
(2010) 08 KAR CK 0110
In the Karnataka High Court
Case No : C.E.A. No. 29 of 2008

Commissioner of C. Ex.

APPELLANT

Vs

Indian Oil Corporation

RESPONDENT

Date of Decision : 24-08-2010

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 11 AB, 35 C (2) (a)

Citation : (2010) 258 ELT 504 : (2011) ILR (Kar) 71 : (2010) 20 STR 458 :
(2010) 29 STT 219

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : Y. Hariprasad, for the Appellant; Harish, for Harish and Company, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—This appeal is by the revenue challenging the order passed by the CESTAT (Customs, Excise and Service Tax Appellate Tribunal) holding that there is no requirement to pass any order extending the stay of recovery already ordered and the stay of recovery shall remain valid till the final disposal of the appeal.

2. The Assessee is a holder of Central Excise Registration Certificate. It is carrying on the business of procuring and clearing various petroleum products such as motor spirit, high speed diesel, kerosene, furnace oil, etc., to their depots/company owned company operated retail pump outlets/jubilee outlets (COCO RPOs for short) located at various places. The said products are subsequently sold from their depots to their rental outlets. The Assessee was issued with a show-cause notice demanding the differential duty of Rs. 7,83,142/- (CENVAT Rs. 6,00,320.42 + SED Rs. 1,82,821.58) for the period 1-8-2001 to 28-2-2002 under the provisions of Section 11A apart from demanding interest at the rate of 24% u/s 11AB and proposal for penalty under Rule 25 of CE(2) Rules, 2001. The Assessee gave his reply opposing the said claim. The Assistant

Commissioner of Central Excise by his order dated 28-1-2003 held that the price charged in respect of motor spirit and high speed diesel at their COCO (Company Owned Company Operated) outlets should be treated as transaction value in terms of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Section 4 of the Central Excise Act, 1944. Aggrieved by the said order, the Assessee preferred an appeal before the Commissioner (Appeals), Mangalore who dismissed the appeal and upheld the order of the assessing authority. Aggrieved by the same, the Assessee preferred an appeal before the CESTAT, Chennai. The Assessee also filed an application for stay of the impugned order dated 14-1-2004. The Tribunal granted stay of recovery vide Stay Order No. 938-940/2006 dated 24-8-2006 subject to the Assessee making a pre-deposit of 1/5th of the total amount of duty. Accordingly, the Assessee deposited a sum of Rs. 3,75,000/- on 15-9-2006. As per proviso to Section 35C(2)(A) of the Central Excise Act, 1944 (for short, hereinafter referred to as, "the Act), if the appeal in respect of which an order of stay is made, is not disposed of within a period of 180 days from the date of the stay order, on expiry of the specified period of 180 days, the stay stands vacated. Hence, the Department initiated recovery proceedings on 29-8-2007. The Assessee filed a miscellaneous application before the Tribunal seeking extension of stay granted on 24-8-2006. The Department filed a counter application objecting extension of the stay order. The Tribunal purporting to follow the law laid down by the Gujarat High Court in the case of Poly Fill Sacks Vs. Union of India (UOI), , wherein it has been held that, there is no requirement to pass any order extending stay of recovery already ordered and that, such stay of recovery shall remain valid till final disposal of the appeal, has refrained the Department from proceeding with the recovery proceedings pending disposal of the appeal on merits. Aggrieved by the said order, the Department has preferred this appeal.

3. The revenue assailing the impugned order contended that, by the introduction of Section 35(C)(2)(A) with two provisos, by Act 20 of 2002. which came into force on 11-5-2002, any order of stay granted by the appellate Tribunal shall on the expiry of 180 days stands vacated. This express provision has been ignored by the Tribunal. The judgment of the Gujarat High Court deals with an order passed on 21-5-1996 before the said amendment and therefore, the impugned order passed is ex facie, illegal and liable to be set aside. He also contended that, when once it is specifically provided by way of amendment that the said order shall come to an end with the expiry of 180 days from the date the order is passed, in the absence of any provision for extension of the stay order or in the absence of any power, conferred on the Tribunal to extend the stay order granted earlier, the Tribunal extending the stay order would not arise and therefore, he contends, seen from any angle, the impugned order requires to be set aside and the application for stay is liable to be dismissed.

4. Per contra, the learned Counsel appearing for the Assessee submitted, though in Section 35C before amendment and after amendment, there is no express provision conferring power on the Tribunal to extend the stay order granted

earlier, the Tribunal in exercise of its appellate power has inherent power to grant an order of stay as well as to extend the stay granted earlier. In the absence of any specific provision prohibiting such extension, the power to extend stay is to be gathered from the appellate power as well as the inherent power of the Tribunal, that is the view, which is taken by the various Courts including the Apex Court and therefore, he submits, even if the order of the Tribunal is held to be erroneous, the Assessee cannot be denied the benefit of extension of stay order.

5. In the light of the aforesaid facts and rival contentions, the point that would arise for our consideration is as under:

In the absence of any express provision in the Act, for granting an interim order of stay

(a) Whether the Tribunal has power to grant stay of the impugned order?

(b) Whether the Tribunal has power to extend the period of stay granted at the expiry of 180 days in view of amendment Act 20 of 2002 introducing Section 2(A) to 35(C) of the Act?

6. Point No. (i) : Before the introduction of Section 2A and the provisos, there was no express provision in Section 35C of the Act providing for grant of an order of stay of the impugned orders. However, on an application filed for such stay order, the Tribunal was granting such stay orders. Similar situation was in existence in the appeal provisions under the Income Tax Act. The Apex Court in the case of Income Tax Officer Vs. M.K. Mohammed Kunhi, , in those circumstances held as under:

the arguments 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 premises 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 question 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 u/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 of recovery, the entire purpose of the appeal can be defeated if ultimately 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 u/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 implications the authority to use all reasonable means to make such grant effective. The powers which have been conferred by Section 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 the end, the Supreme Court has held as under:

Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion, the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

Following the said decision, the Tribunal in the case of 2003 (106) ECR 458 has held as under:

Apart from the proviso to Section 35F, the appellate authority has inherent power of granting interim relief in the exercise of its appellate jurisdiction. This has been so recognised explained by the Supreme Court in the case of Income Tax Officer v. Mohammed Kunhi (1992) ITR 341. We must make it clear that it does not mean that in every case where appeal is filed the Collector (Appeals) or the Tribunal must, as a matter of course, grant interim relief. The guidelines for the grant of interim relief are contained in the proviso to Section 35F, namely, relief will be granted only if there would be undue hardship to the person if he is asked to pay excise duty or penalty. Unless, therefore, it can be shown by the Appellant that undue hardship would be caused if he is required to pay the duty or penalty the appellate authorities would be entitled to refrain from granting any interim relief. What is undue hardship would depend upon the facts of each case.

In Domats Civil Law (Volume I) page 88, it is stated as under:

It is the duty of 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.

In Polini v. Gray [1879] 12 CD 438] this is what Jessel M.R. said about the powers of the Court of appeal to grant stay at page 443:

it appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success". That principle, as it appears to me, applies as much to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal.

7. The right of appeal is a substantive right, and the question of fact and law are at large and are open to review by the Appellate Tribunal. It is firmly established rule that an express grant of statutory power carries with it by necessary implications the authority to use all reasonable means to make such grant effective. One such authority is the duty in proper cases to make such orders for staying proceedings as will prevent the appeal, if successful from being rendered nugatory. Therefore, the appellate Tribunal has the power to grant stay as incidental and ancillary to its appellate jurisdiction. When the parliament introduced the amendment restricting the operation of the stay order, they recognized this settled legal position that the appellate Tribunal has the power to grant an order of stay even in the absence of a specific provision conferring such power, and such power flowing from the appeal provision itself. What they intended by the amendment is to restrict the duration of the stay order which is passed by virtue of such power, In the light of the aforesaid law, prior to amendment even in the absence of an express provision, the Tribunal in exercise of its power u/s 35C is entitled to grant an order of stay of the impugned order. That is how, the stay orders were being granted, which was well accepted. Accordingly, we answer this point No. (i).

8. Point No. (ii): Though earlier to the amendment, there was no express provision providing for grant of an order of stay, by virtue of the Amendment Act 20 of 2002, 2(A) was introduced with two provisos, which reads as under:

(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

Provided that, where an order of stay is made in any proceeding relating to an appeal filed under Sub-section (1) of Section 35B. the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.

9. By reading of the aforesaid amended provision, it is clear, a time limit of three months is prescribed for hearing and deciding the appeal filed u/s 35(B) of the Act. In such an appeal, if an order of stay has been granted by the Tribunal, the

first proviso cast an obligation on the Tribunal to dispose of the appeal within a period of 180 days from the date of the stay order. In other words, Section 2A provides a three years limit for disposal of the appeal u/s 35(B) whereas 180 days is a time limit prescribed for disposal of the very same appeal, if an order of stay is granted in such an appeal. In order to see that after obtaining a stay order, the Assessee who has the benefit of an order of stay would not drag an the proceedings, the legislature thought of introducing second proviso with an intention of curbing delaying tactics in disposal of the appeal. Therefore, it is expressly provided, if the appeal is not disposed of within 180 days from the date of the said order, on expiry of that period, the stay order stands vacated. The sole object being to ensure disposal of the appeals on merits within 180 days thus preventing the Assessee from indulging any dilatory tactics. Therefore, this provision was introduced in *terrorem*.

10. The Supreme Court in the case of Commissioner of Cus. & C.Ex., Ahmedabad v. Kumar Cotton Mills Private Limited reported in 2005 (180) E.L.T. 434 (S.C.) dealing specifically with the amended provision, held as under:

3. The provision has clearly been made for the purpose of curbing the dilatory tactics of those Assesseees who, having got an interim order in their favour, seek to continue the interim order by delaying the disposal of the proceedings. Thus, depriving the revenue not only of the benefit of the assessed value but also a decision on points which may have impact on other pending matters.

4. The Tribunal which was then know as Customs, Excise Gold (Control) Appellate Tribunal (CEGAT) came to the conclusion that the amendment did not affect stay orders which were passed prior to the date of coming into force of the amendment and also held that the amendment did not in any way curtail the powers of the Tribunal to grant stay exceeding six months.

5. During the pendency of the appeal before this Court, the matter was conferred to a Larger Bench of the Tribunal. The Larger Bench has by its decision reported in 2004 (169) E.L.T. 267 upheld the view impugned in this case. The decision of the Larger Bench has not been challenged by the Department being of the view that repeated SLP raising the same issue was unnecessary.

11. It is also useful to refer to a decision of the Income Tax Appellate Tribunal, while considering an identical issue relating to the power of the Tribunal to grant further stay after the expiry of six months since passing the first order of say, in *Centre for Women's Development Studies v. Deputy Director of Income Tax*, which reads as follows:

On a careful perusal of the relevant new provisions in the law and aforesaid judicial pronouncements, we are of the considered opinion that Sub-section (2A) was inserted in Section 254 to curtail the delays and ensure the disposal of the pending appeals within a reasonable time frame. There is no intention of the Legislature to curtail or withdraw the powers of the Tribunal for granting a say exceeding a period of six months. Had it been the intention of the Legislature,

there would be a specific amendment in the Act to this effect because if the powers of the Tribunal for granting the stay exceeding a period of six months are withdrawn by this amendment, the object of imparting justice by the Tribunal cannot be achieved even in those cases where the Assessee has co-operated with the Tribunal to its full extent and the hearing is in progress. We, therefore, are of the considered view that the Tribunal has power to grant a further stay on the expiry of six months of earlier stay if the facts and circumstances so demand.

Affirming the said view, a Larger Bench in the case of 2004 (95) ECC 425 observed as under:

We find that in Themis Pharmaceuticals the Bench has taken note of the fact that it is practically not possible to dispose of the appeals pending before the Bombay Bench of the Tribunal within 180 days. The Bench has also suggested some remedy for the problem. In this connection, we may observe that similar situation can arise in other Benches also where an appeal posted within 180 days could not be taken up for different reasons. It may be due to non-availability of time for the Bench or due to non-availability of the Bench itself. Unless the Tribunal has the power to extend stay beyond 180 days, the Assessee's interest will be in jeopardy for no fault of his. Even the order granting exemption from pre-deposit will be rendered nugatory as the Assessee will be compelled to satisfy the demand during dependency of the appeal. It has been always the judicial view that no party should be prejudiced due to action or inaction on the part of the Court (Raj Kumar Dey and Others Vs. Tarapada Dey and Others, .

12. Therefore, it is clear that the sub-section though was introduced in *terrorem* cannot be construed as punishing the Assessee for matters; which may be completely beyond their control. The sole object behind this amendment is to ensure speedy disposal of the appeals where orders of stay was granted and duty payable to the revenue are with-held. The said provisions act in *terrorem* preventing the Assessee from delaying the disposal of the appeal. But if the Assessee is not at fault and the Tribunal for reasons beyond its control is unable to dispose of the appeal within 180 days from the date of the grant of order of stay, the Tribunal cannot be held to be powerless to extend the order of stay granted on an application being made for extension of stay by the Assessee. Merely because there is no express provision provided for extending stay granted earlier, it cannot be said that the appellate Tribunal has no power to extend the time. Prior to amendment in the absence of any specific provision it was granting stay. If the Tribunal is held to possess the power to grant stay, on the same analogy, the Tribunal is held to possess power to extend the order of stay granted, if the appeal is not disposed of within 180 days from the date of the stay order.

13. In such circumstances, if an application is made by the Assessee, the Tribunal has the power to extend the order of stay. The order of stay is not automatic. Therefore, even an order of extension of stay need not be automatic. When an application is filed for extension of stay, the Tribunal has to apply its

mind to find out for what reasons, the appeal is not Disposed within statutory period of 180 days. If the Assessee conduct is not the cause for the appeal not being disposed of, then the Assessee cannot be denied the benefit of extension of the stay order. Expressly they have not taken away the power of the Tribunal to extend the period of stay granted. To extend the period of stay granted no express provision is required. Once the power to grant stay exists and is conceded, the power to extend the period of stay follows from such power. It is settled law that no party should be prejudiced due to action or inaction on the part of the Court. In those circumstances, the contention of the revenue that in the absence of express provision conferring the power of the Tribunal to extend the stay order, the Tribunal cannot extend the stay is without any substance. Accordingly, we answer point No. (ii).

On Facts:

14. Coming to the facts of this case, admittedly after the expiry of 180 days from the order of stay, when recovery proceedings are initiated by the revenue, the Assessee was compelled to file an application for extension of stay. Without considering the said application on merits, the Tribunal proceeded to hold that once an order of stay is granted after hearing both the parties, the said stay order will be in operation till the disposal of the appeal on merits, relying on the judgment of the Gujarat High Court referred to above. It is a clear case of misreading of the judgment. That was the position prior to the amendment. In the aforesaid Gujarat case, the order of stay was granted in the year 1996 and therefore, in that case, the Gujarat High Court was justified in holding when once an order of stay is granted after hearing both the parties, there is no requirement to pass any order extending stay of recovery already ordered and that, such stay of recovery shall remain valid till final disposal of the appeal and has refrained the Department from proceeding with the recovery proceedings pending disposal of the appeal on merits. In the very same judgment, they have also pointed out the difference after the amendment. Therefore, after the amendment, the stay order granted comes to an end at the expiry of 180th day from the date of the stay order. Rightly the Assessee filed an application for extension. The Tribunal ought to have considered the application on merits and then should have passed the appropriate orders. Therefore, the order passed by the Tribunal is *ex facie*, illegal and is liable to be set aside. In view of the same, it is a matter which has to be remanded back to the Tribunal for disposal in accordance with law in the light of the aforesaid observations.

15. However, till the Tribunal hears the said application on merits, the order of stay granted earlier would be in force and the revenue is restrained from proceeding with the recovery of the amount due under the impugned order. Hence, we pass the following:

ORDER

(I) The appeal is allowed.

(II) The impugned order passed by the Tribunal is hereby set aside.

(III) The application for stay filed by the Assessee is remanded back to the Tribunal for fresh consideration in the light of the observations made above.

(IV) The said exercise will be done within a period of three months from the date of receipt of copy of this order.

(V) Till the said application is disposed of on merits, the stay order granted earlier would be in force.

Parties to bear their own costs.