SUPREME COURT OF INDIA

Messrs Swan Mills Limited

Vs

Union of India and Others

(Arijit Pasayat and D. K. Jain, JJ)

26.07.2007

JUDGMENT

DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Bombay High Court dismissing the Writ Petition filed by the appellant.

3. The background facts in a nutshell are as follows:

The appellant is a composite Textile Mill engaged in manufacture of cotton yarn, man-made yarn, cotton fabrics and man-made fabrics as well as the processing amongst other activities. For the period from October, 1994 to February, 1997, the appellant was served with 14 Show Cause Notices for recovery of differential duty of approximately Rs.50 lakhs. The said show cause notices were adjudicated by the Assistant Commissioner of Central Excise, Mumbai-II vide Order-in-original No.781/398/97 to 794/411/97 dated 12th November, 1997, confirming the demands covered thereunder along with interest. The Assistant Commissioner of Central Excise also imposed penalty of Rs.5, 000/-. There being incorrect computation, he directed the Range Superintendent to verify figures and work out the fresh demand. The Range Superintendent re- worked the duty amount of Rs.9, 40, 753/- and issued a demand notice on 18th May, 1998 requiring the appellant to pay the

said amount along with penalty of Rs.5, 000/-.

Dissatisfied with the order-in-original dated 12th November, 1997 passed by the Assistant Commissioner of Central Excise and the order of Range Superintendent dated 18th May, 1998, the appellant preferred appeal before the Commissioner of Central Excise (Appeals) on 2nd September, 1998 along with stay application. The Commissioner of Central Excise (Appeals) vide order dated 28th December, 1998 asked the appellant to deposit the entire amount of duty and penalty within four weeks from the date of the order.

Finance (No.2) Act, 1998, came out with Scheme known as "Kar Vivad Samadhan Scheme, 1998" (for short, 'KVSS'). The said scheme provided for settling the tax arrear by paying 50% of the disputed tax arrear. Under the KVSS, the Commissioner of Central Excise was appointed as Designated Authority. The scheme was operative from 1st September, 1998 to 31st January, 1999. The appellant filed declaration under Section 89 of the Finance Act, 1998 before the Commissioner of Central Excise on 31st December, 1998.

The aforesaid declaration filed by the appellant came to be rejected by the Designated Authority vide his order dated 25th February, 1999 on the ground that appeal was filed by the appellant before the Commissioner of Central Excise (Appeals) after the limitation for filing the appeal had already expired and that delay in filing the appeal was not condoned by the Commissioner of Central Excise (Appeals).

Aggrieved by the order in appeal dated 25 February, 1999, the appellant preferred appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai (for short, 'the Tribunal').

4. The Tribunal vide its order dated 29th November, 1999 held that the appeal preferred by the appellant before the Commissioner (Appeals) was within time and, accordingly, set aside the order of the Commissioner (Appeals) and remanded the matter back to him for fresh disposal in accordance with law.

5. On remand, the Commissioner (Appeals) vide order dated 29th June, 2001 upheld the order-in-original dated 12th November, 1997.

6. After the Tribunal passed the order on 29th November, 1999 holding that the appeal preferred by the appellant before the Commissioner (Appeals) was within time, the appellant approached the Designated Authority vide its letter dated 24th April, 2001 for reconsideration of the earlier order dated 25th February, 1999 and give the appellant the benefit of KVSS in the matter of the application filed under Section 89 of the KVSS on 28th January, 1999.

7. The Superintendent of Central Excise, Range II on 18th January, 2002 informed the appellant that

the Application under Section 89 of the KVSS was re-examined by the Chief Commissioner's office, Mumbai and since the KVSS no longer exists, the question of accepting the application does not arise.

8. The appellant then made an application dated 5th February, 2002 to the Chief Commissioner of Central Excise with a request for direction to the Commissioner concerned to look into the appellant's request for KVSS.

9. As the order-in-original dated 12th November 1997/18th May, 1998 had attained finality on dismissal of the appellant's appeal by the Commissioner (Appeals) on 29th June, 2001, the order was enforced and the appellant deposited the entire duty and penalty on 7th October, 2004.

10. The Office of Superintendent of Central Excise vide letter 3rd November, 2004 asked the appellant to pay the interest of Rs.11, 58, 647/- under Section 11AA of the Central Excise Act, 1944 for delayed payment of duty. By subsequent letter dated 22nd November, 2004 the appellant was again called upon to pay the interest of Rs.11, 58, 647/- failing which it was informed that recovery of Government dues shall be made under Section 142 of the Customs Act, 1962.

11. Despite repeated letters when the appellant failed to pay interest amount of Rs.11, 58, 647/-, the Superintendent of Central Excise vide letter dated 29th September, 2005 again called upon the appellant to pay the interest (Government dues) immediately. It was thereafter that the appellant on 10th October, 2005 sent a letter to the Commissioner of Central Excise for reconsideration of the matter.

12. The Commissioner of Central Excise vide letter dated 19th October, 2005 informed the appellant that benefit of KVSS cannot be extended to it as the scheme is no longer in existence. It is then that the appellant approached the Bombay High Court by filing a writ petition. The appellant challenged principally the order dated 25th February, 1999 passed by the Designated Authority. It prayed for direction to the respondents to accept the appellant's declaration dated 31st December, 1998 made under Section 89 of Finance Act, 1998 in respect of KVSS and restrain the respondents from recovery of interest amount of Rs.11, 58, 647/- as per the final demand dated 7th December, 2005.

13. Analysing the various provisions of the KVSS the High Court held that since the appeal was filed after the limitation and delay was not condoned, the appellant

14. According to the High Court the crucial word was "pending" and, therefore, the decision in Commissioner of Income Tax, Rajkot v. Shatrusailya Digvijaysingh Jadeja Â relied upon by the appellant was not applicable.

15. In support of the appeal, learned counsel for the appellant submitted that the Designated

Authority erred in rejecting the declaration made under KVSS on the ground that the appeal preferred by the appellant on 2.9.1998 before the Commissioner (Appeals) was time barred and, therefore, it cannot be said that any appeal was pending under Section 95(ii)(c) of KVSS. The appeal dated 2nd September, 1998 in respect of order-in-original dated 12th November, 1997/15th May, 1998 was in time and it has been so held ultimately by the Tribunal. Therefore, the Designated Authority ought to have considered the matter. The High Court noted that the appellant kept quite and did not take steps in challenging the order dated 25th February, 1999 passed by the Designated Authority rejecting the declaration made by the appellant under KVSS for some time but filed an appeal against the order dated 25th February, 1999 passed by the Commissioner of Central Excise (Appeals) rejecting the appellant's appeal as time barred by filing an appeal before the Tribunal. By order dated 29th November, 1999 the Tribunal allowed the appeal setting aside the order passed by the Commissioner of Central Excise (Appeals) and remanded the matter to the Commissioner (Appeals).

16. Learned counsel for the respondents supported the order of the High Court.

17. Undisputedly, the Tribunal held that the appeal was within time. That being so, for the purpose of KVSS the appeal was to be treated as pending. In Shatrusailya's case (supra) this Court has held as follows:

"10. The basic point which we are required to consider in this case is the meaning of the word "pending" in Section 95(i)(c) of the said Scheme.

11. The object of the Scheme was to make an offer by the Government to settle tax arrears locked in litigation at a substantial discount. It provided that any tax arrears could be settled by declaring them and paying the prescribed amount of tax arrears, and it offered benefits and immunities from penalty and prosecution. In several matters, the Government found that a large number of cases were pending at the recovery stage and, therefore, the Government came out with the said Scheme under which it was able to unlock the frozen assets and recover the tax arrears.

12. In our view, the Scheme was in substance a recovery scheme though it was nomenclatured as a "litigation settlement scheme" and was not similar to the earlier Voluntary Disclosure Scheme. As stated above, the said Scheme was a complete code by itself. Its object was to put an end to all pending matters in the form of appeals, references, revisions and writ petitions under the Income-tax Act, 1961/Wealth Tax Act, 1957. Keeping in mind the above object, we have to examine Section 95(i)(c) of the Scheme, which was different from appeals under Section 246, revisions under Section 264, appeals under Section 260-A, etc. of the Income-tax Act, 1961 and similar provisions under the Wealth Tax Act, 1957. Under the Income-tax Act, 1961, there is a difference between appeals, revisions and references. However, those differences were obliterated and appeals, revisions and references were put on par under Section 95(i)(c) of the Scheme. The object behind Section 95(i)(c) in putting on par appeals, references and revisions was to put an end to litigation in various forms and at various stages under the Income-tax Act, 1961/Wealth Tax Act, 1957 and, therefore, the rulings on the scope of appeals and revisions under the IT Act or on Voluntary Disclosure Scheme, will not apply to this case.

13. One more aspect needs to be looked into. The Finance (2) Act, 1998 introduced a scheme called the Kar Vivad Samadhan Scheme, 1998. It was a recovery scheme. Under the Scheme, the tax arrears had to be outstanding as on 31-3-1998. Under Section 87(f), "disputed tax" was defined to mean total tax determined and payable under the Income-tax Act, 1961/Wealth Tax Act in respect of an assessment year but which remained unpaid as on the date of making of the declaration from which TDS, self-assessed tax, advance tax paid, if any, had to be deducted under Section 90; the DA had to determine the amount payable and for that purpose, he had to determine the tax arrear as well as the disputed amount as defined under Section 87(f). Thus, the DA had to make an assessment of tax arrears, disputed amount and amount payable for each year of assessment; that the appeal was barred against the order under Section 90 (see Section 92); that such determination had to be done within 60 days from the receipt of the declaration and based thereon the DA had to issue a certificate. In other words, till the completion of the afore-stated exercise, the appellants could not have paid the amount of tax and, therefore, the appellants was not liable to pay interest as his liability accrued only after the ascertainment of the amount payable under Section 90. In the present matter that exercise has been completed; that taxes have been recovered by the sale of lands; that amounts have been paid pursuant to the determination by the DA, may be under the orders of the High Court and, therefore, we do not wish to reopen the matter.

14. In the case of Dr Renuka Datla this Court has held on interpretation of Section 95(i)(c) that if the appeal or revision is pending on the date of the filing of the declaration under Section 88 of the Scheme, it is not for the DA to hold that the appeal/revision was "sham", "ineffective" or "infructuous" as it has.

15. In the case of Raja Kulkarni v. State of Bombay this Court laid down that when a section contemplates pendency of an appeal, what is required for its application is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid or competent. Whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent e.g. when it is held to be barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court.

16. To the same effect is the law laid down by the judgment of this Court in the case of Tirupati Balaji Developers (P) Ltd. v. State of Bihar Â in which it has been held that an appeal does not cease to be an appeal though irregular and incompetent."

18. The ratio in Shatrusailya's case (supra) is clearly applicable. In the instant case the appeal is to be treated as pending. The High Court was not justified in dismissing the writ petition. The impugned order of the High Court is set aside. Orders of the Designated Authority rejecting the declaration filed by the appellant are quashed. The appeal is allowed with no order as to costs.