THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

and

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

WRIT PETITION No.9811 of 2015

ORDER: (per RR, J)

This writ petition, under Article 226 of the Constitution of India, is filed against the order passed by the Commissioner of Central Excise, Customs and Service Tax dated 17.03.2015 rejecting the petitioner's application, for rectification of the mistake, under Section 74 of the Finance Act, 1994 (for short 'the Act').

Facts, to the extent necessary, are that the Commissioner of Central Excise, Visakhapatnam initiated investigation against the petitioner, and a show cause notice dated 30.12.2008 was issued to him. On the petitioner furnishing information, by his letter dated 14.10.2009, a second show cause notice dated 22.10.2009, covering the Financial Year 2008-09, was issued wherein it was proposed to demand Rs.1,34,55,265/- and Rs.3,60,13,330/- respectively as service tax in terms of Section 73 of the Act. In addition thereto, it was also proposed to charge interest thereon under Section 75 of the Act, and to impose penalties under Sections 76, 77 and 78 of the Act. After the petitioner submitted his reply to the show cause notice, the adjudicating authority passed the order dated 28.09.2012 confirming the demand of service tax for a total sum Rs.4,75,69,781/-. In addition, interest under Section 75, and penalty under Sections 76, 77 and 78 of the Act, were also imposed.

Aggrieved thereby, the petitioner carried the matter in appeal to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in S.T.No.25304 of 2013 together with the stay application in S.T.No.25384/2013. In its order dated 09.01.2014, the CESTAT noted that, with regards construction of residential complex service, the claim of the appellant was that the service tax demanded had been wrongly computed; this plea could not be considered at the interim stage for the reason that such a plea was not taken before the adjudicating authority; the appellant had filed an application, for admission of additional grounds, which could be considered only at the time of final hearing of the appeal, and not at the interlocutory stage; and, therefore, they were not inclined to consider any relief in respect of this claim urged by the appellant. The CESTAT directed the petitioner herein to make pre-deposit of Rs.3.4 crores within a period of six weeks, and report compliance by 21.02.2014.

Aggrieved thereby, the petitioner herein filed Central Excise Appeal No.31 of 2014 and this Court, in its order dated 14.03.2014, observed that the CESTAT had rightly exercised its discretion to make the deposit; and, instead of Rs.3.4 crores directed to be deposited by the CESTAT, it would suffice if the appellant (petitioner herein) deposited a round figure of Rs.3.00 crores. Aggrieved by the order of this Court, in CEA.No.31 of 2014 dated 14.03.2014, the petitioner herein carried the matter in appeal to the Supreme Court. By its order in SLP (Civil) No.11099 of 2014 dated 05.05.2014, the Supreme Court dismissed the Special Leave Petition. However, time was extended till 15.07.2014 to comply with the order passed by the High Court, and the CESTAT was directed, in case the order was complied with, to proceed with the hearing of the appeal.

Sri S.V.S.Chowdary, learned counsel for the petitioner, would submit that, as against the pre-deposit directed by the High Court of Rs.3.00 crores, the petitioner had deposited Rs.1.5 crores.
Sri Gopalakrishna Gokhaley, learned Standing Counsel for the respondent, however, states that he is unaware of any such deposit. Be that as it may, it is not in dispute that the order of this Court, in CEA.No.31 of 2014 dated 14.03.2014 directing the petitioner to deposit a sum of Rs.3.00 crores, has not been complied with in its

entirety.

Thereafter, the petitioner herein filed an application under Section 74 of the Act seeking rectification of the mistake in the adjudication order, contending that the sum of Rs.41,14,69,442/-, referred to by them before the assessing authority, was a typographical mistake and the correct receipts, for the project of construction of 928 houses for the Financial Year 2008-09, was only Rs.4,14,69,442/-. The petitioner's application for rectification was rejected by the Commissioner of Central Excise, Customs and Service Tax on 17.07.2014, on the ground that no action could be taken, by them at their end, as the matter was under consideration before the CESTAT, Bangalore; and, in view of the judgment of the High Court in CEA.No.31 of 2014 dated 14.03.2014, wherein it was held that the Tribunal or the appellate forum had to decide the issue whether the figure, mentioned in the impugned order, was correct or not.

Aggrieved thereby, the petitioner invoked the jurisdiction of this Court and a Division Bench, in its order in W.P. No.25709 of 2014 dated 20.01.2015, held that the mere fact that an appeal was pending before the CESTAT did not disable the petitioner from seeking rectification of the mistake under Section 74(2) of the Act; and, as long as the appeal or revision has not been considered and decided, the power of rectification was available to the original authority under Section 74(2) of the Act. The respondent was directed to consider the application, for rectification of mistake under Section 74(2) of the Act, on its own merits and, in accordance with law, after affording the petitioner an opportunity to make his claim of the alleged typographical mistake. Consequent thereto, the impugned order dated 17.03.2015 was passed.

The Commissioner has, in his order dated 17.03.2015, given elaborate reasons why the petitioner's claim of rectification of mistake does not merit acceptance. The Commissioner held that the assessee had submitted their written reply to the show cause notice dated 22.10.2009 vide their letter dated 19.11.2009; though the assessee had not mentioned, in their letter dated 19.11.2009, of any enclosures, they had attached two attachments to the said letter; the applicant, in his letter dated 19.11.2009, had all through argued that he was not liable to pay Service Tax but had not discussed about the quantification of the Service Tax liability; he had not objected to the figures adopted in the show cause notice to arrive at the liability; he had attached a copy of Annexure-I, of the show cause notice dated 22.10.2009, to said letter dated 19.11.2009; in the copy of Annexure-I the sum of Rs.59,02,61,437/-, at Sl.No.3 and column No.3 of the Table, was rounded off, and Rs.22,02,61,207/- was written with a pen; similarly, the total amount of Rs.68,68,45,146/- in column No.3 was rounded off, and Rs.30,64,28,271/- was written by pen; such writings with pen were not attested by anybody; there was no written explanation, either in the main letter or in the annexure, as to why some numbers were rounded off; even if it is presumed that the amount of Rs.59,02,61,437/- at Sl.No.3 and column No.3 of the Table was wrong, and was to be replaced by Rs.22,02,61,207/-, the total would be Rs.31,68,44,916/- and not Rs.30,64,28,271/-; the assessee had attached a Table of two pages titled “Total Turnover as on 31.03.2009”, to the said letter dated 19.11.2009; this table was similar to the table given in their letter dated 14.10.2009 before issue of the show cause notice; the amount of Rs.41,14,69,442/- at Sl.No.5 was replaced with Rs.4,14,69,442/-; the fact of this replacement, and the reason for doing so, was not mentioned either in the attachment or in the main letter; the said letter dated 19.11.2009 did not make any mention that the same had any enclosures; the attached statement did not have any signature authenticating the writings in pen; the said two attachments, to letter dated 19.11.2009, were not legally admissible for taking cognizance for passing the order dated 28.09.2012; the contention of the assessee that a mistake, apparent from the record, had been brought to the notice of the Adjudicating Authority vide his letter dated 19.11.2009, i.e. prior to issue of the Order-In-Original, was not sustainable in law; in paras 2 & 3 of the letter dated 19.05.2014, the applicant had sought rectification of the mistake in paras 13(c), 22, 24 & 25 of the order dated 28.09.2012; what was stated, in the said paras, was the statement of facts in respect of the said order dated 28.09.2012, and was beyond the scope of Section 74 of the Finance Act, 1994; there was no mistake apparent from the record in respect of the Order-in-Original dated 28.09.2012; consequently, there was no scope for 'Rectification of Mistake' in terms of Section 74 of the Finance Act, 1994; and the applications for 'Rectification of Mistake', filed by the applicant vide letter dated 19.05.2014 and application dated 23.05.2014, were liable to be rejected.

Sri S.V.S.Chowdary, learned counsel for the petitioner, would draw attention of this Court to the letter dated 17.01.2008, addressed to the petitioner by the GVMC, to submit that the tender quoted by the petitioner, for construction of 928 houses, was only Rs.12,77,62,719.13 ps; the ledger extract, relating to the said work, would show that the petitioner had received only Rs.4.98 crores; and it was evident that the figure was erroneously reflected as Rs.41,14,69,442/-, instead of Rs.4,14,69,442/-.

A typed statement, allegedly the ledger extract, was placed before us by Sri S.V.S. Chowdhary, Learned Counsel for the petitioner. The typed sheet shows that a sum in excess of Rs.4.98 crores, was received, and not Rs.4,14,69,442/-. The relevant extract of the ledger for the year 2008-09, in so far as it related to the amounts received towards the 928 houses scheme, (a copy of which is enclosed along with the Writ Petition)reflects receipts of only Rs.2,25,20,061/-, and not Rs.4,14,69,442/-. It is evident that the documents, on which the petitioner places reliance on, show different figures none of which tally with the sum of Rs.4,14,69,442/- claimed by him to be the actual receipts.

Even otherwise, the power conferred under Section 74(1) of the Act is only to rectify a mistake apparent from the record. On the petitioner's own admission, he had, by oversight, informed the adjudicating authority that the amount received by him was Rs.41,14,69,442/-. Even assuming there is an error, it is because of the mistake committed by the petitioner himself, and not the adjudicating authority. Under the guise of exercise of jurisdiction under Section 74(1) of the Act, it is not open to the assessing authority to review the order passed by him earlier. It is only if there is a mistake, which is apparent from the record before him, can the adjudicating authority exercise jurisdiction under Section 74(1) of the Act, to rectify the said mistake.

In the exercise of its Certiorari jurisdiction, this Court would not re-appreciate findings of fact recorded by the Commissioner in his order dated 17.03.2015. It is only if the order were to suffer from an error apparent on the face of the record, would there be any justification to interfere with the impugned order. We are satisfied that the impugned order does not suffer from any such infirmity. As the scope of Section 74(1) of the Act, for rectification of a mistake, is limited, and as the statements made by the petitioner, at different points of time, are inconsistent, we see no reason to interfere with the well-reasoned order passed by the Commissioner dated 17.03.2015.

Rejection of the application, for waiver of pre-deposit, by the CESTAT would only enable the respondent to collect the amount demanded from the petitioner towards service tax, interest and penalty. It would not result in the dismissal of the appeal itself. As the CESTAT has the power to examine the material on record, re-appreciate the evidence, and arrive at a finding different from that of the adjudicating authority, we request the CESTAT to hear and decide the appeal with utmost expedition. Subject to the above observations, the writ petition fails and is, accordingly, dismissed. No costs.

Miscellaneous Petitions pending, if any, shall also stand dismissed.

RAMESH RANGANATHAN, J

3rd DECEMBER, 2015.

M.SATYANARAYANA MURTHY, J

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