

**ASSAM URBAN WATER SUPPLY AND SEWERAGE BOARD -VS-
SUBHASH PROJECT AND MARKETING LTD. AIR 2005 GAUHATI
112; 2005(1) GLT 501 - AN APPRAISAL.**

By

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A Division Bench of the Gauhati High Court, by the above noted Judgement dated 15.02.2005, decided Arbitration Appeal Nos 6 & 7 of 2004. The appellant (hereinafter referred to as the Board) awarded two contracts for execution of two Water Supply Schemes at Tezpur and Tinsukia to the respondent (hereinafter referred to as the Contractor). Disputes having arisen between the Board and the Contractor they were referred to arbitration by a sole arbitrator. Two awards were made by the arbitrator whereunder certain amounts became payable to the contractor. The Board received the two awards on 26.08.2003. Aggrieved, the Board filed two applications under Section 34 of the Arbitration and Conciliation Act 1996 (the 1996 Act hereinafter) on 02.01.2004 for setting aside the awards. Two petitions for condonation of the delay under the proviso to Section 34 (3) of the 1996 Act were also filed alongwith the main applications. The District Judge dismissed the two petitions for condonation of the delay and refused to admit the main applications under Section 34 for hearing. The Board reached the High Court and the Judgment affirming the decision of the District Judge followed. The Judgment hereinafter referred to as Urban Water Supply throws up a few questions of law relating to limitation of proceedings under a special statute. This essay is an attempt at exploring these questions of law and testing the validity of Urban Water Supply as a precedent.

1. ANALYSIS OF URBAN WATER SUPPLY

1.1. The District Judge

The District Judge has used the term applicant in relation to the applications under Section 34(3) of the 1996 Act and the main applications under Section 34 of the 1996 Act has been treated as appeals. The date of filing of the appeals and the applications cannot be gathered from the order dated 05.06.04. It would appear that the period of three months for filing the application for setting aside the award and the period of further thirty days extension at the

discretion of the Court under the proviso also has not been distinctly and accurately dealt with. It was held that Section 5 of the Limitation Act 1963 is not applicable and under the 1996 Act the application under Section 34 mis-described as the appeal cannot be filed beyond 120 days. On such a holding the applications under Section 34 (3) of the 1996 Act were dismissed. The District Judge ended the order dated 05.06.2004 by observing, "appeal is not liable for admission".

Because of this the District Judge was not troubled with the questions of law agitated before the High Court. Only if the District Judge had allowed the application under the proviso to Section 34(3) of the 1996 Act by finding "sufficient cause" in favour of the Board, the District Judge would have been confronted with further legal hurdles to cross.

1.2. The High Court.

From the Judgment of the Division Bench it can be gathered that applications (the main and the one seeking extension of time) were filed on 02.01.2004 whereas the awards were received on 26.08.2003. After noticing the rival submissions of the learned counsels of the parties and extracting Section 4 and 29 (2) of the Limitation Act 1963 and Section 34(3) of the 1996 Act in para 6 of the Judgment, the High Court proceeded to the conclusions at para 7 and 8 thereof. It was noticed that from the relevant dates to apply the provisions of Section 34(3) to the utmost that is giving the entire 3 months and 30 days the prescribed time will end during the Christmas Holidays. Indeed that is why the reopening day on 02.01.2004 was pressed as the last day of prescribed limitation. The High Court placed strong reliance on AIR 2001 SC 4010 (hereinafter Popuplar Construction) despite noticing that the case was one dealing with express exclusion of Section 5 of the Limitation Act within Section 29 (2) of the Limitation Act and not of Section 4 of the Limitation Act. The High Court derived additional assurance for such reliance from the decisions of the High Courts of Bombay, Delhi and Himachal Pradesh High Court. The High Court concluded thus :

"Having understood the Judgement of the Apex Court in Popuplar Construction Co. (Supra) in the manner indicated we must respectfully concur with views expressed by the Bombay, Delhi and Himachal Pradesh High Courts. Our conclusions as indicated, make it wholly unnecessary for us to consider the contentions advanced on behalf of the

appellant on the basis of the provisions of Section 10 of the General Clauses Act, the application of which, even otherwise, stand excluded by the proviso there of as well as by Section 5 of the Act of 1996.”

2. SECTION 4 OF THE LIMITATION ACT, 1963 AND SECTION 10 OF THE GENERAL CLAUSES ACT 1897.

To begin with the end of the Judgment it will be worthwhile to have a close look at Section 4 and Section 10 of the two acts indicated above.

The two provisions are in *pari-materia* being based on the pristine principles of justice and fairness enshrined in the three legal maxims (1) The law does not compel a man to do that which he cannot possibly perform *lex non cogit ad impossibilia*, (2) An act of the Court shall prejudice no man-*Actus Curiae neminem gravabit*. (3) Law does not expect a party to do the impossible-*Impossibilium nulla obligatio est*.

If the two provisions are juxtaposed it will at once be clear that the sweep of the provisions of Section 10 of the General Clauses Act is wider than that of the Section 4 of the Limitation Act 1963. Both are enabling provisions. These enable a party to do what he could do on the day when the Court was closed on the immediate subsequent day of opening of the Court. In connection with cases under special statutes the Supreme Court has spoken many times on the sweep, nature and applicability of Section 10 in terms or in principles. Most of these cases barring one or two are in connection with Election Petitions under the Representation of the People Act 1951 where the interplay of Section 4 and 29(2) of the Limitation Act 1963 and Section 10 of the General Clauses Act 1897 had been considered. Indeed, the basis of Urban Water Supply that is Popular Construction mentions two among them in interpreting the phrase “express exclusion” within Section 29(2) of the Limitation Act. Some samples will be illuminating.

Harinder Singh -Vs- Karnail Singh AIR 1957 S.C. 271 is a Four Judge unanimous decision of the Supreme Court where an Election Petition presented on reopening of the Court was held not barred. Para 4 to 6 of the Judgment contain the discussion on Section 10 of the General Clauses Act. The argument that some other provision of the unamended Act exhibited an intention to exclude the general principles of construction of statute contained in Section 10 was rejected thus :

“ The operation of such a beneficent enactment as S.10 of the General Clauses Act is not, on our opinion, to be

cut down on such unsubstantial grounds as have been urged before us.”

Hukumdev Narain Yadav -Vs- Lalit Narain Mishra AIR 1974 S.C. 480, a Three Judge decision of the Supreme Court reiterated the holding in Harinder Singh (supra) and held thus :

“..... even if s.4 of the Limitation Act does not apply, s.10 of the General Clauses Act will certainly apply to election petitions.”

Hari Shanker Tripathi -Vs- Shiv Harsh (1976) 1 SCC 897 spoke thus :

“In the instant case which arises out of the election petition it is manifest from the judgment of this court on Hukumdev Narain Yadav that the provisions of section 4 and 5 of the Limitation Act do not apply. Thirdly the period of limitation prescribed expired on June 14, 1974 during the summer vacation. In these circumstances the inescapable conclusion would be that section 10 of the General Clauses Act would apply in terms and the appellant would be entitled to file the election petition on July 8, 1974 as he did.”

The same legal interpretation had been reiterated in Simhadri Satya Narayana Rao 1994 Supp (1) SCC 449. Another Three Judge Bench of the Supreme Court in Manohor Joshi -Vs- Nitin Bhaurao Patil (1996) 1 SCC 169 reiterated the same law while emphasizing the fact that Section 10 of the General Clauses Act occurs in the “Part therein relating to General Rules of Construction of all Central Statutes.” It further held that even in self contained Code like the Representation of the People Act for purposes of limitation there is no specific exclusion of the provision of Section 10. Another three Judge Bench of the Supreme Court in Chandra Kishore Jha -Vs- Mahavir Prasad (1999) 8 SCC 266 held thus :

“ Since the Indian Limitation Act does not apply to an election petition, Section 10 of the General Clauses Act would apply.”

The latest one from the Supreme Court on the point was delivered on 11.03.2005 by a Three Judge Bench. The case is Raj Kumar Yadav -Vs- Samir Kumar Mahaseth 2005 AIR SCW 1647.

The limitation for Registration of an award under the cumulative effect of Section 23 and 25 of the Registration Act, 1908, if the conditions are fulfilled, is a total period of eight months. The Calcutta High Court held that registration having been effected after eight years was void. The Supreme Court applied the two legal maxims indicated above because during a good part of the period the award was in the custody of Civil Court and the party despite its efforts could not obtain possession and present it for registration within the period prescribed. Registration was held valid. That was *Rajkumar Dey -Vs- Tarapada Dey* (1987) 4 SCC 398. Lastly in *Huda -Vs- Babeswar Kanhar* (2005)1 SCC 191 one can read the following :

“ Even the logic of Section 10 of the General Clauses Act, 1897 can be pressed into service. Apart from the said section and various provisions in various other Acts, there is the general principles that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see *Sambasiva Chari -Vs- Rama sami Reddi* ILR 22 Mad 179). The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day..... The reason is that law does not compel the performance of an impossibility (see *Hossen Ally -Vs- Donzelle* ILR (1880) 5 Cal 906). Every consideration of justice and expediency would require that the accepted principle which underlines section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying are *Lex nor cogit ad impossibilia* (the law does not compel a man to do the impossible) and *actus curiae neminem gravabit* (the act of court shall prejudice no man)?

In *Urban Water Supply* the High Court first held “ that there has, indeed, been an exclusion of the provisions of Section 4 of the Limitation Act” and found it “wholly unnecessary” even to consider the contentions on the basis of Section 10 of the General Clauses Act. This will be in the teeth of the Supreme Court Judgments of high Authority indicated above. It is surprising that even *Hukum Dev Narain* (supra) referred to in *Popuplar Construction* the basis of *Urban Water*

Supply was not considered. The concluding portion of Urban Water Supply quoted earlier indicated that the proviso to Section 10 excluded its application. Proviso has not been extracted in the Judgment. It reads thus :

“ Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877 applies.”

The simple meaning of the above is that if the Limitation Act does not apply Section 10 applies. That is what has been held by the Supreme Court in the cases indicated above. That part of the conclusion appears fallacious because the High Court has already held that Section 4 of the Limitation Act does not apply. The second part of the conclusion based on section 5 of the 1996 Act will be considered hereinafter.

3. SECTION 4 AND 29(2) OF THE LIMITATION ACT, 1963

In Urban Water Supply the High Court observed that “the law laid down by the Apex Court in Papuplar Construction Co.(supra), though, is strictly in the context of the applicability of Section 5 of the Limitation Act, 1963, the principles laid down, as already noticed, must be duly made applicable while construing the provisions of Section 4 of the Limitation Act also”

At the core of the doctrine of precedents is the principle that a case is an authority for what it actually decides and not for a proposition that seem to follow logically from it. In this connection an extract from Quinn -Vs- Leathem 1901 AC 495 quoted at page 651 in the Constitution Bench Decision of State of Orissa -Vs- Sudhansu Sekhar Mishra AIR 1968 SC 647 may be seen.

Papuplar Construction while dealing with the phrase “expressly excluded” in Section 29(2) of the Limitation Act apart from other precedents considered and extracted portions of the Constitution Bench Judgment in Vidyacharan Shukla -Vs- Khubchand Baghel AIR 1964 S.C. 1099 and of Hukum dev Narain Yadav (supra). Another Three Judge decision of the Supreme Court dealing with the special law the Representation of the People Act 1951 held that in an appeal against the Order of Election Tribunal section 4 and 12 of the Limitation Act are applicable. That was D.P. Mishra -Vs- Kamal Narayan Sharma, AIR 1970 SC 1477. A CLOSE READING OF THE ABOVE three judgements, more particularly the extract from Hukum Dev Narain Yadav quoted at page 4013 of Popular Construction would show firstly, that “express exclusion” depends on the nature of the provisions of the Limitation Act within the group of Section 4 to 24 as also the nature and scheme of the provisions of special law, secondly exclusion may be of all or any

one of the group of section. In other words merely because the nature and scheme of the special law is held to have excluded a particular section within the group 4 to 24, it will not automatically follow that the entire group is excluded. To support or negate the observation in Urban Water Supply quoted above it will be necessary to read both Section 4 and 5 of the Limitation Act. Under Section 4 where the prescribed period for any suit, appeal or application expires on a day when the court is closed the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. It is thus an enabling provision and creates a right or entitlement in the party if the conditions are fulfilled to institute etc. on the day when the court reopens. Section 5 on the other hand confers a discretion on the Court to extend the prescribed period for filing on proof of sufficient cause for the delay. The nature and scheme of the two provision are as distinct as chalk from cheese. What is logical and relevant for exclusion of Section 5 may be quite irrelevant for exclusion of Section 4. Thus, it appears that Popular Construction cannot even be a persuasive authority for deciding exclusion of Section 4 of the Limitation Act. Though many Judgments of the Supreme Court considered in para 2 above have said that Hukumdev Narain Yadav held that Section 4 and 5 are not applicable to Election Petition the writer had not been able to discover any firm statement regarding exclusion of Section 4 of the Limitation Act in that case. Because of the nature of the provisions like Section 10 of the General Clauses Act, and Section 4 of the Limitation Act. Section 4 also cannot be held to have been excluded in the special law be it the 1996 Act or the Representation of the People Act.

4. THE BOMBAY, HIMACHAL PRADESH AND DELHI HIGH COURT

The additional assurance derived in Urban Water Supply from the three decision of the Bombay, Himachal Pradesh and Delhi High Court needs to be examined. As far as the Judgment of the first two High Courts are concerned, it has been indicated that Popular Construction was used to exclude application of Section 14 of the Limitation Act 1963 by these two High Courts. In addition to what has been stated in para 3 above a short answer to these holdings may be read in National Aluminium Co. -Vs- Pressteel and Fabrication AIR 2005 S.C. 1514. In that case an application for modification of the arbitral award was filed in the Supreme Court. The Supreme Court eventually held thus :-

“We find no difficulty in coming to the conclusion that in view of the provisions of Section 34 read with Section 2(e) of the 1996 Act that it is not this Court which has jurisdiction to entertain an application for modification of the award..... therefore, in

our opinion this application is not maintainable before this Court.”

The Supreme Court dismissed the application with a direction to file in a proper Court and further directed thus :-

“..... and if the same are filed within 30 days from today, the delay in regard to the filing of the objections as contemplated under Section 34 of the 1996 Act shall be condoned by the said court since the time consumed was in bonafide prosecution of the application in a wrong forum.”

Thus the direction was to apply Section 14 (2) of the Limitation Act, 1963.

The writer has not been able to read the Delhi case. Therefore no comments are possible. It would thus appear that like Urban Water Supply the Bombay and Himachal Pradesh High Court also mis-appreciated Popular Construction.

5. SECTION 5 OF THE 1996 ACT

The provision reads thus :-

“ Extent of judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.”

In popular Construction considering the language of Section 34 of 1996 Act it was concluded at para 12 that the phrase “but not thereafter” amounts to express exclusion of Section 5 of the Limitation Act within the meaning of Section 29 (2) of the Limitation Act. Then as an additional ground for so holding and in obedience to the enunciation of law on this aspect in Hukum Dev Narain Yadab extracted at para 13 the scheme and legislative history of 1996 Act was considered at para 14.15 and 16 at the end of which the Supreme Court concluded thus :-

“ If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the Courts powers by exclusion of the operation of Section 5 of the Limitation Act.

The clear implication of the above is that application of Section 5 constitutes a judicial intervention not provided by Part I containing Section 34 of the 1996 Act. The meaning of "Judicial intervention" can perhaps gather further light from a few other decisions of the Supreme Court. After Popular Construction was decided on 05.10.2001 the Supreme Court respectively on 20.05.02; 28/01.03; 14.04.03 and 26.02.04 delivered four other Judgments (as can be gathered from AIR and SCC only) dealing with Section 5 of the 1996 Act. In AIR 2001 SC 2308 the question was whether in view of the provisions of Section 37 of the 1996 Act application of the CPC not having been specifically provided judicial intervention by way of a Civil Revision to the High Court will attract the sweep of Section 5 of the 1996 Act and will thus be barred. The Supreme Court answered the question in the negative.

In (2003) 12 SCC 140 the Division Bench of Karnataka High Court in a writ petition intervened in a pending arbitral proceedings by issuing a status quo order. The Supreme Court set aside the order by observing that the High Court should have had regard to Section 5 of the 1996 and the interference with the arbitration violates the mandate of Section 5 of the 1996 Act.

In AIR 2003 SC 2252 in a pending suit an application under Section 8 of the 1996 Act was filed requesting reference to arbitration. All the parties were not parties to the arbitration agreement and the dispute, in the suit and disputes to be referred were not identical. The question was whether Section 5 of the 1996 Act would mandate the reference sought for. The Supreme Court upholding the order of rejection of the application under Section 8 observed that "for interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I judicial authority shall not intervene except where so provided in the Act. Except Section 8 there is no other provision in the Act that in a pending suit the dispute is required to be referred to the arbitrator."

Lastly in (2004) 3 SCC 447 an injunction was granted in a suit against a proceedings before a Council set up under the provisions of Interest on delayed payments to small scale and Ancillary Industrial Undertakings Act, 1993. Eventually the City Civil Court at Bombay discharged the injunction in view of the provisions of Section 5 of the 1996 Act but on appeal the Bombay High Court stayed the proceedings. The Supreme Court held that the provisions of Section 5 of the 1996 Act bars the jurisdiction of the High Court to stay the arbitral proceedings before the Council.

According to Black's Law Dictionary "Judicial" means "of, relating to or by the Court or a Judge" and "Legal" means "of or relating to law, falling within the province of law". In the light of the sample of "judicial intervention" from the five Supreme Court cases indicated above together with the definitions of "Judicial" and "Legal" noted here conclusion seems inescapable that while application of Section 5 of the Limitation Act will be a "Judicial intervention" application of Section 4 of the Limitation Act will only be a legal intervention. It has already been shown that Section 4 of the Limitation Act creates a right or entitlement as does Section 10 of the General Clauses Act but Section 5 of the Limitation bestows a discretion on the Court. Therefore the conclusion in Urban Water Supply that Section 10 of the General Clauses Act stand excluded by its proviso "as well as by Section 5 of the 1996 Act appears not to be correct.

6. A SIDEWIND

Recently (16.03.2005) a Three Judge bench of the Supreme Court had an occasion to deal with an application like in Urban Water Supply under Section 34(3) of the 1996 Act. The decision is reported in (2005) 4 SCC 239, Union of India -Vs- Tecco Trichy Engineers and Contractors. Arguments made before the District Judge in Urban Water Supply for condonation of delay and in the case before the Supreme Court centered round the working of the Govt. Departments. Supreme Court condoned the delay although the Courts below that is Single Judge and the Division Bench of the High Court did not. The point of importance is that Supreme Court and apparently the two Courts below confined the matter to considering only 30 days extension permissible under the proviso to Section 34(3) of the 1996 Act and had not lumped the period together with the 3 months. It appears that part of the inadequacy of argument and consideration and the resultant fallacy in reasoning in Urban Water Supply is traceable to this failure to keep the period of permissible extension distinct and separate from the period of limitation.

In conclusion, from what has been discussed in paragraph 2 onwards in this writing it appears that the point of limitation decided in Urban Water Supply needs reconsideration by a Larger Bench.