

(2009) 05 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 4317 of 2009

Suzlon Infrastructure Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-05-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(2), 35C, 35D(1)
Customs Act, 1962 — Section 129B(2), 129C
Finance Act, 1994 — Section 86

Citation : (2009) 111 BOMLR 3135 : (2009) 225 CTR 177 : (2009) 243 ELT 497 : (2009) 15 STR 529 : (2009) 22 STT 176

Hon'ble Judges : J.H. Bhatia, J; Ferdino I. Rebello, J

Bench : Division Bench

Advocate : V. Sreedharan and Prakash Shah, instructed by PDS Legal, for the Appellant; P.S. Jetley and Rutuja Ambekar, for the Respondent

Judgement

Ferdino I. Rebello, J.—Rule. Heard forthwith.

2. The petitioner on 21st January, 2009 had filed an application u/s 86 of the Finance Act, 1994 read with Section 35C of the Central Excise Act, 1944 and under inherent jurisdiction of CESTAT for passing supplementary order and for formulating revised questions, if needed.

The matter arose thus :

In an appeal preferred by the petitioner there was difference of Opinion disclosed in the orders passed by two members and consequential questions were framed for determination of a third member. The third member has listed the matter for final hearing on 22nd May, 2009. Earlier when the matter came up for hearing before the third member the petitioners informed the third member that an application dated 21st January 2009 was filed for passing a supplementary order. The third member only indicated that he has no jurisdiction to hear such an application and that he will dispose of the difference of opinion without going into the correctness or otherwise of Misc. order dated 24th October, 2008. That Misc.

Application till date has not been decided.

3. It is the submission on behalf of the petitioners that before the tribunal they had raised the submissions that there have been findings on some of the submissions and in respect of some others both the members have not recorded their findings though they are germane for the purpose of deciding the controversy in appeal.

4. We may gainfully reproduce the summary of the main submissions and tabulations as handed over to us at the bar by learned Counsel for the petitioner. These questions arise for determination considering both the appeal memo and written submissions filed before the CESTAT. We are consequently re-producing the same :

Table showing the summary of the main submissions made by the petitioners during the hearing before the CESTAT and findings if any of the Hon"ble Members on the same :

Sr. No.

Submissions

Findings given by Hon" ble President of the CESTAT

Findings given by the Hon" ble Member (tech) of the CESTAT

1

The sub-contractor had provided the taxable service to the customer and had discharged the service tax liability. Therefore the appellants have done only reselling of such service which is not liable to service tax in India.

No finding

No finding

2.

The definition of erection" commission and installation service has been amended with effect from 1.5.2006 to cover "structures whether prefabricated or otherwise. Therefore, since tower isa structure erection, commissioning and installation of tower was not taxable prior to 1.5.2006.

No finding

Submissions

3.

The consideration which the appellants have received is to be treated as inclusive of the service tax payable. Therefore, cum-service tax benefit should be granted.

No finding.

No finding

4.

Service tax can be levied only on the value of service. There cannot be any service tax on value of material. Therefore. While calculating demand, Rs .210, 79, 68, 878/- of material, is to be excluded.

No finding

No finding

5. Section 35(2) of the Central Excise Act, 1944 reads as under :

The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under Sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to appeal.

Section 35D(1) reads as under :

6. The relevant portion of Section 129C of the Customs Act, 1962 reads as under : 129C: Procedure of Appellate Tribunal.

1. The powers and functions of the Appellate Tribunal may be exercised and discharged by Benches constituted by the President from amongst the members thereof. 2. Subject to the provisions contained in Sub-section (4) a Bench shall consist of one judicial member and one technical member.

3. ...

4. ...

(5) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority but, if the members are equally divided, they shall state the point or points on which they differ and make a reference they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it.

6. Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its power or of the discharge of its functions including the places at which the Benches shall hold their sittings.

7. ...

8. ...

7. On behalf of the petitioners, learned Counsel submits that the bench at the time of hearing the appeal was bound to have settled the points for determination and answer the said points. The points for the determination are those points which are relevant for deciding the controversy in appeal and if decided will have the effect of deciding the fate of the appeal. In the instant case, it is submitted that the learned bench did not fix the points for determination. It is in these circumstances, that only some of the submissions advanced at the bar and raised in the appeal memo have been considered without answering other submissions and/or points which were relevant for disposal of the appeal. The consequences is that what has been referred to the learned third member are only the points on which the members have deferred. The third member considering his jurisdiction will only decide the said points. On his decision, the appeal would have to be disposed of by the two members originally constituting the bench in terms of the opinion given by the third member as that opinion would become the majority view. The result would be that though there are other points for determination which are relevant and having been not answered the choice for the petitioner would be to either apply for rectification and/or file an appeal to contend that the points raised have not been answered. If the relevant points are not answered the Appellate Court in appeal would have to set aside the matter and remand the matter to CESTAT. In case of rectification CESTAT on hearing the application will have to pass fresh orders which may have the effect of varying the order already passed or if there have been difference of opinion again would result in referring the matters back to the third member. Apart from the propriety judicial time would be involved. Procedure being hand made of justice is not meant to defeat the ends of justice.

8. On the other hand on behalf of the respondent- revenue it is submitted that considering the language of Section 35(2) of the Central Excise Act, what can be rectified is the order. Presently, as the issue is before a third member there is no order and consequential Misc. Application is premature and in these circumstances, this Court should not exercise its extraordinary jurisdiction.

9. We have given our anxious consideration to the issues involved. Considering the language of Section 35C(2) of Central Excise Act, as also the relevant provisions of Section 129C of the Customs Act, and in terms of Section 129C(5) on difference of opinion on any point, the points have to be decided according to the opinion of the majority. If the members are equally divided they shall state the point/points on which they differ and make a reference to the President who shall either hear the points by himself or refer the case for hearing on point or points by one or more members of the appellate tribunal and such point or points shall be decided according to the opinion of the majority of the members of the appellate tribunal, who have heard the case including those who first heard it.

10. The points of difference arise on the members constituting the bench disposing of the appeal by separate orders from which orders, the points of difference are disclosed. u/s 35(2) of the Excise Act, there is power in the

tribunal to rectify any mistake apparent on the record and amend any order passed by it under subsection (1) within the time frame. It is thus, clear that the order passed is different from the points for determination. Points for determination thus arise from orders passed by the appellate tribunal which orders are not enforceable because of difference of opinion on points arising from the orders. These points finally shall be decided according to the opinion of the majority of the members of the tribunal who have heard the case including those who have first heard it. The final order would be based on the opinion of the third member who answers the point of difference referred to him as that would constitute the majority opinion. The third member does not pass any order. Such member only answers the points referred. The power to rectify u/s 35C(2) is the order.

11. Let us now examine some judgments referred at the bar by learned Counsel for their submissions. On behalf of the petitioner, learned Counsel firstly draws our attention to the judgment of the High Court of Delhi in Commissioner of Income Tax Vs. Shri Ram Memorial Foundation, . In that case, the Accountant Member did not consider one claim on merits just because, a small amount was involved. The Accountant Member did not also categorically state that he agreed with the conclusions of the judicial member. A Misc. Application was therefore, filed which was allowed by the tribunal on the ground that there was an error of law. In respect of that a reference was sought by the revenue. The application was dismissed against which the revenue moved the High Court. The High Court noted that the first order by the Accountant Member did not categorically state that he agreed with the conclusions of the judicial Member and in fact by stating that as the amount involved was only Rs. 5200/-he had no comments to add, implied that he had not considered the issue involved on merits. The Court found that in these circumstances, the tribunal was right in entertaining the application for rectification.

12. Our attention was next invited to the judgment of the Gujarat High Court in Colourtex and Another Vs. Union of India (UOI) and Others, In that case, on difference of opinion amongst the members, the points of difference was referred to a third member. Before the third Member could decide the matter the petitioner preferred an application seeking rectification of the mistake u/s 129B(2) of the Customs Act. When the application for rectification was pending, the matter came up for hearing before the third member and an adjournment was requested on that ground. The third Member did not adjourn the matter but instead called for the papers of rectification application and disposed of the same on the same day by stating that there was no scope for filing the application for rectification of mistake at the stage of hearing on the point of difference. It was this order which was the subject matter of writ jurisdiction before the Gujarat High Court. The Court noted that in the absence of any "order" by the Bench which originally heard the appeal, consequently the petitioner could not have moved an application for rectification.

13. In Joint Commissioner of Income Tax (TDS) Vs. Jindal Tractbel Power Co. Ltd. and Another, , in a pending appeal, on an application for stay, there was difference of opinion amongst the members. There were also some observations by the Vice-Chairman. Against that Revenue preferred a Writ Petition. The learned Single Judge noted that in a case where there is difference of opinion, the points has to be decided by opinion of the majority but, if the members are equally divided they shall state the point or points on which they differ and the case shall be referred for hearing on such point or points by one or other member of the appellate tribunal and the decision on such point or points shall be according to the opinion of the majority of the members of the appellate tribunal who have heard the case including those who first heard it. A learned Judge of the Karnataka High Court observed that as there was no final order the petitioner's appeal could not be entertained.

14. Our attention is also invited to the order of tribunal in Mangalore Chem. & Fertilisers. Ltd v. Collector of Central Excise 1998 (98) 490. In that case, there was difference of between two members constituting the bench. The point was referred to the President for reference to the third member. After the matter was heard by the third member the member referred back to the original bench with observations for re-framing the reference if necessary. The matter was thereafter listed before the Bench and after it had been heard an opportunity was given to the appellant seeking clarifications. Accordingly, an application was moved. On the application moved, the Member (Judicial) who had not expressed any opinion regarding Notification No. 235/85 concurred with the view taken by the Vice-President. In these circumstances, the members held that the reference was required to be remitted only to the first part of reference. This was cited to indicate that there is power in the Tribunal even during pendency of a reference to move an application for rectification and the Tribunal has jurisdiction to entertain the same.

15. On behalf of the revenue, learned Counsel had placed reliance in the case of Meenakshi and Nanjappa Vs. Selvaraj @ Selvam and Others, . An order for assessment had been passed, the correctness of which was canvassed before the tribunal. There was difference of opinion and consequently the matter was referred to a third member. The order of the bench was challenged by invoking the writ jurisdiction of the Madras High Court. The learned Judge of the Madras High court held that that there was no order passed by the third member under reference the order made by the tribunal cannot be considered as enforceable final order. The High Court therefore declined to exercise its extraordinary jurisdiction.

16. Both the counsel have also relied on the judgment of the Gujrat High court in Commissioner of Wealth Tax Vs. Pramilaaben Chunibhai, . On behalf of the petitioner it is submitted that from the judgment it is clear that the statutory provisions cast a duty on the members to give findings on each point and if there be difference of opinion on point or points then they have to refer the point in

difference to be decided to the President for hearing on such point by one or more of the other members of the tribunal. Such point on which the members defer is to be decided according to the opinion of the majority of the members. Reference was made to the judgment of the Allahabad High Bench in J. K. IRON AND STEEL CO. LTD. Vs. COMMISSIONER OF Income Tax, U. P., LUCKNOW., to contend that when members defer, a duty is first cast on them to consult with each other. The Court then observed that in a case, where a court or tribunal consists of more than one Judge or Member, they shall corroborate amongst themselves and bring their mind together in order to judge the matter before them. If they defer, they should not pronounce the judgment until they held a conference on the difference and arrive at a unanimous judgment. If after consultation they find that it is not so possible to concur then only to give a dissenting judgment.

The Allahabad High Court in J.K. Steel Co Ltd (supra) made a reference to the judgment in Subramaniam Chettiar v. Muthuswamy (1941) 192 IC 225. The Court there had observed that a difference of opinion amongst members who are equally divided did not individually nor collectively constitute a decision of the tribunal.

17. The issue therefore, before is whether during the pendency of the application before the third member, is it open to an aggrieved party to apply for rectification ? The difference of opinion can only arise when there are differing opinions in judgments or orders of members as noted in Subramaniam Chettiar (supra.) These difference of opinions would not constitute a decision. u/s 35C power is to amend an order to rectify any mistake apparent from the record. The members of the tribunal can only pass orders. If they differ in their opinion nevertheless those order would not cease to be orders. Those orders however cannot be enforced as there is no enforceable order. u/s 129C(5) what has to be referred is difference of opinion on points amongst members. On the points being answered by the third member the points would stand answered in terms of the majority opinion of the judges constituting the earlier bench and the member to whom the matter was referred though a final order may be required to be formally passed. In such event, one of the two judgments would be the decision of the Tribunal and be the operative or enforceable judgment in terms of the points answered by the third member. An application for rectification would therefore be maintainable even when a reference is made to a Member. In our opinion, apart from the language of the provisions it would be a more constructive and purposeful method of answering the issue. Holding otherwise, and accepting the stand of the revenue would be to delay the proceedings and may also again lead to other points being referred once again.

18. We have also to consider whether a Court or tribunal has suo motu or inherent or implied power of procedural review if the said has not been specifically conferred. In our opinion, the issue is no longer res integra having been concluded by the judgment of the Supreme Court in Grindlays Bank Ltd. Vs.

Central Government Industrial Tribunal and Others, . We may gainfully reproduce the following observations made in para 13 :

The expression "review" is used in two distinct senses, namely (1) a procedural review, which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and

(2) a review on merits when the error sought to be corrected is one of law and is apparent on the fact of the record. It is in the latter sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provided for it. Obviously, when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justice to prevent the abuse of its process and such power inheres in every court or Tribunal.

It will be thus clear, that there is inherent or incidental power for procedural review in courts and tribunals to do justice. This view has been reiterated by the Supreme Court in M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise, which was a case under the provisions of the Central Excise Act.

19. The Bench is bound to refer the points of difference for determination and get answered the said points by a third member. The points for determination would be those points which are relevant for the purpose of deciding the controversy and if decided would have the affect of determining the controversy in the appeal. For this purpose while hearing and deciding an appeal the Tribunal is bound to frame points for determination which are relevant for deciding the issue in controversy in the appeal. Once the points for determination are fixed the members are bound to answer the points so framed. It is only on the points on which there is difference of opinion, then only is there a need to refer to a third member those points for determination. It is in that context while disposing of appeals the tribunal is bound to fix points for determination and answer the said.

20. In the instant case, as we have noted, there are several points which have not been answered. Each of those points if answered and if both the members had concurred could have resulted in the appeal being allowed or dismissed. The points in difference already referred then perhaps would have been immaterial and even not required to be referred to a third member. If there was unambiguity on other points on which the appeal could be allowed or dismissed.

21. In our opinion, therefore as discussed earlier, once there be two orders, it is not possible to say that they are merely opinions. These are two distinct judgments ,which on account of difference in answer to the points raised, the members differ on the reliefs to be granted and as such is not a final decision. It is therefore, not possible to accept the contention as argued on behalf of the revenue that these being merely opinions the application for rectification is not maintainable. In our opinion, such an application would be maintainable.

22. Apart from that, it is the cardinal duty of Court or Tribunal to do complete justice between the parties subject to its jurisdiction in order to avoid multiplicity of proceedings. The Court or tribunal in such case has an inherent jurisdiction to decide an application for rectification so that the real controversy in issue is decided and/or referred if there be any difference of opinion amongst the members to a third member. The power to do procedural justice inheres in every Court or tribunal as noted by the Supreme Court. The Court or Tribunal in deciding an appeal have to frame points for determination which would be relevant for answering the contrary in appeal. Once points are framed, each point has to be answered by the Tribunal.

23. For the aforesaid reasons, we direct that the application dated 21st January 2009 filed by the petitioners be heard according to law on all the points raised and which have been referred to in the earlier part of the order. It is for them to decide whether the submissions in the context of the issues raised in the appeal are required to be answered, if they are relevant points for determining the controversy in the appeal.

24. Till such time, the third Member is directed not to proceed to answer the points raised.

25. Rule made absolute accordingly.