

(1967) 02 BOM CK 0002

In the Bombay High Court

Case No : Special Civil Application No. 2197 of 1965

Vasanji Ghela and Co.

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 08-02-1967

Acts Referred:

Bombay Sales Tax Act, 1946 — Section 23, 34
Constitution of India, 1950 — Article 226, 227

Citation : (1967) 69 BOMLR 598 : (1967) MhLj 855 : (1968) 22 STC 104

Hon'ble Judges : V.M. Tarkunde, J;K.K. Desai, J

Bench : Division Bench

Advocate : V.J. Jhaveri and H.K. Shah, for the Appellant; R.J. Joshi instructed by Little and Co., for the Respondent

Judgement

K.K. Desai, J.—In this petition under Articles 226 and 227 of the Constitution the petitioners have challenged the correctness and legality of the decision of the Maharashtra Sales Tax Tribunal dated 24th September, 1965, whereby the Tribunal rejected the petitioners' application requiring the Tribunal to refer to the High Court questions of law mentioned in the application for reference.

2. The short facts leading to the application for reference and the above decision may be summarised as follows :

Petitioner No. 2 was at all material times a partner in petitioner No. 1 firm being a registered dealer under the Sales Tax Act. In connection with the sales tax liability of petitioner No. 1 firm hereinafter referred to as the petitioner-firm for the period from 1st April, 1950, to 31st October, 1952, returns were filed by the petitioner-firm. The return in respect of the quarter ending 31st October, 1952, was filed on 2nd December, 1952. The Sales Tax Officer disposed of the question of the petitioners' liability in respect of the above period (1st April, 1950, to 31st October, 1952) by an assessment order dated 20th August, 1953. He held that out of the actual sales ascertained by him, sales worth Rs. 18,27,053-3-6 should be "disallowed" (thereby meaning as sales to a registered dealer) "as these sales

did not appear to be genuine transactions". The petitioners filed an appeal against the above assessment order. Their main contention in the appeal was that in respect of the sales held to be not genuine particulars had not been disclosed to them. By a schedule appended to a letter dated 12th March, 1956, the appellate authority gave particulars of the sales which were liable to be disallowed as not genuine. Thereafter, in due course the appeal was disposed of by an order dated 12th April, 1956. The petitioners' case is that by the appellate order relief was given to the petitioners in respect of sales of the value of Rs. 6,25,247-11-3 to Keshavji Hirji. The submission was that the appellate authority held the sales of the petitioners to Keshavji Hirji to be genuine sales to a registered dealer and gave relief accordingly. The petitioners filed a revision application against the above appellate order on 25th May, 1956. The revisional authority issued a notice dated 16th May, 1958, under the suo motu powers of revision vested in it in connection with the alleged sales of the petitioners to Keshavji Hirji. The revisional authority appears to have formed an opinion that these sales were not genuine sales to a registered dealer and an inquiry in revision should be made in that connection. The revisional application filed by the petitioner and the matter of the above suo motu notice issued by the revisional authority, were decided by the Deputy Commissioner of Sales Tax by his order dated 22nd July, 1961. His finding was that the petitioners' alleged sales to Keshavji Hirji were not genuine and the Sales Tax Officer was right in "disallowing" these sales. From the above decision of the Deputy Commissioner the petitioners filed revisional application before the Maharashtra Sales Tax Tribunal. That revisional application was disposed of by a decision of the Tribunal dated 29th November, 1963. The judgment and decision was served on the petitioners on 31st December, 1963. u/s 23 of the Bombay Sales Tax Act, 1946, and u/s 34 of the Bombay Sales Tax Act, 1953, a provision is made to enable assesseees to have questions of law arising out of the orders made by the Maharashtra Sales Tax Tribunal referred to this Court. By an application dated 20th March, 1964, the petitioners submitted to the Tribunal that a question of law mentioned in their application arose out of the order of the Tribunal and the same should be referred by the Tribunal to this Court. Under sections 23 and 34 mentioned above the time prescribed for application to the Tribunal for making a reference to this Court was respectively 60 days and 90 days from the date of the decision of the Tribunal. By application dated 2nd August, 1965, the petitioners submitted that they were under the impression that the time for filing application for reference was 90 days from the date of receipt of the judgment, and that in connection with their application they were governed by 1953 or 1959 Sales Tax Act. That was the effect of the decision of the Tribunal itself in the case of Collector of Sales Tax v. Mohammed Usman Chand (Revision Application No. 421 of 1960 (Sales Tax Tribunal, Bombay)). They further submitted that they were lay people. If the 1946 Act was held to be applicable, the delay in filing the petition was 21 days. The petitioners submitted that the delay in filing the application should be condoned.

3. By the impugned decision dated 24th September, 1965, in connection with the application for condonation of delay the Tribunal observed : "there is no power for the Tribunal to condone the delay" The Tribunal further held that to the proceedings out of which the application for reference arose the 1946 Act applied. The prescribed period of limitation in respect of the application was 60 days. The application being barred by limitation was liable to be rejected. The application was accordingly rejected.

4. In connection with the above findings of the Tribunal Mr. Shah for the petitioners has submitted that each one of the findings is contrary to the provisions in the Sales Tax Acts (i) 1946, (ii) 1953, and (iii) 1959. He has further submitted that u/s 5 read with section 29 of the Limitation Act, 1963, the Tribunal had jurisdiction to condone delay. The Tribunal has failed to exercise their jurisdiction. There were sufficient facts for condonation of delay in the making of the application, if 1946 Act was applicable. There was no delay if the subsequent Acts applied. The Tribunal has failed to consider these facts and has failed to exercise its discretion and powers for condonation of delay. For these reasons, in the submission of the petitioners, the impugned decision of the Tribunal is liable to be set aside. Mr. Joshi for the respondents submitted that the sections of the Limitation Act relate and apply only to civil proceedings which originate in a civil court. The provisions in the Act cannot apply to the application for reference to this Court made under the Sales Tax Acts. He also contended that the proceedings for assessment in this case commenced under the 1946 Act. In his submission, therefore, the question of reference to this Court was liable to be disposed of by the Tribunal u/s 23 of the 1946 Act.

5. It is convenient first to deal with the submissions made on the footing of sections 5 and 29 of the Limitation Act, 1963. Section 5 relates to the power to condone delay and thus accept and entertain proceedings otherwise barred by limitation. Section 29 relates to savings in connection with the prescribed period of limitation. Sections 4 to 24 which are referred to in section 29 also relate to extension of period of limitation and/or in respect of computation of, period of limitation. The relevant part of section 5 provides :

"Any appeal or any application ... may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. - The fact that the appellant or the applicant was misled by any order, practice ... in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

6. Section 29(2) provides :

"Where any special or local law prescribes for any ... 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 ...

application by any special or local law, the provisions contained in sections 4 to 21 (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."

7. It is not necessary to quote here the provisions in sub-sections (1), (3) and (4) of section 29. The application for reference was made under special law, i.e., the Sales Tax Act, 1946, or Sales Tax Act, 1953. The application was made after the Limitation Act of 1963 had come into force. The period of limitation of 60 days was prescribed by special law in connection with the making of an application for reference. The submission, therefore, was that to the petitioners' application for reference having regard to the provisions in sub-section (2) of section 29, sections 4 to 24 of the Limitation Act applied. Thus the Tribunal was bound to consider all the relevant facts for condonation of delay u/s 5 of the Limitation Act in respect of the petitioners' application for reference.

8. In connection with this question it requires to be noticed that by the 1963 Limitation Act the parallel provisions in section 5 and section 29 of the Limitation Act of 1908 have been substantially altered. On the question of condonation of delay u/s 5 of the 1908 Act, it was necessary that the provisions of the section should have been made applicable by or under the relevant enactments. That necessity has been avoided under the 1963 Act. Section 5 is now applicable without any further notification or enactment made in that connection. Sub-section (2) of section 29 in the 1908 Act did not refer to section 5 at all, and the relevant part thereof provided :

"29(2)

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law." Thus u/s 29(2)(a) of the 1908 Act where the period of limitation was prescribed by special laws, the question of condonation of delay u/s 5 of the Limitation Act could never arise. Similarly the application of sections 6 to 8, 19 to 21, 23 and 24 could not arise. The period of limitation could not be considered extended under these sections where proceedings were barred by limitation prescribed by special laws. That scheme has been altered by the present sub-section (2) of section 29, which we have already quoted above. It is clear that sub-section (2) of section 29 of the 1963 Act provides that in determining the period of limitation under a special law, the provisions contained in sections 4 to 24 of the Limitation Act shall apply. It is, however, true that these sections will not be applicable in so far as, and to the extent to which, they are expressly excluded by such special laws.

9. Nothing has been shown to us and it has not been contended that by the 1946 Sales Tax Act application of the above sections 4 to 24 or any of them has been excluded in respect of applications for reference made u/s 23 of that Act. Having regard to the unambiguous and clear language of sub-section (2) of section 29, it is clear that the Tribunal was not right in proceeding to decide the petitioners'

application on the footing that the provisions of section 5 of the Limitation Act of 1963 were not applicable. In this connection a reference may be made to the observations of the Supreme Court in the case of Vidyacharan Shukla Vs. Khubchand Baghel and Others, . The question before the Supreme Court related to an appeal u/s 116A(1) of the Representation of the People Act, 1951, and the contention that to that appeal Article 156 in the First Schedule of the the Limitation Act of 1908 applied. In that connection the Supreme, Court had to consider the true effect of the provisions in section 29(2) of that Act. The argument of the counsel for the appellant was that for invoking sub-section (2) of section 29 the necessary condition was that the First Schedule of the Act should have prescribed the period of limitation for an appeal and that the special law (the Representation of the People Act) should have prescribed for the same type of appeal a different period of limitation. To an appeal against the order of an Election Tribunal sub-section (2) of section 29 of the Act was not applicable. The argument in reply on behalf of the respondents was in two alternatives, viz., (1) that the First Schedule to the Limitation Act prescribed a period of limitation for such an appeal, and (2) that sub-section (2) of section 29 was applicable even when the First Schedule to the Limitation Act did not prescribe any period of limitation for an appeal, and a special law prescribed a period of limitation for such an appeal. The Supreme Court accepted the contention made in reply on behalf of the respondents, as stated above. The finding of the Court thus was that Article 156 in the First Schedule to the Limitation Act prescribed period of limitation in respect of an appeal from an order of an Election Tribunal. The Court observed that assuming that Article 156 did not prescribe a period of limitation, the position was that section 29(2) would apply even to a case where a difference between the special law and the Limitation Act arose by the omission to provide for a limitation to a particular proceeding under the Limitation Act. In so far as these observations are applicable to the present contents of sub-section (2) of section 29, it requires to be noticed that Article 137 in the First Schedule to the 1963 Limitation Act provides a period of limitation of three years in respect of "any other application for which no period of limitation is provided elsewhere ..." and the time commences to run "when the right to apply accrues". The true effect of this Article came to be considered in a case arising from an application made under the Employees' State Insurance Act in the case of the The Employees' State Insurance Corporation, Bombay Vs. Bharat Barrel and Drum Manufacturing Co. Private Ltd. and Another, . A Division Bench of this Court held that applications filed by the Employees' State Insurance Corporation for a relief u/s 75 of the Act before 1st January, 1964 (being the date of commencement of 1963 Limitation Act) were not subject to any period of limitation, but those filed thereafter were subject to the period prescribed in Article 137 of the Limitation Act, 1963. The ratio of the decision of the Court was that Article 137 in the Limitation Act prescribes a period of limitation for applications made under any statute and special laws if these laws do not prescribe special period of limitation in respect of such applications.

10. Now, this decision of the Division Bench is also relevant on the contention made by Mr. Joshi that sub-section (2) of section 29 and section 5 have no relevance to proceedings which do not originate in a civil court. The application under the Employees' State Insurance Corporation Act was not made to a civil court. Even so, the Division Bench came to the conclusion that Article 137 applied to the applications made under the Act. This question appears to have arisen before the Calcutta High Court in the case of Imperial Bucket Co., a firm Vs. Sm. Bhagwati Basak, . In that case in dealing with the contention that section 29(2)(a) had no application to the facts before the Court because the appeal that was filed in the lower court was an appeal which was not filed in any civil court but before a "Persona designata", the court observed :

"Section 29(2)(a) speaks of suit, appeal or application. In their plain meaning the words "suit or appeal" refer to any suit or any appeal, be it filed in a court or before a "Persona designata"."

11. There are similar further observations in the judgment of the Court, which it is not necessary to quote here. We are unable to accept Mr. Joshi's contention that the provisions in section 29(2) and/or section 5 of the Limitation Act of 1963 were not attracted and could not be applied to the application for reference filed before the Tribunal by the petitioners.

12. In connection with the facts relating to the application for condonation of delay, it requires to be observed that the question of liability to sales tax was in respect of the period from 1st April, 1950, to 31st October, 1952. Though the liability arose under the 1946 Act, the assessment order was passed on 20th August, 1953, after the 1946 Act had come to an end on 1st November, 1952. The above appeal and the revisional application were proceeded with after the 1953 Act had come into force. Different periods of limitation were prescribed u/s 23 of the 1946 Act and section 34 of the 1953 Act. The petitioners being lay people were liable to get confused having regard to the changes in law made by the above Acts. In the application it was pointed out that the delay was only of 21 days. The Tribunal has pointed out that in fact the petitioners' application for reference was within the period of 90 days prescribed by 1953 Act. The petitioners further pointed out that they were under the impression that they were governed by the 1953 or 1959 Sales Tax Act. There was no reason to doubt the correctness of these statements of facts made in the application for condonation of delay. In the application the petitioners referred to the decision of the Tribunal in Collector of Sales Tax v. Mohammed Usman Chand (Revision Application No. 421 of 1960 (Sales Tax Tribunal, Bombay)), and their case was that the decision in that case left them in no doubt that their application was liable to be considered as made under the 1953 or 1959 Sales Tax Act. These are prima facie very strong facts which ought to lead any Court of law to a conclusion that the delay in the matter of the petitioners' application was liable to be condoned. These facts ought to have led the Tribunal to consider the petitioners' application favourably.

13. The Tribunal was accordingly not right when it observed that it had no power to condone the delay in filing the reference application beyond the period of limitation provided by law. In not disposing of the petitioners' application for condonation of delay on merits, the Tribunal failed to exercise jurisdiction and discretion which it had. The Tribunal in fact ought to have considered the application on the merits and ought to have granted it.

14. The question as to whether to the proceedings before the Tribunal and referred to in this petition the 1946 Act applied, or 1953 Act applied, mainly related to the question of period of limitation. As has been observed by the Tribunal, if the 1953 Act applied, the petitioners' application was in time. As has been observed by us above, even if the 1946 Act applied, the petitioners' application was liable to be considered on merits and the delay in filing was liable to be condoned. Under the circumstances, we find it unnecessary to decide the second contention made by Mr. Shah that to the proceedings in the petition the 1953 or 1959 Act applied and the Tribunal's finding to the contrary is incorrect.

15. In the result the rule is made absolute. The decision of the Tribunal dated 24th September, 1965, is set aside. The application for reference to be made to this Court filed on 20th March, 1964, is restored to the file of the Tribunal. The Tribunal will dispose of the same in accordance with law and consistently with the observations made above. Respondent No. 1 will pay costs to the petitioners.

16. Rule made absolute.