
(2004) 09 CAL CK 0042
In the Calcutta High Court
Case No : C.O. No. 2585 of 2003

Nikhilesh Bagchi

APPELLANT

Vs

Metropolitan Co-operative Housing Society Ltd. and Another

RESPONDENT

Date of Decision : 10-09-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 21, Order 41 Rule 3A
Constitution of India, 1950 — Article 14, 227
Limitation Act, 1963 — Article 123, 137
West Bengal Co-operative Societies Act, 1983 — Section 135, 135(3), 136, 95, 96

Citation : (2004) 4 CHN 632

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : Samrat Sen, Ambar Nath Banerjee and Neena Panja, for the Appellant;

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This application under Article 227 of the Constitution of India is at the instance of an appellant before the West Bengal Co-operative Tribunal u/s 136 of the West Bengal Co-operative Societies Act (hereinafter referred to as the Act) and is directed against Order No. 94 dated February 4, 2002 passed by the West Bengal Co-operative Tribunal, Calcutta in Misc. Case No. 8 of 2000 arising out of Appeal No. 10 of 1994.

2. The present petitioner filed a disputed case u/s 95 of the Act before the Registrar of Co-operative Society, West Bengal thereby claiming relief both against the Co-operative Society, being respondent No. 1 and the respondent No. 2. On contested hearing the Assistant Registrar of Co-operative Society to whom the matter was referred, passed an award on March 3, 1994.

3. Being dissatisfied with such award dated March 3, 1994, the petitioner preferred an appeal u/s 136 of the Act before the Co-operative Tribunal ("Tribunal") and ultimately, by order dated December 28, 1999, the Tribunal

disposed of the said appeal by setting aside the award and declaring the petitioner to be lawful allottee of the concerned plot with further observation that the claim of title by respondent No. 2 was void.

4. Long thereafter, on November 27, 2000 the respondent No. 2 filed an application under Order 41 Rule 21 of the CPC (hereinafter referred to as the Code) for setting aside order dated December 28, 1999 on the ground that although a lawyer was engaged by him for contesting the appeal but ultimately, due to negligence on the part of such lawyer, the appeal was allowed ex parte. The respondent No. 2 subsequently filed another application under Order 41 Rule 3(A) of the Code for condonation of delay in preferring the said application under Order 41 Rule 21 of the Code. The aforesaid application under Order 41 Rule 21 of the Code was opposed by the present petitioner but ultimately, the learned Tribunal overruled the objection of the petitioner and by treating the application under Order 41 Rule 3(A) of the Code to be an application u/s 5 of the Limitation Act, condoned the delay in preferring the said application under Order 41 Rule 21 of the Code and also allowed such application thereby recalling order dated December 28, 1999 passed in the appeal preferred by the petitioner.

5. Being dissatisfied, the petitioner has come up with the present application under Article 227 of the Constitution of India.

6. None appears on behalf of the respondents. It appears from the affidavit-of-service that the respondent No. 2 in spite of intimation did not receive the envelope containing the application and the notice and as such, the said registered envelope came back with the endorsement "not claimed", I treat the said service as good service.

7. Mr. Sen, the learned Advocate appearing on behalf of the petitioner has raised a pure question of law in support of this application.

8. According to Mr. Sen, section 136 of the Act specifically excludes the operation of the Limitation Act, 1963 from the proceedings of appeal before the Tribunal against an order passed u/s 96 of the Act. Mr. Sen submits that although, the provisions contained in Order 41 are applicable to such appeal, the Tribunal below could not condone the delay in preferring application under Order 41 Rule 21 of the Code filed by the respondent No. 2. Mr. Sen, thus, submits that the Tribunal below exercised jurisdiction not vested in it by law by condoning the delay in preferring application under Order 41 Rule 21 of the Code for setting aside ex parte order passed in appeal. He, thus, prays for dismissal of the order impugned.

9. To appreciate the question involved in this application, it will be profitable to refer to the provisions contained in Sections 135 and 136 of the Act and those are quoted below :

"135. Tribunal.-(1)(a) The State Government may by notification constitute one or more co-operative Tribunals. A Tribunal shall consist of such number of persons

(including a Chairman) possessing such qualifications and shall have such jurisdiction as may be prescribed.

(b) When more than one Tribunal is constituted under clause (a), the State Government shall declare by notification one of the Tribunals to be the Principal Tribunal.

(2) A Tribunal shall exercise all the powers conferred upon an Appellate Court by Order 41 in the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908).

(3) Any person aggrieved by an order made by a Tribunal may, within ninety days from the date of such order, apply to such Tribunal for review of such order on one or more of the grounds specified in Rule 1 of Order 47 of the Code of Civil Procedure, 1908.

(4) A Tribunal shall not make any order on an application made under Sub-section (3) without giving the person likely to be affected adversely by such order an opportunity of being heard.

(5) When an appeal or application for review is filed before a Tribunal, it may make, no such terms and conditions as it thinks fit, such interlocutory order as may appear to it to be just and convenient.

(6) A Tribunal may hold its sittings at any place within its jurisdiction for the convenience of the parties concerned after previous notice to them and may by regulation lay down its own procedure with the previous approval of the State Government.

136. Appeal.-(1) An appeal shall lie from an order shown in Column 2, to the authority shown in column 3, and within the period shown in column 4, of the Third Schedule to this Act.

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

(3) Save as provided in this Act or the rules, no appeal shall lie against an order, decision or award made under this Act.

(4) An appeal referred to in sub-section (1) shall be decided by the Appellate Authority (other than the Co-operative Tribunal) within six months from the date of its presentation :

Provided that if the Appellate Authority fails to decide an appeal within the aforesaid period, it shall submit a report to the State Government before the expiry of the said period, stating reasons for its failure, and the State Government may allow it such further time as it thinks fit for decision of such appeal".

10. In the past, there were conflicts of opinions in this Court as to the applicability of section 5 of the Limitation Act to an appeal u/s 136 of the Act. There was also divergence of views as to whether the provisions contained in

Order 41 Rule 3(A) of the Code gives power to the Appellate Court to condone the delay. Those conflicting decisions have been settled by a Division Bench of this Court in the case of Egra Thana Co-operative Agricultural Marketing Societies Ltd. and Ors. v. Registrar of Co-operative Societies and Ors. reported in 2003(1) West Bengal Law Reporter (Cal) 488, wherein the Division Bench has in clear terms held that Order 41 Rule 3(A) is not the source of power of condonation of delay but it is the Limitation Act which gives authority to the Appellate Court to condone the delay in preferring appeal. The Division Bench, thus, held that in view of exclusion of the provisions of the Limitation Act from an appeal u/s 136 of the Act, the Tribunal while discharging function as an Appellate Authority cannot exercise the power of condonation of delay.

11. Therefore, it is apparent that the Tribunal acted without jurisdiction in allowing the application under Order 41 Rule 3(A) of the Code by treating the same as one u/s 5 of the Limitation Act for condonation of delay in filing the application under Order 41 Rule 21 of the Code.

12. But there remains a further question as to whether the said application was really filed beyond the prescribed period of limitation in preferring the application under Order 41 Rule 21 of the CPC for setting aside ex parte order in an appeal u/s 136 of the Act.

13. By the Code of Civil Procedure, a respondent in an appeal is given right to pray for setting aside the ex parte order passed in appeal, if such respondent can show that no notice of appeal was served upon him or that in spite of service of notice he was prevented by sufficient cause from appearing when the appeal was called on for hearing.

14. However, in the CPC there is no period of limitation prescribed for preferring such application. Article 123 of the Limitation Act prescribes 30 days period for preferring such application and such time begins to run from the date of decree if the notice of appeal was served upon such respondent but where the notice was not duly served, from the date when the respondent had knowledge of the ex parte decree passed in appeal.

15. Since, the provisions contained in the Limitation Act have no application to an appeal preferred against an order u/s 96 of the Act before the Tribunal the said Article 123 of Limitation Act cannot govern the period of limitation for preferring an application under Order 41 Rule 21 of the Code before the Tribunal.

16. In the Act itself, although, it is stated that provisions of Order 41 will have application before the Appellate Authority but no separate period of limitation is prescribed. Under such circumstances, the question is what will be the period of limitation for filing an application under Order 41 Rule 21 of the Code before such Tribunal.

17. In the case of Collector of Central Excise, Jaipur Vs. M/s. Raghuvar (India) Ltd., , it was pointed out by the Supreme Court that any law or stipulation

prescribing a period of limitation to do or not to do a thing after the expiry of the period so stipulated has the consequences of creation and destruction of rights and therefore, must be specifically enacted or prescribed therefor. It is not for the Courts, the Apex Court proceeded, to import any specific period of limitation by implication, where there is really none, though the Court may always hold when any such exercise of power has the effect of disturbing the right of a citizen that it should be exercised within a reasonable period.

18. As provided by the Supreme Court in the case of *Government of India Vs. Citedal Fine Pharmaceuticals, Madras and Others*, , even if, in statute there is no period of limitation for recovery of duty, such absence would not render the provision violative of Article 14 of the Constitution and the recovery may be made within a reasonable period.

19. The next question is what should be the reasonable period of limitation for filing an application under Order 41 Rule 21 of the Code in an appeal under the Act. After going through the provisions contained in section 135(3) of the Act, I find that there is provision for review of an order passed by the Appellate Authority and period of limitation is prescribed as 90 days from the date of order.

20. In my view, since the period of 90 days from the date of order has been fixed as the maximum period of preferring an application for review, it will be just and reasonable that for the purpose of invoking power under Order 41 Rule 21 of the Code, the same period of limitation should be prescribed and as such, if a respondent wants to challenge the order ex parte passed in appeal on the ground that no notice was served upon him, in such a case, he should come up within 90 days from the date of knowledge of such ex parte order and in other cases, where in spite of service of notice of appeal, he was prevented by sufficient cause from appearing at the time of hearing, as in the present case, the limitation should be 90 days from the date of order. It appears that the legislature in its wisdom decided not to confer the right to condone delay upon the Appellate Authority and 90 days time was the maximum period prescribed for entertaining an application for review by the Tribunal after the appeal is finally disposed of. Such being the intention of the legislature, the view adopted above is quite in conformity with the intention of the makers of law. In case of non-service of notice of appeal, the principles of natural justice demand that the limitation should not run from the date of ex parte order but from the date of knowledge of such order.

21. In the case before us, the Appellate Authority disposed of the appeal ex parte on 28th December, 1999 and the respondent No. 2 after entering appearance in the appeal through a lawyer ultimately did not contest the appeal and subsequently, filed the application under Order 41 Rule 21 of the Code on 27th November, 2000 long after the expiry of 90 days from the date of such order and the application for condonation of delay was filed even thereafter on 7th March, 2001.

22. I, thus, find that in the facts of the present case, the Tribunal had no jurisdiction to entertain an application under Order 41 Rule 21 of the Code beyond 90 days from the date of ex parte order as notice of appeal was served upon the respondent No. 2 and he entered appearance in the matter.

23. There is also no scope of treating the period of limitation for filing an application under Order 41 Rule 21 to be 3 years by taking aid of Article 137 of the Limitation Act, inasmuch as, the entire provisions of the Limitation Act are excluded before an Appellate Authority under the Act.

24. I, thus, find that the learned Tribunal below acted without jurisdiction in entertaining the Misc. Case No. 8 of 2000 arising out of Appeal No. 10 of 1994 beyond 90 days from the date of disposal of the appeal after condonation of delay. I, therefore, set aside the order impugned. This revisional application, thus, succeeds.

25. In the facts and circumstances, there will, however, be no order as to costs.