

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

+ WRIT PETITION No.36553 of 2016

% Date: 24-03-2017

Between:

M/s. Andhra Cements Limited
Durgapuram, Srinagar (P.O)
Dachepalli – 522 414, Guntur District, A.P.
Rep. by its Chief Financial Officer
Mr. Anand Kumar Agarwal.

... Petitioner

Vs.

1. The commissioner of Central Excise and Service Tax Central Revenues Building, Kannavari Thota, Guntur – 522 004 (A.P.)
2. State of Andhra Pradesh, rep. by its Secretary, Industries, Secretariat, Saifabad, Hyderabad.
3. Department of Industries A.P., rep. by its Commissioner, Abids, Hyderabad.

... Respondents

! Counsel for Petitioner : : Mr. P. Balaji Varma

^ Counsel for Respondents: Mrs Sundari R. Pisupati

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? Cases referred

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

Delivered on : 24-03-2017

Coram :

Honourable Mr. Justice V.RAMASUBRAMANIAN
and
Honourable Ms. Justice J.UMA DEVI

W.P.No.36553 of 2016

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5. State of Andhra Pradesh, rep. by its Secretary, Industries, Secretariat, Saifabad, Hyderabad.
6. Department of Industries A.P., rep. by its Commissioner, Abids, Hyderabad.

... Respondents

For the Petitioner : -- P. Balaji Varma

For Respondents : -- Sundari Pisupati

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

W.P.No.36553 of 2016

ORDER: (per V. Ramasubramanian, J.)

Aggrieved by an Order in Original confirming a demand of interest under Section 11AA of the Central Excise Act, 1944, the petitioner has come up with the present writ petition.

2. Heard Mr. P. Balaji Varma, learned counsel for the petitioner and Mrs. Sundari R. Pisupati, learned Standing Counsel appearing for the respondents.

3. The petitioner is a manufacturer of cement and clincker, falling under Ch.SHNo.25232910 and 25231000 respectively. The petitioner was registered with the department of Central Excise.

4. It appears that the petitioner had three units located at three different places. They claimed the benefit of Notification No.36/87 dated 01.03.1987 and 124/87 dated 29.04.1987 in respect of all the three units. When the benefit of the notifications was denied by the department, the petitioner filed a writ petition in CWP No.1653/88 on the file of the High Court of Delhi. The said writ petition was allowed by a learned Single Judge on 22.01.1990. The department filed an appeal before a Division Bench of the Delhi High Court in L.P.A.No.23 of 1990.

5. Meanwhile, the petitioner filed a refund claim on 20.04.1990, pursuant to the judgment of the learned Single Judge of the Delhi High Court. But the department did not settle the refund claim in view of the pendency of the appeal before the Division Bench. Thereafter, the petitioner filed a Civil Suit in O.S.No.589 of 1990 on the file of the City

Civil Court Hyderabad, seeking a money decree in terms of the judgment of the learned Single Judge of the Delhi High Court. Alternatively they prayed for permission to clear excisable goods without payment of duty, until such time as the amount of refund was adjusted.

6. In the said suit, the V Additional City Civil Judge, Hyderabad granted an interim injunction on 11.07.1990 restraining the department from assessing or demanding excise duty. As against the said order, the department filed an appeal before this Court. The Court passed an order directing the petitioner to furnish immovable properties as security for a value of Rs.5 crores.

7. In the meantime, the appeal filed by the department in L.P.A.No.23 of 1990 before the Division Bench of the Delhi High court was allowed on 06.09.1999 and the petitioner was held to be ineligible for the benefit of the notification No.124/1987. A direction was also issued to the petitioner to pay back the amounts wrongly adjusted by them.

8. Thereafter, the City Civil Court, Hyderabad, dismissed the suit filed by the petitioner on 01.02.2000. As against the said judgment the petitioner filed an appeal before this Court. After initially granting an order of restraint, this Court dismissed the stay petition on 21.07.2005.

9. The petitioner filed Special Leave Petitions as against the judgment of the Division Bench of Delhi High Court and also against the judgment of this Court. But the Special leave Petitions were dismissed and the review petitions were also dismissed by the Apex Court.

10. As a consequence, the department estimated the liability on the clearances made without payment of duty by way of adjustment, to be Rs.6.29 crores. Therefore, six show cause notices were issued demanding a total amount of Rs.3,49,66,090/-, towards clearances made without

payment of duty during the period from 16.07.1990 to 20.01.1991. These show cause notices were adjudicated by an Order in Original dated 06.11.2001 in and by which the demand made in the show cause notices was confirmed. The Order in Original was upheld by the Commissioner (Appeals) on 11.09.2012 and the petitioner became liable to pay a total amount of Rs.6,29,61,118/-. This liability, partly in respect of Nadicudi and Vijayawada plants and partly in respect of Vizag plant became final and there is no dispute about the quantum.

11. Even while litigating before various forums including the High Court of Delhi, City Civil Court Hyderabad and the High Court of Andhra Pradesh, the petitioner filed an application before the BIFR to declare them as a Sick Industrial Company in terms of the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. By an order dated 23.07.1990, BIFR declared the petitioner as a sick industrial company under Section 3(1)(o) of Act 1/1986. Thereafter, a scheme for revival was sanctioned by BIFR on 06.06.1994. The scheme was upheld by AAIFR by an order dated 19.12.1994 with some modifications.

12. It appears that the scheme sanctioned by BIFR was implemented partly, but not in full. Therefore, in December, 2001 BIFR declared the scheme to have failed. The BIFR also directed a change of management.

13. The order of BIFR was challenged before the AAIFR, which remanded the matter back to the BIFR. Again in February, 2003 BIFR declared the scheme to have failed and issued a notice for winding up. However, four months time was granted to the petitioner to come up with a final proposal.

14. The petitioner submitted a modified proposal, but the same was rejected by BIFR on 05.04.2004. The petitioner filed an appeal before AAIFR. AAIFR allowed the appeal on 12.09.2006 and remanded the matter back to BIFR for formulating a scheme for revival.

15. After remand, the BIFR sanctioned a modified scheme on 21.07.2008. Under the said scheme, the petitioner was allowed to pay an excise duty of Rs.6.29 crores in five installments. The scheme also granted waiver of interest and penalty.

16. Contending that the order of the BIFR permitting the petitioner to pay the duty amount in five installments and granting waiver of interest and penalty was passed without hearing them, the Department filed an appeal in Appeal No.10 of 2010 before AAIFR. The said appeal was opposed by the petitioner on the ground that the appeal was barred by time, but by an order dated 12.08.2011, the AAIFR held that the appeal of the Department was in time.

17. Aggrieved by the order of the AAIFR holding that the appeal of the Department was within time, the petitioner filed a writ petition in W.P.(C).No.7304 of 2011. The said writ petition was dismissed by a Division Bench of the High Court of Delhi by an order dated 01.09.2014, with certain observations. It should be pointed out at this stage that the only issue that arose before the Division Bench of the Delhi High Court in W.P.(C).No.7304 of 2011 was as to whether the AAIFR was correct in holding the appeal of the Department to be within time or not. On this issue, the Delhi High Court held in para-8 of its order dated 01.09.2014 that the scheme sanctioned by BIFR on 21.07.2008 was without notice to the Department and without hearing the Department and that there was manifestly a violation of the principles of natural justice. The Delhi High

Court also found that BIFR did not supply or send certified copy of the order dated 21.07.2008 to the Department, to enable the Department to prosecute the matter further by way of appeal. Therefore, the Delhi Court came to the conclusion that AAIFR was right in holding the appeal of the Department to be within time.

18. But unfortunately without stopping at recording an opinion on the only issue raised by the petitioner, the Division Bench of the Delhi High Court was persuaded by the petitioner also to consider the question of waiver of interest and penalty. Therefore, in paragraph 20 of its decision, the Delhi High court recorded an observation, which reads as follows:

“Learned counsel for the petitioner has submitted that the scheme has been substantially implemented and even payment of the principal amount has been made. This may be correct. The issue, which remains is, whether or not interest or penalty should be paid or levied under the Central Excise Act, 1944. This is a separate issue. We hope and trust the Revenue will take all relevant facts into consideration and the contentions put forth by the petitioner will be examined while setting up the case on merits. Of course, they will be bound by the guidelines or policies framed by them in relation to sick companies.

With the aforesaid observations, the writ petition is dismissed. Interim order is vacated. The parties are directed to appear before the AAIFR on 29th October, 2014, when a date of hearing will be fixed.”

19. Thereafter, the appeal filed by the Department of Central Excise in Appeal No.10 of 2010 before the AAIFR was taken up for consideration on merits. But instead of considering the case on merits, AAIFR fell into an error in thinking that the Delhi High Court had clinched the issue by its observations in para-20 of the order dated 01.09.2014 in W.P.(C).No.7304 of 2011. Therefore, the AAIFR disposed of the appeal in a cryptic manner. It may be useful to extract the order dated 03.12.2014 passed by the AAIFR in Appeal No.10 of 2010 as follows:

“In this appeal, the appellant is aggrieved by certain provisions in the modified rehabilitation scheme which provide for waiver of interest and penalty leviable or payable by the respondent company to the appellant.

This issue has been considered by the High Court of Delhi in Writ Petition (Civil) No.7304 of 2011 vide its order dated 1st September 2014 wherein it has, inter alia, held as follows:

“20. Learned counsel for the petitioner has submitted that the scheme has been substantially implemented and even payment of the principal amount has been made. This may be correct. The issue, which remains is, whether or not interest or penalty should be paid or levied under the Central Excise Act, 1944. This is a separate issue. We hope and trust the Revenue will take all relevant facts into consideration and the contentions put forth by the petitioner will be examined while setting up the case on merits. Of course, they will be bound by the guidelines or policies framed by them in relation to sick companies.”

In view of above directions of the High Court of Delhi, nothing remains to be considered by us in this appeal.

We accordingly, dispose of the appeal with direction to the appellant to consider and decide the issue of waiver of interest and penalties in terms of the above directions of the Hon'ble High Court of Delhi.”

20. Thereafter, the Principal Commissioner issued a show cause notice dated 17.06.2014 calling upon the petitioner to show cause as to why an amount of Rs.9,84,69,985/- should not be levied towards interest in terms of Section 11AA for the period from 26.08.1995 to 29.03.2013. Challenging the said show cause notice, the petitioner filed a writ petition in W.P.No.27732 of 2015. Though notice was ordered in the said writ petition, no stay appears to have been granted in the said writ petition.

21. Therefore, the adjudicating authority took up the matter for consideration and passed the order dated 04.10.2016 impugned in the present writ petition confirming the demand. It is against the said order that the petitioner has come up with the present writ petition.

22. The only ground on which the petitioner challenges the impugned order is that once the scheme sanctioned by BIFR had attained

finality with the AAIFR not granting any relief to the Department by its order dated 03.12.2014, the Department is bound by the scheme in view of Section 32 of the Central Act No.1/1986. It is the contention of the petitioner that the Department of Central Excise cannot refuse to give effect to the provisions of the sanctioned scheme, in terms of which, the entire duty liability of Rs.6.29 crores had already been discharged. Whenever, a sick company is ordered to be revived and rehabilitated, especially in terms of the provisions of the Central Act No.1/1986, the Central and State Governments are obliged to lend a helping hand. Since Section 32 contains a non obstante clause, the petitioner contends that the Department cannot claim anything more than what is sanctioned under the scheme.

23. After we ordered notice in the writ petition, the Department filed a counter affidavit along with an application for vacating the stay. It is contended in the counter affidavit that Section 11AA of the Central Excise Act, 1944 came into effect from 26.05.1995 and that there is no provision available in the Act for waiver of interest or penalty. Therefore it is claimed by the respondents that in the absence of a specific provision empowering the authorities to waive penalty and interest, it is not possible for them to grant a waiver of a statutory liability. Insofar as the effect of the order of the AAIFR dated 03.12.2014 is concerned, it is contended by the Department that the AAIFR left it to the Department to consider the question in accordance with law and that therefore there was no question of waiver of interest and penalty in the absence of any provision therefor.

24. We have carefully considered the rival submissions.

25. The sheet anchor of the case of the petitioner is the scheme sanctioned by BIFR on 21.07.2008 and the order passed by AAIFR on

03.12.2014 and the effect of Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985, hereinafter referred to as the Act.

26. It is no doubt true that in the scheme sanctioned on 21.07.2008, the BIFR permitted the petitioner to pay the excise duty liability of Rs.6.29 crores in five annual installments. In paragraph 9.4 of the modified scheme sanctioned by BIFR on 21.07.2008, it was recorded as follows:

- “(C) Central Excise, Customs and Service Tax Authorities
- (i) To waive entire interest and penalty levied or leviable on Excise Duty and Service Tax Arrears and to accept payment of excise duty/service tax outstanding as on the cut-off date over a period of seven years without any interest/penal interest/penalty. The company vide their letter dt.08.05.07, has accepted the outstanding dues of Deptt. as Rs.6,29,62,888/- any re-payment of their dues in five (5) annual installments.
 - (ii) To exempt ACL/its directors/officers from the penal provisions of the Excise, Cenvat, Customs and Service Tax Acts and rules made thereunder.
 - (iii) To exempt ACL from the penal provisions of the Customs Act relating to the pre-takeover defaults.”

27. It may be of interest to note that paragraph 9.4 (B)(iii) of the modified scheme provided for waiver of interest and penalty leviable under the Income Tax Act, 1961. Paragraph 9.4 (A)(i) merely exempted the company from the penal provisions of the Companies Act, Central Excise Tax Act, and service Tax, Central Sales Tax Act, Customs Act etc. There was no specific mention in paragraph 9.4 of the modified scheme sanctioned by BIFR to the effect that interest and penalty under the Central Excise Act, 1944 will be waived. In the light of the fact that a special mention was made about waiver of interest and penalty under the Income tax Act, this omission with regard to Central Excise Act is crucial.

28. Let us now examine the case from two possible scenarios. In the first scenario let us assume that the scheme indirectly provided for waiver of interest and penalty under the Central Excise Act, 1944 also. If

the scheme had actually provided for such a benefit, there was no scope for the Delhi High Court to give an observation in paragraph 20 of its judgment dated 01.09.2014 in W.P.(C).No.7304 of 2011. The liberty granted to the Department by the Division Bench of the Delhi High court as confirmed by the AAIFR by its order dated 03.12.2014 to consider the case of the petitioner for waiver, would tantamount to overruling any such waiver of interest and penalty, even if the same can be read into the modified scheme sanctioned by BIFR. To put it differently, if the modified scheme sanctioned by BIFR is taken to have allowed waiver, the same stood modified by the order of the Division Bench of the Delhi High Court dated 01.09.2014 and the order of the AAIFR dated 03.12.2014. The moment the Delhi High Court and the AAIFR granted liberty to the Department to examine the question of waiver and penalty, any protection granted under the modified scheme by the BIFR will be taken to have been removed.

29. Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 merely states that any scheme sanctioned under the Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law except under two specified enactments. In the case on hand, the scheme (paragraph 9.4) does not specifically speak about the waiver of interest and penalty under the Central Excise Act, though it specifically speaks about the waiver of penalty and interest under the Income Tax Act. Therefore, the protection under Section 32(1) of the Act is not available.

30. Assuming for the sake of argument that the scheme as sanctioned by the BIFR has an inbuilt protection regarding interest and penalty under the Central Excise Act, 1944 also, even then the protection

is not available any more to the petitioner after 01.09.2014, when the Delhi High Court gave liberty to the Department to examine the question on merits. We have extracted paragraph 20 of the order of the Delhi High Court which merely expresses a hope that the Revenue will take all relevant facts into consideration and decide the same. Therefore, even if we read the modified scheme as containing a provision for waiver of interest and penalty, the same stood diluted by the judgment of the Delhi High Court, which left it to the Department to decide the question.

31. Therefore, neither the order of the AAIFR nor Section 32 of the Act is of any assistance to the petitioner, for successfully challenging the impugned Order in Original. As a matter of fact, the petitioner does not appear to deserve any sympathy, as can be seen from the long litigation that they have fought over a period about 30 years from 1988. As we have pointed out in the narration of facts, the petitioner originally filed a writ petition on the file of the Delhi High Court in CW.P.No.1653 of 1988 claiming the benefit of the notifications. Though they succeeded before the learned Single Judge, the Department went on appeal in L.P.A.No.23 of 1990. Even during the pendency of the appeal before the Division Bench, the petitioner moved a Civil Court in Hyderabad in O.S.No.589 of 1990 seeking an injunction order restraining the Department from demanding any excise duty on the clearances effected by them, until the amount of refund that they became entitled as per the order of the learned Single Judge of the Delhi High Court got adjusted. The petitioner also got an interim order of injunction from the Civil Court. It was only at around the same time in the year 1990 that the petitioner filed a reference under Section 15(1) of the Act before the BIFR in Case No.22 of 1990.

32. Therefore, the petitioner has to be seen as a person who gained advantage from a Civil Court by way of an interim order and by the time the interim order got vacated, the petitioner secured protection under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. This protection was enjoyed by the petitioner from the year 1990 till the year 2008 when the modified scheme was sanctioned. It must be remembered that the scheme first sanctioned, failed due to the inability of the company to get revived and BIFR recommended winding up. But by repeatedly litigating, the petitioner survived.

33. In any case, a person, who gained an advantage by an interim order of the Court, cannot subsequently turn around and seek umbrage under Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985. De hors the above, the Delhi High Court and AAI FR granted liberty to the Department to examine the question of waiver of interest and penalty. This has been done by the 1st respondent, with specific reference to the mandate of Section 11AA of the Central Excise Act, 1944. Therefore, there are no merits in the writ petition and hence it is dismissed. The miscellaneous petitions pending, if any, in this writ petition shall stand closed. There shall be no order as to costs.

JUSTICE V. RAMASUBRAMANIAN

JUSTICE J. UMA DEVI

Date:24-03-2017

Js

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE MS. JUSTICE J. UMA DEVI

W.P.No.36553 of 2016

(Per VRS,J)



24th March, 2017

Js.