(2012) 06 CAL CK 0049

In the Calcutta High Court

Case No : Writ Petition 417 of 2012

Sanjit Biswas APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 14-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Constitution of India, 1950 — Article 14

Citation : (2012) 192 ECR 125

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : P.S. Sengupta and Mr. B. Bhattacharya, for the Appellant;A. Mazumdar, Advocate, Mr. S. Mukherjee, Advocate, for the Respondents 1 to 3 and Mr. N. Biswas, Advocate for the Respondent 4, for the Respondent

Final Decision : Dismissed

Judgement

Hon''ble Justice Dipankar Datta

1. In exercise of power conferred by the Bengal Excise Act, 1909, the West Bengal Excise (Country Spirit) Rules, 2009 (hereafter the Rules) have been framed. The rules were notified vide notification no. 1320-EX dated November 12, 2010, published in the Kolkata Gazette dated November 15, 2010. Rule 28 of the Rules providing for "Issue of country spirit only on payment of duty", was amended by notification no. 320-EX/O/1R-5/10 dated March 26, 2012, published in the Kolkata Gazette dated April 12, 2012. Sub-rule (2) of Rule 28 was substituted and sub-rule (3) thereof was deleted. The petitioners are licensees/ retailers of country spirit. They claim that the amendments in Rule 28 would result in their suffering huge business losses. They say that effect given to the amendments in Rule 28 has resulted in a situation where the maximum retail price of a product that the petitioners have been permitted to sell would be lower than the cost of procurement. Feeling aggrieved thereby, this writ petition dated May 16, 2012 was presented before this Court seeking, inter alia, the following

relief:

(a) Grant leave to the petitioners under Order 1 Rule 8 of the Code of Civil Procedure, 1908;

(b) Declare that the impugned notification as published in the Official Gazette on 2nd April, 2012 as ultra vires Article 14 of the Constitution of India;

(c) Issue a Writ in the nature of Mandamus commanding the respondents and their men, agents and assigns to cancel, rescind, withdraw and/or forebear from giving any effect and/or further effect to the impugned decision as contained in the impugned notification dated 26th March, 2012 and to act in accordance with law by acting in the manner as stated hereinabove;

(d) Issue a Writ in the nature of Mandamus commanding the respondents and their men, agents and assigns to forthwith and/or immediately decide the petitioners'' grievances by affording an opportunity of hearing to the petitioners and to act in accordance with law by acting in the manner as stated hereinabove;

(e) Issue a Writ in the nature of Certiorari commanding the respondents to forthwith and/or immediately certify and/or transmit to this Hon''ble Court the entire records and/or proceedings forming subject matter of the instant case so that conscionable justice may therein be administered by setting aside and/or quashing the impugned decision as contained in the impugned notification dated 26th March, 2012;

(f) Issue a Writ in the nature of Prohibition prohibiting the respondents from giving any effect and/or further effect to the impugned decision as contained in the impugned notification dated 26th March, 2012;

2. At the first hearing of this petition on May 17, 2012, Mr. Sengupta, learned senior unsel representing the petitioners submitted that only prayer (d) supra would be pressed, meaning thereby that the rest of the prayers would stand abandoned. According to him, the official respondents have subjected licensees/ retailers of country spirit like the petitioners to arbitrary and discriminatory treatment and, therefore, he prayed that a direction be made for consideration of the petitioners'' plight by the official respondents.

3. Mr. Mazumdar, learned counsel for the official respondents, raised a preliminary objection in relation to maintainability of the writ petition before this Court. Referring to Sections 5 and 6 of the West Bengal Taxation Tribunal Act, 1987 (hereafter the Act), he contended that the Taxation Tribunal constituted thereunder only has jurisdiction to entertain this writ petition notwithstanding abandonment of all but one of the prayers quoted above.

4. Hearing did not conclude on that day and the writ petition has been listed once again for admission hearing.

5. Replying to the objection raised by Mr. Mazumdar, Mr. Sengupta referred to provisions contained in Section 8 of the Act and Rule 5 of the West Bengal

Taxation Tribunal Rules, 1998 to contend that an order passed or action taken pertaining to any matter within the jurisdiction of the tribunal could be assailed before it and since in the present case the petitioners have sought for limited relief of consideration of their grievance by the official respondents, the provisions of the Act do not bar entertainment of the writ petition. It is also his contention that the grievance that the petitioners seek to voice is neither relatable to adjudication or trial of any dispute, complaint or offence with respect to levy, assessment, collection and enforcement of any tax under a specified State Act nor is it incidental thereto or connected therewith and, therefore, the objection regarding maintainability of the petition is not well founded.

6. For the purpose of a decision on the preliminary objection, Sections 5, 6 and 8 of the Act are material. For facility of reference, the same are quoted below:

5. The State Acts to which this Act shall apply -This Act shall apply to every State Act specified in the Schedule to this Act with effect from the date on which such State Act is so specified, and the Tribunal, save as otherwise expressly provided under such State Act and subject to the other provisions of this Act, shall exercise jurisdiction, powers and authority in relation to all matters of adjudication or trial of any disputes, complaints or offences with respect to levy, assessment, collection and enforcement of any tax under any specified State Act and of matters connected therewith or incidental thereto; and no Court except the Supreme Court of India shall, with effect from such date, exercise any jurisdiction, powers or authority in the matter of adjudication or trial of any disputes, complaints or offences with respect to the aforesaid matters.

6. Jurisdiction, powers and authority of the Tribunal- (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, in respect of a State Act, with effect from the date on which such State Act is specified in the Schedule referred to in section 5, all the jurisdiction, powers and authority exercisable immediately before that day by all Courts including the High Court but excluding the Supreme Court of India for adjudication or trial of disputes or complaints or offences with respect to all matters of levy, assessment, collection and enforcement of any tax under any specified State Act and matters connected therewith or incidental thereto:

Provided that where the matter relates to disposal of question of constitutional validity of any provision of any specified State Act, the matter shall be decided by a Bench constituted of at least three Members of which the Chairman shall be one.

(2) Notwithstanding anything contained elsewhere in this Act, all proceedings triable by any Court or Courts in accordance with the provisions of the Code of Criminal Procedure, 1973(2 of 1974), shall continue to be tried by such Court, and the Tribunal shall have no jurisdiction to try such proceedings.

Explanation - For the purpose of this sub-section, proceedings shall include proceedings under Chapter XXIX and Chapter XXX of the Code of Criminal

Procedure, 1973.

8. Extraordinary jurisdiction - (1) Subject to the other provisions of this Act, a person aggrieved by any order passed or action taken pertaining to any matter within the jurisdiction of the Tribunal may make an application to it for the redressal of his grievance on any of the grounds referred to in sub-section (3).

Explanation _ For the purposes of this sub-section, "order" means an order made by any authority under any specified State Act and "action" means an action taken by any authority under any of the specified State Acts or by the State Government in the matter of, and in relation to, levy7, assessment, collection and enforcement of any tax.

****

7. There is no disagreement on the point that sub-rule (2) of Rule 28 of the Rules, as amended, postulates imposition of excise duty by multiplying the assessed value by the duty multiple provided in column 4 of the table appended thereto. It is a formula for calculating the payable excise duty. It is true that the petitioners by abandoning most of the prayers have not urged this Court to examine the validity and/or propriety of the amended provisions. Indeed, if they had persisted with their challenge, they would have been relegated to the Taxation Tribunal without any further discussion. Question in the circumstances is, whether this Court can entertain prayer (d) alone and direct the official respondents to consider the petitioners'' grievance, as highlighted in their representation.

8. Section 5 of the Act provides that adjudication or trial of not only disputes, complaints and offences with respect to levy, assessment, collection and enforcement of any tax under any specified State Act is to be considered by the Taxation Tribunal at the first instance but it would also have the jurisdiction to adjudicate or try matters connected with or incidental to levy, assessment, collection and enforcement of such tax. No doubt, payment of excise duty as envisaged in the notification dated March 26, 2012 is a levy. Now, the point that would exercise the consideration of the Court is what one means by the expression "incidental to". According to Stroud''s Judicial Dictionary, a thing is said to be incidental to another when it appertains to the principal thing. The word ''incidental'', according to Webster''s New World Dictionary, means "happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated". Matters incidental to a thing must, therefore, mean something happening as a result of or in connection with the thing or associated with the thing. The business loss that the petitioners say they are suffering or likely to suffer, without any iota of doubt, is incidental to a levy i.e. payment of excise duty in terms of amended Rule 28. Thus, even an order for consideration of their grievance cannot be passed by this Court in view of the provisions of Section 5 of the Act.

9. The contention of Mr. Sengupta based on Section 8 of the Act read with Rule 5 as aforesaid does not appeal to me to be acceptable. Section 8 begins with the words "Subject to the other provisions of this Act, ..." meaning thereby that in construing the said provision the other provisions of the Act cannot be ignored. The Act does not make annexation of the order passed under a specified State Act, forming subject matter of challenge before the Taxation Tribunal, a condition precedent for entertainment of an application by it. What is of importance is the nature of the grievance that the party seeks to espouse. If it relates to the factors mentioned in Section 5 of the Act, there could be no two opinions that the Taxation 10. Tribunal is the forum that ought to be approached first.

10. I find substance in the submission of Mr. Mazumdar that even for an order for consideration of their grievance by the official respondents, this Court is not the proper forum.

11. The writ petition stands dismissed, without costs. Needless to observe, this order of dismissal shall not preclude the petitioners to approach the Taxation Tribunal in accordance with law. Urgent photostat certified copy of this order, if applied for, shall be furnished to the applicant at an early date.