

A. Easwara Moorthy and anr. Vs. the Government of Tamil Nadu, Represented by Its Secretary to Commissioner, Industries Department and ors.

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Court : Chennai

Decided On : Oct-19-1989

Reported in : (1990)1MLJ202

Appellant : A. Easwara Moorthy and anr.

Respondent : The Government of Tamil Nadu, Represented by Its Secretary to Commissioner, Industries Department an

Judgement :

ORDER

Sathiadev J.

1. For comprehending the common points taken in these writ petitions, the averments in W.P. No. 8073 of 1989 are referred to hereunder.

2. Petitioner is a lessee of stone quarry situated in S. No. 1645 of Vedamadurai village for fasli 1398. The lease expired on 30.6.1989. Under Rule 9 (1) of the Tamil Nadu Minor Minerals Concession Rules, 1959 (hereinafter referred to as the Rules), the lessees are eligible to apply for renewal for the next fasli. As per Rule 9 (2), every application for renewal shall be made to the Collector 60 days prior to

the date of expiry of the earlier lease. Petitioner understands that first respondent had passed G.O. Ms. No. 964, Industries (K1), dt. 19.8.88, wherein Rule 9 (1) of Tamil Nadu Minor Mineral Concession Rules had been amended to the effect that every application for renewal shall be made to the Collector three months prior to the date of expiry of the lease. The lessees in the District have been under the impression that the period for filing application for renewal is only 60 days prior to the expiry of the lease, and therefore, petitioner submitted his application on 17.4.1989. Second respondent in impugned proceedings dt. 5.6.1989 had rejected the application on the sole ground that it is not in compliance with Rule 9 (2) as amended. When oral representations were made by petitioner and others, second respondent had stated that he had no power to condone the delay. Hence, he has filed the writ petition to quash the impugned proceedings on coming to know of the publication in the local daily that auction is to be held on 27.6.1989 in respect of the quarry site involved in the petition.

3. Learned counsel Mr. N.R. Chandran, submits that, in these petitions three points are taken; they being (1) section 5 of the Limitation Act would apply thereby conferring power upon the 2nd respondent to condone delay on showing sufficient cause; (2) Amended Rule 9 (2) having been passed at a time when the proclamation of President Rule in Tamil Nadu was in force, it had not been passed by complying with the requirements of the Business Rules as superseded by G.O. Ms. No. 194, Public (Special -B) dt. 5.2.1988 and therefore, it is illegal; and (3) it having not been published in the District gazette as required under the Rules, it cannot be applied in so far as petitioners are concerned.

4. On the first point, what is to be considered is, whether Rule 9 (2) is a Rule of limitation or a condition for applying for renewal. Learned counsel Mr. R.S. Venkatachari, at the forefront would claim that it is a total misconception to read the rule as a rule of limitation and in the eye of law, it is a condition which will have to be scrupulously adhered to, and that second respondent not being a 'court' in any sense under the Rules, Sec.5 of the Limitation Act cannot be invoked.

5. To begin with, learned counsel Mr. N.R. Chandran, relies on Mahesh Harilal v. B.N. Narasimhan A.I.R. 1983 Guj. 298 wherein the learned Judge in considering

the provisions of Gujarat Agricultural Produce Markets Act, held that the delay in filing an appeal to the Director of Agricultural Marketing and Rural Finance under Section 27 (5) of the Act against refusal of licence, can be condoned under Section 5 of Limitation Act. Reliance was placed on Section 29 (2) of Limitation Act to arrive at this conclusion. A period of 30 days for preferring an appeal was provided under Section 27 (5) of the Gujarat Act. There was no discussion in the said judgment as to whether the Director is a 'court' or not, and it was by holding that Section 29 (2) of Limitation Act is attracted, and in conjunction with section 3, special or local law should prevail, and therefore, held that Section 5 of Limitation Act applies. In the absence of any finding that Director is a 'court' within the meaning of Section 5, this decision cannot be relied upon. The next decision relied upon is Mohd. Ashafaq v. State U.P. : [1977]1SCR563 , which dealt with renewal of permits for which a time limit laid down in the Proviso to section 58 (2) of Motor Vehicles Act is that an application for renewal of a permit shall be made not less than 120 days before the date of expiry of the permit. Dealing with the point whether Section 5 of Limitation Act (hereinafter referred to as the Act), taking note of what is provided in Sub-section (3) of section 58 of Motor Vehicles Act regarding vesting of discretion in Regional Transport Authority to entertain an application for renewal even if it is beyond time, but in that case the delay should not be of more than 15 days, it was held that this sub-section expressly excludes the applicability of Section 5 in cases where an application for renewal is delayed by more than 15 days. The question whether Regional Transport Authority is a Court or not never came up for consideration in that case. Hence, this decision has no application to the point taken in this petition. By relying on Section 29 (2) of the Act, it was held that Land Acquisition Act is a special law, and Sections 4 to 24 of the Act having not been expressly excluded by such special law, Section 5 petition could lie to condone the delay in seeking for reference under Section 18 of Land Acquisition Act. By placing reliance on the said decision, a similar view was expressed in Bhikhubhai v. State A.I.R. 1987 Guj. 8 by another Division Bench. In Venkaimarbon v. Dakshinamoorthy : (1981)1MLJ275 , a learned judge of this court while dealing with the power of the constituted Appellate Authority under Tamil Nadu Act 18 of 1960, held that he is not a persona designata but a court within the meaning of Section 5 of the Act and that the said section would apply.

Undoubtedly, if the application is filed before a Court, there could be no two opinions about applicability of Section 5 of the Act to condone the delay in the presentation of the application. A learned judge of this court in *Angaiyaraja v. Alagaraja* : AIR1977 Mad142 held that when a petition under Section 9 of Tamil Nadu Act III of 1922 is filed in a court, and as the said section does not expressly exclude the operation of Section 5 of the Act, it would be applicable for an application, under Section 9 (1) of the Act.

6. *Mrs Johari Bi v. Vinayakam (Died)* 89 L.W. 108 is a decision of the learned judge of this Court pertaining to the provisions of Tamil Nadu Act III of 1922, and on holding that the period provided in Section 9 is the period of limitation for filing an application for getting benefits under that Act, it was observed as follows:..However, undoubtedly, the proceedings must be before a civil court for invoking S.5 of the Limitation Act....

Therefore, under such circumstances, invoking of Section 5 of Limitation Act is available.

7. *Nagarajan v. The Commissioner* : HR & CE, 1983 T.L.N.J. 155 proceeds on the basis of a comprehensive analysis made of the nature of powers exercised by the Commissioner under Tamil Nadu Act 22 of 1959 to act judicially while disposing of appeals though he is a quasi-judicial functionary, and therefore, for the purpose of Limitation Act, he will be a 'court' though certainly he is not a court of justice and will not be a court within the meaning of Civil Courts Act. It is on such a considered finding rendered, Section 5 of Limitation Act was made applicable pertaining to proceedings instituted before him.

8. The next decision is that of the Supreme Court in *Commissioner of S.T. U.P. v. Madan Lal* : [1977]1SCR683 in which the question involved was, whether the Judge (Revision) Sales Tax functioning under U.P. Sales Tax Act, has the power to condone the delay in filing a revision petition under Section 10 of the U.P. Sales Tax Act, and it was held that the time spent for obtaining copies of order appealed would necessarily have to be excluded under Section 12 (2) of the Limitation Act. It was specifically held therein:..There is nothing in the U.P. Sales Tax Act expressly excluding the application of Section 12 (2) of the Limitation Act for

determining the period of limitation prescribed for revision application....

It was not a case wherein the applicability of Section 5 came up for consideration, but the question whether the revisional authority functions as a court or not alone came to be considered.

9. *Lata Kamat v. Vilas* : [1989]2ITR48(SC) is relied upon to claim that Section 4 to 24 of Limitation Act will be applicable, unless they are expressly excluded. It was in relation to a proceeding instituted in a court under Hindu Marriage Act, and the period involved in obtaining copy of the judgment or decree could be excluded as per Section 12 (2) of Limitation Act or not alone came up for consideration, and therefore, this decision could be of no assistance to held that the second respondent functions as a 'court' while considering renewal application. Learned counsel Mr. N.R. Chandran, submits that unless there is an express exclusion, Section 5 of Limitation Act should be implanted whenever, a period was provided for presentation of application under a special or local law, and therefore, second respondent had the jurisdiction to condone the delay in filing the renewal application. All these pleas could succeed, provided if it be shown that the application is one which could be dealt with by a court, which would come within the four corners of Section 5 of the Limitation Act. Once that is absent, the factor of exclusion is not the only test. Yet another decisions of the Division Bench of this court in *Rathinasamy v. Komalavalli*, 95 .W. 552 is also relied upon, but here again, on holding that the appellate authority under Tamil Nadu Act 18 of 1960 is a 'court' for the purpose of Sections 3,5 and 29 (2) of the Limitation Act, it was observed that the view expressed by the learned Judge in *J. Eswaran v. Palaniammal* 1974 T.N.L.J. 380 is confirmed by holding that Section 5 of the Limitation Act would be applicable in the absence of specific exclusion under Section 25 of the Act.

10. Mr. R.S. Venkatachari, learned counsel for the third respondent, submits that the period stipulated in Rule 9 (2) is only a condition for filing renewal application. He would first refer to *Manilal Mohanlal Shah v. Sardar Saueed Ahmed Sayed Mohamad* : [1955]1SCR108 which dealt with the requirements of Order 21, Rule, 84 and 85, C.P.C. relating to deposit of 25% of the purchase money immediately

after sale, and payment of balance within 15 days of the sale, and it was held therein that the period prescribed is mandatory and if not complied with, there is no sale at all. This decision could be of no relevance, because Section 5 states that applicability of this section would be in respect of application 'other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908'.

11. *Thangammal v. K. Dhanalakshmi* 1984 Mad. 254 also deals with a period of 30 days prescribed under Order 21 Rule 92 (2), C.P.C. and therefore, this decision need not be considered in detail. This decision found approval by the Supreme court in *Basavantappa v. G.N. Dharwadkar* : [1986]3SCR734 which decision also does not specifically deal with the applicability of Section 5 of the Limitation Act. This is relied upon only to show that whenever a period is provided for a deposit to be made, it could be only a condition to be complied with and not a period of limitation.

12. A Full Bench of this court in *Chenchuramana v. Arunachalam* 581.L.R. Mad.794 in construing the period of three months mentioned in Section 9 (1) (c) of Provincial Insolvency Act, held that it is not a period of limitation, but it is a condition to an adjudication. Section 9 (1) (c) reads as follows:

(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless ... (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

By taking into account the object and the purpose for fixing the period, it was held that it was only a condition and not a period of limitation. Likewise, as far as Rule 9 (1) and (2) is concerned, they are framed for prescribing a period within which applications for renewal must be received, so that the authorities may proceed to call for fresh applications if renewal applications are not either made or if made, they do not deserve to be renewed and the like. The intention in prescribing such a period is to enable the existing lessee to seek for renewal well before a decision is taken to call for applications from outsiders. Hence, the object and the purpose for providing this period is not a period of limitation, but is a condition to be complied with for applying for renewal.

13. In construing Rule 15 (a) (i) of Schedule IV to Madras City Municipal (Corporation) Act, which contemplates issue of notice to the Commissioner within 10 days from the date of receipt of the decision of Taxation Appeals Committee, it was held in *Presentation Convent v. Corporation of Madras* 98 L.W. 465 that there being a fetter on the power of the court for hearing appeals, unless a notice under Rule 15 (1) is issued within the time prescribed therein, it being akin to Section 80, C.P.C. it is mandatory in nature, and therefore, the court cannot exercise the power similar to what it exercises while dealing with a matter covered by Section 5 of the Limitation Act.

14. In *T. Chengalvarayan v. Muthilalpet High School* : AIR1983 Mad66 a Division Bench of this Court, in dealing with an appeal to be preferred to Chief Educational Officer, held that as Section 5 of Limitation Act had not been made applicable as part of the agreement, and when the appeal proceedings being not in court nor preferred under special or local enactment, it cannot be invoked.

15. The more clinching decision on this point is the one rendered in *Sakuru v. Tanaji* : 1985(22)ELT327(SC) which holds that the provisions of the Limitation Act, 1963 apply only to proceedings in 'Courts' and not to appeals or applications before bodies other than courts, such as quasi-judicial Tribunals or executive authorities, notwithstanding the fact that they may be vested with certain specific powers conferred on courts under the Codes of Civil or Criminal Procedure. The relevant special statute may contain an express provision by laying down that section 5 of Limitation Act would be applicable to such proceedings. In the Rules, there is no specific provision made for applying Section 5, because it is not a rule of limitation. It is a condition for making an application for renewal. Since it could not be in law a period of limitation, there is no express intendment found in the Rules to apply Section 5 which is inapplicable for a matter of this nature. The object and the purpose of the rule is to fix a period before which the existing lessee should make his intention known to the authorities, whether he is seeking for renewal or not. The period fixed under the Rules is required for taking a decision as to what course will have to be adopted for inviting applications by issue of gazette publication, scrutiny of applications, etc., ...Before the period of lessee is over, the new lessee will have to be decided upon, and he should be in a

position to take the lease-hold property on due date. If there is any interval between the expiry of the lease and the taking over of lease-hold property by the new applicant, it will result in loss of revenue to the State. Therefore, for ever so many reasons, a condition of this nature had been incorporated in the Rules. In a way the existing lessee is also be fitted by being granted 120 days time to wind up his enterprise, if he is not for seeking renewal. Now that Supreme court having held that positive provision should exist for applying Section 5, negative test is no longer applicable.

16. Nagarajan v. The Commissioner HR & CE 1983 T.L.N.J. 155 elaborately considers as to what are the facts which could be taken into account to construe whether an authority functions to a 'court' or not, and when the second respondent in the instant case does not satisfy the test laid down therein, in view of the decision in Sakuru v. Tanaji : 1985(22)ELT327(SC) ; Rule 9 (2) is not a rule of limitation, but is only a condition to be complied with for filing a renewal application, and therefore, Section 5 of the Limitation Act cannot be invoked, if the applications are not filed within the time as prescribed therein. Therefore, the first point fails.

17. On the second point that Business Rules have not been complied with, though no counter affidavit had been filed, there is always a presumption that official acts have been done in accordance with the Business Rules. It is not the claim of the petitioner that an Executive Committee as contemplated in G.O. Ms. No. 194, Public (Special B) dated 5.2.1988 had not been formed. Fixing a different period for filing of renewal applications is not a policy decision. Instead of the existing period of 60 days, it had been altered as three months. Hence, it being not a policy decision, this point also fails.

18. On the third point that amendment to Rule 9 had not been published in accordance with the Rules, in the District Gazette, learned Government Pleader produced a copy of Tamil Nadu Government Gazette dated 21.9.1988 which contains the amendment effected to Tamil Nadu Mines Concession Rules in exercise of the powers conferred under Section 15 (1) and (1A) of Mines and Minerals (Regulation and Development) Act, 1957. Section 26 of the Act deals

with delegation of powers authorising the Central and the State Government to make notifications in the Official Gazette in relation to concerned matters for the implementation of the provisions of the Act. In regard to such of these matters, relating to which the State Government could make notification Section 26 (2) states that it shall be published in the Official Gazette. Hence, when this statutory requirement under Section 26 (2) had been duly complied with it cannot be claimed that the failure to publish Rule 9 (2) in the District Gazette would invalidate the rule. Therefore, all the three points taken necessarily fail.

19. Hence, W.P. No. 8073 of 1989 is dismissed with costs of the third respondent. Counsel fee Rs. 500. The other writ petitions are dismissed without costs.

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