

(2009) 07 BOM CK 0217

In the Bombay High Court

Case No : Sales Tax Application No. 68 of 2009 in R.A. No. 129 of 2008

Vadilal Dairy International Ltd.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-07-2009

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 32, 32(1)

Citation : (2009) 111 BOMLR 3585 : (2011) 1 CompLJ 466 : (2009) 26 VST 530

Hon'ble Judges : Ferdino I. Rebello, J;D.G. Karnik, J

Bench : Division Bench

Advocate : P.C. Doshi and Piyush Shah, for the Appellant; S.K. Nair, A Panel Counsel, for the Respondent

Judgement

Ferdino I. Rebello, J.—Parties agree that instead of asking for a reference from the Tribunal, the court itself can dispose of the questions which have been raised, as if referred by the Tribunal.

The Applicant herein had applied by way of Reference before the Sale Tax Tribunal for referring the following questions to this Court:

(a) Whether on a true and proper construction of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, read with the Approved Rehabilitation Scheme by BIFR, the Tribunal was justified in not following the said order?

(b) Whether on the facts and under the circumstances of the case, the Tribunal was justified in retaining the quantum of interest at 25% of the amount of the interest and penalty, though directed to be waived in entirety without any condition?

(c) Whether on the facts and under the circumstances of the case, the Tribunal was justified in not exercising its discretionary power judiciously by remitting 100% interest and penalty as per the direction of the BIFR through Approved "Rehabilitation Scheme?"

(d) Whether on the facts and under the circumstances of the case, the Tribunal was justified in overlooking the legal position that the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, had an overriding effect on all State enactments?

2. The tribunal by its order dated 19.7.2008 declined to make reference. Consequent the present application.

The order of assessment is for the financial year 1999-2000. The original order of the A.O. is dated 28.2.2003. It provided for interest and penalty. The applicant herein aggrieved preferred an appeal which appeal came to be dismissed on 29.1.2005 with a small variation in so far as amount of interest is concerned. The applicant being aggrieved preferred the second appeal before the tribunal.

3. When the appeal came up before the tribunal, the applicant which was a sick company had moved the B.I.F.R. Under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as SICA Act). The board after considering the submissions of the various parties by its order dated 31.10.2007 was pleased to sanction the scheme. In so far as the sales tax department is concerned, it waived the interest and penalty upto the period 31.3.2007.

4. When the appeal came up for hearing it was the submission on behalf of the applicant herein that considering the provisions of the SICA Act the tribunal ought to have taken a note of the same. The learned tribunal after considering the contentions advanced on behalf of the applicants herein was pleased to reduce the amount of interest and also set aside the amount of penalty. However, chose not to follow the scheme as sanctioned by B.I.F.R. Reference sought as already pointed out was rejected. Hence, the present application.

6. Section 32 of SICSP Act reads as under :

32. Effect of the Act on other laws. (1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act.

On behalf of the respondents the learned Counsel sought to make a submission that before the scheme is sanctioned, the concerned authority must be heard. In the instant case, the power to waive interest and or penalty is the Commissioner. No notice was given to the Commissioner and consequently the scheme as sanctioned being without hearing and or consent of the Commissioner of Sales Tax is not binding on the authorities under the Act.

7. We have seen the record as also the scheme. In Para 14 of the Scheme it is clearly set out as under:

14. The company's representative further submitted that they were disputing the dues of Central Excise and only the accepted dues had been included in the rehabilitation scheme. The Appellate Tribunal had granted a stay order against the disputed Excise demands. If and when crystallized, these dues would be paid by the ice-cream unit. Further, in respect of the relief sought from the Sales Tax Department for allowing transfer of utilized Sales Tax benefits of Rs. 2315.38 lakhs to the dairy unit, the Sales Tax Department vide letter dated 18.10.2007 had submitted that this decision was required to be taken by the Joint Director of Industries, Nashik. However, this relief was in line with the State Govt's policy and the company expected to get the relief. The company would follow up the matter with the Industries Department. The reliefs envisaged from SEBI and the Department of Company Affairs in paras 8.13 of the scheme, were under BIFR's powers.

This apparently shows that the Sales Tax Department had having notice and in fact was represented before the B.I.F.R. In other words, prima facie the contention urged that no notice had been served on the Sales Tax Department is contrary to the record before us and the scheme in which it is so set out.

8. The next question which we have to answer is after the scheme has been sanctioned and the same has been brought to the attention of the appellate authority, could the appellate authority have ignored the scheme. We have already reproduced Section 32(1) of SICA Act. On the reading of the said provision it is clear that once the scheme is sanctioned, the provisions of the Section shall have effect notwithstanding anything inconsistent therewith contained in any other law. In other words, even if under the Sales Tax Act it was open to charge interest and impose penalty considering scheme as sanctioned, it would not be open to the authorities including the quasi judicial authorities under the Act to order payment of interest and or penalty which is contrary to the sanctioned scheme. To that extent in our opinion, clearly the second appellate authority acted without jurisdiction in refusing to consider the effect of Section 32(1) of SICA Act. The Appellate Authority ought to have allowed the appeal in terms of the sanctioned scheme in so far as penalty and interest arising under the B.S.T. Act.

9. Having so held we may also point out that it is the contention of the respondents that they were not heard. Considering the argument advanced the remedy for such person would be to apply before the BIFR for recalling that part of the sanctioned scheme in so far as they are concerned. It is now settled law as laid down by the Supreme Court in *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, that the power of procedural review is inherent in a court and or quasi judicial body which includes the power to set aside an *ex parte* order, i.e. an order passed without notice to the aggrieved person. If therefore, the respondents are still aggrieved by that part of the order and it is open to them that they can still move the BIFR for whatever reliefs they may be entitled to in law. The Tribunal will note the finding in the scheme that the

Respondents were present.

10. Having so said, in our opinion, the second appellate authority having not considered the true import of Section 32 of SICA Act, the order to that extent in not granting the complete relief of interest and penalty as upto 31.3.2007 is liable to be set aside. Consequently question (a) and (b) will have to be answered in the negative against the revenue and in favour of the assessee. As the questions (a) and (b) are answered in the negative against the revenue, in our opinion, question (c) is not required to be answered. In view of the answer to questions (a) and (b), question (d) is also answered in the negative against the revenue and in favour of the assessee.

Application stands disposed of accordingly