

Bengal Chemist And Druggists ... vs Kalyan Chowdhury on 2 February, 2018

Equivalent citations: AIR 2018 SUPREME COURT 807, 2018 (3) SCC 41, (2018) 4 MPLJ 7, (2018) 5 MAH LJ 566, (2018) 1 WLC(SC)CVL 481, (2018) 2 SCALE 406, (2018) 2 PAT LJR 186, (2018) 3 CAL HN 15, (2018) 2 JLJR 49, 2018 (2) KCCR SN 190 (SC)

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Bench: Navin Sinha, R.F. Nariman

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 684 OF 2018

BENGAL CHEMISTS & DRUGGISTS ASSN.

...APPELLANT

VERSUS

KALYAN CHOWDHURY

...RESPONDENT

JUDGMENT

R.F. Nariman, J.

1) The present appeal is against an order of the National Company Law Appellate Tribunal dated 31.07.2017 by which the Appellate Tribunal, after setting out Section 421(3) of the Companies Act, 2013, (for short 'the Act') has dismissed the appeal as not maintainable, inasmuch as the appeal has been Reason: and a further period of another 45 days has also expired.

2) Mr. Jayant Mehta, learned counsel appearing on behalf of the appellant, has argued the matter persuasively before us. He points out that Section 421(3) of the Act does not contain the language of Section 34(3) proviso of the Arbitration Act, 1996 which contains the words "but not thereafter" which Union of India vs. Popular Construction Co. (2001) 8 SCC 470 considered. He further points

out that, in any case, under Section 433 of the Act, the provisions of the Limitation Act, 1963 shall, as far as may be, apply to Appeals before the Appellate Tribunal and that therefore, Section 5 would be applicable to condone the delay beyond the period of 90 days. He has buttressed his submission by referring to various decisions of this Court.

3) Before coming to the judgments of this Court, it is important to first set out Section 421(3) and Section 433 of the Act. These provisions read as follows:

“421. Appeal from orders of Tribunal.-

**** * (3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

433. Limitation.- The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.”

4) A cursory reading of Section 421(3) makes it clear that the proviso provides a period of limitation different from that provided in the Limitation Act, and also provides a further period not exceeding 45 days only if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period. Section 433 obviously cannot come to the aid of the appellant because the provisions of the Limitation Act only apply “as far as may be”. In a case like the present, where there is a special provision contained in Section 421(3) proviso, Section 5 of the Limitation Act obviously cannot apply.

5) Another very important aspect of the case is that 45 days is the period of limitation, and a further period not exceeding 45 days is provided only if sufficient cause is made out for filing the appeal within the extended period. According to us, this is a peremptory provision, which will otherwise be rendered completely ineffective, if we were to accept the argument of learned counsel for the appellant. If we were to accept such argument, it would mean that notwithstanding that the further period of 45 days had elapsed, the Appellate Tribunal may, if the facts so warrant, condone the delay. This would be to render otiose the second time limit of 45 days, which, as has been pointed out by us above, is peremptory in nature.

6) We are fortified in this conclusion by the judgment of this Court in Chhattisgarh SEB v. Central Electricity Regulatory Commission, 2010 (5) SCC 23. The language of Section 125 of the Electricity

Act, 2003, which is similar to the language contained in Section 421 (3) of the Companies Act, 2013, came up for consideration in the aforesaid decision. The issue that arose before this Court was whether Section 5 of the Limitation Act can be invoked for allowing the aggrieved person to file an appeal beyond 60 days plus the further grace period of 60 days. This Court held that Section 5 cannot apply to Section 125 of the Electricity Act in the following terms:

“25. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression “within a further period not exceeding 60 days” in the proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days.” The aforesaid judgment was reiterated and followed in *ONGC v. Gujarat Energy Transmission Corporation Limited*, 2017 (5) SCC 42 at Para 5.

7) It now remains to deal with the decisions cited by learned counsel appearing on behalf of the appellant. The first is the judgment in *Guda Vijayalakshmi vs. Guda Ramachandra Sekhara Sastry*, (1981) 2 SCC 646. In that case, a Transfer Petition was filed under Section 25, CPC, 1908 in this Court. A preliminary objection was taken stating that in view of Sections 21 and 21A of the Hindu Marriage Act, 1955, Section 25 would not be applicable. This was turned down by this Court stating that Section 21 would not apply to substantive provisions of the Code as apart from procedural provisions. Equally, Section 21A of the Hindu Marriage Act, 1955 only dealt with transfers “in certain cases”. This being so, the wide and plenary power conferred on this Court to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one Civil Court in one State to another Civil Court in any other State was held not be entrenched upon by Sections 21 and 21A of the Hindu Marriage Act. We fail to see how this judgment, in any manner, furthers the proposition sought to be canvassed on behalf of the appellant, which is that Section 5 of the Limitation Act would continue to apply even after a second period of 45 days is peremptorily laid down. This judgment, therefore, does not carry the matter any further.

8) Reliance placed on *Dr. Partap Singh and Another vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, (1985) 3 SCC 72 is equally misplaced. In this case, Section 37 of the Foreign Exchange Regulation Act, 1973 was involved. Section 37(2) provides that the provisions of the Code relating to searches shall, so far as may be, apply to searches directed under Section 37(1). This Court held that the expression “so far as may be” has always been construed to mean that those

provisions may generally be followed to the extent possible. In the fact scenario of that case, it was held that to give full meaning to the expression 'so far as may be', sub-section (2) of Section 37 should be interpreted to mean that broadly the procedure relating to search as enacted in Section 165 shall be followed.

9) This case again does not take the matter any further. In fact, the ratio of the judgment as far as this case is concerned is that the expression “so far as may be” only means to the extent possible. If not possible, obviously the Limitation Act would not apply. We have already held that it is not possible for Section 5 of the Limitation Act to apply given the peremptory language of Section 421(3).

10) The third judgment is Mangu Ram vs. Municipal Corporation of Delhi, (1976) 1 SCC 392. In this judgment, Section 417 of the Code of Criminal Procedure, 1898 provided for special leave to appeal from an order of acquittal. Section 417 (4) required that the application for special leave should be made before the expiry period of 60 days from the date of the order of acquittal. Applying Section 29(2) of the Limitation Act, this Court held that Section 5 of the Limitation would not be impliedly excluded in such case despite the mandatory and peremptory language contained in Section 417(4) of the Cr.P.C. This Court held that all periods of limitation are cast in such mandatory and peremptory language and, therefore, Section 5 could not be said to be impliedly excluded.

11) This case again is wholly distinguishable. It applies only to a period of limitation which is given beyond which nothing further is stated as to whether delay may be condoned beyond such period. In the present case, the Section 417(3) does not merely contain the initial period of 45 days, in which case the aforesaid judgment would have applied. Section 417(3) goes on to state that another period of 45 days, being a grace period given by the legislature which cannot be exceeded, alone would apply, provided sufficient cause is made out within the aforesaid grace period. As has been held by us above, it is the second period, which is a special inbuilt kind of Section 5 of the Limitation Act in the special statute, which lays down that beyond the second period of 45 days, there can be no further condonation of delay. On this ground therefore, the aforesaid judgment also stands distinguished.

12) One further thing remains – and that is that learned counsel for the appellant pointed out the difference between the expression used in the Arbitration Act as construed by Popular Construction (supra) and its absence in the proviso in Section 421(3). For the reasons given above, we are of the view that this would also make no difference in view of the language of the proviso to Section 421(3) which contains mandatory or peremptory negative language and speaks of a second period not exceeding 45 days, which would have the same effect as the expression “but not thereafter” used in Section 34(3) proviso of the Arbitration Act, 1996.

13) We, therefore, see no reason to interfere with the judgment under appeal. The appeal is dismissed.

.....J. (R.F. Nariman)J. (Navin Sinha) New Delhi;

February 02, 2018