

(1980) 11 BOM CK 0001

Bombay High Court

Case No: Special Civil Application No. 940 of 1974

Ghanshyamdas Gopaldas Mohta
and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision: Nov. 12, 1980

Acts Referred:

- Income Tax Act, 1961 - Section 86

Citation: (1983) 139 ITR 1013 : (1981) MhLj 560 : (1983) 14 TAXMAN 525

Hon'ble Judges: D.G. Deshpande, J; A.A. Ginwala, J

Bench: Division Bench

Judgement

Ginwala, J.

The only point which arises for our consideration in the writ petition is whether the appeals filed under s. 86 of the Second Schedule to the I.T. Act, 1961, are governed by these provisions of s. 5 of the Limitation Act, 1963 (hereinafter referred to as "the Limitation Act"). The facts relevant for the purposes of question under considerate may briefly be stated.

2. It appears that the ITO had forwarded to the TRO, a certificate under the provisions of s. 222 of the I.T. Act, in the year 1964, for recovering a amount of Rs. 10,370.45 from the original petitioner, namely, Gopaldas Bulakhidas Mohta. After adjustments from time to time, the demand came to be reduced to Rs. 4,365 in the year 1972. In order to recover this amount, the TRO, who is respondent No. 2 herein, attached two pieces of agricultural lands bearing survey No. 14, admeasuring 4 acres 31 gunthas and survey No. 18/1 admeasuring 1 acre 5 gunthas. Both situated at Tajnapur. On June 22, 1972, the said Officer issued a proclamation of sale under rule 38 of the said rules read with r. 52(2) declaring that those two lands would be sold by public auction at 1.00 p.m. on July 13, 1972. In pursuance of this proclamation, the sale was held on July 13, 1972, and survey No. 14 was knocked down for Rs. 75,500 and survey No. 18/1 for Rs. 15,500. The upset

price for these two lands and been fixed at Rs. 75,000 and Rs. 15,000, respectively. On August 10, 1972, Gopaldas Mohta filed an application before the TRO purporting to be under r. 61 read with r. 87 of the said rules. In this application, he contended that the sale held on July 13, 1972 was bad, firstly, because it was held within 30 days from the date of proclamation and as such in contravention of the provision contained in r. 55 of the Second Schedule and, secondly, that a much larger property had been put-on to sale for recovering a merger amount of Rs. 4,365. It was contended that material irregularities had been committed in the conduct of sale, which had resulted in a loss to the petitioner. It appears that besides Gopaldas Mohta, three ladies had also filed an application on August 14, 1972, under the said rules for setting aside the said sale on the ground that they were equitable mortgagees of the land bearing survey No. 14 and that the proclamation was silent with respect to their said right. Besides this, they also challenged the sale on the same two grounds, on which Gopaldas Mohta had done it under his application stated above. When the application of Gopaldas Mohta was pending before the TRO, Gopaldas Mohta had filed two more applications on September 7, 1972, one for a review of the order for sale and second for permitting him to sell the lands privately. Proviso (b) to r. 61 provides that an application made by a defaulter under that rule shall be disallowed unless the applicant deposits the amount recoverable from him in execution of the certificate. It appears that because of the requirement of this proviso, Gopaldas Mohta made an application for permission to deposit the amount due from him on September 20, 1972. It is alleged that the TRO issued the requisite challan to him on September 20, 1972, and he deposited the amount on September 30, 1972. However, in the meanwhile, the TRO on September 29, 1972, passed his order on the application filed by Gopaldas Mohta on August 10, 1972, for setting aside the sale. The TRO rejected the application holding that Gopaldas Mohta had not fulfilled the requisite conditions laid down in r. 61 for setting aside the sale, namely, (a) that he had not proved any substantial injury by reason of irregularity, and (b) that he had not deposited the amount recoverable from him in execution of the certificate. He also dismissed the application for review. On the same day, the TRO proceeded to confirm the sale in favour of respondent No. 4, who was the auction-purchaser. While passing the order for confirming the sale. The TRO held that the officer conducting the sale was not empowered to sell the second lot, namely, survey No. 18/1. If the amount recoverable could be realised by the sale of the first lot, namely, the land bearing survey No. 14. In this view of the matter, the TRO confirmed the sale only in respect of the land bearing survey No. 14, but did not in respect of the other land.

3. Being aggrieved by this order passed by the TRO, it appears that Gopaldas Mohta filed a writ petition in this court, instead of filing an appeal under r. 36. However, during the pendency of the said writ petition, he preferred an appeal to the Tax Recovery Commissioner, who is respondent No. 3 herein. Since he had preferred the appeal, he was allowed to withdraw the writ petition with liberty to file a fresh

petition. This was done on February 12, 1973. It appears that along with the appeal which Gopaldas Mohta had filed before the Tax Recovery Commissioner on November 23, 1972, he had also filed an application for condonation of delay in filing the appeal on the same day. It may be mentioned here that r. 86 prescribes a period of limitation of 30 days from the date of the order appealed against for filing an appeal and obviously the appeal preferred on November 23, 1972, had not been filed within 30 days from September 29, 1972, when the order had been passed by the TRO. At this stage, we are not concerned with the grounds which Gopaldas Mohta stated in this application for condoning the delay.

4. The TRO, respondent No. 3, first took up the application for condonation of delay for consideration. It appears that it was contended on behalf of the auction-purchaser, namely, respondent No. 4, herein, that the Tax Recovery Commissioner lacked the power to condone the delay firstly, because r. 86, which prescribes the period of limitation for appeal, did not invest him with any such power and, secondly, because s. 5 of the DGB Limitation Act was not applicable in view of the fact that the Tax Recovery Commissioner was not a "Court" within the meaning of that section. This contention was opposed by the learned counsel appearing for Gopaldas Mohta before the Tax Recovery Commissioner on the ground that sub-s. (2) of s. 29 of the Limitation Act applied ss. 4 to 24 of the said Act to all cases where period of limitation had been laid down under a local or special law, it was contended before the said Commissioner that the I.T. Act was a special law and since the said Act or Rules did not expressly exclude the application of ss. 4 to 24 of the Act, s. 5 of the said Act would be applicable to the proceeding under the I.T. Act and hence the Tax Recovery Commissioner would be very much within his power to condone the delay by virtue of s. 5 of the Limitation Act. This submission on behalf of Gopaldas Mohta did not find favour with the said Commissioner and, holding that s. 5 of the Limitation Act was not applicable for condoning the delay. It is thereafter that Gopaldas Mohta filed the present petition of February 25, 1974. During the pendency of the petition, Gopaldas Mohta Expired and the present petitioners are his legal representatives.

5. Mr. R. S. Pandit, the learned counsel for the petitioners, firstly submitted that the view taken by the Tax Recovery Commissioner (respondent No. 3) to the effect that he had no power to condone the delay in filing the appeal for the above stated reasons, is not correct. He submitted that though s. 5 of the Limitation Act by virtue of its language applies to proceedings before a court, sub-s. (2) of s. 29 of the said Act specifically enacts that for the purpose of determining any period of limitation prescribed for any suit, appeal for application by any special or local law the provisions of ss. 4 to 24 (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. Mr. Pandit submitted that even though s. 5 of the Limitation Act by itself speaks of a "Court". Sub-s. (2) of s. 29 would make the said provision applicable to proceedings before other authorities also if the special or local law under which the period of limitation

is prescribed, does not exclude the provisions of s. 5 of the Limitation Act. Mr. Pandit contends that the TRO has not taken into consideration this aspect while considering the application of condonation of delay. Mr. Pandit further contended that even on merits the order passed by the TRO could not be sustained inasmuch as the sale had been held on clear contravention of rr. 52 and 55 as the property worth more than necessary to satisfy the certificate had been sold and the sale had been held within 30 days from the date of the proclamation. Mr. Pandit contended that these are not only materials irregularities, but illegalities, which vitiated the sale and hence it was necessary to set aside the same in this writ petition irrespective of the fact that the appeal filed by Gopaldas Mohta before the Tax Recovery Commissioner had not been entertained as barred by limitation.

6. Mr. R. G. Deshpande, the learned counsel for respondents Nos. 1 to 3, has, however submitted that the Limitation Act is means to apply to proceedings before a court as such and not before any authorities who could not be termed as courts and if that is so, even s. 29(2) of the Limitation Act will not be helpful in applying s. 5 of the said Act to the appeal filed under r. 86 of the said rules since the I.T. Act or the said rules do not empower the Tax Recovery Commissioner to condone the delay caused in filing the appeal. With regard to the validity of the sale, Mr. Deshpande submitted that even assuming that the provisions contained in rr. 52 and 53 of the Rules had been contravend they would, at the most, amount to material irregularities and the defaulter would not be entitled to have the said sale set aside unless and until he satisfied the two conditions laid down in the proviso to r. 61, namely, that the applicant therein must establish that he had sustained substantial injury by reason of irregularity, and that the applicant-defaulter had deposited the amount recoverable from him in execution of the certificate. Mr. Deshpande submitted that none of these two conditions had been satisfied by Gopaldas Mohta inasmuch as it had not been alleged in the application under r. 6, much less proved, that he had sustained any substantial injury by reason of the alleged irregularities and the amount had been deposited subsequent to the day. When the application had been deposited subsequent to the day, when the application had disposed of by the TRO. In substance, therefore, Mr. R. G. Deshpande upheld the order passed by the said Officer.

7. In the view which we take on the question of application of s. 5 of the Limitation Act, it is not necessary for us to go into the question of the validity of the sale.

8. A question more or less similar had arisen for consideration before a Division Bench of this court in *Vasanji Ghela & Co. v. State of Maharashtra* [1967] M LJ 855. There, the petitioners had preferred a revision application before the Maharashtra Sales Tax Tribunal, under the provisions of the Bombay Sales Tax Act, 1946 and the Bombay Sales Tax Act, 1953. That revision application came to be disposed of by the Tribunal on November 29, 1963, and the judgment and decision was served on the petitioners on December 31, 1963, Under s. 23 of Bombay Sales Tax Act, 1946, and

under s. 34 of the Bombay Sales Tax Act, 1953, a provision had been made to enable assesseees to have the questions of law arising out of the order made by the Maharashtra Sales Tax Tribunal referred to the High Court. By an application dated march 20, 1964, the petitioners requested the Tribunal to refer to questions of law raised therein to the High Court. Now, the time prescribed by ss. 23 and 34 of the Acts stated above of such application was respectively sixty and ninety days from the date of the decision of the Tribunal. On August 2, 1965, the petitioners made another application to the Tribunal praying for a condonation of the delay caused in filing the earlier application on certain grounds. This latter application was rejected by the Tribunal observing that it has no power to condone the delay. It was against this order that the petitioners moved this court under arts. 226 and 227 of the Constitution. The question, therefore, which fell for consideration in that writ petition, was whether s. 5 of the Limitation Act, 1963, was applicable to the Maharashtra sales Tax Tribunal by virtue of Sub-s. (2) of s. 29 of the said Act. The Division Bench considered the provisions contained in sub-s. (2) of s. 29 of the Limitation Act, 1963, and noted the alteration which had been brought about by s. 29(2) of the Limitation Act, 1963 in the law which privatised under the Limitation Act of 1908. After a careful consideration of the provisions of the Limitation Act, 1963, and particularly those of s. 29(2), the Division Bench concluded that the provisions contained in s. 29(2), read with s. 5 of the Limitation Act, 1963 could be applied to the application for reference filed before the Tribunal by the petitioners. The Division Bench rejected the contention urged on behalf of the respondents in that petition to the effect that sub-s. (2) of s. 29 and s. 5 of the Limitation Act, 1963, have no relevance to proceedings which do not originate in a civil court. In this connection, the Division Bench referred to an earlier ruling of this court in Employees" State Insurance Corporation v. Bharat Barrel and Drum Manufacturing Co. [1967] MLJ 261, where a Division bench of the court held that applications filed before the Bombay Employees" Insurance Court after January 1, 1964, when the Limitation Act of 1963 came into force would be subject to the period of limitation prescribed in art. 137 of the said Act. Referring to this decision in the case of Employees" State Insurance Corporation, the Division Bench in Vasanji Ghela" case [1966] March LJ 855, held that the application under the Employees" State Insurance Corporation Act was not made to a civil court and even so, the earlier Division Bench had come to the conclusion that art. 137 applied to applications made under that Act. It would, therefore, appears that the Division Bench deciding Vasanji Ghela"s case [1967] Mah LJ 855, was clear in holding for the application of s. 5 read with s. 29(2) of the Limitation Act, 1963, the proceedings need not originate in a civil court. In our view. The ruling in Vasanji Ghale"s case [1967] Mah LJ 855, is a complete answer to the view taken by the Tax Recovery Commissioner in the present case.

9. In [Radheshaym Mohanlal Kaitan Vs. The Maharashtra Revenue Tribunal Nagpur and Others](#), , a learned single judge of this court has held that s. 14 of the Limitation Act, 1963, is applicable to an application under s. 36(1) of the Bombay Tenancy and

Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1957, by virtue of s. 29(2) of the said Limitation Act. It is needless to say that the authority to whom an application has to be made under s. 37 (1) of the said Tenancy Act cannot be termed as a court and even so the learned single judge has held that s. 14 of The Limitation Act was applicable to such proceedings by virtue of s. 29(2).

10. In *Raghunath Agarwalla v. State of Orissa* [1975] 36STC 461, Tax LR 2075 (Ori) a Division Bench of Orissa High Court has taken the view that by virtue of s. 29(2) of the Limitation Act, 1963, the provisions contained in ss. 4 to 24 thereof apply to proceedings under the Orissa Sales Tax Act to the extent they are not inconsistent with any specific provisions in the said Act. It has held that, though the Tribunal under the said Sales Tax is not a "Court", s. 5 of the Limitation Act applies to a reference application made to the Tribunal under s. 24(1) of the said Act by virtue of s. 29(2) of the Limitation Act, the Tribunal has jurisdiction under s. 5 to condone the delay in making reference application. In this case the Division Bench of the Orissa High Court has considered various rulings of the High Courts, including the one of this court in *Vasanji Ghela's* case [1966] Mah LJ 855. It is after a careful consideration of these authorities that that at court had reached the said conclusion. We find ourselves in respectful agreement with what has been said by the Orissa High Court in *Raghunath's* case [1975] Tax LR 2075. It is not necessary for us to cite any other authorities on this question, suffice it to say that the consensus of judicial opinion is that by virtue of s. 29(2) of the Limitation Act of 1963, the provisions of ss. 4 to 24 of the said Act are applicable to cases where the period of limitation has been prescribed for a suit, appeal or application, as the case may be, under any special or local law unless the said sections are specifically excluded.

11. In the background of the provision which has been stated above, it appears to us clear that the Tax Recovery Commissioner would be entitled to entertain an application for condonation of delay under s. 5 of the Limitation Act of 1963 and to decide the same even though no specific power has been given to him under the I.T. Act, 1961 or the rules contained in Sch. II thereof. In the view which we take, therefore, we cannot sustain the order passed by respondent No. 3 on November 26, 1973, a copy of which is at annex. M in the application filed by Gopal Das Mohta for condonation of the delay in filing the appeal. We would, therefore, quash that order and direct respondent No. 3 to dispose of the said application on its merits.

12. In the result, the writ petition is allowed and the order passed by respondent No. 3 on November 26, 1974, (annex. M) is hereby quashed and respondent No. 3 is hereby directed to consider and dispose of the application filed by Gopal Das Mohta on November 23, 1972 (annex. L) on its own merits. In the circumstances of the case. We do not make any order as