(1984) 08 CAL CK 0031

In the Calcutta High Court

Case No : A.F.O.D. No. 29 of 1980

State of West Bengal — APPELLANT

Vs

Satyanarayan Rice Mill — RESPONDENT

Date of Decision : 28-08-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Constitution of India, 1950 — Article 226
Essential Commodities Act, 1955 — Section 3(4)
Limitation Act, 1963 — Article 113, 14

Citation : AIR 1985 Cal 391

Hon'ble Judges : Sachindra Nath Sanyal, J;Bankim Chandra Ray, J

Bench : Division Bench

Advocate : A.N. Banerjee and Tapan Kr. Sengupta, for the Appellant; N.N. Dutt and Swapan Kr. Dutt, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Ray, J.—This appeal is directed against the judgment and decree passed in Money Suit No. 528 of 1974 at the instance of the defendant, State of West Bengal.

2. The facts of the case as appear from the plaint in short are as follows:-- The respondent, Satyanarayan Rice Mill instituted the said Money Suit for recovery of the price of the rice delivered on the basis of the purported order made under the West Bengal Rice Mills Levy Order, 1967 whereby he was directed to deliver 225 quintals of fine quality and 450 quintals of common quality rice as well as 224.80 quintals of common rice und 300 quintals of fine rice the price of which is claimed at the rate as per the order of this Hon''ble Court to be Rs. 37,578.25 P. It has been stated that the impugned Levy Order directing delivery of the aforesaid quantities of rice was served on the plaintiff some time in April, 1967 and the procurement price fixed under the West Bengal Rice Mills Levy Order, 1967 was much below the average price prevalent. It has been stated that the price that was fixed in the aforesaid Rice Mills Levy Order, 1967 being illusory,

the Rice Mills Owners Association made an application under Article 226 of the Constitution to this Hon''ble Court on or about 6th June, 1967 and this was registered as Matter No. 347 of 1967. This application was heard on 14th Nov. 1968 and by consent of parties, R. C. Mitra J. made an order appointing Mr. A. K. Sarkar as a Special Referee for determining the question as to what was the price of rice between Jan. 1, 1967 and April, 30, 1967. On or about 28th Feb. 1972 the Special Referee submitted his report finding that the average wholesale price of rice in all the districts of West Bengal during the period under enquiry was Rs. 124.09 P. per quintal. On 5th May, 1972 the said application came up for hearing before his Lordship B. C. Mitra J. and the learned Judge was pleased to uphold the finding of the Special Referee holding that the wholesale price of rice throughout the districts of West Bengal was Rs. 124.09 P. per quintal and direction was given for issuance of a Writ in the nature of Mandamus directing the respondent State of West Bengal to cancel and withdraw and not to give effect to Clause IV of the West Bengal Rice Mills Levy Order, 1967 and further directed issue of a Writ in the nature of prohibition directing the respondent, State of West Bengal not to give effect to the procurement price fixed by Clause IV of the said Order. Against the said order, the defendant. State of West Bengal, preferred an appeal and an application for stay of operation of the order was also filed. But the prayer for stay was refused by the Appeal Bench of this Hon''ble Court. Hence the instant suit has been brought by the plaintiff claiming the difference of price, i.e. the procurement price and the price that has been fixed by this Hon''ble Court in the aforesaid Matter No. 347/67 amounting (o a sum of Rs. 37,578.25 P. The defendant, State of West Bengal, appeared in the suit and filed written statement. Four issues were framed, which were as follows :--

1. Is the suit barred by limitation?

2. Is the suit not maintainable in view of the appeal pending against the order dt. the 5th May, 1972 of his Lordship, B. C Mitra J.?

3. Is the suit barred by the provisions of Order 2 Rule 2 of the Civil P. C?

4. To what relief, if any, is the plaintiff entitled?

3. The suit was heard on 20th Dec. 1978 before the Chief Judge, City Civil Court, Calcutta. As regards issue No. 1, it was held that the suit was not barred by limitation. This finding was arrived at on the basis of a judgment rendered by His Lordship, S. C. Ghosh J. (as His Lordship then was) in Suit No. 414 of 1973 (Banishri Rice Mills Private Ltd. v. State of West Bengal) (Ext.4a).

4. As regards issue No. 2, it has been held that there is no bar to maintain and proceed with the present suit when there was no order of stay granted by the Court of Appeal and the filing of an appeal did not operate as a stay of proceedings in a decree or order appealed from.

5. Issue No. 2 was therefore held against the defendant. As regards issue No. 3, it was held that the claim for difference in price was beyond the scope of the Writ

petition and as such the present suit does not come within the bar of Order 2 Rule 2 C.P.C. It was finally held that the plaintiff was entitled to recover the sum of Rs. 37,578.25 P. from the defendant with interest at the rate of 6% per annum from the date of the decree until repayment if the defendant fails to pay the decretal amount by 31st Dec. 1978.

6. It is against this judgment and decree the instant appeal has been preferred by the State of West Bengal.

7. Mr. A. N. Banerjee, learned Advocate appearing on behalf of the appellant, has submitted before this Court that the suit is not maintainable in view of the provisions of Section 15 of the Essential Commodities Act, 1955. This section runs as follows : --

15(i)-- "No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done in pursuance of any order u/s 3 or Section 4."

15(ii)-- "No suit or other legal proceeding shall lie against a Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of any order u/s 3 or Section 4".

8. Referring to this provision Mr. Banerjee has contended that the instant suit is not maintainable. It has been next contended by Mr. Banerjee that this suit is barred by limitation as it has not been brought within one year from the date of seizure of the rice or in other words, the service of the impugned order directing the plaintiff-respondent to deliver the rice mentioned in the order itself. It has been submitted that Article 80 of the Lim. Act will apply to this case and this Article 80 provides for bringing in a suit within a period of one year from the date of seizure for compensation for wrongful seizure of movable property under legal process. It has been contended by Mr. Banerjee that in this case the seizure was made some time in 1967 and the instant action was brought on 6th July, 1974, and the suit is barred by limitation being beyond the prescribed period. It has been next submitted by Mr. Banerjee that Section 14 of the Lim. Act does not apply to the instant case, inasmuch as, the time taken for filing the Writ application on 6th June, 1967 and disposal of the same on 5th May, 1972 cannot be excluded, inasmuch as, a proceeding under Article 226 of the Constitution is not a civil proceeding. In support of his contentions Mr. Banerjee drew our attention to explanation to Section 141, C.P.C. where it has been expressly stated that the expression ''proceeding'' under Order IX does not include any proceeding under Article 226 of the Constitution. Mr. Banerjee therefore, contended that a proceeding under Article 226 of the Constitution is not a civil proceeding and as such Section 14(1) of the Lim. Act cannot be invoked to exclude the time taken in prosecuting the application under Article 226 of the Constitution before this Court. Therefore, it has been submitted that the instant suit is barred by limitation. It has been next contended by Mr. Banerjee that even assuming for argument''s sake that it is a civil proceeding, relief claimed in the

suit should have been claimed in the proceeding under Article 226 of the Constitution. This being not done, the instant suit is barred by Order 2 Rule 2, C.P.C. In support of his submission, Mr. Banerjee tried to rely upon the observation made in Bharat Board Mills Ltd. Vs. The Regional Provident Fund Commissioner and Others, .

9. Mr. Banerjee then submitted that the suit ought not to have been decreed as the plaintiff did not adduce any evidence to prove its case and the judgment and decree rendered by the trial Court is liable to be set aside on that ground. It has been further contended by Mr. Banerjee that the fixation of average price that has been made in the Writ application by B. C. Mitra, J. on accepting the report of the Special Referee cannot be relied upon and the average price of the different varieties of rice cannot be determined on that basis inasmuch as the average price that was fixed by the Special Referee relates to the average price prevailing in the districts of West Bengal without any reference to the average price prevailing in the respective areas where the procurement of rice has been made under the West Bengal Rice and Levy Order, 1967.

10. Mr. Dutt, learned Advocate appearing on behalf of the respondents has submitted in the first place that during the period when the 226 proceeding was pending and till its final disposal, the limitation u/s 14(1) of the Lim. Act was suspended. In support of this submission decisions in Dwijendra Narayan Roy v. Joges Chandra De, 39 Cal LJ 40 : (AIR 1924 Cal 600) has been cited at the bar. It has been submitted further in connection with this submission that the instant suit could not be filed earlier as the cause of action did not accrue till the disposal of the 226 proceedings wherein it has been held that Clause 4 of the Levy Order, 1967 was ultra vires of the provisions of Section 3(4) of the Essential Commodities Act, 1955 and the price that has been fixed by Clause 4 of the said Levy Order was held to be bad and the same was directed not to be given effect to by the authorities concerned.

11. It has been next submitted by Mr. Dutt that if a payment is made under an mistaken view of law or of fact, limitation will run from the date when such mistake of fact or mistake of law for the first time comes to the knowledge of the plaintiff who brings the action for refund of the same that has been paid under a mistaken knowledge of fact or law. In support of this submission the decision in K.S. Venkataraman and Co. Vs. State of Madras, has been referred to as well as the decision in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, and AIR 1939 PC 128. It has been submitted further that a proceeding under Article 226 of the Constitution is a civil proceeding and Section 14(1) of the Lim. Act applies. It has been further submitted that Section 141 of the Civil P. C. read with explanation appended thereto by the 1976 Amendment Act does not in any way or in express term say that a proceeding under Article 226 of the Constitution is not a civil proceeding. It has been further urged that the submissions that Section 14(1) of the Lim. Act does not apply to exclude the period taken diligently in proceeding with the application under Article 226 of the

Constitution is not sustainable. Reference has been made to the decision in Ramesh and Another Vs. Seth Gendalal Motilal Patni and Others, and Dhanalakshmi Vilas Cashew Co. and Others Vs. President, Cashew Industries Staff Association and Others, and Guru Gobinda Basu Vs. Sankari Prosad Ghosal and Others, and also to the meaning of the word civil proceeding as given in Mitra''s Legal Dictionary, 135. It has been next submitted by Mr. Dutt that Section 15 of the Essential Commodities Act has no application in this case as that section merely provides for protection of all official acts done bona fide and faithfully in pursuance of the provisions of the Essential Commodities Act by the officers. It has also been submitted that Article 80 of the Lim. Act has no application in the instant case as there is no question of any wrongful seizure of movable property under legal process because the word ''wrongful seizure under legal process'' means a process issued by Court. In this connection the decision in Shivrao Sheshgiri Kalbag v. Secretary of State, AIR 1942 Bom 300 has been cited at the bar. It has also been submitted that the bar under Order 2 Rule 2 of the Civil P. C. does not apply to an application under Article 226 of the Constitution. In support of this submission our attention has been drawn to the language of Order 2 Rule 2 of the Code, where the expression used is "suit" and it has been submitted that the suit according to the definition u/s 2(1) of the Lim. Act does not include an appeal or an application. It has therefore been submitted that the Writ application in no circumstances can be treated or deemed to be treated as a suit. Therefore the bar under Order 2 Rule 2 of the Code cannot be invoked to such a proceeding. Reference has been made in this connection to the decision in Devendra Pratap Narain Rai Sharma Vs. State of Uttar Pradesh, .

12. It has been lastly submitted by Mr. Dutt that there was no dispute about the facts. Rather the facts were admitted and as such, no evidence was adduced by either of the parties to the suit in supporter in contravention of the statements of fact pleaded in the plaint of the aforesaid suit.

13. Mr. Banerjee in reply very ingenuously referring to the language of Section 14(1) of the Lim. Act tried to contend before us that meaning of civil nature proceeding in Section 14(1) is a proceeding of a civil nature where the plaintiff had or could ask for the same relief which the plaintiff is now asking in the instant suit. In other words, the proceeding under Article 226 of the Constitution would have been a civil proceeding if the relief regarding a Writ of Mandamus or a direction or order would be asked for for refund or payment of the balance of the price of rice which the plaintiff had to deliver on the basis of the levy order served on him. As it in evident from the order itself that the Writ Court could not issue such a Writ or order or direction upon the State respondents for refund or payment of the balance of the price, according to the average market price of rice as determined in the 226 proceedings in respect of the rice delivered by the plaintiff to the defendant-appellant, the State of West Bengal. It has therefore been submitted that this being a civil proceeding, the Section 14(1) of the Lim. Act could not be invoked to have an exclusion of the time taken in prosecuting

the 226 proceeding. It has been next submitted by Mr. Banerjee that in the pleading itself it has been specifically pleaded by the plaintiff that he is delivering the rice to the State of West Bengal, the defendant appellant under protest and this very statement clearly shows, according to Mr. Banerjee, that the plaintiff was verily in know of the fact that the price as fixed by Clause 4 of the said levy order was not the proper price and the same was ultra vires being not fixed in accordance with the provisions of Section 3(4) of the Essential Commodities Act, 1955. Therefore, it has been submitted that it is not a case of mistake of fact or of law and the price that was given to the plaintiff was not received by him under a mistaken notion of fact or of law. It has been submitted that the decision in K.S. Venkataraman and Co. Vs. State of Madras, as well as Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, have got no application. It has been next submitted that even if it is assumed that Article 113 of the Lim. Act applies, still then the plaintiff could not get any extension of the period of limitation in view of the fact that the plaintiff could have brought a civil suit in a court of competent civil jurisdiction for the reliefs which he claimed in the application under Article 226 of the Constitution. It has been further submitted in this connection by Mr. Banerjee that all the questions that were raised in the 226 application could have been raised in the said civil suit and there is express provision in the Civil P. C. empowering the civil court to refer a question concerning the validity or vires of any Act or Regulation or Rules to the High Court for its opinion. This having been not done, the plaintiff is not competent to get any extension of the period of limitation and the instant suit had been filed long after the prescribed period of three years from the date of the delivery of the rice in accordance with the Rice Mill Levy Order, 1967. It has also been submitted that the decision in 39 Cal LJ 40 : (AIR 1924 Cal 600) does not apply as the same relates to the registration of some documents and it has nothing to do with the question of limitation.

14. The first question that poses itself for decision is whether a proceeding under Article 226 of the Constitution is a civil proceeding or not and the bar under Order 2 Rule 2 of the Civil P. C. is applicable or not. To decide this question the word ''civil proceeding'', according to Mitra''s Legal Dictionary, refers to a proceeding regarding the civil matters as distinguished from criminal matters.

15. In Black''s Legal Dictionary, 5th Edition, the word ''civil'' has been stated to be derived from the Latin word Civitas meaning concerning the private rights of a citizen. It has also been stated therein that civil rights relate to or refer to civil rights of a citizen including the rights which are administered in equity courts, as distinct from rights administered in criminal courts. It is pertinent to refer to the decision in Ramesh and Another Vs. Seth Gendalal Motilal Patni and Others, . It has been observed by Hidayatullah, J. as his Lordship then was, that the term ''civil proceeding'' has been held to include, at least, all proceedings affecting civil rights, which are not criminal. The dichotomy between civil and criminal proceedings made by the Civil Law Jurists is apparently followed in Articles 133 and 134 and any proceeding affecting civil, i.e., any private right, which is not

criminal in nature, is civil...... A proceeding under Article 226 for a Writ to bring up a proceeding for consideration must be a civil proceeding, if the original proceeding concerned civil rights." In Dhanalakshmi Vilas Cashew Co. and Others Vs. President, Cashew Industries Staff Association and Others, similar view has been expressed and that if a right to property or any other civil right is involved in a proceeding, then the proceeding is a civil proceeding, on matter the jurisdiction of the Court invoked is special or extraordinary. It also does not matter whether the proceeding under Article 226 of the Constitution has ended in dismissal.

16. Similar view has been expressed in Guru Gobinda Basu Vs. Sankari Prosad Ghosal and Others, that if a proceeding is in aid of establishing a civil right or for disputing one, it would be a civil proceeding.

17. Therefore, on a consideration of the above decisions there is no room for doubt that a proceeding under Article 226 of the Constitution ascertaining the vires of para 4 of the West Bengal Rice Levy Order, 1967 is a civil proceeding and as such, the argument that has been advanced on behalf of the appellant that it is not a civil proceeding is not sustainable and Section 14(1) of the Lim. Act applies. The plaintiff, as has been rightly held by the court below, is entitled to get exclusion of the time during which the proceeding under Article 226 of the Constitution was actually proceeded with in this Hon''ble Court. That proceeding undoubtedly was initiated sometime in June, 1967 and it was finally terminated on May 5, 1972 by B. C. Mitra, J. The plaintiff is entitled to get exclusion of this period during which the said proceeding continued.

18. The next question that comes up for consideration is whether the bar under Order 2, Rule 2 of the Civil P.C. applies as the plaintiff did not seek the relief which was claimed in the instant suit. It has been contended before us on behalf of the appellant that the plaintiff could have prayed for this relief regarding refund or payment of the balance of the price of the rice which he had to deliver to the defendant appellant, the State of West Bengal, and this being not done, this instant suit is barred by Order 2, Rule 2 of the Code. This argument, though apparently attractive, will fall through for the reasons given below.

19. On a reading of the judgment delivered by His Lordship, B. C. Mitra, J. it is evident that though in the Writ application no such prayer for payment of the balance of the price of the rice has been made, still during the hearing of the application an oral prayer to that effect was made and the learned Judge has expressly observed in the judgment that such a direction and/or order for Writ cannot be made or issued in this jurisdiction, and for getting the said relief the petitioner will have to bring a separate suit. Therefore, the submission that such a prayer had not been made cannot be accepted. Moreover, it is well-settled by several decisions of this Court that the Writ Court is not restricted by the prayers made in the Writ petition to grant the effective relief to the petitioner if such relief is thought by the Court to be appropriate and -expedient for the ends of fair play and justice. Moreover, on a plain reading of Order 2, Rule 2 of the Code

it will be clear that this particular provision expressly applies only to suit and not to other proceedings. Though in the Civil P.C. suit has not been expressly defined, nowhere it has been defined, that the suit does include an application. Therefore, it cannot be conceived under any circumstance that the bar of Order 2, Rule 2 applies to an application under Article 226 of the Constitution. The submission of Mr. Banerjee that Article 80 of the Lim. Act applies to the instant case and the period of limitation is one year from the date of the wrongful seizure by process of Court, and as the suit has been brought beyond the prescribed period of one year, it is barred by limitation cannot be sustained. In this case, of course, it was submitted that the limitation will be computed from the date of delivery of the rice and the delivery was effected sometime in April, 1967. This submission, in our considered opinion, is not tenable at all because the instant suit was not a suit for compensation of wrongful seizure of movable property under legal process. Legal process, as observed in AIR 1942 Bom 300, does mean process according to law by some sort of court. Here the Levy order has been made by the officer concerned in pursuance of the provisions of the West Bengal Rice Mill and Levy Order, 1967. Therefore, the Article 80 of the Limitation Act does not apply to the instant suit and as there is no specific provision in the Lim. Act for bringing a suit of the present nature, Article 113 of the Lim. Act will apply and the period of limitation is three years when the right to sue accrues. The question is when the right to sue accrues.

20. The suit has been brought for a decree for payment of difference of the price of rice delivered by the petitioner, that is, the difference of the price fixed under Clause 4 of the West Bengal Rice Mill Levy Order, 1967 which was declared ultra vires and the average price of rice that has been directed to be paid in respect of the rice procured in the Writ Petition. Therefore, after the judgment was delivered by this Hon''ble Court declaring the fixation of the procurement price of rice under Clause 4 of the West Bengal Rice Levy Order, 1967, the cause of action for the instant suit arises, that is, on and from the date of delivery of the judgment on 5th May, 1972, and the suit was filed on 6th July, 1974, that is, well within the prescribed period of three years. Therefore, in our considered opinion, there is no necessity of invoking the aid of Section 14(1) of the Lim. Act. It has been observed in 39 Cal LJ 40 : (AIR 1924 Cal 600) that time runs when the cause of action accrues and the cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

21. In view of our above findings, though it is not necessary for us to consider the question whether the acceptance of the procurement price which was taken under a mistaken knowledge of fact or law will save limitation, yet we think it fit and proper to deal with this part of the submission made on behalf of the learned Advocates of both the parties. It has been held by the Supreme Court in the case in K.S. Venkataraman and Co. Vs. State of Madras, that if somebody does something in a mistaken view of law, limitation of three years will run from the

date when this fact came to his knowledge for the first time. In that case sales tax was assessed and the same was paid by the assessee. Thereafter the assessee came to know that the provisions on the basis of which the said sales tax was assessed was declared ultra vires. The powers of the State legislature and therefore void. The assessees thereafter brought the proceedings for refund of the sales tax paid by them. In that connection the aforesaid observations were made.

22. In the instant case undoubtedly the plaintiff-respondent had to deliver the rice on the basis of the levy order though of course he delivered the same under protest and accepted the procurement price of rice from the State of West Bengal, the appellant. Thereafter the application under Article 226 of the Constitution was moved before this Hon''ble Court for appropriate Writ or order or direction declaring that the price fixed under Clause 4 of the said levy order was ultra vires or Section 3(4) of the Essential Commodities Act, 1955. The said Clause 4 was ultimately declared ultra vires and the Government was directed to pay the price of rice at the rate of which has been arrived at by the Special Referee and accepted by the Court. Therefore, in the instant case the cause of action accrued on 5th May, 1972 when the said Writ proceeding was terminated by the order made as aforesaid. Till the order was made the petitioner could not know whether the procurement price was fixed in accordance with the provisions of Section 3 of the Essential Commodities Act or not. In these circumstances we are constrained to hold that the respondents are entitled to bring the suit after termination of the said Writ proceeding when the cause of action accrues. The suit is, therefore, well within the period of limitation.

23. The last submission of Mr. Banerjee that the plaintiff respondent did not adduce any evidence to prove his case is also not tenable in view of the fact that there is no dispute regarding facts pleaded in the plaint and the defendant-appellant also did not raise any controversy regarding the quantum of rice directed to be delivered under the impugned levy order and the price paid thereof. Therefore, this submission is not sustainable. The learned Chief Judge, City Civil Court has very rightly observed that in a similar suit in the Original side being Suit No. 414 of 1973 all these questions raised were considered and decided by S. C. Ghosh, J. as his Lordship then was, on June 14, 1977 and the said judgment was filed before the learned Chief Judge as Ext. 4(a). The findings of the learned Judge are, in our opinion, appropriate, valid and legal findings on the issues raised in the said suit.

24. For the reasons aforesaid, we affirm the judgment and decree of the court below and dismiss the appeal.

25. In the facts and circumstances of the case, the appellant will pay costs of 30 G.Ms. to the respondents.

S.N. Sanyal, J.

26. I agree.