause for the delay is shown, without

specifying the period within which delayed proceedings can be initiated, then necessarily the provision under Section 5 of the Limitation Act would be fully applicable; or rather, the provision would be similar to Section 5 of the Limitation Act. When a specific time period is provided for the authority/tribunal/court before which a proceeding is to be initiated and a further period is specified for delay condonation, then there is exclusion of Section 5 of the Limitation Act. However, when there is no provision for delay condonation expressly provided and only a period of limitation for initiating the proceeding stipulated, then the scheme of the special statute will have to be looked at to understand whether Section 5 is excluded or not.

16. With the above interpretation in mind, we look at Section 107 of the Act of 2017 and we find absolutely no way to entertain the writ petition. We respectfully disagree with the dictum of the decision of the Division Bench of the Hon'ble Calcutta High Court.

17. We also have to notice the decision in **Sakuru v. Tanaji [(1985) 3 SCC 590]**, wherein it was held that when the appeal is before a body or authority other than a 'Court', special statute under which appeal is filed must authorise such body or authority to apply Section 5, while dealing with application for condonation of delay. The above decision was relied on in

International Asset Reconstruction Company of India Limited v. Official Liquidator of Aldrich Pharmaceuticals Limited and Others [(2017) 16 SCC 137], while dealing with the question as to whether Section 5 of the Limitation Act is applicable to appeals from the order of the Recovery Officer to the Debt Recovery Tribunal; to hold in the negative. **Sakuru** (supra) was also approvingly referred to in **Superintending Engineer/Dehar Power House Circle** (supra).

18. Further, The Central Board of Indirect Taxes and Customs has by Notification No. 53 of 2023- Central Tax, dated 02.11.2023 (S.O. 4767(E)) extended the time for filing appeal against an order passed by the Proper Officer on or before 31.03.2023 under Sections 73 and 74 of the BGST Act. This in fact extends the period for filing a delayed appeal beyond the one-month period as provided under Section 107(4) of the BGST Act, on following the special procedure prescribed under the said Notification. We have to further notice that the special procedure provided an appeal to be filed on or before 31.01.2024, if 12.5% of the remaining amount of tax in dispute subject to a maximum of twenty-five crore rupees is paid. The petitioner obviously has not availed of the said remedy also.

19. In the above circumstances, we find no reason to invoke the extraordinary jurisdiction under Article 226,

especially since it is not a measure to be employed where there are alternate remedies available and the assessee has not been diligent in availing such alternate remedies within the stipulated time.

20. The law favours the diligent and not the indolent. The delay stands against the petitioner.

21. The writ petition hence would stand dismissed.

(K. Vinod Chandran, CJ)

(Harish Kumar, J)

rohit/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	01-07-2024
Transmission Date	