AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO. 285 OF 2014

GANNON DUNKERLEY & CO. LTD.,
Mechanical Engineering Division, Bomay Mutual Annexe, 2nd Floor, Rustom Sidhwa Marg, Mumbai – 400 001 **...Appellant**

Versus

COMMISSIONER OF SERVICE TAX, MUMBAI – I, 5th Floor, New Central Excise Building, Maharshi Karve Road, Churchgate, Mumbai – 400 020 **...Respondent**

Mr. Prakash Shah, *with Mr. Prasad Paranjape, i/b PDS Legal for the Appellant.*
Mr. Pradeep S. Jetly, *with Mr. Jitendra B. Mishra, for the Respondent.*

CORAM: S.C. DHARMADHIKARI & G.S. PATEL, JJ.
DATED: 2nd February 2016

PC:- (Per G.S. Patel, J.)

1. This Appeal is directed against the order dated 26th February 2014 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai ("**CESTAT**") in an Appeal filed by the present Appellants. A copy of that order is at Exhibit "A" to the present Appeal.

2. We have heard Mr. Shah for the Appellants and Mr. Jetly for the Respondent. With their consent, we took up the Appeal for final disposal at the admission stage.

3. The Appellants have set out several questions of law in paragraph 18, and which, according to them, are substantial questions that require to be decided.

4. It seems to us clear that the impugned order is wholly unsatisfactory. The CESTAT has simply recorded the contentions on both sides but has not given us the benefit of their reasons for their conclusion.

5. The controversy is narrow. The Appellant Company provides civil and mechanical construction services. It has a Mechanical Engineering Division. On 24th August 2006, the Directorate General of Central Excise Intelligence, Regional Unit, Vadodara initiated an enquiry against the Appellant. It issued a summons dated 24th August 2006. There followed the recording of statements of the Manager (Accounts) of the Appellant and of one Mr. Nageshwaran Rajagopalan Srinivasan under Section 14 of the Central Excise Act, 1944 ("**the Act**").

6. During the course of investigation, i.e., even before the issuance of a Show Cause Notice, the Appellant paid an amount of Rs. 1,10,80,626/- with interest of Rs. 11,35,434/- toward the alleged short payment of service tax.

7. There followed a Show Cause Notice dated 21st August 2008 in which it was alleged that the Appellant had misdeclared the value of the services provided and calling on them to show cause why the service tax amount of Rs. 1,10,80,626/- (the very amount already paid) should not be demanded and recovered under Section 73 of the Act along with interest (also already paid) under Section 75 and penalties under Sections 76 and 78. The Appellant responded by its letter dated 11th December 2008. On 2nd January 2009, the Respondent, the Commissioner of Service Tax, passed an Order in Original demanding service tax of Rs. 1,10,80,626/- and interest of Rs. 11,35,434/-, both amounts already paid before the issue of the Show Cause Notice. However, the Respondent also imposed a penalty under Section 76 and Section 78 of the Act. He did not give the Appellant the option of paying 25% of the penalty imposed within thirty days as provided in the second proviso to Section 78 of the Act.

8. The Appellant carried the matter in Appeal to the CESTAT. On 26th February 2015, the CESTAT dismissed the Appeal by the impugned order.

9. Mr. Shah points out that apart from anything else, the CESTAT did not consider the questions specifically raised as to whether the Respondent, the Commissioner of Service Tax, had any jurisdiction to impose a penalty under Section 78 of the Act for a period prior to 13th May 2005. According to him, that authority, at the relevant time, remained only with the Assistant Commissioner or the Deputy Commissioner of Central Excise and could not have been exercised by the present Respondent.

10. In addition, he points out that given the fact that the Appellant had already paid the duty and interest, no question arose of issuing a Show Cause Notice in the first place demanding the very amounts deposits. He also submitted that there was no question of imposing a penalty on the Appellant either under Section 76 or Section 78 of the Act. There was no deliberate intent on the part of the Appellant to evade tax. The non-deposit of the tax collected was attributable only to certain ambiguities in the law as it then existed. Mr. Shah points out that under proviso to Section 73(1), there is a proviso that extends the relevant period of five years. However, in order to invoke that extended period, one or more of several conditions must be shown to have existed, viz., fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the Act and Rules made thereunder. The services provided by the Appellant were in the nature of a works contract and these came into the tax net only with effect from 1st June 2007. At the relevant time, there was no provision corresponding to Section 73A of the Act, one that was introduced with effect from 18th April 2006, and which requires parties like the Appellant to pay amounts collected from the customers to the credit of the Central Excise.

11. Mr. Shah points out that none of these issues, though squarely raised in Appeal, a copy of which is Exhibit "J" to the present Appeal, were considered by the CESTAT. The various points raised by the Appellant have been set out in the grounds of appeal in the appeal before CESTAT.[1] We find no consideration of

[1] *p.* 115 onwards of the Appeal paper-book

any of these on merits. In our view, the impugned order is most unsatisfactory. It is virtually an unreasoned order.

12. In the facts and circumstances of this case, the impugned order is quashed and set aside. Appeal No. ST/75/2009-MUM is restored to the file of the CESTAT. The CESTAT is requested to dispose of the Appeal at its earliest convenience and in doing so to record its findings on all issues raised and, in particular, now that the present Appeal has been filed before us, on the questions set out in paragraph 18 of the present Appeal. We make it clear that the Appeal is to be decided on its merits uninfluenced either by the previous order under challenge or this order. We have expressed no opinion on any of the issues raised in the present Appeal. All contentions are expressly left open.

(G. S. PATEL, J.) **(S.C. DHARMADHIKARI, J.)**