* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 16.09.2011

\+ WP(C) No.5438/2011

BHUPEN ELECTRONICS LTD. ..... PETITIONER

Vs

APPELLATE AUTHORITY FOR INDUSTRIAL AND FINANCIAL RECONSTRUCTION & ORS. .... RESPONDENTS

Advocates who appeared in this case:
For the Petitioner : Ms.Pooja Verma
For the Respondent: Mr. Sachin Datta and Ms. Gayatri Verma

CORAM :-
HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ?

SANJAY KISHAN KAUL, J (ORAL)

1. The appellant being aggrieved by an order dated 11.06.2009 passed by BIFR in reference case No.32/2007 preferred appeal no.104/2010 before the AAIFR. This appeal was not accompanied by any application for condonation of delay as according to the appellant, the appeal had been filed within time.

2. The appeal had been dismissed as time barred, not having been filed within a period of 45 days, and not being accompanied by any application for condonation of delay by the impugned order dated 18.11.2010 of the AAIFR. This order has been passed at the initial stage itself in the absence of any representation of the respondents.

3. It is the say of the appellant that the order dated 11.06.2009 of the BIFR was never received by the appellant company and the appellant company derived knowledge from one of the secured creditors, and therefore immediately thereafter, they applied for certified copy on 22.02.2010 which was received on 26.02.2010. The appeal was filed on 08.04.2010. Thus, it is claimed that the appeal is filed within a period of 45 days.

4. The AAIFR took notice of the fact that the dispatch proof received from BIFR showed that the order dated 11.06.2009 was dispatched by the BIFR on 01.07.2009 by speed post at the registered office of the appellant. The counsel for the appellant was given time to check the records of the BIFR and the postal authorities. It was found that the BIFR had not received back the impugned order sent to the appellant with any unserved remark or endorsement from the postal authorities. No better

information could be received from the postal authorities. The appellant failed to rebut the presumption by not adducing any information about the receipt of envelope which includes the order dated 11.06.2009 since the same was not found returned in the records of the BIFR.

5. The appellant moved the application being: MJA No.9/11 seeking recall of the impugned order dated 18.11.2010 of the AAIFR, which had been dismissed on the ground that there is no power of review and / or recall. The appellant had filed the application after inspection of the records of the BIFR for dispatch and incoming postal records for the relevant period and obtained certified copies of the same which showed that the envelope containing the order dated 11.06.2009 of the BIFR sent on 01.07.2009 was received back by the BIFR on 06.07.2009.

6. The aforesaid two applications are now sought to be impugned in the present writ petition filed under Article 226 of the Constitution of India.

7. In view of the facts averred, we considered it appropriate to call upon the Bench Officer/Bench Registrar of the BIFR to produce the record before us relating to service of the order dated 11.06.2009 passed by the BIFR in case no.32/2007 regarding service of the appellant.

8. The records seem to substantiate the plea of the petitioner that the order dated 11.06.2009 sent to the petitioner on 01.07.2009 was apparently returned undelivered on 06.07.2009. We called upon the Registrar of the BIFR to make inquiry on this aspect and file an affidavit alongwith the copies of the relevant portion of the receipt and dispatch register. It came to our notice that the returned envelopes are not placed on the record but sent to the record room with the result that it is not possible to verify on inspection of records whether a particular envelope has been returned back, and if so, the reason for the same. We thus called upon the BIFR to also look into this aspect to streamline the procedure.

9. The Registrar of BIFR has filed an affidavit affirmed on 12.09.2011. The affidavit states that the envelope enclosing the order dated 11.06.2009 was returned back undelivered by the post office on 06.07.2009, and that the envelope was lying in the record room. The concerned envelope was retrieved from the record room and it was found that the same did not bear any remark / endorsement of the postal authorities as to why the letter was not delivered, and thus, the BIFR could not specify the reason for non delivery. The affidavit also states that necessary office orders have now been issued on 07.09.2011 and

09.09.2011 in terms whereof undelivered envelopes would be kept on record so that they can be inspected and a copy of the order passed would also be supplied to the counsel/advocate/representative of the sick company as per these two office orders respectively. Thus a better system has been put in place.

10. The factual matrix referred to above, thus shows that the order sought to be impugned by the appellant before the AAIFR of the BIFR dated 11.06.2009 was never delivered to the appellant nor the reason for non delivery is known. The appellant in the appeal in the AAIFR set forth the date from which it derived knowledge from one of the secured creditors and thereafter applied for certified copy, obtained the same and filed the appeal within 45 days. Thus the appeal is filed within time.

11. We thus set aside the impugned orders of the AAIFR dated 18.11.2010 and 29.06.2011 and direct that the appeal no.104/2010 be heard by the AAIFR on merits.

12. We may also add that the AAIFR has fallen into an error while passing order dated 29.06.2011 since the order passed on 18.11.2010 was on the basis of a factual error and without even calling upon the BIFR to verify the position as regards the

delivery of the envelope containing the order. The exercise which we have undertaken could have been easily undertaken by the AAIFR, possibly more conveniently. The relief sought for by the appellant by filing MJA No.09/2011 was really not in the nature of review but to correct an error which had come into being while passing order dated 18.11.2010. AAIFR like any other authority or Tribunal has incidental and/or ancillary powers to correct such like errors. In this behalf, we may extract with profit hereinbelow the relevant observations of the Supreme Court in the case of ***ITO Vs. M.K. Mohd. Kunhi (1969) 71 ITR 815*** :-

> *"4. There can be no manner of doubt that by the provisions of the Act or the Income-tax Appellate Tribunal Rules, 1963, powers have not been expressly conferred upon the Appellate Tribunal to stay proceedings relating to the recovery of penalty or tax due from an assessee. At the same time it is significant that under section 220(6) the power of stay by treating the assessee as not being in default during the pendency of an appeal has been given to the Income-tax Officer only when an appeal has been presented under section 246 which will be to the Appellate Assistant Commissioner and not to the Appellate Tribunal. There is no provision in section 220 under which the Income-tax Officer or any of his superior departmental officers can be moved for granting stay in the recovery of penalty or tax. It may be that section 225, notwithstanding that a certificate has been issued to the Tax Recovery Officer for the recovery of any tax (the position will be the same with regard to penalty) the Income-tax Officer may grant time for the payment of the tax. In this manner he can probably keep on granting extensions until the disposal of the appeal by*

the Tribunal. It may also be that as a matter of practice prevailing in the department the Commissioner or the Inspecting Assistant Commissioner in exercise of administrative powers can give the necessary relief of staying recovery to the assessee but that can hardly be put at par with a statutory power as is contained in s.220(6)which is confined only to the stage of pendency of an appeal before the Appellate Assistant Commissioner.

The argument advanced on behalf of the appellant before us that in the absence of any express provisions in Sections 254 and 255 of the Act relating to stay of recovery during the pendency of an appeal it must be held that no such power can be exercised by the Tribunal, suffers from a fundamental infirmity inasmuch as it assumes and proceeds on the premise that the statute confers such a power on the Income-tax Officer who can give the necessary relief to an assessee. The right of appeal is a substantive right and the questions of fact and law are at large and are open to review by the Appellate Tribunal. Indeed the Tribunal has been given very wide powers under s. 254(1) for it may pass such orders as it thinks fit after giving full hearing to both the parties to the appeal. If the Income-tax Officer and the Appellate Assistant Commissioner have made assessments or imposed penalties raising very large demands and if the Appellate Tribunal is entirely helpless in the matter of stay or recovery the entire purpose of the appeal can be defeated if ultimately the orders of the departmental authorities are set aside. It is difficult to conceive that the Legislature should have left the entire matter to the administrative authorities to make such orders as they choose to pass in exercise of unfettered discretion. The assessee, as has been pointed out before, has no right to even move an application when an appeal is pending before the Appellate Tribunal under s.220(6) and it is only at the earlier stage of appeal before the Appellate Assistant Commissioner that the statute provides for such a matter being dealt with by the Income-tax Officer. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Arts. 5401 and 5402). The powers which have been conferred by s.254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully

effective. In Domat's Civil Law Cushing's Edition, Vol. 1 at page 88, it has been stated :

> *"It is the duty of the judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it."*

Maxwell on Interpretation of Statutes, eleventh edition, contains a statement at page 350 that "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdictio data est, ea quoqe concessa esse videntur, sine quibus jurisdictio explicari non potuit." An instance is given based on Ex parte Martin [1879] 4. Q.B.D. 212 that "where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced."

(emphasis is ours)

12.1 This view has been reiterated in ***Union of India Vs. Paras Laminates (P) Ltd., (1990) 4 SCC 453***. The relevant portion is extracted hereinbelow :-

> *"8. There is no doubt that the Tribunal functions as a court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised, the powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The*

implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes, (eleventh edition) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution".”

(emphasis is ours)

13. The writ petition is allowed leaving the parties to bear their own costs.

The petitioner to appear before the AAIFR on 10.10.2011.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

SEPTEMBER 16, 2011
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