

JUDICIAL REVIEW & LOCUS STANDI OF TIME BARRED ORDERS

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Abstract

The concept of "locus standi" generally limits the ability to challenge "time-barred" orders (orders that have passed the legal time limit to be challenged). This means that even if a court has the authority to conduct judicial review, a party may not have the legal standing to do so because of the delay in action. However, depending on the particular circumstances and jurisdiction, there may be exceptions, especially in cases where there is a significant public interest or where there are procedural irregularities that could be contested. In this paper author has attempted to critically examine the provisions relating to Judicial Review & Locus Standi of Time Barred Orders in India.

Keywords: Judicial Review, Locus Standi, Time-Barred Orders, Administrative Law, Limitation and Remedies

INTRODUCTION

One of the most vexed question of all, particularly in respect of Orders of the quasi judicial authorities which have become time barred on account of failure on the part of the aggrieved to approach the appellate authorities under the Act is the question of locus standi, which means legal capacity of the aggrieved to invoke the jurisdiction of the Court under Articles 32 and 226 of the Constitution of India,. As Lord Denning¹ rightly states, "In administrative law the question of locus standi is the most vexed question of all". Locus standi asks the question whether the petitioner is entitled to invoke the jurisdiction of the court which must be distinguished from that of the justiciability which raises a question as to whether the judicial process is suitable for the resolution of this type of dispute at all, whoever may bring it to the Courts. It is also distinct from the issue known in the US as ripeness, under which abstract or hypothetical questions are not adjudicated upon.²

Locus standi, in other words means legal capacity to challenge an act or decision. Whether the decision is valid or not is seldom relevant to the determination of the question whether the applicant has locus standi to impugn it.³ The object of the present paper is to examine the power conferred under Articles 32 and 226 of the Constitution of India on the Constitutional Court's in entertaining writ petitions where the Order(s) passed by the quasi judicial authorities which have become time barred, which though fulfill the criteria for judicial review, within the scope of jurisdiction exercisable under the said Articles.

The Supreme Court under Articles 32 and 136 and the High Court under Article 226 of the Constitution have the power of judicial review. No other court has such power. Article 226 of the Constitution of India provides for effective, efficacious and speedy remedies for enforcing

¹The Discipline of Law (1979) 144.

²Craig, Administrative Law (2007) 717; Administrative Law by Justice C.K. Thakker, 2nd Edition, 2012 at page 933

³de Smith, Judicial Review of Administrative Action (4th Edn.) 416.

fundamental and legal rights against laws, Orders including action of the authorities which violate them. The said Constitutional power is exercisable for the purpose of judicially reviewing an Act of Legislature or a decision of an administrator, an order of a quasi-judicial authority and/or in a given case, a decision of judiciary. It is not intended either to review the entire governance under the rule of law nor the court steps into the area exclusively reserved by the *Suprema lex* to two other organs of the State, this Legislature/Parliament and the Executive. Likewise, decisions and actions which do not have adjudicative disposition are not justifiable before the judicial review court. In our democracy governed by the rule of law, the judiciary has expressly been entrusted with power of judicial review as sentinel in *qui vive*. Basically, judicial review of administrative actions as also of legislation is exercised against the action of the State. Since the State or public authorities act in exercise of their executive or legislative power, they are amenable to judicial review. The judicial control of administrative action affords the court to determine not only the constitutionality of the law but also the procedural part of the administrative action as a part of judicial review.⁴ The State, therefore, is subject to *etat de droit*, i.e., the State is submitted to the law which implies that all actions of the State or its authorities and officials must be carried out subject to the Constitution and the Acts and within the limits set by the law, i.e., constitutionalism. In other words, the State is to obey the law. The more the administrative action in our welfare State expands widely touching the individuals, the more is the scope of judicial review of State action. Judicial review of administrative action is, therefore, an essential part of rule of law. The judicial control on

administrative action, thus, affords the courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review.⁵ All statutory powers conferred on executive officers are subject to supervision by the courts exercising their classic and traditional powers of judicial review.⁶ The purpose of judicial review is to keep public authorities within due bounds and for upholding the rule of law and to ensure that the administrative action is not in excess of power.⁷ Independence of judiciary is a basic structure of our Constitution. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law will be a “teasing illusion and a promise of unreality”. If there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review. The judiciary has been made the interpreter of the Constitution and has been assigned the delicate task to determine what is the power conferred on each branch of the government and to ensure that it does not transgress such limits. It is for the judiciary to uphold constitutional values and to enforce constitutional limitations. That is the essence of the rule of law.⁸ The abuse of power by the statutory authority or as a matter of fact by any authority created by an Act or under an Act does not bar the exercise of jurisdiction under Article 226/227 of the Constitution of India even there is an alternative remedy for the redressal of the grievance against such abuse of power provided on undisputed facts the authority is shown to have assumed jurisdiction.

⁴ Interpretation of Statutes by D. P. Mittal, Second Edition, Page No. 397.

⁵ State of Bihar & Ors v. Subhash Singh, (1997) 4 SCC 430 : JT 1997 (2) SC 463

⁶ Observed by Lord Wilberforce in the case of Rossminster Ltd., (1979) 52 TC 160 : (1980) 1 All ER 80 (p. 84 of 1 All ER)

⁷ Wade's Administrative Law, 8th Edition (pg. 33 – 35)

⁸ Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, 677 – 678; Fertilizer Corpn. Kamgar Union v. Union of India, (1981) 1 SCC 568, 574-575; Kumar Padma Prasad v. Union of India, (1992) 2 SCC 428.

SCOPE OF ALTERNATIVE REMEDY:

The Hon'ble Supreme Court of India has persistently held that when it comes to fiscal law statutes, rule of alternate remedy has to be applied with utmost rigour. One such case being, *Assistant Collector of Central Excise v. Dunlop India Ltd.*⁹, wherein it has been pronounced:

“... Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute.” (Emphasis supplied)

The Supreme Court in *Mafatlal Industries Ltd. v. Union of India*,¹⁰ has observed that an Act cannot bar and curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute.

In *Calcutta Discount Co. Ltd. v. Income Tax Officer*¹¹, *Das Gupta, J.*, spearheading the

majority view laid down the following propositions of law:

- (i) The question of limitation is the question of jurisdiction.
- (ii) It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.;
- (iii) The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.; and

Similarly, the Supreme Court in the case of *Whirlpool Corporation v. Registrar of Trade Marks*¹², wherein with reference to, inter alia, the Constitution Bench decision in *Calcutta Discount Co. Ltd.*'s case (supra), held :

“20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had

⁹ (1985) 1 SCC 260.

¹⁰ [1997] 5 SCC 536

¹¹ (1961) 41 ITR 191 (SC) : (1961) 2 SCR 241 : AIR 1961 SC 372

¹² (1998) 8 SCC 1

purported to usurp jurisdiction without any legal foundation."

RULE OF ALTERNATIVE REMEDY-EXCEPTIONS:

The correct legal position with regard to the grounds for entertainment of a writ petition despite the existence of alternative remedy has been highlighted in the case of *U.P State Spinning Co. Ltd. v. R. S. Pandey*¹³ wherein it stands pronounced:

"... There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute." (Emphasis supplied)

On the question of maintainability of writ petition the Hon'ble Supreme Court in *Radha Krishan Industries v. State of H.P.*¹⁴, has culled out the following principles of law, despite the availability of alternative remedy:

- (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
- (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
- (iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;
- (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;
- (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

¹³(2005) 8 SCC 264. See also: *State of H.P. and Others v. Gujarat Ambuja Cement Ltd. and Another*, (2005) 6 SCC 499.

¹⁴ (2021) 6 SCC 771

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

In the case of *Commissioner of Income Tax v. ChabbilDassAggrawal*¹⁵, the Hon'ble Supreme Court considered the question as to whether the High Court could interfere with an Order passed by the assessing authority under Section 148 of the Act in exercise of its jurisdiction under Article 226 of the Constitution of India. While answering the aforesaid question, the Supreme Court ruled that the High Court would have jurisdiction to entertain the writ petition questioning the correctness of the notices issued under Section 148 of the Act, the reassessment Orders passed and consequential demand notices issued thereon only if the alternate remedy under the Act was ineffectual or the High Court ascribed cogent and satisfactory reasons for exercising its jurisdiction on the facts of a given case. The said decision rendered by the Hon'ble Supreme Court of India cannot be considered to be an authority for the proposition that the assessee is debarred from challenging the Order passed on the Objections and/or the notice issued under Section 147/148 of the Act on the ground of assumption of jurisdiction by an authority not warranted by the said provisions and/or lack of inherent jurisdiction etc. A decision will have to be understood in the context in which it has been rendered. It cannot be read like a statute.¹⁶ A decision must be read in the context in which it appears to have been stated. Such a decision cannot be read in the manner as to

nullify the express provisions of an enactment and/or assumption of jurisdiction by an authority which is a nullity. The exceptions to the doctrine of exhaustion of alternative remedies would not curtail the exercise of power at the hands of the Hon'ble High Courts under Article 226 of the Constitution of India, merely, because alternative remedy under the Act is available to an assessee, more so in view of the settled principle of law that judicial review is a part of basic structure of the Constitution of India¹⁷ and a fundamental right; and an alternative remedy cannot take away such a fundamental right for the enforcement of which Constitutional Court like the High Court under Article 226 of the Constitution of India exists. It is true that when a statutory forum is created by law for redressal of grievance, a writ petition should not be entertained ignoring the statutory dispensation. But, such principles, in a given case, maybe given a go-bye, if the Court is convinced that on the face of it, the impugned Order of reassessment and/or notice under Section 147/148 of the Income Tax Act, 1961 is not sustainable in law.¹⁸ Significantly, the decision rendered in *ChabbilDass case (supra)* has not considered the decision of the Constitutional Bench rendered in the case of *Calcutta Discount Co. (supra)*.

The exceptions to the doctrine of exhaustion of alternative remedy may not apply where after the writ petition has been admitted and taken up for consideration for final hearing, unless the case falls in the exceptions. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except

¹⁵(2013) 357 ITR 357 (SC)

¹⁶*Amar Nath Om Prakash v. State of Punjab* AIR 1985 SC 218.; *Haryana Financial Corporation v. Jagadamba Oil Mills* (2002) 110 Comp. Cas. 20 (SC); *Indian Charge Chrome Ltd. v. Union of India* (2003) 2 SCC 533; *Rekha Mukherjee v. Ashish Kumar Das* AIR 2004 SC 443; *General Electric Co. v. Renuagar Power Co.* (1987) 4 SCC 137; *Rajeswar Prasad Misra v. State of West Bengal*

AIR 1965 SC 1887; *CIT v. K. Ramakrishnan* (1993) 202 ITR 997 (Ker.)

¹⁷*L. Chandra Kumar v. Union of India* (1997) 3 SCC 261 : AIR 1997 SC 1125

¹⁸*Engineering Professional Co. (P.) Ltd. v. Deputy Commissioner of Income-tax*, [2020] 424 ITR 253 (Guj)

in cases falling within the well-defined exceptions. Thus, the well-known exceptions to the doctrine of exhaustion of alternative remedy are:

- i. If the impugned action is violative of the principles of natural justice; or
- ii. If it is vitiated by an apparent bias or is mala fides the authority taking the decision; or
- iii. If the decision has been taken in flagrant disregard of a fundamental statutory provision; or
- iv. If the situation is such that the remedy will become fruitless, viz., the authority which is to give remedy has expressed its mind or has committed itself to an unalterable stand in the proceeding; or
- v. Where the action taken is wholly without jurisdiction; or
- vi. Where it infringes any fundamental right of the person aggrieved; or
- vii. Where the assessee has raised a prima facie and strong case that the action has been taken under a law which is *ultravires* the Constitution; or
- viii. Where gross injustice is done justifying interference, the existence of alternative remedy by way of appeal or revision would be no bar to exercise writ jurisdiction. That also provides safeguard against the assessing authorities passing a highhanded or palpable illegal Order.

The decision of the Hon'ble Supreme Court in the case of *Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer – cum- Assessing Authority*¹⁹ may usefully be referred, wherein it has been pronounced that:

“A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision

reported in 1958 SCR 595 (*State of Uttar Pradesh vs. Mohd. Nooh*) had the occasion to observe as follows:

“10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury’s Laws of England, 3rdEdn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.”

Significantly, the Hon'ble Supreme Court in the aforesaid case while drawing distinction between maintainability and entertain-ability of a writ petition, has observed:-

“Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as “not maintainable” merely because the alternative

¹⁹(2023) 109 GSTR 402 (SC); 2023 SCC OnLine SC 95; AIR 2023 SC 781; See also: *Misty Meadows Pvt. Ltd. v. Union of India* (2024) 465 ITR 630 (P&H).

remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the high court under Article 226 has not pursued, would not oust the jurisdiction of the high court and render a writ petition “not maintainable”. In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the “maintainability” of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that “entertainability” and “maintainability” of a writ

petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to “maintainability” goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of “entertainability” is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.”

EFFECT OF FORE-CLOSURE OF STATUTORY REMEDY:

No period of limitation is prescribed by Article 32 or Article 226 of the Constitution of India within which an aggrieved party can institute the petition. The writ proceedings are not governed by the provisions of limitation Act, 1963. In view of the wide amplitude of the jurisdiction of the Supreme Court and the High Court’s enjoined upon them by Article 32 and Article 226 of the Constitution of India respectively, the real difficulty which arises is whether the High Court in exercise of its writ jurisdiction could entertain a challenge to the Order of assessment where the statutory remedy of appeal against such an Order stands foreclosed by the limitation provided under the statute for filing appeal before the appellate authority under the Act.

In *Prem Chand Garg v. Excise Commr., U.P.*,²⁰ the question before the Constitutional Bench was whether the Supreme Court could frame a rule or issue an order which would be inconsistent with

²⁰ AIR 1963 SC 996/1963 SCR Supl.(1)885.

any of the fundamental rights. While answering the question in negative, Gajendragadkar J., for the majority observed that an order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even being consistent with the substantive provisions of the relevant statutory laws. The proposition of law expounded in the Prem Chand Garg case (supra) was approved by a seven judges' bench of the Hon'ble Supreme Court in the case of A. R. Antulay v. R. S. Nayak.²¹ This said view was further reiterated by a three judges' bench of the Hon'ble Supreme Court in Arjun Khiamal Makhijani v. Jamnadas C. Tuliani²² holding that – "... Article 142 does not contemplate doing justice to one party by ignoring mandatory statutory provisions and thereby doing complete injustice to the other party by depriving such party of the benefit of the mandatory statutory provisions".

In *Nidhi Kaim & Anr. v. State of Madhya Pradesh & Ors.*,²³ a three judges' bench of the Hon'ble Supreme Court after expressing its concurrence with the judgment rendered in the case of SCBA (supra) held that the power to do 'complete justice' under Article 142 of the Constitution does not include the power to disregard statutory provisions or declared pronouncements of law under Article 141 of the Constitution. The observations of the Supreme Court read as follows:

“Yet under the law as now declared by the Constitution Bench, the highest court whilst deciding a particular case before it cannot consciously overlook or bypass enacted law when exercising its wide

powers under Article 142.” (Emphasis supplied)

In *Oil and Natural Gas Corporation Limited Vs. Gujarat Energy Transmission Corporation Limited & Ors.*²⁴, a statutory appeal filed in the Supreme Court was barred by 71 days and the maximum time for condoning the delay in view of Section 125 of the Electricity Act, 2003 was only 60 days, therefore, the Hon'ble Supreme Court could not have condoned the delay of 71 days. However, while admitting the appeal, the Court condoned the delay in filing the appeal. At the time of filing hearing of the appeal, an objection regarding appeal being barred by limitation was allowed to be raised being a jurisdictional issue. The Hon'ble Supreme Court while referring to various decisions²⁵ concluded that Section 5 of the Limitation Act, 1963 could not be invoked by the Court for maintaining an appeal beyond maximum period prescribed in Section 125 of the Electricity Act, 2003 pronounced:

“... when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy as has been held in *Union Carbide Corpn. case* ... the prescription of limitation in a case of present nature, when the statute commands that this Court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to Section 3 of the Limitation Act. Therefore, it is uncondonable and it

²¹ (1991) 4 SCC 406.

²² 1989 SCRSupl. (1) 380.

²³ (2017) 4 SCC 1.

²⁴ (2017) 5 SCC 42.

²⁵ *Singh Enterprises v. Commissioner of Central Excise, Jamshedpur & Ors.*, (2008) 3 SCC 70; *Commissioner of Customs and Central Excise v. Hongo India Private*

Limited & Anr., (2009) 5 SCC 791; *Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission & Ors.*, (2010) 5 SCC 23; and *Suryachakra Power Corporation Limited v. Electricity Department represented by its Superintending Engineer, Port Blair & Ors.*, (2016) 16 SCC 153.

cannot be condoned taking recourse to Article 142 of the Constitution.” (Emphasis supplied)”

In *Mafatlal Industries Ltd. & Ors. v. Union of India & Ors.*²⁶, the Supreme Court held that an Act cannot bar and curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take not of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass Orders which can be settled only through a mechanism prescribed by the statute.

In *Assistant Commissioner of Income Tax and Others vs. Glaxo Smith Kline Consumer Health Care limited*²⁷, an assessment Order was passed against the assessee under the Andhra Pradesh Value Added Tax Act, 2005, against which under Section 31 of the said Act a remedy of appeal against the said Order was available to the assessee. The assessee did not file appeal against the assessment Order within the statutory period of limitation of 30 days provided therein. The assessee filed an application under the Andhra Pradesh Value Added Tax Rules, 2005 highlighting the error made in raising the demand based on its incorrect turnover. The said application was dismissed against which an appeal was preferred before the appellate authority which was also rejected, on the ground of being barred by limitation and also because no sufficient cause was made out for condonation of delay. Notably, the delay in filing the appeal could be condoned upto a period of 60 days by the appellate authority provided sufficient cause for not preferring the appeal within the prescribed time was made out.

Thereafter, the assessee filed a writ petition for quashing the assessment Order being contrary to law, without jurisdiction and in violation of Principle of Natural Justice. The Hon'ble High Court allowed the writ petition by quashing the assessment Order thereby relegating the assessee before the Original Authority for reconsideration of the matter afresh after affording personal hearing to the assessee. The Hon'ble Supreme Court in appeal set-aside the judgment of the Hon'ble High Court in view of the following principles of law:

- i. Where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of.
- ii. An Act cannot bar an curtail remedy under Article 226 or 32 of the Constitution. The Constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass Orders which can be settled only through a mechanism prescribed by the statute.
- iii. Indubitably, the powers of the Hon'ble Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while exercising that powers, this Court is required to bear in mind the legislative

²⁶ (1997) 5 SCC 536.

²⁷(2020) 19 SCC 681; (2020) 77 GSTR 342; 2020 SCC OnLine SC 440.

intent and not to render the statutory provision otiose.

- iv. An Order under Article 142 can be passed to do complete justice between the parties but cannot be inconsistent with the substantive provisions of the relevant statutory laws.
- v. It is one thing to say that “prohibitions or limitations in a statute” cannot come in the way of exercise of jurisdiction under Article 142 of the Constitution to do complete justice between the parties in the pending “cause or matter” arising out of that statute, but 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 another statute.
- vi. The power under Article 142 has to be regulated after taking note of the express provisions of any substantive statutory laws.
- vii. It is unfathomable, what the Supreme Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, as to how the Hon'ble Court can take a different approach in the matter in reference to Article 226 of the Constitution.

A RIGHT OF APPEAL IS A SUBSTANTIVE RIGHT AND A CREATURE OF THE STATUTE:

An appeal confirms a right to enter a superior Court for invocation of its aid and interposition of redressal of an error of the Court and/or

authority.²⁸ A right of appeal is created by statute and is not inherent and being statutory, statute can make it conditional or qualified²⁹. The right to appeal can become vested and exercisable only upon fulfillment of condition laid down in statute. That is a matter of substantive right and not merely a matter of procedure³⁰. The legal pursuit of a remedy of an appeal including condonation of delay are really but steps in a series of proceedings all connected by an intrinsic unit and are to be regarded as one legal proceedings. In other words, an appellate authority would acquire jurisdiction to hear an appeal after exercising the power of condoning the delay within the period of limitation prescribed and the provision laying down the maximum period within which such power of condonation of delay could be exercised, therefore, the period provided by the statute for entertaining the appeal including the provision providing for exercise of power of condonation of delay would be substantive and not merely a matter of procedure. There cannot be an appeal filed out of time with an application for condonation of delay and such an application having been dismissed³¹. The power of an authority to hear an appeal after the same has been presented outside the period of limitation prescribed for condoning the delay would cease to exist, therefore, the jurisdiction to hear an appeal and power of condoning the delay is intrinsically connected and the moment an appeal is preferred beyond the period of limitation for condonation of delay provided under the statute, even the Hon'ble High Court and/or the Supreme Court in exercise of its powers under Article 226 and 32 respectively would be disarmed in entertaining a writ petition, in view of the judgment rendered in the case of Glaxo Smith Kline Consumer Health Care limited (Supra).

²⁸Dayawanti Vs. Interjit, AIR 1966 (SC) 1423 at p. 1427.

²⁹Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of City of Ahmedabad (1999) 4 SCC 468 (SC).

³⁰Hoosein Kasam Dada (India) Ltd. v. State of MP (1953) 4 STC 114; AIR 1953 SC 221; Garikapati Veeraya v. Subbiah Choudhry AIR 1957 SC 540.

³¹P.P.M.S. Nagarathinam v. CIT (1989) 178 ITR 304 (Mad); CIT v. Shahzadi Begum; Mela Ram & Sons v. CIT (1956) 29 ITR 607 (SC)

CONCLUDING REMARKS:

The pronouncement in Glaxo Smith Kline Consumer Health Care limited (Supra) may present some difficulty in cases arising under the Income Tax Act and/or other fiscal statutes where no limitation is prescribed with regard to condonation of delay in appeal preferred by the aggrieved party and/or an assessee; and such aggrieved party invokes the jurisdiction of the Hon'ble High Court under Article 226 of the Constitution of India on the ground that the Order and/or action of an authority falls within the well defined exceptions to the doctrine of exhaustion of alternative remedy for entertain-ability of a writ petition. Unlike the provisions of Section 31 of Andhra Pradesh Value Added Tax Act, 2005 where delay could be condoned upto a period of 60 days, there is no such condition under Section 249 of the Income Tax Act which provides that the First Appellate Authority may admit an appeal after the expiration of period of 30 days if such authority is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period of 30 days. Despite given the availability of alternative remedies in the legal frame work, where sufficient cause is shown in not preferring an appeal within 30 days before the Hon'ble High Court by an assessee, provided the case falls within the exception to the rule of exhaustion of alternative remedies, the statutory command by the legislation as regards limitation would not come in the way of exercise of Constitutional Power under Article 226 of the Constitution of India. Indubitably, on principle, a Court cannot lay down a period of limitation, as that is a legislative and not a judicial function. The question of delay in approaching the Court and question whether an appeal is barred by limitation are two different questions. Power to condone a delay is concurrent on account of sufficient cause shown to the Court or the appellate authority for not having filed an appeal within the prescribed period of limitation. Therefore, if the appeal has become time barred on account of having not been filed within the period of limitation although an appellate authority has been provided with the power of

condonation of delay, the High Court would be well within its powers in exercising its jurisdiction under Article 226 of the Constitution of India and the principle of law laid down in Glaxo Smith Kline Consumer Health Care limited (Supra) would not come into play, for then the Court must administer justice in accordance with law, and principles of equity, justice and good conscience. It would be unjust to defeat the right of an aggrieved party, after all Justice is a virtue which transcends all barriers and neither the rules of procedure nor technicalities of law can stand in its way. Even the law bends before justice.

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