

(2006) 07 CAL CK 0053

In the Calcutta High Court

Case No : F.M.A. No. 466 of 2006 and C.A.N. No. 2510 of 2006

Mackintosh Burn Ltd.

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 11-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3A
Coal Bearing Areas (Acquisition and Development) Act, 1957 — Section 10
Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 27
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Mineral Concession Rules, 1960 — Rule 54

Citation : (2007) 2 CHN 115

Hon'ble Judges : Prasenjit Mandal, J;Prabir Kumar Samanta, J

Bench : Division Bench

Advocate : Anupam Chatterjee, Ashok Kumar Jena and Kishore Dutta, for the Appellant;Keshab Bhattacharjee and J.D. Quarder for Respondent Nos. 4 and 5, Shukla Kabir (Sinha), for the Respondent

Final Decision : Allowed

Judgement

Prabir Kumar Samanta, J.—This appeal involves an interesting question that when the petition filed by the respondent Nos. 4 and 5 under Article 227 of the Constitution of India has been rejected with the observation that such rejection will not prevent the said respondents to approach the Appellate Tribunal within ten days from the date of rejection, then whether such a leave and liberty to the said respondents to prefer an appeal before the Tribunal would thereby condone the delay, if any, in preferring such appeal before the Appellate Tribunal, if preferred within the said period of ten days. The facts giving rise to the present question may briefly be stated as follows:

In a dispute between the appellant/company and the respondents No. 4 & 5 which are the Co-operative Spinning Mill and its Managing Director, the Registrar of the Co-operative Societies in exercise of its power under the West Bengal Co-

operative Societies Act, 1983 (hereinafter called as the said Act) passed an award dated 31st January, 2003. The said award was communicated in accordance with the provisions of law to the respondent Nos. 4 and 5 on 14th February, 2003. The respondent Nos. 4 and 5 challenged the said award dated 31st January, 2003 in a petition under Article 227 of the Constitution of India before the Single Bench of this Court on 1st September, 2003. The said petition came to be disposed of on 7th September, 2005. The learned Single Judge upon hearing the respondent Nos. 4 & 5 and the appellant/company disposed of the same by its order dated 7th September, 2005. The said order reads as under:

The petitioners have an alternative efficacious remedy by way of appeal before the Co-operative Tribunal. Therefore, I am not inclined to interfere with the award impugned in this revisional application.

The revisional application is, therefore, rejected without any order as to costs.

However, rejection of this application shall not prevent the petitioners to approach the Appellate Tribunal within ten days from this date. By way of abundant caution, I make it clear that I have not gone into the merits of the claim and the counter-claim of the parties and all questions are left open to be considered by the Appellate Tribunal in accordance with law.

Office is directed to return the certified copy of the award impugned to the learned Advocate-on-Record of the petitioners on her furnishing a xerox copy thereof.

2. Pursuant to the said order the respondent Nos. 4 and 5 preferred an appeal before the Appellate Tribunal.

3. The respondent Nos. 4 and 5 had accordingly preferred the said appeal on 15th September, 2005 before the Appellate Tribunal against the said award dated 31st January, 2003. Necessarily the appeal was preferred under Section 136(1) of the said Act. It is worthwhile to state that Sub-section (2) of Section 136 of the said Act reads as under:

The provisions of the Limitation Act, 1963 (36 of 1963) shall not apply to appeal referred in Sub-section (1).

4. The application for stay filed by the respondent Nos. 4 and 5, upon filing of the appeal, while was taken up for hearing, the company raised a plea as to the limitation of the appeal filed by them before the Appellate Tribunal. The question necessarily cropped up before the Appellate Tribunal as to whether the liberty to file the appeal within ten days from 7.9.2005 had saved the limitation or not; or in other words extended the period of limitation for filing the appeal.

5. Although the Appellate Tribunal observed that filing of the petition under Article 227 of the Constitution of India before the Hon^{ble} Court at Calcutta cannot be termed as a bona fide proceeding before a Court without jurisdiction, yet it held that since the Id. Judge of this Court observed that rejection of the

petition under Article 227 will not prevent the respondent Nos. 4 & 5 to approach the Appellate Tribunal with further observation that this Court did not enter into the merits of the claim or counter-claim of the respective parties while rejecting the said petition under Article 227 of the Constitution of India, it was crystal clear that the delay in filing the appeal is to be condoned. In coming to such a view the Appellate Tribunal relied on the two Supreme Court decisions, one unreported and the other reported in *Spencer and Company Ltd. and Another Vs. Vishwadarshan Distributors Pvt. Ltd. and Others*, The said order dated 6th January, 2006 was challenged by the appellant company in a writ petition being W. P. No. 2493 (W) of 2006 in this Court. The Writ Court disposed of the said petition by the following order:

It appears to me that the time given to the respondent No. 4 has been fixed by the order dated 7th September, 2005, which clearly records that such appeal was to be filed within ten days from the date of the said order. Therefore, the presumption is that the previous delay has been condoned by the Court, while passing the said order. Whether such condonation is permissible under the law cannot be the subject-matter or issue before this Court since the order was passed by another learned Single Judge. Judicial propriety demands that such interpretation should be obtained from the Court which passed the order.

I, accordingly, dismiss this application. The petitioner is at liberty to obtain such clarification from the Court, which passed the order, fixing the time to prefer the appeal. There will be no order as to costs.

6. The said order has been challenged in this appeal by the appellant/ company.

7. Mr. Anupam Chatterjee, learned senior Advocate appearing on behalf of the appellant/company has assailed the said order, first by contending that it is not necessary to seek clarification from the learned Judge who disposed of the petition under Article 227 of the Constitution of India by his order dated 7.9.2005 in the manner as above as before the Writ Court the question was in relation to the interpretation and/or the implication of the order passed by the learned Single Judge on 7th September, 2005 in the petition under Article 227 of the Constitution of India.

8. Secondly, it has been seriously contended on behalf of the company that the grant of liberty would under no circumstances save the period of limitation in filing the statutory appeal u/s 136 of the said Act, particularly when Sub-section (2) of the said section creates a statutory bar to apply the provisions of Limitation Act, 1963 even for the purpose of condonation of delay.

9. Mr. Chatterjee, in support of his contention referred to the provisions of Sub-section (2) of Section 136 of the said Act and the decision rendered by the Division Bench of this Court in the case reported in 2003(2) CHN 460 (*Egra Thana Co-operative Agricultural Marketing Society Limited and Ors. v. Registrar of Co-operative Societies and 85 Ors.*) on the preliminary question as to the jurisdiction of the Tribunal to entertain the application for condonation of delay in

preferring an appeal before it.

10. In view of the provisions of Sub-section (2) of Section 136 of the said Act debarring the application under any of the provisions of Limitation Act, 1963, the question was raised in the said case, as to whether or not the West Bengal Co-operative Tribunal constituted under the West Bengal Co-operative Societies Act, 1983 is empowered to condone delay, if an appeal is presented beyond the period of limitation, as prescribed under the Act, in exercise of its power under Order 41 Rule 3A of the CPC particularly when under the provisions of Sub-section (2) of Section 135 of the said Act, the Tribunal has been conferred with all the powers of the Appellate Court as provided under Order 41 of the Code. The Division Bench upon consideration of the question as above held in no uncertain terms that since the provision of Section 5 of the Limitation Act cannot be invoked in respect of a proceeding before the Tribunal notwithstanding the provisions of Section 135(2) of the said Act, the Tribunal has no jurisdiction to condone the delay in filing an appeal before it.

11. Mr. Chatterjee, further referred to the Supreme Court decision reported in Union of India and Another Vs. Kirloskar Pneumatic Company Limited, In the case before the Supreme Court the Appellate Court similarly by its order dated 23rd June, 1995 granted liberty to the petitioners to file an application for refund in respect of the consignments imported, as referred to in their petition, in the prescribed form as per the amended provision of Section 27 of the Customs Act, 1962, within two weeks from the date of its order with specific direction upon the respondents not to reject the application on the ground that it is time-barred. The Supreme Court upon interpretation of the said direction of the Bombay High Court in no uncertain terms held in paragraph 10 as under:

According to these sub-sections, a claim for refund or an order of refund can be made only in accordance with the provisions of Section 27 which, inter alia, includes the period of limitation mentioned therein. Mr. Hidayatullah submitted that the period of limitation prescribed by Section 27 does not apply either to a suit filed by the importer or to a writ petition filed by him and that in such cases the period of limitation would be three years. The learned Counsel refers to certain decisions of this Court to that effect. We shall assume for the purposes of this appeal that it is so, notwithstanding the fact that the said question is now pending before a larger Constitution Bench of nine-Judges along with the issue relating to unjust enrichment. Yet the question is whether it is permissible for the High Court to direct the authorities under the Act to act contrary to the aforesaid statutory provision. We do not think it is, even while acting under Article 226 of the Constitution. The power conferred by article 226/227 is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law. It cannot be invoked for directing the authorities to act contrary to law. In particular, the Customs authorities, who are the creatures of the Customs Act, cannot be directed to

ignore or act contrary to Section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but the authorities under the Act are. Nor can there be any questions of the High Court clothing the authorities with its power under Article 226 or the power of a Civil Court. No such a delegation or conferment can ever be conceived. We are, therefore, of the opinion that the directions contained in Clause (3) of the impugned order is unsustainable in law. When we expressed this view during the hearing Mr. Hidayatullah requested that in such a case the matter be remitted to the High Court and the High Court be left free to dispose of the writ petition according to law.

12. Mr. Chatterjee further referred to the decision reported in Ashis Kumar Hazra Vs. Rubi Park Co-operative Housing Society Ltd. and others, The said decision is under the West Bengal Co-operative Societies Act, 1983. The said decision has been rendered by the Supreme Court under Sub-section (3) of Section 95 of the West Bengal Co-operative Societies Act, 1983. Under the aforesaid provisions of the said Act any claim which arises between the society and its members etc. is required to be laid within two months from the date of notice for arbitration. In the case before the Supreme Court notice was given on 26th October, 1974 and the suit was filed on the Original Side of the High Court on 10th September, 1975. Under Sub-section (3) of Section 95, if an application is filed explaining properly the delay, the Court has been given power for condoning the delay. The High Court had held ultimately that the proceedings laid in the original side of the suit are not maintainable. However, since the petitioner was bona fide prosecuting the claims before the Civil Court, u/s 14 of the Limitation Act, the said period may be condoned.

13. In the aforesaid facts the Supreme Court held that by operation of the direction issued by the High Court u/s 14 of the Limitation Act, the period from 10th September, 1975 when the suit was filed on the Original Side of the High Court till the date of disposal of the matter in the High Court on the Civil Side, stood excluded. However, the explanation for the period of delay from 26th October, 1974 when the notice was given till the date when civil suit came to be filed on the Original Side is required to be explained. The limitation prescribed is only two months after notice. Unless proper explanation is given the valuable right has been created in favour of the respondents u/s 3 of the Limitation Act. It is the duty of the Court to ensure that unless proper explanation is given the valuable right cannot be defeated.

14. Upon reference to the said decision Mr. Chatterjee contended that the award was passed on 31st January, 2003 which was communicated to the respondents No. 4 and 5 on 14th February, 2003. The petition under Article 227 was filed in the High Court on 1st September, 2003 which again came to be disposed of on 7th September, 2005. According to him by applying the aforesaid principle as laid down by the Supreme Court in the case of Ashis Kumar Hazra, the respondent Nos. 4 and 5 are though entitled to the exclusion of the period from 1st

September, 2003 till 7th September, 2005, but they are not entitled to the exclusion of the period from 14th February, 2003 till 1st September, 2003 when the petition under Article 227 was filed in the High Court. Most importantly Sub-section (2) of Section 136 of the said Act having excluded the applicability of the Limitation Act, 1963 altogether, the respondent Nos. 4 & 5 are also not entitled to explain delay for the said period for the purpose of entertaining the appeal upon condonation of delay. Under the statute Tribunal has been divested with the power to condone delay for the purpose of entertaining an appeal. Therefore the question whether proper explanation for the delay has been given or not is of no relevance. In terms of the provision of Sub-section (2) of Section 136 of the said Act, once the period to prefer an appeal expires, the party in whose favour the order stands, acquires an indefeasible right in view of the provision of Sub-section (2) of Section 136 of the said Act.

15. Mr. Keshab Bhattacharjee, Id. Advocate for the respondent Nos. 4 & 5 refuted such arguments upon reference to the Supreme Court decisions reported in Central Coalfields Ltd. Vs. State of Jharkhand and Others, and Ors.) and State of Orissa Vs. Dr. Sivasankar Lal Bajoria and Another,

16. In the case of Central Coal Fields Limited (*supra*), the rights over the land stood vested in the Central Government in view of the provisions of Section 10 of the Coal Bearing Areas (Acquisition and Development) Act, 1957. Certificate proceedings against the appellant Central Coal Field Ltd. for realization of surface rent for mining areas in possession of the company were initiated by Certificate Officer of the State Government. The company objected to those proceedings by filing objection on 12th June, 1991. Ignoring such objections of the company an interim order was passed by the Certificate Officer directing the company to pay an amount of Rs. 78,16,712/-. The appellant/ company challenged the said interim order in a writ petition which was disposed of by setting aside the order of certificate officer and further by directing him to dispose of the objection filed by the company by passing an appropriate order in accordance with law. The Certificate Officer further rejected the objection and held the company is liable to pay rent. The said order was further challenged in a writ petition. The Single Judge dismissed the petition by observing that the said order was an appealable order as per the provision of the Bihar and Orissa Public Demands Recovery Act, 1914. The Single Judge also observed that the appellate authority would consider the question as to the delay in filing the" appeal which had occasioned as the appellant/company had approached the High Court. The appellant/company instead of approaching the appellate authority filed a Letters Patent appeal against the order passed by the learned Single Judge. It was mainly urged that the writ petition ought not to have been dismissed on the ground of availability of alternative remedy. The Letters Patent appeal was dismissed by upholding the order of the learned Single Judge. The appellant company challenged the said order of the Division Bench passed in the aforesaid Letters Patent before the Supreme Court. The Supreme Court upon consideration of the case held that it cannot be said that the learned Single Judge as well as the Division Bench had

committed any error of law by dismissing the petition and appeals respectively thereby allowing the appellant to avail of the alternative remedy by filing appeal. Those orders were held to have not suffered from any infirmity. Upon holding as such, the Supreme Court however observed in paragraph 11 of the said report that since the appellant/company had filed petitions, intra-Court appeal and the appeal in this Court, it would be in the interest of justice, if appeals are filed under the Bihar and Orissa Public Demands Recovery Act, 1914, within a period of two months from today, the appellate authority would entertain them without raising any question as to limitation. This portion of the judgment has been stressed upon by Mr. Bhattacharya to contend that if such kind of order is made by the High Court or the Supreme Court, then the bar of limitation becomes of no relevance. But most unfortunately it has not been pointed out to us that the said Act of 1914 contained the similar provision like Sub-section (2) of Section 136 of the West Bengal Co-operative Societies Act, 1983. On the other hand it has been stated at the bar that there is no such provision like 136(2) of the West Bengal Act, in the Bihar & Orissa Public Demands Recovery Act, 1914.

17. In the case of A. H. Jaffar and Sons (*supra*), similarly in a case for rejection of an application for lease of minor minerals which was confirmed by the State Government it was held that a writ petition against such rejection in the High Court is not maintainable as the remedy of revision before Central Government has been provided, under the Act. There Rule 54 of Mineral Concession Rules, 1960 prescribed a period of limitation for preferring revision before the Central Government against such rejection. Proviso to the said rule empowered the revising authority to condone delay if it is satisfied that the revision could not be presented, for sufficient cause, within the time. The Supreme Court considering the said proviso and further being satisfied, that the respondent was pursuing its remedy in the High Court bona fide, observed that it would be sufficient cause to condone the delay, and also observed that the revision if preferred within four weeks from date shall not be dismissed as being barred by time.

18. Both the decisions as above in our view do not apply in the case in hand. Those decisions also do not lay down a general proposition of law that in all cases where a litigant would pursue his remedy in the High Court instead of availing of the alternative remedy provided under the statute, the time consumed in such proceeding before the High Court and/or the Supreme Court would automatically be condoned.

19. That apart even assuming though not holding that the time consumed in pursuing the application under Article 227 of the Constitution of India by the respondent Nos. 4 and 5 in this High Court for the period from 1st September, 2003 till 7th September, 2005 is to be condoned by applying the aforesaid decisions of the Supreme Court, then there still remains the period from 14th February, 2003 when the award was communicated to the respondent Nos. 4 and 5, till 1st September, 2003 during which the said respondents neither preferred any appeal before the Appellate Tribunal nor filed the petition under Article 227

of the Constitution of India.

20. Mr. Chatterjee further referred to the provision of Section 29 of the Limitation Act, 1963, Sub-section (2) of which reads as under:

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

21. Therefore, because of specific, bar under Sub-section (2) of Section 136 of the said Act and in view of Sub-section (2) of Section 29 of the Limitation Act all the provisions contained in Sections 4 to 24 of the Limitation Act including Section 5 of the Limitation Act have been expressly excluded from operation by such special or local law. Upon such reading, we are of the view that Section 5 of the Limitation Act was very much applicable in case of an appeal under the Bihar and Orissa Public Demands Recovery Act, 1914. Similarly, in the case of A. H. Jaffar and Sons the proviso to the Rule 54 of the Minor Concession Rules, 1960 empowered the revising authority to condone the delay if it is satisfied that the revision could not be presented for sufficient cause within time.

22. It, therefore, cannot be said that the Supreme Court passed such direction upon the authorities concerned where there was a statutory bar to apply the provisions of Section 5 of the Limitation Act.

23. The decision of the Supreme Court in the case of Union of India and Another Vs. Kirloskar Pneumatic Company Limited, is clear on the point as stated hereinbefore. Even at the risk of repetition it may be reiterated that the Supreme Court in the said judgment in no uncertain terms has held that the power conferred by Articles 226/227 is designed to effectuate the law, to enforce the rule of law and to ensure that the several authorities and organs of the State act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law, nor can there be any question of the High Court clothing the authorities with its power under Article 226 or the power of a Civil Court. No such delegation or conferment can ever be conceived. The Supreme Court consequently was of the opinion that the direction contained in Clause (3) of the order of the High Court thereby directing the respondents not to reject the revisional application on the ground that it is time-barred, was held to be unsustainable in law.

24. In view of the foregoing discussions we have no hesitation to hold that the learned Single Judge while disposing of the petition under Article 227 although granted liberty to the respondent Nos. 4 and 5 to challenge the award in an appeal as per provision of Section 136(1) of the said Act but such a liberty can in no way be interpreted to have directed the Appellate Tribunal to condone the

delay in preferring the appeal if there be any.

25. The learned Tribunal, therefore, acted illegally by treating the said order by way of saving the period of limitation in preferring the appeal against the said award pursuant to the liberty granted by this Court in its order dated 7th September, 2005. The order of the Tribunal, therefore, cannot be sustained on the views as above.

26. In such view of the matter we are also of the view that there is no necessity and/or occasion to seek for clarification of the said order dated 7th September, 2005 as directed by the learned Trial Judge in disposing of the writ petition. The said order of the learned Trial Judge is set aside. The appeal and the application are accordingly allowed.

27. Prayer for stay of operation of this order as prayed for on behalf of the respondent Nos. 4 and 5 is considered and refused.

28. Urgent xerox certified copy, if applied for, be given to the parties on usual undertakings.

Prasenjit Mandal, J.

29. I agree.