
(2002) 08 AHC CK 0119

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2301 of 2002

Khalil Usmani

APPELLANT

Vs

Trade Tax Tribunal, Bench II, Agra & Anr.

RESPONDENT

Date of Decision : 16-08-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Trade Tax Act, 1948 — Section 10

Citation : (2002) 08 AHC CK 0119

Hon'ble Judges : R.B.Misra, J

Final Decision : Partly Allowed

Judgement

R.B. Misra, J.

1. By this writ petition the order dated 28 2002 passed by learned Trade Tax Tribunal on the application of waiver in second appeal No. 229 of 2002, have been challenged.

2. Heard Sri Rakesh Ranjan Agrawal, learned Counsel for the petitioner as well as Sri B.K. Pandey, learned Counsel for the respondent/Commissioner Trade Tax.

3. By consent of the parties, the writ petition are decided at this stage under second proviso to Rule 2 of Chapter XXII of the Allahabad High Court Rules, 1952.

4. It appears that the petitioner is engaged in the business of purchase and sale of goods and is merely handling the goods by taking out the same from Breakwan and keeping the same on platform. According to the petitioner the provisional assessment order passed by Respondent No.2 on 2412000 was challenged by the petitioner in writ petition No. 130 (Tax) of 2000 which was partly allowed and the petitioner were directed to file appeal against that consequently the Respondent No. 2 passed an best judgment assessment order on 2732002 imposing penalty of Rs. 1,260,000 against which the petitioner preferred first appeal under Section 9 of the U.P. Trade Tax Act in short called Act before the appellate authority. The appellate authority granted stay to the extent

of 95% to the disputed amount of tax for hearing the first appeal. Against such order the petitioner preferred second appeal before the Trade Tax Tribunal which directed on 2662000 to deposit only 60000 and allowed the first appeal to be heard. The first appeal for the year 19992000 was dismissed on 2962002. The petitioner preferred the second appeal under Section 10 of the Act alongwith the grounds of appeal, waiver application with affidavit in support thereof and the stay application. The Tribunal considered the facts and circumstances and contents narrated in the affidavit and has directed by its order on 282002 that by depositing only 5% of the disputed tax condition of depositing one third of disputed amount of tax for hearing the stay application preferred the second appeal shall be dispensed with.

5. It has been contended on behalf of the petitioner that his financial condition is poor and he has no capacity to pay the tax therefore, the order dated 282002 should be set aside placing reliance on 2002 UPTC 690 (Heins India Private Limited v. Deputy Commissioner, Central Excise). Where, this Court has held that while dealing with the dispensation of the predeposit of the duty, the prima facie case on merits has to be considered by the Commissioner (Appeals).

6. In 1998 (98) ELT 350 (Cal), Tata Iron & Steel Co. Ltd. v. Commissioner (Appeals) Central Excise Calcutta, it was held that one of the relevant factors which is required to be considered by the appellate authority under Section 35F of the Act is prima facie case on merits and such other relevant factors pertaining to undue hardship while dealing the stay/dispensation of predeposit.

7. In para 4 of Tata Iron & Steel Co. (supra), it was noticed that in the case of Vijay Prokash D. Mehta and Jawahar D. Mehta v. Collector of Customs (Preventive) Bombay, 1989 (39) ELT 178 (SC) : AIR 1998 SC 2010, Supreme Court observed that while dealing with Section 129E of the Customs Act, which is para materia to Section 35F of the Central Excises and Salt Act, 1944, that the proviso gives the discretion to the authority to dispense with the obligation to deposit in case of undue hardship and that such discretion must be exercise on relevant materials honestly, bona fide and objectively. Their Lordships further observed that in the facts and circumstances of each case all the relevant factors viz. the probability of the prima facie case of the appellant and the conduct of the parties have to be taken into consideration by the appellate forum while it is to decide the question whether the deposit has to be dispensed with or not.

8. In 1990 UPTC 321 (M/s. Matsushita Television Audio Ltd. India v. Commissioner (Appeals) Customs and Central Excise, Noida) while dealing Rule 57G, Central Excise Rules, 1944, in respect of Modvat claimed, the adjudication officer issued show cause notice and after obtaining objection claimed of modvat was disallowed and appeal with stay application preferred against such order, the appellate authority passed stay in part and condition of predeposit was waived in part. Since Section 129E of Customs Act is identical to Section 35F of Central Excise Act, therefore, High Court directed the appellate authority to rehear and dispose of the stay application.

9. It was held in para 9 of *Matshusita Television (supra)*, that there could not be any dispute about legal proposition that the appellate authority while considering an application under proviso in Rule 35F should take a realistic view of the matter in determining whether the prayer for dispensation of pre condition of deposit of the amount required to be deposited should be allowed or not and if so allowed what conditions should be imposed upon the person claiming such dispensation.

10. In para 12 of *M/s. Matshusita Television (supra)*, it was observed that, considering the amount involved and the nature of goods, authorities below were to give opportunity to the appellant before passing the order to produce material in support of its claim as the appellant had very good case on merits and if the stay as prayed for was not granted it might cause great irreparable loss/injury and hardship to the appellant, therefore, the Court felt it was expedient in the interest of justice to remand the matter to the appellate authority for afresh disposal of the stay application after affording an opportunity to the parties to produce material/evidence in support of the grounds taken in the stay application.

11. In *M.C. Goel's v. Union of India*, 1988 (35) ELT 449, dealing with the Excise and Customs Act, it was observed that Section 129E of the said Act had almost similar provisions as contained in Section 35F of the Central Excise Act had almost similar provisions as contained in Section 35F of the Central Excise Act. Proviso to Section 129E is identical to the proviso to Section 35F of the Central Excise Act. In both the provisos it is mentioned that the person desirous of appealing against the order shall, pending the appeal deposit with the proper officer the duty demanded or the penalty levied. Provisos to Rule 129E of the Customs Act as well as to Rule 35F of the Central Excise Act similarly provide 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 safe guard the interest of the revenue.

12. In 1999 UPTC 423 (*M/s. Kaushal Industries, Agra v. Commissioner (Appeals) Customs and Central Excise, Ghaziabad*) it was held in reference to Section 35F Central Excise Act and Salt Act, 1944 that prima facie case on merits and the financial condition has to be looked into for deciding the application for waiver and stay.

13. In 1998 (104) ELT 330 (Cal) (*Ruby Rubber Industries v. Commissioner of C. Ex., Calcutta II*) while dealing the stay/dispensation of predeposit while elaborating the prima facie case and its meaning the Calcutta High Court has indicated that prima facie case is a relevant factor for deciding the question of undue hardship and prima facie case did not necessarily mean that one must have (sick) edged case which is bound to succeed where as the prima facie case always has been held by the Courts to be a case which is arguable and fit for trial

and consideration and the Court finds that there is nonapplication of mind on the part of Tribunal to prima facie case, the Court may set aside tribunal's partial stay order and remand the matter for afresh decision

It was also held that in the matter of stay/dispensation of predeposit the alternative remedy of appeal is not provided for against stay orders passed under Section 35F of Central Excise Act, 1944, therefore, the writ petition against stay order is maintainable under Article 226 of Constitution.

14. In 1998 (104) ELT 325, Sri Krishna v. Union of India; following AIR 1970 SC 713, Malkiat Singh v. State of Punjab; AIR 1989 SC 1789, State of M.P. v. Narayan Singh; AIR 1972 SC 1610, Nasir Sheikh v. State of Bihar and AIR 1976 SC 1527, S.I. Coir Mills v. Addl. Collector, it was observed that in respect of stay/dispensation of predeposit and undue hardship, the Tribunal is obliged to consider in its order, the pleas raised before it about existence of prima facie merits and if appellant has such a strong prima facie case then he is most likely to be exonerated him from payment and the Tribunal if still insist on pre deposit of the amount that would amount to undue hardship.

15. In the case of State of M.P. v. Bharat Heavy Electricals Ltd., 1998 (99) ELT 33 (SC), the Supreme Court has examined the expression? shall be liable to pay penalty equal to 10 times the amount of entry tax? in Section 7(5) of the M.P. Entry Tax Act, 1976. The Supreme Court held that the penalty for violating the provisions of Entry Tax is the maximum and not a fixed rate of penalty the penalty imposed under the Entry Tax Act in M.P. is not confiscatory in nature. An assessee is always liable to explain the circumstances and satisfy the genuine reasons forcing the assessee of not complying with the law in letter and spirit in such cases the penalty can be waived or token penalty can be imposed by the authority. The Supreme Court thus held that the penalty is not automatic under the statute.

16. The revising authority discharges judicial functions while deciding the revision and the stay and waiver application. The order under Section 10(4) of the Act is subject to scrutiny under Articles 136 and 226 of the Constitution. The order as such must be a speaking order and the decision given must be supported by reasons, so that the superior Court may peruse that it is in accordance with law and is not a result of caprice whim fancy, or reached on the basis of policy or expediency, in view of M/s. Mahabir Prasad Santosh Kumar v. State of U.P., AIR 1970 SC 1302 and M/s. Travancore Rayons Ltd. v. Union of India, AIR 1971 SC 862, where it was observed that the absence of reasons vitiates the conclusions of a judicial authority.

17. In the light of above observations the petitioner prayed to quash the order dated 282002 as well as the amount of disputed tax and to waive the condition of predeposit of required amount. I do not find much force in the contentions of learned Counsel for the petitioner that the learned Tribunal has not considered the case of the petitioner on the merits of the case whereas the Tribunal has

itself indicated that the disputed points shall be adjudicated at the final stage as it was not necessary to give verdict on that point. The consideration of merits, undue hardship shall depend upon the facts of each case and the same could be analysed or evaluated in the prevailing circumstances of a case depending upon the circumstances involving financial condition, capacity to pay tax status and condition of dealer/assessee as there could not be any mathematical formula set pattern or yard stick or prescribed parameter for this even if the Tribunal does not mention specific words e.g. prima facie merits undue hardship, weak financial condition, poor business set up, capacity to pay, bank accounts etc. in its order but it would be sufficient if Tribunal analyses the facts and circumstances of a case interest of justice as well in the interest of revenue and has recorded adequate reasons to relax or waive the requirement of payment of predeposit of disputed amount of tax. This Court in exercise of its jurisdiction under Article 226 of Constitution may not give its indulgence to invoke its discretion to give any remedy in a case.

18. In facts and circumstances, of the present case it is directed that by depositing 3% of the disputed tax to the satisfaction of the concerned authority within six weeks from today the remaining disputed amount shall not be insisted upon to be deposited and the second appeal No. 229 of 2002 shall be heard by the Tribunal expeditiously. If the above indicated amount is not deposited within the stipulated time, the conditional order of stay shall automatically be discharged.

19. In view of the above observations, the writ petition is partly allowed with no amount as to cost.