
(2017) 07 OHC CK 0047

In the Orissa High Court

Case No : 19092 of 2015

Udayanath Autonomous College of Science & Technology

APPELLANT

Vs

Regional Provident Fund Commissioner, Orissa and others

RESPONDENT

Date of Decision : 04-07-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 23 Rule 2](#) -

[Limitation Act, 1963](#), [Section 14](#), [Section 14](#), [Section 41](#), [Section 57](#)

Citation : (2017) 07 OHC CK 0047

Hon'ble Judges : Dr. B.R. Sarangi

Bench : DIVISION BENCH

Advocate : S. Kanungo, S.K. Pattanaik, P.K. Pattnaik, S.P. Das, S. Das

Judgement

1. Udayanath Autonomous College of Science & Technology situated at Adaspur in the district of Cuttack files this application challenging the order dated 06.10.2015 passed by the Employees Provident Fund Appellate Tribunal, New Delhi in ATA No. 1138(10) of 2015 in dismissing the appeal filed against order dated 15.06.2012 passed by the Assistant Provident Fund Commissioner, Odisha, Bhubaneswar under Section 7A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short "EPF & MP Act, 1952"). 2. The factual matrix of the case is that the petitioner-Udayanath Autonomous College of Science & Technology is an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969, which has been assessed by the Assistant Provident Fund Commissioner, on an enquiry being caused, and directed to pay a sum of Rs. 13,96,260/- for the period 4/10 to 2/12 and a sum of Rs. 1,88,987/- towards interest @ 12% per annum as per the provision of Section 7Q of the EPF & MP Act, 1952. Such assessment has been made for payment of dues under Section 7A of the EPF & MP Act, 1952. The said order of assessment was challenged by the petitioner before this Court in WP(C) No.12088 of 2012, which was disposed of finally on 23.07.2015 stating that the

order being appealable one the petitioner may prefer an appeal before the appellate tribunal ventilating its grievance. Pursuant to such order, since there was availability of an alternative remedy, the petitioner preferred appeal before the Employees Provident Funds Appellate Tribunal, New Delhi, which was registered as ATA No. 1138(10) of 2015. The appellate tribunal came to hold that the appeal has to be filed before the tribunal within the statutory period and not according to wishes of the petitioner and considering the long delay in filing the appeal dismissed the same without going into its merits on account of barred by limitation. 3. Mr. S. Kanungo, learned counsel appearing for the petitioner strenuously urged that when the appeal was preferred before the appellate tribunal, it should have taken into consideration the fact that the delay in filing the appeal was due to pendency of the writ application before this Court and, as such, Section 14 of the Limitation Act will apply for the purpose. The appellate tribunal also failed to appreciate the fact on merit that without considering the applicability of Section 7A of the EPF & MP Act, 1952 the determination has been made by the Provident Fund Commission. He thus submitted that the appellate tribunal could have decided the appeal on merits instead of dismissing the same on the ground of limitation. 4. Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. P.K. Pattnaik, learned counsel for opposite parties no.1 and 2 states that once the assessment has been made under Section 7A of the EPF & MP Act, 1952, the order itself is appealable and, as such, the petitioner should have preferred appeal before the appellate tribunal instead of filing the writ application. Since the petitioner availed the remedy before this Court by filing the writ application, which was ultimately disposed of by permitting the petitioner to prefer appeal, the appeal should have been considered in accordance with law. 5. This Court heard Mr. S. Kanungo, learned counsel for the petitioner and Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. P.K. Pattnaik, learned counsel for opposite parties no.1 and 2. Pleadings between the parties having been exchanged, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission. 6. The petitioner being an aided educational institution within the meaning of Section 3(b) of Orissa Education Act, 1969, most of its employees are receiving grant-in-aid/block grant from the State Government. The College does not bear burden of disbursing the salary to its staff. Consequentially, the College is not liable to make EPF contribution under the provisions of the EPF & MP Act, 1952. Once the College is notified as an aided institution, the services of its employees are controlled by the State Government under the Orissa Education Act, 1969 and Rules framed thereunder. The Assistant Provident Fund Commissioner issued a notice to the petitioner on 20.03.2012 for inspection. In response to the same, the petitioner submitted its reply on 27.03.2012, 17.04.2012, 16.05.2012, 05.06.2012 and 14.06.2012 stating inter alia that the College in question is not covered under the EPF & MP Act, 1952 and is exempted from the purview of Section 17 read with Section 16(1)(b) of the said Act as per the decision of the apex Court in Regional Provident Fund Commissioner v. Sanatan Dharam Girls Secondary School, AIR 2007 SC 276. But the Assistant Provident Fund

Commissioner vide order dated 15.06.2012 held that the College is liable to pay a sum of Rs. 13,96,260/- for the period from 4/10 to 2/12 and Rs. 1,88,987/- towards interest @ 12% per annum as per the provisions of Section 7Q of the EPF & MP Act, 1952 without determining the liability under Section 7A of the EPF & MP Act, 1952. Against the said order, the petitioner approached this Court by filing WP(C) No.12088 of 2012, but the same was disposed of on 23.07.2012 with liberty to approach the appellate tribunal. In compliance of the same, the petitioner preferred appeal before the appellate tribunal which was registered as ATA No.1138 (10) of 2015. The appellate tribunal, without considering the appeal on merit with regard to applicability of the provisions of Section 7A of the EPF & MP Act, 1952, dismissed the same on the ground of limitation by order dated 06.10.2015, the relevant part of which is quoted below: ".....It is pertinent to mention here that during course of argument, reason for filing WP before Hon"ble High Court was asked, against which counsel for appellant submitted that it was the choice and Sweet Will of appellant whether to challenge impugned order before this Tribunal or before Hon"ble High Court. Such kind of averments on behalf of appellant can not bypass the Provisions of the Act and Rules. Appeal is to be filed before this Tribunal within the statutory period not according to the wishes of appellant. Keeping in view all the circumstances of the case this Tribunal reached at a considered opinion that there is long delay in filing of appeal so present appeal is dismissed on account of barred by limitation. Copy of the order be sent to the parties as per law. File be consigned to the record room after due compliance." 7. While preferring the appeal, in paragraph 5 of the appeal memo the petitioner had taken the following plea for condonation of delay: "5. Limitation The appellant preferred writ petition bearing W.P.(C) No. 12088 of 2012 against the order dated 15.06.2012 passed by the Respondent No.2 on 09.07.2012 and the same was disposed of on 23.07.2015 with a directions that "after making some argument, learned counsel for the petitioner seeks permission to withdraw this writ petition with liberty to raise question on limitation before the appellate forum. Prayer is allowed. Accordingly, the writ petition is dismissed as withdrawn with liberty aforesaid". A true certified copy of the said order dated 23.07.2015 as well as the proof of the filing the writ petition is annexed hereto as ANNEXURE A8 for identification. The said certified copy was supplied on 03.08.2015. The present appeal is being filed under section 7- I of the Act, 1952 on 29/09/2015. If the period which was taken during high court proceeding, then present appeal is within the limitation period of 60+60 prescribed as per Rule 7(2) of the Employees Provident Appellate Tribunal (Procedure) Rules, 1997". The Hon"ble Tribunal is having legislative power to condone the delay of further 32 days. However, in the interest of justice, the application for condonation for delay is annexed hereto for kind consideration." 8. On perusal of the grounds taken in the appeal memo vis-a-vis the reasons assigned by the appellate tribunal, it appears that Section 14 of the Limitation Act has not been taken into consideration. 9. Rule 7(2) of the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 reads as follows: "7. Fee, Time For Filing Appeal, Deposit Of Amount Due On Filing Appeal- (2) Any

person aggrieved by a notification issued by the Central Government or an Order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal; Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days: Provided further no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal 75 percent of the amount due from him as determined under Section 7-A: Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 7-O." The above mentioned rule clearly specifies that the appeal has to be preferred within the period of 60 days from the date of issuance of the notification/order. Provided if the Tribunal is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, it can extend the said period by a further period of 60 days. 10. In view of the above provision and applying the same to the present context, since the petitioner had preferred a writ application before this Court challenging the order passed under Section 7A of the EPF & MP Act, 1952 and ultimately the said writ application was disposed of permitting the petitioner to prefer appeal, the delay which had been caused in preferring appeal was because of pendency of the writ application before this Court and therefore that period of delay should have been excluded in view of the provisions contained in Section 14 of the Limitation Act, which reads thus: "14. Exclusion of time of proceeding bona fide in court without jurisdiction. - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (3) Notwithstanding anything contained in rule 2 of Order 23 of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Explanation.- For the purposes of this section,- (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted; (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding; (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of

jurisdiction." 11. Similar question had come up for consideration in *Kartik K. Parekh v. Special Director, Directorate of Enforcement*, AIR 2012 SC 683 and the apex Court in paragraphs 26 and 27 of the judgment came to hold as follows: "26. The question whether Section 14 of the Limitation Act can be relied upon for excluding the time spent in prosecuting remedy before a wrong forum was considered by a two-Judge Bench in *State of Goa v. Western Builders* (AIR 2006 SC 2525 : 2006 AIR SCW 3436) (supra) in the context of the provisions contained in Arbitration and Conciliation Act, 1996. The Bench referred to the provisions of the two Acts and observed: "19. There is no provision in the whole of the Act which prohibits discretion of the court. Under Section 14 of the Limitation Act if the party has been bonafidely prosecuting his remedy before the court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4), (6), (9) and sub-section (3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section 41, subsection (2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid sections that wherever the legislature wanted to give power to the court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the Statute for curtailing the power of the court under Section 14 of the Limitation Act. Much depends upon the words used in the Statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (sic not) be read in the Act of 1996, which will advance the cause of justice. If the Statute is silent and there is no specific prohibition then the Statute should be interpreted which advances the cause of justice." 27. The same issue was again considered by the three Judge Bench in *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department* (AIR 2009 SC (Supp) 396 : 2008 AIR SCW 4182) (supra) to which reference has been made hereinabove. After holding that Section 5 of the Limitation Act cannot be invoked for condonation of delay, Panchal, J. (speaking for himself and Balakrishnan, C.J.) observed: "21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service: (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; (2) The prior proceeding had been prosecuted with due diligence and in good faith; (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and; (5) Both the proceedings are in a court. 22. The policy of the section is to

afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.

23. At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court. Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which

excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award." 12. From the above, it is evident that the apex Court has also taken note of the judgment of the apex Court in *State of Goa v. Western Builders*, JT 2001 (8) SC 271 and also in *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department*, JT 2008 (6) SC 22 and has come to a conclusion that the policy of Section 14 is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which, by reason of some technical defect, cannot be decided on merits and is dismissed. Therefore, while considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. The section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading of Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Needless to say that in the present context Section 5 of the Limitation Act may not have any application, but while applying such provisions condonation of delay has to be made on showing the "sufficient case". But the said provision is not applicable to the case of this nature, as because due to pendency of the writ application before this Court the petitioner approached the appellate tribunal at a belated stage. Reason for approaching the appellate tribunal is because of the pendency of the writ application before this Court. Therefore, the petitioner is entitled to avail the benefit of Section 14 of the Limitation Act to exempt the period covered by bona fide litigious activity. 13. In view of the above settled position of law, the appellate tribunal, by applying the provisions contained in Section 14 of the Limitation Act, should have construed that the delay in approaching the appellate forum was bona fide. For non-consideration of the provisions of Section 14 of the Limitation Act, the order dated 06.10.2015 passed in ATA No.1138 (10) of 2015

in Annexure-2, being unsustainable in the eye of law, is liable to be quashed and is accordingly quashed. The matter is remitted back to the appellate tribunal for fresh adjudication in accordance with law. 14. The writ application stands allowed. No order to cost. Petition Allowed.