(2014) 07 GUJ CK 0128

In the Gujarat High Court

Case No : Special Civil Application No. 8763 of 2014

Archer Metal Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 31-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AA, 6
Constitution of India, 1950 — Article 226, 227

Citation : (2014) 310 ELT 855 : (2014) 47 GST 529

Hon'ble Judges : Mukesh R. Shah, J;Kaushal Jayendra Thaker, J

Bench : Division Bench

Advocate : Paresh V. Sheth, Advocate for the Appellant; A.Y. Kogje, Advocate for the Respondent

Judgement

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Mukesh R. Shah, J.—By way of this petition under Article 226 of the Constitution of India, the petitioners have prayed for appropriate writ, order and/or direction to quash and set aside the impugned order passed by the learned tribunal, by which the learned tribunal has refused to condone the huge delay of 406 days caused in preferring the appeals against the order demanding huge Central Excise Duty liability of approximately more than 8 Crores. Facts leading to the present Special Civil Application are as under:

1.1 That against the Order-in-Original passed by the adjudicating authority dated 19/11/2012 confirming the demand of Central Excise Duty of Rs. 3,35,49,250/- and interest on the aforesaid amount confirmed under section 11AA and the penalty of the like amount of Rs. 3,35,49,250/-, petitioners preferred appeals before the CESTAT. There was a delay of 406 days in preferring the appeals and therefore, the petitioners submitted application to condone the delay caused in preferring the appeal by submitting that the authorised person of the Company advised that before filing an appeal, the Company will have to deposit the entire amount of duty and penalty confirmed. However, he did not clarify that the

Company can file an application before the learned tribunal requesting for waiver of the pre-deposit. It was submitted that since the Company was not in a position to deposit the entire amount of duty and penalty, did not file an appeal within the period of limitation. That the learned tribunal was not satisfied with the explanation submitted in support of their prayer to condone the huge delay of 406 days and therefore, by the impugned order, the learned tribunal has dismissed the said application and has refused to condone the delay by observing that no justifiable reasons have been given for condoning the delay. Feeling aggrieved and dissatisfied with the impugned order passed by the learned tribunal in not condoning the delay of 406 days caused in preferring the appeals, the petitioners herein have preferred the present Special Civil Application under Article 226 of the Constitution of India.

2. Mr. Paresh Sheth, learned advocate appearing on behalf of the petitioners has requested to condone the delay caused in preferring the appeals by submitting that the petitioners have meritorious case. It is submitted that as such the petitioners were wrongly advised at the relevant time by their authorised person of the Company that before filing an appeal, the Company will have to deposit the entire amount of duty and penalty confirmed and since the Company was not in a position to deposit the amount of duty and penalty, the petitioners did not file the appeal within the period of limitation. Therefore, it is requested to allow the present Special Civil Application and quash and set aside the order passed by the learned tribunal in refusing to condone the delay and to condone the delay caused in preferring the appeals and to direct the learned tribunal to decide the appeals on merits.

No other submissions have been made.

3. Present petition is opposed by Mr. A.Y. Kogje, learned advocate appearing on behalf of the revenue. An Affidavit-in-reply is filed on behalf of the respondents opposing the present petition. It is submitted that as such, in the facts and circumstances of the case, the learned tribunal has rightly not accepted the case on behalf of the petitioners for not filing the appeals within the period of limitation. It is submitted that in fact other co-noticee had preferred appeals against the orders of penalty imposed vide Order-in-Original. However, the petitioners did not prefer appeal within the period of limitation deliberately. It is submitted that as such the properties of the Company have already been sold and as such the same have been purchased in auction by the close relatives of the petitioners. It is submitted that even after the Order-in-Original, the department started recovery proceedings and two Companies formed in the name of M/s. Neev Technocast Pvt. Ltd. and M/s. Neev Metologies Pvt. Ltd. have applied for the issuance of Central Excise registration on 13/1/2013 having common Directors Mr. Sagar Vinodbhai Parsana and Mrs. Nisha Mo-hitbhai Parsana for manufacturing of moulding patters and aluminium coil/foil at the address of M/s. Archer Metals Ltd. However, they were denied to issue the same on account that the petitioner No. 1 - M/s. Archer Metals Ltd. was already existed

at the given address and for the same premises, no other registration can be issued. It is submitted that thereafter again both the new entrants applied for the Central Excise Registration on 11/6/2013 but were not recommended, since the petitioner No. 1 was still existed at the given address and holding Registration Certificate and also huge government dues were pending against the petitioner Nos. 1 and 2. It is submitted that on 25/6/2013, surrendered the registration certificate of the petitioner No. 1 through ACES, a departmental website and delivered a printed copy to the department on 26/6/2013 with the wrong declaration that "I/We also declare that there is no government due pending against us and that there is no demand pending against us under Central Excise Act, 1944 (1 of 1944) and rule made thereunder pending as on the date of surrendering the Registration Certificate. It is submitted that in fact the petitioner No. 2 himself acknowledged the Order-in-Original No. 71/ Commr./2012 dated 19/21.11.2012 on 8/12/2012 under which the duty and penalties of Rs. 8.71 Crores was confirmed. It is submitted that the aforesaid conduct on the part of the petitioners lacks bona fide of the part of the petitioners and therefore, the petitioners are not entitled to any relief. It is submitted that the land and buildings including the machineries has been disposed of and again acquired by the relatives of the default company and in such a way the huge government dues were put at stake. It is submitted that therefore, extraordinary jurisdiction under Article 226 of the Constitution of India may not be exercised in favour of the petitioners.

3.1 Mr. Kogje, learned advocate appearing on behalf of the respondents has heavily relied upon the decision of the Hon''ble Supreme Court in the case of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others, and in the case of Basawaraj and Others Vs. The Spl. Land Acquisition Officer, in support of his submissions and request to dismiss the present petition.

4. Heard the learned advocates appearing on behalf of the respective parties at length.

4.1 At the outset, it is required to be noted that pursuant to the Order-in-Original against the petitioners, there is a huge liability of approximately more than Rs. 8 Crores which is still due and payable by the petitioners. It is also required to be noted that there is a huge delay of 406 days caused in preferring the appeal before the learned tribunal against the Order-in-Original and demand of excise duty and penalty to the extent of approximately more than Rs. 8 Crores. The only ground on which the huge delay of 406 days sought to be condoned was that the authorised person of the Company advised that before filing an appeal, the Company will have to deposit the entire amount of duty and penalty confirmed and since the Company was not in a position to deposit the amount of duty and penalty, they did not file the appeal within the period of limitation. However, it is required to be noted that as such and so stated in the Affidavit-in-reply filed on behalf of the respondents that as such the authorised person of the

Company was the ex-employee of the department and therefore, the contention on behalf of the petitioners that he advised that before filing an appeal, the Company will have to deposit the entire amount of duty and penalty and since the Company was not in a position to deposit the entire amount of duty and penalty, they did not prefer appeal, cannot be accepted and is rightly not accepted by the learned tribunal. At this stage, it is also required to be noted that as such the aforesaid is not supported by any other evidence and/or affidavit of the concerned person. Even the conduct on the part of the petitioners so stated in the Affidavit-in-reply disentitles the petitioners to any discretionary relief in exercise of powers under Article 226 of the Constitution of India. In paras 9 to 13 of the Affidavit-in-reply, it is stated as under:--

"9. I say and submit that meanwhile, two Companies formed in the name of M/s. Neev Technocast Pvt. Ltd. and M/s. Neev Metologies Pvt. Ltd. (hereinafter referred to as "M/s. Neev Met & Tech") have applied for the issue of Central Excise registration on 13/1/2013, having common directors Shri Sagar Vinodbhai Parsana and Smt. Nisha Mohitbhai Parsana, for manufacturing of moulding patters and Aluminium Coil/foil at the address of M/s. Archer Metals Ltd. However, they were denied to issue the same on account that the petitioner No. 1 M/s. Archer Metals Ltd. was already existed at the given address and for the same premises, no other registrations can be issued. Again both the new entrants applied for the Central Excise Registration on 11/6/2013 but were not recommended, since the petitioner No. 1 was still existed at the given address & holding Registration Certificate and also huge Govt. dues were pending against the petitioner Nos. 1 & 2.

10. I say and submit that on 25/6/2013, the petitioner No. 2 has surrendered the registration certificate of the petitioner No. 1 through ACES, a departmental website and delivered a printed copy to the department on 26/6/2013, with the wrong declaration that "I/we also declare that there is no government due pending against us and that there is no demand pending against us under Central Excise Act, 1944 (1 of 1944) and rule made thereunder pending as on the date of surrendering the Registration Certificate. In fact, the petitioner No. 2 himself acknowledged the Order-in-Original No. 71/Commr./2012 dated 19/21-11-2012 on 8/12/2012 under which they have been asked to pay Central Excise duty and penalties of Rs. 8.71 crores.

11. I say and submit that being aggrieved against the action taken for not granting the Registration Certificate, both the parties M/s. Neev Met and Tech approached Hon''ble Gujarat High Court under Articles 226, 227 of the Constitution of India by filing two SCA No. 13326 of 2013 and 13323 of 2013 on 12/8/2013.

12. I say and submit that this Hon''ble Court was pleased to dispose of the aforementioned petition by Order Dtd. 13/11/2013. The copy of the Order passed by this Hon''ble Court (Coram : M.R. Shah & R.R Dholaria, JJ) is annexed hereto and marked as Annexure-R-1.

13. I say and submit that on the direction so passed by the Hon''ble Gujarat High Court, the respondent No. 4, issued SCNs and after heard the case, passed Order-In-Original Nos. 17 & 18/D/2013-14 dated 30/12/2013 and rejected the registration application dated 11/6/2013 mainly on the grounds that (1) Huge Govt. dues were to be recovered from the petitioner Nos. 1 & 2 (2) The land and buildings including machinery of the petitioner No. 1 has been disposed off and again acquired by the relatives of the default company and in such a way the huge govt. dues were put at stake. The property of M/s. Archer Metals Ltd. was auctioned by the Co-operative bank to Shri Pareshbhai P. Vora, who sold the said property by bifurcating it in three different blocks (Survey Nos. 84 - 84/3, 4 & 5/A, 84/3, 4 & 5/B, & 84/3, 4 & 5/C) to M/s. Neev Metologes Pvt. Ltd., M/s. Neev Technocast Pvt. Ltd. & Smt. Daxaben Vinodbhai Parsana, which were the close relative to each other OR to say in different words that the property was managed in such a way that nobody was to take care of Govt. dues and made them safe. (3) M/s. Archer Metals Ltd. with its director Shri Mohit Vinodbhai Parsana and Vinodbhai Tejabhai Parsana and the new formed companies M/s. Neev Met & Tech, with its Directors Shri Sagar Vinodbhai Parsana and Smt. Nisha Mohitbhai Parsana, common for both the companies were so closed relatives to each other. Shri Mohit Vinodbhai Parsana and Shri Vinodbhai Tejabhai Parsana, directors of M/s. Archer Metals Ltd. are the brother and husband and father and father-in-law of the directors in newly formed company, respectively. The third portion which was sold to Smt. Daxaben Vinodbhai Parsana, who happened to be wife and mother of the directors of M/s. Archer Metals Ltd., and mother and mother-in-law of the new formed companies directors, who also got used by these new formed companies for manufacturing activity by way of taking it on rent. (4) The same family has managed the auctioned property, though through third party just to avoid the Central Excise duty liability of M/s. Archer Metals Ltd. (5) The Companies Act, 1956 defined the related person and all these sons, wife, mother, father, son''s wife/brother''s wife i.e. daughter-in-law has been covered under section 6 of the said Act.''

4.2 There is no counter to the aforesaid Affidavit-in-reply filed on behalf of the respondents. Even considering the aforesaid facts and circumstances of the case, more particularly when there is a huge liability of approximately more than Rs. 8 Crores and even now there is no property of the Company as the same has been sold and alleged to have been purchased by the close relatives of the petitioners and even in the premises of the petitioner No. 1 Company, other Companies are running and they applied for Registration Certificate, we see no reason to interfere with the impugned order passed by the learned tribunal. It is also required to be noted that even we suggested that if some reasonable amount towards duty and penalty liability confirmed is deposited, still the case of the petitioners can be considered, however, the learned advocate appearing on behalf of the petitioners has refused to accept the above and therefore, we have no other alternative but to pass the order on merits. In view of the aforesaid facts and circumstances, we see no reason to interfere with the impugned order passed by the learned tribunal in rejecting the application to condone the huge delay of 406 days. We are satisfied that the learned tribunal has not committed any error in rejecting the delay condonation application by observing that there is no justifiable reasons shown to condone the huge delay of 406 days.

In view of the above and for the reasons stated above, present petition fails and the same deserves to be dismissed and is accordingly dismissed. Notice is discharged. No costs.

