

(1975) 09 OHC CK 0030

In the Orissa High Court

Case No : Special Jurisdiction Case No. 111 of 1973

Gandharb Misra

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 24-09-1975

Acts Referred:

Industrial Disputes Act, 1947 — Section 33C
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (1975) 36 STC 466

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : U.N. Misra, for the Appellant; The Standing Counsel (S.T.), for the Respondent

Judgement

R.N. Misra, J.—On assessee's application made u/s 24(2)(b) of the Orissa Sales Tax Act, 1947 (hereinafter to be referred to as "the Act") this court directed the Tribunal to state a case and refer the following question for opinion of this court:

Whether, in the facts and circumstances of the case, the assessee was entitled to obtain extension of time for filing of the appeal before the first appellate authority upon satisfying him that there was good cause for not presenting the appeal within the prescribed period ?

2. On 9th March, 1970, assessee received the order of assessment for the period 1968-69. On 16th May, 1970, an appeal was filed before the Assistant Commissioner of Sales Tax. Under the provisions of Section 23(1) of the Act such an appeal has to be filed within 30 days from the date of receipt of the order of assessment. As the appeal was out of time, the assessee made an application for condonation of delay and claimed that he was ill. A medical certificate in support of the illness was also filed. The first appellate authority dismissed the appeal by saying that he had no jurisdiction to condone the delay. The Tribunal in second appeal placed reliance on the decision of the Supreme Court in the case of The Commissioner of Income Tax, Delhi and Rajasthan Vs. National Finance Ltd., ,

and upheld the order of the Assistant Commissioner.

3. Section 23(1) provides :

Within thirty days from the date of receipt of the copy of-

(a) an order of assessment with or without penalty u/s 12, 12-A or 12-B; or... any dealer or person, as the case may be, may, in the prescribed manner appeal to the prescribed authority against such order.

In the original Act of 1947 power had not been conferred on the first appellate authority to admit appeals filed beyond thirty days. Under Orissa Act 27 of 1951 the following proviso was inserted to Sub-section (1) of Section 23 of the Act :

Provided further that the prescribed authority may admit the appeal after the period hereinbefore specified if the said authority is satisfied that the dealer has sufficient cause for not preferring the appeal within the said period.

Section 23 underwent substantial amendments by Orissa Act 1 of 1955 and Orissa Act 20 of 1957. The proviso referred to above was not disturbed. Under Orissa Act 1 of 1955, similar power was vested in the Tribunal. Under Orissa Act 20 of 1957, Section 23 was redrafted and the power to admit appeals beyond time so far as the Tribunal was concerned was not provided, but it was reintroduced by Orissa Act 31 of 1962. Under Orissa Act 15 of 1968, Sub-section (1) of Section 23 was substituted. The proviso was dropped out from the said sub-section. The net result, therefore, is that the first appellate authority under the Act has no power to condone delay in preferring appeals, while the power has been vested in regard to second appeals in the Tribunal.

4. The assessee contends that the decision of the Supreme Court relied upon by the Tribunal could not have been applied to the facts of the case, because the decision was rendered with reference to the Limitation Act of 1908 and did not take note of the changed provisions under the Limitation Act of 1963. We may refer to the two provisions under the Act of 1908 and the Act of 1963. Section 29(2) of the Limitation Act of 1908 provided :

Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefore by the First Schedule, the provisions of Section 3 shall apply, as if such period were prescribed therefore in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law-

(a) the provisions contained in Section 4, Sections 9 to 18, and Section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law ; and

(b) the remaining provisions of this Act shall not apply.

The same provision under the new Limitation Act of 1963 reads thus :

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.

The change in the two provisions is of substantial character. While under the old provision the sections not stated in Clause (a) were not to apply, under the new provision Sections 4 to 24 of the Limitation Act were made applicable unless their application was expressly excluded.

A Bench of this Court in *Raghunath Agarwalla v. State of Orissa* [1876] 36 S.T.C. 461 (O. J. C. No. 654 of 1973 disposed of on 16th January, 1975) dealt with the applicability of Section 5 of the Limitation Act to a proceeding u/s 24(1) of the Orissa Sales Tax Act. u/s 24(1), an application is required to be filed within sixty days of the receipt of the copy of the order of the Tribunal or the Additional Tribunal, as the case may be, made u/s 23(3) of the Act. There is no provision authorising the Tribunal to extend the period of filing of such an application by condoning the delay. At the instance of the State, the Tribunal condoned the delay in making of the application u/s 24(1) of the Act. The assessee had challenged the order of the Tribunal as being without jurisdiction before this court. Several authorities were examined and the following conclusion was indicated:

In view of these authorities and considerable amount of consensus of judicial opinion, we are prepared to hold that by virtue of Section 29(2) of the Limitation Act, 1963, the provisions contained in Sections 4 to 24 thereof shall apply to proceedings under the Orissa Sales Tax Act to the extent they are not inconsistent with any specific provision in the taxing Act.

We may refer to a recent decision of a Full Bench of the Kerala High Court in the case *Jokkim Fernandez Vs. Amina Kunhi Umma*, . The question for examination was whether by virtue of Section 29(2) of the Limitation Act Section 5 of that Act was applicable for condoning delay in preferring of an appeal under the Kerala Buildings (Lease and Rent Control) Act (2 of 1965). In the predecessor Kerala Act there was a provision applying Section 5 of the Limitation Act to all proceedings under it. But in Kerala Act 2 of 1965 no provision of that type was found. Gopalan Nambiyar, J., with whom the learned Chief Justice agreed referred to two decisions of the Supreme Court being the cases of *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, , and *Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others*, , and observed:

...This being the position, even if the power u/s 5 were to be read into a special

local law by reason of the provisions of Section 29 of the Limitation Act, that power is exercisable only by courts and not by tribunals or other authorities such as the appellate authority in this case.

The provision of Section 18(1)(b) of the Kerala Buildings (Lease and Rent Control) Act, 1965, itself seems to contain an indication in support of the above conclusion. The said provision, which I have extracted earlier, enacts that in computing the thirty days prescribed for appeal, the time taken to obtain a certified copy of the order appealed against shall be excluded. This special provision would be unnecessary if Section 29(2) in the absence of express words of exclusion were to attract Section 12 of the Limitation Act providing for exclusion of time for obtaining a certified copy of the judgment. The provisions of Section 18(1)(b) therefore show that the Kerala Buildings (Lease and Rent Control) Act was meant to be a self-contained code in the matter of prescribing the periods of limitation and granting exemption therefrom.

The provision as found in Section 18(1)(b) of the Kerala Act is not available in the Orissa Act under consideration. The additional reasoning, therefore, is of no avail in this case. The two Supreme Court cases may now be referred to. In the case of *Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc.*, , the question for consideration was whether Article 137 of the Schedule of the Limitation Act applied to a proceeding u/s 33C(2) of the Industrial Disputes Act. The court observed :

It appears to us that the view expressed by this court in those cases *Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd.*, and *Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others*, must be held to be applicable even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963. The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as, when prescribing the three years" period of limitation, the first column giving the description of the application reads as "any other application for which no period of limitation is provided elsewhere in this division". In fact, the addition of the word "other" between the words "any" and "application" would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of *ejusdem generis* should be applied when interpreting the new Article 137....

This point, in our opinion, may be looked at from another angle also. When this court earlier held that all the articles in the third division to the schedule, including Article 181 of the Limitation Act of 1908 governed applications under the CPC only, it clearly implied that the applications must be presented to a court governed by the Code of Civil Procedure....One factor at least remains constant and that is that the applications must be to courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than courts, such as a quasi-judicial tribunal, or even an executive authority....

In *Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others*, , the self-same question arose for consideration, that is, the applicability of Article 137 to a proceeding u/s 33C(2) of the Industrial Disputes Act, and the court took the view that as the Labour Court is not a court within the Limitation Act, Article 137 of the Schedule had no application to the proceeding in question. Section 29(2) of the Limitation Act does not purport to make the schedule applicable. Expressly Sections 4 to 24 (inclusive) are made applicable in the absence of express exclusion. If no provision of the Limitation Act was at all to apply, the learned Judges of the Supreme Court would have directly stated so to rule out the point contended before the court. The Supreme Court decisions, therefore, do not purport to decide the point in issue and cannot be relied upon to resolve the problem.

Minority view *Jokkim Fernandez Vs. Amina Kunhi Umma*, of Viswanatha Iyer, J., in the Full Bench has observed :

Tribunals are very often given powers which are vested in a court under the Code of Civil Procedure. Section 23 of the Buildings (Lease and Rent Control) Act, 1965, is an instance of this type. In the same manner when the provisions of Section 5 of the Limitation Act are made applicable to proceedings under special laws what is done is that the deciding authorities under the special law are given the power of the court u/s 5 of the Limitation Act to condone the delay. These deciding authorities may or may not be courts. This, according to me, is the principle on which the provisions of the Limitation Act are made applicable to proceedings under the various special laws. A conclusion that the proceeding under the special law should be before ordinary (civil and criminal) courts alone in order that the provision of Section 5 can be applied is not warranted by the provisions of the various special laws and the Limitation Act.

If the terms of Section 5 are applicable only to courts, by the same terms they can apply only to cases where the Limitation Act prescribes periods of limitation, for, that section speaks of "prescribed period" as well. That means the provisions contained in Section 5 cannot be made applicable to periods prescribed by special laws, a conclusion not warranted by Section 29(2) of the Limitation Act, 1908....

While in the old Act some sections were stated to be not applicable to the determination of the periods of limitation under special laws unless expressly extended by a special provision, in the new Act all the provisions contained in Sections 4 to 24 are made applicable to the determination of the periods of limitation prescribed under special laws unless expressly excluded by it. By this change it is not necessary to expressly state in a special law that the provisions contained in Section 5 of the Limitation Act shall apply to the determination of the periods under it. By the general provision contained in Section 29(2) this provision is made applicable to the periods prescribed under the special laws. An express mention in the special law is necessary only for any exclusion. It is on this basis that when the new Buildings (Lease and Rent Control) Act was passed

in 1965 the provision contained in the old Section 31 was omitted. So, according to me, the provisions contained in Section 5 of the new Limitation Act applies to this case by the force of Section 29(2) of the Limitation Act.

5. With all respect to the learned Judges who expressed the majority view, we accept the analysis given by Viswanatha Iyer, J. *Jokkim Fernandez Vs. Amina Kunhi Umma*,

6. We shall now refer to another recent decision of the Supreme Court. In the case of *Commissioner of Sales Tax, U. P. v. Parson Tools & Plants, Kanpur* AIR 1976 S.C. 1039, the question for examination was the applicability of Sections 5 and 14(2) of the Limitation Act, 1963, to a revision under the U. P. Sales Tax Act of 1948. Section 14(2) of the Limitation Act, 1963, provides:

In computing the period of limitation for any application the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

Analysing this provision, the court observed :

It will be seen that this sub-section will apply only if-

- (i) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party ;
- (ii) the prior proceedings had been prosecuted with due diligence and in good faith;
- (iii) the failure of the prior proceeding was due to a defect of jurisdiction or other cause of a like nature ;
- (iv) both the proceedings are proceedings in a court.

Their Lordships relied upon the earlier decisions of the court in the cases of *Ujjam Bai v. State of U.P.* AIR 1962 S.C. 1621 and *Jagannath Prasad Vs. The State of Uttar Pradesh*, , to hold that the authorities under the U. P. Sales Tax Act are not courts and, therefore, came to the conclusion that Section 14(2) can have no application to proceedings under the U. P. Sales Tax Act. The learned Judges after reading the provisions of the material part of Section 10 of the U. P. Sales Tax Act, which runs thus :

(3)(i) The revising authority...may for the purposes 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

observed :

Three features of the scheme of the above provision are noteworthy. 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 unusually long. The third is that the revising authority has no discretion to extend this period beyond a further period of six months even on sufficient cause shown....

The three stark features of the scheme and language of the above provision unmistakably show that the legislature has deliberately excluded the application of the principles underlying Sections 5 and 14 of the Limitation Act, except to the extent and in the truncated form embodied in Sub-section (3-B) of Section 10 of the Sales Tax Act....

None of the three features is present here. A small period of thirty days is prescribed for filing of an appeal. There is no upper limit of the period beyond which delay cannot be condoned. Though Section 5 of the Limitation Act refers in term to a court, as already pointed out, the principle of Section 5 is not applicable on its own terms but on account of the language of Section 29(2) of the Limitation Act. We do not find anything contrary to our view in the decision.

7. For the reasons given in the judgment of the writ application referred to above, and the additional reasons now given, we would hold that by virtue of Section 29(2) of the new Limitation Act, principles of Section 5 of the Limitation Act are applicable to an appeal filed before the Assistant Commissioner of Sales Tax u/s 23(1) of the Act. The application made for condonation of delay in preferring of the appeal before the Assistant Commissioner was, therefore, maintainable and the Assistant Commissioner went wrong in rejecting it as incompetent in law and the Tribunal equally erred in upholding the decision of the Assistant Commissioner on such score. Our answer to the question referred to is :

On the facts and in the circumstances of the case, the assessee was entitled to obtain extension of time for filing of the appeal before the Assistant Commissioner of Sales Tax upon satisfying him that there was good cause for not presenting the appeal within the prescribed period.

8. The assessee shall have his costs. Hearing fee is assessed at Rs. 200.

N.K. Das, J.

9. I agree.