

Authority Under Gratuity Act Cannot Condone Delay In Filing Appeal By Entertaining An Application U/S 5 Of Limitation Act: Kerala High Court

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

AMIT RAWAL; J.

WP(C) NO. 2502 OF 2021; 23 JANUARY 2023

THE SECRETARY, SREE AVITOM THIRUNAL HOSPITAL *versus* STATE OF KERALA

Petitioner/s by Adv R.S. Sarat

Respondent/s by Adv B. Ananthu, Sunil Kumar Kuriakose

J U D G M E N T

Order dated 10.12.2020 of the Regional Joint Labour Commissioner, Kollam rejecting the appeal preferred by the petitioner against the order of the controlling authority dated 28.3.2019 in G.C No.233 of 2018 being barred by law of limitation is under challenge and subsequent recovery proceedings brought on record vide interim application Exts.P10 and P11 which had been stayed for a period of six months.

2. Succinctly, the facts in brief are that an application under Section 7(4) of the Payment of Gratuity Act was filed by a workman namely Sindhu S on the ground that he had been working as a Senior Computer Operator with effect from 5.10.1998 and sought voluntary retirement on 16.3.2018. At the time of retirement, was drawing a sum of Rs.26,725/- as last drawn salary and claimed a sum of Rs.3,80,831/- as gratuity. The aforementioned application was numbered as GC 233 of 2018. Notice was issued to the petitioner Sree Avittam Thirunal Hospital, Thiruvananthapuram and sought to file the written statement. Thereafter, remained absent; nor filed written statement and accordingly, on 29.1.2019 was proceeded ex-parte.

3. Learned Controlling authority vide order dated 28.3.2019 assessed the gratuity to the tune of Rs.2,92,947/- by considering 19 years of length of service and taking into consideration of the last drawn salary of Rs.26,725/-. Accordingly, notice of payment of gratuity was served upon the petitioner on 28.3.2019, Ext.P2. Petitioner vide reply dated 8.11.2019 submitted that there was no scheme of gratuity or any fund when the respondent workman left the society. It was a charitable institution and performing functions without any financial assistance either from Government or Government agencies and requested to review the order dated 28.3.2019.

4. Jurisdiction of this Court, on behalf of the petitioner, was invoked by writ petition (C) No.21468 of 2020 by challenging the order of the authority and vide order dated 13.10.2020 it withdrawn with a liberty to avail the alternative remedy. The appeal accordingly was filed accompanied by an application for condonation of delay of one year. It has been rejected vide impugned order Ext.P8 on ground of being barred by limitation and subsequently recovery proceedings Exts.P10 and P11.

5. Learned counsel appearing on behalf of the petitioner submitted that the remedy of appeal is to be availed under Section 7 of the Act to be preferred within a period of 60 days from the date of receipt of the order with a further condonation of 60 days in case, it could not be filed within 60 days as prescribed under Section 7 of the Act. There is no exclusion of the applicability of the limitation Act and therefore the provisions of Section 29(2) of the Limitation Act, 1963 would be applicable. It is a beneficial legislation and persons so affected should not be prevented to espouse the

grievance by availing the remedy under the Act. In support of the contentions relied upon the judgment of the Supreme Court in **Commissioner of Sales Tax, U.P v. Madan Lal Dan and Sons, Barielly (1977 AIR 523)** and **Commissioner of Customs and Central Excise v. M/s Hongo India (P) Ltd. And Anr. arising out of S.L.P No.18999 of 2007 decided on 27.3.2009.**

6. In the first judgment, the controversy was with regard to the condonation of delay and payment of the application for condonation of delay by the appellate authority as in the aforementioned case the matter related to assessment years, and one appeal was preferred by the dealer respondent against the order of the Sales Tax officer which was disposed of by the Assistant Commissioner (Judicial) Sales Tax, Bareilly and served upon the dealer on 2.8.1965. The dealer lost the copy of the appellate order served upon him and thereafter re-applied for the same and delivered in the year 1967. Revision under Section 10 of the UP Sales Tax Act was preferred. Sub - Section 3B of Section 10 of the Act prescribed the period of limitation for filing such a revision; ie., one year from the date of service of the order. By accepting the prayer of condonation, the revision petition was partly allowed. At the instance of the Commissioner of Sales Tax, the matter was referred to the High Court. High Court answered the question in favour of the assessee by placing reliance upon the provision of section 12(2) of the Limitation Act.

7. **Commissioner of Customs and Central Excise** (supra) was a case where, as per Section 35B of the Central Excise Act, appeals to the appellate Tribunal were to be filed within 3 (three) months from the date on which the order sought to be appealed is communicated to the officer concerned or the other party and sub Section 5 of therein enables the Tribunal to condone the delay irrespective of the number of days, if sufficient cause is shown. Considering the provisions of Section 29(2) of the Limitation Act the appeal preferred beyond the limitation was condoned by taking the benefit of Section 5 of the Limitation Act.

8. On the contrary, learned counsel appearing for the respondent opposed the aforementioned prayer by submitting that the provisions of the Act referred to in the judgment cited on behalf of the petitioner did not exclude the applicability of the limitation Act and therefore the provisions of sub Section 2 of Section 29 of the limitation Act was pressed into service. But on plain and simple reading of the language of Section 7(7) of the Payment of the Gratuity Act the applicability of limitation has been specifically excluded as the limitation to file an appeal in the first instance is sixty (60) days and on explanation of sufficient ground can be preferred within a period of another sixty (60) days and not beyond. The aforementioned provisions are pari materia to the provisions of Section 34 of the Arbitration and Conciliation Act where in case the party fails to avail the remedy within the period of the limitation, cannot be further condoned by taking aid of Section 29(2) of the Act. In support of the contentions relied upon the judgment of the Supreme Court in **Ganesan v. the Commissioner, the Tamil Nadu Hindu Religious and Charitable Endowments Board and Ors. ((2019) 7 SCC 108)** (paragraph 58) and **Oil and Natural Gas Corp. Ltd. v. Gujarat Energy Transmission Corporation (2017 KHC 2730)**. In the first cited judgment the matter was with regard to the jurisdiction of the Commissioner to consider the application filed under Section 5 of the Limitation Act while hearing the appeal preferred under Section 69 of the Hindu Religious and Charitable Endowments Act, 1959 i.e., whether in such circumstances, the provisions of Section 29(2) of the Limitation Act with regard to the different limitation prescribed

for in a suit, appeal or application could be pressed into service or not. In the other judgment, it was a case where the limitation period for filing an appeal before the appellate authority under Section 125 of the Electricity Act was one hundred and twenty (120) days and it could not be condoned in exercise of powers under Section 14 and the period was held to be barred by limitation. In the instant case, petitioner preferred an appeal after almost one year.

9. I have heard the learned counsel for the parties and appraised the paperbook. It would be appropriate to reproduce the provisions of Section 7(7) of the Payment of Gratuity Act.

(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf: Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days: ³⁰ [Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount.]

The limitation to file an appeal against the order of the authority has been specified as sixty (60) days condonable by another 60 days subject to the explanation of prevention by giving a sufficient cause and not beyond. Section 5 and 29 of the Limitation Act reads thus:

5. Extension of prescribed period in certain cases. — Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Explanation.— The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

29. Savings.—(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872). (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 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. (3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law. (4) Sections 25 and 26 and the definition of “easement” in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend.

10. As per the provisions of sub Section 2 of Section 29 of the Act 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 to 24 (inclusive) shall

apply only in so far as, and to the extent to which, they are not expressly excluded by such special and local law.

11. On plain and simple reading of the aforementioned provisions, it is evident that the legislature while enacting sub Section 7 of Section 7 specifically excluded the application of limitation Act by providing the limitation of appeal for a period of 60+60 days. Otherwise, the limitation to file an appeal under the schedule of the limitation Act is thirty (30) days. Thus for all intends and purposes, there cannot be any condonation of delay by taking the aid of the aforementioned provisions by entertaining an application under Section 5 of the Limitation Act. In the judgment cited on behalf of the petitioner **Commissioner of Sales Tax, U.P v. Madan Lal** (supra) and **Commissioner of Customs and Central Excise** (supra), was a case wherein both aforementioned provisions i.e., the UP Sales Tax Act and the Central Excise Act there was no exclusion of the limitation Act. It is in that context the provisions of Section 29(2) of the Limitation Act were brought into consideration. Thus there cannot be quarrel to the findings rendered in the judgments (supra). The ratio culled out in the judgment relied upon by the respondent (para 58 and 59) in **Ganesan** (supra) extracted herein below would be applicable in the instant case.

58. The ratio which can be culled from above noted judgments, especially judgment of three Judge Benches, as noted above, is as follows:

- (1) The suits, appeals and applications referred to in the [Limitation Act](#), 1963 are suits, appeals and applications which are to be filed in a Court.
- (2) The suits, appeals and applications referred to in the [Limitation Act](#) are not the suits, appeals and applications which are to be filed before a statutory authority like Commissioner under Act, 1959.
- (3) Operation of [Section 29\(2\)](#) of the Limitation Act is confined to the suits, appeals and applications referred to in a special or local law to be filed in Court and not before statutory authorities like Commissioner under Act, 1959.
- (4) However, special or local law vide statutory scheme can make applicable any provision of the [Limitation Act](#) or exclude applicability of any provision of [Limitation Act](#) which can be decided only after looking into the scheme of particular, special or local law.

59. We, thus, answer question Nos.2 and 3 in the following manner:

- (i) The applicability of [Section 29\(2\)](#) of the Limitation Act is with regard to different limitations prescribed for any suit, appeal or application when to be filed in a Court.
- (ii) [Section 29\(2\)](#) cannot be pressed in service with regard to filing of suits, appeals and applications before the statutory authorities and tribunals provided in a special or local law. The Commissioner while hearing of the appeal under [Section 69](#) of the Act, 1959 is not entitled to condone the delay in filing appeal, since, provision of [Section 5](#) shall not be attracted by strength of [Section 29\(2\)](#) of the Act.

12. Accordingly, the order under challenge Ext.P8 cannot be said to be suffering from any illegality and perversity. No ground for interference is made out. Writ petition is accordingly dismissed.