(2011) 01 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No. 9297 of 2010

DSL Enterprises Pvt. Ltd. APPELLANT

Vs

Commr. of C. Ex. and Cus. RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

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

Citation : (2011) 267 ELT 465

Hon'ble Judges : Mridula Bhatkar, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Chirag Balsara, Swati Deshpande and Rahul P. Jain, instructed by RES Legal, for the Appellant; M.I. Sethna and J.B. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—The short question raised in this writ petition is, whether the Appellate-Authority for Industrial and Financial Reconstruction, New Delhi (''AAIFR'' for short) by its order dated 28-9-2010 was justified in condoning the delay of seven days in filing the Appeal filed by the Respondents u/s 25 of the Sick Industrial Companies (Special Provisions) Act, 1989 (''SICA for short). The Appeal was filed by the Commissioner of Central Excise, Nashik on 2-2-2007 against the order dated 5-12-2006 passed by the Board for Industrial and Financial Reconstruction (''BIFR'' for short) sanctioning a Scheme of Rehabilitation under SICA.

2. Section 25 of the SICA reads thus:

Section 25(1): Any person aggrieved by an order of the Board made under this Act may, within 45 days from the date on which the 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 45 days but not after 60 days from the date aforesaid if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal in time.

3. There is no dispute that u/s 25 of SICA, the expression "within 45 days from the date on which the copy of the order is issued to him", means "within 45 days from the date of communication of the order". The dispute in the present case, is, regarding the date of communication of the order of BIFR dated 5-12-2006 to the Commissioner of Central Excise, Nashik. Notarized copy of the order of the BIFR dated 5-12-2006 was served on the Commissioner of Central Excise, Nashik on 13-12-2006. Authenticated copy of the order dated 5-12-2006 was dispatched by the BIFR on 7-12-2006 addressed to the Aurangabad Commissionerate. The Aurangabad Commissionerate received the said order on 12-12-2006 and after considering that the Petitioner''s unit does not fall under their jurisdiction, they forwarded the authenticated copy of the order dated 5-12-2006 to the Nashik Commissionerate which was received by the Nashik Commissioner-ate on 2-1-2007.

4. Challenging the order of BIFR, the Respondents filed an Appeal before the AAIFR on 2-2-2007. In the application seeking condonation of delay, the cause for the delay was stated thus:

01 The order was not received by the Commissionerate within reasonable time. It was dispatched by BIFR on 7-12-2006 and mis-sent to Aurangabad Commissionerate which was finally received at Nashik Commissionerate on 2-1-2007. Till the receipt of order in the Nashik Commissionerate i.e. the applicant was not aware of the order of the BIFR and therefore the appeal could not be filed within 45 days from the date of issue of the order. It is clear that there was sufficient cause for not filing the appeal within 45 days from the date of issue of order.

5. The Petitioners filed their reply opposing the application seeking condonation of delay. By an order dated 23-3-2007, the AAIFR condoned the delay without considering the objections raised by the Petitioners.

6. On a Writ Petition filed by the Petitioners, a Division Bench of this Court by its order dated 16-9-2008 set aside the order dated 23-3-2007 and directed the AAIFR to pass fresh order after considering the points raised by both the sides. Accordingly, the matter was heard afresh and by the impugned order dated 28-9-2010, the AAIFR condoned the delay of seven days in filing the Appeal beyond 45 days as the AAIFR is empowered to condone the delay upto fifteen days after 45 days from the date of communication of the order of BIFR.

7. The entire case of the Petitioners is that the impugned order dated 28-9-2010 has been passed by the AAIFR in gross violation of the order passed by this Court on 16-9-2008 wherein specific directions were given to consider the points raised by the Petitioners in their reply, however, the objections raised by the Petitioners have not been considered. It is further contended that the statement made by the Respondents in the application seeking condonation of delay that they were unaware of the order passed by the BIFR dated 5-12-2006 till 2-1-2007 was totally false, because notarized copy of the order dated 5-12-2006

was served upon the Commissioner of Central Excise, Nashik on 13-12-2006 and this fact has been suppressed by the Respondents. It is further contended that the AAIFR failed to consider that the above false statement does not constitute sufficient cause for not filing the appeal within the statutory period of 45 days and, therefore, the AAIFR was not justified in condoning the delay.

8. There is no dispute that the Commissioner of Central Excise, Nashik had received notarized copy of the order of BIFR on 13-12-2006, and authenticated copy of the order of BIFR on 2-1-2007. However, the AAIFR, by accepting the contention of the Petitioners held that 12-12-2006 i.e. the date on which the Aurangabad Commissionerate received the authenticated copy of the order of BIFR dated 5-12-2006 would be the relevant date for computing the limitation. Thus, receiving notarized copy of the order on 13-12-2006 and authenticated copy of 2-1-2007 loses significance once 12-12-2006 is considered to be the relevant date for computing the period of limitation for filing the appeal.

9. As per Section 25 of SICA, appeal against order of BIFR had to be filed within 45 days from receiving the order on 12-12-2006, that is, on or before 26-1-2007. However, the appeal was filed on 2-2-2007, that is, seven days after the expiry of 45 days. This delay of seven days could be condoned by AAIFR only if sufficient cause was shown.

10. This Court while remanding the matter back on 16-9-2008 had specifically directed the AAIFR to consider the points raised by both the sides and pass appropriate orders. The point raised by the Petitioners before the AAIFR was that firstly the statement contained in the application seeking condonation of delay that till the receipt of the order on 2-1-2007, the Commissioner of Central Excise, Nashik was not aware of the order of BIFR was totally false and secondly, the above false statement does not constitute sufficient cause for condoning the delay of seven days. Perusal of the order of AAIFR shows that neither of the above contentions have been considered and the AAIFR condoned the delay by making general observations.

11. In the ordinary course, we would have remanded the matter. However, considering the fact that this is the second round of litigation, we consider it proper to dispose off the application on merits without remanding the matter.

12. The only reason given in the application seeking condonation of delay is that, till the date of receipt of the authenticated copy of the order of BIFR on 2-1-2007, the Commissioner of Central Excise, Nashik was not aware of the order passed by the BIFR and, therefore, the appeal could not be filed within 45 days. The above reason apart from being incorrect, does not constitute sufficient cause for condoning the delay, because, even if the authenticated copy was received on 2-1-2007, why the appeal could not be filed on or before 26-1-2007 ought to have been set out in the application seeking condonation of delay.

13. Failure to set out reasons for the delay in the application seeking condonation of delay shows complete callousness and dereliction of duty on the part of the

Officer who had affirmed the application seeking condonation of delay. It is high time that appropriate action is taken against such officers who perform their duties casually and without application of mind.

14. For the first time before this Court in reply to the present Writ Petition, it is brought on record that initially the appropriate authority on [29-1-2007] decided to accept the order of BIFR and thereafter on re-examination decided to contest the order of BIFR on the ground that the said order is prejudicial to the interest of the Revenue. Accordingly, the appeal was filed on 2-2-2007. Though these facts on record were not set out in the application seeking condonation of delay, we cannot ignore these facts which are now brought to our notice. In our opinion, these facts constitute sufficient cause for condoning the delay of seven days.

15. Dealing with the allegation of making false statement, it is contended by the Revenue that for computing the period of limitation, the relevant date is the date of receiving authenticated copy of the order and not the date on which the notarized copy of the order was received. Seen in this context, the statement made in the application that prior to 2-1-2007 the Respondents were not aware of the order of BIFR cannot be said to be a false statement, because, what was received prior to 2-1-2007 was a notarized copy and not the authenticated copy of the order dated 5-12-2006. No doubt that the above inaccurate statement made in the application seeking condonation of delay does not amount to showing any cause much less a sufficient cause for condoning the delay of seven days.

16. Therefore, in the facts of the present case, though the inaccurate statement contained in the application seeking condonation of delay does not constitute sufficient cause for condoning the delay, in view of the material now brought on record, we uphold the order of AAIFR in condoning the delay of seven days in filing the appeal.

17. Strong reliance was placed by the learned Counsel for the Petitioners on the decision of the Apex Court in the case of Pundlik Jalam Patil v. Executive Engineer, Jalgaon reported in (2008) 17 SCC 448. In that case, acquisition proceedings initiated by the State Government under the Land Acquisition Act for the benefit of Jalgaon Medium Project culminated into an award on 31-3-1999. Reference application filed by the owners of the land against the award was disposed off on 9-3-2000 by enhancing the compensation. On 24-3-2000, the Government Pleader recommended that it was a fit case for filing an appeal against the grant of enhanced compensation. On 13-4-2000, the Law Department decided to accept the decision of the Reference Court. Thereafter, the Special Land Acquisition Officer on 31-5-2001 addressed a letter to the Principal Secretary, Law Department to review their order dated 13-4-2000. The Government declined to review their order. Thereafter, the beneficiary made arrangements to deposit the decretal amount in May 2001 itself. However, the beneficiary filed an appeal on 25-2-2005 against the enhancement of

compensation along with an application seeking condonation of delay of 1724 days. In those circumstances, the Apex Court held that the cause shown was false and that the delay could not be condoned. In the present case, admittedly after receipt of the authenticated copy of the order on 2-1-2007, decision was taken on 1[29-1-2007] to accept the order of BIFR, however, subsequently on reconsideration it was decided to file an appeal against the order of the BIFR and accordingly the appeal was filed on 2-2-2007. Therefore, the decision of the Apex Court in the case of Pundlik Patil (supra) is distinguishable on facts.

18. Reliance was also placed by the counsel for the Petitioners on the decision of the Apex Court in the case of Balwant Singh (Dead) Vs. Jagdish Singh and Others, , particularly para 12, 37 and 38 of the said judgment. As held by the Apex Court in para-37 of the said judgment, the decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation. Applying the above ratio to the facts of the present case, it becomes clear that the facts now brought on record constitute sufficient cause for condoning the delay.

19. In the result, we hold that the inaccurate statement contained in the application seeking condonation of delay did not amount to showing sufficient cause and the AAIFR was not justified in condoning the delay without considering the inaccurate statement contained in the application seeking condonation of delay. However, on the basis of the material now placed on record, we hold that there was sufficient cause and the delay of seven days in filing the appeal deserves to be condoned.

20. Accordingly, the writ petition fails and the same is dismissed with no order as to costs.

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1 Corrected vide Bombay High Court order dated 17-2-2011