

Rajkumar Shivhare Vs. Assistant Director of Enforcement

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Court : Delhi

Decided On : Sep-24-2008

Reported in : 154(2008)DLT280

Judge : Vikramajit Sen and; S.L. Bhayana, JJ.

Acts : [Foreign Exchange Management Act, 1999](#) - Sections 35; Code of Civil Procedure (CPC) - Sections 20; [Constitution of India](#) - Article 226(1) and 226(2)

Appeal No. : WP(C) 6527/2008 and CM Nos. 12446-47/2008

Appellant : Rajkumar Shivhare

Respondent : Assistant Director of Enforcement

Advocate for Def. : Sanjay Katyal, Adv.

Advocate for Pet/Ap. : Mathews J. Nedumpara, Adv

Disposition : Petition dismissed

Judgement :

Vikramajit Sen, J.

1. This Writ Petition assails the Order dated 17.7.2008 of the Appellate Tribunal for Foreign Exchange, Janpath, New Delhi. The contention of the Petitioner is that the rules of natural justice have been violated inasmuch as the Petitioner was not

permitted to cross-examine the sole witness on the basis of whose testimony orders adverse to the interests of the Petitioner had been passed by the Special Director of Enforcement, Ministry of Finance, Mumbai.

2. A Preliminary Objection has been raised by learned Counsel for the Respondent to the effect that if the Petitioner is desirous of filing a writ petition or even an Appeal, the High Court holding territorial jurisdiction in the matter would be the Bombay High Court where the Petitioner resides and carries on his vocation, where the entire cause of action has arisen and where the adjudication has taken place. Learned Counsel for the Petitioner, however, relies on the situs of the Appellate Tribunal, Foreign Exchange being in Delhi. We are of the view that the Preliminary Objection is well-founded.

3. The position is analogous to that of the Union Government. The statement that the Union Government is located throughout every part of Indian territory and hence can be sued in any Court of the country, brooks no cavil. This does not, however, inexorably lead to the consequence that a litigant can pick and choose between any Court as per his caprice and convenience. Generally speaking, some part, nay, the significant part of the cause of action should have arisen within the territorial sway of the Court which is chosen by the Petitioner. *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; New Horizon Ltd. v. Union of India : AIR1994 Delhi126 .

4. Various Division Benches of the Delhi High Court, inter alia, in Suraj Woolen Mills v. Collector of Customs, Bombay 2000 (123) E.L.T. 471; Bombay Snuff Pvt. Ltd. v. Union of India : 2006(194)ELT264(Del) and Commissioner of Central Excise v. Technological Institute of Textile : 76(1998)DLT862 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. On a reading of Article 226(1) of the Constitution it will be palpably clear that without the next following provision, 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 pre-requisite to the exercise of such power is that the cause of action must 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). 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.

5. 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'.

6. Section 35 of the [Foreign Exchange Management Act, 1999](#) ('FEMA' for short) enables any person aggrieved by any decision or order of the Appellate Tribunal to file an Appeal to the High Court. The Explanation to the Section is extremely

significant inasmuch as it prescribes that High Court means 'the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain' and further clarifies that if the Appeal is filed by the Central Government it is the residence or place of business of the Respondent which is the relevant and determining factor. Any lingering doubt that may remain stands dispelled by Section 35 of FEMA.

7. Therefore, on two counts this Court ought not to exercise territorial jurisdiction - firstly, on the general principles as culled out in *Ambica Industries* and secondly by virtue of Section 35 of FEMA.

8. Writ Petition is rejected for the reason that this Court ought not to exercise jurisdiction on the ground of lack of territoriality. Liberty is granted to the Petitioner to approach the appropriate High Court. There shall be no order as to costs.

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