

(2010) 02 CAL CK 0047

Calcutta High Court

Case No: F.M.A. No. 432 of 2009

Priya Food Products Limited and
Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: Feb. 19, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: (2010) 35 VST 534

Hon'ble Judges: Kalidas Mukherjee, J; K.J. Sengupta, J

Bench: Division Bench

Advocate: R.K. Jaiswal, Utpal Bose and Debasish Mitra, for the Appellant; Seba Roy, for the Respondent

Judgement

1. This was an appeal against the judgment and order of the learned trial judge dated March 2, 2009, whereby his Lordship has dismissed the writ

petition on the ground that it is hit by the principles of res judicata.

2. The fact of the case is as follows:

The Appellant/ Petitioner No. 1 is a manufacturer and as such, a dealer under the appropriate sales tax statute (now VAT). In course of business,

the Appellants have marketed and sold products to various customers scattering over a number of States. Returns were filed by the Appellants

showing turnover of the business dealt with various parties.

3. The manufacturer/dealer enjoys certain benefits of exemption of tax if necessary requisite declarations in forms D and F are produced. The

assessing officer, it appears, in past dealt with, on production of form D and in some cases, D forms were not accepted holding the same not being genuine and in some cases there was no decision whether the forms were genuine or not. But it was noted that there was no movement of the goods covered by the said forms in respect of the transactions took place with the Bihar party.

4. At one stage, the Appellants/ Petitioners could not produce form D and, as such, the benefit of form D could not be given. The order of assessment was affirmed right up to the revisional authorities and thereafter the Appellants/ Petitioners approached this Court with a writ petition earlier and learned single judge of this Court by an order dated December 5, 2008 gave liberty to the Petitioner to make an application to the revising authority and produce the D forms in original. At that point of time, the issue of refusal to entertain the F forms, produced by the Petitioner, was not agitated. In the earlier writ petition, the issue related to refusal to produce the D forms. As such, the learned single judge granted the relief in the manner, as aforesaid.

5. The present writ petition has been filed challenging all these orders which were challenged earlier, on the plea that there could not be any tax liability if the F forms produced before the authority, are examined properly. It appears that the revising authority has noted that the F forms produced by the Appellants/ Petitioners in respect of the transactions made with Orissa parties were found to be fake and, as such, the same were not accepted previously.

6. We are not touching that portion of the order of the revising authority as well as the appellate authority. This is essentially a fact-finding and when all the authorities below have come to the conclusion that the said forms are forged, this Court in writ jurisdiction, either at the first instance or at the appellate stage, will not substitute its own finding because simply it is not permissible; as judicial restraint is observed by the court following long tradition.

7. It is submitted that despite production of F forms issued in connection with the transactions with the Bihar party, viz., "Sarbasree Ma Enterprise

(Aurangabad) Bihar, all the authorities have simply ignored the same. It appears from the observations and findings of the assessing officer as well

as the appellate authority that there has been no evidence with regard to the movement and/or transportation of the goods covered by the said F

forms. As such, the claim covered by those forms was not allowed.

8. Smt. Seba Roy, appearing for the Respondents contends that the Appellants/ Petitioners are estopped from raising this plea, as it could have

been raised at the time of hearing of the earlier writ petition as the same very orders were challenged in the said writ petition which have been

challenged herein. She further submits that when on fact it was found that there was no movement of the goods, the question of sale does not arise.

9. We are of the view that issuance of the F forms by the appropriate authorities, where the buyers are carrying on business, gives rise to a

conclusive presumption that there has been movement of goods and sale took place; of course the same are not established to be forged

document. Unless enquiry is made, question of forgery cannot be regarded. From all the orders we do not find any findings why these documents

were rejected and not accepted.

10. Question of res judicata in a case of this nature is absolutely misplaced in law. In order to attract the provisions of res judicata, either express

or constructive, there must be a decision with framing of issues by a court of competent jurisdiction in an earlier proceedings between the same

parties. In earlier order his Lordship justice Pal neither framed any issue nor decided anything else and only asked the authority to consider the

Petitioner's application enclosing their D forms. Acceptability and non-acceptability of the F forms with regard to the Bihar transactions was

neither discussed nor decided. Hence, the plea of res judicata, as recorded by the learned trial judge, is not supportable and we are not supporting

it.

11. It may be argued that the relief claimed here might have been barred by the principles of issue estoppel or Order II, Rule 2 of the CPC read

with Rule 53 of the writ rules.

12. We are of the view that the Appellants/ Petitioners here have a Constitutional right to be subjected to payment of tax only in accordance with

the provisions of law. If the law enjoins them a right of exemption on production of certain documents, such right really partakes the character of

Constitutional right. Issue estoppel or bar, under Order II, Rule 2 of the CPC are of procedural nature and this bar must yield to the Constitutional right and so also to the fundamental right.

13. We are of the view that justice has to be rendered and from a perusal of the documents we have already noted that there has been no decision

with regard to the genuineness of the F forms issued by the appropriate authorities with regard to the transactions took place with ""Sarbasree Ma

Enterprise"" (Aurangabad), Bihar.

14. However, taking note of the submission of Smt. Seba Roy, we are not very impressed with the diligence and conduct of the Appellants either;

as this point could have been resolved from the court earlier. This was not done so. As such, for the ends of justice, we directed the revising

authority to do the following things:

In the event, the Appellants/ Petitioners deposit a sum of Rs. 1,20,000 (one lakh twenty thousand), within a period of one month from date, then

on an application being made enclosing all the original F forms with regard to the transactions with Sarbasree Ma Enterprise (Aurangabad), Bihar,

the revising authority will examine whether these documents are genuine or not. Upon scrutiny if the documents are found to be genuine, he will

take note of the same and will grant appropriate relief in accordance with law and the tax deposited shall be refunded, if no other tax liability is

there. This refund must be made within a period of one month from the date of taking the decision.

15. In the event the documents are found to be not genuine then the Appellants/ Petitioners shall pay all interest, penalty as leviable under the law.

At the same time, we grant liberty to the revising authority to lodge appropriate complaint with the appropriate authority so that the case of forgery

is brought to book.

16. The Appellants/ Petitioners shall pay cost, assessed at 300 (three hundred) G.M.s to the Respondents and such cost is to be paid along with

the aforesaid deposit.

17. If the deposit, as directed above, is not made within the time specified, this order will stand recalled and the appeal will stand dismissed and

nothing is to be done. The hearing and enquiry must be concluded within two months from the date of deposit.

18. This appeal is, thus, disposed of. There will be no order as to costs.

19. Urgent xerox certified copy of this order, if applied for, be supplied to the applicants.