Pradnya Bhogale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3625 OF 2019

Infra Dredge Services Pvt. Limited ..Petitioner

vs.

Union of India and Anr. ..Respondents

…….

Mr. Sriram Sridharan for Petitioner.
Mr. J.B. Mishra for Respondent No.2.

…….

CORAM : NITIN JAMDAR &
M.S.KARNIK, JJ.

DATE : 29 JANUARY 2020

P.C.:-

Heard learned counsel for the parties.

2. The Petitioner has challenged the order passed by the Commissioner of CGST and Central Excise, Thane-Respondent No.2 dated 12 July 2019.

3. The Petitioner provides dredging services. A show-cause notice came to be issued to the Petitioner on 19 March 2013. The demand was made for three periods. First was regarding 'Management Maintenance and Repair Service' under the Reverse Charge Mechanism for the period April 2008 to March 2012. For a period April 2009 to March 2012 for 'Supply of Tangible Goods for Use Service' under Reverse Charge Mechanism. For a

period 7 May 2010 to 16 November 2010 for 'Supply of Tangible Goods for Use Service' and for 'Dredging Service' for a period 26 November 2009 to 23 February 2010.

4. By order dated 30 September 2015, demand was confirmed against ex-parte. The Petitioner filed a Writ Petition in this Court. By directing the Petitioner to deposit an amount of Rs.25,00,000/-, this Court quashed and set aside the order and directed that the Petitioner be heard after the deposit of the amount. Proceedings were relegated to the Commissioner.

5. The Petitioner appeared for hearing on 3 January 2019 and submitted documentary evidence. By the impugned order dated 29 July 2019 the Commissioner confirmed the demand totalling to Rs.18,31,80,394/- under Section 73 of the Act was confirmed. Hence this Petition.

6. We have heard learned counsel for the parties. Learned counsel for the Petitioner relied upon the decisions in the case of *Shivsagar Veg Restaurant Vs. Asstt. Commr. Of Income Tax, Mumbai*[1] and *EMCO Ltd. Vs. Union of India*[2]. He submitted that there is not only delay of six months from conclusion of the argument till pronouncement of order but because of this delay gross errors have occurred in the order which has caused severe

1 ITXA No.144 of 2006, decided on 14 November 2008.
2 Writ Petition No.12124 of 2013, decided on 11 February 2014.

prejudice to the Petitioner. Learned counsel also relied upon the Circular issued by the Central Board of Excise and Custom dated 10 March 2017 laying down guidelines for adjudicating authorities while adjudicating the matters, more particularly Clause 14.10 thereto. It is contended that in view of this the Writ Petition be entertained without relegating the Petitioner to the appellate remedy.

7. Learned counsel for the Respondent submitted that all contentions raised by the Petitioner could be raised by the Petitioner before the Appellate Authority and merely because statutory pre-deposit is mandated, the Petitioner cannot invoke writ jurisdiction.

8. The factum of delay of six months in passing the order after the hearing was concluded is not in dispute. The Division Bench of this Court in the case of *Shivsagar Veg Restaurant* had observed thus :-

> *"11. Having said so, the inordinate unexplained delay in pronouncement of the impugned judgment has also rendered it vulnerable.*
>
> *12. The learned counsel for the appellant has referred to various judgments of the Apex Court as well as of this Court and various other High Courts to show that only on the ground of delay in rendering the judgment for period ranging from four months to 10 months, judgments were held to be bad in law and set*

aside. It has been held time and again that justice should not only be done but should appear to have been done and that justice delayed is justice denied. Justice withheld is even worse than that. The Apex Court in the case of Madhav Hayawadanrao Hoskot v. State of Maharashtra, 1978 (3) SCC 544 had an occasion to take serious note of the prejudice normally caused to the litigant due to delayed delivery or pronouncement of the judgment for the reasons which are not attributable either to the litigant or to the State or to the legal profession.

13. In R.C. Shama v. Union of India, 1976 (3) SCC 474, the Apex Court after noticing absence of the provision in the Code of Civil Procedure in the matter of time frame in delivery of judgment, observed as under :

"Nevertheless, we think that unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even where written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments. Justice, as we have often observed, must not only be done but must manifestly appear to be done."

14. Recently, the Apex Court in the case of Anil Rai v. State of Bihar, 2002 (3) BCR (SC) 360 : 2001 (7) SCC 318 has also reconsidered the serious issue of delayed delivery of judgment by some of the High Courts and laid down certain guide-lines in the matter of pronouncement of judgments by the High Courts.

> *15. In the case of Devang Rasiklal Vora v. Union of India, 2003 (158) E.L.T. 30 (Bom.) = 2004 (3) BCR 450, the Division Bench of this Court to which one of us is a party (Daga, J.) had an occasion to issue directions to the President of the Central Excise and Gold (Control) Appellate Tribunal, Mumbai to frame and lay down the guide-lines on the similar lines as were laid down by the Apex Court in the case of Anil Rai v. State of Bihar (supra) and to issue appropriate administrative directions to all the Benches of the said Tribunal. The similar guide-lines can conveniently be laid down for the courts, tribunals and quasi-judicial authorities prescribed under the Income Tax Act, 1960 ("Act" for short) so as to prevent delayed delivery of the judgment and/or order which at the end of the day results in denial of justice as happened in the instant case."*

This decision was rendered in the context of the order passed by Appellate Tribunal. Thereafter the Division Bench in the case of *EMCO Ltd.* extended the principle order of the Additional Commissioner adjudicating or the original authority. The Division Bench observed thus :-

> *"5. We have heard the learned counsel for the Parties. In the present case, the personal hearing was concluded on 17 September 2012 and the written submissions were filed by the Petitioner on 24 September 2012. The impugned order was passed on 31 July 2013 i.e. almost nine months after the hearing. This delay has resulted in the Petitioner's submissions of goods being returned within 180 days not being considered. This evidence was sought to be brought on record before the Tribunal but not allowed. However, this Court by its order dated 14*

September 2010, while remanding the matter to the Adjudicating Authority, had left all issues open. Therefore, the above evidence, which was available before the Adjudicating Authority and also relied upon by the Petitioner at the time of hearing, was not considered in the impugned order, then the same can only be attributed to the delay in passing the order. This delay does appear to have causesd prejudice to the Petitioner. This Court in the matter of Shivsagar Veg. Restaurant (supra) has, after considering the various decisions of the Apex Court, laid down that undue delay (four months) in delivery of judgment by the ITAT after the hearing is in itself sufficient to set aside the impugned order without considering the merits of the order. The Apex Court in the matter of Anil Rai (supra) has reiterated the observations made by an earlier Bench of Apex Court in R.C.Sharma Vs. Union of India {(1976)3-SCC-574}, which reads as under :

".....Nevertheless an unreasonable delay between hearing of arguments and delivery of judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments ." (emphasis supplied)

6. In view of the above, it is very clear that the authorities under the Act are obliged to dispose of proceedings before them as expeditiously as possible after the conclusion of the hearing. This alone would ensure that all the submissions made by a party are

> *considered in the order passed and ensure that the litigant also has a satisfaction of noting that all his submissions have been considered and an appropriate order has been passed. It is most important that the litigant must have complete confidence in the process of litigation and that this confidence would be shaken if there is excessive delay between the conclusion of the hearing and delivery of judgment.*
>
> *7. Therefore, in this case, we find that the delay by the Adjudicating Authority in rendering its order nine months after the conclusion of the hearing has caused prejudice to the Petitioner as it has not considered the evidence produced in respect of return of goods within 180 days.*
>
> *8. We have not relegated the Petitioner to the alternate remedy of filing an appeal under the Act, as we find that the impugned order is against the parameters laid down by this Court in Shivsagar Veg. Restaurant (supra).*
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> *9. In the aforesaid circumstances, we set aside the impugned order dated 31 July 2013 and direct the Additional Commissioner of Central Excise and Customs to pass a fresh order after granting the Petitioner an opportunity of personal hearing. Needless to add that the resultant adjudication order would be passed within a reasonable time after the conclusion of the hearing granted to the Petitioner.*

Basis of these two decisions is not the delay alone but the resultant prejudice discernable from omissions and need to inculcate discipline.

9. The learned counsel for the Petitioner points out various errors to impugned order which likely to have resulted from the delay in passing order. He states that the criteria for imposing liability on the Petitioner has been adopted from the wrong provision of law and that an affidavit of the Petitioner placing certain factual position on record supported by the decisions of the Tribunal has not been considered at all even though it was on the record.

10. The operative portion of the impugned order regarding Dry Docking reads as under :-

> *"6 (iv) the services received by the Noticee in India under said agreements from SSSHIPL related to fry docking (maintenance & repair) of dredgers are classified under the category of 'Management, Maintenance or Repair Service', as per definition contained in Section 65(64) and Section 65 (105)(zzg) of the Finance Act, 1994 read with Section 66 A of the Finance Act, 1994 & Rule 2(i)(d)(iv) of the Service Tax Rules, 1994."*

The liability therefore is imposed under Section 65 (105)(zzg) of the Finance Act. The discussion and conclusion about how this liability is imposed is in Para 5.22 of the said order, which reads thus :-

> *"5.22 The noticee further contended that the demand of Rs.10,45,71,398/- in the category of Management, Maintenance or repair services as*

> *defined under Section 65 (105) (zzzg) of the Finance Act, 1994 was not maintainable as the same was rendered outside India. It is admitted position that the noticee had made payment in foreign currency to SSIHPL for repair and maintenance of the 'goods' during the period their dry dock. The noticee was the recipient of service situated in India. The service provider was situated outside India. In respect of maintenance and repair services it is not mandatory provision of the rule that the article undergoing repair and maintenance should be located in India. Therefore, as per the provisions of Rule 2 (1)(d)(iv) fo the Service Tax Rules, 1994 read with Section 66A of the Finance Act, 1994, the noticee was required to pay service tax under reverse charges as being recipient of service located in India in respect of service provided from a place outside India. The demand of service tax totally amount to Rs.10,45,71,398/- for receipt of 'Management, Repair and Maintenance Service' falling under Section 65(105)(zzzg) of the Finance Act, 1994 is therefore maintainable."*

In the discussion, at both the places the Commissioner has referred to Section 65 (105) (zzzg) of the Act.

11. Section 65(105) (zzg) relates to 'Management, Maintenance or Repair Service' while Section 65 (105)(zzzg) refers to 'Mailing List Compilation and Mailing'. It is not even the case of the Respondents that the activities of the Petitioner are in relation to Mailing List. Taxation of Services (provided from outside India and received in India) Rules, 2006 have been

framed. Rule 3 has categorized different activities. Rule 3(ii) deals with categorized sub-clauses (zzg) and (zzzzg) and does not include (zzzg), which is referable to Rule 3(iii). Rule 3(ii) and Rule 3(iii) deal with different contingencies. Rule 3(ii) refers to services provided in India and Rule 3 (iii) refers to services received by a recipient located in India for use in relation to business or commerce. These categories would require a different conclusion and approach. It is clear from the impugned order that there is a mix up between the provisions. This is attributable to the delay that has occurred in passing the order. A clear prejudice that has arisen to the Petitioner.

12. The second ground put forth by the Petitioner is that the Tribunal in the case of *Reliance Industries Ltd. Vs. Commissioner of C.EX. & S.T., LTU, Mumbai*[3] has emphasized that operations must be performed wholly in India and that by filing an affidavit of that Managing Director, Petitioner had sought to place on record the movement of dredgers. There is no reference to this affidavit in the impugned order.

13. The Division Bench in the case of *EMCO Ltd.* has emphasized that when the proceedings are disposed of expeditiously by the authorities, it ensures there is an application of mind and litigants are satisfied that their submissions have been

3 2014 (36) S.T.R. 820 (Tri-Mumbai)

considered. A Circular by the Central Board of Excise and Customs dated 10 March 2017 also directs a decision be taken expeditiously where the hearing has been concluded, and the decision be communicated expeditiously.

14. Considering these peculiar facts, we are of the opinion that the Writ Petition can be entertained to set aside the order. The Commissioner will have to take a fresh decision.

15. In the circumstances, the impugned order dated 12 July 2019 passed by the Respondent No.2 is quashed and set aside. The proceedings are restored to the file of Respondent No.2. The Petitioner will appear before Respondent No.2- The Commissioner of CGST and Central Excise, Thane on 24 February 2020, wherein the Commissioner may give a further date for the hearing. The Commissioner will pass the order expeditiously in the light of the observations made by this Court in the case of *EMCO Ltd.* The above observations are limited to emphasis on the need for expeditious disposal and the related prejudice, and are not to be construed as reflections on the merits of the controversy.

16. Writ Petition is disposed of.

(M.S.KARNIK, J.) (NITIN JAMDAR, J.)