IN THE HIGH COURT OF BOMBAY AT GOA

MISC.CIVIL APPLICATION NO. 882 OF 2019
IN
WRIT PETITION NO. 178 OF 2015

SOCIEDADE DE FOMENTO
INDUSTRIAL PVT. LTD., ... Applicant

Versus

THE ASSISTANT COMMISSIONER
OF INCOME-TAX AND ORS., ... Respondents

Mr. N. Thakkar, Mr. P. Rao and Ms. J. Amalsadvala, Advocates for the Applicant.
Ms. S. Linhares, Advocate for Respondents No.1 and 2.

Coram:- M.S. SONAK &
C. V. BHADANG, JJ.

Date:- 4th December, 2019

P.C.:

Heard learned counsel for the parties.

2. By this civil application, the applicants seek the following reliefs:

a) This Honourable Court be pleased to direct the release of the Bank Guarantee of a sum of ₹105,95,04,390/- furnished pursuant to order dated 08.05.2015 read with order dated 14.02.2019, by modifying the said orders.

b) Pass such other and further Orders, as this Honourable Court deems fit and proper.

3. The bank guarantee of which the applicants seek release was furnished in terms of our order dated 08.05.2015, which reads as follows:

"Rule.

Returnable forthwith.

2. Mrs. Asha Desai, learned counsel for the Respondent/Revenue waives service.

3. At the request of the learned counsel the petition is taken up for final disposal.

4. All these three petitions assail three orders dated 19/12/2014 issued under Section 281B of the Income Tax Act, 1961. The first of the three impugned orders dated 19/12/2014 seeks to attach a refund of Rs.29,01,56,762/- due to the petitioner for the Assessment year 2007-2008. The second of these impugned order dated 19/12/2014 seeks to attach a refund of Rs.51,30,88,859/- due to the petitioner for the year 2008-09 and the third of the impugned order dated 19/12/2014 seeks to attach refund of Rs.25,62,58,769 due to the petitioner for the Assessment year 2009-2010.

5. We have heard Mr. Pardiwalla, learned Senior Counsel for the petitioner at some length yesterday in respect of the above three petitions. The petitioner had made a grievance of the manner in which the respondent has dealt with the petitioner in these proceedings and particularly the fact that the Affidavits which were filed on 24/12/2014 in response of the petitioner's writ petition being Nos.679/2014 and 680/2014 seeking direction *that the respondent gave effect to the order of the Tribunal. At that time the respondent/revenue filed an affidavit and assured the Court that effect is being given to the order of the tribunal. However, proceedings for attachment had already commenced and sanction on 12/12/2014 also obtained, from the Commissioner to the attachment of refunds due to the petitioner, yet the same was not pointed out either to the petitioner or to the Court. This issue could have otherwise been resolved at that time itself.*

6. We find that the petitioner is justified in making a grievance with regard to the Respondents/Revenue's failure to disclose all facts in its affidavit filed on 24/12/2014. We expect the Respondents/Revenue to be fair in its dealing with the Assessee and also to this Court. This attitude is not expected of the State. At this stage except for making the aforesaid observations which we trust that the Revenue would bear in mind and ensure this does not happen in future, we let the matter rest for the present.

7. The petitioner's grievance is that the total refund which has to be adjusted for the assessment years 2007-08 to 2009-10 amounts to Rs.1059504390/-. They are undergoing grave liquidity problems and are therefore in need of the funds which are legitimately due to them today. ***However, to allay the fears of the Respondent/Revenue being without any security as and when the orders on reassessment proceedings for the assessment year 2008-09 to 2011 -2012 are passed, they were willing to replace the security by making available immovable properties free from encumbrances for attachment by the Revenue. However, thereafter the petitioner submitted that they would secure the Revenue by a Bank Guarantee for 100% of the refund attached i.e. Rs.105,95,04,390/-.***

8. ***Mrs. Asha Desai, learned counsel for the***

Respondent/Revenue on instructions states that she has no objection to the Revenue being secured by a Bank Guarantee*.*

9. In view of the above, as the petitioner is furnishing a Bank Guarantee of a Nationalized Bank for an amount of Rs.105,95,04,390/- to the satisfaction of the Commissioner of Income Tax, the respondents would vacate the attachment of the refund of Rs.105,95,04,390/- done under Section 281B of the Act. The Bank Guarantee furnished by the petitioner will be kept alive till the final disposal of the reassessment notices for the Assessment year 2008-2009 to 2011-2012 and for eight weeks thereafter. Once the Bank Guarantee in the above terms is furnished to the satisfaction of the Commissioner of Income Tax, Panaji, the Respondents/Revenue will hand over the three refund amounts aggregating to Rs.105,95,04,390/- to the petitioner within one week thereafter.

10. Rule made absolute in the above terms.

11. Parties to act on an authenticated copy of this order."

(Emphasis supplied)

4. The applicants, took out Misc. Civil Application No.171/2019 in Writ Petition No.178/2015 seeking to replace the bank guarantee from a nationalized bank with a bank guarantee from a scheduled bank. Since the same was not opposed, necessary modification was made to our order dated 08.05.2015 and the bank guarantee from the nationalized bank was permitted to be replaced by a bank guarantee of a scheduled bank. What is important is that even this modification was with the consent of the parties.

5. From the perusal of our order dated 08.05.2015, it is very clear that the same was a consent order. The applicant desired the raising of attachment and for that purpose, had instituted Writ Petition No.178/2015 with which we are presently concerned. The applicants, as is clear from paragraph 7 of our order dated 08.05.2015, had offered a security by making available immovable properties free from encumbrances from the attachment by the Revenue to begin with. However, thereafter, the applicants submitted that they would secure revenue by a bank guarantee in an amount of ₹105,95,04,390/-. Paragraph 8 of our order dated 08.05.2015 thereafter records the statement made by Ms. Asha Desai, the learned counsel for the Revenue on instructions, that she has no objection to revenue being secured by a bank guarantee. From all this, as also, subsequent order dated 14.02.2019, it is very clear that an order dated 08.05.2015 was a consent order. The order was made simply because the applicants offered to secure the amount by furnishing a bank guarantee and this offer, was accepted by the revenue.

6. Mr. Thakkar however submits that our order dated 08.05.2015 was not a consent order but a direction to furnish a bank guarantee in terms of the statute. If that be so, unless it is pointed out that there has been some change in the statutory provisions, then again,there is no question of varying our order dated 08.05.2015. In any case, from the tenor of our order dated 08.05.2015, we are satisfied that the same

was indeed a consent order.

7. The orders which are made by consent of the parties, cannot, ordinarily, be varied on the basis of a unilateral plea of one of the parties. Ms. Linhares has relied upon the ruling in ***Ramesh Raghunath Joshi and another vs. Mrs. Aruna Preet Mohan Singh Malik and others - 2013 (0) Supreme (Mah) 1943*** in support of this proposition.

8. Despite grant of opportunity, the applicants, have not been able to cite any decisions on the issue as to whether consent orders made can be varied on the basis of unilateral plea of one of the parties.

9. Besides, we note that the only varied circumstances referred to by the applicants are the following:-

> *(a) The Writ Petitions No.1015/2015, 15/2016 and 16/2016 which dealt with the assessment years 2009-10, 2010-11 and 2011-12 have already been disposed of in favour of the applicants;*
>
> *(b) The circulars dated 29.02.2016 and 31.07.2017 issued by CBDT.*

10. Mr. Dada, the learned Senior Advocate who had appeared for the applicants pointed out that since almost three writ petitions which were in fact clubbed along with the pending Writ Petition

No.233/2015 have already been decided in favour of the applicants, this, should be regarded as a substantial variation of circumstance. Mr. Dada further submitted that the CBDT circulars referred to above, inter alia, provide that when the assessee deposits about 20% of the demanded amount, the appellate authority, should either grant a stay or the assessing authority should refrain from enforcing the demand.

11. When the connected writ petitions were disposed of, this Court, specifically, de-tagged Writ Petition No.233/2015 which pertains to the assessment year 2008-09 by observing that certain additional issues arise in the said petition. The subject matter of demand in Writ Petition No.233/2015 is ₹117.15 crores according to the applicants and the same is ₹120 crores or thereabouts according to the revenue. The bank guarantee, which is provided by the applicants, is in an amount of approximately ₹105 crores or thereabouts. Accordingly, it cannot be said that the disposal of the connected writ petitions really constitutes some substantial variation.

12. The circulars referred to by the applicants really apply at the stage of appeals. In Writ Petition No.178/2015, we were concerned with the lifting of attachment consequent upon the offer of security by the applicants. This security was offered by the applicants on their own and this offer was accepted by the Revenue. Based upon the consent order, the applicants were permitted to and have in fact

withdrawn the amount of ₹105.95 crores. From the tenor of our order dated 08.05.2015, it is very apparent that the order was based upon the consent of the parties. Now, on the basis of unilateral withdrawal of consent or rather, on the basis of unilateral plea of the parties, the order dated 08.05.2015 cannot be varied.

13. Besides, it was pointed out by Ms. Linhares, learned counsel for the Revenue that the bank guarantee has to continue until the disposal of Writ Petition No.233/2015. She points out that Writ Petition No.233/2015 is already on the Board for Final Hearing. This, according to us, is an additional reason as to why, this application for variation need not be allowed.

14. For the aforesaid reasons, we dismiss this Miscellaneous Application No.882/2019.

15. There shall be no order for costs.

C. V. BHADANG, J. **M. S. SONAK, J.**

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