IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.1124 of 2015

Karnataka Power Corporation Limited
(KPCL), Shakthi Bhavan
No.82, Race Course Road,
Bangalore - 560 001. ... Appellant/Petitioner

versus

1. The Assistant Commissioner of Customs,
(Refunds), Customs House,
33 Rajaji Salai, Chennai - 600 001.

2. Customs, Excise and Service Tax Appellate
Tribunal (CESTAT),
South Zone Bench, Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road,
Chennai - 600 006. ... Respondents/Respondents

PRAYER: APPEAL under Section 130 of the Customs Act against the order dated 31.07.2012 made in C/ROA/35/2011 in C/338/2004 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.Karthik Ranganathan

For Respondent : Mr.Devendran - R1



J U D G M E N T
(Judgment of the Court was delivered by R.SUDHAKAR,J.)



This Civil Miscellaneous Appeal is filed by the Karnataka Power Corporation, which is a Government of Karnataka undertaking. It is engaged primarily in the installation, maintenance and operation of power generating units in the State of Karnataka. As against the rejection of the refund claim by the Adjudicating Authority as well as by the Commissioner (Appeals), the appellant filed an appeal before the Tribunal on 25.09.2004. On the first hearing date, i.e., on 12.1.2001, the Tribunal dismissed the appeal holding as follows:

> "The assessee being an undertaking of the Government of Karnataka, clearance from the Committee on Disputes is required to pursue the appeal. No clearance is on record and the appeal is an old one. We, therefore, dismiss the appeal for want of COD clearance with liberty to the assessee to apply for restoration in the event of clearance being granted."

2. Subsequent to the order of the Tribunal, the Supreme Court, in the case of Electronics Corporation of India Vs. UOI, reported in [2011] 30 STT 472 (SC), vide judgment dated 17.2.2011, held that the decision in the case of Oil and Natural Gas Commission v. Collector of Central Excise reported in 1992 suppl. (2) SCC 432 had outlived its utility and therefore, it had to be recalled.

3. It was pointed out by the appellant that the issue of getting clearance from the COD and their instrumentalities was brought in by an order dated 20.7.2007 in the case of Oil and Natural Gas Commission v. Collector of Central Excise. Despite the fact that the decision in the case of Electronics Corporation of India Vs. UOI, reported in [2011] 30 STT 472 (SC) dispensed with the requirement of clearance from COD, it appears that the appellant had been pursuing the matter before the COD vide series of correspondences, viz., on 21.2.2011, 04.03.2011 and 27.04.2011. Thereafter, the appellant filed a restoration application on 30.5.2011 based on the decision of the Supreme Court before the Tribunal. The Karnataka Government on 20.12.2011, clarified that the COD functioning the Secretariat stood wound up under the orders of the Supreme Court, w.e.f., 17.2.2011. On 31.7.2012, the Tribunal dismissed the restoration application holding as follows:

> "On perusal of the record we find that this appeal was filed by the applicant in 2004. At that time, as per the decision of ONGC of the Hon'ble Apex Court, the appellants are required to obtain clearance from the Committee on Disputes and at the time of disposal of their appeal the law was prevailing and their appeal was dismissed for want of COD clearance with the liberty to the appellant to file for restoration in the event of clearance being granted. Admittedly, no clearance was produced by the appellant and when this dismissal order of their appeal was passed the decision of ONGC case was in operation. Therefore, we do not find any merit in the application for restoration of the appeal. Accordingly, the same is dismissed."

4. Challenging the above-said decision of the Tribunal, the present appeal has been filed raising the following substantial questions of law:

"1.Whether the CESTAT was right in dismissing the restoration application filed by the appellant/petitioner herein in C/ROA/35/2011 on 31.05.2011 on the ground that the appellant/petitioner herein has not obtained the approval from the Committee on Disputes (COD) at the time of filing the appeal before it inC/338/2004 without appreciating the point that the Committee on Disputes system itself has been abolished by the Supreme Court in its judgment Electronics Corporation of India vs. UOI [2011] 30 STT 472 (SC).

2. Whether the CESTAT was right in not appreciating the fact that at the time of filing of the appeal by the appellant/petitioner herein in C/338/2004 that the approval from Committee on Disputes was not required at all as the Supreme Court in Oil and Natural Gas Commission v. CCE (1992 Supp (2) SCC 432) directed that only matters involving central government, its departments and PSUs of Central government required the approval of Committee on Disputes to file cases before courts and tribunals."

5. Heard learned counsel appearing for the appellant and the learned Standing Counsel appearing for the respondent and perused the materials placed before this Court.

6. The short issue that arises for consideration is whether the Tribunal was justified in dismissing the restoration application on the premise that COD clearance is required.

7. It is seen that the decision in the case of Electronics Corporation of India Vs. UOI, reported in [2011] 30 STT 472 (SC) it was held in paragraph 8 that by another order dated 20.7.2007 (Oil & Natural Gas Corpn. Maharashtra Ltd. case) this Court extended the concept of dispute resolution by High-Powered Committee to amicably resolve the disputes involving State Government and their instrumentalities. The appeal in this case was filed on 25.09.2004 and therefore, prima facie the appellant is justified in saying that there was no requirement for clearance by the High Powered Committee. The Tribunal was at error in dismissing the appeal at the first instance. Even otherwise, subsequent to the decision of the Supreme Court in the case of Electronics Corporation of India Vs. UOI, reported in [2011] 30 STT 472 (SC), the restoration application has been filed on 30.5.2011. The law as it stands on and after 17.2.2011 is that there is no requirement of getting clearance from the COD.

The Tribunal had failed to note the decision of the Supreme Court and therefore, the order of the Tribunal is erroneous.

8. Learned counsel appearing for the respondent relied upon the decision in the case of Hindustan Copper Ltd. v. UOI reported in 2014 (307) ELT 662 (Jhar.), wherein it was held as follows:

> "9. In the present case, challenging the order of the Commissioner (Appeals), the petitioner filed appeal before the CESTAT on 14-10-2009 [In ECIL case, the judgment was passed on 17-2-2011]. When the appeal was filed before the CESTAT, the directions in ONGC-II [1995 Supp(4)SCC 541 = 1992 (61) E.L.T. 3 (S.C) (11-10-1991) and ONGC-III (2004) 6 SCC 437 = 1994 (70) E.L.T. 45 (S.C.)] (7-1-1994) were holding that field. In ONGC-II [1995 Supp (4) SCC 541 = 1992 (61) E.L.T. 3 (S.C.), Hon'ble Supreme Court held as under:-
>
> "4. It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with."
>
> 10.........
>
> 11. In the present case, the petitioner, HCL, filed appeal in 2009. As per the ONGC-III (2004) 6 SCC 437 = 1994 (70) E.L.T. 45 (S.C.)] , the petitioner should have approached COD for obtaining clearance within one month after such filing (i.e. on 14-10-2009). But even though the appeal was pending from 2009 to 2012, the petitioner has not approached COD for obtaining clearance. As on the date of the judgment of ECIL, i.e. 17-2-2011, the petitioner has neither obtained COD clearance, nor produced evidence showing that it had approached COD for obtaining clearance. It is a matter of record that the petitioner had applied for COD clearance only on 4-9-2012 just ten days prior to taking up of its appeal. Having not been vigilant in either applying or obtaining COD clearance, the petitioner cannot take advantage of ECIL judgment."

9. We find that the above-said decision relied on by the learned counsel appearing for the respondent does not apply to the facts of the present case. As we have already held, when the restoration application was filed on 30.5.2011 by the appellant, the decision of the Supreme Court in the case of Oil and Natural Gas Commission v. Collector of Central Excise reported in 1992 suppl. (2) SCC 432 does not apply to the State Government and its instrumentalities.

10. In the light of the above, we answer the question of law in favour of the assessee and against the Revenue. Accordingly, the order of the Tribunal stands set aside and this Civil Miscellaneous Appeal stands allowed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Assistant Commissioner of Customs,
(Refunds), Customs House,
33 Rajaji Salai, Chennai - 600 001.

2. Customs, Excise and Service Tax Appellate Tribunal (CESTAT),
South Zone Bench, Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road,
Chennai - 600 006.

+1cc to M/s.Karthik Ranganathan, Advocate, S.R.No.28386
+1cc to M/s.M.Devendran, Advocate, S.R.No.28521

Civil Miscellaneous Appeal No.1124 of 2015

ALA(CO)
CA(01/07/2015)