
(2004) 09 BOM CK 0015
In the Bombay High Court
Case No : Writ Petition No. 2314 of 2004

Navinon Limited

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 30-09-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35
Limitation Act, 1963 — Section 29(2), 5

Citation : (2005) 1 BomCR 58 : (2005) 101 ECC 532 : (2008) 12 STR 84 :
(2009) 19 STT 203

Hon'ble Judges : Lodha R.M., J;Devadhar J.P., J

Bench : Division Bench

Advocate : Hardik Modh and Krishna Raja, instructed by M.K. Ambalal and Co, for the Appellant; R.V. Desai, Sr. C. and Rajiv Chavan and A.S. Rao, instructed by T.C. Kaushik, for the Respondent

Final Decision : Dismissed

Judgement

Lodha R.M., J.—By the order in original dated 31st October, 2003, passed by the Deputy Commissioner of Central Excise, petitioner's rebate claims were rejected. The petitioner received the said order in original on 20th December, 2003 and preferred appeal before the Commissioner of Central Excise (Appeals) on 28th April, 2004. By the impugned order dated 31st May, 2004 the Commissioner of Central Excise (Appeals) held that the appeal was not maintainable being barred by limitation prescribed u/s 35 of Central Excise Act, 1944 (for short "Central Excise Act). The petitioner has preferred this writ petition challenging the order of the Commissioner of Central Excise (Appeals).

2. Mr. Hardik Modh, the learned Counsel for the petitioner submitted that section 5 of the Limitation Act, 1963 is applicable by virtue of section 29(2) thereof to the appeal u/s 35 of the Central Excise Act being special law and section 5 can be availed of for the purpose of extending the period beyond 30 days of expiry of limitation as provided u/s 35 of the Central Excise Act. In support of his

submission, the learned Counsel for the petitioner relied upon the judgments of the Supreme Court in *Mangu Ram Vs. Municipal Corporation of Delhi*, , *Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker*, and *P. Sarathy Vs. State Bank of India*, .

3. Mr. R.V, Desai, the learned Senior Counsel for the revenue, on the other hand, submitted that the Commissioner of Central Excise (Appeals) is not empowered to condone the delay in excess of period prescribed u/s 35 of Central Excise Act and the provisions of Limitation Act, 1963 are not applicable. He relied upon the judgments of the Supreme Court in *Sakuru Vs. Tanaji*, , *Prakash H. Jain Vs. Ms. Marie Fernandes*, and *Union of India Vs. M/s Popular Construction Co.*, . He also relied upon the judgment of Allahabad High Court in the case of *E. Sefton and Co. Private Ltd. Vs. Government of India*, .

4. We reflected over the submissions advanced before us.

5. Section 35 of the Central Excise Act provides for an appeal to Commissioner (appeals) against the order or decision passed by an excise authority lower in rank than the Commissioner of Central Excise. The limitation prescribed for preferring appeal u/s 35 is 60 days. The limitation commences from the date of communication of such decision or order to the aggrieved person. The Commissioner (appeals) is empowered to condone the delay on the sufficient cause being shown by the appellant if the appeal is preferred beyond the period of 60 days but within a period of 30 days from the date of expiry of statutory limit of 60 days. The question that falls for determination by us is whether the provisions of Limitation Act, particularly sections 29(2) and 5 are applicable to the appeals preferred u/s 35 of the Central Excise Act.

6. Section 29 of the Limitation Act provides thus-

"29. Savings. - (1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application 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.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of "easement" in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend."

7. We also advert to section 5 of Limitation Act here itself which reads thus:

"5. Extension of prescribed period in certain cases. - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

8. In *Mangu Ram*, the Apex Court considered the question whether section 5 of the Limitation Act, 1963 was applicable to the application for special leave made u/s 417(3) of Criminal Procedure Code. The Supreme Court observed thus

"7. 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's* case 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. Here, as pointed out by this Court in *Kaushalya Rani Vs. Gopal Singh*, the time limit of sixty days laid down in sub-section (4) of section 417 is a special law of limitation and we do not find anything in the special law which expressly excludes the applicability of section 5. It is true that the language of sub-section (4) of section 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an

order of acquittal shall be entertained by the High Court after the expiry of sixty days from .the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of section 5 in order that the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of section 5. The conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after the coming into force of the Limitation Act, 1963, section 5 would be available to the applicant and if he can show that he had sufficient cause for not preferring the application within the time limit of sixty days prescribed in sub-section (4) of section 417, the application would not be barred and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain it. The High Court, in the present case, did not, therefore, act without jurisdiction in holding that the application preferred by the Municipal Corporation of Delhi was not barred by the time limit of sixty days laid down in sub-section (4) of section 417 since the Municipal Corporation of Delhi had sufficient cause for not preferring the application within such time limit. The order granting special leave was in the circumstances not an order outside the power of the High Court."

9. In *Mukri Gopalan*, the question that fell for determination before the Supreme Court was whether the Appellate Authority constituted u/s 18 of the Kerala Rent Control Act, 1965 had power to condone the delay in filing the appeal before it. Dealing with the said question, the -Supreme Court observed thus -

"22. As a result of the aforesaid discussion it must be held that Appellate Authority constituted u/s 18 of the Kerala Rent Act, 1965 functions as a Court and the period of limitation prescribed therein u/s 18 governing appeals by aggrieved parties will be computed keeping in view the provisions of sections 4 to 24 of the Limitation Act, 1963. Such proceedings will attract section 29(2) of the Limitation Act and consequently section 5 of the Limitation Act would also be applicable to such proceedings. Appellate Authority will have ample jurisdiction to consider the question whether delay in filing such appeals could be condoned on sufficient cause being made out by the applicant concerned for the delay in filing such appeals. The decision rendered by the High Court in the present case as well as by the Appellate Authority taking contrary view are quashed and set aside. The proceedings are remanded to the Court of the Appellate Authority, that is, District Judge, Thalassery. Rent Control Appeal No. 9 of 1994 filed before the said authority by the appellant is restored to its file with a direction that the Appellate Authority shall consider IA No. 56 of 1994 filed by the applicant for condonation of delay on its own merits and then proceed further in accordance with law."

10. In the case of *P. Sarathy*, the Supreme Court considered the issue whether

the suit instituted by the appellant therein in the City Civil Court, Madras was within time. In order to bring the suit within limitation, the appellant claimed benefit of section 14 of the Limitation Act on the ground that he had represented to the local board and thereafter, filed an appeal u/s 41(2) of the Tamil Nadu Shops and Establishments Act, 1947 and the entire period during which those proceedings remained pending deserved to be excluded and the suit was within time. In the backdrop of the said fact situation, the Supreme Court observed thus -

"8. It is not disputed that the appeal filed before the Deputy Commissioner of Labour (Appeals), Madras was within time.

9. The Deputy Commissioner of Labour (Appeals), Madras, which is the authority constituted under the Tamil Nadu Shops and Establishments Act, 1947 has the jurisdiction to adjudicate upon an order by which the services of an employee are terminated. He has the jurisdiction to decide whether the order of dismissal, passed by the employer, was valid or it was passed in violation of any statutory rule or principles of natural justice. u/s 41(3), the order passed by him is binding on the employer as also on the employee. Thus, the Deputy Commissioner of Labour (Appeals) may not be a "Civil Court" within the meaning of the CPC but it is definitely a "Court".

10. This appeal was dismissed on 1-9-1987 on the ground that the provisions of the Tamil Nadu Shops and Establishments Act, 1947 were not applicable to nationalised banks as held by the Madras High Court in the judgment since reported in C.V. Raman. This judgment was rendered during the pendency of the appeal before the Deputy Commissioner of Labour (Appeals), Madras.

11. Sub-section (1) of section 14, Limitation Act, provides as under :

"14(1). In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

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15. Applying the above principles in the instant case, we are of the opinion that the Deputy Commissioner of Labour (Appeals), which was an authority constituted u/s 41 (2) of the Tamil Nadu Shops and Establishments Act, 1947 to hear and decide appeals, was a "Court" within the meaning of section 14 of the Limitation Act and the proceedings pending before him were civil proceedings. It is not disputed that the appellant could file an appeal before the Local Board of

the Bank, which was purely a departmental appeal. In this view of the matter, the entire period of time from the date of institution of the departmental appeal as also the period from the date of institution of the appeal u/s 41(2) before the Deputy Commissioner of Labour (Appeals) till it was dismissed will, therefore, have to be excluded for computing the period of limitation for filing the suit in question. If the entire period is excluded, the suit, it is not disputed, would be within time."

11. The question that arose for the decision before the Supreme Court in the case of Sakuru was whether the provisions of Limitation Act, 1963 could be invoked for condoning the delay in filing the appeal before the Collector u/s 90 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950. The Supreme Court considered its previous decisions in the cases of Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc., , Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, and Smt. Sushila Devi Vs. Ramanandan Prasad and Others, and held that the provisions of Limitation Act, 1963 applied only to the proceedings in courts and not to appeals or applications before bodies other than courts such as quasi judicial Tribunals or executive authorities. The Supreme Court held thus -

"3. After hearing both sides we have unhesitatingly come to the conclusion that there is no substance in this appeal and that the view taken by the Division Bench in Venkaiah's case is perfectly correct and sound. It is well settled the decisions of this Court in Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc., ; Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, and Smt. Sushila Devi Vs. Ramanandan Prasad and Others, that the provisions of the Limitation Act, 1963 apply only to proceedings in "Courts" and not to appeals or applications before bodies other than courts such as quasi Judicial Tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Code of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein u/s 90 of the Act not being a Court, the Limitation Act, as such, had no applicability to the proceedings before him. But, even in such a situation the relevant special statute may contain an express provision conferring on the Appellate Authority, such as the Collector, the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of section 5 of the Limitation Act shall be applicable to such proceedings. Hence it becomes necessary to examine whether the Act contains any such provision entitling the Collector to invoke the provisions of section 5 of the Limitation Act for condonation of the delay in the filing of the appeal. The only provision relied on by the appellant in this connection in section 93 of the Act which, as it stood at the relevant time, was in the following terms:-

"93. Limitation. - Every appeal and every application for revision under this Act

shall be filed within sixty days from the date of the order against which the appeal or application is filed and the provisions of the Indian Limitation Act, 1908 shall apply for the purpose of the computation of the said period."

On a plain reading of the section it is absolutely clear that its effect is only to render applicable to the proceedings before the Collector, the provisions of the Limitation Act relating to computation of the period of limitation. The provisions relating to computation of the period of limitation are contained in sections 12 to 24 included in Part III of the Limitation Act, 1963. Section 5 is not a provision dealing with computation of the period of limitation. It is only after the process of computation is completed and it is found that an appeal or application has been filed after the expiry of the prescribed period that the question of extension of the period u/s 5 can arise. We are, therefore, in complete agreement with the view expressed by the Division Bench of the High Court in Venkaiah's case that section 93 of the Act did not have the effect of rendering the provisions of section 5 of the Limitation Act, 1963 applicable to the proceedings before the Collector."

12. In the case of Prakash H. Jain, inter alia the question before the Supreme Court was whether the Competent Authority under the Maharashtra Rent Control Act, 1999 was empowered to condone the delay in filing the application of eviction. The Supreme Court considered its previous decisions in the cases of Mukri Gopalan (supra), Sakuru (supra), P. Sarathy (supra), Thakur Jugal Kishore Sinha Vs. Sitamarhi Central Co-operative Bank Ltd. and Another, , Birla Cement Works Vs. G.M., Western Railways, and another, and Mr. France B. Martins and Another Vs. Mrs. Mafalda Maria Teresa Rodrigues, and held that the Competent Authority cannot be held to be Court for any purpose much less for availing of or exercising the powers under the Limitation Act, 1963.

13. The Supreme Court in the case of Popular Construction Co. considered the question whether the provisions of section 5 of Limitation Act were applicable to a application challenging the Award u/s 34 of the Arbitration and Conciliation Act, 1996 and held thus-

"5. The issue will have to be resolved with reference to the language use- section 29(2) of the Limitation Act, 1963 and section 34 of the 1996 Act. Section 29(2) provides that:

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

6. On an analysis of the section, it is clear that the provisions of sections 4 to 24

will apply when :

(i) there is a special or local law which prescribes a different period of limitation for any suit, appeal or application; and

(ii) the special or local law does not expressly exclude those sections.

7. There is no dispute that the 1996 Act is a "special law" and that section 34 provides for a period of limitation different from that prescribed under the Limitation Act. The question then is- is such exclusion expressed in section 34 of the 1996 Act? The relevant extract of section 34 reads:

34. Application for setting aside Arbitral Award. -(1)-(2) ***

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that, application had received the Arbitral Award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the Arbitral Tribunal;

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

12. As far as the language of section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section

(3). In our opinion, this phrase would amount to an express exclusion within the meaning of section 29(2) of the Limitation Act, and would therefore bar the application of section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principles of interpretation would justify such a result.

13. Apart from the language, "express exclusion may follow from the scheme and object of the special or local law:

"Even in a case where the special law does not exclude the provisions of sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

16. Furthermore, section 34(1) itself provides that recourse to a Court against an Arbitral Award may be made only by an application for setting aside such Award "in accordance with" sub-section (2) and sub-section (3), sub-section (2) relates to grounds for setting aside an Award and is not relevant for our purposes. But an application filed beyond the period mentioned in section 34, sub-section (3) would not be an application "in accordance with" that sub-section. Consequently by virtue of section 34(1), recourse to the Court against an Arbitral Award cannot

be made beyond the period prescribed. The importance of the period fixed u/s 34 is emphasised by the provisions of section 36 which provide that

"Where the time for making an application to set aside the Arbitral Award u/s 34 has expired the Award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court."

This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the Award expired, the Court was required to "proceed to pronounce judgment according to the Award, and upon the judgment so pronounced a decree shall follow" (section 17). Now the consequence of the time expiring u/s 34 of the 1996 Act is that the Award becomes immediately enforceable without any further act of the Court. If there were any residual doubt on the interpretation of the language used in section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the Court's powers by the exclusion of the operation of section 5 of the Limitation Act."

14. The Division Bench of the Allahabad High Court in the case of E. Sefton & Co. was concerned with the question of applicability of section 5 and section 29(2) of the Limitation Act, 1963 to the appeal preferred u/s 35 of the Central Excise Act, the question with which we are concerned. The Allahabad High Court held that section 29(2) of the Limitation Act, 1963 does not make section 5 of the Limitation Act applicable to the proceedings under the Central Excise Act. In paras 10 and 11 of the report, the Allahabad High Court held thus

"10. The above legal position however, can be of no avail to the petitioner. It has to be noticed in this connection that section 5 of the India Limitation Act contains a provision for extension of prescribed period of limitation in certain cases if the Court is satisfied about the sufficiency of the cause for not preferring the appeal or making the application within such period. It is obvious, therefore, that the proceedings referred to in section 5 of the Indian Limitation Act are proceedings before a Court. If we examine that the scheme of the Central Excises and Salt Act, 1944 and the provisions contained therein it will be apparent that the authorities contemplated therein are instrumentalities of the State and are not a part of the judiciary. Their functions are the assessment and collection of the excise duty and in the process of the assessment of the duties envisaged under the Act they followed a pattern of action which may be considered judicial. However, these authorities are not thereby converted into courts. In the case of Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, , it has been observed that the scheme of the Indian Limitation Act only deals with applications to courts. Further in the case of Sakuru Vs. Tanaji, it has been clearly held that the provisions of the Limitation Act, 1963 apply only to proceeding in "courts" and not to appeals or applications before bodies other than courts such as quasi judicial Tribunals or executive authorities notwithstanding the fact that such bodies or authorities may be vested with certain specified power conferred on courts.

11. It is, therefore, clear that even section 29(2) of the Limitation Act, 1963 cannot make section 5 of the aforesaid Act applicable to the proceedings under the Central Excises and Salt Act, 1944 and, therefore, the petitioner is not entitled to the benefits of the said provision."

15. The legal position that emerges from the various pronouncements referred to above is that the provisions of Limitation Act, 1963 apply only to "courts". Such courts may not be Civil Courts. These courts may not necessarily be constituted under the CPC or the Code of Criminal Procedure. The forum that functions as a Court or has trappings of the Court would be a Court for the purposes of applicability of the Limitation Act, 1963. The jurisdiction to entertain proceedings appeals or revisions under the special laws is sometimes given to the ordinary courts, and sometimes given to separate Tribunals constituted under the special law. Such Tribunals constituted under the special law which function as courts or having trappings of courts may be treated as courts for the purposes of the Limitation Act, 1963 but not all bodies or authorities hearing appeals or revisions under special law, having no trappings of the Court or which do not function as a Court.

16. The Commissioner of Central Excise (Appeals) empowered to hear appeals u/s 35 of Central Excise Act, in our considered view, cannot be treated to be forum functioning as a Court nor the said authority can be said to have trappings of the Court. The Commissioner of Excise (Appeals), though, is an Appellate Authority u/s 35 but his decisions do not satisfy the essential tests of judicial pronouncement. He cannot be said to possess the attributes of a Court. In the entire Central Excise Act, there is no provision which even makes the Commissioner of Central Excise (Appeals) a Court for limited or specific purpose. The Appellate Authority u/s 35 of the Central Excise Act is only executive authority; true it is while hearing the appeals contemplated u/s 35, the Commissioner of Central Excise (Appeals), acts quasi judicially. But that would not make Commissioner, Central Excise a Court or an authority functioning as a Court or having the trappings of a Court. In view of the admitted position that the appeal was preferred by the present petitioner u/s 35 beyond 30 days of the expiry of statutory period of 60 days, the Commissioner of Central Excise (Appeals) cannot be said to have committed any error in not entertaining the appeals as barred by limitation prescribed u/s 35 of the Central Excise Act.

17. We, therefore, hold that section 29(2) of the Limitation Act, 1963 is not attracted to the appeals preferred u/s 35 of the Central Excise Act and consequently section 5 of the Limitation Act is not applicable to such appeals.

18. Even otherwise, as per section 35, the Appellate Authority could extend the period of limitation upto 30 days of the expiry of statutory period of 60 days. There being any express provision in section 35 of Central Excise Act putting a ceiling on the powers of Appellate Authority even on the proof of sufficient cause, the general provision of section 5 of Limitation Act shall be deemed to be excluded. The language of section 35 of Central Excise Act does not permit

invocation of section 5 of Limitation Act, either, in terms or in principle.

19. In what we have observed above, in view of the admitted position that the appeal was preferred by the present petitioner u/s 35 beyond 30 days of the expiry of statutory period of 60 days, the Commissioner of Central Excise (Appeals) cannot be said to have committed any error in not entertaining the appeals as barred by limitation prescribed u/s 35 of the Central Excise Act.

20. Writ petition is, accordingly, dismissed.