
(1983) 04 AP CK 0015

In the Andhra Pradesh High Court

Case No : A.A.O. No. 613 of 1980 and Civil Revision Petition No. 219 of 1981

Government of Andhra Pradesh

APPELLANT

Vs

Durgaram Prasad

RESPONDENT

Date of Decision : 08-04-1983

Acts Referred:

Arbitration Act, 1940 — Section 30, 37
Clauses Act, 1897 — Section 8
Limitation Act, 1963 — Article 119, 29(2), 5

Citation : AIR 1984 AP 14

Hon'ble Judges : Ramanujulu Naidu, J; Rama Rao, J

Bench : Division Bench

Advocate : P. Innayya Reddy, Government Pleader, for Panchayat Raj, for the Appellant; N.V.B. Sankara Rao, for the Respondent

Judgement

Rama Rao, J.—The appellant is the petitioner-plaintiff. These appeal and Revision arise out of proceedings under Sections 30 and 33 of the Arbitration Act to set aside the award dated 31-3-1979 in the matter of arbitration pertaining to the disputes arising out of a contract No. 27/CFB/65 dated 22-5-1965 relating to the construction of Arts and Science College at Siddipet in Medak district and Sections 14 and 17 of the Arbitration Act to receive the award dated 31-3-1979 and make it rule of Court. The 1st respondent is a firm of contractors and in view of the disputes raised with regard to the contract the 2nd respondent was appointed as arbitrator to adjudicate the disputes between the parties. The arbitrator made and signed the award dated 31-3-1979 allowing certain claims in favour of the 1st respondent. The award was filed into court by the 1st respondent with a prayer that it may be made a rule of the Court and decree may be passed in terms of the award and the petition is filed to set aside the award. The reasons in support of the petition for setting aside the award need not be traversed in this appeal as the subject-matter of this appeal is confined to the question with regard to the applicability of Section 5 of the Limitation Act. The respondent filed the written statement denying the allegations and

contentions and also stated that the petition is not filed within the period of limitation prescribed under Art. 119 (b) of the Limitation Act and it cannot be treated as an application to set aside the award and the Court has no power to extend the period of limitation and permit the Chief Engineer to file objections beyond the period of limitation. The issue that was considered is whether the defendant filed the objections to the award within the period of limitation and this was tried as a preliminary issue. The essential facts culminating in this issue may be stated: The arbitrator made and signed the award on 31-3-1979 and issued notices of the same to both the parties. The award was signed by the arbitrator on 31-3-1979 and on 14-4-1979 the petitioner requested the arbitrator to cause the award to be filed into court or in the alternative authorise him to file the same in his behalf. The arbitrator by his letter dated 16-4-1979 authorised the petitioner to file the award into court and delivered the award into court and delivered the award to the petitioner. The original award dated 31-3-1979 pertaining to the contract was filed into court along with the petition on 21-4-1979. After registering the petition, the court ordered notice to the respondents for their appearance on 22-7-1979. The notice was ultimately returned after service with endorsement that it was served on 5-7-1979. The learned Government Pleader represented that a copy of the award was not furnished to him either by the arbitrator or by the petitioner and he could not get a copy of the same from the court and therefore applied to the court for furnishing the certified copy of the same. The said application was filed on 24-7-1979 and later on the certified copy was obtained on 18-8-1979 and objections were filed on 7-9-1979. It is also represented by the Government Pleader that the Court extended the time to file the counter up to 27-9-1979 and therefore the counter was filed within the time. The period of limitation prescribed for filing application for setting aside the award is 30 days from the date of service of notice of filing the award. The Government Pleader contended that the copy of the award was not supplied to him and the time taken by him to obtain a copy of the award should be excluded while computing the period of limitation. After computing the time taken for obtaining certified copy, it was calculated that the time taken by the 1st respondent who filed the application for cancellation of the award was one month and 17 days and this is beyond the period of 30 days limitation prescribed under Art. 119 of the Limitation Act after excluding the time in accordance with Section 14(4) of the Limitation Act. The court below held that the provisions of Section 5 of Limitation Act cannot be invoked and the court has no power to extend the time for filing the objections beyond the period stipulated under Art. 119 (b) of the Limitation Act and the order passed by the Court extending the time for filing the objections up to 27-9-1979 is of no consequence and the court cannot look into the said objections. In this view it is held that O. S. 140/1979 for cancellation of the award dated 31-3-1979 is made rule of the Court and the decree is passed in terms thereof is O. S. 133/1979.

2. The learned Government Pleader contended that Section 5 of the Limitation

Act 1963 is applicable in the circumstances as Section 5 is wide in its sweep and by its own force applies and the Court has jurisdiction to extend the time in its discretion. The learned counsel for respondents contended that Section 37 of the Arbitration Act totally excluded the applicability of Section 5 of the Limitation Act and as such the court has no discretion to extend the time and the time stipulated under Article 119 (b) of the Limitation Act should be adhered to and the extension sought for is not valid. It is further contended that Section 37 of the Arbitration Act provides for the applicability of provisions of Limitation Act, 1908 and in the absence of substitution of provision regarding applicability of Limitation Act, 1963 the question of invoking the provisions of new Limitation Act does not arise.

3. In support of the contention regarding wide coverage of Section 5 of the Limitation Act the learned Government Pleader relied upon the decision of Allahabad High Court in Smt. Ram Piyari Vs. Budh Sen and Others, . In this case the applicant moved for setting aside the ex parte decree on 19-1-1976. She filed a tender for Rs. 208.50, the decretal amount along with the application and the Court passed the tender the same day but the money was deposited in the Bank on 18-2-1976. The trial court dismissed the application on the finding that the applicant Smt. Ram Piyari had knowledge of the suit and wilfully did not appear and allowed it to proceed ex parte. It is further held that the application was filed on 19-1-1976 beyond the period of limitation for setting aside the ex parte decree. The revision was filed and in the revision it was contended by the respondent that in accordance with the proviso to Section 17 of the Provincial Small Cause Courts Act the decretal amount was not deposited within time and as such the application for setting aside the ex parte decree was not maintainable. The learned District Judge upheld this contention and dismissed the revision. During the pendency of the revision before the District Judge the applicant moved an application that the delay in depositing the money may be condoned and no specific orders have been passed on this application. Thereafter the revision petition was filed u/s 115, C. P. C. in the High Court and it was contended that in any event the application for condonation of delay in depositing the money should have been considered. In the context of considering the applicability of S. 5 of the Limitation Act it was held that unlike Section 5 of the prior Act which covered only applications for review of judgment or for leave to appeal and applications to which the section was made expressly applicable by some enactment, the present section of its own force applies to all applications except those under Order 21, C. P. C. In Soorajmull Nagarmal Vs. Golden Fibre and Products, the question that came up for consideration is whether the Court can extend the time for making application u/s 30 of the Indian Arbitration Act for setting aside the award and it was held that Section 5 of Limitation Act applies to all applications except those under Order 21, C. P. C. In Union of India (UOI) Vs. Builders Union, the notice of the filing of the award was received by the appellant on 26-5-1980. The notice required the appellant to file objections to the award on 9-7-1980 and applied for time to file objections and no order was

passed on that application and the case was adjourned to 10-7-1980 and on the said day the objection petition dated 10-7-1980. The prayer for amendment was resisted by the respondent on the ground that the objections petition dated 10-7-1980 was itself barred by limitation. On 2-9-1980 the appellant made an application u/s 5 of the Limitation Act to condone the delay in filing the objection. The court proceeded upon the footing that Section 5 of the Limitation Act is applicable and no issue was raised regarding the applicability of Section 5. In *Executive Engineer, Rural Engineering Division, Puri Vs. Construction India*, the petition u/s 30 of the Arbitration Act was filed beyond the prescribed time and the question arose whether the Court has jurisdiction to condone the delay u/s 5 of the Limitation Act. Relying upon the earlier judgments of the Orissa High Court and also the decision of the Calcutta High Court in *Soorajmull Nagarmal Vs. Golden Fibre and Products*, it is held by the Orissa High Court that in view of the change brought about in Section 29 of the New Limitation Act, the Court has jurisdiction to extend the time by condoning the delay in filing the application beyond 30 days.

4. The learned counsel for the respondent heavily leaned upon the decision of the Madras High Court in *H. Chandanmull and Co. Vs. Mohambal M. Mehta and Others*, . In this case the notice of the filing of the award was served on the appellant. The appellant did not file the application to set aside the award within 30 days prescribed under Art. 158 of the Limitation Act. On the reopening of the High Court after summer recess the appellant filed application u/s 5 of the Limitation Act for condonation of delay in filing the application to set aside the award and the question arose whether Section 5 of the Limitation Act is applicable. The Division Bench consisting of Rajamanner, C. J. and Venkataramaiyar, J. held that Section 5 of the Limitation Act, 1908 is not applicable. It was noticed that before the Arbitration Act of 1940 the law was well settled that the Court has no power u/s 5 of the Limitation Act to extend time prescribed under Art. 158 of the Limitation Act. Construing the amplitude of Section 37 of the Arbitration Act which provides for the applicability of the provisions of the Limitation Act, 1908 to arbitrations as they apply to proceedings in Court, it is held as follows at page 562:-

"In the context, therefore, the word "arbitration" should be limited to proceedings before the arbitrators; and an application to set aside an award being a proceeding in Court, cannot be held to be an arbitration proceeding. Moreover, Section 37(1) is intended to apply to proceedings in Arbitration the provisions of the Limitation Act which would otherwise be inapplicable. But even apart from Section 37(1), Art. 158 in terms applies to an application to set aside an award. On the construction of the section, therefore we are of the opinion that "arbitration" referred to in Section 37(1) cannot include a proceeding taken in court for setting aside the award."

It is further held as follows at page 562:-

"The true scope of this provision is therefore that when proceedings are taken

before the arbitrator the parties are entitled to plead limitation exactly as if the proceedings had been taken in a civil court. That being the scope of Section 37(1), its operation should be limited to proceedings before the arbitrator and not to proceedings taken in a Court, though they might arise out of arbitration proceedings. In this view we are of opinion that Section 37(1) does not have the effect of making Section 5, Limitation Act, applicable to an application to set aside the award."

Reliance is also placed on the decision of the Bombay High Court in *Purshottamdas Hassaram Sabnani Vs. Impex (India) Ltd.*, . With reference to the exclusion of time in computing the time for setting aside the award Chief Justice Chagla observed that after Section 37(1) of the Arbitration Act was enacted no further question arises as to the application of principles of Limitation Act merely by analogy to proceedings before the Arbitrators. Further the exclusion of time taken up in arbitration proceedings and the manner of computing the period of limitation is specified in Section 37(5) of the Arbitration Act. Section 37(5) provides for a restricted time to be excluded and in view of the special provision made in Section 37(5), of the Arbitration Act the provisions of Section 14 of the Limitation Act are excluded and the limited period stipulated u/s 37(5) is liable to be excluded for computing the time taken in the arbitration proceedings. In *Hastimal Dalichand Bora and Others Vs. Hiralal Motichand Mutha*, the Division Bench of the Bombay High Court consisting of Gajendragadkar and Chainani, JJ. Held that Section 5 of the Limitation Act is not applicable with reference to the period prescribed under Art. 158 of the Limitation Act and the Court has no jurisdiction to condone the delay in which a party may make in filing the application u/s 33 of the Arbitration Act. Reliance is also made on the decision in *Kawalsingh v. Baldeosing*, AIR 1957 Nag 57 wherein it is held that Section 5 of the Limitation Act does not apply to the proceedings under Arbitration Act 1940 and therefore it cannot be invoked in extending time for filing application to set aside the award. To the same effect is the decision of the Orissa High Court in *Ganesh Chandra Misra Vs. Artatrana Misra and Others*, wherein it is held that the limitation prescribed under Art. 158 to applications u/s 33 of the Arbitration Act challenging the validity of award cannot be saved u/s 5 of the Limitation Act. Reference is also made to the decision of the Delhi High Court in *Union of India v. M/s. Vijay Construction Co.* AIR 1981 Del 193. In this case the issue considered was whether the application filed u/s 20 of the Arbitration Act is within time. The contract between the company and the Union of India was to be completed by 9-6-1974. This was extended to 5-12-1974. The work was not completed and the Union of India rescinded the contract on 6-12-1974. Thereupon the company sent notice dated 17-11-1976 to the General Manager, Northern Railways requiring that he should either act as sole arbitrator within the prescribed period of 15 days from the date of the receipt of the letter. A reminder was sent but there was no response. Thereafter the company moved an application on 8-9-76 u/s 20 of the Arbitration Act for filing the arbitration agreement and referring the matter to the arbitrator. The plea of limitation was raised by the Union of India

regarding the filing of the application u/s 20 of the Act. The Delhi High Court held that the applications u/s 20 of the Act are governed by Limitation Act and as the right to apply accrued to the respondent on 6-12-1974 when the contract was rescinded the period of limitation has to be computed from that date and the application filed on 4-9-1978 is beyond time. But however at the instance of the company Section 5 of the Limitation Act was invoked as there was sufficient cause for filing the belated application under the bona fide belief that the limitation would run from the date of issue of notice on 17-11-1976. In the Criminal Law, the delay was condoned. The proceedings in this case are in respect of Section 20 of the Arbitration Act and therefore not directly applicable to the facts of the instant case. But however even with respect to Section 20 of the Arbitration Act the Delhi High Court held that Section 5 of the Limitation Act is applicable.

5. To have an insight into the new dimension projected into Section 5 under 1963 Act, it is necessary to have a focus upon the limitation of the old provision and the enlarged sphere of the charge over under the new one. The applicability of Section 5 of the old Act was confined to applications for leave to appeal and review and the applications under the provisions of Order 21, C. P. C. were excluded from its ambit. The applicability of Section 5 to the proceedings under special enactment is inhibited in the absence of special provision to that effect in the enactment. Section 5 under 1963 Act is made applicable to all applications before the Court except the application under the provisions of Order 21, C. P. C. and the applicability of the old provision is restricted to the specific applications and situations enumerated therein. In so far as the proceedings under special enactment the halting applicability of former Section 5 is patent and the present Section 5 has an universal application to the proceedings irrespective of the source, nature or otherwise. The present S. 5 applies to all proceedings by its own force without the necessity of being propelled by external aid. The present Section 5 comprehends a wide sweep and applies to all applications before the Court save the proceedings under Order 21, C. P. C. The trend always intrusion of the provisions of Limitation Act in the proceedings under the special enactments is plainly discerned from Section 29(2) of the Act. In the absence of specification of period of limitation under the special enactment the provision of Sections 4 to 24 of the Limitation Act are made applicable. The provisions prescribing limitation under the special enactment prevails and in the absence of the same the provisions of Sections 4 to 24 are applicable. The cumulative effect of Section 5 and Section 29(2) of the new Act is that the power to condone delay in deserving cases of sufficient cause in all applications except under Order 21, C. P. C. is conferred on the courts and the provisions of Sections 4 to 24 embrace the proceedings under the special enactment unless a different period or situation is visualised under the special Act.

6. The learned counsel for the respondent echoed that the applicability of the decision of the Madras High Court in *H. Chandanmull and Co. Vs. Mohambal M. Mehta and Others*, is not affected by the repeal of the provisions of the

instrument, 1908 and the impact of the said decision is not denuded in any way by substitution of the new provision. The complexion and texture of Section 5 of the old Limitation Act is entirely different from the new provision. The limitation of the applicability of Section 5 of the old Act is enlarged in the new provision. The fetters under the old provision are removed and the new provision has full sway over all proceedings except one under Order 21, C. P. C. The decision in *H. Chandanmull and Co. Vs. Mohambal M. Mehta and Others*, and other decisions relied upon by the learned counsel for the respondent are rendered on the basis of the old model and frame of Section 5 prior to the new touch given under the new Act. The stress of the learned counsel on the applicability of the said decisions demonstrates clinging to the past despite the overhaul and new fittings under the 1963 Act. The principle enunciated in the Madras decision is that in the absence of a provision under a special enactment facilitating the applicability of Section 5 of the Limitation Act the delay in filing the application for setting aside the award cannot be condoned u/s 5 of the Act. This decision and other decisions which followed suit have lost vitality in view of the substantial change-over of Section 5 of the Limitation Act.

7. In support of the proposition that the switch-over to the applicability of Section 5 of 1963 Act is precluded in view of status quo maintained in Section 37 of the Arbitration Act by retention of the applicability of the provisions of Limitation Act, 1908, reference is made to the decision of the Supreme Court in *Mahindra & Mahindra Ltd. V. Union of India*, AIR 1979 SC 798. In the context of considering that the substitution of new Section 100, C. P. C., did not affect or restrict the grounds specified in unamended Section 100, C. P. C. incorporated in Section 55 of the Monopolies and Restrictive Trade Practices Act, the Supreme Court adverted to the impact of Sec. 8 of the General Clauses Act and highlighted the distinction between a reference to a statute and incorporation of a provision. *Bhagwati, J.* held as follows at page 810:

"Where there is mere reference to or citation of the enactment in another without incorporation, Sec. 8 (1) applies and the repeal and re-enactment of the provision referred to or cited has the effect set out in that section and the reference to the provision repealed is required to be construed as reference to the provision as re-enacted."

It is further held at page. 811 as follows:-

"It is, therefore, clear that if there is mere reference to a provision of one statute in another without incorporation, then, unless a different intention clearly appears, Section 3(1) would apply and the reference would be constructed as a reference to the provision as may be in force from time to time in the former statute. But if a provision of one statute is incorporated in another, any subsequent amendment in the former statute or even its total repeal would not affect the provision as incorporated in the later statute. The question is to which category the present case belongs."

It is further held at page 810 as follows:-

"But where a provision of one statute is incorporated in another, the repeal or amendment of the former does not affect the latter. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were a part of it. Litigation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute."

The learned counsel referred to Maxwell on Interpretation of Statutes in 1962 Edition at page 176 which is as follows-

"When a general Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they were inconsistent. It may be added, also, that when an Act on one subject, such as highways, incorporates some of the provisions comprised in another relating to a different subject, such as poor rates, if does not thereby incorporate the modifications of those provisions which are subsequently made in the latter Act."

8. The incorporation effectively operates as bodily lifting of provision of one enactment and making it as integral part of another statute and the consequence of such incorporation is that the provision in another statute becomes a part of the present statute and in view of the same the statute along with its of the same the statute along with its added provision will become a self contained statute without being effected or percolated by any amendments in the other statute from which this provision is borrowed. But in a case of a reference to a provision or enactment the subsequent amendment or substitution by way of repeal or otherwise must be implied to have been the part of the present statute as the reference refers to only the provision as such and implies the applicability of the provision as amended from time to time. But in the case of incorporation the provision itself is taken out and merged in the provisions of the statute and unless there is an amendment in this statute and unless there is an amendment in this statute there will not be any impact of an amendment or otherwise made in the other statute as there is no continuing link between the two statutes. Section 8 of the General Clauses Act provides that in the event of reference to any other enactment or provision it must be constructed that the reenactment provisions pursuant to repeal or otherwise will apply unless different intention can be spelt out from the provisions of the statute. Bearing in mind these cardinal principles it has to be considered whether Section 37 of the Arbitration Act makes a reference to the provisions of the Limitation Act or the entirety of the provisions of the Limitation Act or any provisions of the Limitation Act is incorporated in the statute. It is patent from the perusal of S. 37 of the

Arbitration Act that a reference to the provisions of the Limitation Act, 1908 has been made and it cannot be interpreted that the provisions of Limitation Act have been incorporated or merged into the provisions of the statute. Therefore, when S. 37 of the Arbitration Act has made a reference to the provisions of the Limitation Act, 1908 and when 1908 Act has been substituted by 1963 Act by repeal the new provisions of 1963 Act are applicable.

9. The Court below erred in holding that the provisions of Section 5 of the Limitation Act, 1963 cannot be invoked. Therefore, the judgment and decree in both the suits are set aside and the Court below is directed to dispose of the suits afresh according to law.

10. Appeal and C. R. P. allowed. No. costs.

11. Appeal allowed.