
(1997) 02 P&H CK 0009
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 1299 of 1994

Emerald International Ltd.	Vs	APPELLANT
State of Punjab and Others		RESPONDENT

Date of Decision : 21-02-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Haryana General Sales Tax Act, 1973 — Section 39(5)
Punjab General Sales Tax Act, 1948 — Section 20(5)

Citation : (1997) 116 PLR 797 : (2001) 122 STC 382

Hon'ble Judges : N.C. Jain, J;H.S. Brar, J;Ashok Bhan, J

Bench : Full Bench

Advocate : K.L. Goyal, A.K. Mittal and S.S. Saron, for the Appellant; S.K. Sharma, Deputy Advocate-General, S.K. Kapoor and J.S. Duhan, Assistant Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

N.C. Jain, J.—This judgment of ours would dispose of Civil Writ Petition Nos. 1299, 8131, 9092 and 9148 of 1994 as common question of law has arisen in these petitions. Before noticing the question of law, it is necessary to have a brief look on the factual side. The counsel for the parties are agreed that the facts of the case be picked up from Civil Writ Petition No. 1299 of 1994, Emerald International Limited v. State of Punjab, etc. We would accordingly be taking into consideration the factual position as emerging from the aforementioned case only but it is necessary to observe at this stage that in one case, i.e., Civil Writ Petition No. 8131 of 1994, S.A.R. Springs Industries v. State of Haryana the provisions of Section 39(5) of the Haryana General Sales Tax Act (hereinafter referred to as "the Haryana Act") would also be noticed as this case arises out of the orders passed by the authorities under the Haryana Act.

2. The facts of the aforementioned case as they emerged from the orders of the Assessing Authority, Deputy Excise and Taxation Commissioner (hereinafter

called "the appellate authority") and the Tribunal are that the sales tax including penalty and interest (hereinafter referred to as "the tax amount") to the tune of Rs. 24,80,464 was imposed upon the petitioner by the Assessing Authority vide annexure P3. The order, annexure P3, was appealed against before the appellate authority. Along with the appeal an application u/s 20(5) of the Punjab General Sales Tax Act, 1948 (for short, "the Punjab Act") was filed for entertaining the appeal without prior payment of tax amount on the ground that the petitioner was unable to pay the same. The appellate authority, Patiala, by his order dated June 17, 1993 directed the petitioner to deposit a sum of Rs. 10,00,000 (rupees ten lacs) before August 9, 1993 failing which the appeal was to be dismissed as not maintainable. The order of the appellate authority was subjected to a further challenge in appeal before the Tribunal u/s 20(2) of the Punjab Act. The Tribunal upheld the order of the appellate authority, Patiala. The orders of the authorities below have been challenged by the petitioner in writ petition both on merits and on points of law.

3. When the matter came up for hearing before the division Bench, the counsel appearing for the assessee in various writ petitions advanced two-fold arguments. The vires of Section 20(5) of the Punjab Act and also the provisions of Section 39(5) of the Haryana Act were challenged in the first instance. Secondly, it was argued that the appellate authority while hearing the stay matter should see the prima facie merit in the appeal and the prima facie case should be a relevant consideration for granting stay. It was argued that prima facie case could not be gone into on account of the decision of this Court in *Food Corporation of India v. Sales Tax Tribunal* [1989] 73 STC 241. The attention of the division Bench was invited to a single Bench authority--*Kisan Workers Transport Co-operative Society Ltd. v. Assessing Authority* 1982 ITR 345 in which it was held that in the matter of exercise of discretion regarding grant of stay, the appellate or the revisional authority should not treat such a thing as merely a routine matter and should find out amongst other things whether the impugned tax was prima facie legal or not. The division Bench upheld the vires of the Punjab Act and the Haryana Act. However, the learned Judges while referring the matter to the Full Bench had directed the appellate authority to dispose of the appeal in accordance with law. The relevant reference order incorporating the arguments and the observations of the division Bench reads as under :

"During the hearing of the petition, our attention was invited to *Kisan Workers Transport Co-operative Society Ltd. v. Assessing Authority* 1982 ITR 345 in which a learned single Judge held that in the matter of exercise of discretion demanding deposit of the tax levied or any part thereof as a condition precedent to the hearing of the appeal or revision on merits, the Appellate or the Revisional authority should not treat such a thing as merely a routine matter and should find out, amongst other things, whether the impugned tax was prima facie legal or not. It was further observed by the learned Judge that the matter of assessment of tax was a quasi-judicial function and not an executive function and, therefore, it was the duty of the Appellate or Revisional authority to

exercise its discretion, inter alia, after taking into consideration whether the tax in question was prima facie illegal as contended by the appellant or revision-petitioner.

On the other hand, the observations in Food Corporation of India's case [1989] 73 STC 241, made by a division Bench of this Court, convey the impression that it is not open to the appellate authority to consider the prima facie merits of the appeal. We are unable to subscribe to the view expressed by the learned Judges of the division Bench in the aforesaid case. This is a very important question and it keeps arising in a large number of writ petitions filed by those aggrieved by the orders of the authorities u/s 20(5) of the Punjab General Sales Tax Act or an analogous provision of the Haryana General Sales Tax Act. We are prima facie in agreement with the view expressed by the learned single Judge in Kisan Workers Transport Co-operative Society Ltd.'s case 1982 ITR 345. We, therefore, direct that the papers be laid before honourable the Chief Justice for referring the matter to a Full Bench for decision on this question.

For the purposes of the present petition, it is made clear that we do not find that apart from what has been stated above, the vires of Section 25(5) of the Act are in doubt. We accordingly uphold the vires of Section 25(5) and direct the Deputy Excise and Taxation Commissioner (Appeals) to dispose of the appeal according to law if the order passed at the motion stage dated January 31, 1994, referred to in the earlier part of this order, has been complied with. In other words, the decision of the appeal shall not be held up on account of the question referred by us to the Full Bench. We order accordingly."

As is clear from the aforementioned observations, the division Bench has referred the question of law in view of the apparent conflict in Kisan Workers Transport Co-operative Society Ltd.'s case 1982 ITR 345 and the Food Corporation of India's case [1989] 73 STC 241, and this is how the matter has been placed before us. Before examining the rival contentions of the counsel for the parties, we have thought it appropriate to extract the provisions of Section 20 of the Punjab Act and Section 39 of the Haryana Act in their entirety. They read as under :

"Punjab Act :

20. Appeal.--(1) An appeal from every original order passed under this Act or the Rules made thereunder shall lie,--

(a) if the order is made by an Assessing Authority or by an officer-in-charge of the check-post or barrier or any other officer not below the rank of Excise and Taxation Officer, to the Deputy Excise and Taxation Commissioner ;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner ;

(c) if the order is made by the Commissioner or any officer exercising the powers of the Commissioner, to a Tribunal.

(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Commissioner or any officer on whom the powers of the Commissioner are conferred shall be further appealable to a Tribunal.

(3) Every order of a Tribunal and subject only to such order, the order of the Commissioner or any officer exercising the powers of the Commissioner or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority, if it was not challenged in appeal or revision shall be final.

(4) No appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against, or such longer period as the appellate authority may allow, for reasons to be recorded in writing.

(5) No appeal shall be entertained by an Appellate Authority unless such appeal is accompanied by satisfactory proof of the payment of the tax or of the penalty, if any, imposed or of both as the case may be :

Provided that if such authority is satisfied that the dealer is unable to pay the tax assessed or the penalty, if any, imposed or both, he may, for reasons to be recorded in writing, entertain an appeal without the tax or penalty or both having been paid or after part payment of such tax or penalty or both.

(6) Subject to such rules or procedure, as may be prescribed, an appellate authority may pass such order on appeal as it deems to be just and proper."

"Haryana Act :

39. Appeal.--(1) An appeal from every original order, including an order u/s 40, passed under this Act or the Rules made thereunder shall lie,--

(a) if the order is made by an Assessing Authority ; officer-in-charge of a check-post or barrier or an officer below the rank of a Deputy Excise and Taxation Commissioner, to the Deputy Excise and Taxation Commissioner or such other officer as the State Government may, by notification, appoint ;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner, or such other officer as the State Government, may by notification, appoint ;

(c) if the order is made by the Commissioner, to the Tribunal.

(Proviso.....) (2) An order passed in appeal by the Deputy Excise and Taxation Commissioner or the officer appointed by the State Government under Clause (a) of Sub-section (1) or by the Commissioner or the officer appointed by the State Government under Clause (b) of that Sub-section shall be further appealable to the Tribunal.

(3) The appellate authority shall not for the first time, receive in evidence on behalf of any dealer in any appeal, any account, register, record or document, unless for reasons to be recorded in writing, he considers, that such account, register, record or document is genuine and that the failure to produce the same

before the authority below was for reasons beyond the control of the dealer.

(4) Every order passed by the Tribunal on appeal under Subsection (2) shall, subject to the provisions of Section 42, be final.

(5) No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied, that the amount of tax assessed and the penalty and interest, if any, recoverable from the person has been paid :

Provided that the said authority, if satisfied that the person is unable to pay the whole of the amount of tax assessed, or the penalty imposed, or the interest due, he may, if the amount of tax and interest admitted by the appellant to be due has been paid, for reasons to be recorded in writing, entertain the appeal and may stay the recovery of the balance amount subject to the furnishing of a bank guarantee or adequate security in the prescribed manner to the satisfaction of the appellate authority :

Provided further that in the case of an appeal against any order which has to be communicated by the appropriate authority to the appellant, the period of sixty days shall commence from the date of receipt of the copy of the order by the appellant and in the case of an appeal against any other order made under this Act, the time spent in obtaining the certified copy of the order shall be excluded in computing the period of sixty days.

(6) Subject to regulations made by the Tribunal under Subsection (10) of Section 4 and subject to such rules of procedure as may be prescribed in relation to an appellate authority other than the Tribunal, an appellate authority may pass such order on appeal as it deems to be just and proper, including an order enhancing the amount of tax or penalty or interest or all under this Act :

(Proviso.....) (7) An assessing authority may challenge in appeal before the Tribunal, the order of the officer on whom the State Government has conferred the powers of the Commissioner under Sub-section (2) of Section 40, within one year from the date of the order appealed against."

4. On behalf of the petitioner-assessee Emerald International Ltd. v. State of Punjab, Mr. K.L. Goyal, Advocate, addressed arguments whereas on behalf of other assesseees in other writ petitions Mr. A.K. Mittal and Mr. S.S. Saron, Advocates, advanced arguments. Mr. S.K. Sharma, Deputy Advocate-General, Punjab, represented the State, whereas the State of Haryana was represented by Mr. S.K. Kapoor and Mr. J.S. Duhan, Assistant Advocate-Generals.

5. Counsel for the petitioners argued that the power to grant stay should be held to be incidental or ancillary to the powers of the appellate court and should be exercised on the same principles as given in order 39, Rules 1 and 2 of the Code of Civil Procedure. The counsel for the assesseees went on to argue that in a particular given case the tax amount assessed may be on the face of it illegal and since the inability to pay the tax is the only ground for the grant of stay and

that since the appellate authority cannot look to the prima facie nature of the case, the provisions made in Section 20(5) of the Punjab Act and Section 39(5) of the Haryana Act along with the provisos apart from being onerous would cause undue hardship to the assessee and, therefore, it be held by this Court that the appellate authority has got inherent power to grant stay. In a nut shell, the counsel wants this Court to lay down that in addition to the existing provisions made in the shape of provisos in Sub-section (5) of Section 20 of the Punjab Act and Section 39(5) of the Haryana Act, that the appellate authority may take into consideration prima facie nature of the case for passing an order that the appeal be entertained without the deposit of tax amount. In addition thereto Mr. A.K. Mittal, Advocate, representing the petitioners in Civil Writ Petition Nos. 8131 and 9148 of 1994 has further argued that an assessee is entitled to the consideration of the application for stay on the basis of the merit in the appeal on the filing of the same under Sub-section (1) of Section 39 of Haryana Act as the appeal is filed under this provision and in case the assessee is unable to convince the appellate authority regarding the prima facie nature of his appeal, he is entitled to the grant of stay under Sub-section (5) of Section 39 of the Haryana Act on the ground that the assessee is unable to pay the tax amount. In other words, he means to say that the petitioner is entitled to the consideration of his stay application both at the time of institution of the appeal on the point of prima facie nature of the case and in case he fails to prove the prima facie nature of the case, he would, in the alternative or in addition thereto, be entitled to the grant of stay on the ground that the assessee is unable to pay the tax amount. The learned counsel for the petitioners in support of their arguments have relied upon *Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi* [1969] 71 ITR 815 ; AIR 1969 SC 430, *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, , *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, , *Uptron Powertronics Vs. Collector of Central Excise, Meerut*, , *Excise and Taxation Commissioner, Patiala v. Guranditta Mall Shadi Parkash Rice and Oil Mills* [1971] 27 STC 39 and *Kisan Workers Transport Co-operative Society Ltd., Amritsar v. Assessing Authority* 1982 ITR 345.

6. On the other hand, the counsel for the State of Punjab, Mr, S.K. Sharma, Deputy Advocate-General, has argued that the right of appeal has been given to the assessee in a statute and if the assessee wants to avail of the same, he has to accept the conditions prescribed in the same. It has further been argued that in view of the wording of the two provisions in the Punjab Act and Haryana Act, the appellate authority can grant stay only on the ground of inability to pay and on no other ground. Mr. Sharma has further argued that if the argument of Mr. Ajay Mittal that the assessee is entitled to the consideration of his stay application at two stages, i.e., at the time of filing of the appeal under Sub-section (1) of Section 20 of the Punjab Act and Sub-section (1) of Section 39 of the Haryana Act on the merits of the case and on his failure to obtain stay under the above provisions, he is entitled to obtain stay under the provisos of Sub-section (5) of the aforementioned two Acts on the basis of his being unable to

pay, is accepted ; it would amount to reading something more in the statute which is not there. In support of his argument he has relied upon *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, , *Commissioner of Income Tax Vs. Bansi Dhar and Sons*, , *Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others*, , *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , *Chatter Singh Baid and Others Vs. Corporation of Calcutta and Others*, , *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, and *Food Corporation of India v. Sales Tax Tribunal* [1989] 73 STC 241 .

It deserves to be noticed here that during the course of arguments the counsel for the State did concede that if in a particular given case the tax imposed was illegal, the High Court has got the power to interfere under Article 226 of the Constitution of India.

income tax Officer, Cannanore's case [1969] 71 ITR 815 ; AIR 1969 SC 430, was cited by Mr. K.L. Goyal, counsel for the assesseees for the proposition that the appellate authority can be held to be possessing powers to grant stay as incidental or ancillary to its appellate jurisdiction. Although the apex Court has observed in so many words that the Appellate Tribunal has got the power of stay as incidental and ancillary to the appellate jurisdiction but it appears to us that the Tribunal has been held to be possessing powers to grant stay in view of the relevant provisions of the Income Tax Act as has been noticed in paragraph 3 of the judgment and more particularly in view of the powers of the Income Tax Officer to treat the assessee as not in default so long as the appeal remains pending. Before examining the precise arguments threadbare on the basis of the aforementioned judgment of the apex Court, it is necessary not only to have a look at the various provisions of the Income Tax Act as noticed in paragraph 3 but also the observations made in paragraph 4. Both paragraphs 3 and 4 read as under :

"3. The relevant provisions of the Act may be first noticed. Section 156 provides that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under the Act, the Income Tax Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable. u/s 220(1) any amount specified in the notice of demand u/s 156 has to be paid within 35 days of the service of the notice or within such lesser period as may be specified under the proviso to Sub-section (1). If the amount is not paid within the period limited or extended (the assessee can ask for an extension) the assessee shall be deemed to be in default. Sub-section (6) of Section 220 provides that where an assessee has presented an appeal u/s 246 the Income Tax Officer may, in his discretion and subject to such conditions as he may think fit, treat the assessee as not being in default so long as the appeal remains pending. Section 221 provides for the imposition of penalty when the assessee is in default. Sections 222 to 224 relate to the issuance of a certificate to the Tax Recovery Officer. u/s 225 the Income Tax Officer can order stay of

proceedings, even after the certificate has been issued to the Tax Recovery Officer. It may be mentioned that the last four sections in terms relate to recovery of tax, but by virtue of Section 229 any penalty imposed is also recoverable in the same manner. Section 246, to which reference has been made in Section 220(6) gives the appealable orders against which an assessee may appeal to the Appellate Assistant Commissioner. Appeals to the Tribunal are dealt with by Sections 252 to 255. Section 252 provides merely for constitution of the Tribunal. Section 253 says that any assessee aggrieved by the orders set out in Clauses (a), (b) and (c) of Sub-section (1) may appeal to the Tribunal. The Commissioner is also entitled to direct the Income Tax Officer to file an appeal against the order of an Appellate Assistant Commissioner made u/s 250. Section 254 specifies the orders which the Tribunal can make. Sub-section (1) which is material may be reproduced below :--

"254. Orders of Appellate Tribunal.--(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

Section 255 gives the procedure of the Appellate Tribunal. Sub-sections (5) and (6) of this section need alone be noticed :

"255. (1)

(2)

(3)

(4) (5) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

(6) The Appellate Tribunal shall for the purpose of discharging its functions, have all the powers which are vested in the Income Tax authorities referred to in Section 131, and any proceedings before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code (XLV of 1860) and the Appellate Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (V of 1898)."

Section 131 may at this stage be referred to. It gives to the Income Tax Officer, the Appellate Assistant Commissioner and the Commissioner the same powers as are vested in the court under the CPC when trying a suit in respect of the matters specified in the section. But these powers relate to discovery and inspection ; enforcing the attendance of witnesses ; compelling production of books of account, etc., issuing commissions and allied matters.

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 u/s 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 u/s 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 u/s 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 Section 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 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 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 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 implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Articles 5401 and 5402), 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 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 quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit*". An instance is given based on *Ex Parte, Martin* (1879) 4 QBD 212 at page 491 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".

7. The observations of the apex Court reproduced above, would show that the Income Tax Appellate Tribunal has been held to be possessing powers to grant stay in the context of several provisions of the Income Tax Act. u/s 226 of the Income Tax Act an assessee can be treated to be not in default during the pendency of appeal. Income Tax Officer can grant time for payment of the amount in question despite the issuance of certificate of recovery. Not only that, the provisions of the Income Tax Act envisage granting of extension till disposal of the appeal by the Tribunal. In the light of the provisions of the Income Tax Act it was held by the apex Court that the power to grant stay is incidental and ancillary to the appellate jurisdiction by the Tribunal. The position before us on the other hand, is altogether different inasmuch as there is no provision either in the Punjab Act or in the Haryana Act to the effect that the Assessing Authority could consider the assessee not to be in default as long as appeal was pending. The powers to grant stay has been limited only to the ground of inability to pay the amount u/s 20(5) of the Punjab Act and Section 39(5) of the Haryana Act. In view of the specific prohibition in the Punjab and Haryana Acts and in view of the non-existence of any parallel provisions equivalent to the Income Tax Act in the aforementioned two Acts, it cannot be held that the Appellate Authority has got the power to grant stay even if the condition laid down in the proviso is not fulfilled.

8. In the *Commissioner of Income Tax Vs. Bansi Dhar and Sons*, two propositions of law were laid down by the honourable Supreme Court. It was held that the High Court has no inherent or incidental power to grant stay of realisation of tax during the pendency of the Income Tax reference. It was further held that the High Court could exercise its power of stay under Articles 226 and 227 of the Constitution of India, in appropriate cases. Of course, the apex Court was dealing

with the question whether an assessee is entitled to the grant of stay or not during the pendency of a reference under Income Tax Act, yet the ratio of law to the effect that the power of stay is neither incidental nor ancillary to the jurisdiction of the appellate powers, is fully applicable to the facts of the instant case. However, the aforementioned case does go in favour of the assessee to the extent that the High Court in appropriate cases can grant stay under Articles 226/227 of the Constitution of India.

9. Shyam Kishore and others Vs. Municipal Corporation of Delhi and another, does not help the assessee for the proposition of law that the appellate authority can grant stay on the basis of prima facie nature of the case. However, the observations of the apex Court to the extent that the High Court can under Article 226 of the Constitution of India grant appropriate relief in a given case, does help the assessee. It is necessary to have a look at the bare provisions of the Delhi Municipal Corporation Act before finding as to what extent the observations of the apex Court would help the assessee in the present cases. Section 170 of the Delhi Municipal Corporation Act reads as under :

"170. Conditions of right to appeal.--No appeal shall be heard or determined u/s 169 unless,--

(a) the appeal is, in the case of a property tax, brought within thirty days next after the date of authentication of the assessment list u/s 124 (exclusive of the time requisite for obtaining a copy of the relevant entries therein) or, as the case may be, within thirty days of the date on which an amendment is finally made u/s 126, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days after the date of the presentation of the first bill or, as the case may be, the first notice of demand in respect thereof :

Provided that an appeal may be admitted after the expiration of the period prescribed therefore by this section if the appellant satisfies the court that he had sufficient cause for not preferring the appeal within that period :

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Corporation."

The aforementioned provisions have been interpreted by the honourable Supreme Court to mean that the appeal can be admitted to a hearing but the same cannot be heard and disposed of without predeposit of the disputed property tax. It was held that the Appellate Authority had no jurisdiction to waive the condition of deposit or stay collection of the tax pending disposal of the appeal, but it has got the powers to adjourn the hearing of the appeal enabling the assessee to pay the tax before the appeal is actually heard and determined. The Appellate Authority, it was held, could grant adjournment for valid reasons, but could not grant stay of recovery of the amount of tax. It was further held that in case there was hardship, the High Court under Article 226 of the Constitution of India had the jurisdiction to interfere. While interpreting the

provisions of Section 170 of Delhi Municipal Corporation Act, it was observed that the right of appeal was the creature of a statute. The view taken by the Delhi High Court in another case reported in 1982 Rajdhani Law Reporter 247 [Punj Sons (P) Ltd. v. Municipal Corporation of Delhi] that the Appellate Authority had powers to have recourse to the provisions of order 41, Rule 5 of the CPC was not approved by the apex Court in Shyam Kishore and others Vs. Municipal Corporation of Delhi and another, .

10. There cannot be any doubt that grant of any adjournment to enable the assessee to pay the tax assessed does grant some relief in appropriate cases where undue hardship is there, but under no circumstances the Appellate Authority has been invested by the apex Court any power to put a restraint upon the corporation from recovering the tax amount. In view of the aforementioned discussion it can safely be observed that while the observations of the apex Court are absolutely of no help to the assessees for laying down the proposition of law that the Appellate Authority can grant stay but it does help the assessees to the extent that the High Court can grant stay in rare cases keeping in view the peculiar facts and circumstances of the case under Article 226 of the Constitution of India.

11. The observations of the honourable Supreme Court in paragraphs 7 and 10 (page Nos. 159 and 161 of 21 STC) in Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, which were relied upon by the counsel for the assessees does not advance his argument to any logical end. The perusal of the paras 7 and 10 (page Nos. 159 and 161 of 21 STC) of the judgment of the apex Court in Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, , which are reproduced below would make it clear that the apex Court was interpreting as to what was the meaning of the word "entertained" and it was held that the word "entertained" means that the appeal as filed would not be admitted for consideration unless there was satisfactory proof available of the making of deposit of admitted tax :

"7. To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word "entertained" in this context ? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available ? The dictionary meaning of the word "entertain" was brought to our notice by the parties, and both sides agreed that it means either "to deal with or admit to consideration". We are also of the same opinion. The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso ? Is it "entertained" when it is filed or is it "entertain" when it is admitted and the date is fixed for hearing or is it finally "entertained" when it is heard and disposed of ? Numerous cases exist in the law reports in which the word "entertained" or similar cognate expressions have

been, interpreted by the courts. Some of them from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. For the present we must say that if the Legislature intended that the word "file" or "receive" was to be used, there was no difficulty in using those words. In some of the statutes which were brought to our notice such expressions have in fact been used. For example, under Order 41, Rule 1, of the CPC it is stated that a memorandum shall not be filed or presented unless it is accompanied, etc. ; in Section 17 of the Small Causes Courts Act, the expression is "at the time of presenting the application". In Section 6 of the Courtfees Act, the words are "file" or "shall be received". It would appear from this that the Legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word "entertain" and it must be accepted that it has used it advisedly. This word has come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them.

..... 10. In our opinion these cases have taken a correct view of the word "entertain" which according to dictionary also means "admit to consideration". It would, therefore, appear that the direction to the court in the proviso to Section 9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai, C.J.) holds that the words "accompanied by" showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be accompanied by satisfactory proof, it had to be in the shape of something tangible, because no intangible thing can accompany a document like the memorandum of appeal. In our opinion, making "an appeal" the equivalent to the memorandum of appeal is not sound. Even under Order 41 of the Code of Civil Procedure, the expressions "appeal" and "memorandum of appeal" are used to denote two distinct things. In Wharton's Law Lexicon, the word "appeal" is defined as the judicial examination of the decision by a Higher Court of the decision of an inferior court. The appeal is the judicial examination ; the memorandum of appeal contains the grounds on which the judicial examination is invited. For purposes of limitation and for purposes of the rules of the court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax."

The aforementioned observations of the apex Court in *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, defining and pointing out the distinction between the words "entertained" and "admitted to consideration" when examined in the light of the provisions made in Sections 20 and 39 of the Punjab and Haryana Acts does not and cannot lead us to any such inference that the assessee can in the first instance, on the

presentation of the appeal ask for stay order under Sub-section (1) of the Act on the ground that he has a good prima facie case and that in case he does not succeed in convincing the Appellate Authority that he had a good case on merit, he can fall back upon the proviso to Sub-section (5) of the Act and ask the Appellate Authority to entertain the appeal without payment of tax as he is unable to pay the same. Neither on the basis of the observations made by the apex Court nor on the basis of the interpretation of the provisions of both the Punjab and Haryana Acts, it can be held that the assessee can move his application for stay on the ground of prima facie case. The provisions of the two Acts, in our considered view, will have to be construed harmoniously and the only conclusion which can be drawn is that an appeal is maintainable either under Sub-section (1) of Section 20 or 39 of the two Acts but the same shall not be entertained until and unless the same is accompanied by a satisfactory proof of payment of tax or of the penalty amount. In other words, the Appellate Authority is debarred from entertaining the appeal for consideration in the absence of proof of deposit unless the assessee brings his case within the meaning and purview of the proviso. The ratio of law, in our considered view, as laid down in *Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another*, , does not go in favour of the assessee rather the same goes against them.

12. 61 *Uptron Powertronics Vs. Collector of Central Excise, Meerut*, , a Division Bench of the Delhi High Court set aside the order of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, directing the petitioner to deposit 50 per cent of the sum demanded as a condition precedent before hearing the appeal. The Delhi High Court set aside the order of the Tribunal wherein it was mentioned that it need not go into the prima facie nature of the case of the appellant. The court held that in case the appellant wanted any discretionary relief in his favour he was first to show prima facie substance in his claim and on this being done he has further to show undue hardship to him. It was observed that the reverse was not to be done. In our considered view the observations of the Delhi High Court are inapplicable to the facts of the instant case. A reading of the judgment in *Uptron Powertronics Vs. Collector of Central Excise, Meerut*, shows that the specific provision relating to the stay matter was not noticed by the Bench. The observations were made while dealing with a writ petition and as has been observed by us, the High Court in exercise of jurisdiction under Article 226 of the Constitution of India can grant stay keeping in view the peculiar facts and circumstances of a case and order the hearing of an appeal without depositing the tax or a part thereof. It, therefore, inevitably follows that the judgment of the Delhi High Court is inapplicable to the facts of the instant case.

13. Reliance placed upon the Division Bench judgment of this Court in *Excise and Taxation Commissioner, Patiala's case* [1971] 27 STC 391 by the counsel for the assessee, in our considered view, is misplaced. The following observations of the Division Bench clearly indicate that the Appellate Authority has the implied power to grant stay only if an assessee was able to show his inability to pay the tax

amount and not otherwise :

"From the plain reading of the proviso, it is clear that in case of non-payment of the tax, before entertaining an appeal, the Appellate Authority has been empowered to determine if the assessee is unable to pay the tax in full or the penalty and to pass an appropriate order, either exempting it in full or requiring part payment of the same. A fortiori the exercise of this wide power implies that in case of entertaining the appeal the Appellate Authority has power to stay the recovery proceedings and pass an order to that effect. If that be not so, it would be strange to find that the Appellate Authority is satisfied that the assessee is unable to pay the tax and still cannot relieve him from the harassment to be caused by the recovery proceedings. This could not be the intention of the Legislature. Thus, we are clearly of the opinion that the Appellate Authority while using the powers given under the proviso in favour of assessee, has implied power to stay the proceedings for the recovery of the tax. It is noteworthy that in the instant case the Appellate Authority not only got the part payment of the tax made but also secured the payment of the remaining amount by getting the property of the assessee hypothecated."

The aforementioned observations clearly indicate that the Appellate Authority had implied power to grant stay in a situation where the assessee is unable to pay the tax amount and if inability to pay is not shown then there is no power to grant stay.

14. Coming to the last case, i.e., Kisan Workers Transport Co-operative Society Ltd.'s case 1982 ITR 345 on the basis of which reference has been made to the Full Bench, the analytical examination of the said case does reveal that the observations made by the learned single Judge, in the aforementioned case, do support the proposition of law canvassed by the learned counsel for the assessee. However, the question arises whether the view taken by learned single Judge in the aforesaid case that the authorities should find out amongst other things whether the impugned tax was prima facie legal or not in view of the provisions of the two Acts with which we are dealing is correct or not and our answer is in the negative. The facts of the said case were that Assessing Authority under the Punjab Passengers and Goods Taxation Act, 1962, framed assessment orders for two assessment years against which the assessee filed appeal before the Appellate Authority which ordered the assessee to pay 1/4th of the tax amount by a particular date before the appeal could be heard on merits. The assessee did not deposit the amount and preferred revision petition before the Excise and Taxation Commissioner who extended the time for payment of the tax amount. The time allowed had expired before the tax was paid entailing the dismissal of the appeal. The revision petitions were also dismissed and the assessee approached the High Court under Article 226 of the Constitution of India. It was held by this Court that the authority while exercising the discretion demanding the deposit of the tax levied as a condition precedent should not treat it as a matter of routine and should find out amongst other things whether the

amount of tax was legal or not.

15. In view of the specific bar in the Punjab Act and Haryana Act, it is difficult to uphold the ratio of the single Bench judgment that the appellate and revisional authorities amongst other things should prima facie find out whether the impugned tax was legal or not. It is relevant to note at this stage that no provision of the Punjab Passengers and Goods Taxation Act, 1962, was noticed by the single Bench. In any case, we are unable to agree with the proposition of law laid down by the single Bench that the appellate and revisional authorities can while considering the stay matter keep in mind the prima facie nature of the case. The view of single Bench on this point is, therefore, overruled. As has been observed by us in the earlier part of the judgment and as has been so held by the apex Court, the existence of alternative remedy as such is no bar to the exercise of the extraordinary jurisdiction in a writ petition and, therefore, we do not have even the slightest quarrel with the proposition of law laid down by the single Bench of this Court in *Kisan Workers Transport Co-operative Society Ltd.*'s case 1982 ITR 345 on the aforesaid point.

16. Having dealt with the arguments of the counsel for the assesseees and the case law cited by them, the arguments of counsel for the State and the judicial pronouncements cited by them need to be adverted to. The precise arguments have already been noticed by us in the earlier part of the judgment and we hasten to add that the same have got force in view of the law laid down in several judicial pronouncements to be noticed hereinafter.

17. In *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, a Constitution Bench of five Judges of the honourable Supreme Court while dealing with the Constitutional validity of certain provisions of the Bombay Provincial Municipal Corporations Act (59 of 1949) and Section 406 (59 of 1949) of Bombay Provincial Municipal Corporations Act as amended by Gujarat Act (5 of 1970) held as under :

"After hearing the learned counsel for the parties, we are unable to subscribe to the view taken by the High Court. Section 406(2)(e) as amended states that no appeal against a rateable value or tax fixed or charged under the Act shall be entertained by the Judge in the case of an appeal against a tax or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant, unless the amount claimed from the appellant has been deposited by him with the Commissioner. According to the proviso to the above clause, where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject to such conditions as he may deemed fit. The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any property tax assessed upon such value has been presented to him.

Power at the same time is given to the appellate Judge to relieve the appellant from the rigour of the above provision in case the Judge is of the opinion that it would cause undue hardship to the appellant. The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution. It is significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision in our considered opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them ; it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income Tax Act, 1922. The proviso to that section provided that ".....no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the

exercise of the right. Any requirement for the discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission."

18. The perusal of the aforementioned observations of the apex Court clearly show that the apex Court while dealing with the constitutional validity of certain provisions of the Bombay Provincial Municipal Corporations Act and Section 406 of the said Act as amended by Gujarat Act (5 of 1970) held that the right of appeal was the creature of the statute and that it failed to understand as to why the Legislature while granting the right of appeal could not impose conditions for the exercise of such right. While reproducing the observations of the apex Court we do riot and need not comment upon the constitutional validity of the provision of the statute with which we are dealing with as the vires of the two Acts have already been upheld by the Division Bench while referring the case to us. The aforementioned observations, in our considered view, throw sufficient light, for holding that the assessee have to accept the conditions laid down in the provision pertaining to appeals if they want to take advantage of the same and that the conditions imposed therein cannot be described to be onerous. Moreover, the words "undue hardship" cannot, in our considered view, be equated with the words "unable to pay" as have been used in the statute.

19. The discussion on *The Anant Mills Co. Ltd. Vs. State of Gujarat and Others*, straightway brings us to the examination of *Shyam Kishore and others Vs. Municipal Corporation of Delhi* and another, once over again as this judgment of the apex Court was sought to be relied upon not only by the counsel for the assessees but by the counsel for the State as well. In view of the observations made by us in the earlier part of the judgment, it is not understandable as to how the ratio of law of the apex Court helps the assessees. In our considered view the ratio of law of the apex Court in *Shyam Kishore and others Vs. Municipal Corporation of Delhi* and another, as a whole goes against the assessees except to the extent that the High Court can always interfere in writ jurisdiction in a particular given case, as has been observed by the apex Court.

20. In *Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others*, the question arose whether the appeal of a person against whom penalty has been imposed could be dismissed in case of non-compliance of order of deposit as provided in Section 129(1) of the Customs Act, In the abovesaid case the honourable Supreme Court ruled that in case of non-deposit of penalty amount levied under the aforementioned provisions of the Customs Act, the appeal could be dismissed. Section 129(1) of the Customs Act reads as under :

"Where the decision or order appealed against related to any duty demanded in respect of goods which are not under the control of customs authorities or any

penalty levied under this Act, any person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied :

Provided that where in any particular case the Appellate Authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit."

21. In *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, , the honourable Supreme Court was dealing with Section 129-E of the Customs Act which is reproduced below :

"Where in any appeal under this chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied :

Provided that where in any particular case, the Collector (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Collector (Appeals) or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue,"

The apex Court held that the aforesaid provision provides conditional right of appeal and that it was obligatory on the appellant to deposit the dues or penalty pending appeal, failing which the Tribunal was competent to reject the appeal. It was further held that the proviso did empower the Appellate Authority to dispense with such deposit in case of undue hardship. The right to appeal, it was observed by the apex Court was neither an absolute right nor an ingredient of natural justice, the principle of which must be followed in all judicial and quasi-judicial adjudications. The following observation of the apex Court clearly supports the arguments of the learned counsel for the State that right to appeal was a statutory and that it could be circumscribed by conditions :

"Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant."

In our considered view, the observations of the apex Court as reproduced above are fully applicable to the facts of the instant case. The provisions in the statute being dealt with herein are similar except that words "undue hardship" has been used in the proviso in the customs Act whereas the words "unable to pay" has been used in the Punjab and Haryana Acts.

22. In addition to the law laid down by the honourable Supreme Court in various

judicial pronouncements noticed above, two judgments of Calcutta and Punjab and Haryana High Court which have got direct bearing can be quoted with advantage. The Calcutta High Court in Chatter Singh Baid and Others Vs. Corporation of Calcutta and Others, was discussing Section 183(3-A)" of the Calcutta Municipal Act, 1951, which reads as under :

"No appeal under this section shall be entertained unless the consolidated rate payable up to the date of presentation of the appeal on the valuation determined--

(a) by an order u/s 182, in the case of an appeal to the Court of Small Causes,

(b) by the decision of the Court of Small Causes, in the case of an appeal to the High Court,

has been deposited in the municipal office and such consolidated rate is continued to be deposited until the appeal is finally decided."

While dealing with the aforementioned section, it was held that right of appeal was not a natural or inherent right attaching to every litigation and that such a right does not exist and cannot be assumed unless expressly given by the statute. Relying upon the ratio of The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, it was observed that right of appeal was a creature of statute and Legislature could impose conditions for the exercise of such right and there is no constitutional or legal impediment to imposition of such a condition for deposit of tax. Reference was made to other judicial pronouncements as well. The following observations of the Calcutta High Court deserve reproduction :

"A right of appeal is not a natural or inherent right attaching to every litigation and the right of appeal does not exist and cannot be assumed unless expressly given by statute (See Rangoon Botatung Co. Ltd. v. Collector, Rangoon (1903) 30 I. A. 197 : ILR 40 21 , Soorajmull Nagarmull Vs. Commissioner of Income Tax, Calcutta, , Smt. Ganga Bai Vs. Vijay Kumar and Others, . Therefore, the provision, viz., Section 183 which conferred upon the petitioners right to prefer appeal against the order disposing of their objection u/s 181 of the Calcutta Municipal Act, could be lawfully amended by inserting a provision imposing the above condition for deposit for entertaining their appeal.

The condition laid down by Sub-section (3-A) of Section 183 of the Calcutta Municipal Act is not something which is without any parallel. Both Mr. Dipankar Ghosh, learned Advocate for the petitioner, and Mr. Pradip Kumar Ghosh, learned Advocate for the respondents, has drawn my attention to nearly similar provisions for deposit of disputed tax duty and rates contained in various other taxing, municipal and fiscal laws. Mr. Dipankar Ghosh, however, submitted that unless the appellate authority is given discretionary powers to relax or modify such condition for deposit of the disputed amount, the condition precedent ought to be pronounced as unreasonable. In my view, the observations made in para 40 of the Supreme Court decision in The Anant Mills Co. Ltd. Vs. State of Gujarat

and Others, , are directly against the above submission of the petitioners. With reference to Section 406(2) of the Bombay Provincial Municipal Act, the Supreme Court upheld the power of the Legislature to impose similar condition for deposit while granting right of appeal. According to the Supreme Court, there was no legal or constitutional impediment to imposition of such a condition. I respectfully agree and apply the aforesaid observations in upholding the validity of Section 183(3-A) of the Calcutta Municipal Act, I am unable to accept Mr. Dipankar Ghosh's submission, that, the court's power u/s 406(2) of the Bombay Provincial Municipal Act to relax the condition for deposit the tax due had at all weighed with the Supreme Court in making the aforesaid observations in The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, . The ratio of the said decision is that the right of appeal is a creature of statute and while granting the right of appeal the Legislature can impose conditions for exercise of such right and there is no constitutional or legal impediment to imposition of such a condition for deposit of tax. The Supreme Court in their subsequent decision in the case of Seth Nand Lal and Another Vs. State of Haryana and Others, , had followed their earlier decision in The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, . The Supreme Court in Seth Nand Lal and Another Vs. State of Haryana and Others, had rejected similar argument that conditions imposed on right of appeal were onerous because no discretion had been given to the appellate or revisional authority to relax or waive the said condition in view of subjects for imposing such a condition."

23. In Food Corporation of India's case [1989] 73 STC 241 this very provision was subject-matter of discussion. The facts of the case were that the Food Corporation of India preferred an appeal u/s 20 of the Punjab Act against the imposition of tax along with an application u/s 20(5) of Punjab Act for exempting it from the payment of tax to the extent of Rs. 29,65,551 on the ground that the disputed tax was not taxable in view of the decision of another Division Bench judgment reported in [1987] 66 STC 7 (Food Corporation of India v. State of Haryana) and that the appellant was unable to pay the tax. It was held by the Division Bench of this Court that even if the Food Corporation of India was not liable to pay any tax at all on the disputed turnover in view of the law laid down in [1987] 66 STC 7 (Food Corporation of India v. State of Haryana), the Tribunal had no jurisdiction to waive the tax on that ground and that the only ground on which the Tribunal could waive the tax was that the assessee was unable to pay the same. Since the Tribunal rejected the arguments of the Corporation that it was unable to pay tax and that since it was held to be a finding of fact, the writ petition of Corporation was dismissed. The ratio of law laid down by the Division Bench judgment in Food Corporation of India case [1989] 73 STC 241, in our considered view, is based on correct interpretation of Section 20(5) of the Punjab Act and its proviso. However, we are unable to endorse the view of the Division Bench that the finding of the Tribunal that the assessee was unable to pay could not be interfered in proceedings under Article 226 of the Constitution of India. In an appropriate case, the High Court as has been observed in the earlier part of

the judgment can interfere in writ jurisdiction and can grant stay in rare cases keeping in view the peculiar facts of a given case.

24. As a sequel to our discussion on the question of law referred to us the following conclusions can be deduced :

(a) The appeal is a creation of a statute and in case a person wants to avail of the right of appeal, he has to accept the conditions imposed by the statute.

(b) The right of appeal being a creature of statute, the Legislature could impose conditions for exercise of such a right. Neither there is a constitutional nor legal impediment for imposition of such a condition.

(c) The right of appeal is neither natural nor inherent attaching to a litigation and such a right neither exists nor can be assumed unless expressly given by the statute.

(d) Even if, this Court was to interpret the bare provisions of two statutes, i.e., the Punjab General Sales Tax Act, 1948 and the Haryana General Sales Tax Act, 1973, it could safely be held that there is a complete bar to the entertainment of an appeal by the appellate authority without the payment of tax amount unless the authority is satisfied that the dealer is unable to pay the amount so assessed and only in that situation the appellate authority for the reasons to be recorded in writing can entertain the appeal without deposit of the payment of such amount.

(e) Neither on the wording nor in view of the spirit of the Punjab and Haryana Acts it is possible to hold that the appellate authority should see the prima facie nature of the case while hearing the stay matter.

(f) The factum of tax assessed being illegal cannot be a relevant consideration for grant of stay by an Appellate Authority.

(g) The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India in rarest of the rare cases in the given facts and circumstances, can grant stay and waive the condition of pre-deposit of tax and the existing alternative remedy in such circumstances would be no ground to refuse interference.

25. As a consequence of the aforementioned discussion, the reference is answered against the assessee and dismiss all the writ petitions. No costs.