
(2007) 12 CAL CK 0003
In the Calcutta High Court
Case No : W.P.L.R.T. No. 778 of 2002

Kashinath Mondal and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 19-12-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Constitution of India, 1950 — Article 226, 227
Limitation Act, 1908 — Section 5
Limitation Act, 1963 — Article 97, 10, 12, 14, 16
West Bengal Land Reforms Act, 1955 — Section 17, 18, 18(1), 18(2), 18A(2)

Citation : (2008) 2 CHN 7 : 112 CWN 474

Hon'ble Judges : Manik Mohan Sarkar, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Bidyut Banerjee, Sulekha Mitra and Arnab Roy, for the Appellant;
Saktinath Mukherjee, Subrata Talukdar, Mahendra Maskara and Tanmoy Roy, for the Respondent

Final Decision : Dismissed

Judgement

1. The judgement and order dated 1st April, 2002 is assailed by this appeal. Upon reading of the impugned judgement and order we find that the only point raised before the learned Tribunal by the applicant herein is, to challenge the order of the District Land and Land Reforms Officer being the appellate authority under the West Bengal Land Reforms Act, 1955 (hereinafter referred to as the said Act), whether without considering the application for condonation of delay u/s 5 of the Limitation Act the appellate authority could decide the matter on merit or not. From the records the following facts emerge:

The applicants, Mondals, had filed an application for recording their names as bargadars under the ownership of one Abanti Nath Pal and Jibanti Nath Pal being heirs and legal representatives Of one Jitendra Nath Pal, since deceased, in respect of 3.39 acres of land, Dag No. 140 of Mouza Atghara in the year, 1978, though the land in question had been transferred to different persons including

the private respondent herein at different times in between the years, 1965 to 1966. The then JLRO by his order dated 29th January, 1979 rejected that application once. Subsequently the names of the applicants before us, were recorded as bargadars without serving any notice to them or without their knowledge. It is also not disputed that the land in question was not being used as agricultural land and the said land was not under cultivation by the said respondents. Further it was stated that one of the recorded bargadars is engaged in other profession. The version of the applicant before us is that they all along have and still had been cultivating the said land in question and even they tried to offer their share of produce to the land owners/respondents herein but the same was refused. In view of this factual background recording of barga has been made by the BLLRO. The respondents had preferred statutory appeal against the aforesaid order of recording barga beyond the period provided in the statute. So an application was filed for condonation of delay. On 13th January, 2000 the application along with the appeal was taken up for consideration by the appellate authority viz. ADM and DLLRO, 24-Paraganas (North). On that date learned lawyer for the applicant (herein) viz. Sanjit Sarkar appeared and the appellate authority directed to supply a copy of the application u/s 5 of the Limitation Act for condonation of delay to him. From the document annexed to the affidavit-in-opposition it appears to us that on the same very date, may be at a later point of time the said copy of the application was served and the same was received by him. No opposition to the said application for condonation of delay was filed. On 27th April, 2000 in presence of the learned lawyers for both the parties the said appeal was taken up for hearing and in their presence an order was passed for conducting local enquiry. In fact, as it has been recorded in the said order by the appellate authority a proposal was made for spot enquiry on behalf of the respondent (appellant before us) and such proposal was not opposed by the private respondents. Accordingly, in order to decide the appeal, the said enquiry was asked to be conducted by the BLLRO personally for ascertaining the names of the cultivating possessors and quantum of land cultivated by each recorded bargadar and to submit a report.

On 23rd June, 2000 the appeal was taken up for hearing and considering all aspects of the matter, the appellate authority, found that the applicant before us failed to prove the case of cultivation at any point of time with acceptable evidence. Therefore, the appeal was allowed. The judgement passed by the Revenue Officer was set aside and the names of the appellants in respect of an area of 2.42 acres of land were directed to be deleted from the respective khatians.

2. The appellate authority on analysis of evidence in great details came to the above conclusion and granted relief.

3. Mr. Bidyut Banerjee, learned senior Advocate, in support of the applicant had taken a new point before us which had not been argued before the learned Tribunal. He contends that the appeal was really preferred under the provision of

Section 51A Sub-section (5) read with Section 51B of the aforesaid Act as order of the BLLRO is nothing but, order of refusal to correct the record-of-rights. He says that Sub-section (5) of Section 4 provides for time-limit within which appeal has to be preferred. In the said provision there is no mention of applicability of the Section 5 of the Limitation Act, 1963. According to him, the Legislature in its wisdom necessarily did not make provision for condonation of delay consciously as there is a specific mention for applicability of the said Section 5 of the Limitation Act elsewhere in the Act itself. In support of his contention on this point he has relied on the decision of the Division Bench reported in 1999(1) CHN 365 rendered in case of *Serish Maji v. Nishit Kumar Dolui*, which was approved later on by the Supreme Court in the case of *Gopal Sardar Vs. Karuna Sardar*, . As such, u/s 5 the application should not have been entertained and consequently the appeal should have been dismissed.

4. His alternative argument is that even if it is assumed that by virtue of Section 29 Sub-section (2) of the Limitation Act, provision of Section 5 of the Limitation Act is still applicable then in that case he submits that the appellate authority, without considering the application for condonation of delay, should not have decided the appeal on merit and the learned Tribunal accordingly committed mistake agreeing with the judgement of the appellate authority. According to him, the appellate authority cannot assume jurisdiction unless by an order delay is condoned upon considering the objection raised in the Section 5 of the Limitation Act. He submits that the fact finding of the appellate authority is wholly erroneous in the eye of law. Failure to share the crops or deposit of money in lieu of share of crops cannot be a ground for correction of record-of-rights by way of deletion of the name of the, applicant before us from the record-of-rights.

5. Mr. Saktinath Mukherjee, learned senior Advocate, appearing for the respondents, on the other hand, contends firstly that new point raised in this Court has no basis as the Division Bench judgement cited by Mr. Bidyut Banerjee and the Supreme Court decision as above were rendered in the context of provision of Section 8 of the said Act. If two judgements are read carefully it will appear that the application u/s 8 has been treated to be a proceedings akin to a suit. In case of filing of suit condonation of delay u/s 5 has no manner of application. Those judgements, according to him, cannot be said to be the statement of law to hold that Section 5 of the Limitation Act, will not be applicable in case of appeal or revision when under the special statute the provision of the same has not been expressly excluded. By virtue of Section 29 Sub-section (2) of Limitation Act, provision of Section 5 of the Limitation Act will have automatic application. In the said Supreme Court or Division Bench judgement nowhere it has been stated that by necessary implication applicability of the provision of Section 5 of the Limitation Act should be excluded.

6. He thereafter contends that it is not correct to say that the appeal was preferred under the provision as contended by the applicant. This appeal was

really made against the provision of Section 19 which provides applicability of Section 5 of the Limitation Act expressly in case of appeal against an order of this nature passed in this matter. Mr. Mukherjee contends that disputes involved in the application of his client before the BLLRO were the same as it is contemplated u/s 18 Sub-section (2) of the said Act. It was a question whether the applicants before us were and still are bargadars in respect of the land in question and decision on this question under the aforesaid provision has been made appealable under the aforesaid provision of law. His client's prayer was always in the nature of a declaration that the applicants before us were and still are not bargadars. Therefore, as a consequential order correction of record-of-rights by way of deletion of the appellant's name as a bargadar was sought for. He thereafter contends that it will appear from the records that application u/s 5 of the Limitation Act was made and the same was served upon the applicant herein who did not file any objection to the said application. Even on two different dates the appeal was taken up for hearing and no objection was made either orally or by filing petition of objection against the application for condonation of delay. As such, the applicants before us have waived their right to oppose the application u/s 5 of the Limitation Act. Upon hearing without having received any objection the appellate authority has decided the matter on merit. When such course of action was taken by the appellate authority it shall be presumed that the appellate authority is deemed to have condoned delay. He also draws our attention to the Division Bench judgement of this Court reported in Sree Sree Iswar Sridhar Jew Vs. Jnanendra Nath Ghose and Others, and also another judgement of this Court.

7. On fact finding both the appellate authority and Tribunal have found that the applicant before us has failed to prove factum of cultivation. As such, recording done earlier is wholly improper and erroneous.

8. We have considered the rival contentions of the parties. We shall decide the new point raised by Mr. Bidyut Banerjee in this case since it is question of law. The provision of appeal, as pointed out by Mr. Banerjee, does not expressly exclude the provision of the Limitation Act. We have to consider as to whether there can be any exclusion of the aforesaid provision by necessary implication or not.

9. It appears to us that the Supreme Court judgement relied on by Mr. Banerjee has dealt with the provision of Section 8 of the said Act vis-a-vis the provision of Section 5 of the Limitation Act. According to us, this judgement has dealt with only the limited point whether Section 5 of the Limitation Act is attracted to the proceedings u/s 8 of the said Act or not. The Supreme Court, after discussing all the aspects on this issue, has found that the proceedings of pre-emption as contended u/s 8 of the said Act is an original proceedings as if it were a suit. Actually, the period of limitation for enforcement of a right of pre-emption is available under Article 97 to the Schedule of the Limitation Act, 1963. It appears to us, on reading of the judgement of the Supreme Court, that the right of pre-

emption basically emanates from Article 97 but the period of limitation as contained in the Section 8 of the said Act is different from that of Article 97. By virtue of Section 29 Sub-section (2) the period of limitation mentioned in the Act overrides the period of limitation mentioned in the Article. The provision of Section 29 Sub-section (2) is set out hereunder:

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 insofar as and to the extent to which, they are not expressly excluded by such special or local law.

10. The Supreme Court in that judgement further held that provision of pre-emption right and proceedings leading thereto as embodied in the said Act is a complete Code by itself. In case of suit provision of Section 5 has no manner of application. In that context in our opinion the Supreme Court held that although the proceedings u/s 8 of the said Act starts with the word "application" yet substantially it is a suit.

11. Here we are dealing with the appeal, not the original proceedings. The provision of appeal, according to Mr. Banerjee in this case Section 51A Sub-section (5) is relevant provision. The provision of Limitation Act has not been made applicable expressly, as such, by virtue of the provision of Section 29 Sub-section (2) provision of Section 5 will have to be made applicable. Exclusion by necessary implication is not the intention of the Legislature, according to us, exclusion must be expressed. Whenever Legislature intends that provision of Limitation Act has to be kept outside purview of any enactment it is to be mentioned in the particular Act itself particularly. For example, in the provision for setting aside of an award u/s 34 of the Arbitration and Conciliation Act, 1996 specific period of limitation has been made strictly applicable as the language mentioned therein is very specific. We hold, therefore, that the aforesaid provision is applicable herein. Provision of Section 4 to Section 24 of Limitation Act are not excluded expressly.

12. Now, we shall deal with the legal issues involved and argued before the learned Tribunal. It appears that in West Bengal Land Reforms Act there are number of chapters which deal with separately in various situations and various appellate provisions have been provided for. Mr. Bidyut Banerjee says that in this case appropriate appellate provision would be Section 51A Sub-section (5) of the said Act as it relates to revision and correction of the entry in the record-of-rights. In our view having regard to the subject-matter involved we think that it does not relate to the question of revision of record-of-rights, it is really a question of declaration of the status of Mr. Banerjee's client as to whether he is a bargadar or not. This dispute, in our view, as rightly been contended by Mr.

Mukherjee falls within the purview of Section 18 Sub-section (2) of the said Act which is set out hereunder:

If in deciding any dispute referred to in Sub-section (1) or otherwise any question arises as to whether a person is a bargadar or not and to whom the share of the produce is deliverable, such question shall be determined by the officer or authority mentioned in Sub-section (1).

(emphasis supplied)

13. From the records it appears to us that Mr. Mukherjee's client contended that Mr. Banerjee's clients were never bargadars and this is really an issue covered by Sub-section (2). Naturally Block Land and Land Reforms Officer held in favour of Mr. Banerjee's clients. Obviously the corresponding appellate provision against the aforesaid decision is provided u/s 19 of the said Act which is set out hereunder:

19. Appeal.- (1) An appeal shall lie to the Collector having jurisdiction over the area in which the land is situated, against any order made u/s 17 or Section 18 or Sub-section (3) of Section 21. The Collector shall, on an appeal being disposed of, send a copy of his order to the officer or authority whose decision is appealed against.

(1A) An officer or authority appointed by the State Government u/s 17 or Section 18 or an officer specially empowered under Sub-section (1) of Section 19B shall not pass any interlocutory or final order in any proceedings before him or it on the basis of any consent, agreement or compromise obtained or effected for the purpose of such proceedings, notwithstanding anything contained in the Indian Contract Act, 1872 (9 of 1872), or any other law for the time being in force-

(2) The period within which the appeal mentioned in Sub-section (1) must be filed shall be thirty days from the date of the order appealed against:

Provided that an appeal against any order referred to in Sub-section (2) of Section 18A made before the commencement of the West Bengal Land Reforms (Amendment) Act, 1960 may be filed within ninety days of such commencement:

Provided further that the provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to an appeal under this section.

(emphasis supplied).

(2A) Every appeal pending before any Munsif at the commencement of the West Bengal Land Reforms (Amendment) Act, 1970, shall, on such commencement, stand transferred to, and be disposed of by, the Collector having jurisdiction in relation to the area in which the land is situated and on such transfer every such appeal shall be dealt with from the stage at which it was so transferred and shall be disposed of in accordance with the provisions of this Act as amended by the West Bengal Land Reforms (Amendment) Act, 1972.

(2B) The Collector may transfer any appeal, whether transferred to, or filed before him, for disposal to any officer subordinate to him as may be prescribed:

Provided that the officer to whom the appeal is transferred is superior in rank or position to the officer or authority making the order appealed against and every such appeal shall be dealt with from the stage at which it was so transferred and shall be disposed of in accordance with the provisions of this Act.

(3) The Sub-Divisional Officer hearing the appeal may for sufficient cause make an order staying execution of the order appealed against.

(4) When the Sub-Divisional Officer makes an order under Sub-section (3), a copy of such order shall be sent to the officer or authority before whom an application for execution is pending.

14. It will appear from above provision that provision of Section 5 of the Limitation Act has been made applicable by the Legislature.

15. It is settled position of law that record-of-rights does not create nor extinguish title. It really reflects the title and this has got a presumptive value. The decision relating to status and/or right of a particular person is something else from the record-of-rights. After the decision of right or status is rendered, the same is reflected in the record-of-rights and that is why from time to time correction of the same is required under the circumstances as mentioned in this Act. For example, if the property vests by way of devolution or transfer record-of-rights needs to be corrected in view of change of ownership either by way of voluntary transfer or by way of succession. Therefore, the correction of record-of-rights is really consequential and does not relate to adjudication of substantive dispute involved relating to status or title in the matter.

16. We hold that the appropriate appellate provision in this case would be the aforesaid Section 19 of the Act.

17. It is contended that without disposing of Section 5 of the application the appellate authority should not have disposed of the appeal. We are of the view that provision of Section 5 is a power given to the Court and/or appropriate authority to condone delay. The said Section itself does not require any application to be made. It can be done by the Court and/or authority itself either expressly or by necessary implication. Any appeal preferred beyond the prescribed period of limitation and where provision of Section 5 is applicable the adversary has every right to take the point of limitation, as after expiry of prescribed period of limitation valuable right accrued in its or his favour. It is for him either to take the plea or not to take the plea. If such plea is not taken or the prayer for condonation of delay is not opposed then it should be presumed that such a right has been waived. We are of the view that right to oppose the prayer for condonation of delay is a waivable right and absolutely an individual one and it is not a statutory provision unlike Section 3 of the Limitation Act. In case of a suit it is the duty of the Court u/s 3 of the Limitation Act to see the

point of limitation whether it is taken or not. But in case of condonation of delay such duty is not upon the Court to consider unless asked for. Right to oppose the prayer for condonation is always conferred upon the party, in whose favour the right has accrued.

18. It is, thus, the discretion of the Court and/or appellate authority either to condone or not to condone if such plea is taken. When it is found that the Court has decided the matter on merit it shall be presumed that the Court is deemed to have condoned. Mr. Saktinath Mukherjee has brought in support of the aforesaid opposition two decisions viz. Sree Sree Iswar Sridhar Jew Vs. Jnanendra Nath Ghose and Others, and 1969(1) Mys. 391 (B.H. Subbiah Gowda v. Seshagiriachar and Ors.)

19. In the decision of this Court the Division Bench while dealing with an appeal against an order of the learned Single Judge approved the decision allowing an appeal against an order of learned Master under Rule 15 of Chapter VI of the Original Side Rules without dealing with question of limitation, though raised specifically, on merit. Their Lordships in paragraph 11 therein concluded as follows:

...Prima facie, therefore, the application was time barred and if the learned Judge was not prepared to extend the time, he would obviously have thrown out the application on the ground of limitation and not troubled himself with it further. In fact, however, the application was not thrown out, but an order of a positive character was made. It is thus perfectly clear that the learned Judge entertained the application and made an order upon it and he could not have done so, unless he was willing to treat the application as made within time....

20. In Mysore case (supra) the Division Bench accepted a decision on merit of Revenue Appellate Tribunal in a revision application filed u/s 37 of Mysore Tenancy Act, though filed beyond the period of limitation. The learned Tribunal without deciding the question of limitation meaning thereby without condoning delay, expressly allowed the application reversing the order of Tahsildar under the said Act. The Division Bench while dismissing writ petition observed at page 392 of the report amongst other:

If the presumption that there was a condonation of delay springs from the fact that the Tribunal which had to consider the question of limitation heard the matter on merits, it is that act on the part of that Tribunal which brings into being an inference that had not the Tribunal been satisfied that there was sufficient ground for the presentation of the matter which it had to decide, beyond the period of limitation prescribed for that purpose, it would not have proceeded to spend any time over the merits of the case. In that view of the matter, the fact that the Tribunal in the cases before us proceeded to hear arguments on merits after it had once decided to postpone its decision on the question of limitation, far from rendering in-applicable the ratiocination on which pronouncement of the Privy Council depended, makes it all the more applicable.

That is so because, if we should infer the condonation of delay in a case in which the Tribunal did not at all state anything about the bar of limitation, we should not be slow to do so in a case in which the Tribunal did know that the delay had to be condoned and proceeded to hear the matter on the merits. In the latter case the inference that the delay must be deemed to have been condoned becomes stronger than in the former.

21. In those two cases the Courts thus long time back have stated proposition of law that condonation of delay need not be an expressed one and it can be inferred that the same is deemed to have been done.

22. We find in this case on records that application for Section 5 was served on 13th January, 2000 and on the subsequent date viz. on 27th April, 2000 the appeal was taken up for hearing and almost by consent an interim order was passed holding enquiry for a report. Thereafter on the final hearing day the matter was heard out extensively. At no point of time Mr. Banerjee's client took up the point of limitation or opposed the prayer for condonation of delay. If there is no opposition nor any prayer for rejection of the appeal on the ground of limitation Then it must be held that the right to oppose is waived.

We are of the considered view after allowing the appellate authority to decide the matter on merit, Mr. Banerjee's client is estopped from taking point of limitation. The learned Tribunal in our view has rightly rejected such a plea.

23. On merit we find findings of the appellate authority and as affirmed by the Tribunal is so strong and supported, by reasons that it is impossible for this Court to upset the same. The appellate authority with fact finding has found that Mr. Banerjee's clients have failed to prove that they were ever bargadars or cultivated the land in question. The Tribunal has also discussed in detail. Those findings, in our view, cannot be termed to be perverse by any stretch of imagination so as to exercise our jurisdiction in public law field to reverse the same. The jurisdiction conferred under Article 226 and Article 227 of Constitution, upon this Court is not of an appellate one but it is a combination of supervisory and equitable jurisdiction and to do justice and further prevent the miscarriage of justice being done. If we interfere with the aforesaid findings we will be doing gross injustice, if not, miscarriage of justice. Hence, we do not find any substance in the contentions of Mr. Banerjee and the same is accordingly overruled. Thus, this application fails and the same is dismissed, however, without any order as to costs.