(2019) 03 CAL CK 0019

In the Calcutta High Court

Case No : Writ Petitions (Wp) No. 84 Of 2019, 564 Of 2018, General Application (Ga) No. 98 Of 2019

Sudipta Koley — APPELLANT

Vs

M Bhowmick And Anr — RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Electricity Act, 2003 — Section 111, 111(2), 125, 126, 127, 127(1)
Limitation Act, 1963 — Section 4, 5, 29(2)
Indian Electricity Act, 1910 — Section 36(2)
Arbitration And Conciliation Act, 1996 — Section 3
Securitisation And Reconstruction Of Financial Assets And Enforcement Of SecurityInterest Act, 2002 — Section 17?Indian Electricity Rules, 1956 — Rule 6(3)

Citation : (2019) 03 CAL CK 0019

Hon'ble Judges : Rajasekhar Mantha, J

Bench : Single Bench

Advocate : M. Agarwalla, R.C. Agarwalla, Dr. M. Saha Roy, L. Chatterjee, S. Majumdar, D. Halder

Final Decision : Disposed Off

Judgement

The Court : The issue raised in the writ application has wide ramifications on the right to an appeal under section 127 of the Electricity Act, 2003 for both a licensee and the distribution company.

The controversy is whether the delay beyond the statutory time period of thirty days for preferring an appeal under section 127(1) against an order under section 126 of the Indian Electricity Act, 2003 can be condoned applying section 5 of the Limitation Act.

The first case referred to in the context by the petitioner is the case of Omvati Devi Agarwalla -vs- CESC Ltd. & Ors., reported in AIR 2015 SC 382, where a Single Judge of this Court had held that the delay in filing an appeal preferred under section 127(1), beyond the statutory period of 30 days, can be condoned by applying section 5 of the Limitation Act, 1963.

The next decision relied upon by the petitioner is the case ofShreegopal Engineering Works Ltd. -vs- CESC Ltd., reported in AIR 2002 Calcutta 99, rendered by another Single Judge of this Court. It was held in the said decision, at paragraph 14, that an appeal under section 36(2) of the Indian Electricity Act, 1910, i.e. against an award of the Chief Electrical Inspector, can be preferred within a period of 3 months stipulated under Rule 6(3) of the Electricity Rules of 1956. The Court went on to hold that section 5 of the Limitation Act applies to an appeal under section 36(2) of the Electricity Act.

The petitioner also relies upon a decision in the case of Union of India -vs- Popoular Construction Co., reported in (2001) 8 SCC 470, where under section 34 of the Arbitration and Conciliation Act, 1996, an application under section 34 of the Arbitration Act seeking setting aside of an arbitral award must be made within ninety days and a further period of thirty days but not thereafter.

According to the Supreme Court, the expression "not thereafter" would bar the application under section 5 of the Limitation Act. It is, therefore, axiomatic that where the expression "not thereafter" is not used in a statute, there may be a case for application of section 5 of the Limitation Act.

The next decision relied upon is the case of Mukri Gopalan vs. Cheppilat Puthanpurayil Aboobacker reported in (1995) 5 SCC 5. In the said case, before the Supreme Court, under the Rent Control Eviction Act of State of Kerala, the power of an appellate authority under Section 18 to condone the delay in filing of a statutory appeal was being addressed and it was held that Section 5 of the Limitation Act is applicable to the said Kerala Act in the absence of any restriction to the contrary.

A Single Bench of the Bombay High Court by a judgment dated 18th October, 2016 in WP No.1674 of 2016 in the case of Rakhee Gupta vs. State of Maharashtra has also held in the context of Section 127 of the Electricity Act that Section 29 (2) of the Limitation Act would be applicable, there by meaning that Section 5 of the Limitation Act would apply to any special statute unless the same was impliedly excluded by reason of the language of such statute.

The Counsel for the petitioner also relies upon the case of Collector, Land Acquisition, Anantnag & Anr. vs. Mst. Katiji & Ors., reported in (1987) 2 SCC 107. At paragraph 3 of the said judgment, while holding that a liberal approach must be taken in the context of applying Section 5 of the Limitation Act, principles have been laid down by the Hon'ble Supreme Court for application of Section 5.

Per contra, learned Advocate for the licensee first relies upon a decision of the Division Bench of this Court in the case of CESC Ltd. & Anr. vs. Kalavanti Doshi Trust & Ors., reported in 2011 (1) CHN (CAL) 182. A Division Bench of this Court while referring to the decision of the Hon'ble Supreme Court in the case of Chhattisgarh State Electricity Board vs. Central Electricity Regulatory Commission & Ors. reported in (2010) 5 SCC 23 has held that the period of 30 days stipulated under Section 127 of the Electricity Act cannot be extended by application of Section 5 of the Limitation Act.

The same view was followed in an unreported decision of another Division Bench of this Court dated 22nd December, 2015 in the case of the West Bengal State Electricity Distribution Company Ltd. & Ors. vs. Pranab Kr. Sarkar in MAT 1875 of 2015.

There is one distinction that this Court notices in the context of Kalavanti Doshi (Supra) case. In the said case the Division Bench of the Calcutta High Court (Supra) was relying upon a Supreme Court decision in the Chhattisgarh State Electricity Board reported in (2016) 1 SCC 444. One cannot lose sight of the fact that in the Chhattisgarh case (supra) the Supreme Court was dealing with Section 125 of the Electricity Act, 2003 which prescribes a limitation of 60 days for preferring an appeal to the Supreme Court and also prescribes the power to extend the period by another period of 60 days but no more. There is no such restriction imposed under Section 127 of the Electricity Act, 2003.

Section 127 only prescribes a period of 30 days in preferring an appeal from an order of the assessing authority. The language of Section 127 does not contain the restriction similar to the proviso to Section 125. Equally Section 111A confers powers on the appellate Tribunal to extend the period of limitation to prefer an appeal. Neither Section 111A nor Section 127 impose any restriction on the period of delay that may be condoned.

Yet another vital aspect must be borne in mind that Electricity Act, 2003 does not specifically exclude the provisions of the Limitation Act, 1963.

In view of the decision of Kalavanti Doshi (Supra) which followed Chhattisgarh State Electricity Board (Supra) which may have or may not have been applicable to a case under Section 127 of the Electricity Act, 2003 as also the other decision of the Supreme Court like Vidyacharan Shukla vs. Khubchand Boghel (AIR 1964 SC 1099), DSR Steel Pvt. Ltd. vs. State of Rajasthan (2012) 6 SCC 782, Baleshwar Dayal Jaiswal vs. Bank of India (2016) 1 SCC 444.

This Court feels that the issue must be revisited and settled by a larger Bench and that may be constituted by the Hon'ble the Acting Chief Justice on the following questions of law.

1. In respect of a provision in a statute prescribing a fixed period of time within which an appeal may be preferred against an order of authority thereunder, and where the bonus period beyond the regular period of limitation is stipulated and an expression 'not any further' than the principal period and the bonus period where apparently Section 5 of the Limitation Act may not have any application, whether the same can be treated as applying mutatis mutandis to a case where the statutory period for referring an appeal against the administrative order may be fixed but the expression "not thereafter" is not used i.e. can the two situations be treated as a similar?

2. Does the Chhattisgarh case (Supra) apply even to appeals under Section 127

of the Electricity Act where the said decision was rendered in the context of Section 111 (2) and Section 125 of the said 2003 Act and whether the Kalavanti decision has correctly viewed the Chhattisgarh case (supra)?

3. Whether or not the decision of the Hon'ble Supreme Court in the context of specialised statutes like the Kerala Rent Control Act and the Land Acquisition Act of the State of Jammu and Kashmir like the Mukri Gopalan (Supra) and Collector, Land Acquisition Anantnag (Supra), can be cited as exception to enable application under Section 5 of the Limitation Act even in the context of appeals under Section 127 of the Electricity Act, 2003?

4. Whether or not the decision of the Hon'ble Supreme Court in the case of Popular Construction (Supra) conclusively decides the circumstances in which Section 5 of the Limitation Act can be applied to statues worded with the expression 'and not thereafter'?

5. When the provisions of the Limitation Act, 1963 have not be specifically excluded under a special statute and particularly in the Electricity Act of 2003, a period is prescribed for preferring an appeal, can the delay in preferring the same not be condoned by applications of the provisions of Sections 4 to 29 of the Limitation Act, 1963?

6. Are the provisions of appeal under Section 127 of the Electricity Act akin to a Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2003. The Supreme Court has held in the case of Merdia Chemicals vs. Union of India, (2004) 4 SCC 311 that a proceeding under Section 17 of the Act is in the nature of a suit and not 'an appeal' as understood in common legal parlance.

While it is true that a decision of a Division Bench is binding on the Court, more so two in the instant case, but since the other two Single Bench judgments of this Court in Omvati Devi (supra) and Shreegopal Engineering (supra) as also the context in which the decision of Chhattisgarh case (Supra) of the Hon'ble Supreme Court had been rendered may not have been construed correctly in the decision of Kalavanti Doshi (Supra), this Court feels it necessary that the matter needs to be conclusively decided by the larger Bench of this Court as may be constituted by the Hon'ble Acting the Chief Justice.

Let the matter be placed before the Hon'ble Acting the Chief Justice as above.

GA No.98 of 2019

GA No.98 of 2019 has been filed by the petitioner. By an order dated 27th November, 2018 in WP No.564 of 2018, a coordinate Bench of this Court had granted 7 days' time to the writ petitioner to prefer an appeal before the appellate authority. The petitioner admittedly has preferred the appeal in question after 9 days instead of 7 days in view of an intervening weekend. She has fled the instant application for extension of time for two days.

In normal practice as has been ordained by the Hon'ble Supreme Court, orders passed in the disposed of writ application cannot be reviewed and/or recalled.

However, since the time to file the appeal was granted by an order of Court, the delay of 2 days in preferring the appeal is also considered by a period of three days as a weekend has intervened. What is also necessary to note is that the rejection of the appeal for being 2 days beyond the time granted by this Court, that too for an intervening weekend, was by way of an interim order passed by the appellate authority.

The Appellate Authority is directed to hear out the appeal in question on merits and dispose of the same in accordance with law. However, it is made clear that the result of the appeal shall abide by any decision rendered by the larger Bench that this Court has referred to on those questions of law in WP No.84 of 2019 and without prejudice to the rights and contentions of the licensee.