(2015) 08 RAJ CK 0132

In the Rajasthan High Court

Case No : Civil Writ Petition No. 27 of 2009

Lords Chloro Alkali Ltd. APPELLANT

Vs

Commissioner of C. Ex. , Jaipur-I RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35F

Citation : (2015) 326 ELT 490

Hon'ble Judges : Ajay Rastogi and Anupinder Singh Grewal, JJ.

Bench : Division Bench

Advocate : S.S. Hora, for the Appellant; Tej Prakash Sharma, for the Respondent

Judgement

1. Instant petition has been filed assailing order dated 12-4-2007 passed by the Customs, Excise & Service Tax Appellate Tribunal in Restoration Application No. 50/2007 and for restoration of Central Excise Appeal No. 903/2006. The petitioner, as alleged was producing Caustic Soda through Mercury Cell Technology in the year 1983, however, enhanced its commercial production of Caustic Soda in the year 1994-95 through Hydrogen Gas which earlier emerged during the production of Caustic Soda which could be used in the edible products like in solvex plants. It has been alleged in the petition that petitioner-company was declared sick by BIFR vide order dated 15-1-2002. The scheme of its rehabilitation with reliefs and concession was sanctioned on 30-11-2006 by BIFR and during pendency of the writ petition on 26-3-2010 on company''s net worth becoming viable it was deregistered by BIFR with direction to implement the provisions of the sanctioned scheme including relief/concession of the Government agencies but because of the lack of funds, the petitioner-company closed from July, 2011 till January, 2015 and has now started production from February, 2015 and only because of the long consistent financial hardship, it could not make pre-deposit in compliance of the order passed by the CESTAT u/ Sec. 35F , dated 27-4-2006.

2. A show cause notice dated 9-2-2005 came to be issued by the Deputy

Commissioner of Central Excise, Alwar for recovery of duty and imposition of penalty and after affording opportunity of hearing, the adjudicating authority vide its order dated 27-6-2005 confirmed the Excise Duty of Rs. 12,63,598/- along with the penalty of Rs. 1,00,000/-. The petitioner-company being aggrieved by the order-in-original, filed appeal before the Commissioner (Appeals) which came to be rejected vide order dated 8-12-2005 and that came to be challenged in appeal before the Central Excise & Service Tax Appellate Tribunal (CESTAT) along with stay application under proviso to Sec. 35F of the Central Excise Act for waiver of pre-deposit and stay of duty and penalty imposed originally by the adjudicating authority and confirmed by the Commissioner (Appeals).

3. The CESTAT vide its order dated 27-4-2006 [, 2006 (204) E.L.T. 442 (Tri. - Del.)] on stay application filed by the petitioner u/Sec. 35F of the Act disposed of the application directing the petitioner-company to deposit 50% of the duty and penalty within six weeks to entertain the appeal before 21-6-2006 failing which the appeal before the CESTAT will stand dismissed.

4. In all fairness, counsel for the petitioner submits that the jurisdiction to question the order of CESTAT lies before the Rajasthan High Court but on the ill advise extended to the petitioner, the order dated 27-4-2006 came to be challenged by filing of Writ Petition No. 10553/2006 before the High Court of Delhi but before there could be any order passed on the writ petition filed before the High Court of Delhi, the Commissioner, CESTAT dismissed the appeal vide order dated 21-6-2006 as the order dated 27-4-2006 was not complied with by the petitioner on 21-6-2006 itself and the writ petition was disposed of by the High Court of Delhi vide order dated 4-12-2006 holding that since the appeal before CESTAT was dismissed on 21-6-2006 and the petitioner has remedy against dismissal of appeal, it does not require any further consideration.

5. Since the appeal came to be dismissed by the CESTAT because of non-compliance of the order dated 27-4-2006 on the last date of its compliance i.e. on 21-6-2006 and the earlier writ petition also came to be dismissed, the petitioner was advised to file a fresh writ petition before the High Court of Delhi being Writ Petition No. 1097/2007 and that came to be dismissed as withdrawn on 13-3-2007 in view of the fact that question of law raised before the High Court of Delhi has already been raised before the CESTAT by filing of review/ recalling application but to the dismay of the petitioner, the CESTAT vide its order dated 12-4-2007 dismissed the application for recalling/restoration application taking note of the fact that the petitioner has failed to deposit in terms of the original order passed by CESTAT on the application filed by petitioner u/Sec. 35F of the Act dated 27-4-2006 which was again the subject matter of challenge by filing of writ petition before the High Court of Delhi in CWP No. 7075/2007 and when that writ petition came up for hearing before the High Court of Delhi, objection was raised that in the light of judgment of the Apex Court in Ambica Industries Vs. Commissioner of Central Excise, , jurisdiction lies with the

Rajasthan High Court. Taking note thereof, the petitioner withdrew the writ petition with leave to approach the appropriate jurisdictional High Court and that liberty was granted to petitioner by the High Court of Delhi while dismissing the writ petition vide order dated 25-9-2007.

6. However, by filing three separate successive writ petitions, the petitioner remained at square one in adjudicating the dispute which he raised in assailing the original order passed by the CESTAT along with stay application filed u/Sec. 35F of the Act which came to be dismissed vide order dated 27-4-2006.

7. Counsel for the petitioner submits that after a long battle, may be under ill advise, the petitioner finally approached the jurisdictional High Court of Rajasthan. Counsel further submits that petitioner-company was a sick company for a long time and it has become viable in the recent past and started commercial production from February, 2015 and right of appeal is a statutory right provided under the Act has been denied to him only for the reason that he has failed to comply with the condition of pre-deposit in terms of order dated 27-4-2006 passed by the CESTAT and further submits that the statutory right of appeal, is not dependent upon compliance of pre-deposit, as contemplated u/ Sec. 35F of the Act and even if the petitioner failed to comply with the order of pre-deposit in terms of Sec. 35F of the Act dated 27-4-2006, at least the appeal which he preferred could not have been dismissed on account of non-compliance of order passed by the CESTAT dated 27-4-2006 and in support of his submission, counsel placed reliance on judgment of the Hon''ble Supreme Court in Balaji Steel Re-Rolling Mills Vs. C.C.E. and Customs,] and submits that without going into merits the question which he has raised in the instant petition, he has instructions from his client to inform that since the petitioner-company has now become viable and started commercial production, he needs liberty of this court that on complying with the conditions of pre-deposit in terms of order of CESTAT dated 27-4-2006, the appeal which he has preferred before CESTAT at least may be restored and heard on merits.

8. Per contra, counsel for respondent submits that ample opportunity was afforded to the petitioner but he has failed to comply with the order dated 27-4-2006 passed on his application filed u/Sec. 35F of the Act and there was no other option left with the CESTAT to reject the appeal preferred and in furtherance thereof, the restoration/recalling application was dismissed and there appears no justification to now grant the petitioner an opportunity to comply with the condition of pre-deposit, as prayed for by him, in compliance of the order dated 27-4-2006 and restoring the appeal before the CESTAT.

9. Taking note of the submissions made and the fact that one after the other three successive writ petitions were preferred by petitioner before the High Court of Delhi assailing the orders passed by the CESTAT and this fact cannot be ruled out that petitioner-company remained sick for a long time and became viable and started commercial production in February, 2015 and so also the fact that right of appeal which has been provided under the statute, ordinarily is not to be

frustrated and in the present facts and circumstances, if the petitioner is not permitted to deposit, as prayed for by him in terms of order passed by the ld. Tribunal dated 27-4-2006, he will remain remediless and taking note of the long litigation, we are of the view that the petitioner deserves indulgence to be afforded an opportunity to comply with the order of pre-deposit passed by the CESTAT dated 27-4-2006 on his application filed u/Sec. 35F of the Act within a period of thirty days from today, the appeal which was filed before the CESTAT deserves to be restored and heard on merits. Consequently, the instant writ petition is disposed of with the direction that if the petitioner now complies with the condition of pre-deposit in terms of the order of CESTAT dated 27-4-2006 on his application filed u/Sec. 35F of the Act by 4-9-2015, the appeal preferred by the petitioner before the CESTAT, which at one point of time, was dismissed because of non-compliance of the order dated 27-4-2006, be restored and the same be heard on merits.