

Brindavan Beverages Pvt. Ltd. Vs. Commr.of Central Excise

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Court : Delhi

Decided On : May-01-2009

Reported in : 159(2009)DLT276; 2009(165)LC105(Delhi); [2009]21STT5

Judge : Vikramajit Sen, J.

Acts : [Central Excise Act, 1944](#) - Sections 2(11), 10(1), 11A and 11AC; Companies Act - Sections 10F; [Constitution of India](#) - Article 226 and 226(1); CENVAT Credit Rules, 2004 - Rules 14 and 15; Code of Civil Procedure (CPC) - Sections 20

Appeal No. : CEAC No. 10/2008, CM Nos. 13457-58/2008 and 14416/2008

Appellant : Brindavan Beverages Pvt. Ltd.

Respondent : Commr.of Central Excise

Advocate for Def. : P.P. Malhotra, ASG, ; Mukesh Anand, ; Shailesh Tiwari a

Advocate for Pet/Ap. : Chandra Shekhar, Sr. Adv.,; P.B. Aggarwala,; Prerna Gautam

Judgement :

Vikramajit Sen, J.

1. The question which we are called upon to decide on the threshold of these proceedings is whether this Court ought to exercise jurisdiction over the challenge made to the Orders dated 1.5.2008 passed by Customs Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi. Preliminary Objections have been raised on behalf of the Respondents pertaining to the relative lack of territorial jurisdiction of the High Court of Delhi. As the array of parties manifests, the Appellant operates from Plot No. 54-55, Parsakhera Industrial Estate, Parsakhera, Bareilly, Uttar Pradesh where it had installed the capital goods imported by it. It had availed of CENVAT credit during the period from November, 2004 to March, 2005. The Commissioner of Central Excise, Meerut-II, issued a Show Cause Notice dated 30.3.2006. After adjudication the Commissioner confirmed the demand and directed recovery of CENVAT of Rupees 1,64,08,716/- under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A of the [Central Excise Act, 1944](#) together with a penalty for the like amount under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the [Central Excise Act, 1944](#). It is that Order which was appealed against before CESTAT, New Delhi which, by its impugned Final Order, rejected the Appeal.

2. Generally speaking the significant part of the cause of action should have arisen within the territorial sway of the Court which is chosen by the Petitioner for ventilation of his grievances. *Kusum Ingots and Alloys Ltd. v. Union of India* : 2004(186)ELT3(SC) clarifies the law on these lines, as is evident from the following paragraphs thereof:

When an order, however, is passed by a Court or Tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of original authority merges with that of the appellate authority. ..

We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. (See Bhagar Singh Bagga v. Dewan Jagbir Sawhany : AIR1941 Cal670 ; Mandal Jalal v. Madanlal (1945) 49 CWN 357; Bharat Coking Coal Limited v. Jharia Talkies and Cold Storage Pvt. Ltd. (1997) CWN 122; S. S. Jain and Co. and Anr. v. Union of India and Ors. (1994) CHN 445; M/s. New Horizon Ltd. v. Union of India : AIR1994 Delhi126).

3. In Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages(P) Ltd., : AIR 1994 SC158 the conundrum concerned which High Court would be the appropriate forum to adjudicate an appeal from the Company Law Board, Principal Bench, New Delhi. The Supreme Court opined that - 'the expression 'the High Court? in Section 10-F of the Companies Act means the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate as indicated by Section 2(11) read with Section 10(1)(a). Accordingly, in the present case, the appeal against the order of the Company Law Board would lie in the Madras High court which has jurisdiction in relation to the place at which the registered office of the company concerned is situate and not the Delhi High Court merely because the order was made by the Company Law Board at Delhi'.

4. Various Division Benches of the Delhi High Court, inter alia, in Commissioner of Central Excise v. Technological Institute of Textile : 76(1998)DLT862 , Suraj Woolen Mills v. Collector of Customs, Bombay 2000 (123) E.L.T. 471 and Bombay Snuff Pvt. Ltd. v. Union of India : 2006(194)ELT264(Del) have clarified that the High Court should not exercise jurisdiction only because the Tribunal whose order is in appeal before it, is located within its territorial boundaries. In Seth Banarsi Dass Gupta v. CIT : [1978]113ITR817(Delhi) and Birla Cotton & Spinning Mills Ltd. v. CIT, Rajasthan : [1980]123ITR354(Delhi) this Court declined to exercise jurisdiction because both the assesses resided and carried on business outside Delhi. In the former case, the Division Bench suggested that when a Bench of the

ITAT determines an appeal as an appeal from a particular State, it would be quite appropriate for the Bench to state the case to the High Court of the State from which the appeal had originated. A similar approach was taken by the Division Bench of the High Court of Judicature at Bombay in *Sun Pharmaceutical Industries Limited v. Union of India* : 2007ECR470(Bombay) . The Court held that even though the Settlement Commission was physically located at Mumbai, since it was dealing with a case arising in Tamil Nadu, it could be deemed to be located in that State and accordingly amenable to the writ jurisdiction of the Madras High Court; the Bombay High Court declined to exercise writ jurisdiction primarily because only a small part of the cause of action had arisen within its jurisdiction. In *West Coast Ingots(P) Ltd. v. Commissioner of C. Ex., New Delhi* : 2007(209)ELT343(Del) the Division Bench of this Court declined to exercise territorial jurisdiction because the lis was pending before the Principal Bench of Settlement Commission at Delhi. It followed another decision of the Division Bench in WP(C) No. 16672/2006 titled *Raj Leather Cloth Industries Pvt. Ltd. v. Union of India* decided on 29.11.2006.

5. On a reading of Article 226 (1) of the Constitution it will be palpably clear that without the next following provision, that is, sub-clause(2) a High Court may not have been empowered to issue a writ or order against a party which is not located within the ordinary territorial limits of that High Court. The power to issue writs against any person or Authority or government even beyond the territorial jurisdiction of any High Court is no longer debatable. The rider or prerequisite to the exercise of such power is that the cause of action must meaningfully arise within the territories of that particular High Court. It does not logically follow, however, that if a part of the cause of action arises within the territories over which that High Court holds sway, it must exercise that power rather than directing the petitioner to seek his remedy in any other High Court which is better suited to exercise jurisdiction for the reason that the predominant, substantial or significant part of the cause of action arises in that Court. In other words any High Court is justified in exercising powers under Article 226 either if the person, Authority or Government is located within its territories or if the significant part of the cause of action has arisen within its territories. The rationale of Section 20 of the Code of Civil Procedure would, therefore, also apply to Article 226 (2) of the Constitution.

These considerations are aptly encapsulated in the term *forum conveniens* which refers to the situs where the legal action be most appropriately brought, considering the best interests of the parties and the public (see Black's Law Dictionary). The writ Court should invariably satisfy itself that its choosing is not *malafide* or an example of forum shopping.

6. This question has now been authoritatively settled by the Supreme Court in *Ambica Industries v. Commissioner of Central Excise* : 2007(213)ELT323(SC) where several of the above quoted decisions have been reviewed. The Petitioner/Assessee in that case carried on business at Lucknow where it was also assessed. It approached the CESTAT, New Delhi which exercised jurisdiction in respect of the States of Uttar Pradesh, Maharashtra and the National Capital Territory of Delhi. The Appeal filed in the Delhi High Court was rejected on the ground of lack of territoriality, and the Appeal to the Supreme Court turned out to be a sterile exercise. Their Lordships observed that 'the aggrieved person is treated to be the *dominus litis*, as a result whereof, he elects to file the appeal before one or the other High Court, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of a High Court does not extend beyond its territorial jurisdiction and the decision of one High Court would not be a binding precedent for other High Courts or courts or tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play. An assessee, affected by an order of assessment made at Bombay, may invoke the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay. ... It would give rise to the issue of forum shopping.For example, an assessee affected by an assessment order in Bombay may invoke the jurisdiction of the Delhi High Court to take advantage of the law laid down by it which may be contrary to the judgments of the High Court of Bombay'.

7. Learned Counsel for the Petitioner has relied heavily on the pronouncements in *Canon Steels P. Ltd. v. ComMr. of Customs (Export Promotion)* : 2007(218)ELT161(SC) . Significantly, *Ambica Industries* was not cited or

considered even though it was an earlier decision of a Coordinate Bench. Even more significant is the fact that Canon is irreconcilable with the view of the same learned Judge in *ComMr. of Central Excise, Delhi-III v. Enkay HWS India Ltd.* : 2002(139)ELT21(Del) where it had been held that the site of the Commissionerate or Appellate Authority does not determine jurisdiction. It appears evident to us that what prevailed on his Lordship, Dr. Arijit Pasayat in Canon, was the fact that a writ petition had been filed and withdrawn in the High Court of Delhi, to be later filed in the High Court of Punjab and Haryana which also was found not to have jurisdiction. In order to effect substantial justice, their Lordships directed that the writ petition should be heard in New Delhi. What is interesting to note is the fact that the question that the jurisdiction would lie before the High Court of Judicature at Bombay because the cause of action and primary adjudication had taken place there, was not even broached before the Court in that matter.

8. Learned Senior Counsel appearing for the Petitioner has read copiously from the decision of the Supreme Court in *S.S. Rathore v. State of Madhya Pradesh* : 1989(43)ELT790(SC) as well as *Kunhayammed v. State of Kerala* : [2000]245ITR360(SC) , both of which deal with the doctrine of merger. This doctrine, however, will have no relevance or application to the question before us. We must assume that the order of the Adjudicating Authority had merged with that of the CESTAT. That is not the central issue before us. The question is altogether different, that is, which is the forum where such an order can be challenged. We are not persuaded to ignore altogether the place where the cause of action had arisen and where the original adjudication had taken place which would constitute forum conveniens for all the parties concerned.

9. In these circumstances, we are of the opinion that merely because the Order that is impugned has been challenged by the CESTAT, New Delhi, the High Court at New Delhi ought not exercise jurisdiction. It is not a moot question that if CESTAT had an establishment in Uttar Pradesh, the Plaintiff would have to file its appeal there. What is irrefutable is that the Plaintiff cannot contend that it is inconvenient to approach the High Court in Uttar Pradesh where its factory and offices are located. There is no justification for the officials to travel out of that State only because for reasons recondite, if not mala fide, a Court outside that

State has been approached. The Appeal is returned to be filed in the appropriate Court in accordance with law. All pending applications stand disposed of.

10. The Appellant shall pay costs of Rupees 20,000/- to the Prime Minister's Relief Fund within four weeks from today.

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