

(1988) 10 MP CK 0032
In the Madhya Pradesh High Court
Case No : F.A. No. 38 of 1977

Nagar Palika, Bhind

APPELLANT

Vs

M.P. State Road Transport Corporation

RESPONDENT

Date of Decision : 07-10-1988

Acts Referred:

Limitation Act, 1963 — Section 17(1)(c)

Citation : (1989) JLJ 641

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Advocate : K.N. Gupta, for the Appellant; Arun Mishra, for the Respondent

Final Decision : Allowed

Judgement

Dr. T.N. Singh, J.—This is defendant's appeal which must succeed on a very short point of limitation despite long arguments being advanced on both sides on merits of plaintiff's claim.

2. To the claim made in the suit, undisputedly Article 24 of the Limitation Act applied inasmuch as in para 6 of the plaintiff, plaintiff stated its own case and also stated that suit was "within limitation as per Article 14 read with section 17 (1) (c) of the Limitation Act, 1963". The suit was for refund of certain "fees" said to have been recovered by the defendant illegally from the plaintiff "from the year 1971 upto December, 1973" as stated in para 5 of the plaint. Within that period, a sum of Rs. 19,471/- is said to have been paid "under mistake of law" by the plaintiff to the defendant. However, the statement that the mistake was discovered when this Court passed its judgment dated 13-7-1973, certified copy whereof was annexed to the plaint, is not acceptable for reasons to follow.

3. As appears from Ex. P/1, which was addressed in the month of November, 1971 by Chief Municipal Officer, Bhind Municipality to the Manager, M. P. S.R.T. C. of Bhind, Morena, Gwalior and Guna depots, the Municipality informed the plaintiff that fees will be levied for parking of vehicles belonging to the plaintiff

within the municipal area in virtue of the bye-law in that regard being approved by the State Government on 29-10-1971.

4. In the certified copy of the Judgment annexed to the plaint, which is proved as Ex. P/71, at para 2, what is observed is crucial to disposal of the instant appeal. Therein, it is stated "the present petitions are directly covered by a decision of Division Bench of this Court in Sindhi Sahiti Multipurpose Transport Cooperative Society, Ltd, Bairagarh, Bhopal v. Municipal Council. Bhopal 1967 JLJ 47. There is no doubt that the question which arose for this Court's consideration in Misc. Petition No. 109 of 1972 which was decided on 19-9-1972 (as per Ex. P/71) had been decided by this High Court much earlier, in 1967 itself and that decision has been duly reported in an All India Journal of repute. It was held in the earlier Judgment rendered in the case Sindhi Sahiti's case (supra) that no municipality in the State of M. P. had the required legislative competence to frame bye-laws under clause (m) as it then existed, of section 358 (7) of M. P. Municipalities Act, 1961, for short, the "Act". That position was reiterated subsequently in 1972 in Ex. P/71. In the suit in the instant case, it was claimed that in ignorance of law laid down by this Court, the plaintiff had the "fees" demanded by the Municipal Council, Bhind and said Municipal Council, cited as defendant (herein respondent), was found, therefore, liable to refund the same to the plaintiff.

5. No doubt, the plaintiff admitted applicability of Article 24 but I am otherwise too satisfied that provisions was rightly cited. Law in that regard is well-settled. In the case of Venkata Subbarao AIR 1965 SC 1772, the suit was instituted for recovery of money from the Government which, it was claimed, were not due payable by the plaintiffs to the Government, but had been paid by the plaintiffs in ignorance of their legal rights. It was held that Article 62, Limitation Act, 1908 (which is in pari materia with Article 24 of 1963 Act) was applicable because "the money was received as tax by the defendant State from the plaintiff which the plaintiff was not bound in law to pay". The same view was taken in Ranendra Narayan Sinha and Others Vs. State of West Bengal, case on Article 62 to a suit for recovery of tax illegally collected.

6. As per Article 24, the period of limitation prescribed is three years from the time "when the money is paid". Evidently the suit filed on 7-7-1976 could only take care of payment of "fees" paid by the plaintiff to the defendant upto 7-7-1973. A major portion of the claim accordingly was evidently barred; but by amending the plaint, aid was invoked of section 17 (1) (c) of Limitation Act and that question has, therefore, to be examined.

7. The best thing that can be done to decide the crucial controversy is to extract the relevant portion of section 17 (1) :

17. Effect of fraud or mistake--(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,--

.....

(a) the suit or application is for relief/from the consequences of a mistake; or

.....

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with the reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production :

.....

The first question to be examined obviously would be to see when the "mistake" can be said to have been discovered as to payment of "fees" being made under unauthorised, incompetent or illegal bye-laws. Because this Court had decided the question of legality of such bye-laws as had been made under clause (m) as it then existed, of section 358 (7) of the said Act, as far back as in 1967 and that decision must be regarded to be within the knowledge of the plaintiff, it is difficult to accept plaintiff's case that the "mistake" was discovered only when the certified copy of the judgment passed subsequently by this Court in 1972 had been obtained ?

7-A. Indeed, the later decision was unreported decision while the earlier decision of 1967, as earlier alluded, though rendered on 18-10-1967, had come in prints in the All India Reporter in the year 1967. What is very clearly contemplated u/s 17 (1) is that date of discovery of the "mistake" pleaded by the plaintiff would not prevail inasmuch as it is not only any case of discovery which is contemplated thereunder, but such discovery which could not be made even exercising "reasonable diligence". Without a finding rendered by Court on pleadings and evidence on plaintiff's exercise of diligence", claim for extension of limitation cannot be sustained. What is to be noted importantly in the context of the facts pleaded by the plaintiff is that besides filing the certified copy of the judgment of this Court, rendered on plaintiff's own writ petition (on 13-7-1973), no care was taken by the plaintiff to state any other fact to bring its case within section 17 (1) (c). Now the plaintiff came across that judgment, Ex. P/71, only in 1976, is not stated. Circumstances of the case show only carelessness, and not an iota of diligence on the part of the plaintiff in pursuing the remedy. Indeed, even the fact that the plaintiff was not in knowledge of the law laid down by this Court earlier in 1967 in Sindhi Sahiti's case (supra) is also not mentioned. However, I have no doubt that even on the basis of judgment Ex. P/71, it is difficult to hold that the plaintiff acted with "diligence" in lodging the belated claim to avail the benefit of section 17 (1) (c).

8. As regards the minor part of the claim of the months of July to December, 1973, care of that is taken by the amended law. Section 358 (7), aforesaid, was amended and the old clause (m) was substituted by a new clause which is extracted below :

(m) regulating and prohibiting the stationing of carts or picketing of animals on any ground under the control of the Council or the using of such ground as halting place of vehicles or animals or as a place for encampment or the causing or permitting of any animal to stray and imposition of fees for such use.

this Court had considered the old clause (m) insufficient to confer sufficient legislative competence on a municipality to make provision for "fees" of the nature claimed from the plaintiff because there was no provision in old clause (m) for "imposition of fees" which deficiency was, therefore, made up by the amendment, aforesaid. In this connection, reference may be made to what was observed by the Court in para 8 of the Report in the case of Sindhi Sahiti (supra). It was observed that the declaration of a land belonging to Municipal Council as a bus stand did not prevent the Municipal Council from exercising its power under sub-clause (m) of clause (7) of section 358 of the Act, but the power of regulation contemplated thereunder did not carry with it the power of imposing fees for the use of the bus stand. In the absence of such power being conferred for making bye-laws in that respect, the bye laws framed by the municipality in that regard would have no force of law because tax or fees could only be collected under authority of law. The same view was reiterated in the subsequent decision rendered in 1972, as per Ex. P/71.

9. Although the constitutional doctrine eclipse, in terms, is not applicable to the facts and circumstances of the case, that may still provide the basis for the view that force and efficacy of a subordinate legislation revives the moment the virus afflicting it is removed. Indeed, the Constitution Bench in *Behram Khurshed Pesikaka Vs. The State of Bombay*, , had made the legal position clear that Courts merely interpret the law and it may also declare law to be valid or not but the result of such a declaration is only that no effect should be given to such a law in a Court of law. In this connection, reference may also be made to *Cooley on Constitutional Law*, wherein, at p. 201, it is stated that "a finding of unconstitutionality, does not destroy the statute but merely involves a refusal to enforce it". Because Municipal Council, Bhind acquired the legislative competence to make bye-laws for "imposition of fees" under the new clause (m) of section 358 (7) of the Act, the Municipality acquired the legal authority to enforce the existing bye-law under which "fees" had been recovered from the plaintiff. Therefore" there can be no warrant for the plea taken by the plaintiff that the "fees" realised after June/July, 1973 was illegal and unauthorised and the defendant was bound to refund the same to the plaintiff.

10. It is true that the trial Court did not examine the question of limitation; but in this Court, the plea of limitation was agitated not only in the memorandum of appeal, but that was the main contention pressed by Shri K. N. Gupta, who appeared for the appellant. By that, however, I am not excused of the statutory duty that section 3 of the Limitation Act has placed on all Courts to examine the plea Of limitation and dismiss a suit" although limitation has not been set up as a defence". Indeed/the right which has been allowed to the defendant u/s 3 has

always been regarded indefeasible and mandate of section 3, it has been held for more than a contrary, to admit no exception or relaxation. (See AIR 1935 85 (Privy Council) , Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others, , Ittavira Mathai Vs. Varkey Varkey and Another, , Rama Shankar Singh and Another Vs. Mst. Shyamlata Devi and Others, .

11. For the reasons aforesaid, I have no hesitation to hold plaintiff's suit to be barred by limitation. Accordingly, the appeal is allowed and judgment and decree passed by the Court below are set aside. However, in the facts and circumstances of the case, parties are left to bear their own costs in this Court.