
(2021) 02 JH CK 0139

In the Jharkhand High Court

Case No : Writ Petition(T) No. 6729 Of 2011

Central Coalfields Limited

APPELLANT

Vs

Custom Excise and Appellate Tribunal And Ors

RESPONDENT

Date of Decision : 17-02-2021

Acts Referred:

Companies Act, 1956 — Section 615
Central Excise Salt Act, 1944 — Section 11B

Citation : (2021) 02 JH CK 0139

Hon'ble Judges : Aparesh Kumar Singh, J;Anubha Rawat Choudhary, J

Bench : Division Bench

Advocate : Amit Kumar Das, Ashish Shekhar, Amit Kumar

Final Decision : Allowed

Judgement

Heard learned counsel for the petitioner Mr. Amit Kumar Das and Mr. Ashish Shekhar, assisting counsel to Mr. Amit Kumar for the respondent

Central Excise and Custom Department.

2. Petitioner's appeal no. E/3796/03 preferred against the order dated 11.09.2003 passed by the Commissioner, Customs and Central Excise

(Appeals), Nagpur in appeal no. 286 of 1999 was dismissed by the learned Customs Excise & Service Tax Appellate Tribunal (CESTAT), West

Zonal Bench at Mumbai by the order dated 17.02.2011(Annexure-5), impugned herein holding as under:

When this matter was called out, none appeared on behalf of the appellants. There is a request for adjournment from the accountant of the appellants.

2. On a perusal of the record, we find that the appellant is government of India undertaking, which is indicated on the letter head. If that is so, they are

supposed to file clearance certificate from the Committee on Disputes. In the absence of any such certificate, we are unable to take up the appeal for disposal. The appeal is dismissed for non-production of certificate from the Committee on Disputes. At the same time, liberty is granted to make an application for restoration as and when they get certificate from the Committee on Disputes.

3. Petitioner is a government company as defined under Section 615 of the Companies Act, 1956. A claim of its supplier M/s International Conveyers

Limited for refund of excess amount of excise duty for the period 22.04.1987 to 31.03.1994 was rejected by the Commissioner, Central Excise &

Customs, Aurangabad Division vide order dated 08.01.1996 for the reason that the duty has been passed on to the buyer. Its appeal was also rejected

on 21.03.1996 on the ground that claim for refund can at best be made by the buyer as provided under Section 11-B of the Central Excise Salt Act,

1944. Petitioner on coming to learn of the two orders, having realized that it was the petitioner who had suffered the loss due to realization of excess

excise duty, which was illegally collected by the respondent authorities, made a claim for refund before the Excise Department. The refund application

was rejected vide order dated 06.01.1999. The appeal bearing no. 286 of 1999 was also dismissed vide order dated 11.09.2003 by the Commissioner

(Appeals) Central Excise and Customs, Nagpur on the ground that appeal of the supplier M/s International Conveyers Limited was still pending before

the CESTAT. The impugned order has been passed thereafter on the appeal preferred by the petitioner against the order of Commissioner (Appeals).

4. Learned counsel for the petitioner submits that the appeal has been rejected by the learned CESTAT on the sole ground that petitioner had not been

able to produce the clearance certificate from the Committee on Disputes (COD). However, the learned Tribunal granted liberty for making an

application for restoration as and when the petitioner gets certificate from the COD. Learned counsel for the petitioner submits that the requirement of

obtaining clearance from the COD was done away with by the Constitution Bench decision of the Apex Court in the case of Electronics Corporation

of India Limited Vrs. Union of India and others reported in (2011) 3 SCC 404. He further submits that the same issue cropped up in the case of

Northern Coalfields Limited Vrs. Heavy Engineering Corporation Limited and another reported in (2016) 8 SCC 685, which was decided by the Apex

Court reiterating that absence of such permission was not a fatal defect. What was restrained under the previous dispensation in the light of judgment

of the three judges Bench by the Apex Court in the case of Oil and Natural Gas Commission and another Vs. Collector of Central Excise reported in

1995 Supp (4) SCC 541 was that progress in such suit, application or appeal till such time permission from COD was obtained shall remain restrained.

The absence of permission from COD was not a mandatory legal requirement for institution of the suit. It is submitted that the learned Tribunal

however, erroneously rejected the appeal on account of non-production of the clearance certificate from the COD.

5. Learned counsel for the petitioner has placed reliance upon a decision of this Court in the case of M/s National Buildings Construction Corporation

Limited, New Delhi Vrs. Commercial of Central Excise & Services Tax, Ranchi in Tax Appeal No. 29 of 2013 dated 10.12.2020 and submitted that in

more or less similar circumstances the order passed by the learned CESTAT dismissing the appeal preferred by the appellant therein, only on the

ground that permission had not been taken from the COD at the time of filing of appeal and till its disposal, was held to be not justified in law. Reliance

has also been placed on the decision of the Apex Court in the case of Electronics Corporation of India Limited (supra) and Northern Coalfields

Limited (supra). It is submitted that the impugned order may be set aside so that petitioner may have the liberty to approach the learned CESTAT for

restoration of the appeal and hearing on merits.

6. Learned counsel for the respondent department has submitted that the order of the learned Tribunal was dismissed both on account of non-

appearance of the appellant and on failure to produce the clearance certificate from the COD. However, learned Tribunal had granted liberty to the

appellant to seek restoration of the appeal as and when clearance is obtained from the COD. Learned counsel for the respondent however does not

dispute the legal position as settled by the decision of the Apex Court in the case of Electronics Corporation of India Limited (supra) and Northern

Coalfields Limited (supra) and followed in the case of M/s National Buildings Construction Corporation Limited, New Delhi (supra) by this Court in

T.A. No. 29 of 2013.

7. We have considered the submission of learned counsel for the parties and

gone through the materials on record including the impugned order. As the facts disclose, the learned Tribunal dismissed the appeal on the ground that clearance certificate of COD was not obtained. The legal position has been explained in this regard by the Apex Court in the case of Northern Coalfields Limited (supra) after referring to the decision rendered in the O.N.G.C. cases earlier and the decision of the Constitution Bench in the case of ECIL (supra) as also the office memorandum dated 12th June, 2013 issued by the Government of India, Ministry of Industries and Public Enterprises, Department of Public Enterprises wherein the earlier guidelines have been revised and para-13 requiring clearance from the COD have been deleted. This Court followed the decision in the case of National Buildings Construction Corporation Limited, New Delhi (supra) in T.A. No. 29 of 2013. The Apex Court had held that under the series of orders passed in ONGC cases in case of an inter corporation dispute or dispute between PSU and Ministry of Government, the aggrieved party could file a suit or a case or appeal before a Tribunal/ Court of Law but the only rider was that the concerned Tribunal or Court could not proceed with the suit so long the COD permission was not taken. This prohibition or rider in proceeding with the case or suit by a Tribunal or a court of law was lifted by virtue of the Constitution Bench decision in the case of ECIL (Supra) vide judgment dated 17th February, 2011. The legal position rendered by Hon'ble Supreme Court in the case of ECIL (supra) was further clarified in the case of Northern Coalfields Limited (Supra). The opinion of the Apex Court at para no. 23 to 25 in the case of Northern Coalfields Limited (Supra) is extracted herein below:

23. The net effect of the above can be summarized as under: 23.1. The Permanent Machinery of Arbitration was put in place as early as in March, 1989, even before ONGC-2 was decided on 11- 10-1991.

23.2. The Permanent Machinery of Arbitration was outside the statutory provision then regulating arbitrations in this country, namely, the Arbitration Act, 1940 (10 of 1940).

23.3. The award made in terms of the Permanent Machinery of Arbitration being outside the provisions of the Arbitration Act, 1940 would not constitute an award under the said legislation and would therefore neither be amenable to be set aside under the said statute nor be made a rule of the

court to be enforceable as a decree lawfully passed against the judgment-debtor.

23.4. The Committee on Disputes set up under the orders of this Court in the series of orders passed in ONGC cases did not prevent filing of a suit or

proceedings by one PSE/PSU against another or by one government department against another. The only restriction was that even when such suit or

proceedings were instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party

approaching the Court. 23.5. The time-limit fixed for obtaining such permission was also only directory and did not render the suit and/ or proceedings

illegal if permission was not produced within the stipulated period. 23.6. The Committee on Disputes was required to grant permission for instituting or

pursuing the proceedings. If the High-Powered Committee (COD) was unable to resolve the dispute for reasons to be recorded by it, it was required

to grant clearance for litigation. 23.7. The Committee on Disputes' experience was found to be unsatisfactory and the directives issued by the Court

regarding its constitution and matters incidental thereto were recalled by the Constitution Bench of this Court thereby removing the impediment which

was placed upon the court's/tribunal's powers to proceed with the suit/ legal proceedings. The Department of Public Enterprises has subsequent to the

recall of the orders in the ONGC line of cases modified its guidelines deleting the requirements for a COD clearance for resorting to the Permanent

Machinery of Arbitration; and 23.8. The Permanent Machinery of Arbitration was and continues to be outside the purview of Arbitration Act, 1940

now replaced by the Arbitration and Conciliation Act, 1996.

24. Let us now see the case at hand in the light of the above propositions. It is true that the disputes between the appellant and respondents were

referred for settlement in terms of the Permanent Machinery for Arbitration as early as in the year 1993/1994. It is also not in dispute that as on the

date of the said reference the Committee on Disputes was already set up but no permission for a reference was taken. That the Arbitrator made an

award under the Permanent Machinery of Arbitration which was questioned in appeals before the Law Secretary who made some alterations in the

same is also admitted. That the award so made has not been accepted by the appellants is also common ground inasmuch as the appellant has filed a

suit challenging an arbitral award in Civil Suit No.1709 of 2000 in which the

appellant claimed a declaration that the contracts were rendered null and void on account on the breach of Clause 3 thereof. The appellant also sought a declaration that the respondent company was not entitled to claim any relief under the said contract nor was respondent 2 entitled to do so and that the so- called arbitral award was vitiated on the face of record hence liable to be set aside. That such a suit could be filed but could not be proceeded with till such time the CoD granted permission is also beyond dispute as on the date of the institution of the suit the direction of this Court in ONGC group of cases still held the field. Such permission could be obtained within 30 days which was not sacrosanct but the institution of the suit itself could not be faulted as a litigant was in terms of the direction of this Court entitled to institute the proceedings to save limitation. The High Court has, all the same, rejected the plaint on the ground that permission from CoD was not obtained. In doing so the High Court obviously understood the direction of this Court to mean as though absence of such permission was a fatal defect which it was not. The orders of this Court to which we have made a reference earlier unequivocally make it clear that filing of the suit in itself was not barred. What was restrained was further progress in the suit till such time permission from the CoD was obtained. Inasmuch as the High Court considered the absence of permission from CoD to be a mandatory legal requirement for the institution of the suit it committed a mistake. No such legal requirement could be read into the judgment of this Court nor has any such requirement been pointed out by Mr. Ranjit Kumar, learned Solicitor General appearing before us.

25. The question then is whether the requirement of the clearance of CoD could be insisted upon even at this stage. Our answer is in the negative.

We say so because CoD stands abrogated/dissolved and the orders directing constitution of such a Committee reversed. Since there is no CoD at present there is no question of either obtaining or insisting upon any clearance from the same. The upshot of the above discussion is that the orders passed by the High Court rejecting the plaint on the ground that the same was not preceded or accompanied by permission from CoD is unsustainable, are hence, liable to be set aside."" (Underline supplied to add emphasis)

8. In the facts and circumstances discussed above and the above legal position, we are of the considered view that the learned CESTAT proceeded

on an erroneous understanding that the appeal instituted by the appellant could not be entertained since the COD permission had not been obtained.

Learned Tribunal gave a liberty to the appellant to seek restoration of the appeal after obtaining the COD permission. However, that requirement has

been done away with by virtue of the judgment rendered by the Apex Court. The reasoning of the learned Tribunal in dismissing the appeal does not

exist. The impugned order dated 17.02.2011 passed in E/3796/03 by the learned Customs Excise & Service Tax Appellate Tribunal (CESTAT), West

Zonal Bench at Mumbai (Annexure-5) is set aside. The matter is remitted to the learned CESTAT for hearing the appeal on merits.

9. The writ petition stands allowed in the manner indicated herein above.