
(1981) 04 BOM CK 0020

In the Bombay High Court

Case No : Writ Petition No. 1514 of 1979

Mehta Construction Company

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 29-04-1981

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 10, 11, 12, 13, 14

Citation : (1981) 83 BOMLR 625 : (1981) MhLj 835 : (1981) 48 STC 398

Hon'ble Judges : D.P. Madon, J; D.N. Mehta, J

Bench : Division Bench

Judgement

Madon, J.—The question which falls for determination in this petition under articles 226 and 227 of the Constitution of India is : "Whether the Maharashtra Sales Tax Tribunal (hereinafter for the sake of brevity referred to as "the Tribunal") constituted u/s 21 of the Bombay Sales Tax Act, 1959 (hereinafter for the sake of brevity referred to as "the said Act"), has any power to condone the delay in filing an application for reference u/s 61(1) of the said Act ?"

2. The petitioners are a partnership firm and carry on business as engineers and building contractors. The petitioners applied for and obtained registration as a dealer under the said Act. During the period 1st June, 1965, to 31st May, 1966, the petitioners in the course of their business as building contractors purchased inter alia building materials such as sand, lime, cement, metal, iron and steel. By his assessment order dated 11th March, 1967, the Sales Tax Officer held that during the said period the petitioners had purchased lime, sand and metal from unregistered dealers and those purchases were, therefore, liable to purchase tax u/s 13 of the said Act. Against this order of assessment the petitioners unsuccessfully filed appeals, first to the Assistant Commissioner of Sales Tax and then to the Tribunal. The petitioners' second appeal to the Tribunal was dismissed on 24th November, 1972, and they applied for and obtained a certified copy of the judgment of the Tribunal on 19th December, 1972. Thereafter on 22nd February, 1973, the petitioners filed a writ petition, namely, Miscellaneous

Petition No. 281 of 1973, on the original side of this High Court. During the pendency of the said Writ Petition on 27th March, 1973, the petitioners also filed an application for reference u/s 61(1) of the said Act before the Tribunal. On 9th April, 1973, the said writ petition was admitted, and on 13th September, 1978, it was dismissed by a learned single Judge of this High Court (Madon, J.) holding that not only had the petitioners an alternative remedy under the said Act but they were pursuing it. On 30th March, 1979, the Tribunal dismissed the petitioner's application for reference on the ground that it was filed seven days after the expiry of the period of limitation for filing such applications, namely, ninety days from the date of the communication of the order of the Tribunal against which the reference was sought. The Tribunal further held that it had no power to condone the delay in filing the said application. It is against this judgment and order of the Tribunal that the present writ petition is directed.

3. Before we deal with the question which actually falls for our consideration in this petition we may mention that the main contention of the petitioners is that as they are consuming goods which they purchase in the construction of buildings, they cannot be held to be a dealer and cannot be made liable to purchase tax under the said Act. This controversy now no more survives in view of the judgment of a Division Bench of this Court (Madon and Kania, JJ.) in *Commissioner of Sales Tax v. D. V. Save* [1975] 36 S.T.C. 47, in which it has been held that where a person purchases building materials in the course of his business as a building contractor and consumes such materials in the construction of buildings or in carrying out repairs to buildings, he would be a dealer within the meaning of that term as defined in clause (11) of section 2 of the said Act. It was pointed out in that decision that it is open to a State Government, in the exercise of the legislative powers conferred upon it by the relevant entry in the Legislative List in the Constitution, to levy tax in respect of a transaction of sale on the seller or the purchaser and that provided the goods are purchased in the course of the business of purchasing goods, the purchase tax under the said Act would be attracted subject to the other statutory conditions being fulfilled. It was observed in that case that a person carries on a business with a profit-motive and in order to earn money, but when he purchases goods, by the very act of purchase he is not earning, but he is spending money and, therefore, the business of purchasing goods must necessarily be linked with some activity which would result in profit. It was further held that it is not necessary that the activity with which the purchase of goods is linked must itself be the activity of selling goods and that so long as the goods purchased are either resold with a profit-motive or consumed in the very business activity, for the carrying on of which they were purchased, the purchaser must be held to be carrying on the business of purchasing goods. It was further held that the goods purchased must be such as are indispensable for carrying on the particular business activity of the purchaser and must be goods without which such business activity would not exist and that the business activity of construction of buildings cannot exist without building materials.

4. Turning now to the controversy before us, Mr. Shah, the learned counsel for the petitioners, relied upon section 29(2) of the Limitation Act, 1963, and submitted that the said provisions of the said section had made a deliberate departure from the provisions of section 29(2) of the Indian Limitation Act, 1908, and that while under the old Act section 5 did not apply to any period of limitation under a special or local law unless expressly made applicable, under the new Act section 5 applied unless it was expressly excluded by such special or local law. In support of this submission Mr. Shah relied upon the judgment of a Division Bench of this High Court in *Vasanji Ghela & Co. v. State of Maharashtra* [1968] 22 S.T.C. 104, in which it was held that by reason of the change brought about by the provisions of the new section 29(2), section 5 of that Act applied to an application for reference and, therefore, the Tribunal had the power to condone the delay in filing an application for reference. On behalf of the respondents Mr. Agarwal submitted that the power to condone delay had expressly been conferred by the said Act in the case of an appeal or revision but had not been conferred with respect to an application for reference and, therefore, section 5 of the Limitation Act, 1963, was impliedly excluded. Mr. Agarwal further submitted that in any event assuming that the said section 5 had not been impliedly excluded, none the less it had no application to an application for reference under the said Act inasmuch as the Tribunal was not a court. Mr. Agarwal further submitted that the decision in *Vasanji Ghela & Co. v. State of Maharashtra* [1968] 22 S.T.C. 104 was no longer good law in view of the later decision of the Supreme Court.

5. Before dealing with these rival submissions and the authorities cited at the Bar it will be convenient to refer to the relevant statutory provisions. Section 29(2) of the Indian Limitation Act, 1908, provided as follows :

"29. Savings. -

(2) 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."

Section 29(2) of the Limitation Act, 1963, is in the following terms :

"29. Savings. -

(2) 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 said Act was enacted while the old Limitation Act was in force and before the passing of the new Limitation Act, sections 59 and 60 of the said Act are as follows :

"59. Application of sections 4 and 12 of Limitation Act. - In computing the period laid down under sections 55, 57 and 61 the provisions of sections 4 and 12 of the Limitation Act, 1963, shall so far as may be apply.

60. Extension of period of limitation in certain cases. - An appellate authority may admit any appeal u/s 55 and the Tribunal may admit an application u/s 57 after the period of limitation laid down in the said sections, if the appellant or the applicant, satisfies the appellate authority or the Tribunal, as the case may be, that he had sufficient cause for not preferring the appeal or making the application, within such period."

The words and figures "the Limitation Act, 1963" in section 59 were substituted for the words and figures "the Indian Limitation Act, 1908" by Maharashtra Act 29 of 1965. Thus the provisions of sections 4 and 12 of the Indian Limitation Act, 1908, were expressly made applicable in computing the period of limitation laid down for filing an appeal u/s 55 or an application in revision u/s 57 or an application for reference u/s 61 of the said Act, and they continue to be so expressly applied after the new Limitation Act came into force. Admittedly, the time required by the petitioners for obtaining a certified copy of the judgment of the Tribunal against which a reference to this High Court was sought to be made was excluded in computing the prescribed period of limitation of ninety days from the date of the communication of the said order of the Tribunal. It was submitted by Mr. Agarwal, the learned counsel for the respondents, that since u/s 60 of the said Act the power to condone delay in filing an appeal or an application in revision on sufficient cause being shown had been conferred upon an appellate authority and the Tribunal as a revising authority, such power being similar to the power conferred upon courts by section 5 of the Limitation Act, 1963, but no such power had been conferred upon the Tribunal in the case of an application for reference, the said section 5 must be held to be impliedly excluded in the case of an application for reference. It is not possible to accept this submission. While under the old section 29(2) section 5 of the Limitation Act, 1963, did not apply unless expressly made applicable, under the new section 29(2) the provisions of section 3 and those contained in sections 4 to 24 of the new Act apply to periods of limitation under any special or local law, unless expressly excluded and, therefore, section 5 would also apply to a period of limitation prescribed by any special or local law. It was so held by a Division Bench of this

High Court with regard to an application for reference under the Bombay Sales Tax Act, 1946, in *Vasanji Ghela & Co. v. State of Maharashtra* [1968] 22 S.T.C. 104 referred to earlier. The matter is finally concluded by the decision of the Supreme Court in *Mangu Ram Vs. Municipal Corporation of Delhi*, Pointing out the departure made from the old law by section 29(2) of the Limitation Act, 1963, the Supreme Court held :

"There is an important departure made by the Limitation Act, 1963, in so far as the provision contained in section 29, sub-section (2), is concerned. Whereas under the Indian Limitation Act, 1908, section 29, sub-section (2), clause (b), provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions of the Indian Limitation Act, 1908, other than those contained in sections 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of section 5 was in clear and specific terms excluded. Section 29, sub-section (2), of the Limitation Act, 1963, enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24, which would include section 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. Section 29, sub-section (2), clause (b), of the Indian Limitation Act, 1908, specifically excluded the applicability of section 5, while section 29, sub-section (2), of the Limitation Act, 1963, in clear and unambiguous terms provides for the applicability of section 5 and the ratio of the decision in *Kaushalya Rani Vs. Gopal Singh*, *Kaushalya Rani v. Gopal Singh* can, therefore, have no application in cases governed by the Limitation Act, 1963, since that decision proceeded on the hypothesis that the applicability of section 5 was excluded by reason of section 29(2)(b) of the Indian Limitation Act, 1908. Since under the Limitation Act, 1963, section 5 is specifically made applicable by section 29, sub-section (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of section 5, that it would stand displaced."

6. In this event, the present petition must succeed if there were no validity in the other contentions raised by Mr. Agarwal, the learned counsel for the respondents, namely, that section 5 of the Limitation Act, 1963, applies only to the proceedings in a court of law and that the decision in the case *Vasanji Ghela & Co. v. State of Maharashtra* [1968] 22 S.T.C. 104 , referred to earlier, is no longer good law. In that case it was held that section 29(2) of the Limitation Act, 1963, applied also to periods of limitation prescribed by any special or local law in respect of any appeal or application before a Tribunal or authority other than a civil court and that, therefore, section 5 of the new Limitation Act applied to an application for reference made under the old Bombay Sales Tax Act, 1946. Ordinarily, we would be bound by this judgment. We, however, find that in view of the later decisions of the Supreme Court, to which we will presently refer, this

authority can no longer be said to be good law. In *Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others*, , it was held by the Supreme Court that in view of sections 4 and 5 of the Limitation Act, 1963, it would be clear that the scheme of that Act is that it only deals with applications to courts and the labour court is not a court within the meaning of that Act. In *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, , it has been held that sections 4 and 5 of the Limitation Act, 1963, which speak of courts, apply only to those applications which are made to courts and not to other tribunals. The decision of the Supreme Court in *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, was directly under a State Sales Tax Act. The question before the Supreme Court was whether section 14(2) of the Limitation Act, 1963, could be invoked for excluding the time spent in prosecuting an application under rule 68(6) of the U.P. Sales Tax Rules, 1948, for setting aside an order of dismissal of appeal in default under the U.P. Sales Tax Act, 1948, in computing the period of limitation for filing a revision u/s 10 of that Act to the Judge (Revisions), Sales Tax. In that case, referring to the earlier decision of the Supreme Court in *Jagannath Prasad Vs. The State of Uttar Pradesh*, , the Supreme Court held that the appellate authority and the Judge (Revisions), Sales Tax, exercising jurisdiction under the U.P. Sales Tax Act, 1948, were not courts but merely administrative tribunals. In that case the Supreme Court reiterated with approval the following observations of Hidayatullah, J. (as he then was), in *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, which had been quoted with approval in *Jagannath Prasad Vs. The State of Uttar Pradesh*, :

"The taxing authorities are instrumentalities of the State. They are not a part of the legislature, nor are they a part of the judiciary. Their functions are the assessment and collection of taxes, and in the process of assessing taxes, they follow a pattern of action, which is considered judicial. They are not thereby converted into courts of civil judicature. They still remain the instrumentalities of the State and are within the definition of "State" in article 12 (that is, article 12 of the Constitution of India)."

Under the provisions of the U.P. Sales Tax Act, 1948, prior to its amendment by U.P. Act 12 of 1979, an appeal was provided against the order of the assessing authority, and against the order in appeal a revision application could be made either at the instance of the Commissioner of Sales Tax or at the instance of the assessee. Applications in revision were heard by the revising authority who is designated the Judge (Revisions), Sales Tax, or an additional revising authority who is designated the Additional Judge (Revisions), Sales Tax. Both these authorities are to be appointed by the State Government. A reference to the High Court u/s 11 of the U.P. Sales Tax Act, 1948, lay only against the order of the Judge (Revisions), Sales Tax, or the Additional Judge (Revisions), Sales Tax. Thus under the scheme of the U.P. Sales Tax Act a Judge (Revisions), Sales Tax, and an Additional Judge (Revisions), Sales Tax, fulfilled the functions of the Sales Tax Tribunal under that Act.

7. Mr. Shah, the learned counsel for the petitioners, however, relied upon another decision of the Supreme Court under the U.P. Sales Tax Act, 1948, namely, *The Commissioner of Sales Tax, U.P. Vs. Madan Lal Das and Sons, Bareilly*, . In that case it was held that the provisions of section 12(2) of the Limitation Act, 1963, can be relied upon for computing the period of limitation prescribed for filing a revision petition u/s 10 of the U.P. Sales Tax Act, 1948. The point whether the Judge (Revisions), Sales Tax, who is the revising authority under the U.P. Sales Tax Act, was a court, and, therefore, section 29(2) of the Limitation Act, 1963, did not apply to proceedings before him was not raised in that case nor was any reference made in that case to the decision of the Supreme Court in the case of *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, or to the earlier cases cited therein, namely, *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, and *Jagannath Prasad Vs. The State of Uttar Pradesh*, . In view of this position, this decision of the Supreme Court cannot be said to be directly on the point whether the Tribunal or other authority under a Sales Tax Act is a court or not, and it cannot help the petitioners.

8. Mr. Shah, the learned counsel for the petitioners, next relied upon two decisions of the Orissa High Court, namely, *Raghunath Agarwalla v. State of Orissa* [1975] 36 S.T.C. 461 and *Gandharb Misra v. State of Orissa* [1975] 36 S.T.C. 466 . In the first of these cases it was held that though the Sales Tax Tribunal was not a court, by virtue of section 29(2) of the Limitation Act, 1963, the provisions contained in sections 4 to 24 of that Act applied to proceedings under the Orissa Sales Tax Act, 1947, to the extent they are not inconsistent with any specific provision in that Act. The decisions of the Supreme Court above referred to were, however, not brought to the notice of the Orissa High Court. In the second case the same principle was laid down. In that case the decision in the case of *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, was brought to the notice of the court and was distinguished by it by referring to the second point decided in that case. The second point which was decided was that by analogy the provisions of section 14(2) of the Limitation Act, 1963, did not apply for computing the period of limitation for a revisional application, because the relevant section of the U.P. Sales Tax Act, 1948, which provided a period of one year for filing a revisional application, also conferred power upon the revising authority to extend such period by a further period of six months on proof of sufficient cause being shown for not filing the application within one year from the date of the order appealed against. The Orissa High Court, however, overlooked that the first point which the Supreme Court had decided in that case was that the revising authority under the said U.P. Sales Tax Act was not a court and that section 29(2) of the Limitation Act, 1963, applied only to periods of limitation prescribed by special or local laws in respect of proceedings in a court of law. This authority, therefore, also cannot help the petitioners.

9. It may also be pointed out that so far as the Income Tax Tribunal is concerned, the Gujarat High Court in *Commissioner of Income Tax, Gujarat III Vs. Western*

India Engineering Co. Ltd., has held that the Income Tax Appellate Tribunal is not a court but is merely a Tribunal exercising the judicial power of the State, and as the provisions of the Limitation Act, 1963, are not intended to be made applicable to proceedings before authorities other than courts governed the CPC or the Code of Criminal Procedure, section 5 of Limitation Act, 1963, will not apply to an application for reference made to the appellate authority and that the Tribunal has, therefore, no power to condone the delay in filing such application u/s 66(1) of the Indian Income Tax Act, 1922. The same view has been taken by the Calcutta High Court in Commissioner of Income Tax (Central) Vs. Assam Oil Company Ltd.,

10. For the reasons set out above, we must hold that the decision in the case of Vasanji Ghela & Co. v. State of Maharashtra [1968] 22 S.T.C. 104 is no longer good law to the extent that it decides that section 5 of the Limitation Act, 1963, can be availed of so far as applications for a reference to the High Court under the Sales Tax Acts are concerned. The petitioners' application having been filed beyond the period of limitation prescribed by section 61(1) of the said Act was time barred, and the Tribunal had no power, even if sufficient cause was shown, to condone the delay.

11. In the result, this petition fails and is dismissed and the rule issued therein is discharged. There will be no order as to the costs of this petition.

12. Petition dismissed.