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M/S. B. HIMMATLAL AGRAWAL

v.

COMPETITION COMMISSION OF INDIA & ANR.

(Civil Appeal No. 5029 of 2018)

B

May 18, 2018

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Competition Act, 2002:

C *s. 53B – Appeal under – Dismissal of – For non-compliance of condition imposed for granting stay of operation of the impugned order – Held: The condition was attached to the order of stay and not for entertaining the appeal – Therefore, non-compliance of the condition, would not warrant dismissal of appeal.*

Allowing the appeal, the Court

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HELD: 1. The order of the Competition Commission was challenged by filing appeal under Section 53B of the Competition Act, 2002. Section 53B confers a right upon any of the aggrieved parties mentioned therein to prefer an appeal to the Appellate Tribunal. This statutory provision does not impose any condition of pre-deposit for entertaining the appeal. Therefore, right to file the appeal and have the said appeal decided on merits, if it is filed within the period of limitation, is conferred by the statute and that cannot be taken away by imposing the condition of deposit of an amount leading to dismissal of the main appeal itself if the said condition is not satisfied. Sub-section (3) of Section 53B specifically casts a duty upon the Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against. It is to be done after giving an opportunity of hearing to the parties to the appeal. It, thus, clearly implies that appeal has to be decided on merits. The Appellate Tribunal, which is the creature of a statute, has to act within the domain prescribed by the law/statutory provision. This provision nowhere stipulates that the Appellate Tribunal can direct the appellant to deposit a certain amount as a condition precedent for hearing the appeal. [Paras 6 and 7][499-F; 501-A-D]

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2. In the present case, the condition of deposit was attached to the order of stay. In case of non-compliance of the said condition, the consequence would be that stay has ceased to operate as the condition for stay is not fulfilled. However, non-compliance of the conditional order of stay would have no bearing insofar as the main appeal is concerned. Therefore, at the most, stay could have been vacated. The Appellate Tribunal, thus, had no jurisdiction to dismiss the appeal itself. The appeal is restored which shall be decided by the Appellate Tribunal on merits. [Paras 6, 7 and 9][499-H; 500-A; 501-E; 502-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5029 of 2018.

From the Judgment and Order dated 21.12.2017 of the High Court of National Company Law Appellate Tribunal in IA No. 84 of 2017 in COA No. 24 of 2017.

Mohit Chaudhary, Kunal Sachdeva, Ms. Manju Jetley, Ms. Puja Sharma, Ms. Tripti Podder, Balwinder Singh, Advs. for the Appellant.

Arjun Krishnan, Ankur Singh, Sumit Srivastava, Advs. for the Respondents.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. A neat question of law which arises for consideration in this appeal is as to whether the order of the National Company Law Appellate Tribunal (hereinafter referred to as the ‘Appellate Tribunal’) dismissing the main appeal itself of the appellant herein for non-compliance of the direction to deposit the amount as a condition for grant of stay, is justified and legal.

2. In order to decide this question, it is not necessary to take stock of the factual matrix in detail. Narration of the following facts, which are germane for deciding this appeal, would suffice.

The appellant herein is a partnership firm, engaged in the business of transportation of coal and sand since 1981. In June, 2014, the appellant firm participated in two tenders, bearing numbers 03/2014-15 and 06/2014-15 floated by the respondent No. 2 herein i.e. M/s. Western Coalfields Limited. The appellant firm was L-II and not the lowest bidder for allotment of the tenders. In June, 2015, the appellant firm

A received a notice from the Competition Commission of India, New Delhi (hereinafter referred to as 'CCI') asking to show cause under Section 19(1)(a) read with Section 3 of the Competition Act, 2002 (hereinafter referred to as the 'Act'). In the said notice, it was alleged that the appellant firm was involved in anti-competitive and unfair trade practices in collusion with nine other firms. The appellant firm filed its reply. The
B CCI after considering the same passed orders under Section 26 of the Act and directed the inquiry to be conducted by the Director General (DG) of the CCI. DG submitted its report after the inquiry giving his findings to the effect that the appellant had indulged in anti-competitive and unfair trade practices in collusion with the other firms. The appellant
C was given a chance to file its objections thereto. After considering those objections, the CCI passed orders dated September 14, 2017 affirming the findings of the DG and imposed penalties on the appellant firm as well as nine parties. Insofar as appellant is concerned, penalty of Rs.3.61 crores has been imposed.

D 3. The appellant filed the statutory appeal thereagainst before the Appellate Tribunal which was registered as Competition Appeal (AT) No. 24/2017. The appellant also prayed for interim stay of the penalty order. Arguments were heard on admission as well as on stay. Vide orders dated November 20, 2017, Appellate Tribunal admitted the appeal.
E It also granted stay on the orders of the CCI with the condition of depositing 10% of the total penalty (i.e. a sum of Rs. 36,12,222/-) imposed by CCI, to be paid by the appellant, within two weeks i.e. by December 4, 2017. The appellant could not fulfill the said condition of deposit. When the matter was taken up on December 4, 2017, the appellant pleaded before the Appellate Tribunal that non-compliance because of
F financial crunch which the appellant was facing. The Appellate Tribunal, however, passed orders dated December 4, 2017 to the following effect:

G "By way of last opportunity, the appellant is given time till 20th December, 2017 to deposit 10% of the penalty amount, failing which, the appeal stands disposed without referring further to the bench".

H 4. As per the appellant, since it was in deep financial trouble, it could not deposit the amount by December 20, 2017 in spite of all *bona fide* intentions. The appellant accordingly filed I.A. No. 84 of 2017 on

December 18, 2017 seeking modification of orders dated December 4, 2017. It was stated in the said application that it had incurred net loss of Rs.3,72,45,393.94 for the Financial Year 2016-17 and, therefore, was not in a position to deposit the said amount. The request of the appellant was, however, not acceded to and vide orders dated December 21, 2017, the Appellate Tribunal has dismissed I.A. No. 84 of 2017. At the same time, it has dismissed the appeal of the appellant as well for non-compliance of its order dated December 4, 2017. The order dated December 21, 2017 reads as under:

“21.12.2017 – We find no ground made out to modify our interim order dated 20th November, 2017. In fact, the stay order was passed on the request of the learned counsel for the appellant and the amount having not deposited within the time, last opportunity was given on 4th December, 2017 to deposit the amount. In terms of the order dated 4th December, 2017 the appeal now stands disposed off without further reference to the Bench.

In view of the order aforesaid dated 4th December, 2017, both the IA No.84/2017 and Competition Appeal (AT) No. 24/2017 stands disposed off for non-compliance of the Appellate Tribunal.”

5. A pure legal submission which is advanced by the learned counsel for the appellant is that even if the appellant could not comply with orders dated December 4, 2017 vide which conditional stay was granted directing the appellant to deposit 10% of the penalty amount, the maximum effect thereof was to vacate the stay granted and the Appellate Tribunal was not legally justified in dismissing the appeal itself. This submission of the appellant commends acceptance, having due force and substance in law.

6. From the facts narrated above, it is apparent that order of the CCI was challenged by filing appeal under Section 53B of the Act. Along with this appeal, the appellant had also filed application for stay of the operation of the order of the CCI during the pendency of the appeal. Appeal was admitted insofar as stay is concerned, which was granted subject to the condition that the appellant deposits 10% of the amount of penalty imposed by the CCI. It needs to be understood, in this context, that the condition of deposit was attached to the order of stay. In case

A of non-compliance of the said condition, the consequence would be that stay has ceased to operate as the condition for stay is not fulfilled. However, non-compliance of the conditional order of stay would have no bearing insofar as the main appeal is concerned. Right to appeal is statutorily provided under Section 53B of the Act, which reads as under:

B **“53B. Appeal to Appellate Tribunal. —**

C (1) The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

D (2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

E Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

F (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

G (5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal.”

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7. The aforesaid provision, thus, confers a right upon any of the aggrieved parties mentioned therein to prefer an appeal to the Appellate Tribunal. This statutory provision does not impose any condition of pre-deposit for entertaining the appeal. Therefore, right to file the appeal and have the said appeal decided on merits, if it is filed within the period of limitation, is conferred by the statute and that cannot be taken away by imposing the condition of deposit of an amount leading to dismissal of the main appeal itself if the said condition is not satisfied. Position would have been different if the provision of appeal itself contained a condition of pre-deposit of certain amount. That is not so. Sub-section (3) of Section 53B specifically cast a duty upon the Appellate Tribunal to pass order on appeal, as it thinks fit i.e. either confirming, modifying or setting aside the direction, decision or order appealed against. It is to be done after giving an opportunity of hearing to the parties to the appeal. It, thus, clearly implies that appeal has to be decided on merits. The Appellate Tribunal, which is the creature of a statute, has to act within the domain prescribed by the law/statutory provision. This provision nowhere stipulates that the Appellate Tribunal can direct the appellant to deposit a certain amount as a condition precedent for hearing the appeal. In fact, that was not even done in the instant case. It is stated at the cost of repetition that the condition of deposit of 10% of the penalty was imposed insofar as stay of penalty order passed by the CCI is concerned. Therefore, at the most, stay could have been vacated. The Appellate Tribunal, thus, had no jurisdiction to dismiss the appeal itself.

8. We may mention that the learned counsel appearing for the CCI had referred to the judgment of this Court in the case of *Ultra Tech Cement Ltd. v. Competition Commission of India & Ors.*¹. Said judgment has no application to the facts of this case. That was a case where the appellant had challenged the jurisdiction of the Appellate Tribunal to pass conditional order i.e. deposit of 10% of the penalty as a condition for grant of stay. It was argued that the Appellate Tribunal did not have any power to impose such a condition for grant of stay. This challenge was rejected by the Court holding that Appellate Tribunal could pass a conditional stay order. No such issue, that has arisen in the instant appeal, was raised therein, namely, whether the Tribunal could dismiss the appeal itself if the condition attached to the grant of stay is not complied with.

¹Civil Appeal Nos. 4766-4767 of 2013 with Ors. decided on June 12, 2013

- A 9. Accordingly, we allow this appeal and set aside that part of the impugned order whereby the appeal of the appellant is dismissed and restore the appeal which shall be decided by the Appellate Tribunal on merits. We, however, make it clear that as far as stay of the penalty order is concerned, that stood vacated for non-compliance of the condition of deposit of 10% of the penalty and, thus, there is no stay of the CCI
- B order in favour of the appellant.

No cost.

Kalpana K. Tripathy

Appeal allowed.