(2014) 09 PAT CK 0028

In the Patna High Court

Case No : Miscellaneous Appeal Nos. 857, 864, 865 and 866 of 2010 and I.A. Nos. 9288, 9328, 9327 and 9326 of 2010

Shree Durga Rice Mill APPELLANT

Vs

The State of Bihar RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Bihar Value Added Tax Act, 2005 — Section 79
Contract Act, 1872 — Section 25, 26
Customs Act, 1962 — Section 35H(1)
Easements Act, 1882 — Section 2
Electricity Act, 2003 — Section 125
Industrial Disputes Act, 1947 — Section 33C(2)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14, 14
Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 — Section 4(2)
Telegraph Act, 1885 — Section 16(3)

Citation : (2014) 4 PLJR 340

Hon'ble Judges : Rekha M. Doshit, C.J;Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : R.K. Agrawal, Advocate for the Appellant; Lalit Kishore and Vikash Kumar, Advocate for the Respondent

Judgement

Rekha M. Doshit, C.J.

Interlocutory Application No. 9288 of 2010

Interlocutory Application No. 9328 of 2010

Interlocutory Application No. 9327 of 2010

Interlocutory Application No. 9326 of 2010.

1. These four Applications under Section 5 of the Limitation Act are filed by the appellant M/s. Shree Durga Rice Mill. a dealer within the meaning of the Bihar Value Added Tax Act, 2005 (hereinafter referred to as "the 2005 Act") for

condonation of delay of 1053 days occurred in preferring the Appeals. It is the case of the appellant that these Appeals are preferred under Section 79 of the 2005 Act against the orders of the Commercial Taxes Tribunal (hereinafter referred to as "the Tribunal") made in respective revision applications.

2. According to the appellant, prior to enactment of 2005 Act, such matters were governed by the Bihar Finance Act, 1981 (hereinafter referred to as "the 1981 Act"). Under the 1981 Act, against the order of the Tribunal made in revision, a reference would lie before the High Court. Since the present Appeals involve the assessment for the financial years 1997-98; 1999-2000; 2000-01; and 2001-02, i.e. the period prior to 2005 Act, under the belief that a reference would lie to the High Court, the appellant filed applications before the Tribunal for reference to the High Court. The said applications were entertained by the Tribunal. The said reference applications were dismissed by the Tribunal on 11th June, 2010 on the ground of maintainability. Since the dismissal of the said applications on 11th June, 2010, the above Appeals are filed in October 2010. The appellants were thus bona fide pursuing the remedy before a wrong forum. The said period, therefore, requires to be excluded or at least the appellant has made out a sufficient cause for condoning the said delay.

3. Section 79 of the 2005 Act provides for "Appeal before High Court". The said Section reads as under:--

"79. Appeal before High Court.--

(1) An appeal shall lie to the High Court from every order passed by the Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner or a dealer aggrieved by any order passed by the Tribunal,--

(i) under the Bihar Finance Act, 1981, (Bihar Act 5 of 1981) as it stood before its repeal by Section 94, on or after the date of commencement of this Act; or

(ii) under this Act,

may file an appeal to the High Court, and such appeal under this section shall be filed within ninety days from the date of the communication to the dealer or the Commissioner on any question of law arising out of such order.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate the question.

(4) The appeal shall be heard only on the question so formulated and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the High Court to hear for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) (a) The High Court shall decide the substantial question of law so formulated or involved and deliver such judgment thereon containing the grounds on which such decision is founded and may award such costs as it deems fit.

(b) The High Court may determine any issue which--

(i) has not been determined by the Tribunal, or

(ii) has been wrongly determined by the Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(6) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to High Court, shall as far as may be, apply in the case of appeals under this section."

4. Sub-section (2) of above Section 79 leaves no doubt that an appeal shall lie before the High Court against the order of Tribunal even though the order is made by the Tribunal under the 1981 Act. Such appeal has to be filed within 90 days from the date of communication, inter alia, to the dealer. Under the said Section and sub-sections the jurisdiction of the High Court to entertain the appeal is confined to substantial questions of law. In other words, unless the appeal involves a substantial question of law, the High Court is debarred from entertaining such appeal.

5. The question that was posed for our consideration is whether the High Court has jurisdiction to entertain the appeal filed after 90 days from the date of communication specified in clause (ii) of sub-section (2) of the above referred Section 79.

6. It is indisputable that the said Section does not confer power, expressly or by necessary implication, upon the High Court to entertain the appeal filed after expiry of the specified 90 days by condoning the delay or by extending the period of limitation.

7. Learned advocate Mr. R.K. Agrawal has appeared for the appellant. He has relied upon Section 29 of the Limitation Act, particularly sub-section (2) thereof. He has submitted that in absence of power to condone the delay under any special law, Section 29(2) is attracted and Sections 4 to 24 (both inclusive) of the Limitation Act will apply, that is the Court can consider the cause for delay or can exclude the period spent in pursuing the remedy before a wrong forum. In support of his submissions, he has relied upon the judgments of the Hon''ble Supreme Court in the matters of Shantilal M. Bhayani v. Shanti Bai [1995 Supp. (4) SCC 578]; and of State of West Bengal and others Vs. Kartick Chandra Das and others, .

8. The Applications are contested by the State Government. The learned Principal Additional Advocate General Mr. Lalit Kishore has appeared for the respondents. He has relied upon the judgments in the matters of Gopal Sardar Vs. Karuna

Sardar, ; of Fairgrowth Investments Ltd. Vs. The Custodian, ; and of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, .

9. Thus, the matter at issue is the scope and ambit of Section 29(2) of the Limitation Act, 1963. Section 29 of the Limitation Act, 1963 reads as under:--

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

(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.

(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, may for the time being extend."

10. In the matter of Shantilal M. Bhayani (supra), a similar issue arose in respect of an appeal filed before the appellate authority under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The Hon''ble Court held that Section 5 of the Limitation Act did apply by operation of Section 29(2) of the Limitation Act.

11. Again in the matter of State of W.B. and Others (supra), the same issue arose in respect of a letters patent appeal preferred against the order made under the Contempt of Courts Act. The Hon''ble Court held that it was an appeal arising from a proceeding under the special Act. Section 5 of the Limitation Act was attracted by operation of Section 29(2) of the Limitation Act.

12. In the matter of Gopal Sardar (supra), the issue arose from the application for pre-emption made before the Court of Munsif under Section 8 of the West Bengal Land Reforms Act, 1955. The question that came before the Hon''ble Supreme Court was whether the said application could have been entertained after the expiry of period of limitation by invoking Section 5 of the Limitation Act. The Hon''ble Court held that the application for pre-emption was in the nature of "suit" for the purpose of Limitation Act. Section 5 of the Limitation Act was not attracted to the proceedings under the said Section 8. The Hon''ble Court held, "Thus, a conscious and intentional omission by the legislature to apply Section 5 of the Limitation Act to the proceedings under Section 8 of the Act, looking to the scheme of the Act, nature of right of pre-emption and express application of

Section 5 of the Limitation Act to the other provisions under the Act, itself means and amounts to "express exclusion" of it satisfying the requirement of Section 29(2) of the Limitation Act".

13. In the matter of Fairgrowth Investments Ltd. (supra), a similar issue arose in respect of a petition filed under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. The relevant provision [Section 4(2) of the said Act] allowed 30 days for filing the petition leaving no room for the Court to dispense with the time limit. The question arose whether the Court could invoke Section 29(2) of the Limitation Act to bring in the provisions contained in Sections 4 to 24 of the Limitation Act. The Hon''ble Court held that under the scheme of the Act, Section 29 of the Limitation Act did not apply.

14. Once again, a similar question arose in re. Hongo India Private Limited and Another (supra) in respect of the application for reference made to the High Court under Section 35-H(1) of the Customs Act. The Hon''ble Court held that there was complete exclusion of Section 5 of the Limitation Act and that the High Court was justified in holding that there was no power to condone the delay after the expiry of the period of 180 days.

15. I have considered the above judgments and the catena of judgments in the subject matter of the Hon''ble Supreme Court and the High Courts down the line up to AIR 1933 63 (Privy Council). To me it appears that the matters have been decided keeping in view the relevant provision and the scheme of the concerned Act. I do not propose to deal with each and every judgment on the issue. However, I may refer to a few of them at appropriate place.

16. The simple issue of power of the Courts to condone the delay or for that matter to extend the period of limitation has been baffling the Courts and there is no final pronouncement as yet. It cannot be said that the issue has been set at rest by an authoritative pronouncement by the Hon''ble Supreme Court and calls for no further discussion. The very language of Section 29(2) of the Limitation Act calls for examination of its applicability in the light of the provisions contained in the concerned enactment. No finality, therefore, can be achieved.

17. At first I may consider the scope of application of the Limitation Act. The Courts are consistent in application of the Limitation Act to the suits, appeals and applications instituted/preferred/made to the Courts under the Code of Civil Procedure. In other words, the Limitation Act is held to be applicable to the proceedings filed before the Courts under the Code of Civil Procedure, but there are deviations from the above settled law.

18. In the matter of Town Municipal, Council, Athani Vs. The Presiding Officer, Labour Courts, Hubli and Others etc., , the Hon''ble Supreme Court came to a specific conclusion that the Limitation Act would not apply to the applications made under Section 33C(2) of the Industrial Disputes Act, 1947. The Court held that the Limitation Act did not extend to the proceedings before the tribunals or the authorities.

19. A three-Judges Bench in the matter of Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, held, "It seems to us that it may require serious consideration whether applications to Courts under other provisions, apart from Civil Procedure Code, are included within Article 137 of the Limitation Act, 1963 or not".

20. In the matter of The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , the Hon''ble Court applied the Limitation Act to the applications made before the District Judge under Section 16(3) of the Telegraph Act. In the opinion of the Hon''ble Court, the Court of the District Judge being a Court under the Code of Civil Procedure, the Limitation Act would apply to the applications made to the District Judge. The Hon''ble Court also considered the language of Article 137 of Schedule to the Limitation Act. The Hon''ble Court held that "any other application" contemplated under Article 137 are not applications confined to the Code of Civil Procedure.

21. In the matter of Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker, , the Hon''ble Court invoked Section 29(2) of the Limitation Act to apply the provisions of the Limitation Act (Sections 4 to 24) to the appeal preferred to the appellate authority constituted under Kerala Buildings (Lease and Rent Control) Act, 1965. The Court held that the appellate authority, being the District Judge, functioned as a Court.

22. I do not need to give more time on the question whether the Limitation Act will apply to the proceedings before the tribunals/authorities which are not "Court" within the meaning of the Code of Civil Procedure. In the present case, I am dealing with the appeals preferred before the High Court. There cannot be and there is no dispute that the Limitation Act does apply to the appeals preferred before the High Court. The question is whether the Limitation Act will apply to the appeals filed before the High Court under the enactment other than the Code of Civil Procedure, i.e. under some special or local law.

23. It is well understood that the Limitation Act is a procedural law to be read with the Code of Civil Procedure and will apply to the proceedings filed before the Court under the Code of Civil Procedure. However, it is not confined exclusively to the proceeding filed under the Code of Civil Procedure. There is intrinsic evidence within the Act itself which will satisfy any trained mind that it can apply to the proceedings other than the proceedings filed under the Code of Civil Procedure.

24. Articles 114 and 115 in the Second Division of the Schedule to the Limitation Act provides for limitation for appeals under the Code of Criminal Procedure. Similarly, Section 29(2) of Limitation Act, in given circumstances, permits the application of the Limitation Act (Sections 4 to 24) to the appeals or the applications made under special or local laws subject to the conditions provided therein. Thus, the application of the Limitation Act is not absolutely barred in case of the appeals or the applications made under the Acts other than the Code

of Civil Procedure. The words "They are not expressly excluded by such special or local law" connote that but for such express exclusion the Limitation Act (Sections 4 to 24) would apply to the appeals or applications preferred or filed under a special or local law.

25. In the matter of Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others, , the Hon''ble Court made note of the limitation of 60 days provided for appeal to the Supreme Court against the order of the tribunal under Section 125 of the Electricity Act, 2003 and further period of 60 days allowed under the proviso thereto. The Hon''ble Court culled the legislative intention of allowing the party to prefer appeal before the Supreme Court in not more than 120 days from the date of order. The Hon''ble Court held that Section 5 read with Section 29(2) of the Limitation Act was not attracted.

26. Much stress has been laid on the words "period of limitation different from the period prescribed by the Schedule", meaning thereby that except where the provisions are specifically excluded, Sections 4 to 24 of the Limitation Act will apply to the appeals and applications only if the limitation provided under such special or local law is different from the one prescribed by the Schedule. This provision has been extended to the cases where the Schedule does not provide for any limitation at all. Should the application of Limitation Act (Sections 4 to 24) to the appeals or applications preferred or made under some special or local law be dependent on a fortuitous circumstance of the period of limitation provided in such special or local law. If the period of limitation is different from the one provided by the Schedule or where no limitation is provided by the Schedule, the Limitation Act (Sections 4 to 24) will apply. If the limitation prescribed is the same as the one prescribed by the Schedule, the Limitation Act (Sections 4 to 24) will not apply. Does it not amount to discrimination based on a fortuitous circumstance of the period of limitation prescribed under the concerned law. Could it be the intention of the Parliament or the State Legislature to discriminate the proceedings in respect of the application of the Limitation Act (Sections 4 to 24). I do not suppose so. I am unable to subscribe to the view that for application of the Limitation Act (Sections 4 to 24) by operation of Section 29(2) of the Act, the limitation provided under the special or local law has to be different from the limitation prescribed in the Schedule to the Limitation Act. Either the Limitation Act applies or it does not apply. If it applies it will apply irrespective of the period of limitation prescribed in such special or local law. Section 29(2) of the Limitation Act should not be construed in a manner to create discrimination from proceeding to proceeding under special or local law based on the period of limitation prescribed for such proceedings.

27. The intention behind Section 29(2) of the Act, as I understand, is simple and uncomplicated. It should be read to mean that in case a special or local law provides for an appeal or application to a Court and also provides for limitation for such appeal or application, such special law shall prevail and the limitation prescribed by the special law be read in the Schedule to the Limitation Act. In

other words, if the limitation provided under the special or local law is the same as that provided in the Schedule to the Limitation Act, the Schedule has to be read as it is, It does not need to be read in any other manner. In case the limitation prescribed under the special or local law is different from the one provided in the Schedule to the Limitation Act, the Court must read the limitation prescribed under the special or local enactment in the Schedule for the purpose of the appeal or application under the special or local enactment. The intention is to respect the provisions contained in the special or local law. If after providing the period of limitation, the Limitation Act (Sections 4 to 24) is expressly excluded, the legislative intention must be respected and the said provisions shall not apply. But if no such intention is expressed, the Limitation Act (Sections 4 to 24) shall apply. Further, for applying the Limitation Act (Sections 4 to 24) by operation of Section 29(2) of the Limitation Act, the condition precedent is that the Limitation Act as such applies to the proceedings in question i.e., if the appeal or the application in question lies before the Tribunal or the Authority to which (not being a Court) the Limitation Act does not apply, the same cannot be pressed into service by invoking Section 29(2) of the Limitation Act. However, the Limitation Act does apply to the proceedings before the Courts. It will, therefore, apply to the appeals or applications preferred or made before the Court under any special or local law (Sections 4 to 24) unless the application of any of the said sections is expressly barred. One must not forget that Section 29 of the Limitation Act is the saving provision and not a substantive provision.

28. Now coming to the present proceedings it is not questionable that the above referred appeals are preferred under Section 79 of the 2005 Act. Sub-section (1) thereof provides for an appeal to the High Court from the order made by the Tribunal. Sub-section (2) thereof provides for a limitation of 90 days from the date of communication of such order. The said provision neither expressly confers upon the High Court power to entertain the appeal after the expiry of the period of limitation; nor does it expressly make the Limitation Act applicable; nor does it expressly excludes the application of the Limitation Act.

29. In the circumstances, I am inclined to hold that as the appeal lies to the High Court, by operation of Section 29(2) of the Limitation Act, the Limitation Act (Sections 4 to 24) will apply to the appeals preferred under Section 79 of the 2005 Act.

30. At this stage we may note the judgment of the Hon''ble Supreme Court in the matter of P. Sarathy Vs. State Bank of India, . In that case, the period spent in prosecuting the remedy before the Deputy Commissioner of Labour (Appeals) under the Tamil Nadu Shops and Establishments Act, 1947 was held to be excluded under Section 14 of the Limitation Act. The Court reasoned, "It will be noticed that Section 14 of the Limitation Act does not speak of a "Civil Court" but speaks only of a "Court". It is not necessary that the court spoken of in Section 14 should be a "Civil Court". Any Authority or Tribunal having the trappings of a Court would be a "Court" within the meaning of this Article". It cannot be

gainsaid that the Tribunal has all the trappings of the Court and is a Court for the purpose of Section 14 of the Limitation Act.

31. In the matter of Hukumdev Narain Yadav Vs. Lalit Narain Mishra, , the Hon''ble Court held that Section 5 of the Limitation Act will not apply to the election petition under Representation of the People Act. The Hon''ble Court observed, "But this is not what S. 29(2) of the Limitation Act says, because it provides that 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. If none of them are excluded, all of them would become applicable. Whether those sections are applicable are not determined by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law......................................The applicability of these provisions has, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Act relating to the filing of election petitions and their trial to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in S. 29(2) of that Act".

32. In the matter of Shaik Saidulu @ Saida Vs. Chukka Yesu Ratnam and Others, , the Hon''ble Court held that the law of limitation would apply to the election petition filed under Hyderabad Municipal Corporation Act, 1955. The Hon''ble Court held, "Taking any other view would defeat the very purpose of the enactment providing for filing of an election petition calling in question any elections on the grounds specified under the Act. The remedy provided under a statute cannot be defeated under the cloak of technicalities by adopting a hyper-technical approach".

33. Now that I have held that the Limitation Act (Sections 4 to 24) does apply to the Appeals before us, the delay in question having occurred on account of the appellant''s pursuing the remedy before the wrong forum (the Tribunal), the period spent in pursuing the remedy before the Tribunal will be excluded as envisaged by Section 14 of the Limitation Act.

34. For the aforesaid reasons, the applications are allowed. The delay in question is condoned. Interlocutory Applications stand disposed of.

Ashwani Kumar Singh, J.

I agree.

