

**SECTION 5 LIMITATION ACT, 1963 WHETHER FRONTIER OF EXPANSION
ARE EMERGING**

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Generally, in various legislations, the procedure is prescribed for filing an appeal challenging the assessment of duty, interest and penalty and time is also prescribed within which, appeal can be filed. There can be two situations (i) no upper limit has been prescribed up to which, delay can be condoned by the Tribunal as could be seen in Section 35B(5) of Central Excise Act, (ii) Tribunal or Appellate Authority is entitled to condone the delay within the maximum period prescribed – like first proviso to Section 35 of Central Excise Act, 1944. A question arises whether the provisions of Section 5 Limitation Act, 1963 can be invoked seeking condonation of delay of time period much more than the days so prescribed. Few judgments of the Hon'ble Supreme Court and that of different High Courts have been taken note of.

2: The applicability of the Limitation Act to the Rent Control proceedings was also dealt by the Supreme Court in the case of Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker MANU/SC/0453/1995 : (1995) 5 SCC 5. The Supreme Court has observed that once the Tribunal which decides the cases has trappings of a court and since the Limitation Act applies to the courts, the Limitation Act will also apply to the proceedings before the Tribunal under the Rent Control proceedings. Likewise, the CESTAT has also all the trappings of a court and, therefore, the provisions of Limitation Act will also apply to the proceedings pending before CESTAT.

3. In 'Union of India vs. M/s.Popular Construction Co.', MANU/SC/0613/2001 : AIR 2001 SC 4010 the issue was whether Sections 4 to 24 of the Limitation Act would be applicable to Section 34 of the Arbitration Act, 1996. The Supreme Court observed :

"8. Had the proviso to Section 34 merely provided for a period within which the Court could exercise its discretion, that would not have been sufficient to exclude Sections 4 to 24 of the Limitation Act because "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5." While holding that Section 5 is not applicable to Section 34(3), it was held that the presence of the words "but not thereafter" operate as an express exclusion to Section 5 of the Limitation Act.

12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to Sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result."

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4: In Popular Construction (supra), the Supreme Court has held that the provisions of Section 5 cannot be invoked since in Section 34(3) of Arbitration Act, 1996, while fixing the time period for filing objections challenging the Award of the Arbitral Tribunal, the words used “but not thereafter” – meaning thereby the legislature intended that no further time can be granted to the petitioner for filing objections under Section 34(3) of Arbitration Act, 1996 by invoking the provisions of Section 5 of Limitation Act. Therefore, to sum up, if the words used in any particular legislation convey legislative intent that the petitioner shall not be entitled to further time by invoking the principle of Section 5 of Limitation Act, then the provisions Limitation Act, 1963 shall not apply.

5: In a very latest judgment of the Full Bench of Orissa High Court in the case of AK Parida Vs. Union of India MANU/Ori/0022/2015 = AIR 2015 Orissa 49, the High Court has observed that in case, the applicability of provision of Limitation Act, 1963 has not been specifically excluded under any Act, the provisions of Limitation Act, shall apply to proceedings under that law. The Full Bench observed as under:-

20. In view of the authoritative pronouncement of the apex Court in the case of Mukri Gopalan (MANU/SC0433/1995 = 1995(5) SCC 5), a situation wherein a period of limitation is prescribed by a special or local law for an application of review and for which no provision is made in the Schedule to the Act, the second condition for attracting Section 29(2) of the Act is attracted. From the enunciation of law laid down in Mukri Gopalan (supra), it must be held that in view of Section 29(2) of the Limitation Act, the Tribunal has the jurisdiction to entertain the application for condonation of delay filed under Section 5 of the Limitation Act. Rule 17 of the Rules does not take away the jurisdiction of the Tribunal to entertain and dispose of the application under Section 5 of the Limitation Act, since applicability of Section 5 of the Limitation Act has not been expressly excluded thereby.

6: In another latest judgment, the Division Bench of AP High Court in the case of K D Kumar Vs. State of Telengana MANU/AP/0185/2015 (delivered on 30.04.2015) has observed as under:-

FACTS:

The petitioner suffered an order of confiscation passed under the provisions of the Andhra Pradesh Excise Act, 1968 by which his vehicle confiscated. An appeal was preferred under Section 46-C of the Excise Act, which provides that any person aggrieved by an order passed by Deputy Commissioner of Prohibition and Excise under Section 46 may, within sixty days from the date of passing such order, appeal to the Commissioner of Prohibition and Excise, within a period of sixty days. The petitioner preferred an appeal beyond sixty days and since there is no express power to condone the delay, the appeal was dismissed on the ground of limitation. The petitioner filed Writ Petition which was also dismissed by Single Judge and upheld order of Commissioner who dismissed on the ground of delay.

RATIO:

The appeal provision nowhere indicates, even by necessary implication, exclusion of applicability of the Limitation Act, 1963. Therefore, the power of condonation inheres in the appellate authority under the aforesaid Statute by applying provision of Section 5 of

the Limitation Act. However, we hasten to add that if Section 5 of the Limitation Act is applied, there may be chances of abuse of such power by unscrupulous litigants. Hence, unlimited condonable period will not be a healthy situation, but Court cannot prescribe any time limit.

7: By and large, the High Courts have generally or cursorily held that in case time period is prescribed within which delay can be condoned, Tribunal or Appellate Authority have no powers to condone the delay by invoking the provisions of Section 5 Limitation Act, 1963. However, the judgments cited above are some of the exception. Notwithstanding the above, the Hon'ble Supreme Court in the latest judgment in the MP Steel Corporation Vs. CCE 2015(319) ELT 373 SC = MANU/SC/0484/2015, has excluded the period of 11 years (in exercise of powers under Section 14 of Limitation Act) which was spent in pursuing the legal remedy before the wrong court/forum and has further held that if period of 11 years is excluded, then the appeal before the Commissioner (Appeal) is within a period of 90 days so prescribed first proviso to Section 35 of Central Excise Act,1944 and hence, the appeal has to be heard on merits by the Commissioner (Appeal) .

8: Now, I would detail few landmark judgments of the Supreme Court in which the principle governing the grant of delay in filing of application, petition or appeal under Section 5 of Limitation Act, 1963 have been explained.

9: The Supreme Court in the case of Collector, Land Acquisition Vs. Mst. Katiji MANU/SC/0460/= AIR 1987 1353/1987 has observed as under:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

10: The Supreme Court in the case of N Balakrishnan Vs. M Krishnamurthy AIR 1998 SC 3222 has held that unless there is a deliberate, malafide or gross negligence, reasonable delay should be condoned in as much as a person does not benefit by filing a petition with delay. Once no malafides or illegal motive can be imputed to a person to file a petition with delay, delay should ordinarily be condoned.

11: Further, the Supreme Court in the case of *Katari Suryanarayana v. Koppiseti Subba Rao* MANU/SC/0545/2009 : (2009) 11 SCC 183 and stated thus:

25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

12: The Supreme Court in the case of *S. Ganesharaju vs. Narasamma* MANU/SC/0379/2012 : 2012 (4) SCALE 152 has held as under :-

"15. The expression "sufficient cause" as appearing in the S.5 of the Indian Limitation Act 1963 has to be given a liberal construction so as to advance substantial justice.

16. Unless the respondents are able to show malafide in not approaching the court within the period of limitation generally as a normal rule the delay should be condoned. The trend of the courts while dealing with the matter with regard to condonation of delay has tilted more towards condoning delay and directing the parties and contest the matter on merits meaning thereby that such technicalities have been give a go by. In fact it is always just, fair and appropriate that matters should be heard on merits.

13: In *Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai* MANU/SC/0298/2012 : (2012) 5 SCC 157, the Supreme Court has ruled thus:

23. What needs to be emphasized is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

14: In a landmark judgment in which all previous judgments of the have been discussed and the Supreme Court in the case of Esha Bhattacharjee Vs. Raghunatha Nafar Academy. MANUSC/0932/2013 = 2013(12) SCC 649 has summarized the principle emerged from all previous decisions.

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

HOW TO DRAFT AN APPLICATION UNDER SECTION 5 OF LIMITATION ACT:

15: In the aforesaid case of Esha Bhattacharjee (supra), the Supreme Court also laid down guide-lines for drafting of an application seeking condonation of delay in filing of petition, appeal or application and these are principle are as follows:.

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

16: Gradually, a trend is emerging from the various judgments that the Hon'ble Courts are inclined to hear the case on merits rather than the shutting the door of justice on mere technicalities of limitation or time bar.