Shree Gouri Shankar Jute Mills Ltd. and Another Vs Union of India and Others

Court: Calcutta High Court

Date of Decision: March 7, 2012

Acts Referred: Customs Act, 1962 â€" Section 142
Foreign Trade (Development and Regulation) Act, 1992 â€" Section 11, 11(2), 11(3), 11(4), 11(4)
Negotiable Instruments Act, 1881 (NI) â€" Section 138
Sick Industrial Companies (Special Provisions) Act, 1985 â€" Section 22, 22(1), 22(1)

Citation: (2012) 2 CALLT 473 : (2012) 4 CHN 257 : (2012) 286 ELT 652

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: Ranjan Deb, Mr. Arijit Banerjee, Bar-at-law, Mr. Kumar Gupta and Ms. K. Banerjee, for the Appellant;Pradip Kr. Tarafdar and Mr. Subir Pal, for the Respondent

Final Decision: Allowed

Judgement

Soumitra Pal, J.
In the writ petition the petitioner has challenged the order of suspension dated 7th December, 2010 passed under sub-

section (4) of section 11 of the Foreign Trade (Development and Regulation) Act, 1992 (for short the ""Act"") by the Joint Director of Foreign

Trade, the respondent no.3, suspending the Importer - Exporter Code (""Code"" for short) of the petitioner. The facts which are relevant for the

purpose of adjudication are that by an order dated 22nd November, 2006 the Deputy Director General of Foreign Trade, the respondent No.4,

after issuing show-cause notice to which the petitioner had replied and was not found to be satisfactory, and after giving an opportunity of personal

hearing, to which the petitioner did not respond, had passed an order u/s 9(4) and section 11 (2) of the Act and under Rule 10(b) of the Foreign

Trade (Regulation) Rules, cancelling the licence of the petitioner and directing payment of customs duty and interest and imposing fiscal penalty of

Rs. 20.28,454/-besides imposing fiscal penalty of Rs. 1,00,000/ on each Director of the firm for non-fulfillment of export obligation and for

payment of other amounts. Though appeal could have been preferred u/s 15 of the Act, the petitioner no. 1 chose not to avail itself of the said

forum. Rather it filed a representation dated 19th December, 2006 requesting the respondent No.4 to waive penalty and interest imposed by the

order dated 22nd November, 2006. According to the petitioner, however ignoring the representations, the order dated 7th December. 2010

suspending the Code was passed by the respondent No.3. Aggrieved, this writ petition has been filed.

2. Mr. Ranjan Deb, learned senior Advocate for the petitioner, relying on the statements in the writ petition had submitted that ""Adjudicating

Authority"". u/s 13 of the Act, is the officer who had imposed the order of penalty. Since the respondent No.4 had issued the order imposing

penalty and as the impugned order of suspension of Code u/s 11(4) for non-payment of penalty suspension is to be carried out by the Adjudicating

Authority"", as the order of suspension was issued by the respondent No.3 and not by the respondent No.4. it is contrary to section 11(4) of the

Act and the same is without jurisdiction and thus a nullity. Further, as the representation dated 19th December, 2006 for waiver of penalty and

interest was pending before the respondent no.4 and as the impugned order of suspension of Code has civil consequences, before suspension of

Code, an opportunity of hearing should have been granted. Moreover as suspension of Code for non-payment of penalty was is in the nature of

execution proceedings and while executing a decree a person is entitled to be heard, before suspension, the petitioner was entitled to be heard.

Referring to the Scheme for revival of the company pending before the Board for Industrial and Financial Reconstruction (''Board'' for short), a

copy of which is on record, submission was since it is pending, u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (''SICA''

for short), suspension of Code without the consent of the Board was illegal.

3. Mr. Pradip Tarafdar, learned Advocate appearing on behalf of the respondents, opposing the writ petition, submitted that the intent and purpose

of the legislation is that the person who has violated the provisions of Act should be penalised and thus punishment should be imposed. Referring to

section 11 (3) of the Act, submission was as the show-cause notice issuing authority is not the adjudicating authority, therefore adjudicating

authority cannot mean a particular authority as contended on behalf of the petitioner. Submission was the respondent No.3 being a superior officer

and empowered by the notification dated 20th January, 1999 issued u/s 13 of the Act, had the jurisdiction to suspend the Code. Besides, while

deciding the jurisdiction of the adjudicating authority and in order to achieve the object of the Act and to suppress mischief. Court should give a

harmonious interpretation of sections 2(a) and 13. Moreover, as before imposition of penalty show-cause notice was issued, reply was received

and as after the petitioner did not respond to the notice for hearing, order dated 22nd November, 2006 was passed imposing penalty, and since it

was not paid, Code was suspended and as in section 11(4) legislature had consciously excluded the right to be heard, submission regarding

violation of natural justice has no basis. Countering the argument that suspension of Code was illegal as Scheme regarding rehabilitation of the

petitioner is pending before the Board, it was submitted that as there is no order of restraint with regard to the recovery of penalty and dues,

suspension of Code was just and proper.

4. Learned counsel for the parties had relied on several judgments in support of their respective submission which shall be dealt with appropriately.

During hearing the attention of Mr. Deb and Mr. Tarafdar was drawn to a judgment of the Division Bench in Jessop and Company Limited and

another v. Union of India and Others: 2010(2) CHN (Cal)53 where the issue was whether the writ petitioner was entitled to get an opportunity of

hearing before any order of suspension of Code is passed u/s 11(4) of the Act and counsel had advanced their respective arguments on the said

judgment.

5. The issues to be considered are : i) whether before passing the order directing suspension of Code u/s 11 (4) of the Act for non-payment of

penalty, an opportunity of hearing should have been granted, ii) whether in the facts of the case the respondent no.3 had the power and authority or

jurisdiction to pass the impugned order of suspension of Code dated 7th December, 2010 and iii) whether consent or approval of the Board u/s

22 of SICA was necessary before the order of suspension of Code was issued.

6. So far as the first issue is concerned, as already noted, a similar question came up for consideration before the Division Bench in Jessop and

Company (supra) wherein it was held that before suspension of Code an opportunity of hearing should be granted. The relevant portion of the said

judgment is as under:-

11. We have gone through the impugned judgment and order of the learned Trial Judge. We cannot agree with the learned Trial Judge that while

passing order of suspension u/s 11(4), no hearing is required. No doubt it is a measure and/or method to recover the dues from the defaulter/

importer but when a measure of suspension is adopted, certainly it has got the affectation of right and in such situation benefit which has been

accrued in favour of the appellant is sought to be withdrawn. The same shall be done upon giving a hearing, namely, before passing suspension

order. It may so happen that the party concerned may pay the entire amount or secure or can explain that it is not a case where order of

suspension should be passed. While on one hand, the certificate proceeding has been initiated and on the other hand, suspension order has been

passed without waiting for the result of certificate proceedings poses somewhat hardship.

12. According to us, when the certificate proceeding has been initiated the respondents should wait for the result of the certificate proceeding.

According to us, both the methods cannot be resorted to together, unless one method is exhausted, another method should not be resorted to. All

these aforesaid points could have been agitated had a hearing been given. Although sub-section (4) does not admit of any pre-decisional hearing

but one should not loose sight of the provision of section 8 though contained in separate chapter where it has been specifically mentioned that

before passing order of suspension cancelling importer-exporter code number, a hearing must be given. When the effect in the order of section 8 is

same as in section 11(4), we find no reason why similar opportunity should not be read inherently in the sub-section. In a large number of decisions

of Supreme Court and this Court it has been held in a particular provision of law though there does not mention express provision of hearing but

compliance of natural justice, namely, opportunity of being heard inheres in the sub-section, if effect thereof results in affectation some right.

(Emphasis supplied)

7. Though it was submitted by Mr. Tarafdar that the said judgment in appeal does not take note of the other provisions in the Act and there is no

deliberation on the judgments cited before the single Judge, as the issue is concluded by the said judgment of the Division Bench, in my opinion, the

petitioner was entitled to hearing before suspension of Code. Therefore. I do not deal with the judgments cited.

8. With regard to the second issue as to whether the Respondent No.3 had the power and authority or jurisdiction to suspend the Code, it is

necessary to examine section 11 (4) of the Act which, before amendment in 2010, was as under :

(4) A penalty imposed under this Act may, if it is not paid, be recovered as an arrear of land revenue and the Importer-exporter Code Number of

the person concerned, may, on failure to pay the penalty by him, be suspended by the Adjudicating Authority till the penalty is paid.""(Emphasis

supplied)

9. It is to be kept in mind that imposition of penalty under the Act is a consequence of adjudication made by a particular officer having the power

to make such order. In the instant case, the Deputy Joint Director of Foreign Trade, the respondent No.4, had passed the order dated 22nd

November, 2006 directing imposition of penalty and on 7th December, 2010 the Joint Director of Foreign Trade, the respondent No.3. u/s 11(4)

had passed the order of suspension of Code of the petitioner for non-payment of penalty. Now the question is can the respondent No.3 be said to

be ""the Adjudicating Authority""? As seen, if penalty is not paid. Code may be suspended by ""the Adjudicating Authority"". As noted section 11(4)

empowers ""the Adjudicating Authority"" to suspend the Code for failure to pay penalty till it is paid. Therefore, it has to be examined whether the

respondent No.3, who had passed the order suspending the Code, was ""the Adjudicating Authority"". It is to be noted that the word ""the"" is a

definite article"" and denotes a particular person or a particular body (Chambers Dictionary). Hence, the use of the word ""the"" before the term -

Adjudicating Authority"" - in section 11(4) has a ""specifying or particularizing effect"" as opposed to the indefinite or generalising force of ""a"" or

an""; (Law Lexicon). Hence, in the background of the discussion, u/s 11 in subsection (4), order directing suspension of Code is to be passed by

the Adjudicating Authority"" which had passed the order imposing penalty. Thus, as the respondent no.4 had adjudicated and had passed the

order dated 22nd November, 2006 imposing penalty, it is ""the Adjudicating Authority"" u/s 11 (4) of the Act. The argument on behalf of the

respondents that the notification dated 20th January, 1999 confers jurisdiction on the respondent No.3 to suspend the Code cannot be accepted

as it only lays down the powers of the officers as envisaged u/s 13 in terms of pecuniary limit. This apart, section 13 speaks of imposition of

penalty and adjudication regarding confiscation and does not speak of suspension of Code for nonpayment of penalty. In this regard it is

appropriate to refer to the judgment in Shri Ishar Alloy Steels Ltd. Vs. Jayaswals NECO Ltd., relied on by the petitioner where the Apex Court

while discussing the use of indefinite article ""a"" and definite article ""the"" had held as under:-

9. The use of the words ""a bank"" and ""the bank"" in the section is an indicator of the intention of the legislature. The former is an indirect (sic

indefinite) article and the latter is prefixed by a director (sic definite) article. If the legislature intended to have the same meanings for ""a bank"" and

the bank"", there was no cause or occasion for mentioning it distinctly and differently by using two different articles. It is worth noticing that the

word ""banker"" in Section 3 of the Act is prefixed by the indefinite article ""a"" and the word ""bank"" where the cheque is intended to be presented u/s

138 is prefixed by the definite article ""the"". The same section permits a person to issue a cheque on an account maintained by him with ""a bank

and makes him liable for criminal prosecution if it is returned by ""the bank"" unpaid. The payment of the cheque is contemplated by ""the bank

meaning thereby where the person issuing the cheque has an account. ""The"" is the word used before nouns, with a specifying or particularising

effect as opposed to the indefinite or generalising force of ""a"" or ""an"". It determines what particular thing is meant; that is, what particular thing we

are to assume to be meant. ""The"" is always mentioned to denote a particular thing or a person. ""The"" would, therefore, refer implicitly to a specified

bank and not any bank. ""The bank"" referred to in clause (a) to the proviso to Section 138 of the Act would mean the drawee bank on which the

cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is

issued.

10. In view of the proposition of law in Shri Ishar Alloy Steels (supra), the principles of law in the State of Mysore and Others Vs. Hutchappa and

Another, relied on behalf of the respondents, are not applicable as therein the Supreme Court had held that in the statute ""expression ''Deputy

Commissioner'' has been expressly made to include an ''Assistant Commissioner'' in charge of a Sub Division."" (emphasis supplied). The judgment

in M. S. Sambamurti Sastriar & Ors. v. The Deputy Registrar of Cooperative Societies, Ranipet, North Arcot Dist & Ors.: AIR 1971 Madras

343 also does not assist the respondents as therein Court was interpreting the word ""himself occurring in section 71 of the Madras Co-operative

Societies Act, 1961. In neither of the Judgments Apex Court and High Court had occasion to consider the use of the expressions ""a"" and ""the

which the legislature had thought it fit to incorporate in the statute. Thus, not being ""the Adjudication Authority"", as the respondent No.3 had no

power and authority or jurisdiction to pass the impugned order dated 7th December, 2010 suspending the Code, the said order is without

jurisdiction and illegal and cannot be sustained.

11. In order to answer the third issue, it is necessary to refer to the relevant portion of section 22 (1) of SICA, which is as under:-

Where in respect of an industrial company... a sanctioned scheme is under implementation...then notwithstanding anything contained... no

proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial

company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the

Board.....

12. In the instant case admittedly, in respect of the petitioners, a sanctioned scheme passed by the Board is being implemented. Though, as noted,

u/s 22(1), during implementation of the sanctioned scheme no proceedings for execution, distress or the like against any of the properties of the

industrial company shall lie or proceeded with except with the ""consent"" of the Board, however, in the case in hand, order has been passed

directing suspension of Code for non-payment of penalty. Evidently the object in suspending the Code is to pressurise the petitioner to pay the

penalty imposed pursuant to the adjudicating order. Question is can such suspension of Code be equated with ""execution"" proceedings? True

suspension of Code may not be strictly in the nature of execution proceedings. However, the use of the words ""or the like"" in section 22(1) means

such proceedings for recovery of penalty from the petitioner are akin to proceedings which are summary in nature. Now as u/s 22(1) no

proceedings in the nature of execution can be initiated against any of the properties of the company, can the Code be called a property? Since the

word ""property"" is of wide meaning, it shall include Code which is one of the assets of business. Since Code is a part and parcel of trade, u/s 22(1)

order directing its suspension during implementation of the scheme without taking ""consent"" of the Board is bad in law. In this regard the judgment

in Himalaya Rubber Products Limited v. The Board for Industrial and Financial Reconstruction, (1992) 1 CAL LT 279 HC relied on behalf of the

petitioner are applicable to the facts of the case as therein while holding that ""sales tax declaration forms have become a necessary adjunct of trade

without which a trader cannot carry on competitive business"" it was held that sales tax authorities cannot withhold declaration forms on account of

non-payment of arrears of sales tax dues without obtaining consent of the Board. Similarly in Allied Resins and Chemicals Ltd. v. Union of India

2001 Company Cases 502 Cal, it was held that demand notice u/s 142 of the Customs Act, 1962 cannot be proceeded with without the leave of

BIFR. The principles of law In the judgment In Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, relied on by

the respondents, are not applicable to the facts of the case as the question therein, as evident from paragraph 18 of the said judgment, was whether

section 22 of SICA creates any legal impediment for instituting and proceeding with the criminal case on the allegations of an offence u/s 138 of the

Negotiable Instruments Act, 1881 against a company or its directors. Therefore, the act of suspending the Code without obtaining the ""consent"" of

the Board is illegal. Hence, as before passing the order of suspension of Code the petitioners were not given an opportunity of hearing, as the

respondent no.3 who had passed the impugned order of suspension of the Code was not ""the adjudicating authority"" u/s 11(4) and as before the

suspension of Code the ""consent"" of the Board was not obtained, the impugned order dated 7th December, 2010 suspending the Code is without

jurisdiction and illegal and is thus set aside and quashed. The writ petition is allowed.

No order as to costs.

Urgent photostat certified copy of this judgment and order, if applied for, be given to the appearing parties on priority basis.

Writ petition allowed