(2017) 08 BOM CK 0157

In the Bombay High Court

Case No : 5654 of 2017

Kim Steel Strips Pvt. Ltd., & Anr. — APPELLANT

Vs

The Commissioner of Central Excise and Customs — RESPONDENT

Date of Decision : 03-08-2017

Acts Referred:

Central Excise Act, 1944, Section 35, Section 35F, Section 35B(1)(b) - Appeals to Commissioner (Appeals)]. - Deposit, pending appeal, of duty demanded or penalty levied. -

Citation : (2017) 08 BOM CK 0157

Hon'ble Judges : Anoop V.Mohta, Anuja Prabhudessai

Bench : DIVISON BENCH

Advocate : Tapan Thatte, Sagar S.Tambe, Swapnil Bangur, Sham V.Walve

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. The Petitioners have invoked the writ jurisdiction of this Court to challenge order dated 22.11.2016 passed by the Commissioner of Central Excise and Customs, Belapur. In the alternative the Petitioners have sought direction that Appeal filled by them should be heard without insisting on monetary predeposit under Section 35 of the Central Excise Act,1944. (The Excise Act).

3. The learned Counsel for the Respondent has raised a preliminary objection about the maintainability of the Petition. He has submitted that the Petitioners have an alternative remedy of filing a statutory appeal under Section 35B (1)(b) of the Excise Act, and hence they should not be permitted to invoke the writ jurisdiction of the Court.

4. Mr. Tapan Thatte, the learned Counsel for the Petitioners submits that, existence of alternative remedy is not a bar to writ jurisdiction, specially when the impugned order is arbitrary and is in violation of principles of natural justice.

He has submitted that deposit of 7.5 % of duty on penalty is the prerequisite condition for filing of the appeal. Such deposit condition is onerous. He has submitted that the Petitioners are not able to pay such amount. He submits that the Petitioners cannot be deprived of the legal remedy solely due to his financial difficulties. He, therefore, contends that this is a fit case to entertain the writ petition or to waive the monetary predeposit. The learned Counsel for the Petitioners have relied upon the judgments in M/s.Baburam Prakash Chandra Maheshwari V. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar reported in AIR 1969 SC 556, Government of Andhra Pradesh & Ors V. Smt. P. Laxmi Devi reported in 2008(2) RCR Civil, 561 and Punjab and Haryana High Court passed in Jindal Drugs Pvt.Ltd. V. Union of India reported in 2016(340) ELT 67.

5. In response, the learned counsel for the Respondent contended that; the Petitioners have already filed the appeal; Section 35F contemplates the deposit of part of penalty or fine; they have neither deposited the amount nor raised any substantial grounds of arbitrariness or violation of principles of natural justice; or any sort of illegality including breach of principles of the natural justice. The decision relied upon by the Petitioners are distinguishable and are not applicable to the facts of the case.

6. We have considered the submissions advanced by the learned Counsels for the respective parties. The Petitioners herein have challenged the order passed by the Commissioner, which is Appellable under Section 35B(a)(b) of the Excise Act. Hence, there is no dispute that the Petitioners have the alternative and equally efficacious remedy to challenge the order passed by the Commissioner. In M/s.Baburam Prakash Chandra Maheshwari (Supra) the Apex Court has held that :

''''There are at least two wellrecognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is wellsettled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the High Court under Art.226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course.(See the decisions of this Court in Carl Still G.m.b.H.v. State of Bihar, AIR 1961 SC 1615 and Bengal Immunity Co.Ltd. V.State of Bihar, (1955) 2 SCR 603= (AIR 1955 SC 661). In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice (See 1958 SCR 595,605=(AIR 1958 SC 86, 93))''''

7. In the instant case, the Petitioners have not challenged vires of any provision of law. Though the learned Counsel for the Petitioners have submitted vaguely that the impugned order is arbitrary and is in violation of principles of natural justice, no such materials and grounds have been placed on record. Hence,the two well recognised exceptions stated in the case of M/s. Baburam Prakash Chandra Maheshwari (supra) are not applicable to the facts of the present case.

8. It is pertinent to note that the Petitioners have already filed an appeal under Section 35B(1)(b) of the Excise Act. Section 35F of the Excise Act mandates deposit of certain percentage of duty demanded or penalty imposed before filing the Appeal. This Section reads thus:

'''' Deposit of certain percentage of duty demanded or penalty imposed before filing appeal :The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal

(i) under subsection(1) of section 35, unless the appellant has deposited seven and a half per cent. Of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;

(ii) against the decision or order referred to in clause (a) of subsection (1) of section 35B, unless the appellant has deposited seven and a half percent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of subsection (1) of section 35B, unless the appellant has deposited ten per cent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.''''

9. A plain reading of this provision makes it clear that the deposit of certain percentage of duty or penalty is a prerequisite for filing the appeal. The provision does not confer any powers on the appellate authority to waive or reduce the mandatory prerequisite. Furthermore, the amounts which is required to be deposited, is 7.5% per cent of the duty demanded or fine imposed, which cannot stated to be exorbitant. The decision of the Apex Court in Government of Andhra Pradesh & Ors. V. Smt. P. Laxmi Devi 2008(2) RCR Civil, 561 (Supra) would not be applicable in the facts of the present case. Similarly, the decision of Jindal Drugs Pvt.Ltd. V. Union of India 2016(340) ELT 67 of Panjab and Haryana High Court is of no assistance as the Petitioners have no where alleged contravention of any provisions of Excise Act. As stated earlier, the only ground for invoking the writ jurisdiction or seeking waiver of predeposit, is that the Petitioners are not in a financial condition to deposit the amount. In our considered view, this cannot be considered as an exceptional circumstance to invoke the writ jurisdiction or to waive the predeposit, particularly when the amount required to be deposited is 7.5 per cent of the duty demanded.

10. Considering the above facts and circumstances, and in view of the availability

of the alternative efficacious remedy, we are declined to entertain the writ jurisdiction.

11. Therefore, taking overall view of the matter, the Writ Petition is dismissed. There shall be no order as to costs.