
(2013) 01 DEL CK 0074

In the Delhi High Court

Case No : LPA 778 of 2012

Standing Conference of Public Enterprises

APPELLANT

Vs

BSES Rajdhani Power Limited and Others

RESPONDENT

Date of Decision : 16-01-2013

Acts Referred:

Citation : (2013) 3 AD 214 : (2013) 198 DLT 186

Hon'ble Judges : D. Murugesan, C.J;V.K. Jain, J

Bench : Division Bench

Advocate : Jayant Nath with Mr. B.C. Pandey, for the Appellant; K. Datta, with Mr. Manish Srivastava, for BSES Rajdhani Power Ltd., Mr. Sumeet Pushkarna, CGSC for R-2/DPCL, Ms. Pratima Gupta, with Mr. Ankit Goel, Sandeep Gupta for R-3, Mr. Nitin Saluja, for Mr. Najmi Waziri for R-4/GNCT of Delhi, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.—The appellant obtained two electric power connections from erstwhile Delhi Vidyut Board (DVB) and had been making payment of the electricity bills, first to the erstwhile DVB and, thereafter to BSES Rajdhani Power Limited (BSES), which is respondent No. 1 in this appeal. The case of the appellant is that till July, 1999, the billing used to be on the basis of Two Part Tariff, comprising of the demand charges corresponding to the maximum demand in the first part and Energy Charges for the aggregate consumption in the second part. Thereafter, DVB started clubbing the maximum demand of two meters for calculating billing demand and demand charges against each connection. In view of clause No. 17 of the agreement, which the appellant had with DVB and which required it to pay the bills notwithstanding any difference or dispute as to the accuracy of the sums involved in the bills and which entailed disconnection of the supply in the event of nonpayment of the bills, the appellant continued to pay bill on the revised basis from July, 1999 to May, 2001 though under protest. According to the appellant, an excess amount of Rs. 1,81,55,924/- was thus recovered from it. This is also the case of the appellant that the liability to refund

the aforesaid amount was admitted by BSES in a letter dated 25.09.2004 which it wrote to Delhi Transco Limited. Since the aforesaid amount was not refunded to the appellant, a writ petition filed by it, claiming the aforesaid amount along with interest at the rate of 18% per annum, amounting to Rs. 3,10,46,630/-. The appellant also claimed a direction to the respondents to pay Rs. 25 lakh to it being the expenditure incurred by it in hiring the services of experts and consultants and towards damages. The writ petition was contested by BSES, inter alia, on the ground that writ was not the remedy available to the appellant since the agreement between the appellant and DVB contained an arbitration clause, writ petition does not lie for recovery of an amount under a contract and claim of the appellant/writ petitioner were barred by limitation.

2. The learned Single Judge vide impugned order dated 04.10.2012, dismissed the writ petition, inter alia, holding that the writ petition was not maintainable to enforce a civil liability arising out of a breach of a contract unless the liability arose out of statutory functions of the State and the claim of the petitioner/appellant did not fall in the said exception, the writ petition for refund of money could not be entertained and there was a serious issue on the question of limitation. The learned Single Judge also took the view that the claim for damages cannot be the subject matter of a writ petition. Being aggrieved, the writ petitioner is before us by way of this appeal.

3. The first question which arises for consideration in this appeal is as to whether a civil suit for recovery of the amount claimed in the writ petition, had it been filed by the appellant on the date of filing of the writ petition, would have been barred by limitation. The learned Single Judge, on going through various Articles in the Schedule to the Limitation Act, 1963, came to the conclusion that since there is no specific Article governing the suits for recovery of such an amount, the residuary Article 113 would apply to such a suit and the period of limitation would be three years from the date when the payment was made. The plea taken in the appeal is that it is Article 26 of Limitation Act which would apply to a civil suit of this nature. Article 26 of the Schedule to the Limitation Act prescribes limitation period of three years in respect of the suit for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated in them and the period of limitation commences when the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives. Stating the account means settlement of accounts. Article 26 of the Limitation Act refers to a case where a balance is struck after adjusting several items of credit and debit, constituting the account between the parties. Mere making of claim by one party and its admission by the other would not be governed by Article 26 of Limitation Act though it would be a case of admission or acknowledgement of the debt by the other party. This Article refers to an account containing items both on credit and debit side, where the figures on both the sides are adjusted between the parties and a balance is struck, the

consideration for the payment of balance being the discharge of items on each side. Reference in this regard can be made to *Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co.*, and AIR 1934 147 (Privy Council) . In an account, which is stated or settled within the meaning of this Article, it is not open to the parties to prove that a higher or lesser amount was due. Such an account when stated in writing and signed by the defendant or its agent may tantamount to a new contract, possibly constitute a substantive cause of action in itself and a suit may possibly be maintained on it. Such account can be reopened only on the grounds of fraud or mistake which would justify setting aside any other agreement. In fact, the view taken by Goa and Madras High Court in *Prabhakar Fadoo Dessai vs. Vassudeva Narayan Sarmalkar* and *N. Ethirajulu Naidu Vs. K.R. Chinnikrishnan Chettiar*, is that where the entire debt has become time barred by the time when the settlement of accounts are made, the same would not amount to a cause of action nor could it provide a fresh starting unless it amounts to express promise within the meaning of Section 25(3) of the Contract Act. We, however, need not delve further into this aspect since, as stated herein below, this is not a case of stating/settlement of account envisaged in Article 26 of Limitation Act.

4. The case of the appellant is that DVB had wrongly started clubbing the maximum demand of the two meters for calculating billing demand and the demand charges against each connection and it was forced to make payment of the wrong bill so as to avoid disconnection of the electricity on account of nonpayment of amount demanded from it. The appellant is claiming a specific identified amount, alleged to have been paid under protest, along with interest on that amount. This amount was known at the time of payment itself, since the appellant claims to have paid it under protest. No taking and settling of accounts was, therefore, required to arrive at the excess amount alleged to have been paid by the appellant. Such a claim cannot be said to be a claim for the money found due from the defendant "on accounts stated" between them and, therefore, the reliance upon Article 26 of the Schedule to Limitation Act is wholly misplaced. We are in agreement with the learned Single Judge that it is Article 113 of Limitation Act which would govern the claim of this nature, if filed before a Civil Court.

5. In *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, , the Supreme Court took a view that Article 113 of Limitation Act applies to a suit for recovery of excess duty paid and a suit for recovery of the said amount needs to be filed within three years from the date of payment. In the case before us, the excess payment is alleged to have been made between June, 1999 to May, 2001. The prescribed period of limitation, therefore, clearly expired by May, 2004.

The case of the appellant is that the letter dated 25.9.2004 written by BSES to Delhi Transco constitutes "acknowledgment" within the meaning of Section 18 of the Limitation Act. However, a fresh period of limitation from the date of the

acknowledgment of debt or liability starts only in a case the said acknowledgment is made before the expiry of the period of limitation prescribed in the statute. This would be evident from a bare perusal of the Section itself which opens with the words "Where the expiration of the prescribed period for a suit or an application in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing". The legal proposition in this regard was approved by the Supreme Court in *J.C. Budhreja Vs. Chairman, Orissa Mining Corporation Ltd. and Another*, though the statutory provisions itself being quite explicit, no reference to any precedent is really required.

6. The next question which arises for consideration is as to whether in a writ petition, the Court can direct payment of an amount, recovery of which has otherwise become barred by limitation. The public policy behind the period of limitation being prescribed by the statute has been explained as under in *Halsbury's Law of England (Third Edition, Vol 24)*, Article 330 at p. 18:

The courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim and (3) that person with good causes of action should pursue them with reasonable diligence.

7. In *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, which is a Constitution Bench decision of the Supreme Court, the petitioners realized sales tax from their customers outside Bombay. The Sales Tax Officer vide order dated May 17, 1956, forfeited the amount u/s 21(4) of the Bombay Sales Tax Act, 1953. On March, 28, 1958, the petitioners filed a writ petition seeking to restrain the Sales Tax Officer from recovering the said amount. They also challenged the vires of Section 24(4) of Bombay Sales Tax Act and impugned the order of forfeiture as violative of Article 19(1)(f) and 365 of the Constitution. The writ petition having been dismissed, an appeal was filed by them against the order whereby the petition was dismissed. On dismissal of their appeal, the amount in question was paid by them. Thereafter, the provisions of Section 12(a) (4) of the Bombay Sales Tax Act were struck down in another matter and a writ petition was, therefore, filed claiming refund of the amount which the petitioners had paid on the assumption that Section 21(4) of Bombay Sales Tax Act was also liable to be struck down on the same ground on which Section 12(a)(4) was held to be unconstitutional. The questions which arose for decision by the Supreme Court were as to whether the claim of the petitioners would be barred by limitation if it were the subject matter of a suit in February, 1968 and if so were the petitioners entitled to relief in a petition under Article 32 of the Constitution. 3 Judges, constituting the majority of the Bench took the view that the petitioners were not labouring under any mistake of law when they made the payment and, therefore, the payment which they made was under coercion and the period of limitation under Article 24 of Limitation Act, therefore, would be

three years from the date when money was received by the respondent and accordingly the suit for recovery of the aforesaid amount would be barred by limitation. As regards the second question, the Court noted that no period of limitation was prescribed for a petition under Article 32 of the Constitution and the technical rules like the provisions of Section 80 of CPC would not apply but held that this would mean that in giving relief under Order 32, the Court must ignore and trample on foot of loss of procedure, evidence, limitation, *res judicata* and the like. Dismissing the petition, the Apex Court [Bachawat, JJ], *inter alia*, held as under:

40. The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. Article 32 and 226 of the Constitution provide concurrent remedy in respect of the same claim. The extraordinary remedies under the Constitution are not intended to enable the claimant to recover monies, the recovery of which by suit is barred by limitation. Where the remedy in a writ application under Article 32 or Article 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the court in its writ jurisdiction acts by analogy to the statute, adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the same limitation on the summary remedy in the writ jurisdiction. On similar grounds the Court of Chancery acted on the analogy of the statutes of limitation in disposing of stale claims though the proceeding in a Chancery was not subject to any express statutory bar, see Halsbury's Laws of England, Vol. 14, Page 647, Article 1190, *Knox vs. Gye*. Likewise, the High Court acts on the analogy of the statute of limitation in a proceeding under Article 226 though the statute does not expressly apply to the proceedings. The Court will almost always refuse to give relief under Article 226 if the delay is more than the statutory period of limitation, see *State of Madhya Pradesh vs. Bhailal Bha* (*supra*) at pp. 273-274.

41. Similarly, this Court acts on the analogy of the statute of limitation in respect of a claim under Article 32 of the Constitution though such claim is not the subject of any express statutory bar of limitation. If the right to a property is extinguished by prescription u/s 27 of the Limitation Act, 1963, the petitioner has no subsisting right which can be enforced under Article 32. In other cases where the remedy only and not the right is extinguished by limitation, it is on grounds of the public policy that the court refuses to entertain stale claims under Article 32. The statutes of limitation are founded on sound principles of public policy. As observed in Whitley Stoke's Anglo-Indian Codes, Vol. 11, p.940, "The law is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence, and to prevent oppression....The other ground of public policy upon which the statutes of limitation are founded is expressed in the maxim "*vigilantibus non dormientibus jura subveniunt*" (2. Co. Inst. 690) the laws aid the vigilant and not those who slumber. On like grounds the court acts on the analogy of the statutes of limitation in the exercise of its jurisdiction under Article 32. It follow that the

present petition must be dismissed.

Concurring with the above referred view, the Hon'ble Mr. Justice J.K. Mittar held that a claim based on infraction of fundamental right ought not to be entertained if made beyond the period fixed by Limitation Act for enforcement of the right by way of suit and that ordinarily the period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise the plea successfully under Article 32 of the Constitution. He also took the view that a claim for money paid under coercion would be covered by Article 113 of the Limitation Act.

In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , the Supreme Court, inter alia, observed that the "maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured".

8. In view the authoritative pronouncement of the Constitution Bench of the Supreme Court, we have no hesitation in holding that since the suit for recovery of amount in question, had it been filed on the date the writ petition was filed, would have been barred by limitation, it would not be appropriate for us to direct payment of the aforesaid amount, in exercise of our discretionary jurisdiction under Article 226 of the Constitution. Taking a contrary view would result in a situation where callous and negligent parties, who are not vigilant enough to pursue their claims would come to the Court by way of a writ petition, wherever the claim is directed against government or any other entity which is State within the meaning of Article 12 of the Constitution. Also we would like to refer to the well-known maxim "delay defeat equity" and the law does not help those who are not vigilant to protect and enforce their rights.

9. In *Burmah Construction Co. Vs. The State of Orissa and Others*, , a Constitution Bench of Supreme Court held as under:

... The High Court normally does not entertain a petition under Art. 226 of the constitution to enforce a civil liability arising out of a breach of contract or a tort to pay and amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under Art. 226 of the constitution against the State or against an officer of the State to enforce a statutory obligation.

However, in the present case, the appellant is disputing the method of computation of demand and is not seeking to enforce some statutory obligation on the part of the respondents. The case, therefore, does not fall in the exception carved out by the Apex Court, in the above referred case.

10. In *Suganmal Vs. State of Madhya Pradesh and Others*, , the Supreme Court, inter alia, held as under:

6. On the first point, we are of opinion that though the High Court have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the state to refund taxes illegally collected, but all such had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the courts were moved by a petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought....."

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9. We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil Court for claiming the amount and it is open to the State to raise all possible defenses to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

In the case before us, the only prayer made by the appellant is for refund of the money alleged to have been paid under protest and no statutory provision or the tariff fixed by DVB was challenged. Here the refund has not been claimed as a relief consequential to the striking down of a statutory rule. This is also not the case of the appellant that DVB had no jurisdiction to collect the amount in question from it. The recovery of excess electricity charges is not a case of acting without jurisdiction. It can only be a wrong application of the tariff fixed by DVB. Since DVB had the authority of law to recover the electricity charges, it cannot be said that it was acting without authority of law, while collecting amount in question from the appellant.

11. The learned counsel for the appellant has referred to Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another, where the Supreme Court observed that tariff is fixed by exercise of statutory power and not as a result of any bargaining by and between the Board and the consumer who has no option but to pay the tariff fixed by the Board in exercise of the statutory power conferred upon it. The next judgment relied upon by him is Ashok Soap Factory and Another Vs. Municipal Corporation of Delhi and Others, where the Supreme Court again observed that fixation of tariff is a legislative function and the only challenge to the fixation of such levy can be on the ground

of unreasonableness or arbitrariness. Neither of these judgments is of help to the appellant, for the simple reason, that in the case before us, it is not the tariff which is under challenge but the method of computation of bill which is being challenged. This is not the case of the appellant that the tariff fixed by DVB was illegal or unreasonable and was liable to be struck down. As noted earlier, the case of the appellant is that the clubbing of the maximum demands of two meters for calculating billing demand and demand charges against each connection was wrong and the load violation charges were levied wrongly. The case of the respondents, on the other hand, is that since the summation metering was dismantled on 30th July, 1999 and individual meters were installed on 7th September, 1999, load violation charges were levied against both the connections after dismantling of summation metering and installation of individual meters by earth mechanical summation of maximum demand as indicated by both the meters. The case of the appellant before us is that the amount of the bills was paid under protest whereas the case of the respondents is that there was nothing on record to indicate that the payment was made under any protest or reservation. Therefore, the reliance upon these judgments is wholly misplaced.

12. During the course of arguments, the learned counsel for the appellant also referred to the following observations made in *Shri Vallabh Glass Works* (supra)

Whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Article 226 of the Constitution, it is appropriate ordinarily to construe any unexplained delay in the filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a rigid formula. There may be cases where even a delay of a shorter period may be considered to be sufficient to refuse relief in a petition under Article 226 of the Constitution. There may also be cases where there may be circumstances which may persuade the Court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit. Each case has to be judged on its own facts and circumstances, touching the conduct of the parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public etc.

In our opinion, the above referred view of the Supreme Court does not help the appellant because the period of limitation prescribed in the Limitation Act for recovery of the amount being claimed by the appellant expired on May, 2004 and there has been no reasonable explanation from the appellant not approaching either the civil court or the writ court for as much as about six years.

The learned counsel for the appellant has also referred to the decision of the Supreme Court in *Madras Port Trust versus Hymanshu International* by its

Proprietor Madras Port Trust Vs. Hymanshu International by its Proprietor V. Venkatadri (Dead) by L.R.s, where the Court, inter alia, observed that the Government and public authorities should adopt the practice of not relying upon the technical pleas for the purpose of defeating legitimate claims of the citizens and do what is fair and just to the citizens. It was further observed that if a government or public authority takes a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the Court, though ordinarily, such a plea should not be taken unless the claim is well-founded and by reasons of delay in filing it, the evidence for the purpose of registering such a claim has become unavailable. In the case before Supreme Court, the claim of the respondent for refund of the amount of demurrage and transit charges etc. paid to the appellant had become barred by Section 10 of the Madras Port Trust Act. It was noted by Supreme Court that it was a just claim supported as it was by the recommendations of the Assistant Collector of Customs. It was, in these circumstances, that the Apex Court declined to interfere with the order of the High Court granting the refund to the respondent, in exercise of its extraordinary jurisdiction under Article 136 of the Constitution. This judgment, in our view, does not apply to the facts of the present case because the claim of the appellant is being disputed on merits and one plea taken by the respondent is that no record available with them indicates that the payment of amount in question was made under protest.

For the reasons stated hereinabove, we find no merit in the appeal. The same is hereby dismissed, without any order as to costs.