(2003) 08 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No. 211 of 2002

U.P. State Bridge Corporation Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 11-08-2003

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2003) 90 ECC 800 : (2003) 157 ELT 267

Hon'ble Judges : P.V. Hardas, J;F.I. Rebello, J

Bench : Division Bench

Advocate : H.K. Maingi, for the Appellant; V.P. Thali, SCGSC, for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J.—The petitioner prays for quashing and setting aside the Order, dated 5th March 1999 [2000 (116) E.L.T. 296 Tri, to the extent the Tribunal dismissed the Appeal No. E/4388/95 and for quashing and setting aside the Order of the Tribunal, dated 16th October, 2001 [2002 (146) E.L.T. 303 Tri, to the extent it declined to restore the Appeal No. E/4388/95.

2. The facts in brief as are necessary for the decision of the appeal are set out hereunder : -

The petitioner is a company incorporated under the Companies Act, 1956 and is an undertaking of the Government of Uttar Pradesh. The petitioner is engaged in the construction of bridges and other civil works all over India. As part of its construction activities, the petitioner sets up site/project offices at the site of construction and those site/project offices are temporary in nature and upon completion of the construction activities, such site/project offices are closed.

3. The Commissioner of Central Excise, Goa, by his Order, dated 31st January, 1995, confirmed the demand for Rs. 4,72,535.34 as duty of excise on piles, girders and bracings. By the aforesaid Order he also imposed on the petitioner a penalty of Rs. 20,000/- under Rule 173 for contravention of provisions of Rules

9(1), 173B, 173C, 173G and 174 of the Central Excise Rules, 1944. The petitioner, being aggrieved by the aforesaid Order of the Commissioner of Central Excise, Goa, the respondent No. 2 herein, filed an Appeal No. E/4388/1995 before the third respondent, namely, the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench, Mumbai. The appeal of the petitioner was admitted on 12th May, 1995.

4. It appears that notices were issued to the petitioner as well as to the advocate on record in the appeal regarding the date of hearing of the appeal, which was fixed on 25th January, 1999. The counsel representing the petitioner before the Tribunal/third respondent by his letter, dated 21st January, 1999, sought adjournment of the hearing of the appeal, which was fixed on 25th January 1999, on the ground that the petitioner had closed its Office at Goa and the counsel was trying to locate its ''whereabouts''. The Tribunal repelled the requests, for adjournment and by the Order, dated 25th January, 1999 dismissed the appeal upholding the Order passed by the second respondent, the Commissioner of Central Excise, Goa. In the impugned order of the Tribunal, the Tribunal observed thus : -

"Why it should be necessary to locate office long after appeals have been filed and stay applications disposed of which is also not indicated. We therefore decline to adjourn."

5. The petitioner subsequently filed an application for restoration of the appeal, but, the said application came to be dismissed for want of prosecution as the notice of hearing of the said application was received by the petitioner on 29th December, 2000 whereas the application for restoration was listed for hearing before the Tribunal on 15th December, 2000. Due to the dismissal of its application for restoration, the petitioner on 22nd March, 2001, filed another application for restoration of the appeal. The Tribunal by its impugned order, dated 16th October, 2001, dismissed the application for restoration of Appeal No. E/4388/95 and declined to restore the said appeal while it allowed the restoration of the Appeal No. E-4393/95 on the ground that the Tribunal in its Order had not dealt with the ''shuttering'' and ''centering'', which are stated to be the subject matter of the goods in appeal. While dealing with the ground urged for restoration of the appeal, against which the present petition arises, the Tribunal came to the conclusion that the adjournment had been refused as the Tribunal was not convinced regarding the ground on which the adjournment was sought. The Tribunal also observed that if at all, it was necessary for some reason for the counsel to get in touch with the petitioner he could have done so at the registered office, which was indicated in the letterhead. The Tribunal then observed "if the counsel is unable to obtain instructions that he feels are required to pursue the appeal it is, in our judgment, his duty to give up the matter or to argue the case to the best of his ability. Neither of this has been done". Along with the application for restoration of the appeal an affidavit of the counsel representing the petitioners before the Tribunal was filed. We reproduce herein

the relevant paragraphs of the affidavit: -

"(d) that sometime in the second week of January, 1999, I received an intimation from CEGAT''s registry stating that the appeals had been listed for hearing on 25-1-1999, The said notice was addressed to U.P. State Bridge Corporation, Cambarjua Canal on N+14A, N Banastarim, Goa and a copy thereof was also marked to me.

(e) that as soon as I received the Notice, I telephoned their local office at Cambarjua which is located about 20 K.M. away from my office. Since there was no response, I thought that perhaps the telephone was out of order. I also thought that since the notice would have been served on the Corporation, they would contact me. I waited for about a week and in the meanwhile, I again tried to contact them but there was again no response.

(f) that ultimately I drove down to the site address to contact them personally but found that their office was now occupied by the local PWD. I was informed by the PWD people that U.P. State Bridge Corporation had moved out once the construction of the bridge was complete.

(g) that on hearing this, I concluded that notice could not have been served on them. I then looked up the phone number of their registered office at Lucknow as appearing on the letterhead and called up the said number. Again, there was no response I thought that perhaps after a number of years since the initial initiation of the case, telephone numbers might have been changed after a lapse of six years.

(h) that since, only a few days were left for the hearing and it would take quite some time to locate and contact the concerned person at Lucknow Office, since the appellant-company is a large public sector undertaking. I sent an application for adjournment dated 21-1-1999 by speed post wherein I brought to the attention of the Hon''ble Tribunal that the appellants had closed down their office at Goa and that I was trying to locate their whereabouts but had not been successful so far.

(i) that I also called up Shri Vipin Kumar Jain, Chartered Accountant who, I knew was handling a few excise cases of U.P. State Bridge Corporation at Mumbai and requested him to take up the matter with their Mumbai Office. I also informed Mr. Jain that since there was no office at Goa, it would be difficult for the Corporation to brief me and also arrange for an air ticket, and hotel stay in Mumbai each time there is a hearing. I therefore, suggested that the matters may be handled by him as he was already handling their Mumbai cases.

Mr. Jain, however, informed me that he contacted their Mumbai Office. However, they had referred the matter to their Head Office for instructions as they could not decide it themselves. Subsequently when I received instruction from U.P. State Bridge Corporation to send the case papers to Shri Vipin Kumar Jain, I sent the case papers to Shri Jain in Mumbai. Subsequently, when I received Order No.

C-II/494-495/99-WZB, dated 5-3-1999. I also sent the same to Shri Vipin Jain".

6. The notice of hearing of the appeal was issued to the petitioner as well as to its counsel. From the affidavit of the counsel representing the petitioner, it is clear that after completion of the project in Goa, the petitioner had closed its office in Goa. Thus, the petitioner was not served with the notice regarding the hearing of the appeal. The appeal was admitted on 5th June, 1995 and was listed for hearing for the first time before the Tribunal on 25th January, 1999. The principle of natural justice would require that the petitioner should be served with a notice of hearing of the appeal. Notice of hearing of the appeal had been issued to the petitioner but, because its office in Goa had been closed, the petitioner was not served with the notice of hearing of the appeal. The counsel representing the petitioner had sought adjournment for the reasons, which are disclosed in the affidavit accompanying the restoration application, that the counsel required instructions, financial mainly, for facilitating his visit and stay at Mumbai for the purpose of hearing of the appeal. The Tribunal has not, according to us, correctly appreciated the reasons sought for restoration, to determine whether sufficient cause had been made out by the petitioner for its absence before the Tribunal on the date of hearing. The petitioner has been certainly deprived of an opportunity of hearing before the Tribunal, particularly in view of the fact that the petitioner had not been served with the notice intimating the date of hearing of the appeal though the counsel representing the petitioner was so informed. The Tribunal, in our opinion, was not correct in holding that if the counsel for the petitioner had been unable to obtain instructions his duty was to give up the case or to argue the case to the best of his ability. According to us, the material on record constituted sufficient cause for non-appearance before the Tribunal on the date of hearing. The impugned Order, therefore, of the Tribunal, dated 25th January, 1999, dismissing the appeal of the petitioner and the impugned Order, dated 31st August, 2001, insofar as it dismissed the application of the petitioner for restoration of Appeal No. E/4388/95 are wholly unsustainable and are liable to be quashed and set aside.

7. We, therefore, allow the Writ Petition and quash and set aside the impugned Orders as indicated above and direct the Tribunal to decide the Appeal of the petitioner No. E/4388/95 afresh within 12 weeks from today with due notice to the petitioner of the date of hearing of the Appeal. Rule made absolute on the above terms, with no order as to costs.