

(2023) 08 BOM CK 0070
In the Bombay High Court
Case No : Writ Petition No. 13084 Of 2022

IDFC First Bank Ltd

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 22-08-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Right To Information Act, 2005 — Section 19

Finance Act, 1994 — Section 73(1), 73(2)(a), 73(4A), 73(4B), 73(4B)(a), 73(4B)(b)

Citation : (2023) 08 BOM CK 0070

Hon'ble Judges : G. S. Kulkarni, J; Jitendra Jain, J

Bench : Division Bench

Advocate : Sriram Sridharan, Shanmuga Dev, Jitendra B. Mishra, Ashutosh Mishra, Umesh Gupta, Sangeeta Yadav

Final Decision : Allowed

Judgement

G. S. Kulkarni, J

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

2. This petition under Article 226 of the Constitution of India has again brought to the fore an issue of delayed adjudication of show cause notice dated 12 March 2010. In the facts and circumstances of the case, it is prayed that the same be quashed and set aside, considering the principles of law on delayed adjudication of a show cause notice.

3. This case would remind us of our observations in the decision in Coventary Pvt. Ltd. vs. The Joint Commissioner CGST and Central Excise & Anr. 2023(8) TMI 352-Bombay High Court wherein we observed that time and tide wait for none. It was observed that pendency of a show cause notice not only weighs against the legal rights and interest of an assessee, but also would adversely affect the interest of the revenue, which is a pure public interest, if prompt

adjudication of the show cause notice is not undertaken. In the context of the present case, our observations we intend to underscore are that 'a lapse of time and certainly a long lapse of time is likely to cause irreversible changes frustrating the whole adjudication.' In our opinion, the present case is a fit case in the context of such observations as made by us. The peculiar facts of the case would unfold the saga.

4. Infrastructure Development Finance Co. Ltd. (IDFC Ltd.) is the original entity to whom the show cause notice in question dated 12 March 2010 was issued by the Commissioner of Service Tax, Mumbai – respondent No.2. It appears from the record that the show cause notice having remained to be adjudicated, has weighed against the interest of the revenue on account of certain irreversible changes, taking place at the noticee's end, inasmuch as on 25 June 2015 IDFC Ltd. stood merged with a new entity, namely, IDFC Bank Ltd., under the orders dated 25 June 2015 passed by the High Court of Judicature at Madras. Subsequent thereto, there was a further significant restructuring of the new company IDFC Bank Ltd., inasmuch as another company known as Capital First Limited, a non banking finance company, was merged with IDFC Bank Ltd. By virtue of such merger, a new merged entity known as IDFC First Bank Ltd. stood enacted, i.e., the petitioner. This change occurred under the order dated 12 December 2018 passed by the National Company Law Tribunal (NCLT).

5. It is on the above backdrop, the petitioner which was completely unaware about the existence of the impugned show cause notice, received an intimation dated 29 March 2022 from the office of respondent No.2 calling upon the petitioner for a personal hearing on 19 April 2022 at 2. 30 p.m. by video conferencing. Such notice admittedly was issued after almost 12 years of the issuance of the show cause notice and more particularly to the petitioner, which certainly in law was not the original noticee.

6. In such circumstances, the petitioner has contended that it would not be permissible for respondent No.2 in peculiar facts and circumstances of the case to adjudicate the show cause notice dated 12 March 2010 now after about 12 years, and that too, a show cause notice not issued to the petitioner but to a different legal entity i.e. IDFC Ltd. which itself had lost its existence in the year 2015 about 7 years, prior to the notice for personal hearing being issued on 29 March 2020. The petitioner in so contending would be correct, as the letter/notice dated 29 March 2022 was issued by the office of respondent No.2 intimating of a hearing being fixed, was itself addressed to IDFC Ltd. (a non-existent entity), which is certainly not the petitioner. It is ill-conceivable that merely for the adjudication of the show cause notice in question, IDFC Ltd. would have a re-birth, this cannot happen either factually or in law.

7. The petitioner in such circumstances was justified in contending before respondent no. 2 that the petitioner does not possess any record in relation to the show cause notice, and to request respondent No.2 to provide all copies of the documents pertaining to the show cause notice by its letter dated 22 May

2022. However, on such letter, the petitioner was orally informed that the impugned show cause notice has been kept in the call book in the year 2010. However, no such reason or rationale was furnished for keeping the matter in the call book, at any point of time. Such contention of the petitioner is although disputed by the respondents.

8. In the above circumstances, the petitioner has stated that it was constrained to file an application with the respondents under Right to Information Act seeking copies of all the personal hearing notices, copy of intimation letter issued to erstwhile entity as also a copy of the show cause notice and other relevant documents. However, such information was not provided to the petitioner. In fact, petitioner's request was denied by a letter dated 23 June 2022 issued by the Assistant Commissioner, CGST & CE, Divison-VIII, Mumbai-South addressed to the representative of the petitioner Mr.Bipin Narendra Gemani. The contents of the said letter read thus:

"To,

Mr. Bipin Narendra Gemani,

101/102, Satyanarayan Bhavan, 7/1,

Dr. R. G. Thandani Marg,

Worli,

Mumbai-400018.

Dt. 23 June, 2022

Sir,

Subject: RTI Application dated 10.06.2021 filed by Shri. Bipin N. Gemani (Received in this office on 15/06/2022)-reg.

Please refer to RTI application dated 10.06.2022 (received in this office on 15.06.2022) through Assistant Commissioner (CPIO), CGST & CX, Mumbai South vide letter F.No. M. South/RTI/ Bipin N. Gemani/220/2022 dated 20.06.2022.

In this regard, it is to inform that as per available record is no such requisite information notices in the jurisdiction of Division – VIII, hence, please be treated as 'NIL' report i.r.o. the above mentioned subject.

As per Section 19 of TRI Act,2005, if you are not satisfied with the reply given above, you may file an appeal within 30 days from the date of receipt of this reply with the First Appellate Authority, whose particulars are as under:-

Shri. Rajiv Garg,

Additional Commissioner (First Appellate Authority) CGST & C.Ex., Mumbai South Commissionerate 13th Floor, Air India Building, Nariman Point, Mumbai-400021.

Yours faithfully,

(Avinash Kumar Pandey)

Assistant Commissioner

CGST & CE, DIVISION-VIII,

Mumbai South"

9. It is on such backdrop, the petitioner was served with another notice dated 2 June 2022 calling upon the petitioner for personal hearing on 22 June 2022 at 12.30 p.m. or on 23 June 2022 at 12.30 p.m. by video conferencing. In the absence of any information and documents, the petitioner by its letter dated 16 June 2022 addressed to respondent No.2 sought an adjournment on the ground that the petitioner was awaiting reply of the RTI application which we have noted above, which came to be rejected, later on i.e. on 23 June 2022. A further notice dated 7 July 2022 was issued to the petitioner, posting the matter for hearing on 20 July 2022 at 12.30 p.m. through video conferencing.

10. In such circumstances, the petitioner filed the present petition on 18 July 2022 challenging the show cause notice inter alia on the ground that it was not permissible for respondent No.2 to have such delayed adjudication on the show cause notice issued to IDFC Ltd. The petitioner, accordingly, has prayed for the following substantive reliefs:-

"(a) writ of mandamus or certiorari or writ in the nature of mandamus or certiorari or any other appropriate writ, order or direction calling for records of impugned show cause notice dated 12.03.2010 (Exhibit A) and quashing and setting aside the same."

11. A reply affidavit is filed to the petition. Mr.Mishra, learned Counsel appearing for the respondents has made submissions opposing the petition. He has drawn our attention to the justification which is sought to be furnished by the department on such delayed adjudication by referring to the averments as made in paragraph 7 of the reply affidavit in which the respondent No.2 has averred that IDFC was given personal hearing on 6 August 2013, however, record of personal hearing memo is not in the file of respondent no. 2. It is stated that hearing was again given on 9 August 2013, however, no one appeared for hearing for IDFC Ltd. Therefore, another hearing was scheduled on 9 October 2013 when a noticee had requested for adjournment on or after 16 October 2013. It is stated that the noticee was heard on 20 February 2014 as per the record of personal hearing memo kept in the file. However, again the same was re-fixed on 17 March 2015 which was again adjourned at the request of the noticee to 14 April 2015, and thereafter, on 27 April 2015. Then again the noticee was heard on 21 May 2015.

12. If such are the averments in the reply affidavit, we wonder as to why respondent No.2 kept on granting requests of IDFC Ltd. for adjournment and did

not pass appropriate order and/or final orders on the show cause notice. There is no justification whatsoever or any reason set out for such lapse/inaction of respondent no. 2, which would be acceptable, as set out in the reply affidavit, which can be accepted as a plausible reason preventing the Commissioner from passing appropriate orders for a period of almost five years upto May 2015. We may also note that there is no justification whatsoever for the inaction of the officer from 21 May 2015 to 10 June 2022 when the recent notice came to be issued.

13. The next purported justification, which is of relevance and as canvassed by Mr. Mishra is referring to the contents of paragraph 14 to 16 of the reply affidavit, which is in the nature of legal submissions referring to Section 73(4B) of the Finance Act, 1994. To appreciate the contention as urged by Mr. Mishra, it would be appropriate to note the case of the respondent in such paragraphs of the reply affidavit, so as to enable us to deal with Mr. Mishra's submission in such context:-

"14. With reference to ground B1 to B5 of the petition the respondents state that the petitioner is pleading that as per section 73(4B) of Finance Act, 1994, SCN should have been decided within time limit prescribed and preferably within one year and as the case was kept pending, they have suffered irreparable prejudice. The Section 73(4B) of the Finance Act merely states that the cases where suppression etc are invoked may be decided within one year as far as possible. Thus the said Section does not make it mandatory to decide the cases within one year. Further, though the case was pending decision for long, it did not cause any prejudice to the petitioner as the case is based on records and law during the relevant time. There is nothing illegal if the case is decided beyond one year of the issue of SCN.

15. With reference to ground B6 to B8 of the petition the respondents state that it is true that hearing did take place in February 2014. There is no reason forthcoming from the note sheet which could be attributed for not deciding the case. However the plausible reason which could be assigned is cadre-restructuring/formation of new Commissionerate of Service Tax-I and Service Tax-II in 2014, when files were transferred due to change in adjudicating authority, necessitating fresh personal hearing.

16. With reference to ground C1 to C2 of the petition the respondents state that the petitioner cited various Board's Circular and argued that once hearing is concluded, order in the case should be passed expeditiously, however, Section 73(4B) of the FA merely states that the cases where suppression etc are invoked may be decided within one year as far as possible. Thus the said Section does not make it mandatory to decide the cases within one year. So, there is nothing illegal if the case is decided beyond one year of the issue of SCN."

(emphasis supplied)

14. In short, the contention of the respondent is to the effect that Section 73(4B)

does not make it mandatory to decide the cases in one year and a notice can very well be decided beyond one year of its issuance. In facts of the case, even referring to the provisions of Section 73(4B) which are brought on the Statute book by an amendment made to the Finance Act, 1994 by the Amendment Act No. 2 of 2014, such contention as canvassed by the deponent of the reply affidavit and as canvassed by Mr. Mishra cannot be accepted. It would be appropriate to extract sub-section (4B) of Section 73, which reads thus:

"Section 73 - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

.....

(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)]."

15. From a plain reading of the provisions of Section 73(4B) and more particularly, in the context of the legislative intent in introducing sub-section (4B), we cannot accept such contention as urged by the respondent that there is no mandate on the concerned officer of the department to decide the show cause notices expeditiously, and / or the timelines which are set out in sub-section (4B) would be required to be held to be merely directory, as the provision would make an allowance for a belated adjudication of the show cause notice. In our opinion, such contention as urged on behalf of the respondent would militate against the plain reading of sub-section (4B) when it pointedly provides that the Central Excise Officer "shall" determine the amount of service tax due under Section 73(2), which in Clause (a) thereof provides for the timelines, namely, within six months from the date of notice where it is possible to do so, in respect of cases falling under Section 73(1); and secondly, when it provides that such determination be made within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to Section 73(1) or the proviso to Section 73(4A).

16. We may observe that the legislature providing that the determination be made within six months from the date of the notice as provided for in clause (a) of sub-section (4B) is concerned, cannot be read to nullify or attaching no weightage to the timelines so prescribed. It can however, be acceptable that a reasonable / plausible delay beyond six months may in a given case be justified depending on the facts and circumstances of the case, for reasons which do not make it possible for the adjudicating officer to conclude the proceedings of the show cause notice. This can be for reasons which are acceptable in law which a

reasonable body of persons would accept to be absolutely justifiable, considering the duration of such period. This would certainly not mean that it can be an unexplained, unjustified, unreasonable and an inordinate delay. The same principle would apply to clause (b) of sub-section (4B) of Section 73.

17. We may also observe that when the legislature uses the words 'where it is possible to do so' in clauses (a) and (b), the legislature is conscious of some free play which is required to be made available to the adjudicating officer. However, such limited relaxation cannot be intended to mean that it would defeat the sanctity and purpose for which the period of six months and one year has been set out to clause (a) and (b) of sub-section (4B). The word 'where it is possible to do so' thus cannot be read to defeat the timelines of six months and one year as set out in clauses (a) and (b) of sub-section (4B). Also these words cannot be construed to mean that by use of such words a complete freedom is available to the adjudicating officer to adjudicate the show cause notice at his own sweet will, much less, with such inordinate delay as in the present case which is of almost more than 12 years.

18. If the interpretation of the provisions as canvassed on behalf of the revenue is accepted, it would tantamount to defeating the well settled principles of law that a show cause notice is required to be taken to its logical conclusion within a reasonable period of time and expeditiously, as a show cause notices issued under any fiscal legislation and concerning recovery of revenue would have a very serious concern and bearing on the public revenue. Hence, there cannot be any laxity much less any lethargic approach on behalf of the officers is delaying adjudication of such notices. The legislative provisions which intend to bring about an expeditious and effective adjudication of a show cause notice cannot be defeated by the officers sitting tight on the show cause notice and/or not expeditiously taking them to the logical conclusion. Such is the view repeatedly taken in series of judgments of this Court, to which a detailed reference has been made by us in our decision in *Coventry Pvt. Ltd. (supra)*. These are decisions in *ATA Freight Line (I) Pvt. Ltd. vs. Union of India & Ors.* Writ Petition No.3671 of 2022 against which Special Leave Petition (Civil) Diary No. 828 of 2023 filed by the Union of India came to be dismissed by the Supreme Court; in *CMA-CGM Agencies (India) Pvt. Ltd. vs. Union of India & Ors.* Writ Petition No. 1313 of 2021; in *Shreenathji Logistics vs. Union of India & Ors.* Writ Petition No. 540 of 2020; in *Sushitex Exports (India) Ltd. & Ors. vs. Union of India & Anr.* 2022 SCC Online Bom. 191 ; in *Sanghvi Reconditioners Pvt. Ltd. vs. Union of India*, through the Secretary, Department of Revenue & Ors. 2017 SCC Online Bom 9781 ; in *Reliance Industries Ltd. vs. Union of India* 2019 (368) E.L.T. 854 (Bom.) ; in *Parle International Ltd. vs. Union of India* 2021 (375) E.L.T. 633 (Bom.) and in *Bombay Dyeing and Manufacturing Company Limited vs. Deputy Commissioner of CGST and CX, DIV-IX, Mumbai Central GST Commissionerate* 2022 (382) E.L.T. 206(Bom.).

19. In paragraphs 15 and 16 of our judgment in *Coventry Pvt. Ltd. (supra)*,

dealing with the provisions of Section 73(4B)(a), the Court had observed thus:-

15. Considering the plain consequences, Section 73(4B)(a) and (b) would bring about, it would be an obligation on the Central Excise Officer to determine the amount of service tax due under sub-section (2), within six months from the date of notice or within a period of one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A). Thus, the statute itself prescribes for such period within which the service tax would be required to be determined. Sub-section (1) of Section 73 would also be relevant when it restricts the liability to service tax, to the period of five years under the situations falling below the proviso to sub-section (4) in cases of fraud, collusion, wilful mis-statement, suppression of facts, contravention of any of the provisions of Chapter V of the Finance Act, 1994.

16. We are thus of the opinion that there has to be a holistic approach and reading of the provisions of Section 73, when it concerns the obligation and repository of the power to be exercised by the concerned officer to recover service tax, in adjudicating any show cause notice, issued against an assessee considering the *raison d'être* of the provision. It is hence expected that the approach and expectation from the officer adjudicating the show cause notice would be to strictly adhere to the timelines prescribed by provisions of the Act, as there is a definite purpose and intention of the legislature to prescribe such time limits, either under Section 73(4B) of six months and one year respectively or of five years under Section 73(1)."

20. We are thus in complete agreement with Mr.Sridharan, learned Counsel for the petitioner, that in the facts of the present case, long lapse of time has caused irreversible changes, for the revenue to adjudicate the show cause notice inasmuch as the original noticee – IDFC Ltd. itself has ceased to exist. We are not shown any acceptable reason in facts or in law, which would make it possible for respondent no. 2, in such circumstances, namely, of two statutory events of merger and amalgamation having taken place, to subrogate the petitioner for IDFC Ltd. for adjudicating the show cause notice nor can the petitioner effectively participate in the belated adjudication of such show cause notice, by having a reasonable chance of defending the same in the absence of any material available to the petitioner, as noted by us above, even assuming the original noticee was to

21. Before parting we may record that we are at pains to note the approach of respondent No.2 - Commissioner who had issued the notice, of not taking the notice to its logical conclusion, by virtue of which a situation has arisen that the notice cannot be taken forward, as the noticee itself has ceased to exist as a legal person. Thus, looked from any angle, not only considering the principles of law which would be applicable on such delayed adjudication of show cause notice, but also, on the facts of the present case, we are of the clear opinion that the show cause notice cannot proceed further and/or has stood frustrated by the

inaction conduct of respondent no. 2. Hence, it would be required to be quashed and set aside.

22. The petition accordingly succeeds. It is allowed in terms of prayer clause (a).

23. Rule is made absolute in the above terms. No costs.