(1999) 12 AP CK 0050

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 33507 of 1997 and 33502 of 1998

Andhra Cements Limited APPELLANT

Vs

Government of A.P. and others RESPONDENT

Date of Decision : 31-12-1999

Acts Referred:

Central Sales Tax Act, 1956 — Section 6
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2000) 6 ALD 404 : (2000) 2 ALD 98 : (2000) 2 ALT 41

Hon'ble Judges : Vaman Rao, J;N.Y. Hanumanthappa, J

Bench : Division Bench

Advocate : Mr. Vedula Venkata Ramana and Mr. S. Krishna Murthy, for the Appellant; Government Pleader, for Commercial Taxes and Mr. P. Srinivasa Reddy, for the Respondent

Judgement

Vaman Rao, J.—Both these writ petitions have been filed for a direction to declare the notice issued by the Commercial Tax Officer, Sitarampuram, Vijayawada in Ref.No.F/518/94 dated 10-12-1997 as arbitrary and contrary to the benefit granted by the Government of Andhra Pradesh (Industries and Commerce (IFR) Department) in Memo No.583/IFR/91-13 dated 20-8-1994 and for a direction to the respondents to forbear from demanding the petitioner for payment of arrears of sales tax in yearly instalments and to permit the petitioner to pay the said arrears in quarterly or monthly instalments.

2. Writ Petition No.33507 of 1997 was filed for restraining the respondents from collecting tax for the first annual. instalment said to be due on [-10-1997. Writ Petition No.32502 of 1998 with identical averments has been filed for restraining the respondents from demanding a sum of Rs.91,16,445/- due in respect of the first instalment without giving credit to an amount of Rs.62,61,910/- collected from him through coercive steps and also for a direction to restrain the respondents from collecting the 2nd instalment of Rs.4,37,52,933/-.

3. As the basis and questions involved in both the writ petitions are common, the

facts as narrated in the affidavit of the Deputy General Manager of the petitioner company in WP No.32502 of 1998 may be briefly extracted below:

The petitioner is a public limited company engaged in the business of manufacturing and marketing of cement with its factories located at various places in Andhra Pradesh and with branch offices in the States of Tamilnadu, Karnataka, Kerala, West Bengal, Orissa, Maharashtra, Bihar and other States. The cement produced by it in its factories in Andhra Pradesh is sold through its own branches and consignment agents in the aforesaid States. Vijayawada is their principal place of business for the purpose of assessment of tax. The petitioner company is an assessee on the rolls of the first respondent, Commercial Tax Officer, Vijayawada. In respect of business conducted in other States, the petitioner got itself registered as a dealer under the sales tax laws of concerned states and has been paying the taxes to the respective States on all sales in the said States. The assessments of tax of the petitioner company for the years 1983-84 to 1994-95 were completed. During this assessment the first respondent considered all sales effected through its branches/consignment agents as inter-State sales and subjected the said turnover to tax at 10% besides additional tax and surcharge. Identical transactions were also subjected to tax by the respondents 5 to 10 under the respective sales tax enactments of the concerned States.

4. Aggrieved by the aforesaid assessment, the petitioner preferred appeals and the same are pending before the Sales Tax Appellate Tribunal. The stay petitions filed before the 4th respondent, Joint Commissioner, (CT) (Legal), Andhra Pradesh, seeking stay of collection of the disputed tax have been dismissed. The particulars of disputed tax and the pendency of appeal are shown in Annexure-A.

5. Earlier, the petitioner filed WP No.774 of 1989 before this Court seeking stay of collection of Central Sales tax assessed for the year 1983-84 and this Court by its order dated 20-1-1989 dismissed the writ petition on the ground that appeal against the said order is pending. The said order is shown as Annexure-B. Against the said order the petitioner filed SLP as well as Writ Petition 230 of 1989 before the Hon''ble Supreme Court. The Supreme Court by its order dated 24-2-1989 (Annexure-C) restrained the first respondent from taking any coercive steps for recovery of the dues for the years 1982-83 and 1983-84.

6. In the year 1990 the petitioner lost its net worth and has been declared as a sick unit under the Sick Industrial Companies (Special Provisions) Act, 1985. The Industrial Development Bank has been appointed as operating agency and rehabilitation scheme prepared by it has been approved by BIFR on 6-6-1994. The new management has taken over the affairs of the petitioner company pursuant to the sanctioned scheme.

7. In pursuance of the sanctioned scheme the petitioner approached the second respondent (Secretary to Government, Industries and Commerce, Hyderabad) seeking concessions in terms of G.O. Ms. No.319, Industries Department dated

4-7-1989. The 2nd respondent by the Memo dated 20-8-1994 (Annexure-D) ordered moratorium of two years and deferred the collection of sales tax arrears as quantified by the first respondent to be paid in five years thereafter. By its further Memo dated 17-9-1997 (Annexure-DI) the cut off date was shifted from 30-9-1994 to 30-9-1995. The first respondent thereupon quantified the arrears by issuing notices changing the total amount of sales tax from time to time as stated in the affidavit. The notice issued in this regard is Annexure-E.

8. With reference to the above notice and the amendment made by the Government in cut-off date, the petitioner filed WP No.33507 of 1997 seeking stay of payment of first yearly instalment as per memo dated 20-8-1994 (Annexure-D). This Court by its order dated 17-12-1997 passed in WP MP No.39405 of 1997 passed a conditional order (Annexure-F). The petitioner complied with the said conditional order. The first respondent has started stopping the vehicles and withholding the issue of statutory forms. The petitioner then approached this Court and the Division Bench in their interim order dated 18-3-1998 (Annexure-Fl) directed the first respondent not to stop the vehicles and issue way bills and statutory forms required for the business. Thereupon the Division Bench by its order dated 20-3-1998 passed in WP No.39405 of 1997 observed that the question whether the first instalment is due on 1-10-1998 or 1-10-1997 is a point of debate and has to be decided in the Writ Petition and ordered payment of the current taxes from March, 1998 under the order Annexure-F2. On a petition filed by the petitioner, the Division Bench by its order dated 31-3-1998 passed in WP MP No.9496 of 1998 in WP MP No.39405 of 1997 clarified that in the light of any order passed by the State Government with regard to deferment of current taxes, it is open to the petitioner to seek clarification or modification of the order.

9. The first respondent, Commercial Tax Officer, issued a revised notice dated 5-11-1998 (Annexure-G) quantifying the Iota! tax arrears payable by the petitioner and called upon the petitioner to pay the balance tax of Rs.91,16,445-00 due from the first instalment without giving credit to an amount of R.62,61,910.00 collected by him from the petitioner through coercive steps and also directed the petitioner to pay the second instalment of Rs.4,37,52,933-00.

10. It is stated that the action of the first respondent in depriving the petitioner of the credit of Rs.62,61,910 and in calling upon the petitioner to pay the second instalment before the due date is arbitrary and is contrary to the interim orders of this Court passed in WPMP No.39405 of 1997 in WP No.33507 of 1997. It is under these circumstances that this petition has been filed. Thus, the contention of the petitioner is that out of demands made by the first respondent, an extent of Rs. 13,52,92,636-00 relates to Central Sales Tax levied by the first respondent on the branch transfers/ consignment sales which should have been exempted in the State of Andhra Pradesh by virtue of provisions in Section 6A of the Central Sales Tax Act, inasmuch as identical transactions were subjected to tax by

respondents 5 to 10 under the respective Sales lax Acts of those States. It is stated that the petitioner has paid an amount of Rs.l 1,99,79,950-00 under the respective Sales Tax enactments to the said respondents. Those assessments have become final. In was under these circumstances the Supreme Court granted stay (Annexure-C) in respect of assessments for the years 1982-83 and 1983-84. The petitioner could not pursue the same legal remedy in respect of subsequent years partly because of its sickness and partly because of deferment granted by the 2nd respondent (Annexure-D). It is staled that the Supreme Court granted stay under similar circumstances in respect of other companies also. It is stated that the demand of Rs.91,16,445-00 is contrary to the directions of Division Bench of this Court in its order dated 20-3-1998 passed in WP MP No.39405 of 1997 mentioned above. It is stated that the first respondent without waiting for the orders of this Court issued the impugned notice calling upon the petitioner to pay the second instalment. In the teeth of the orders of the Court that the question whether the first instalment will commence from 1-10-1997 or 1-10-1998 was a debatable point which was to be decided in the writ petition. According to the petitioner, the first instalment will become due only on 30-9-1998. It is stated that as against the amount payable under the first instalment to the tune of Rs.4,37,52,933-00, the petitioner has already paid an amount of Rs.4,08,98,398-00. At any rate, in respect of Central Sales Tax the demand for Rs.l3,52,92,363-00 qualifies for absolute stay in terms of the orders of the Apex Court mentioned above. It is stated that inspite of the orders of this Court dated 18-3-1998 restraining the first respondent not to stop the movement of the vehicles carrying cement despatched by the petitioner and not to withhold issuance of way bills, the first respondent has not been issuing way bills for business. The Annexure-H shows the particulars of way-bills arc to be issued, in respect of which it was insisted that unless arrears are paid they will not be issued. It is under these circumstances the petitioner prays for the reliefs mentioned above.

11. In the counter-affidavit filed by the respondent No.1, Commercial Tax Officer (filed along with vacate stay petition), it is stated that the petition is not maintainable. It is stated that the respondent No.l issued a show-cause notice dated 10-11-1997 to the petitioner calling for objections. The petitioner filed objections on 3-7-1997. A,fter considering the objections the Commercial Tax Officer issued a demand notice on 10-12-197 stating that in terms of Government orders the balance of old arrears of Rs.25,07,94,217-00 is payable in five equal instalments at the rate of Rs.5,01,15,843-00. It is also stated in the said notice that the first instalment was due for payment on 30-9-1997, but the petitioner paid only Rs.96,36,488-00 leaving a balance of Rs.4,04,2-1,236-00 out of the first instalment. The petitioner was asked to pay the said balance with interest within 10 days.

12. Questioning this demand notice dated 10-12-1997 the petitioner filed WP No.33507 of 1997. The petitioner also filed WP MP No.39405 of 1997 for stay. The said writ petition came up for admission on 17-12-1997 before the Division

Bench of this Court. The Court ordered that there shall be stay of collection of arrears of sales tax for the period from 1990 to 1994 subject to the condition of the petitioner paying the tax at Rs.50 lakhs per month commencing from 15-1-1998. It was further directed that there shall be no stay with regard to payment taxes subsequent to the said period. This order of stay was to be in force for a period of three months and that WP MP was directed to be posted on 10-3-1998.

13. By an order dated 20-3-1998 the Division Bench of (his Court passed an order that in view of the fact that the sick industry was being nurtured by new management, the stay shall be extended for the period 1990-94 subject to the condition of the petitioner paying further sum of Rs.50 lakhs within a period of two months from the date of order and that on payment of taxes due from March, 1998 onwards regularly within the due date. This interim order was directed to be in force till September, 1998 unless it is varied or modified.

14. On an application in WP MP No.9496 of 1998 in WP No.39405 of 1997 filed by the petitioner by an order dated 31-3-1998 the Division Bench corrected the figure of Rs.1.50 lakhs to Rs. 150.00 lakhs.

15. Subsequent to the issue of demand notice on 10-12-1997 the Appellate Deputy Commissioner, Vijayawada has allowed some of the appeals filed by the petitioner and remanded the same to the Commercial Tax Officer. The Commercial Tax Officer after deducting the tax as payable on the turnovers remanded by the Appellate Deputy Commissioner issued a revised demand notice on 5-11 -1998. It is submitted that the demand notice issued on 10-12-1997 and the demand notice dated 5-11-1998 are one and the same. Both the notices relate to the old arrears for the period 1990-94 except that the Commercial Tax Officer has deducted the taxes payable by the petitioner on the turnovers remanded by the Appellate Deputy Commissioner. In the demand notice dated 10-12-1997 the total amount of tax mentioned was Rs.25,07,94217/- and in the demand notice dated 5-11-1998 it is Rs.21,87,64,623-00.

16. It is stated that the petitioner filed WP No.33507 of 1997 questioning the demand notice dated 10-12-1997 and this Court admitted and granted conditional stay as stated above and as such the present writ petition is misconceived.

17. In regard to the averments in Paras 1 to 5 of the petition, it is stated that the petitioner has sought to characterise interstate sales as branch transfers and this was rejected by the assessing authorities who had passed assessment orders right from 1983-84 onwards.

18. Adverting to the averments in Paras 6 and 7 of the affidavit of the petitioner, it is stated that the order of the Supreme Court dated 24-2-1989 was not available with the office of the respondent nor was the same served on them by the petitioner till the filing of the writ petition.

19. It is stated that a scheme had been drafted by the Board for Industrial and Financial Reconstruction and approved in the year 1994. As a part of that scheme the Government of Andhra Pradesh was approached by the petitioner for certain reliefs and the same had been granted vide Memo No.583/IFR/1991-13 dated 20-8-1994. Under this Memo arrears of sales tax upto 31-3-1994 was calculated as 38.56 crores. Another sum of Rs. 12,02,926 was also found to be due as the petitioner had not repaid the APGST Koan granted under an earlier Slate Incentive Scheme. Under the said memo the petitioner was granted five years time for repayment of sales tax dues for 1990-94 with a moratorium of two years. Subsequently, upon a representation made by the petitioner the Government under letter No.583/IFR/1/91 dated 17-9-1997 had shifted the cut of date from 30-9-1994 to 30-9-1995 for payment of due. The above sum of Rs.38.56 crores was taken on the basis of the demands existing at that point of time. Subsequently, certain amounts had been allowed in appeals and the net amount came down to Rs.25,07,94,217-00 and this was intimated to the petitioner in letter dated 10-12-1997 by the Commercial Tax Officer.

20. In regard to the averments in Para 8 of the affidavit of the petitioner, it is stated that aggrieved by the letter dated 10-12-1997 the petitioner approached this Court in WP No.33507 of 1997 and obtained conditional stay of collection of the amount demanded under the letter dated 10-12-1997. Under this order dated 17-12-1997 this Court had clarified that there shall be no stay with regard to the payment of taxes subsequent to the period 1990-94.

21. In regard to the averments in Para No.9 of the affidavit of the petitioner, it is stated that notice dated 5-11-1998 had been issued in line with the earlier notice dated 10-12-1997. As per the notice dated 5-11-1998 the first instalment payable by 30-9-1997 was Rs.4,37,52,933-00. An identical amount became due as second instalment on 30-9-1998 which was not paid. It is stated that in any event the petitioner had not deposited even the sum of Rs.4,37,52,933-00 due towards first instalment. The amount deposited by the petitioner till date towards clearing the said instalments is Rs.3,46,36,488-00. It is stated that sum of Rs.62,61,910-00 which the petitioner is seeking to include as having been paid towards this instalment, was infact collected through issuance of Section 17 notice to the various Government departments to whom the petitioner had supplied the cement. These notices clearly show that these amounts were being collected towards the dues for the period 1997-98 which is in conformity with the order of this Court dated 20-12-1997 in WP MP No.39405 of 1997 in WP No.33507 of 1997. It is stated that an amount of Rs. 13,52,92,637-00 being under slay of collection by virtue of the orders of the Supreme Court, would not make any difference for the collection of these sums. The said sum could be taken to be payable under the first instalment and on the basis of such an interpretation the present demand is valid.

22. It is further stated that as far as the liability of tax is concerned, this is a question of fact which has been decided by the Assessing Authority as well as

Appellate Authority against the petitioner.

23. It is stated that the petitioner has not paid even a single instalment and therefore the question whether the petitioner has to pay first instalment or second instalment by 30-9-1998 would arise only when the petitioner has paid at least one instalment completely. It is stated that Government while granting instalments had clearly directed that there would be two years moratorium and the entire amount would be repayable in five years period with the cut off date being taken as 30-9-1995 and in that view the first instalment would fall due on 30-9-1997 itself, The petitioner has paid only Rs.3,46,36,488-00 towards first instalment and not Rs.4,08,98,398-00 as claimed in ground No.2 of the petition.-

24. Referring to ground No.3 raised in the petition, it is stated that the Commercial Tax Officer did not make any pre-condition of clearing of arrears for issue of way bills. It is the general practice of the Commercial Tax Department to release way bills in small numbers to ensure that there is no evasion of tax or manipulation of accounts by dealers. It is stated that the way bills are being issued as and when requests are being made by the petitioner.

25. Thus, it is stated that taking any view of the matter the petitioner would be liable for an amount of Rs.91,16,445-00 for clearing the first instalment itself. It is submitted that in view of the violation of conditions placed by the State Government in Memo No.583/IFR/91-13 dated 20-8-1994 and orders of this Court in the earlier writ petition the petitioner cannot claim any indulgence from the Court.

26. Thus, in the background of these facts the petitioner seeks a writ of Mandamus or appropriate direction declaring the action of the 3rd respondent in issuing the impugned demand notice in reference No.F/518/1994 dated 10-12-1997 calling upon the petitioner company to make payment of arrears of sales tax in annual instalments commencing from 1-10-1997 as arbitrary and contrary to the benefit granted by the first respondent in Memo No.583/IFR/91-13 dated 20-8-1994 and letter dated 17-9-1997 and consequently a direction restraining the respondents from demanding the petitioner to pay arrears of sales tax in yearly instalments.

27. The learned Counsel for the petitioner firstly made an attempt to show that the demand for sales tax, which is levied against the petitioner, is not justified inasmuch as transfers to its own branch offices in different states have been treated as inter-State sales and taxes have been levied. It may be stated at the outset that this question does not fall for consideration in this writ petition. The demands have been based on the assessments under the provisions of the relevant law, namely, A.P. General Sales Tax Act and Central Sales Tax Act. Appeals have already been filed against the assessment orders which have been dismissed. This Court is not required to go into the assessment of those taxes and in fact no relief is sought in that regard in the petition.

28. It was then contended by the learned Counsel Sri S. Krishna Murthy that in

view of the provisions u/s 22 of the Sick Industries (Special Provisions) Act, the arrears of tax cannot be recovered by coercive methods. Though Section 22 of the said Act places restrictions on adopting coercive methods in respect of claims against the industry which has been declared to be a sick unit under Sick Industries (Special Provisions) Act, the prohibition is not absolute. Recoveries can be effected with the approval of the Board of Industrial and Financial Re-construction. In fact, it is conceded that on the intervention of the Board certain concessions have been granted to the petitioner and it is in terms of those concessions that the present demand is made against the petitioner. Thus, it cannot be said mat this demand is violative in any way of the provisions of Section 22 of the Sick Industries (Special Provisions) Act. The demand must be deemed to be with the approval of the Board. In fact, the affidavit filed on behalf of the petitioner does not allege any violation of Section 22 of the Sick industrial Companies (Special Provisions) Act, 1985.

29. The next contention of the learned Counsel for the petitioner is that the impugned order dated 10-12-1997 based on the previous notice dated 10-11-1997 issued by the third respondent is on contravention of the terms of concessions granted to the petitioner by the respondent No.l, Government of Andhra Pradesh. It may be mentioned that in terms of the consent of the respondent No.l for giving concessions to the Sick Industries, G.O. Ms. No.319, Industries Department, dated 4-7-1989 was issued. According to the petitioner it is under the terms of this Government Order that the petitioner has been granted certain concessions which fall under the category of maximum concessions under Annexure-1 of the said Government Order. These concessions are available for industries which have been declared by the Board of Industrial and Financial Reconstruction as sick. Admittedly, the petitioner is one such industry declared by the Board. Item 3 of Annexure-1 provides concessions in respect of sales tax demands. It contemplates payment of such demands in five years with moratorium of two years. A question was raised in the writ petition that in terms of letter dated 20-8-1994 from the Government of Andhra Pradesh issued in terms of Rehabilitation scheme, provision for deferment of arrears of sales tax in favour of the petitioner was made providing for moratorium of two years in respect of arrears of tax as quantified then and the said arrears were allowed to be paid within five years with interest at 18% per annum. It is stated that subsequently on a request from the petitioner the first respondent through the letter dated 17-1-1997 shifted the cut off date regarding the payment of arrears of sales tax from 30-9-1994 to 30-9-1995. Thus, according to the petitioner, the petitioner can avail the period of moratorium of two years commencing from 30-9-1995 to 30-9-1997. Thus, according to the petitioner no liability regarding the sales tax can be directed against the petitioner before expiry of the period of moratorium i.e., 30-9-1997. Even if this contention is accepted, it may be mentioned that the arrears of tax as contemplated under the concession scheme became payable with effect from 1-10-1997 i.e., even before the filing of this writ petition. In fact the impugned notice has been issued for payment of

Rs.4,37,52,923-00 after giving credit to the payment of 96 lacs and odd by the petitioner out of Rs.5,01,58,843/- payable as the annual instalment. The contention of the learned Counsel for the petitioner is that the arrears of tax was quantified in a sum of Rs.25,07,94,217/- there is moratorium of two years i.e., upto 30-9-1997 and the said amount is payable in five years. The contention is that the concession ordered by the Government does not contemplate that the arrears of sales tax have to be paid in annual instalments. It is contended that the default can be attributed to the petitioner only if the arrears arc not cleared within the stipulated period of five years. If the contention of the learned Counsel for the petitioner is accepted it would amount to allowing the petitioner to pay the arrears of tax at the end of five years after the initial moratorium period of two years. When the Government have granted moratorium of two years and stipulated that the arrears of tax should be paid within five years thereafter and if this is interpreted as permitting the petitioner to pay arrears of tax any time before the end of seven years, then it will amount to virtually granting of moratorium of seven years. It appears meaningless.

30. It is true that the order issued by the Government referred to above does not prescribe the periodicity of payments after the end of moratorium period. In the absence of such specification if the Government have taken the view that the arrears in question should be paid in five annual instalments, it cannot be said to be an unreasonable view of the concession granted to the petitioner. Infact the petitioner''s contention is that they have been requesting the respondents 2 and 3 that they will clear the arrears of sales tax by quarterly instalments or monthly instalments while accepting the arrears of 25,07,94,217/- as mentioned in para six of the affidavit filed by the petitioner. If the petitioner''s requests were to be conceded then the amount of Rs.5,01,58,843-00 which amount has been demanded as an yearly instalment should have been paid by the petitioner in monthly or quarterly instalments by 30-9-1998. Infact that period has elapsed. If there were bona fides in the so called requests of the petitioner then this amount should have been paid by 30-9-1998. Infact, by the time the matter came up for final arguments another year has passed and if the petitioner wanted to abide by their own offer of paying monthly or quarterly instalments then the next yearly instalment claimed by the Government should have been cleared by 30-9-1999. There is nothing to show that any such payments have been made or offered. Infact, no material has been placed before this Court to show that any written requests were made on behalf of the petitioner for permitting them to pay the amount due in monthly or quarterly instalments as offered in para six of the affidavit filed on their behalf.

31. In Writ Petition No.32502 of 1998, the petitioner has taken a plea that in respect of the demand for the first instalment, the respondents have failed to give credit to the collection of Rs.62,61,910/- from the petitioner. It has been explained in the counter affidavit filed on behalf of the respondents that these amounts were collected by issuing notices to various Government Departments to whom the petitioner had supplied cement. It is stated that these notices make

it clear that these amounts have been collected towards tax dues for the period 1997-98 which is said to be inconformity with the order of this Court dated 20-12-1997 in WP MP No.39405 of 1997 in WP No.33507 of 1997. The petitioner has not substantiated the claim that this amount was collected as part payment towards the first instalment. The question of giving credit to this amount towards demand for the first instalment, therefore, does not arise.

32. Considering the circumstances, the view taken by the respondents that the amounts have to be paid in annual instalments appears reasonable, at any rate, the so called offer of the petitioner to pay in monthly or quarterly instalments lacks bona fides.

33. In the result, these petitions are dismissed without costs.

34. However, it is open to the petitioner to approach the Government with their offer to pay the balance of instalments payable in monthly or quarterly instalments as suggested by them and it is open to the Government to consider the same and accept it.