

(2014) 09 DEL CK 0234

In the Delhi High Court

Case No : Writ Petition (Civil) No. 7304/2011

Andhra Cement Ltd.

APPELLANT

Vs

Dy. Commissioner Central Excise

RESPONDENT

Date of Decision : 01-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Evidence Act, 1872 — Section 114

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 25

Citation : (2014) 310 ELT 72 : (2014) 48 GST 132

Hon'ble Judges : V. Kameswar Rao, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Maneesha Dhir, Geeta Sharma, Ujjwal Jain and Sadvi Shahi,
Advocate for the Appellant; Satish Kumar, Sr. Standing Counsel, Advocate for the Respondent

Judgement

Sanjiv Khanna, J.—Andhra Cement Ltd. - petitioner has filed this writ petition impugning order dated 12th August, 2011 passed by the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) on an application filed by the Deputy Commissioner of Central Excise, Guntur ("Excise Department", for short) - respondent for condonation of delay in challenging the order dated 21st July, 2008, passed by Board for Industrial and Financial Reconstruction (BIFR).

2. AAIFR has held that starting point of limitation would be the date when the respondent received copy of the order dated 22nd December, 2009, from the BIFR.

3. The facts as noticed by AAIFR are that an appeal was preferred by the respondent on 14th December, 2009, but without enclosing certified copy of the order passed by the BIFR dated 21st July, 2008. In fact, the respondent had applied for the certified copy on 14th December, 2009, which was supplied to them on 6th January, 2010. Thereafter, the certified copy was filed with the appeal pending before AAIFR.

4. Learned counsel for the petitioner submits that in the present case, the respondent was made aware of the order dated 21st July, 2008, by way of letter dated 8th October, 2008 written by the petitioner enclosing therewith summary of record of proceedings held before Bench No. 1 of BIFR on 21st July, 2008. The said letter was received by the respondent on 24th October, 2008. Reliance is placed upon the letter dated 7th November, 2008 written by the Office of the Commissioner of Customs and Central Excise, Guntur to the Assistant Commissioner of Customs and Central Excise, Guntur/Vijaywada. Our attention is drawn to the legal opinion dated 17th June, 2009, obtained by the respondent from the Ministry of Law and Justice. Reliance is placed on decisions of the Delhi High Court in W.P.(C) 2207/2007, Vijay Kumar Mills Ltd. and Another vs. ICICI Bank and Ors., decided on 10th July, 2008, Civil Writ No.5408/2007, Textile Labour Union, Nadiad vs. UOI and Ors. decided on 17th August, 2007 and Girdhar Lal M. Pittie Vs. Appellate Authority for Industrial and Financial Reconstruction, in support of the proposition that the date of knowledge is an important factor for construing and deciding when limitation should begin and failure of the respondent to apply for certified copy within a reasonable time should be a factor, which was highlighted but not duly considered by the AAIFR. Reference is made to the decision of the Supreme Court in Office of The Chief Post Master General and Others Vs. Living Media India Ltd. and Another, to highlight that lackadaisical approach should not be condoned and delays in matters of this nature could cause prejudice. It is highlighted that the petitioner has already made full payment of the principal amount under the rehabilitation scheme and Customs, Excise and Gold (Control) Appellate Tribunal has allowed the appeal of the petitioner quashing penalty and interest in view of the order dated 21st July, 2008 passed by the BIFR.

5. To appreciate the said contentions, we would like to record basic and relevant facts, viz., (a) The petitioner herein is a company engaged in the activity of manufacture and sale of cement. (b) In 1990, they filed a reference u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (Act, for short) before the BIFR and by order dated 23rd July, 1990, were declared "sick". IDBI was appointed as an operating agency. (c) By order dated 6th June, 1994, a rehabilitation scheme was sanctioned, but the same was challenged by the outgoing promoters as the scheme envisaged change of management. AAIFR on 19th December, 1994, sanctioned the scheme with certain modifications. (d) In spite of infusion of funds, the petitioner had suffered huge and prolonged losses. In December, 2001, BIFR passed an order declaring that scheme had failed and issued direction for change of management, which again was challenged before the AAIFR. An order of remand was passed for reconsideration. (e) Subsequent proceedings continued with the petitioner submitting a modified proposal but no definitive order was passed. (f) Central Excise authorities on 2nd December, 2005 filed an affidavit before the BIFR that an amount of Rs.6.29 crores was due and payable to them by the petitioner company. By order dated 26th August, 2005, AAIFR restrained the Central Excise Department from taking coercive steps

for recovery of dues without their permission till finalisation of the sanctioned scheme. Subsequently, on 12th September, 2006, AAIFR set aside the order dated 5th April, 2004 and remanded the matter to BIFR with certain directions. (g) The petitioner, by their letter dated 8th May, 2007 addressed to Central Excise Department, acknowledged their liability to pay Rs.6.29 crores. It was also stated in the said letter that the petitioner had already requested the BIFR to include this liability in the sanctioned scheme. (h) The respondent by their letter dated 20th February, 2008 informed the Registrar, BIFR that Central Excise dues of Rs.6.29 crores were pending and should be included in the revival package so as to clear the arrears and issuance of order be informed to them. (i) In spite of the said letter, BIFR did not inform or communicate any date of hearing to the respondent. The draft scheme, which contained clauses or stipulations with regard to waiver of penalty and interest, was not made available to the respondent. (j) BIFR by their order dated 21st July, 2008, without opportunity and hearing the respondent, sanctioned the modified scheme, which envisaged relief in form of waiver of interest and penalty and settlement of the dues of Central Excise in five annual instalments as was requested by the petitioner company.

6. In paragraph 11 of the minutes of proceedings dated 21st July, 2008, BIFR recorded:-

"The Dy. Commissioner of Customs, Central Excise and Service Tax, Guntur - 522002 (A.P.), vide his letter dt. 20.02.08 brought-out, inter alia , to the notice of the Board that the Company M/s. ACL, vide their letter dated 08.05.07 to them, admitted the total outstanding liability of the Deptt. as Rs. 6,29,62,888/- and he finally- , requested the BIFR to include repayment of this outstanding dues in the revival scheme being formulated/considered by the Board. The Board noted that the Company M/s ACL requested the Deptt. for inclusion of repayment of this outstanding liability in the modified draft revival scheme (MDRS), in five (5) annual installments."

7. The modified rehabilitation scheme, which was approved, paragraph 9.4 (c) relating to Central Excise, Customs and Service Tax Authorities, stipulated:-

"(i) To waive entire interest and penalty levied or leviable on Excise Duty and Service Tax Arrears and to accept payment of excise duty/service tax outstanding as on the cut-off date over a period of seven years without any interest/penal interest/penalty. The company vide their letter dt. 08.05.07 has accepted the outstanding due of Deptt. As Rs.6,29,62,888/- and re-payment of their dues in five (5) annual instalments.

(ii) To exempt ACL/its directors/officers from the penal provisions of the Excise, Cenvat, Customs and Service Tax Acts and rule made thereunder.

(iii) To exempt ACL from the penal provisions of the Customs Act relating to the pre-takeover defaults."

8. It is, therefore, clear that the aforesaid order dated 21st July, 2008, was passed without issue of notice and hearing the respondent-Revenue on the question whether or not waiver of interest/penal interest or penalty were justified. Directions were issued for waiver of entire interest levied or leviable on excise duty and service tax arrears. It was further directed that the payment of the principal amount should be made in five annual instalments, without any interest/penal interest or penalty. (The modified scheme refers to period of 7 years and 5 annual instalments for payment but the learned counsel for the petitioner has stated that the scheme, which was actually sanctioned, postulated payment of dues in 5 years).

9. It is apparent and manifest that there was violation of principles of natural justice. This is why the Revenue had filed an appeal, inter alia, stating that the order directing complete waiver of interest and penalty should not have been passed without hearing them and without their point of view being considered and examined by the BIFR. It is submitted on behalf of the respondent-Revenue that settlement cannot be forced and imposed on an unwilling party and whether or not to accept the terms had to be decided by the Central Excise authorities in accordance with law as per the guidelines in vogue and applicable.

10. It is noticeable that the BIFR did not supply or send certified copy of the order dated 21st July, 2008 to the respondent-Revenue, though concessions had been directed in the sanctioned scheme as no interest or penalty was payable and the principal amount was to be paid in five annual instalments.

11. By letter dated 8th October, 2008, the petitioner forwarded a copy of the summary of record of proceedings held on 21st July, 2008 before Bench No.1 of BIFR, but this was not the certified copy of the order. What was enclosed with this letter was not a certified copy of the proceedings held on 21st July, 2008, but a photocopy. Learned counsel for the petitioner has accepted the said position.

12. In the aforesaid circumstances and factual matrix, AAIFR has rightly relied on the decision of a Division Bench of this Court in Director General of Income Tax (Admn.), Directorate of Income Tax (Recovery) Vs. Board of Industrial and Financial Reconst. and Others, . In the said case, BIFR had passed an order dated 3rd April, 1997. The petitioner therein was not a party to the proceedings before the BIFR. Subsequently, the petitioner therein filed an appeal, which was dismissed by the AAIFR on the ground that it was barred by limitation. The certified copy of the order was applied for by the petitioner therein on 20th August, 1998 and was received on 9th September, 1998. Thereupon, appeal before AAIFR was filed on 19th November, 1998. Earlier the petitioner herein had received a copy of the order of the BIFR dated 3rd April, 1997 with letter dated 29th April, 1998, written by the assessee. The Division Bench referred to Section 25 of the Act, which for the sake of completeness is reproduced below:-

"Section 25-Appeal

(1) Any person aggrieved by an order of the Board made under this Act may, within forty-five days from the date on which a copy of the order is issued to him, prefer an appeal to the Appellate Authority:

Provided that the Appellate Authority may entertain any appeal after the said period of forty-five days but not after sixty days from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under sub-section (1), the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and after making such further inquiry as it deems fit, confirm, modify or set aside the order appealed against or remand the matter to the Board for fresh consideration."

It was observed that u/s 25 of the Act, any person aggrieved by an order of the BIFR can file an appeal before the AAIFR. The appeal need not necessarily be filed by the person, who was a party before the BIFR. The appeal should be filed within 45 days from the date on which a copy of the order was issued to him and on sufficient cause being shown, the time can be extended up to 60 days in terms of the first proviso. Reference was thereafter made to Regulation 15 of the Board for Industrial and Financial Reconstruction Regulations, 1987, which reads as under [see (1987) Comp Cas (St.) 153] :-

"15. Authentication and communication of order of the Board.- (1) All orders and decisions of the Board shall be authenticated by the signature of the Chairman or any other member, or the Secretary, or any other officer empowered in this behalf by the Chairman, and bear the official seal of the Board.

(2) Every order of the Board shall be communicated under the signature of the Secretary or any other officer of the Board duly empowered by the secretary, in this behalf."

13. Referring to the requirements of Regulation 15, it was elucidated that BIFR's order duly authenticated was required to be communicated and, secondly, the communication should be the under signature of the Secretary or any other officer empowered by the Secretary on his behalf. The manner in which the order has to be issued by the BIFR stands stipulated in Regulation 15.

14. Thereafter, reference was made to expressions "issued" and "served" and it was observed that these words are used interchangeably and in the context word "issued" would mean "served". It was observed in Director General of Income Tax (supra) as under :-

"... In the instant case the order was not issued to the petitioner on the ground that it was not a party to the proceeding before it. But when the certified copy was obtained, obviously that is the starting point when the order can be said to have been issued by the B.I.F.R. to the petitioner. Therefore the starting point has to be the date on which the certified copy was handed over i.e. 9th

September, 1998. If that is to be taken to be the starting point, appeal is within permissible extended time limit. The view of the AAIFR that appeal was barred by limitation is not correct."

15. We notice that the facts of the present case are almost identical insofar as the respondent-Revenue's case is concerned; that they were not made a party to the BIFR proceedings and, secondly, the record of proceedings held on 21st July, 2008 before the Bench No.1 of BIFR, which required concessions to be given, was not communicated to them under signature of the Secretary or any other officer duly empowered by the Secretary on his behalf. We have noted the respective dates, which were recorded in the decision of the Delhi High Court in Director General of Income Tax (supra), also the letter of intimation sent enclosing copy of the order to the Income Tax Department on 29th April, 1998, but application for certified copy and records was filed on 20th August, 1998 and certified was obtained on 9th September, 1998. Appeal before AAIFR was thereafter filed on 19th November, 1998. It was held that limitation period would begin from 9th September, 1998 and the appeal filed on 19th November, 1998 was within time as per Section 25 of the Act. It was specifically observed that the period from 29th April, 1998 to 9th September, 1998 was of no relevance and should not have been taken into consideration by AAIFR as a ground to dismiss the appeal. The exact wording and language used by the Division Bench in the said judgment reads as under:-

"... The petitioner was not a party before the BIFR. It filed an appeal No. 10 of 1999 on 19th November 1998. AAIFR held that while computing the period of limitation, prescribed u/s 25 of the Act the period from 29th April 1998 to 9th September 1998 has to be included. For coming to aforesaid conclusion AAIFR noted that respondent No.3/company who was the applicant before the BIFR had Along with its letter dated 29th April 1998 enclosed a copy of the order passed by BIFR. The stand of petitioner was that on coming to know of order passed by BIFR, an inspection was made of the records on 20th August 1998, and an application for certified copy was filed on the same date. The certified copy was made available on 9th September 1998. Appeal was filed on 19th November 1998 and therefore period from 29th April 1998 to 9th September 1998 has no relevance. As indicated above, AAIFR came to the conclusion that the supply of copy of the order passed by BIFR to the Chairman of the Central Board of Direct Taxes constitutes a proper service and the starting point of limitation has to be from the date it was so supplied i.e. 29th April 1998. An application for review of the order was also not entertained and rejected."

16. Facts in the case of Vijay Kumar Mills Ltd. (supra) are distinguishable. In the said case, the petitioner had applied for being declared a "sick" company. AAIFR dismissed the appeal on the ground that the petitioner's representative was not only aware of the BIFR order, but was present when the order was passed. We further notice that in Vijay Kumar Mills Ltd. (supra), the management had filed an application under the Act for the company to be declared a sick company. The

stand taken by Vijay Kumar Mills Ltd. was that they had not received, copy of the order dated 4th March, 2004, but this was contested by asserting that the order had been dispatched to Vijay Kumar Mills Ltd. as per law. It was in these circumstances that the Court had observed that the petitioner therein in spite of being aware of the BIFR order, which was passed in the presence of the petitioner's authorised representative, applied for certified copy beyond the period of 60 days. AAIFR, therefore, was right in dismissing the appeal. The Court further observed that the petitioner therein was not serious about revival of the company and wanted to enjoy the conditional interim order passed without ever submitting a rehabilitation scheme, did not justify interference and disentitled the petitioner therein to the equitable and discretionary relief under Article 226 of the Constitution of India.

17. Similarly, in the case of Textile Labour Union, Nadiad (supra), a trade union had preferred an appeal. It was noticed that one of the office bearers of the said union had written letters to the operating agency in July and August, 2001, showing their knowledge and thereafter, the said office bearer had accepted the scheme in principle and had agreed for participation with other stake holders. The Court observed that the contention of the trade union that they were not aware of the subsequent order passed was factually incorrect. In the said case, rehabilitation scheme was approved by the BIFR by order dated 30th October, 2002. The said scheme had a clause relating to voluntary retirement as per the memorandum of understanding entered into between the company and respective trade unions. Wages of the members of the petitioner trade union stood frozen for next five years. The petitioner subsequently wanted deletion of the said clause from the scheme and had prayed for direction that they should be paid salary on the basis of the current D.A. index with effect from 2002. The said decision, therefore, proceeds on its own facts and records several reasons why the petitioner trade union was not entitled to the relief sought.

18. Decision in Girdhar Lal M. Pittie and Anr. (supra) is also distinguishable on facts. In the said case, reference was made to Section 114 of the Evidence Act, 1872. It was observed that representatives of the petitioners were present before the BIFR when the impugned order dated 18th March, 1997 was passed. The sanctioned scheme in the said case required the co-promoter to bring over Rs.33 crores and AAIFR had noted that the co-promoters had already brought in Rs.17 crores towards implementation of the sanctioned scheme. Further, the co-promoter had stated that 50 per cent of the one-time settlement amount had been paid and the balance amount was to be paid as per the stipulations of the sanctioned scheme. The claim of the petitioner therein was that they had not received certified copy of the order passed by the BIFR dated 18th March, 1997. The Court noticed that application for obtaining certified copy of the said order was filed on 26th March, 1997. The petitioners then claimed that the said application was rejected. In order to verify the said assertion, records were examined and it was noticed that there was no such order rejecting the application for supply of certified copy. The petitioner subsequently filed another

application for certified copy on 5th May, 1997 and the copy was supplied on 26th June, 1997. This copy was enclosed with the grounds of appeal filed before the AAIFR. In these circumstances, the Division Bench dismissed the writ petition.

19. Decision in the case of Girdhar Lal M. Pittie and Anr. (supra) makes general observations and records that the State and their agencies are equally bound by the law of limitation and should adhered to the time schedule. Under the normal civil law relating to the Court proceedings, an aggrieved party has to apply for the certified copy to the copying agency. In this context, observations and criticism was made for the substantial delay in applying for the certified copy. On the other hand, in the present case, the certified copy should have been supplied as per the applicable regulations. Right to be furnished and supplied a certified copy is a right under the said regulation. It is only when the certified copy was not served or received, that the respondent applied for supply of copy of minutes of proceedings dated 21st July, 2008 and these were then enclosed with the grounds of appeal. Thus, the impugned order does not merit interference for several reasons.

20. Learned counsel for the petitioner has submitted that the scheme has been substantially implemented and even payment of the principal amount has been made. This may be correct. The issue, which remains is, whether or not interest or penalty should be paid or levied under the Central Excise Act, 1944. This is a separate issue. We hope and trust the Revenue will take all relevant facts into consideration and the contentions put forth by the petitioner will be examined while setting up the case on merits. Of course, they will be bound by the guidelines or policies framed by them in relation to sick companies.

21. With the aforesaid observations, the writ petition is dismissed. Interim order is vacated. The parties are directed to appear before the AAIFR on 29th October, 2014, when a date of hearing will be fixed.