(2012) 06 PAT CK 0001

In the Patna High Court

Case No : Misc. Appeal No. 477 of 2009

Commissioner of Central Excise, Govt. of India APPELLANT

Vs

M/s. Bharat Organics Ltd. RESPONDENT

Date of Decision : 28-06-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 85, 86(2)(a), 86(2A)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34(2)

Citation : (2013) 2 PLJR 782

Hon'ble Judges : Vikash Jain, J;Shiva Kirti Singh, J

Bench : Division Bench

Advocate : Nivedita Nirvikar and Mrs. Archana Sinha, for the Appellant; T.N. Maitin and Rajeev Kumar Sinha, for the Respondent

Judgement

Shiva Kirti Singh, J.—Heard the parties in detail with a view to dispose of the appeal finally on merits. This appeal has been filed u/s 35G of the Central Excise Act, 1944 by the Commissioner of Central Excise, Government of India, Patna against the order dated 1.4.2009 whereby the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata (hereinafter referred to as the Tribunal) has dismissed S.T. Appeal No. 37 of 2008 by a short order which runs as follows:--

Heard both sides. We find that the Revenue filed this appeal against the order-in-appeal. The present appeal is filed by Shri M.S. Badan, Commissioner of Central Excise, Patna, whereas the authorization by the Committee of Commissioners was in the name of Shri A.K. Sinha, Additional Commissioner of Central Excise, Patna. There is no authorization by the Committee of Commissioners as required u/s 86(2)(a) of the Finance Act, 1994 in favour of the officer who filed the appeal. Therefore, the appeal is dismissed.

2. On behalf of appellant it was fairly admitted that the appeal was in fact filed by the Commissioner of Central Excise, Patna, one of the members of the

committee of Commissioners and not by the person authorised by the Committee of Commissioners as required u/s 86(2A) of the Finance Act, 1994 which reads as follows:--

The Committee of Commissioners may, if it objects to any order passed by the Commissioner of Central Excise (Appeals) u/s 85, direct any Central Excise Officer to appeal on its behalf to the Appellate Tribunal against the order.

3. On facts it was explained that the necessity of filing the appeal by the Commissioner himself arose due to unexpected non-availability of the authorised officer and to avoid setting in of limitation. The stand of the appellant is that the particular requirement in Section 86(2A) of the Finance Act, 1994 is that the Committee of Commissioners, upon having objection to the order under its consideration is required to direct any Central Excise Officer to appeal to the appellate tribunal, which thus comprises of two distinct acts. The first act of deciding the merit of the order under consideration by the Committee is a substantial provision and is mandatory. But so far as act of the authorised officer requiring him to present the appeal is concerned, it is merely a procedural provision which should not be construed as mandatory so as to prevent decision of the appeal on merits and deny justice to the party concerned especially when consequence of presentation of the appeal by some other officer of the Department and not the authorised officer is not provided by the Statute.

4. On the other hand, learned counsel for the respondent has submitted that the purpose of the provision under consideration is to authorise a specific officer to prefer the appeal and therefore, appeal preferred by any other officer including the Commissioner, who may be a member of the Committee of Commissioners cannot be accepted as a proper filing of the appeal. According to respondent the literal meaning of the provision is clear and hence it requires no interpretation. The violation of the provision must lead to rejection of appeal without consideration on merits.

5. On behalf of appellant reliance was placed upon a Division Bench judgment of High Court of Gujarat in the case of Commr. of C. Ex. and Cus. Vs. Shree Ganesh Dyeing and Ptng. Works, and also upon another Division Bench judgment of Karnataka High Court in the case of Commissioner of C. Ex. Vs. I.T.C. Limited, in support of the proposition that non-filing of the appeal by the authorised officer will not render the appeal invalid and the Tribunal cannot dismiss the appeal on the ground of such defect. It is either to entertain the appeal on merits or to permit the appellant to cure the defect.

6. In reply to aforesaid submission learned counsel for the respondent pointed out that judgment of the Gujarat High Court in the case of Shree Ganesh Dyeing & Printing Works shows that the authorisation was made by the Commissioner as per provision of law existing prior to 13.5.2005 and that was a case in which the Commissioner who presented the appeal was also the delegator and hence he was found competent to present the appeal in place of the authorised officer. In

respect of judgment of the Karnataka High Court in the case of I.T.C. Limited a similar situation was existing because the delegator in that case was the Committee of Commissioners which had preferred the appeal in place of the authorised officer.

7. It is obvious that the facts of the two judgments considered above were different and in those facts it can be easily held that the filing of the appeal was by the delegator himself and therefore, suffered from no defect. In the present case authorisation was by a Committee of Commissioners of which only one member the Commissioner of Central Excise, Patna preferred the appeal in place of the authorised officer. Hence, in the present case the requirement of law was not carried out in strict terms. Hence we have to consider the other submission advanced on behalf of the appellant that non-compliance of the latter part of the provision should not be held as fatal to the appeal and the provision which indirectly requires filing of the appeal only by the authorised officer should be treated as directory requiring either only substantial compliance or it may be complied even subsequently by granting opportunity to the appellant to cure the defect.

8. To persuade us to accept the aforesaid submission, learned counsel for the appellant has placed reliance upon a judgment of the Supreme Court in the case of Mr. Shaikh Salim Haji Abdul Khayumsab Vs. Mr. Kumar and Others, . In that case the Supreme Court was called-upon to consider the amended provision of Order VIII Rule 1 of the CPC as amended by Amendment Act, 2002. The provision required filing of written statement within prescribed time. The maximum time for filing the written statement was prescribed clearly by using negative language implying mandatory character, but the Apex Court held the provision to be directory by explaining that the provision does not deal with the power of the Court and does not specifically take away its power to accept written statement though filed beyond prescribed period. It was further held that the nature of the provision was procedural and not substantive. In our view it would be useful to extract the views of the Supreme Court as expressed in paragraphs 11 to 16 of that judgment which deal not with the facts but as to how law in such circumstances needs to be interpreted:--

11. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating, in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

12. The mortality of justice at the hands of law troubles a Judge''s conscience and points an angry interrogation at the law reformer.

13. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence-processual, as much as substantive. [See Sushil Kumar Sen Vs. State of Bihar,].

14. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. [See Blyth vs. Blyth (1966)1 All. ER 524 (HL)]. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. [See Shreenath and Another Vs. Rajesh and Others,].

15. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

16. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words-- "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

9. On the other hand in support of his stand, learned counsel for the respondent placed reliance upon judgment of the Supreme Court in the case of Harbhajan Singh Vs. Press Council of India and Others, and another judgment in the case of AIR 2003 SC 2103 . In the case of Harbhajan Singh the provision under consideration and interpretation was a substantive provision relating to eligibility of a member under the Press Council Act. It was in an entirely different situation that the Court approved the well known principle of interpretation that ordinary, grammatical and full meaning should be assigned while interpreting the provision. The other case relating to U.P. Financial Corporation related to power of the Financial Corporation to opt between the proceedings under the Financial Corporation Act, 1951 or RDBI Act, 1993. Since the Statute had omitted to include option of proceeding under U.P. Act of 1972 for recovery of its debts, the Court held that it was a clear case where U.P. Act of 1972 cannot be read into Section 34(2) of RDBI Act, 1993. In support of such a stand the Supreme Court in paragraph 14 explained that principle of casus omissus cannot be applied and omission cannot be supplied by the Court except in the case of clear necessity

and when reasons for the same are found within the four corners of the Statute itself. In the present case the principle of casus omissus is not involved at all.

10. For coming to a decision in the light of rival submissions it is necessary to take note of Section 86(2A) of the Finance Act, 1994 already extracted hereinabove.

11. In our considered view, the earlier part of the provision with regard to the objection of the Committee of Commissioners contemplates formation of its substantial opinion after due application of mind, and is hence mandatory. It must be performed by the Committee of Commissioners of Central Excise and not by any other authority. This must be done before authorizing any Central Excise Officer for the purpose of filing the appeal. However, the latter part which requires directing any Central Excise Officer to act as the authorised officer for filing an appeal is clearly a procedural provision. The Committee of Commissioners may or may not direct any officer and instead may choose to file the appeal themselves. But once the Committee directs or authorises a particular Central Excise Officer to prefer an appeal on its behalf, ordinarily the authorised officer alone should prefer the appeal on behalf of the Committee of Commissioners. But in case for some unforeseen reasons the appeal has to be preferred by some other officer of Central Excise such as one of the Commissioners comprising the Committee of Commissioners, that in our view would be only a defect of procedure which shall not render the appeal invalid. Such defect may either be ignored in the facts of the case or may be cured by giving opportunity to the appellant to carry out corrections in the Memorandum of Appeal.

12. The reason for our taking such a view is based upon on a clear fact that the authorised officer does not decide any rights of any of the parties and does not have any substantive role in the matter of filing the appeal except to carry out clerical duties as per decision of the Committee of Commissioners. If he has to decide any issue so as to affect the rights of any of the parties, his role should not be permitted to be performed by any other officer, be it even a superior officer such as Commissioner. But in our view the authorised officer has no such role in the matter. In any case, as explained by the Apex Court in the case of Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Others (supra) all the rules of procedure must be handmaid of justice. Since the Statute does not prescribe any consequence and does not require dismissal of the appeal on account of its filing by an officer other than the authorised officer, the Tribunal in our view is required to give opportunity to the appellant to either produce the authorisation if wanting or to carry out necessary amendment so as to cure the defect by showing that the appeal has been preferred by an authorised officer. In case in spite of opportunity granted by the Tribunal the defect cannot be removed, then the Tribunal may have no option but to dismiss the appeal on the ground that it is filed by an officer who is not authorised to prefer the appeal. To illustrate and support this view, let us take an extreme case. An appeal though preferred by

the duly authorised officer, due to typographical error shows the name of the officer to be different. Interest of Justice would definitely require the Tribunal to permit necessary correction.

13. The view which we have taken for interpreting the relevant part of Section 86(2A) of the Finance Act, 1994 is also justified by another guiding rule of interpretation which requires due regard to be given to the subject matter and object of the statutory provision in question and also the Rule of purposive construction. In support of this principle the learned counsel for the appellant rightly placed reliance upon the judgment of the Supreme Court in the case of Girdhari Lal and Sons Vs. Balbir Nath Mathur and Others, .

14. The purpose of Section 86(2A) is to ensure that an appeal is preferred only against such orders which are found to be objectionable by a Committee of Commissioners of Central Excise i.e. by high ranked officers of the concerned Department. Thereafter once the appeal is filed pursuant to such decision, before the Tribunal, the law requires consideration of the appeal on merits which alone can serve the cause of justice. For not considering the appeal on merits there must exist very strong and compelling reasons permitted by law. In the scheme of the Act there are no such legal provisions which require dismissal of the appeal in a summary manner as has been done by the learned Tribunal. Clearly in the present case, the procedural requirement of filing of the appeal by a designated officer has been given overriding effect over substantive provisions and over the interest of justice which generally requires decision of an appeal on merits. Hence, in our considered view the order under appeal is against law. The learned Tribunal should have given opportunity to the appellant to correct the memo of appeal by showing that the appeal has been preferred by the Committee of Commissioners of Central Excise itself or by the officer duly authorised for preferring the appeal. Only if the defect is not removed in spite of grant of opportunity, the Tribunal may be justified in dismissing the appeal on the ground of such defect. Hence, the order under appeal is set aside. The matter is remitted back to the Tribunal for granting opportunity to the appellant to take steps to remove the defect within a reasonable time and if the defect is removed in the manner indicated above, then the appeal should be heard at an early date and decided on merits. This appeal is therefore allowed to the aforesaid extent only. There shall be no order as to costs.

