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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 16th April, 2019

+ W.P.(C) 2402/2019

M/S NATIONAL INDUSTRIAL
CORPORATION (P) LTD

..... Petitioner

Through: Mr.Samrat Nigam, Md.Qamar Ali &
Mr.M.U.Siddiqui, Advocates

versus

THE EXCISE COMMISSIONER DELHI & ANR. Respondents

Through: Mr.Ramesh Singh, Std.Counsel with
Mr.Dhananjaya Mishra, Ms.Nikita
Goyal & Mr.Chirayu Jain, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (OPEN COURT)

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CM Appl. 18056/2019

Exemption allowed, subject to all just exceptions.

The application is disposed of.

W.P.(C) 2402/2019 & CM Appl. 17968/2019 (stay)

1. Issue notice. Mr.Ramesh Singh, Standing Counsel accepts notice.
2. The petitioner is aggrieved by an order rejecting its application for waiver/exemption from the requirement of pre-deposit, made in terms of Section 74(2) of the Delhi Excise Act, 2009.
3. The facts are that the petitioner has a warehouse and is holder of the license L-1 issued by the respondent/Excise Authorities. He was subjected

to proceedings whereby, demand pursuant to the order of the Asstt. Commissioner of Excise, dated 24.10.2017 to the tune of ₹99,14,992.03/- including interest, was made. The petitioner preferred an appeal to the Excise Commissioner under Section 72 of the Act on 21.11.2017 and also applied under Section 74(2) of the Act for waiver from the requirement of depositing the amount demanded as a pre-condition for the maintainability for the hearing of the appeal. The waiver application was made along with the appeal. The waiver application was rejected by order dated 20.02.2019. The orders dated 24.10.2017 and 20.02.2019 are under challenge in this petition. During the pendency of these proceedings, as a consequence of the order dated 20.02.2019, the appeal was dismissed by an order dated 09.04.2019.

4. The petitioner's grievance is that the long pendency of the application seeking waiver, was contrary to Section 74(3) and that the subsequent action of the excise authorities in rejection and consequent demand of the amounts, threatening attachment of its property, to recover the dues, according to the land revenue laws, is arbitrary to say the least. The petitioner also relies on Rule 56(d), which deals with leftover stock of liquor. He submits that as a warehouse if any stock is in its possession, that is attributable to the vendor or manufacturer and the appropriate consequence of such leftover stock would be destruction of the stock and not generation of demand as in this case.

5. Learned counsel for the Revenue/respondent urged that this Court should not interfere with the orders. Firstly, he submits that the mandate of the provision under Section 72(7) – which enacts that when an appeal is filed, it places an obligation on the concerned appellate authority or forum to decide the appeal within a year, failing which such an appeal would be

allowed; cannot be applied in the circumstances of this case. It is urged that the proceedings, by way of an appeal is not properly instituted, until and unless there is compliance under Section 74(1) i.e. in terms of the deposit of the demanded amount. Only then can the relief be sought by the aggrieved party. On application for waiver of pre-deposit, it is contended that, although the waiver application was decided beyond the time prescribed under Section 74(3) *per se*, the decision is not illegal either on that ground or on its merits. Learned counsel stressed that the order dated 20.02.2019, is made after careful consideration given to the parties and, in those circumstances the Court should not interfere with it under Article 226 of the Constitution.

6. The relevant provisions of the Act reads as follows:

“72. Appeal – (1) Any person aggrieved by any decision or order passed under this Act by an excise officer, subordinate to the Deputy Commissioner, may appeal to the Deputy Commissioner.

(2) Any person aggrieved by any decision or order passed under this Act by the Deputy Commissioner may appeal to the Excise Commissioner.

(3) Any person aggrieved by any decision or order passed under this Act by the Excise Commissioner may appeal to the Financial Commissioner.

(4) Such appeal shall be filed within thirty days from the date of communication of such decision or order together with self attested copy thereof:

Provided that a further period of thirty days may be allowed if the appellant establishes that sufficient cause prevented him from presenting the appeal within the aforesaid period of thirty days.

(5) *At the hearing of an appeal, an appellant may be allowed to go into any ground not specified in the grounds of appeal or take additional evidence, if necessary, if it is established that such omission was not wilful or unreasonable.*

(6) *The appellate authority, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order as the case may be.*

(7) *The appeal shall be heard and decided within one year from the date on which such appeal is filed:*

Provided that if an appeal is not decided within one year the relief prayed for in the appeal shall be deemed to have been granted.

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74. Deposit of excise revenue before filing appeal – (1)
Where the decision or order appealed against under this Chapter relates to any duty, fee or penalty levied under this Act, the person desirous of appealing against such decision or order shall produce satisfactory proof of the payment of the excise revenue before filing the appeal.

(2) *Where in any particular case, the appellate authority is of opinion that the appellant has a prima facie case in his favour and deposit of duty, fee or penalty levied would cause undue hardship to such person, the appellate authority, on an application from the appellant, may dispense with such deposit and stay its recovery subject to furnishing such security and to such conditions as he may deem fit to impose, so as to safeguard the interest of revenue:*

Provided that no appeal shall be entertained by the appellate authority, unless it is satisfied that such amount of excise revenue, as the appellant may admit to be due from him, has been paid.

(3) Where an application is filed for dispensing with the deposit of excise revenue levied under sub-section (2), the appellate authority shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

(4) Notwithstanding anything contained in sub-section (1), no recovery action shall be initiated against the appellant until the application under sub-section (2) has been decided by the appellate authority.”

7. It is evident on a plain reading of the two provisions that right to appeal is conferred upon the aggrieved party under Section 72. The appeal has to be preferred to the Deputy Commissioner or the Excise Commissioner [or in the case of the primary order being made by the Excise Commissioner to the Financial Commissioner under Section 72(3)]. The limitation for such an appeal is within 30 days from the date of the communication of the impugned order [Section 72(4)]. The proviso to Section 72(4) permits extension of time in filing of the appeal if sufficient cause is shown. Section 72(7) mandates/obligates the appellate authority to hear and decide the appeal within one year and specifically enacts through the proviso that in case the appeal is not decided within the stipulated time, it is deemed to be allowed.

8. A joint reading of the relevant parts of Section 72 and Section 74, clarifies that if the appeal is properly filed, in the sense that it is accompanied by the amount in dispute, determined by the primary assessing authority as a demand, the requirements of Section 72(7) would apply. On the other hand, if there is no compliance with Section 74(1) and the aggrieved party seeks relief by way of waiver of pre-deposit under Section 74(2), the application has to be made for that purpose setting out the grounds. In this case, the application was made on 21.11.2017

incorporating all the grounds of appeal. So in that sense, the application under Section 74(2) was pending all the while. Undoubtedly, the respondents did not decide that application within the time stipulated under Section 74(3). Learned counsel for the petitioner has urged that, given the pendency of its waiver application for more than thirty days, the provisions of Section 72(7) must be held to apply, and the petitioner's appeal deemed to be allowed on the expiry of one year. However, this Court is of the opinion that there is no consequence of the kind that is sought to be urged with regard to Section 74(3). One of the indications of a statute being mandatory is that it is cast in imperative terms and the consequence of the failure to comply with such mandate is provided. Not only is Section 74(3) silent as to the consequence of non-compliance, the use of the words "where it is possible to do so" expressly indicates its directory (and not mandatory) nature. This is in contrast to Section 72(7), where the proviso provides the consequence for non-compliance. Such a consequence is mandatory in the case of properly laid out appeals [i.e. where the appeal is accompanied by the demanded amount in full]. The consequence necessarily would be that the deemed fiction under proviso to Section 72(7) would operate, unlike in the case of waiver of deposit of the amount under Section 74(2), where the legislature does not ascribe or enact any consequence, but merely cautions the authorities that the decision on the waiver application should, if possible, be taken within a month.

9. In the light of the above discussion, the *per se* maintainability of the application or the ground on relief, which is urged by the petitioner, cannot be accepted. At the same time, the Court after examining the merits of the order dated 20.02.2019 is of the considered view that it cannot be sustained. The order records that extensive arguments were made by the parties.

Doubtless, the petitioner addressed the necessary grounds to establish a *prima facie* case, and pressed the grounds into service. The Excise Commissioner even appears to have reserved the order. In these circumstances, the so-called reasons contained in the order of 20.02.2019, do not at all satisfy the requirements of expression “reasoned order”. Beyond stating the obvious, that the Excise Authority decided and demanded ₹99,14,992.03 and that a 15 day delay was entailed in complying with the demand, nothing is discernible as to what appealed or did not appeal to the mind of the Excise Commissioner. Looking at the nature of the obligation cast upon the authority under Section 74, the least that was expected of the appellate authority was to discuss what was argued, including the *prima facie* merits of the submissions made and then decide whether and to what extent to grant relief. In these circumstances, that order is untenable and is hereby, set aside.

10. For the above reasons, the petition is allowed. The impugned order dated 20.02.2019 and the consequential demand dated 01.04.2019 are hereby set aside. The resultant dismissal of the appeal which appears to have occurred during the pendency of these proceedings is also untenable and is hereby quashed. The parties shall appear before the Excise Commissioner on 6th May, 2019 at 2:00 PM, who is directed to hear the arguments afresh and pass a reasoned order in accordance with law, as expeditiously as possible, preferably within a month after hearing the application under Section 74(2).

11. The Court is also of the opinion that given that the application was pending for such a long duration and the Commissioner also appears to have heard extensive arguments on it, the resulting order is disappointing. The matter needs to be examined by the Chief Secretary, Government of

NCT of Delhi for necessary action, remedial or otherwise, as he may consider necessary. A copy of this order be communicated by the Registry to the Chief Secretary.

12. The writ petition is allowed in the above terms.

13. The next date of hearing fixed i.e. 3rd May, 2019, stands cancelled.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

APRIL 16, 2019

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