(2015) 03 KL CK 0067

In the High Court Of Kerala

Case No : Writ Petition(C) No. 6173 of 2015 (V)

Muthoot Finance Limited APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 02-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 72, 73

Citation : (2015) 320 ELT 51 : (2015) 50 GST 585 : (2015) 38 STR 1133

Hon'ble Judges : A.K. Jayasankaran Nambiar, J.

Bench : Single Bench

Advocate : V.V. Asokan, Senior Advocate, K.I. Mayankutty Mather, R. Jaikrishna and Jose Jacob, for the Appellant; Saiby Jose Kidangoor and Thomas Mathew Nellimoottil, S.Cs., Advocates for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—The challenge in the writ petition is against Ext. P8 order passed by the 2nd respondent, confirming a demand of service tax and penalty on the petitioner. The demand of service tax has been confirmed against the petitioner under the head of business auxiliary services. The facts in the impugned order would reveal that the petitioner was engaged in the business of lending money to customers, against gold that was pledged by the said customers with the petitioner. It would appear that the loan amounts were then assigned by the petitioner to reputed banks who would pay the petitioner the purchase consideration for the loan amounts assigned to them, the consideration being worked out as the total of the principal amount, interest and other charges. This was as against the book value of the receivables which was admittedly lower. The respondent authorities computed the difference between the purchase price and the book value of the receivables and treated this as consideration received by the petitioner for services that they were required to perform under agreements entered into with the assignee banks in connection with the loans that were assigned to them. It is the service tax on the said amounts that was thus arrived at and demanded from the petitioner by Ext. P8 order, which is impugned in the writ petition.

2. I have heard Sri. K.I. Mayankutty Mather, the learned counsel for the petitioner and Sri. Saiby Jose, Kidangoor, the learned Standing counsel for the respondents. On behalf of the petitioner, it is contended that, in Ext. P8 order, the 2nd respondent, other than making a reference to the obligation of the petitioner to disclose the value of taxable services rendered by him to the assignee banks, does not actually enter any finding with regard to the manner in which the said amounts could be said to have been suppressed by the petitioner. It is pointed out that the petitioner bank has been filing returns on a regular basis, and further, the amounts received by it pursuant to business transactions were all recorded in the audited balance sheet and profit and loss accounts which were regularly filed the statutory authorities from time to time. It is contended, therefore, that in as much as there was adequate disclosure of the receipt of the consideration amounts pointed out by the department, there was no justification whatsoever for invoking the larger period of limitation under the statute, while confirming the demand of service tax against the petitioner. It is also pointed out that the 2nd respondent, in Ext. P8 order, grossly erred in treating the amounts received by the petitioner as consideration for services rendered whereas in actual fact, the said amounts only represented the interest that the petitioner was entitled to in respect of loans advanced to various customers. It is also the case of the petitioner that while issuing the show cause notice in terms of Section 73 of the Finance Act, 1994, as amended, the respondents have not first resorted to the provisions of Section 72 to complete a best judgment assessment against the petitioner, and therefore, to that extent, the issuance of the show cause notice even prior to the completion of that exercise was bad in law. It is further pointed out that the computation of the demand in the impugned order is erroneous in that it does not take into account the fact that there were amounts that were paid by the petitioner to the assignee banks, by way of interest on a discounting arrangement that was in vogue between the petitioner and the assignee bank and, to this extent, the demand in Ext. P8 order is grossly exaggerated. It is also the contention of the petitioner that, as regards the period from 2010-2011, 2011-2012, the confirmation of the demand against the petitioner has been based on an estimation for which there is no authority under the statutory provisions.

3. Per contra, it is the submission of the learned Standing counsel of the respondents that the petitioner has an effective alternative remedy against Ext. P8 order of the 2nd respondent, in that they can prefer an appeal before the Customs, Excise and Service Tax Appellate Tribunal against the said order. It is pointed out that by virtue of the amendment that was introduced into the Finance Act, 1994, with effect from 16.08.2014, the petitioner is required to deposit only 7.5% of the tax amount confirmed against it, as a condition for preferring an appeal before the Appellate Tribunal. It is also the contention of the respondents that the issue of limitation being a mixed question of fact and law, it was not open to the petitioner to contend that there was no suppression found

against the petitioner by the order impugned in the writ petition and, at any rate, this is not a contention that was available to the petitioner in proceedings under Article 226 of the Constitution of India. On the issue of invoking the provisions of Sections 72 and 73 of the Finance Act, 1994, as amended, it is pointed out that the show cause notices are issued by invoking the power under Section 73 of the Finance Act, 1994, and Section 72 only provides for the manner in which assessment is done for the purposes of recovering the amount due as per Section 73. In that view of the matter, there is no illegality in invoking the provisions of both Sections 72 and 73 while issuing the notices to the petitioner.

4. I have considered the submissions of counsel on either side. I find that Ext. P8 is an order passed by the 2nd respondent, against which the petitioner has an alternate remedy under the provisions of the Finance Act, 1994, as amended to prefer an appeal before the Customs, Excise and Service Tax Appellate Tribunal. The only point that arises for consideration is whether the petitioner would have to deposit the amount of 7.5% of the tax confirmed against him, as a condition for pursuing the appellate remedy before the Tribunal. I note in this connection that recently, a Division Bench of the High Court of Telengana and Andhra Pradesh has taken a prima facie view that, in as much as the lis in question had commenced prior to the introduction of the amendment to the Finance Act, 1994, with effect from August 2014, the petitioner''s right of appeal as per the erstwhile provisions of law would not be affected by the provisions introduced by the amendment of 2014. Although not expressly referred to in the interim order dated 19.02.2015 passed by the High Court of Telengana and Andhra Pradesh in WP 3393/2015, the view seems to be consistent with the settled law that the institution of a suit carries with it an implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit and, further, that the right of appeal that is vested is to be governed by the law prevailing at the date of institution of the suit or proceeding, and not by the law that prevails at the date of its decision or at the date of filing of the appeal. (See: Garikapatti Veeraya Vs. N. Subbiah Choudhury, ; Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, ; Vitthalbhai Naranbhai Patel Vs. Commissioner of Sales Tax, M.P., Nagpur, and Ramesh Singh and another Vs. Cinta Devi and others, . In that view of the matter, I find that the petitioner, in whose case also the lis commenced in 2012, would not be required to deposit the amount of 7.5%, as required pursuant to the 2014 amendment, and in that respect, he would have an efficacious alternate remedy before the Tribunal where he can file an appeal, together with an application for waiver of pre-deposit and stay of recovery of the amounts confirmed against him by Ext. P8 order. At the time of filing the appeal, he will not be required to make any payment as a pre-condition for the hearing of the waiver application by the Tribunal. I, therefore, relegate the petitioner to the alternate remedy available under the Finance Act, 1994, as amended, of approaching the Appellate Tribunal by way of an appeal against Ext. P8 order. It is made clear that the appeal to be filed by the petitioner would be governed by the statutory provisions, as they

stood prior to the amendment introduced with effect from 16.08.2014. Thus, without making any observations on the merits of the case, and without prejudice to all the contentions that the petitioner can take against Ext. P8 order of the 2nd respondent, I dismiss the writ petition in its challenge against Ext. P8 order. I make it clear that, if the petitioner prefers a duly constituted appeal under the provisions of the Finance Act, 1994, as they stood prior to 16.08.2014, then the Appellate Tribunal shall number the Appeal, and consider the application filed by the petitioner for waiver of pre-deposit and stay of recovery of the amounts confirmed against him by Ext. P8 order, on merits, and thereafter, proceed to hear the appeal itself in due course. The petitioner shall file the appeal, together with the application for waiver of pre-deposit and stay, before the Appellate Tribunal on or before 31.03.2015. I record the submission made by the learned Standing counsel for the respondents that, till 31.03.2015, no steps for recovery of the amounts confirmed against the petitioner by Ext. P8 order will be either initiated or pursued by the respondents.

The writ petition is disposed as above.

