(2007) 08 CAL CK 0010

In the Calcutta High Court

Case No : M.A.T. No. 2379 and 2430 of 2007, CAN No. 6072 of 2007

Bhattacharyya Bottling Plant Pvt. Ltd. and Another — APPELLANT

Vs

The Excise Commissioner and Others
 The Excise Commissioner Vs Bhattacharyya Bottling Plant Pvt. Ltd. and Another — RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : 112 CWN 1154

Hon'ble Judges : Rudrendra Nath Banerjee, J;Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Pratap Chatterjee, Soumen Sen, Sandip Kr. Banerjee and Siddhartha Banerjee, for the Appellant; Jyodip Kar, B. Bhattacharya, S. Ghosh, Subrata Mukhopadhya and Bhaskar Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—These two mandamus-appeals were heard together as those are preferred against the selfsame order passed by the learned Single Judge. M.A.T. No. 2379 of 2007 is at the instances of the writ-petitioners and is directed against order dated June 14, 2007 passed by a learned Single Judge of this Court in W.P. No. 10044 (W) of 2007 thereby modifying the interim order earlier granted by another learned Single Judge. By the initial Order dated May 8, 2007, the learned Single Judge while entertaining the writ-application stayed the operation of the order impugned till June 8, 2007 or until further order whichever was earlier after fixing the matter at the top of the list on June 4, 2007 as "Motion".

2. On June 14, 2007, another learned Single Judge of this Court before whom the matter appeared as listed motion, passed a direction for exchanging the affidavits and at the same time, modified the interim order earlier granted to this extent that in the event the writ-petitioners furnished a bank-guarantee to the

tune of Rs. 10,00,000/- (Ten Lakh) of any nationalized bank to the satisfaction of the Excise Commissioner within a fortnight from that date, the interim order earlier granted should continue till August 10, 2007. The learned Judge further imposed a condition that the writ-petitioners should not dispose of their fixed assets during the pendency of the writ-application.

3. The other mandamus-appeal being M.A.T. No. 2430 of 2007 is at the instance of the Excise Commissioner and is directed against the selfsame order dated June 14, 2007 passed by the learned Single Judge and according to the Excise Commissioner, the learned Single Judge should not have granted even the conditional order dated June 14, 2007 passed by His Lordship.

4. Both the appeals, accordingly, were heard analogously.

5. We, however, propose to take the appeal preferred by the writ-petitioners at the first instance.

6. In the writ-application, the writ-petitioners prayed for a direction upon the respondents to withdraw, cancel, rescind and/or revoke the impugned notices and/or orders both dated 3rd''May, 2007 being Annexure P-1 and P-2 to the writ-application with further prayer for a direction upon the respondents to refund or reverse the aggregate sum of Rs. 35,40,305.40p. realised towards the alleged chargeable wastage as mentioned in the writ-application. The other consequential prayer, for restraining respondents from acting in terms of order dated May 3, 2007 was also made.

7. The Annexure P-1 is a letter dated May 3, 2007 written by the Deputy Excise Collector-in-Charge of the writ-petitioner whereby the said Deputy Excise Collector informed the Excise Commissioner that as per his instruction over telephone, he unloaded the tanker of the writ-petitioner involved in the accident and after unloading, the chargeable wastage of 19033.9 LPL (allowable 0.75%) was found, the duty of which amounted to Rs. 35,40,305,40p. at the rate of Rs. 186/- per LPL. He had further informed the Excise Commissioner that pursuant to his direction, the said amount was deducted from duty paid PL A/c of the writ - petitioner and consequently, the closing balance of duty paid PL A/c stood at Rs. (-) 29,64,282.96p. it was further informed that subsequently, an additional fee @ Rs. 14/- per LPL on the advised amount was also deducted from the Additional Fee PL A/c and the closing balance of the same was Rs. (-) 4,59,191.10 p. the Deputy Excise Collector-in-Charge further Informed that he had issued letter to the company licensee to deposit sufficient amount to make the balance positive in the PL A/C for smooth functioning of the plant. The copy of such letter also sent to the writ-petitioner.

8. The Annexure P-2 dated May 3, 2007, on the other hand, shows that the Deputy Excise Collector-in-Charge of the writ-petitioner had written a further letter to the Director of the writ-petitioner thereby informing him that he loaded the tanker bearing No. WB-39/9233 at BBPPL, Dankuni as per instruction of the Excise Commissioner, West Bengal and, after unloading, it was found that there

was chargeable wastage of 19033.9 LPL. It was further mentioned that the duty of the said amount was Rs. 35,40,305.40p. at the rate of Rs. 186/- per LPL and the said amount was realised from the duty paid PL A/C as per verbal order of the Excise Commissioner. By the said letter, the writ-petitioner was directed to deposit sufficient amount to make the duty paid PL A/C positive for smooth functioning of the plant.

9. As pointed out earlier, a learned Single Judge of this Court while entertaining the writ-application directed that the matter would appear at the top of the list as "Motion" and thereafter, being prima facie satisfied about the claim of the writ-petitioners, stayed the operation of the decision communicated by the Annexure-P-2 till 8th June, 2007 and subsequently, another learned Single Judge before whom the matter appeared, modified the earlier order by stating the operation of the Order impugned on condition of giving bank-guarantee of Rs. 10,00,000/- by the writ-petitioners with further injunction that the writ petitioners should not dispose of its fixed assets during the pendency of the writ-application.

10. Mr. Kar, the learned advocate appearing on behalf of the Excise Commissioner, has taken a preliminary objection as regards the maintainability of the said writ-application before the learned Single Judge of this Court. According to him, the subject-matter of the dispute of the writ-application was a dispute or complaint relating to levy, assessment, collection and enforcement of tax payable under Bengal Excise Act which is a "Specified Act" within the meaning of the West Bengal Taxation Tribunal Act, 1987 ("Act of 1987") exacted in exercise of the power conferred under Article 3238 of the Constitution of India and therefore, in view of Section 6 of the Act of 1987, the Taxation Tribunal created by the said Statute had. the exclusive jurisdiction to try and entertain the said dispute at the first instance. Mr. Kar submits that consequently, the grant of interim order was liable to be set aside as on the face of Section 6 of the Act of 1987, the learned Single Judge had no jurisdiction to entertain the writ-application.

11. Mr. Chatterjee, the learned senior advocate appearing on behalf of the writ-petitioners/appellants has, on the other hand, opposed the aforesaid contention advanced by Mr. Kar and has contended that in the writ-application, the writ-petitioners did not challenge any order of assessment passed by the respondent authority in accordance with the provisions contained in the Specified Act or the Rules framed thereunder but has impugned the illegal action on the part of the respondent authority as without jurisdiction being violative of the provisions contained in the Specified Act. In such circumstances, Mr. Chatterjee continues, the appellants had no scope of approaching the West Bengal Taxation Tribunal but its remedy lies by moving this Court under Article 226 of the Constitution of India. According to Mr. Chatterjee, by the action on the part of the respondent as reflected in Annexure P-1 and P-2 of the writ-application, the statutory right of his clients conferred under the Bengal Excise Act and the rules framed thereunder has been infringed and, thus, the learned Single Judge had

jurisdiction to entertain the writ-application.

12. Therefore, the preliminary question that arises for determination in these appeals is whether the writ-application filed by the writ-petitioners is barred in view of Section 6 of the Act of 1987 when the Bengal Excise Act, 1909 has been made a Specified Act under the said Statute.

13. In order to appreciate the said question, it will be profitable to refer to the provision of Section 6 of the Act of 1987, which is quoted below:

"6. Jurisdiction, powers and authority of the Tribunal.- (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, in respect of a State Act, with effect from the date on which such State Act is specified in the Schedule referred to in Section 6, all the jurisdiction, powers and authority exercisable immediately before that day by all Courts including the High Court but excluding the Supreme Court of India for adjudication or trial of disputes or complaints or offences with respect to all matters of levy, assessment, collection and enforcement of any tax under any specified State Act and matters connected therewith or incidental thereto :

Provided that where the matter relates to disposal of question of constitutional validity of any provision of any specified State Act, the matter shall be decided by a bench constituted of at least three Members of which the Chairman shall be one.

(2) Notwithstanding anything contained elsewhere in this Act, all proceedings triable by any Court or Courts in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall continue to be tried by such Court, and the Tribunal shall have no jurisdiction to try such proceedings.

Explanation. - For the purpose of this sub-section, proceedings shall include proceedings under Chapter XXIX and Chapter XXX of the Code of Criminal Procedure, 1973."

14. After hearing the learned counsel for the parties and after going through the materials on record, we find that in the writ-application, the writ-petitioner has challenged Annexure P-1 and P-2. By Annexure P-2, the writ-petitioner has been asked to deposit further amount in PL A/C as the respondents had deduced an amount of Rs. 35,40,305.40 p., as a result, the closing balance of duty paid PL A/C had come down to Rs. (-) 29,64,288.96 p. The writ-petitioner complained that such action is not in conformity with the Bengal Excise Act and the rules framed thereunder.

15. From the materials on record, it appears that the tanker containing rectified spirit had met with an accident and was brought to Dankuni Plant of the writ-petitioner where the tanker was unloaded on May 3, 2007 when the respondent authority after alleged investigation and measurement found the LPL of consignment was to be 33227.4 LPL and the received quantity was found to be 13944.3 LPL. The respondent authority, thus, concluded that the quantity of

19033.9 LPL after deduction of chargeable wastage was amenable to tax to the extent of Rs. 35,40,305.40 p. and the same was deducted from the duty paid PL A/C of the writ-petitioner. It appears that the total amount could not be realised from the writ-petitioner No. 1 because there was insufficient fund in the duty paid PL A/C.

16. The liability to maintain PL A/C is imposed under the provision of West Bengal Excise (Supply of Country Spirit on Payment of Duty to the Retail vendor) Rules, 2000 as provided in Rule 3 for giving security. Such rule is framed in exercise of the power conferred by Section 85 and Section 86 of the Bengal Excise Act. Once the respondent authority has deducted the amount from the PL A/C maintained by the writ-petitioner, it necessarily follows that they have charged the amount as tax payable under the provision of the Specified Act. Whether such deduction from the account is legal or not, in our view, can be decided only by the Tribunal after the amendment of the Act of 1987 by which the Bengal Excise Act was brought within the purview of the Specified Act. The decision of the respondents as reflected in Annexure P-1 and Annexure P-2 which has been questioned in the writ-application out of which these mandamus-appeals arise definitely comes within the purview of "adjudication or trial of disputes or complaints or offences with respect to all matters of levy, assessment, collection and enforcement of any tax under any specified State Act and matters connected therewith or incidental thereto" within the meaning of Section 6 of the Act of 1987.

17. We, therefore, find substance in the contention of Mr. Kar, the learned Advocate appearing on behalf of the Excise Commissioner that the writ-application was not maintainable before the learned Single Judge at the first instance before moving the Taxation tribunal created under the Act of 1987 in view of the decision of the Supreme Court in the case of L. Chandra Kumar Vs. Union of India and others,

18. Although Mr. Chatterjee, the learned senior advocate appearing on behalf of the appellant, tried to convince us on merit that the provisions contained in the Bengal Excise Act did not permit the respondent authority to deduct the amount from the PL Account of the writ-petitioner, in view of our aforesaid finding that the tribunal constituted under the Act of 1987 is the appropriate forum, we refrain ourselves from entering into the merit of the same.

19. It is, therefore, apparent that the learned Single Judge in the facts of the present case should not have entertained the writ-application as His Lordship had no jurisdiction to entertain the same and consequently, there was no scope of even granting any interim order on such a writ-application.

20. We, therefore, allow the appeal filed by the Excise Commissioner and dismiss the one filed by the writ-petitioner. In view of our finding recorded above, no purpose will be served by keeping the writ-application pending and thus, we dismiss the writ-application itself as not maintainable before the learned Single

Judge. The interim order granted earlier by this Court stands vacated. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, J.

I agree.

