However, probably in view of the fact that the Tribunal had power to waive the tax only if it is satisfied that the dealer is unable to pay the tax, they also raised a ground that they will be unable to pay the tax and the financial situation of the Corporation is so precarious as to require the prayer for waiving of the tax. Even if the petitioner is well founded in its contention, that as per the decision in *Food Corporation of India's case* (supra) it may not be liable to pay any tax at all on the disputed turnover, still we are of the view that the Tribunal has no jurisdiction to waive the tax on that ground. The only ground on which the Tribunal can waive the tax is that the assessee, in its view, is not able to pay tax. In this case the Tribunal was of the view that contention of the Corporation that they are unable to pay tax could not be accepted and that is a finding of fact with which we could not interfere in preceedings under Article 226 of the Constitution. In the circumstances, therefore, neither we can substitute the satisfaction of the Appellate Authority on the question whether the dealer is unable to pay tax or not, nor can we in any circumstances modify the provisions of the Act, so as to enable the assessee not to pay tax merely on the ground that he is confident that on merits no tax is liable.

(3) In the circumstances, the writ petition fails and it is dismissed. However, we direct the Appellate Authority to dispose of the appeal within a period of six months from the date on which it is admitted. The writ petitioner is also given time for depositing the amount within a period of two months. If the amount is deposited within a period of two months, the appeal shall be taken on file and admitted.

P.C.G.

Before V. Ramaswami, C.J., and G. R. Majithia, J.

M/S VIJAY BROTHERS AND OTHERS,—*Appellants.*

versus

UNION OF INDIA AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 323 *of* 1987

August 10, 1988.

Customs Act (LII of 1962)—Ss. 74, 75, 76 and 128—Limitation Act (XXXVI of 1963)—Ss. 14(2) and 29(2)—Bar of limitation—Order refusing draw-back refund—Such order appealable under Section 128—Period spent in pursuing remedies against order in good faith in wrong forum—Exclusion of such period—S. 14 of the Limitation Act—Whether applies to appeals under S. 128 of the Customs Act.

Held, that the Customs Act, 1962 is a special law. It has also prescribed the period of limitation for filing an appeal different from that prescribed by the Schedule to the Limitation Act, 1963. In the circumstances, therefore S. 4 to S. 24 of the Limitation Act shall apply to such a provision "in so far as, and to the extent to which, they are not expressly excluded by such special or local law." Once that position is reached, S. 14 will have to be applied *mutatis mutandis* to the provisions relating to filing of applications, appeals, revisions etc. The words "suit", "appeals", "revision", "application" used in S. 14 cannot bind or have any restrictive effect because that will have to be understood in the light of the special enactment which refers to the same. The word "court" in that sense could not restrict the applicability of S. 14 to the local Acts nor can the words "application, suit, appeal or revision" restrict such an application. Hence it has to be held that S. 14 of the Limitation Act, 1963 is applicable to the proceedings under the Customs Act, 1963 in respect of an appeal provided under S. 128 and the time spent in the High Court in the abortive attempt to invoke the jurisdiction of the High Court under Article 226 of the Constitution and before the Supreme Court will have to be excluded.

(Para 6)

Appeal under Clause X of THE LETTERS PATENT against the judgment dated 23rd April, 1987 of the learned Single Judge (Hon'ble Mr. Justice D. V. Sehgal) in Civil Writ Petition No. 1289 of 1979 dismissing the writ petition of the appellants.

H. L. Sibal, Senior Advocate with S. C. Sibal Advocate, *for the Appellants.*

H. S. Brar, Senior Standing Counsel with P. S. Teji Advocate, *for the Union of India.*

JUDGMENT

The first appellant is a registered parnership firm carrying on the business of manufacturing and exporting ready-made garments, woollen blankets, shalws and hosiery goods at Ludhiana and appellants, two to five are its partners. Some time in the year 1971, they exported five consignments declared as woollen mixed blankets under claims of draw-back from Dum Dum Airport. Four out of the five were sent to Singapore and the other to Qatar. Before the consignments were despatched from Ludhiana, the appellants got the same tested from the Testing Laboratory set up by the Textile Committee under the regulations framed in pursuance of the Textile Committee Act, 1963. The goods were found to conform to their

description contained in the invoice as per specifications. Again, before they were airlifted at Dum Dum Airport, Calcutta, samples were drawn for the purpose of laboratory test from these parcels and on laboratory test at the Calcutta Customs House, the goods were found to conform to the invoices and the shipping bills. After obtaining the clearance certificate from the Customs Officer, the goods were sent for its destination. The appellants received payment through the State Bank of India from the consignee firms at Singapore and Qatar. These facts are admitted. The appellants thereafter applied for draw-back refund as provided under sections 74 and 75 of the Customs Act, 1962. They were not given any refund, but a show-cause notice dated August 14, 1975, was issued by the Assistant Collector of Customs, Export Investigation Branch, Customs House, Calcutta, wherein it was alleged that the goods exported by them through the above consignments were shoddy blankets and not of mixed fabrics containing terrylene. This show-cause notice was issued on the basis that the samples drawn from the original consignments which were lying in the custody of M/s Thai Airways International Ltd. Singapore, revealed on test that the blankets were manufactured of shoddy wool having terrylene contents of 7.3 per cent maximum though as per the declarations the terrylene content was to be 74 per cent to 74.5 per cent. The department seems to have made some enquiries at Ludhiana before issuing this notice. The appellants filed their replies and objections and demanded the draw-back refund. However, by a considered order despatched on February 16, 1976, the appellants were held guilty of violating the provisions of the Customs Act and Foreign Exchange. Regulation Act and the Deputy Collector of Customs, Export Department, Customs House, Calcutta, imposed penalties both on the firm and the individual partners in respect of the five consignments. By the same order, he also rejected the claim for draw-back refund.

2. The appellants then filed on May 9, 1976, C.W.P. No. 2191 of 1976 in this Court praying for a writ of certiorari for quashing the impugned order dated February 16, and for a mandamus directing the respondents to give the draw-back refund. The respondents objected to the maintainability of the writ petition on the ground that there is an effective alternative remedy of appeal provided under the Act and without exhausting that remedy, the writ petition could not be maintained. This found favour with the Court and by order dated August 13, 1976, a Division Bench of this Court dismissed the petition relegating the petitioners to the alternative

remedy of appeal as provided under the Act. The appellants then filed Special Leave Petition in the Supreme Court against this order and the same was dismissed on October 26, 1976 on the ground that the appellants shall exhaust their remedy of appeal before the Appellate Collector. Thereafter the appellants filed an appeal on November 5, 1976, before the Appellate Collector of Customs against the order of the second respondent dated February 16, 1976, which was received, according to the appellants, on February 18, 1976. This appeal was dismissed on the ground that under section 128 of the Customs Act, an appeal could have been preferred within three months from the date of communication to the appellants of the decision or order appealed against and even the powers of the Collector to excuse the delay was restricted to another three months and since the appeal was filed more than six months from February 16, 1976, it was barred by limitation. The appellants preferred a revision to the Government of India and that was also dismissed on December 21, 1978, affirming the order of the appellate authority.

3. Thereafter, the petitioners filed C.W.P. No. 1289 of 1979 praying for quashing of the order dated February 16, 1976, and the orders of the Appellate Collector and the Government of India dismissing the appeal and revision, respectively, holding that it is barred by limitation. The appellants also prayed for a writ of *mandamus* directing the respondents to pay draw-back amount of Rs. 1,09,437 to the petitioners (appellants).

4. Learned Single Judge, who heard the writ petition was of the view that the appellate authority had no jurisdiction to entertain the appeal after the expiry of the total period of six months and that section 14(2) of the Limitation Act could not be invoked by the appellants for calculating the period of limitation of six months. It is this view of the learned Judge which is canvassed in this letters patent appeal.

5. Section 29(2) of the Limitation Act, 1963, provides as follows :—

> "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."

That Customs Act, 1962, is a special law admits of no doubt. It has also prescribed the period of limitation for filing an appeal different from that prescribed by the Schedule to the Limitation Act also cannot be disputed. In the circumstances, therefore, Section 4 to 24 shall apply to such a provision "in so far as, and to the extent to which, they are not expressly excluded by such special or local law." As to the important departure from Indian Limitation Act, 1908 made by the Limitation Act, 1963, in so far as the provisions contained in section 29(2) is concerned, the Supreme Court in *Mangu Ram and others* v. *Municipal Corporation of Delhi*, (1) observed:—

"Whereas under the Indian Limitation Act, 1908 Section 29, sub-section (2) cl. (b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the Indian Limitation Act, 1908, other than those contained in Sections 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of Section 5 was in clear and specific terms excluded. Section 29, sub-section (2) of the Limitation Act, 1963, enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in Sections 4 to 24, which would include Section 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law."

Thus, it is only if the special or local law expressly excludes the application of any or all the provisions of sections 4 to 24, the sections would stand displaced. The learned Judge has relied on the decision of the Supreme Court in *The Commissioner of Sales Tax Uttar Pradesh, Lucknow* v. *M/s Parson Tools and Plants, Kanpur,* (2), as an authority for holding that the provisions of section 14 are expressly excluded by section 128 of the Customs Act. The facts in that case were these : Against two assessment orders made under

(1) AIR 1976 S.C. 105.
(2) AIR 1975 S.C. 1039.

the U. P. Sales Tax Act, the assessee filed appeals. On May 10, 1963, when the appeals came up for hearing, the assessee was absent and consequently, the appeals were dismissed for default under rule 68(5) of the U.P. Sales Tax Rules. Sub-rule (6) of that rule provided for setting aside such dismissal and re-admission of the appeal. On the very day when the appeals were dismissed, the assessee made two applications under sub-rule (6) of rule 68 for setting aside the dismissal. During the pendency of those applications, sub-rule (5) of rule 68 was declared *ultra vires* by the High Court and the High Court had further held that an appeal preferred against those assessment orders could not be dismissed in default but the appellate authority is bound to decide it on merits even though the appellant was absent. When the applications filed by the assessee for setting aside the *ex-parte* dismissal came up for hearing, the appellate authority dismissed the same on October 20, 1964, in the view that rule 68(5) had already been held to be *ultra vires*. Thereafter, the assessee preferred revision petitions on December 16, 1964 against the order of dismissal dated May 10, 1963, before the revisional authority. These revision petitions having been filed more than 18 months after the dismissal of the appeals, they were filed with two applications for excluding the time spent by him in prosecuting the abortive proceedings under sub-rule (6) of rule 68. The revisional authority found that he was with due diligence pursuing his remedy under rule 68(6) and excluded the time spent in those proceedings from computing the limitation and in consequence held that the revision petitions were within time. On the motion of the Commissioner of Sales-tax, the Revisional Authority made two references to the High Court for answering the following question of law :

> "Whether under the circumstances of the case, Section 14 of the Limitation Act extended the period for filing the revisions by the time during which the restoration applications remained pending as being prosecuted *bona fide*."

Two main contentions were considered by the Supreme Court in that judgment. One of them was whether the proceedings before the Sales-tax Authorities could be considered as proceedings in a Court. It was held that they are mere administrative tribunals and not courts and section 14 of the Limitation Act does not in terms apply to proceedings before such tribunals. The next question that was considered was, whether the general principles underlying section 14(2) are applicable on grounds of justice, equity and good conscience

for excluding the time spent in prosecuting the abortive applications under Rule 68(6) before the Appellate Authority for computing limitation for the purpose of revision applications. The material part of section 10(3) (i) and (3B) of the U.P. Sales Tax Act which was considered by the Supreme Court in that case read as follows:—

> "(3) (i) The Revising Authority may, for the purpose of satisfying itself as to the legality or propriety of any order made by any appellate or assessing authority under this Act, in its discretion call for and examine either on its own motion or on the application of the Commissioner of Sales-tax or the person aggrieved, the record of such order and pass such order as it may think fit.
>
> (3-B) The application under sub-section (3) shall be made within one year from the date of service of the order complained of, but the Revising Authority may on proof of sufficient cause entertain an application within a further period of six months."

The Supreme Court was of the view that this provision expressly excludes the applicability of section 5 and 14 on the ground that there are three features in the scheme of the Act which unmistakably go to show that the legislature has deliberately excluded the application of those sections. The first is that no limitation has been prescribed for the *suo motu* exercise of its jurisdiction by the Revising Authority. The second is that the period of one year prescribed as limitation for filing an application for revision by the aggrieved party is un-usually long. The third was that the revising authority has no discretion to extend this period beyond a further period of six months, even on sufficient cause shown. Therefore, it should be taken that the view expressed is limited to the language used in that section and in view of the language used, the Court had come to the conclusion that there is a deliberate exclusion of the application of the principles of sections 5 and 14 of the Limitation Act. The learned Judge also were pleased to observe:—

> "In most cases, the discretion to extend limitation on sufficient cause being shown for a further period of six months only given by sub-section (3-B) would be enough to afford relief. Cases are no doubt conceivable where an

aggrieved party despite sufficient cause, is unable to made an application for revision with this maximum period of 18 months. Such harsh cases would be rare. Even in such exceptional cases of extreme hardship, the Revising Authority may, on its own motion, entertain revision and grant relief."

In the light of these observations only, the Supreme Court held that the language of Section 10(i) (3B) excludes application of section 14.

Section 128(1) of the Customs Act under which the appeal is filed reads as follows:—

"*Appeals to Collector (Appeals)*—(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Collector of Customs may appeal to the Collector (Appeals) within three months from the date of the communication to him of such decision or order :

Provided that the Collector (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months."

We are not concerned in this case with the applicability of section 5 as learned counsel did not rely on that provision. He was only invoking the provisions of section 14 of the Limitation Act in the light of section 29(2) and wanted that period between May 9, 1976 when the writ petition was filed and October 26, 1976, when the Supreme Court dismissed the Special Leave Petition was to be excluded under that provision. As already stated, the provisions of section 29 are clear and also covered by the authority of the decision in A.IR. 1976 S.C. 105 that unless the provisions of section 14 are expressly excluded by the special law it shall be applied to the special law. Once that position is reached, section 14 will have to be applied *mutatis mutandis* to the provisions relating to filing of applications, appeals, revisions etc. The words "suit", "appeal", "revision", "application" used in section 14 cannot bind or have any restrictive effect because that will have to be understood in the light of the special enactment which refers to the same. The word "court" in that sense could not restrict the applicability of section 14

to the local Acts nor can the words "application, suit, appeals or revision" restrict such an application. The principles enunciated in that provision will have to be applied. The only point, therefore, for consideration is that if there is anything in section 128 of the Customs Act which expressly excluded the applicability of section 14. The limitation of three months provided under the main part of section 128 of the Customs Act is the normal provision for an appeal. Neither it is extraordinary, nor can we call it as unusually a long period so as to make it unconscionable for us to think that the time taken by a party in prosecuting the same relief in good faith in a different forum has to be excluded. Nor is there any provision in the Customs Act, which enables a party to invoke the *suo motu* appellate power. We should also keep it in mind that section 10 of the U.P. Sales Tax relates to filing a revision petition after a regular appeal is over and not to a case of a regular appeal as provided under section 128 of the Customs Act, which, in our opinion is more material. None of the three features, which were pointed out by the learned Judges in the Supreme Court judgment, are available in this case under section 128 of the Customs Act, in order to come to the conclusion that that provision deliberately excluded the applicability of section 14. We are, therefore, unable to agree that the judgment in A.I.R. 1975 S.C. 1039, is any way, applicable to the interpretation of section 128 of the Customs Act vis-a-vis section 25(2) of the Limitation Act. It may also be mentioned that the Limitation Act came into force with effect from January 1, 1964. The decision of the Supreme Court in A.I.R. 1975 S.C. 1039, related to an order dated May 10, 1963, though the revision petition was filed on December 16, 1964, against that order. As pointed out earlier, there is a material difference between the provisions as contained in section 29(2) of the Indian Limitation Act, 1908 and that contained in the Limitation Act 1963. It is not clear as to whether the learned Judges dealt with the case under the Indian Limitation Act, 1908 or the Limitation Act, 1963, though the head-note of the All India Reporter deals with it as one under the Limitation Act 1963. Though the use of the words as to whether legislature has deliberately excluded the application of the principles underlying sections 5 and 14 of the Limitation Act leads to an inference that the case was decided under the Limitation Act 1963, the decisions referred to in the earlier part of the judgment were all under the Indian Limitation Act 1908. Be that as it may, we have already pointed out that the decision is distinguishable and related to the specific provisions in section 10(3-B) of the U.P. Sales Tax Act and has no application

to our case. However, we may point out that the same provision of section 10(3B) of the U.P. Sales Tax Act again came up for consideration in the case reported as *The Commissioner of Sales Tax U.P.* v. *M/s Madanlal Dan & Sons, Bareilly,* (3). That related to the applicability of section 12(2) of the Limitation Act. In that case, the copy of the appellate order of the Appellate Assistant Commissioner was served on the dealer-assessee on August 2, 1965. It appears that he lost the copy of the order and therepon he applied for a certified copy on June 16, 1966. That copy was made ready and delivered to the assessee on August 18, 1967. Thereafter, he filed a revision under section 10. The question for consideration was whether the revision was within time. The contention of the assessee was that under section 12(2) of the Limitation Act, he was entitled to exclude in computing the period of limitation for filing revision, the time spent for obtaining a copy of the appellate order. After referring to the various decisions, the Supreme Court held:—

> "There can be no manner of doubt that the U.P. Sales Tax Act answers to the description of a special or local law. According to sub-section (2) of Section 29 of the Limitation Act, reproduced above, for the purpose of determining any period of limitation prescribed for any application by any special or local law, the provisions contained in Section 12(2), *inter alia*, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. There is nothing in the U.P. Sales Tax Act expressly excluding the application of Section 12(2) of the Limitation Act for detrmining the period of limitation prescribed for revision application. The conclusion would, therefore, follow that the provisions of Section 12(2) of the Limitation Act of 1963 can be relied upon in computing the period of limitation prescribed for filing a revision petition under section 10 of the U.P. Sales Tax Act.
>
> It has been argued by Mr. Manchanda that it was not essential for dealer-respondent to file a copy of the order of the Assistant Commissioner along with the revision petition. As such, according to the learned counsel, the dealer-respondent could not exclude the time spent in obtaining the copy. This contention is equally devoid of force. There is nothing in the language of Section 12(2)

(3) AIR 1977 S.C. 523.

of the Limitation Act to justify the inference that the time spent for obtaining copy of the order sought to be revised can be excluded only if such a copy is required to be filed along with the revision application. All that Section 12(2) states in this connection is that in computing the period of limitation for a revision, the time requisite for obtaining a copy of the order sought to be revised shall be excluded. It would be imperimissible to read in section 12(2) a proviso that the time requisite for obtaining copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded only if such copy has to be filed along with the memorandum of appeal or application for leave to appeal or for revision or for review of judgment when the legislature has not inserted such a proviso in section 12(2). It is also plain that without procuring copy of the order of the Assistant Commissioner the respondent and his legal adviser would not have been in a position to decide as to whether revision petition should be filed against that order and if so, what grounds should be taken in the revision petition."

In this connection the limitation being procedural law, we may quote the famous and classic observation of Master of Rules in *McAndrew* v. *Barker,* (4), in relation to the approach of the Courts in such matters. The learned Master of Rules observed :—

"Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all intended as general rules or procedure as to be compelled to do what will cause injustice in the particular case."

In this case as we have already pointed out, the apellants questioned the validity of the original order in the earlier writ petition. The respondent took the objection that without exhausting the alternative remedy of appeal, the appellants shall not be permitted to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution. That contention was accepted both by this

(4) 1907 (1) K.B. 1.

Court as also in the Supreme Court. After the disposal when the appellants filed the appeal before the Appellate Authority that appeal is now dismissed as not filed in time and the net result is the appellants did not have any decision on merits by the Appellate Authority. We are also satisfied and in fact it was not in dispute that the appellants were prosecuting diligently and *bona fide* the proceedings in this Court and the Supreme Court. If we now, therefore, dismiss it again holding that the Appellate Authority in not exercising its power was not liable to be interfered with, then the appellants would go without a decision on merits. It is in those circumstances the learned counsel at one stage also contended that if for any reason, we are of the view that section 14(2) of the Limitation Act could not be invoked, we should decide the question on merits and not to dismiss the same as any such dismissal will do the appellants great injustice though on facts, the appellants were found to have been *bona fide* pursing in a wrong forum for a remedy. Since we have come to the conclusion that section 14(2) is applicable to the facts and circumstances of the case, we refrain from going into the merits of the appeal.

6. For the foregoing reasons, we are of the view that section 14 of the Limitation Act is applicable to the proceedings under the Customs Act in respect of an appeal provided under section 128 and the time spent in the High Court in the abortive attempt to invoke the jurisdiction of the High Court under Article 226 of the Constitution and before the Supreme Court will have to be excluded. If we exclude the time, there can be no doubt that it was within the period of six months. The *bona fide* of the appellants in pursuing the remedy under Article 226 of the Constitution was never in dispute. In fact, the writ petition itself was filed within the period of three months from the date of the service of the order and there can be no doubt that it is in the view that the order was without jurisdiction they sought to invoke the jurisdiction of the High Court under Article 226 of the Constitution before filing an appeal and not to bypass the appeal as such.

7. We, therefore, allow the appeal, set aside the order of the learned Judge and that of the second respondent dated March 22, 1977, and the third respondent dated December 21, 1978, directing the second respondent to take the appeal on file and to dispose of the same on merits. However, there will be no order as to costs.

R.N.R.