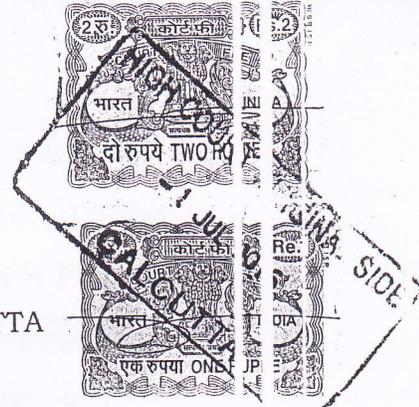


GA No.1230 of 2016
APO No.107 of 2016
WP No.1942 of 2005
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE



WELL WISHER ELECTRONICS PVT. LTD. & ANR.
Versus
STATE OF WEST BENGAL & ORS.

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE

The Hon'ble JUSTICE SANKAR ACHARYYA

Date : 14th June, 2016.

Appearance:

Mr. Samaraditya Pal, Sr. Advocate
Ms. Vineeta Meharia, Advocate
Mr. V.Majundar, Advocate
Mr. S.Bose, Advocate

Mr. Sadhan Roy Chowdhury, Advocate
Mr. Aniruddha Sen, Advocate

The Court: The dispute involved in this appeal arises out of an order withdrawing exemption granted to a company incorporated under the provisions of the Companies Act, 1956 by the name of Calcutta Cement

Corporation Ltd. under the provisions of Section 20(2) of the Urban Land (Ceiling and Regulation) Act, 1976. The land, which would have had vested in the State but for the exemption order under the provisions of 1976 Act comprises of an area of 5529.84 square meters in Mouja Benedanga in the district of Hooghly. The exemption order was issued on 24th January 1986 on the basis of an application made by the said company, and such exemption was subject to the conditions specified in the exemption order, bearing No.285-uL/11-6/84 dated 24th January 1986. A copy of that order has been annexed at page 44 of the stay petition, being GA No.1230 of 2006, filed in connection with the appeal.

Admitted position is that identity or character of the originally exempted entity has undergone several changes under different schemes of arrangement according to the provisions of the 1956 Act. At present, the assets and liabilities of the said company stand vested with the appellant No.1 and the identity of the said company has also merged with the first appellant. The appellants have described the first appellant in the writ petition out of which this appeal arises as successor-in-interest of the exempted entity, Calcutta Credit Corporation Limited. Case of the appellants made out in the writ petition is that a factory for production of industrial gas was set up on the exempted land. It has been pointed out by Mr. Pal, learned Senior Counsel appearing for the appellants, that the

registered address of the exempted entity has remained the same even after the different schemes of arrangement through which the exempted entity has undergone. The order withdrawing exemption was passed on 26th July 2005 primarily on the ground that excess vacant land was not being utilised for industrial purpose since long. In the order dated 26th July 2005, reference has been made to one of the conditions of exemption that if beyond a specified period any area of lands remained unutilised, the State Government would be competent to withdraw the exemption in respect of such lands. Under the provisions of Sub-section (2) of Section 20 of the 1976 Act it is permissible for the State Government to withdraw exemption once the State Government is satisfied that any of the conditions imposed for grant of exemption is not complied with. It is stipulated in the aforesaid provision of the 1976 Act that such withdrawal order could be passed only after giving reasonable opportunity to the exemptee for making representation against the proposed withdrawal.

The writ petition, from which this appeal originates, was instituted by the appellants questioning legality of the withdrawal order primarily on the ground of non-service of notice. It was the case of the appellants/petitioners before the learned First Court that the writ petitioner no.1 was not given opportunity to make representation as contemplated in the aforesaid provision. The order of withdrawal was also

challenged on merit. The writ petition was heard after filing of affidavits. Stand of the State respondents before the learned First Court, which has also been taken before us by Mr. Roy Chowdhury, learned counsel representing the State and its officers, had been that the authorities upon enquiry found that exempted excess vacant land had remained unutilised. It has been pleaded in the affidavit in opposition of the respondents in the learned First Court that such enquiry was held upon forwarding a notice to the exempted entity, but evidence of actual service of notice is not there. As regards subsequent service of notices, plea of the respondents is that these were also sent to the exempted entity, but these were not received for different reasons, to which we shall refer to later in this judgement. It is also the case of the respondents that changes in constitution of the exempted entity was never notified to them and it is for this reason the notices were being sent in the name of Calcutta Credit Corporation Ltd. The learned First Court was pleased to dismiss the writ petition on 17th February 2016 inter alia holding, on the point of non-service of service of notice:-

"Inasmuch as the authorities had attempted to serve the petitioner at the name of the petitioner known to the authorities and at the address known to them, I do not find that the impugned order ^{stands} ~~sans~~ vitiated by the breach of principles of natural justice. The petitioner did not choose to

appear before the authorities in spite of notice being sought to be served on them.”

The learned First Court in the judgement appealed against has dealt with certain aspects of the withdrawal order on merit as well, and has come to a finding that there was failure on the part of the writ petitioner to comply with the conditions for continued exemption. The petitioner's position before the learned First Court was that the petitioner did commence production at the factory on the land exempted. This has been recorded in the judgement under appeal. The learned First Court, however, found that the documents annexed to the writ petition did not establish that a factory was functioning at the property concerned within the time stipulated in the exemption order. Mr. Pal, however, has argued before us primarily on the aspect of non-service of notice. As regards the other issues which were decided in the judgement impugned, his submission is that the appellants ought to have had proper opportunity to address those issues before the administrative authorities. Question of judicial review would arise only after the administrative authorities decided those issues after giving the appellants reasonable opportunity for making proper representation against the proposal for withdrawal of exemption.

It is recorded in the judgement under appeal that the authorities had sought to serve the petitioner^{no.1} at the name of the^{said} petitioner known to the

authorities and at the address known to them. We had requested Mr. Roy Chowdhury to produce the records to show how such service was attempted. He has brought to our notice two covered envelopes, which according to him contain the notice seeking representation from the exempted entity as regards their proposal for withdrawal for exemption.. The first envelope originates from the Secretary, Urban Development Department, Urban Land Ceiling Branch and bears the number 2221 dated 24/11/2004/8.12.2004 on the face of it. From the endorsement on the envelope itself it is revealed that this notice was sent through the postal department. The reverse of the envelope carries three endorsements, which appear to have been inscribed by the delivery personnel of the postal authorities. The first endorsement is "N/F", dated 16th December 2004. This probably implies "Not Found". The second endorsement is "N/K", dated 17th December 2004. This, again appears to imply "Not Known". The third endorsement is dated 28th December 2004, which records "Not Known". The second envelope bears no.460 dated 4th March 2005, and we are apprised by Mr. Roy Chowdhury in course of hearing that this letter was sought to be served by Special Messenger. There are several dates inscribed on the face of this envelope, which seems to reflect the dates on which service was attempted. There is endorsement on this envelope,

which appears to have been made by the special messenger of the department to the following effect :-

“In spite of asking the local people nobody can say – Not found by me.”

Mr. Pal has submitted that it is improbable that the company would not be known to the postal authorities or the messenger of the department, since subsequently the order of withdrawal which was sent to the exempted entity at the same address by the postal authorities was received on 25th August 2005. This has been pleaded in paragraph 13 of the writ petition. Mr. Roy Chowdhury sought to argue that the appellant No.1 acted selectively in deciding which notice to receive and which one to be avoided. But on the basis of materials on record it is not possible for us to reach that conclusion. The learned First Court has found that later service to the same entity was not substantiated. In such circumstances also, no material is there before us which would establish that service of the notices were actually made to the exempted entity. or that the exempted entity had evaded or avoided service. In this perspective, in our opinion, the finding of the learned First Court that the petitioner did not choose to appear before the authorities in spite of notice sought to be served on them cannot be sustained on the basis of materials on record. The choice of the first appellant to go unrepresented before the statutory authority could be

inferred only if materials showed that service was actually made upon them or the addressee had refused to accept service. A notice returned unserved on the addressee with "Not Claimed" or "Refused" might constitute proper service for statutory purpose. But in this case, endorsements of the postal authorities and the messenger of the department are that the addressee was not known or not found. The learned First Court also found that there was attempt to effect service on the exempted entity, and there is no finding that the said entity refused or evaded service of the notice. Learned First Court in effect found attempt to serve to be sufficient to constitute providing of opportunity to make representation. In the given factual context, we are unable to accept this view.

The learned First Court has made observation to the effect that the various changes in the character and status of the company were not notified to the State. The State's stand on such changes is that the same amounted to violations of the third and fourth conditions of exemption. As we have already found that the exempted entity did not get sufficient opportunity to make representation in terms of Section 20(2) of the 1976 Act, we do not think that we ought to go into that question in exercise of appellate jurisdiction under Article 226 of the Constitution of India. The learned First Court also did not give any finding on this point, and

observed that there was no need to enter into that controversy as the impugned order had restricted itself on the violation of one of the conditions in the exemption orders, namely, failure to have a functioning factory. We would have to leave it to the authority of the first instance under the 1976 Act to determine those issues, after giving opportunity to the exempted entity to make representation. The question of judicial review would arise only after the authorities come to its finding on merit in a dispute of this nature. In the event the authorities have already taken decision without giving to the appellants proper opportunity of making representation, then the exemptee ought to be given opportunity afresh to make representation.

Since we are satisfied that the provisions of Sub-clause 2 of Section 20 of the 1976 Act, so far as it relates to giving opportunity of making representation to the exemptee has not been complied with, we do not think we can sustain judgement under appeal. We are also not addressing the impact of change of nature or character of the company after exemption order under the 1976 Act was issued in its favour. That would be for the authority of the first instance to examine. As regards the finding by the learned First Court that there was breach of condition of exemption on the part of the exempted entity in failing to have a functioning factory within prescribed time frame, in our opinion the exempted entity ought to

be given opportunity explain its stand before the statutory authority. The Writ Court cannot be substitute of the statutory authority for determining an issue which under the law is required to be decided by the latter, particularly in a case where we are satisfied that statutory provision for giving opportunity to make representation has been breached. Of course if such breach stood admitted, we would have had adopted a different course, but that is not the case here. In such circumstances, finding of the learned First Court on this count also ought to be invalidated.

We accordingly set aside the judgement under appeal and direct the authority under the 1976 Act to issue a fresh notice to the exempted entity on the question of withdrawal of exemption. The impugned order withdrawing exemption, which was issued on 26th July 2005 under no.1493-UL/IL-6/84 by the State Government bearing the signature of Joint Secretary to the Government of West Bengal, shall also stand invalidated. Such notice shall be issued within two weeks from date and a copy of the notice shall also be served upon the Advocate on Record of the appellants in this proceeding. Such service on the Advocate on Record of the appellants shall be treated to be proper service of notice compliant with the provisions of Section 20(2) of the 1976 Act. The exempted entity shall be entitled to make its representation in response to the notice within a period of four weeks thereafter and the State shall decide on the question

of withdrawal of exemption of the subject land under the provisions of the 1976 Act within a further period of four weeks. The exemptee shall be entitled to opportunity of hearing before the concerned authority. Till decision is taken on the basis of notice to be issued afresh in pursuance of this direction, status quo as regards the land in question shall be maintained till lapse of seven days from the date the decision of the statutory authority is communicated to the appellant No.1, or its Advocate on Record in this proceeding.

By consent of learned counsel for the parties, we have taken up the appeal along with the stay petition for hearing as Mr. Roy Chowdhury representing all the respondents has waived formal service of notice of appeal upon his clients. The appeal also shall stand allowed in the above terms.

All the original records be returned to Mr. Roy Chowdhury.

Certified photocopy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Sd/- Aniruddha Bose, J.
(Aniruddha Bose, J.)

Sd/- Sankar Acharyya, J.
(Sankar Acharyya, J.)

S/
Liliana
Asst. Registrar (C.A.)

CERTIFIED TO BE A TRUE COPY

Mayukha Banerjee
4-7-16

Authorised under Section 75 of
the Indian Evidence Act, 1973
(Act of 1973)