
(2010) 02 CAL CK 0064

In the Calcutta High Court

Case No : A.P.O.T. No. 447 of 2009 with W. P. No. 483 of 2009

Guwahati Carbon Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 19 GSTR 502

Hon'ble Judges : Kalyan Jyoti Sengupta, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : Ramesh Chowdhury and Ms. Saswati Joarder, for the Appellant; Roychowdhury, for the Respondent

Judgement

1. This appeal has been taken out against a very cryptic judgment and the order dated November 16, 2009 of the learned trial judge by which the writ petition was disposed of granting liberty to the petitioner to file an appeal before the Division Bench of this court. This writ petition was filed before the learned trial judge challenging the judgment and the order of the learned Tribunal concerned. The hon''ble trial judge at the time of admission in the presence of the learned counsel for the respondent heard the matter and decided to hear the same on merit. We appropriately quote the first order passed on June 17, 2009:

In this writ application the petitioner has challenged Order No. A/ 181 and 182/ Kol/09, dated April 8, 2009 of the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata in Excise Appeal No. EDM/435 of 2005; Excise Appeal No. EDM/436 of 2005; and Cross-objection No. 139 of 2005. The challenge to the impugned order is on a question of law and involves interpretation of the precedents referred to in the said order. This court, therefore, does not think it necessary to call for affidavits. The writ petition is fixed for final disposal on July, 2009 at 2 p.m.

Affidavits not having been called for, the allegation contained in the petition shall be deemed not to have been admitted.

2. Thus, it is clear that the intention of the learned trial judge was to hear out the matter and as such discretion was exercised in that direction.

3. Appearing in support of the appellant led by Mr. Ramesh Chowdhury, Ms. Saswati Joarder submits when the hon'ble trial judge at the threshold in exercise of discretion in the presence of the learned counsel was satisfied that it was a fit case to be decided on merit in the writ jurisdiction but on the subsequent date the writ petitioner should not have been non-suited on the plea of alternative remedy. According to her the provision of statutory appeal meaning thereby alternative remedy is not a bar to the jurisdiction of article 226 of the Constitution of India.

4. Mr. Roychowdhury, learned senior counsel appears for the respondents and submits that the Tribunal has dealt with the matter both on the facts and law in detail and the writ court is not the appropriate forum to entertain the grievance of the writ petitioners. In other words, he submits that the hon'ble trial judge on the second day could realise that the discretion exercised earlier in entertaining and admitting the writ petition is not appropriate and as such the impugned order was passed. According to him there is no affectation of the right by the impugned judgment and order which cannot under any circumstances be termed to be a judgment within the meaning of clause 15 of the Letters Patent. He submits that by necessary implication adjudication of this matter in the writ jurisdiction by the court is excluded.

5. We deal with the question of appealability first as it is urged it is not the judgment within the meaning of clause 15, since nothing has been decided on merit. We find this contention needs some consideration of this court. True, the impugned judgment and the order has not dealt with the merit of the case but that does not mean, according to us, that it cannot be said to be a judgment within the meaning of clause 15 of the Letters Patent. It is settled law that the question of exercise of jurisdiction and failure to exercise the same are also points to be dealt with in an appeal and it partakes the character of the judgment within the meaning of clause 15 of the Letters Patent. Besides the order of dismissal of the writ petition on any ground reaches finality of lis which is one of the conditions to test the meaning of the word "judgment".

6. Here, the learned trial judge, at the first instance, admitted the hearing of the writ petition on consideration of prima facie facts and law and subsequently, according to us, the learned trial judge ought not to have refused to hear the matter on the plea of alternative remedy.

7. It is settled position of law, which does not need any elaboration, that the existence of alternative remedy is not a bar in exercise of jurisdiction under article 226 of the Constitution of India. No statute can touch this plenary constitutional power of the High Court which is a basic feature of the Constitution, either expressly or by necessary implication. The writ court, in its wisdom, may entertain a writ petition in a given facts and circumstances of the

case. Once it is done, the writ court cannot refuse to hear the matter and it has to be heard within the parameters of power of judicial review and not by way of appeal. No doubt, the scope of the appellate jurisdiction is much wider than that of the power of the judicial review in the public law field. We do not think how the power of judicial review is to be exercised in the public law field needs to be elaborated for the guidance of the learned trial judge.

8. We, therefore, set aside the impugned order and remand the matter for hearing in terms of the earlier order dated June 17, 2009. We record that we have not decided anything on the merit of the case. It would be heard out afresh without being influenced or swayed by any observation of this court.

9. We accordingly desire that the matter may be heard out afresh within eight weeks from the date of drawing attention of the hon"ble trial judge, to this order.

10. The appeal is accordingly disposed of. All parties are to act on a xerox signed copy of this order on the usual undertakings.