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Corporate Laws

Landmark Judgement

LMJ 11:11:2024

NATIONAL TEXTILE WORKERS UNION ETC. v P.R. RAMKRISHNAN & ORS [SC]

Civil Appeals Nos. 4065- 67 of 1982

P.N. Bhagwati, O. Chinnappa Reddy, E.S. Venkataramiah, Baharul Islam & Amarendra Nath Sen,JJ. [Decided on 10/12/1982]

Equivalent citations: 1983 AIR 75; 1983 (1) SCC 228; (1983) 1 LABLJ 45; (1983) 53 Comp Cas 184.

Companies Act,1956- section 433- winding up of company- provisional liquidator appointed- right of employees to have a hearing- whether employees have right of hearing – Held, Yes. [By majority]

Brief facts:

The respondents were two groups of shareholders of a private limited company which had a thousand persons under its employment. A group of shareholders filed a petition for winding-up the company under section 433 of the Indian Companies Act, 1956 along with applications for an interim injunction and for appointment of a provisional liquidator. The Company Judge passed an order of injunction restraining the company from borrowing any moneys from banks, financial institutions or others without the prior permission of the court. Three trade unions representing the employees of the company filed applications for being impleaded as respondents/ interveners in the winding up petition claiming that the interests of the employees had been adversely affected by the interim order. The Company Judge rejected these applications. A Division Bench of the High Court turned down the appeal preferred by one of the unions and that union sought special leave to appeal against the order of the Division Bench while the other two unions sought special leave to appeal against the order of the Company Judge. The Court granted special leave to all the three unions and permitted the Company Judge to pass orders on the application pending before him for appointment of a provisional liquidator with the direction that the liquidator shall not take any steps which would prejudicially affect the employees.

These three appeals by special leave raise a short but interesting question of law relating to the right of workmen employed in a company to appear and oppose a petition for winding up of the company.

We may now proceed to consider the question that arises for determination before us. The question, briefly stated, is: when a petition for winding up a company is filed in court, are the workmen of the company entitled to ask the court to implead them as parties in the winding up petition or to allow them to appear and contest the winding up petition or they have no locus standi at all so far as winding up petition is concerned and they must helplessly watch the proceedings as outsiders though the result of the winding up petition may be to bring about termination of their services and thus affect them vitally by depriving them of their means of livelihood?

Considerable reliance was however placed on the statement of the law on this point contained in the leading textbooks on company law. Respondent Nos. 6 to 9 drew our attention to Palmer Company Precedents (17th Edn.) volume 2 at page 77 where it is stated that any creditor or shareholder may appear to support or oppose the petition but no one else can do so even if he has an indirect interest in the continued existence of the company. So also in Buckley on the Companies Act (14th Edn.) at page 546 the law has been stated in the following terms, namely, "the only persons entitled to be heard are the company, its creditors and contributories .. the court may in its discretion hear other persons who have an interest in order to learn what public grounds there are in favour of, or in opposition to, the winding up.. but such persons can be heard only as amici curiae and cannot appeal."

Our attention was also invited to Halsbury's Laws of England 4th Ed. Vol. 7 where a similar statement of the law is to be found at page 614 paragraph 1028. Now it is undoubtedly true that according to the statement of the law contained in these three leading textbooks, it is only the company, the creditors and the contributories who are entitled to appear on the winding up petition and no other persons have a right to be heard, but this statement of the law is based on the old decision in Re. Bradford Navigation Company which was carried in appeal and decided as Re. Bradford Navigation Company. This decision given by the English Courts over a hundred years ago when a company was regarded merely as a legal device brought into being as a result of a contractual arrangement between the shareholders for the purpose of carrying on trade or business and the workers were looked upon as no more than employees of the company working under a master and servant relationship and the interest of the public as consumers or otherwise was a totally irrelevant consideration and it can have no validity in the present times when the entire concept of a company has changed and it has been transformed into a dynamic socio-economic institution in which capital and labour are both equal partners, possibly with heavy weightage in favour of labour and the interest of the public as consumers as also the general welfare and common good of the community constitute a vital consideration. We cannot allow the dead hand of the past to stifle the growth of the living present.

Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the

tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adopting itself to the fast changing society and not lag behind. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation. We cannot therefore mechanically accept as valid a legal rule which found favour with the English courts in the last century when the doctrine of laissez faire prevailed. It may be that even today in England the courts may be following the same legal rule, which was laid down almost a hundred years ago, but that can be no reason why we in India should continue to do likewise. It is possible that this legal rule might still be finding a place in the English textbooks because no case like the present one has arisen in England in the last 30 years and the English courts might not have had any occasion to consider the acceptability of this legal rule in the present times. But whatever be the reason why this legal rule continues to remain in the English textbooks, we cannot be persuaded to adopt it in our country, merely on the ground that it has been accepted as a valid rule in England. We have to build our own jurisprudence and though we may receive light from whatever source it comes, we cannot surrender our judgment and accept as valid in our country whatever has been decided in England. The rule enunciated in re: Bradford Navigation Company case (supra) does not commend itself to us and though it has been followed by a single Judge of the Bombay High Court in re Edward Textiles Limited (supra), we do not think it represents correct law.

We may also mention that on behalf of the appellants some reliance was placed on Rule 34 of the Companies (Court) Rules 1959 in support of their contention that not only the creditors and the contributories but also other persons are entitled to appear at the hearing of a winding up petition and the workers cannot therefore be excluded. This Rule provides that every person who intends to appear at the hearing of a winding up petition, whether to support or to oppose it, shall serve on the petitioner or his advocate notice of his intention at the address given in the advertisement and such notice shall be in form No. 9 and where such person intends to oppose the winding up petition, the grounds of his opposition or a copy of his affidavit if any shall be furnished along with the notice. The appellants contended that under this Rule anyone who wants to appear in a winding up petition can do so, provided he serves on the petitioner or his advocate, notice of his intention at the address given in the advertisement and complies with the other requirements of this Rule and therefore if the workers desire to appear at the hearing of the winding up petition, they are entitled to do so. The answer given on behalf of respondent Nos. 6 to 9 to this contention was that Rule 34 is applicable only after a winding up petition is admitted and an order is made for advertisement of the winding up petition and it has no application at the stage when the winding up petition is before the court only for the purpose of deciding whether or not it should be admitted and advertised. It was also urged on behalf of respondent Nos. 6 to 9 that in any event Rule 34 does not confer a right on any and every person to appear at the hearing of the winding up petition, intends so to appear he must take various steps set out in that Rule beginning with service of notice on the petitioner or his advocate before he can be heard on the winding up petition. We are inclined to agree with this contention of respondent Nos. 6 to 9.

It is obvious that the object and purpose of Rule 34 is not to confer a right on any one to appear at the hearing of the winding up petition but merely to provide the procedure to be followed before a person who is otherwise entitled to appear in a winding up petition can be heard in support or opposition of the winding up petition. This rule cannot therefore be relied upon by the appellants as conferring a right on the workers to appear at the hearing of a winding up petition. But, one thing is clear that this Rule does postulate that apart from the creditors and contributories there may be other persons who are entitled to appear at the hearing of the winding up petition because it is not confined in its application to the creditors and contributories but uses the generic impression "every person" and to this limited extent it does undoubtedly lend some support to the contention of the appellants.

We are therefore of the view that the workers are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as no winding up order is made by the court. The workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made as also after the admission and advertisement of the winding up petition until an order is made for winding up the company. If a winding up order is made and the workers are aggrieved by it, they would also be entitled to prefer an appeal and contend in the appeal that no winding up order should have been made by the Company Judge. But when a winding up order is made and it has become final, the workers ordinarily would not have any right to participate in any proceeding in the course of winding up the company though there may be rare cases where in a proceeding in the course of winding up, the interest of the workers may be involved and in such a case it may be possible to contend that the workers must be heard before an order is made by the court. We think that even when an application for appointment of a provisional liquidator is made by the petitioner in a winding up petition, the workers would have a right to be heard if they so wish because the appointment of a provisional liquidator may adversely affect the interest of the workers. But we may make it clear that neither the petitioner nor the court would be under any obligation to give notice of such application to the workers. It would be for the workers to apply for being heard and if they do so, they would be entitled to appear and be heard on the application for appointment of provisional liquidator. The workers therefore in the present case had a right to be heard before the provisional liquidator was appointed by

the Company Judge but the circumstance that the workers were not so heard would not have the effect of vitiating the order appointing provisional liquidator, because on the view taken by us, it would be open to the workers to apply to the court for vacating that order and it would be for the court after considering the material produced before it and hearing the parties to decide whether that order should be vacated or not.

We accordingly allow the appeals, set aside the order, dated 14th September 1981 made by a Single Judge of the High Court and confirmed by the Division Bench on 13th September 1981 and direct that the three Unions shall be entitled to appear and be heard in the winding up petition. There will be no order as to costs of these appeals.

LW 79:11:2024

KAILASH MOTILAL KAKRANIA & ANR v. APURVA OIL AND INDUSTRIES PVT LTD [NCLAT]

Company Appeal (AT) (Insolvency) No. 1257 of 2023

Rakesh Kumar Jain & Ajai Das Mehrotra. [Decided on 15/10/2024]

Insolvency and Bankruptcy Code,2016- section 7- CIRP by financial creditor- counter claim of corporate debtor- NCLT rejected the application on the ground of wrong calculation of interest and counter claim- whether correct-Held, No.

Brief Facts:

The Appellant No.1 was a shareholder and erstwhile Director of the Corporate Debtor and Appellant No.2 wife of Appellant No.1 was a shareholder of the Corporate Debtor. The Appellants in their petition under Section 7 of the Code have claimed a default of Rs. 1,22,42,927/- which includes Rs. 1,01,50,009/- towards principal amount and Rs. 20,92,918/- towards interest calculated at the rate of 9% per annum till 30.06.2021 as per the Balance Sheet of the Corporate Debtor.

The petition of Appellants was rejected by the Ld. NCLT vide impugned order dated 14.07.2023 primarily for the reason that the Appellants do not meet the threshold prescribed under Section 4 of the Code as no interest on the said loan appears to have been agreed by the Corporate Debtor in the relevant period and that there was a counter claim of the Corporate Debtor of Rs. 10,85,850/- which brought the debt to less than Rs. One Crore.

Decision: **Allowed.**

Reason:

We have considered the oral and written submissions and have gone through the records. It is admitted by both the sides that there was a financial debt of Rs. 1,01,50,009/- collectively payable to Mr. Kailash Motilal Kakrania (Rs. 88,79,026/-) and his wife Mrs. Manju Kailash Kakrania (Rs. 12,70,983/-). The said outstanding is reflected continuously in the earlier balance sheets and the balance sheet of Financial Year 2021-22 (at page 540 of the Appeal Paper Book). Since the amount has been continuously shown in the balance sheet, and duly acknowledged, there is no dispute that it is within limitation. The financial debt of Rs. 1,01,50,009/- is due and payable and is within limitation is thus an admitted fact.

It is the claim of the Respondent/Corporate Debtor that an amount of Rs. 10,85,850/- is due from Mr. Kailash Motilal Kakrania which is reflected in the Other Current Assets of the balance sheet of Financial Year 2021-22 at page 541 of the Appeal Paper Book. It is alleged by the Respondent/Corporate Debtor that the Appellants have collected these amounts from tenants by misrepresenting himself as Authorized Representative or Director of the Corporate Debtor and this amount is due and recoverable from the Appellant.

The alleged entry in the ledger account is given in page 523 of the Appeal Paper Book. Apparently, the entire entries are made on a single date showing amount receivable from Mr. Kailash Motilal Kakrania of Rs. 10,85,850/- relating to 8 (eight) transactions. The voucher nos. are in seriatim from voucher no. 1 to voucher no. 8 and all entries are made on 10.07.2021. The Corporate Debtor in his written submissions has nowhere stated that any demand of the said amount was ever made on Mr. Kailash Motilal Kakrania. There is no entry in the balance sheet, prior to the date of filing of petition under Section 7, regarding the said amount. Even in the books of account of the Corporate Debtor, the amounts are not adjusted against the financial debt, and are shown separately in the balance sheet as on 31.03.2022.

In the present case, there is no dispute regarding financial debt of Rs. 1,01,50,009/- which is duly reflected in the balance sheets for various years, including for financial year 2021-22. The debt is due and is within limitation. We find that the Adjudicating Authority has erred in allowing adjustment of Rs. 10,85,850/- against the financial debt for the reasons aforesaid. The order of the Ld. NCLT dated 14.07.2023 is set aside and is remanded back to the Ld. NCLT for passing necessary consequential order admitting Corporate Debtor in CIRP under Section 7 of the Code. The Appeal is accordingly allowed. No order as to costs. All connected I.As, if any, are also disposed of.

LW 80:11:2024

CENTURY ALUMINIUM COMPANY LTD v. RELIGARE FINVEST LTD [NCLAT]

Company Appeal (AT) (Insolvency) No. 1719 of 2024

Ashok Bhushan, Barun Mitra & Arun Baroka. [Decided on 29/10/2024]

Section 7 of the Insolvency and Bankruptcy Code,2016 read with section 8 of the arbitration and Conciliation Act,1996 - CIRP by financial creditor- corporate debtor filed application to refer the dispute to arbitration after filing reply- NCLT dismissed the application- whether correct-Held, Yes.

Brief facts:

In the Year 2015, The appellant Corporate Debtor approached the respondent Financial Creditor and obtained loan against the Property for an amount of Rs.12,50,00,000/-. The loan agreement provided for the unilateral appointment of sole arbitrator by the respondent. Corporate Debtor created Security Interest by hypothecation of assets and equitable mortgage in favour of the Financial Creditor, State Bank of India and Canara Bank, being factory, land 9.34 acres, building and other constructions. Corporate Debtor failed to maintain financial discipline and made several defaults and expressed its acknowledgement of outstanding liability vide letter dated 22.08.2019 and 25.05.2022.

The Respondent initiated arbitration proceedings in the year 2019 but the arbitrator recused on the ground that his appointment is invalid. Thereafter the respondent initiated CIRP proceedings before the NCLT by filing an application under Section 7 of the Code for Financial Debt of Rs.16,89,54,976.03/-.

Corporate Debtor filed its Reply to the Section 7 Application. After filing of the Reply by the Corporate Debtor, an Application was filed being I.A. 542/2024 on 12.03.2024, seeking reference to Arbitration under Section 8 of the Arbitration and Conciliation Act, 1996. This application was rejected by the NCLT. Aggrieved by the Order of the Adjudicating Authority, rejecting the I.A., this Appeal has been filed.

Decision: Dismissed.

Reason:

Application under Section 7 was filed by the Financial Creditor in the Year 2023. The thrust of submission of the Appellant is that Financial Creditor itself has initiated Arbitration Proceeding by unilaterally appointed an Arbitrator on 26.07.2019, hence Section 7 Application ought not to have been proceeded and the Adjudicating Authority ought to have allowed the Application filed by the Corporate Debtor under Section 8 of the Arbitration Act. There is no dispute to the fact that Financial Creditor has unilaterally appointed a sole Arbitrator and sole Arbitrator, however, terminated the Arbitration Proceeding on 26.10.2021 holding that appointment of Arbitrator is contrary to the law laid down by the Hon'ble Supreme Court in *Perkins Eastman Architects DPC & Anr v. HSCC (India) Limited.* The Counsel for the Appellant submits that the termination of the Arbitration can be done only under Section 32 and recusal of Arbitrator from proceeding is not a termination of Arbitration. Corporate Debtor has also referred to Notice given by the Corporate Debtor subsequent to initiation of Section 7 Application for initiating the Arbitration Proceeding.

Learned Counsel for both the Parties have referred to the Judgment of the Hon'ble Supreme Court in *Indus Biotech Pvt. Ltd.* (Supra). From the law laid down by the Hon'ble Supreme Court, it is clear that if an Application under Section 8 of the Arbitration and Conciliation Act, 1996, is filed, the Adjudicating Authority is duty bound to proceed first to decide the Application under Section 7 by recording a satisfaction with regard to their being default or not. The fact that whether Arbitration Proceedings are pending on the date when Section 7 Application is filed or it is sought to be initiated subsequent to filing of Section 7 Application is immaterial. The remedy under Section 7 is a special remedy, keeping the object and purpose of the IBC Code. When it is brought in the notice of the Adjudicating Authority that a Corporate Debtor needs a resolution it having committed default in payment of debt, the Court is obliged to consider the Section 7 Application to find out as to whether there is a debt and default. The Insolvency Resolution of a Corporate Debtor which needs Insolvency Resolution can await adjudication of Arbitration Proceedings nor the Application under Section 7 can be kept pending till the adjudication of Arbitration Proceeding is completed. Allowing the Application under Section 8 filed by the Corporate Debtor amounts to asking the Adjudicating Authority to wait till Arbitration Proceedings are decided which is not in accord with the scheme of the IBC and shall defeat the entire purpose and object of the IBC. Adjudicating Authority in the Impugned Order has rightly rejected Application under Section 8 filed by the Corporate Debtor for referring to the dispute between the parties to the Arbitrator. As noted above, the Application under Section 8 was filed much subsequent to the filing of the Reply by the Corporate Debtor.

We, thus find substance in the submission of the Counsel for the Respondent that by not filing of Application under Section 8 at the time of filing of a Reply to Section 7, Corporate Debtor has forfeited his right to file his Application under Section 8. We, thus are satisfied that no error has been committed by the Adjudicating Authority in rejecting the I.A. No. 542/2024, filed by the Appellant. There is no merit in the Appeal. The Appeal is dismissed.

LW 81:11:2024

ADICO FORGE KAMGAR SANGATHANA v. CA RAMCHANDRA DALLARAM CHOUDHARY & ORS[NCLAT]

Company Appeal (AT) (Insolvency) No.1645 of 2024

Ashok Bhushan, Barun Mitra & Arun Baroka. [Decided on 29/10/2024]

Insolvency and Bankruptcy Code,2016- section 7- CIRP by financial creditor- resolution plan fully considering the dues of the workers- NCLT approved the resolution plan- appellant union challenged the resolution plan- - whether tenable -Held, No.

Brief facts:

The Respondent Financial Creditor initiated the CIRP against the Corporate Debtor. IRP was appointed by the NCLT. The Appellant - Union filed their claim with the IRP. Total claim of the workers of Rs.8,19,47,918/- was admitted and also included in the resolution plan for payment. IA No.5826 of 2023 was filed by the RP

for approval of the Plan. The Adjudicating Authority by the impugned order has allowed the Application and approved the Resolution Plan. Aggrieved by which order, this Appeal has been filed.

Decision: Dismissed.

Reason:

The learned Counsel for the Appellant challenging the order contends that the Resolution Plan does not secure rights of the workmen, which include, but are not limited to continued employment after the Successful Resolution Applicant ("SRA") took over the Corporate Debtor ("CD") or retiral/ termination benefits. The learned Counsel for the Appellant also contended that the Resolution Plan also need to take care of the provident fund and gratuity to which the workers are entitled and the same have to be paid in full.

The entire admitted claim in question for provident fund and gratuity having been paid in the Resolution Plan, we do not find any ground to interfere with the order of the Adjudicating Authority of approving the Resolution Plan.

The jurisdiction of the NCLT and NCLAT while considering the Plan approved by the Committee of Creditors ("CoC") has a limited jurisdiction. The remit of the jurisdiction is to examine as to whether the Plan is in compliance of Section 30, sub-section (2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC"). Judgment of the Hon'ble Supreme Court in K. Sashidhar vs. Indian Overseas Bank and Ors. - (2019) 12 SCC 150 is referred in this context.

The gratuity and provident fund having been admitted in full and paid in full in the Resolution Plan, compliance of provisions of IBC are fully met. We, thus, are of the view that no error has been committed by the Adjudicating Authority in approving the Resolution Plan. There are no grounds to interfere Company Appeal (AT) (Insolvency) No.1645 of 2024 6 with the impugned order. The Appeal is dismissed. Pending IAs, if any, are also disposed of. There shall be no order as to costs.

LW 82:11:2024

AMREESH NEON PRIVATE LTD & ANR v. COMPETITION COMMISSION OF INDIA & ORS[NCLAT]

Competition Appeal (AT) No. 30 of 2022

Rakesh Kumar Jain, Naresh Salecha & Indevar Pandey. [Decided on 16/10/2024]

Competition Act,2002- CCI rendered judgement holding that cartelisation existed- punishments by way of penalty were also awarded- appellants challenged the penalty and requested for reduction- whether tenable- Held, No.

Brief facts:

This appeal has been filed challenging the final order and judgment passed by the Competition Commission of India. The Appeal challenges the order passed by the Commission in Suo Moto Case No. 02 of 2020 dated 03.02.2020, wherein the Commission held that the appellants had contravened Sections 3(3)(c) and 3(3)(d) r/w Section 3 (1) of the Act. The Appellant No.1 and 2 along with other parties were found guilty of bid rigging and cartelisation in a Tender process initiated by SBI Infra Management Solutions Pvt. Ltd. (SBIIMS).

Decision: Dismissed.

Reason:

We have heard the Ld. Counsels in detail and gone through the records of the case. In his arguments and the written submissions the counsel for appellants have restricted his prayer to reduction in penalty awarded to Appellant No.1. He has not argued the case on its merits.

The only issue under consideration here is whether the penalty imposed on Appellant No.1 is proportionate to the offence and whether it meets the criteria laid down in Excel Crop Care Ltd. vs CCI (supra).

The CCI has made the reference to the Excel Crop Care Ltd. vs CCI (supra) in its order and mentions that the principle of proportionality as laid down by Hon'ble SC was in the context of multi- product companies only. The Competition Appeal (AT) No. 30 of 2022 CCI noted that in the present matter the OPs are engaged in the business of supply of printed advertising/ marketing material which includes signages. It is not possible to classify different types of signages in multiple products in terms of Hon'ble SC's Judgment in Excel Crop (supra) rather the signages constitute different varieties of the same product. The CCI also differentiated that the contention of the OPs that turn over derived from impugned tender alone should be considered is in the teeth of Excel Crop Care Judgment supra.

In this context, we have looked into the aforesaid Judgment of Excel Corp Care (supra) closely, regarding the facts of the case and whether the aforesaid ratio applies squarely to the present appeal. In the present case the appellant's is main business is that of signage and the other items of turnover relates to the same business activity. Such artificial distinction in segmental turnover cannot be accepted. We have also seen that CCI has taken a very lenient view while levying Monetary Penalties upon the OPs most of whom are MSMEs. The Section

27 of the Act provides for Penalty up to 10% of the average of the turnover or income, as the case may be, for the last 3 preceding financial years, but the CCI taking a lenient view has only imposed penalty of 1% of the average and average of their relevant turnover for the 3 financial years i.e. 2015-16 to 2017-18.

We are of the view that the CCI has passed a well-considered order in the instant case which has been upheld in two separate appeals by this Tribunal. In one of the matter Hon'ble Supreme Court has dismissed the appeal and in another matter no appeal was preferred so the order has attained finality. In view of the facts and circumstances of the present case, we do not find any merit in the present appeal and the same is hereby dismissed. There would be no order as to costs.

LW 83:11:2024

SHRIRAM INVESTMENTS v. THE COMMISSIONER OF INCOME TAX -III, CHENNAI [SC]

Civil Appeal No. 6274 of 2013

Abhay S Oka & Augustine George Masih,JJ. [Decided on 04/10/2024]

Income tax Act,1961- section 139- filing of two revised returns- second revised return filed after the prescribed period- assessing officer rejected the second revised return and completed the assessment- on appeal ITAT remanded the case back to the assessing officer- revenue appealed to the High Court against the remand which was allowed- whether the High Court was correct-Held, Yes.

Brief facts:

The appellant-assessee filed a return of income and also a revised return later on. Again another revised return was filed by the appellant. The assessing officer did not take cognizance of the said second revised return. Therefore, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals), which was dismissed on the ground that in view of Section 139(5) of the IT Act, the revised return filed on 29th October 1991 was barred by limitation.

Being aggrieved, the appellant-assessee preferred an appeal before the Income Tax Appellate Tribunal , which partly allowed the appeal by remanding the case back to the file of the assessing officer. The assessing officer was directed to consider the assessee's claim regarding the deduction of deferred revenue expenditure. The respondent Department preferred an appeal before the High Court of Judicature at Madras. By the impugned judgment, the High Court proceeded to set aside the order of the Tribunal on the ground that after the revised return was barred by time, there was no provision to consider the claim made by the appellant.

Decision: Dismissed.

Reason:

We have carefully considered the submissions made across the bar. We have carefully perused the judgment of this Court in the case of *Wipro Finance Ltd, 2022 (137) taxmann.com 230 (SC)*. The issue which arose before this Court was not regarding the power of the assessing officer to consider the claim after the revised return was barred by time. This Court considered the appellate power of the Appellate Tribunal under Section 254 of the IT Act.

In the case of *Goetzge (India) Ltd*, this Court held that the assessing officer cannot entertain any claim made by the assessee otherwise than by following the provisions of the IT Act. In this case, there is no dispute that when a revised return dated 29th October 1991 was filed, it was barred by limitation in terms of section 139(5) of the IT Act.

Coming to the decision of the Tribunal, we find that the Tribunal has not exercised its power under Section 254 of the IT Act to consider the claim. Instead, the Tribunal directed the assessing officer to consider the appellant's claim. The assessing officer had no jurisdiction to consider the claim made by the assessee in the revised return filed after the time prescribed by Section 139(5) for filing a revised return had already expired. Therefore, we find no reason to interfere with the impugned judgment of the High Court. The appeal is, accordingly, dismissed.

LW 84:11:2024

ASHOK LEYLAND LTD v. THE COMMISSIONER VALUE ADDED TAX [DEL]

W.P.(C) No. 11708 of 2023

Yashwant Varma & Ravinder Dudeja, JJ. [Decided on 16/10/2024]

Delhi Value added Tax- section 28- refund- assessee deposited Rs.3.5 crore with the department at the request of the department- later refund of the same was claimed- department rejected the refund claim- whether correct- Held, No.

Brief facts:

Writ Petitioner was constrained to approach this Court by way of the instant writ petition consequent

to a failure on the part of the respondents to refund an amount of Rs. 3,50,00,000/- along with applicable interest as also interest on refunds issued for Assessment Years 2012-13.

Decision: Allowed.

Reason:

The refund of Rs. 3,50,00,000/- has been rejected on the following grounds:-

- the said amount has not been reflected in the returns filed for the relevant period, nor adjusted against the demands;
- no revised return filed within one year to claim the refund as envisaged under Section 28 of the DVAT Act;
- refund has been claimed after a gap of more than five years.

It is clear from the language of Section 28 of the DVAT Act that if there is any discrepancy in the return furnished for the tax period, the assessee is liable to furnish a revised return. It is not the case of the respondent that there was any discrepancy in the return furnished by the petitioner and therefore the petitioner was not under any obligation to file the revised return under Section 28 of the DVAT Act, inasmuch as, the amount of Rs. 3,50,00,000/- deposited by the petitioner was not a tax but an amount deposited with the department, out of which, tax amount, if any, was to be deducted.

Admittedly, the assessment for the AY 2012-13 was framed vide order dated 31.03.2017 and the objections filed by the petitioner before SOHA were decided vide order dated 08.10.2018. The instruction given by the petitioner while depositing the amount of Rs. 3,50,00,000/- was that the said amount be retained as payment against demand if any raised on account of inspection conducted at their premises on 11.03.2013. The cause of action for claiming refund accrued only after passing of orders by SOHA, when it was found that no further tax was payable or to be adjusted out of Rs. 3,50,00,000/- already deposited. Soon thereafter i.e. on 12.10.2018, petitioner submitted form DVAT-21 claiming refund of Rs. 3,50,00,000/-. There is no inordinate delay in submitting the claim for refund after passing of the orders by SOHA. We also take note that Section 38(2) of the DVAT Act uses the expression "recovery of any other amount due under this Act." The Commissioner in terms of Section 38(2) is entitled to apply any amount found to have been paid by the assessee in excess of the amount due from him before making a refund only if there exists an enforceable demand against the assessee. As is manifest on a conjoint reading of Section 35(2) and 38(2) of the DVAT Act, as long as objections remained pending with OHA, any amount claimed by the respondent would clearly not answer the description of an amount due or payable as contemplated under Section 38(2). Respondent, therefore, cannot possibly seek to justify the retention of the refund claim on account of being barred by limitation. The delay in processing the refund is endemic to the DVAT authorities and if the same is considered, the delay, even if any, on the part of the petitioner approaching the authorities is not long. Respondent cannot possibly seek to justify the retention of refund claim on account of its having been deposited voluntarily or being barred by limitation. It is a clear case of unjust retention of the money of petitioner. Respondent clearly appeared to have acted arbitrarily in illegally depriving the petition of the refund as claimed, in flagrant violation of the mandate of Section 38 of the DVAT Act.

Once the taxpayer succeeds in upsetting the assessments framed under Section 32 & 33 of the DVAT Act, which results in vindicating its claim for refund either in part or as a whole as claimed by either furnishing a return or Form DVAT-21, interest under Section 42(1)(a)of the DVAT Act would be payable from such date as the refund was due to be paid to the taxpayer. The expression "the date that the refund was due to be paid" must be construed as the date when such a refund ought to have been paid to the taxpayer. After the assessee succeeds in vindicating its stand that its claim for refund was correct, it would follow that that the assessee would be refunded the amount claimed and interest would be payable. A harmonious reading of Section 38 and 42 makes it clear that the interest is payable to the petitioner from the date when it accrued in terms of Section 38(3)(a)(ii) of 2004 Act.

In terms of statutory time - frame which stands constructed by Section 38(3)(a)(ii) of the DVAT Act, the said amount had become refundable within the time - frame stipulated under Section 38(3) of the DVAT Act. Since the payment of refund was delayed, petitioner automatically becomes entitled to the interest under Section 42 of the DVAT Act. Similarly, the petitioner would also entitled to interest along with refund of Rs. 3,50,00,000/- in terms of Section 42(1) of the DVAT Act. In view of the afore-going discussion, the instant writ petition is allowed.

General Laws

LW 85:11:2024

KALAMKARI LIFESTYLE TECH PVT LTD v. MSME FACILIATION COUNCIL MUMBAI & ANR[DEL]

W.P.(C) 14572/2024

Sanjeev Narula,J. [Decided on 18/10/2024]

MSME Act- section 18- disputes as to payment- arbitration by MSFC under the Act- MSME seller in Mumbai and the buyer in Delhi- seller initiation

arbitration in Mumbai- buyer challenged the venue and sought for transfer of the proceedings to Delhi- whether tenable-Held, No.

Brief facts:

The Respondent No.2 is a Mumbai based MSME entity with whom the Delhi based Petitioner had entered into a contract for the provision of certain services. Disputes arose with respect to the payment and the Respondent No.2 referred the payment complaint to Respondent No.1. the MSME Facilitation Council in Mumbai. Therefore, aggrieved by the actions of Respondent No. 2, the Petitioner has filed the present writ petition seeking directions for transferring the venue of the proceedings from Mumbai to Delhi.

Decision: Dismissed.

Reason:

The Court has carefully considered the contentions raised by the Petitioner but remains unconvinced. The allegations concerning the contractual disputes between the Petitioner and relating to non-fulfilment of obligations under the Agreement dated 15th November, 2022, are not the subject of examination by this Court, as the Petitioner's grievance pertains solely to the issue of territorial jurisdiction of the Facilitation Council. Specifically, the Petitioner challenges Respondent No. 1's authority to entertain the claims and disputes raised by Respondent No. 2 in Mumbai.

In the opinion of the Court, on this issue, one would have to refer to Section 18(4) of the MSMED Act. The aforenoted provision unequivocally establishes that the Facilitation Council or the designated centre has the jurisdiction to act as an arbitrator or conciliator in disputes between a supplier located within its territorial jurisdiction and a buyer located anywhere across India. In the present case, Respondent No. 2 being the supplier, is based in Mumbai, which places the jurisdiction squarely within the purview of Respondent No. 1, the MSME Facilitation Council in Mumbai, to entertain the claims brought by Respondent No. 2.

Furthermore, the Petitioner's reliance on Section 20 of the CPC is misplaced in the present context. Given the statutory provisions under the MSMED Act, the question of jurisdiction, as raised by the Petitioner, becomes redundant. The MSMED Act's specific jurisdictional framework, as outlined in Section 18(4), takes precedence over general provisions under CPC, particularly when disputes involve suppliers located within the territorial jurisdiction of a particular Facilitation Council, in this case, Mumbai. Therefore, the argument concerning the cause of action under Section 20 of the CPC holds no merit. Additionally, the Agreement dated 15th November, 2022, expressly acknowledges that it was entered into in Delhi/ Mumbai, further undermining the Petitioner's claim that the proceedings should solely be conducted in Delhi. Clause 13 of the Agreement, which deals with governing law and jurisdiction, explicitly provides that both Delhi and Mumbai courts have concurrent jurisdiction. This clause clearly permits Respondent No. 2 to invoke proceedings either in Delhi or Mumbai, based on where the cause of action arose or the supplier is located. Given that Respondent No. 2 is based in Mumbai, it cannot be said that part of the cause of action has not arisen there. Thus, the jurisdiction of the MSME Facilitation Council in Mumbai stands justified. In light of the foregoing, the present writ petition is devoid of merits and accordingly the same is disposed of.

LW 86:11:2024

OKINAWA AUTOTECH INTERNATIONAL PVT LTD & ANR v. UNION OF INDIA [Del]

LPA No. 957 of 2024, and C.M. APPL. Nos. 55939-41 of 2024

Manmohan & Tushar Rao Gedela, JJ. [Decided on 16/10/2024]

Faster Adoption & Manufacturing of Electric Vehicles Scheme [FAME]- Appellant participated in the scheme and availed subsidy- ARI findings disclosed violation of localisation norms- initially the appellant was de-registered and later a show cause notice was issued to blacklist it- Appellant's writ petition was dismissed by the Single judge- whether the dismissal is correct- Held, Yes.

Brief facts:

The Appellant company participated in the Scheme namely Faster Adoption and Manufacturing of Electric Vehicles in India, Phase II (in short 'FAME-II Scheme') floated by the respondent for promotion of electric and hybrid vehicles and claimed subsidy for sale of its vehicle models from the respondent from time to time. Based on the findings of ARAI through strip down analysis alleging violation of localization norms/PMP Guidelines with regard to four components by the appellant company and otherwise, the Respondent de-registered the Appellant company from the FAME II Scheme and thereafter issued a after issuing a show cause notice blacklisting the Appellant. The writ petition filed by the Appellant , challenging the show cause notice , was dismissed by the Single Judge. Aggrieved, the Appellant had preferred the present Letters Patent Appeal before the Division Bench.

Decision: Dismissed.

Reason:

It is no more res integra that ordinarily, a Writ Court may not exercise its discretionary jurisdiction in entertaining a writ petition challenging a Show Cause Notice unless the same appears to have been issued without jurisdiction or in abuse of process of law.

It is not disputed that the respondent had passed an order dated 9th October, 2023 de-registering the appellant company on the grounds, which are subject matter of challenge in another writ petition bearing W.P.(C) 15125/2023. The same appears to be premised on the alleged violations of the conditions set out in FAME - II Scheme and PMP Guidelines. It has been vehemently argued by the appellants that the impugned Show Cause Notice is entirely predicated upon the de-registration order alone. It was stated that there are no other palpable grounds on which the Show Cause Notice has been issued. On that basis, it was argued that the said Show Cause Notice has been issued with a predetermined mind and following the procedures of granting an opportunity of filing a reply thereto and possibly affording an opportunity of hearing would then, surely be an empty formality. According to the appellants, the Supreme Court has not only deprecated, but has also quashed Show Cause Notices in such circumstances.

Though at the first blush, the aforesaid argument appears to be attractive, yet, on a closer scrutiny and consideration, it is fallacious. This is for the reason that, though an order for de-registration and blacklisting may be predicated on the same set of facts, yet the consideration as to whether a party may only be penalised with de-registration or to take it to the next severe level of blacklisting, may be different. Merely because the appellant company has been de-registered by the respondent would not, ipso facto, imply that the Show Cause Notice intending blacklisting, would also be decided against the appellant. Moreover, the appellant would be afforded an opportunity to file its reply which would be considered by the Competent Authority in accordance with law. This Court has also perused the Show Cause Notice carefully and does not find the same to be predetermined. Apart from referring to the order of de-registration, the recitals do not betray the mind of the issuing authority. Since it appears that the background facts are similar, a reference to the de-registration order may have been made. Other than that, this Court does not find any palpable reason to conclude a 'predetermined mind'. It can also not be assumed at this stage that a reasonable opportunity of defence would not be provided to the appellants.

As an analogy, in service jurisprudence, on the same set of facts, two sets of proceedings could be possible. One, in respect of disciplinary proceedings and the other could be the parallel proceedings initiated before the Criminal Court. It is trite that both proceedings could commence and be adjudicated simultaneously. These are two independent proceedings entailing two different consequences altogether. Though, at times, there could be exceptions to the above rule.

So far as the second submission regarding the same authority having issued the Show Cause Notice, who had also, on a previous occasion, passed an order de-registering the appellant company is concerned, there is no allegation of bias nor has the learned senior counsel for the appellants submitted any such issue, except to state that the same person who had passed the order de-registering the appellant could not have issued the Show Cause Notice entailing consequence of blacklisting. Learned senior counsel for the appellants had also expressed apprehension that there could be a possibility of a natural bias to uphold the findings of de-registration and apply the same to blacklisting too. We do not find any substance in the said submission. There are multiple reasons for the said opinion, (i) there is no prohibition for the same person in authority to have passed both, the de- registration order as well as issuing the Show Cause Notice proposing action of blacklisting; (ii) there is no restriction or prohibition either, for the same authority to pass an order of penalty and consider the issuance of Show Cause Notice for a major penalty or action, if the situation or facts so warrant/necessitate; (iii) there is no restriction or prohibition against an authority, circumscribing its power of blacklisting an entity on the same set of facts, vide which the previous penalty, in the present case, de-registration was passed; (iv) there is no restriction in exercising its power, so long as the authority concerned acts in accordance with the principles of natural justice envisaged in administrative law. This Court also notices that there are no allegations of personal bias against the officer concerned. The officer concerned appears to be holding a position warranting different roles and responsibilities in the same capacity. Merely because of such position and status, it cannot be inferred that there would be a natural bias, inbuilt or inherent. On the above principles, this Court does not find any reasons to interdict the Show Cause Notice at this stage. In any case, the appellants can raise all its contentions before the authority while filing the reply to the Show Cause Notice, taking all the objections that are possibly available with them.

The action proposed to be now undertaken vide the Show Cause Notice is separate and distinct from the order of de-registration and thus, pendency of the writ challenging the de-registration order would not be an impediment to the issuance of Show Cause Notice for blacklisting. Suffice to state that this Court reiterates the reasoning rendered by the learned Single Judge in the aforementioned paragraph. Moreover, as observed above, the Show Cause Notice, in the present case, does not betray a predetermined mind as apprehended by the appellant.

That said, this Court does not find any reason to interfere with the sound reasoning rendered by the learned Single Judge in the impugned judgement dated 11th September, 2024. Consequently, the appeal is dismissed along with pending applications, if any, without costs. ❐