
(2014) 04 CAL CK 0002
In the Calcutta High Court
Case No : W.P. No. 4793 (W) of 2012

Nirmala Porwal

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 01-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2(f), 35F, 35G
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 129E

Citation : (2014) 3 CALLT 268

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Pranab Kr. Dutta and N.K. Chowdhury, Advocate for the Appellant;
K.K. Maiti, Advocate for the Respondent

Judgement

Indira Banerjee, J.—In this writ petition, the petitioner has challenged an Order No. S-444/KOL/2011 dated 27.12.11 passed by the Central Excise and Service Tax Appellate Tribunal (CESTAT), East Zonal Bench, Kolkata directing the petitioner to deposit 30% of the total duty demanded, as a condition precedent for stay of the balance demand. The petitioner is engaged in the process of distillation, refining, blending and re-packing of various types of coal tar and petroleum products. According to the petitioner, the petitioner sells the processed materials to different customers, under different codes, according to grade and quality. Mr. P.K. Dutta, appearing on behalf of the petitioner submitted that the process of distillation, refining, blending etc. undertaken by the petitioner does not change the properties of the concerned products/materials.

2. The petitioner was given L6 Licence on 12th January, 1978 and C.T.-2 Certificate on 4th February, 1980 for procuring refined diesel oil known as Solvent CIX in terms of Notification No. 267/67 dated 21st February, 1967 without payment of duty for manufacture of chemicals. The petitioner had procured the raw materials without payment of duty on the strength of the said certificate and the licence. However, the officers of the department tested the

chemicals and the finished products by different test memos in the chemical laboratory of the department and came to the conclusion that no new product came into existence and the process undertaken by the petitioner did not amount to manufacture.

3. The Central Excise Authorities accordingly cancelled the C.T.-2 Certificate vide letter dated 16th September, 1981 and the petitioner had to surrender the L6 Licence at the instance of the Excise authorities. According to the petitioner, the petitioner has all through been carrying out the same procedure. There has not been any change in the procedure. The raw materials and finished goods contain the same ingredients of chemicals even after processing distillation, refining etc.

4. According to Mr. Dutta, all of a sudden, after 10 years, proceedings were initiated by the department by issuing show cause notice for the first time on 19th August, 1992 for the period from 1st April, 1991 to 22nd February, 1992 on the allegation that the petitioner was undertaking activities which amounted to manufacture, wholly on the basis of a rough survey and visual estimation.

5. Mr. Dutta submitted that significantly, in 1981, the Central Excise Department had, on the basis of a test report, arrived at the conclusion that fractional distillation and blending process did not amount to manufacture. However, in 1992, the same process was considered to be manufacture without there being any change either in facts or in the law.

6. Mr. Dutta submitted that a second Show Cause Notice was issued on 13th October, 1992 for the period from 1st December, 1987 to 18th September, 1992 excluding the period from 1st April, 1991 to 21st February, 1992, wholly on the basis of the average production and clearance value of the financial years 1987-88, 1988-89, 1989-90, 1990-91, 1991-92.

7. Mr. Dutta submitted that the average clearance value could not be the basis of the demand, since demand had to be raised on an ascertained sum, on the basis of cogent and tangible evidence.

8. Mr. Dutta further submitted that the demand raised in the aforesaid two Show Cause Notices comes to Rs. 73,33,727.35 which is totally barred by limitation. There is no case made out in the Show Cause Notice of suppression of fact with intent to evade duty.

9. There is no allegation in the Show Cause Notice that the petitioners did not submit the statutory returns required to be submitted from time to time. Subsequently four more Show Cause Notices were issued. Mr. Dutta argued that though the four subsequent Show Cause Notices were within the period of limitation, the value of the exempted goods had not been excluded and SSI benefit had not been extended.

10. In reply to the Show Cause Notice, the petitioner submitted a chart showing the clearance value from their Durgapur and Liluah units during different years. The clearance value of Liluah unit could only be taken into consideration since

the manufactured goods of Durgapur unit were sent to the Liluah unit for packing and selling.

11. The whole dispute centers around the question whether the process undertaken by the petitioner amounts to manufacture. Mr. Dutta argued that there is no evidence at all to show that the process undertaken by the petitioner amounted to manufacture.

12. The learned Commissioner being the Adjudicating Authority passed an order confirming the demand as raised in the Show Cause Notices impugned. The learned Commissioner attempted to draw distinction between distillation and fractional distillation, which according to the learned Commissioner, amounted to manufacture. However, according to Mr. Dutta the findings were not supported by any test report.

13. The order of the learned Commissioner was set aside by the Hon''ble Tribunal by an order dated 14th May, 2008 with a direction to consider the petitioner's case afresh in the light of the directions in the said order.

14. In course of denovo proceeding, written submission was submitted before the learned adjudicating authority, inter alia, contending that the very basis of the demand was wrong and the Show Cause Notice was prejudged.

15. The petitioner contended that the case was covered by the decision of the 1996 (66) ECR 1 18 In that case the Collector had held that fractional distillation is nothing but a purification of Solvent CIX and did not amount to manufacture. The petitioner filed an appeal before the Principal Bench of the learned Tribunal at New Delhi. The learned Tribunal confirmed the view that the process of fractional distillation did not amount to manufacture.

16. Mr. Dutta submitted that in the denovo proceedings the learned Commissioner wrongly interpreted the judgment of the learned Tribunal referred to above held that he found no reason to take a different view in that regard, but again confirmed the demand. On appeal, the Tribunal passed the conditional stay order impugned in this writ petition, directing the petitioner to deposit 1/3rd of the total duty demanded.

17. The short question involved in this writ petition is whether the learned Tribunal was justified in directing the petitioner to pre-deposit 1/3rd of the total duty demanded.

18. Mr. P.K. Dutta appearing on behalf of the petitioner argued that the order has been passed mechanically and in a routine manner and is wholly devoid of any reasons as to why the learned CESTAT directed payment of 1/3rd of the duty demanded. The order is, according to Mr. Dutta is a non-speaking order. Mr. Dutta submitted that the petitioner had a very strong prima facie case since the case of the petitioner was covered by a decision of the Principal Bench of the learned Tribunal at New Delhi in the petitioner's own case.

19. Mr. Dutta submitted that the impugned order of the Tribunal is cryptic. The question of limitation has not at all been considered prima facie even though the major part of the demand is barred by limitation. The demands were not raised within one year, but by invoking the extended period of limitation of five years. Referring to the decision of the Supreme Court in Nizam Sugar Factory Vs. Collector of Central Excise, A.P., Mr. Dutta argued that the extended period of limitation could not be invoked since the facts on the basis of which Show Cause notices have been issued were known to the Authorities.

20. Mr. Maity appearing on behalf of the respondent submitted that u/s 2(f) of the Central Excise Act, manufacture includes any process. The process which is undertaken by the petitioner, therefore, amounts to manufacture for which the petitioner is liable to pay Central Excise duty.

21. Mr. Maity emphatically argued that in the Show Cause Notice it was stated that the finished goods were thinner, softer, diluter and obtained by subjecting the raw materials to various processes and chemical treatment such as acid and alkali treatment, fractional distillation which is completely separate and different from ordinary distillation process. The commissioner, thus, raised a demand of Rs. 89,06,036/- which was duly confirmed.

22. Mr. Maity submitted that the judgment in the petitioner's own case rendered by the 1996 (66) ECR 1 18 has no manner of application in this case since in the earlier case the Solvent CIX that was used for processing the product in question was "gramasol 17/98" which was a chemical formulation. In this case, however, the materials were completely different and the manufactured products were also different.

23. Collector of Central Excise, Jaipur Vs. Rajasthan State Chemical Works, Deedwana, Rajasthan, the Supreme Court held that manufacture involves a series of processes. Process in manufacture and/or in relation to manufacture not only implies production but also the various stages through which raw material is subjected to change by different operation. It is the cumulative effect of the various processes to which the raw material is subjected from which the manufactured products emerge. Each step towards production is thus a process in relation to manufacture.

24. Mr. Maity submitted that the issue of whether the activities of the petitioner amount to manufacture or not is yet to be decided by the Tribunal. The question is one of fact, and the writ Court does not ordinarily interfere with facts. The order of the learned Tribunal in regard to pre-deposit is to be complied with and this Court ought not to interfere with the same.

25. Mr. Maity argued that the Supreme Court has in different cases held that interest of the revenue should be protected. In this case, the petitioner has not produced any evidence of financial hardship. The tribunal being prima facie satisfied directed deposit of 1/3rd of the total excise duty.

26. Relying the judgement of the Division Bench of the Madras High Court in M/s. Metal Weld Electrodes and Metro Trading Company (Electrodes) P. Ltd. Vs. The Customs, Excise and Service Tax and The Commissioner of Central Excise, Mr. Maity argued that no writ lies against pre-deposit orders. The only remedy is an appeal u/s 35G of the Central Excise Act, 1944. The writ petition should, therefore be dismissed.

27. Relying on the judgment of the High Court of Andhra Pradesh in V. Rajagopal v. Commissioner of Customs, Central Excise and Service Tax Mr. Maity argued that the validity of an order which is the subject matter of an appeal before a statutory authority, cannot be decided in proceeding under Article 226 of the Constitution of India.

28. "Section 35F" of the Central Excise Act, 1944 provides as follows:-

"35F. Deposit, pending appeal of duty demanded or penalty levied. -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 Central Excise 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 adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the [Commissioner (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 [Commissioner (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.

[Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filling.]"

29. Pending the appeal, an appellant is required to deposit with the adjudicating authority the duty demanded or the penalty levied. However, in any particular case where the Appellate Authority is of the opinion that deposit of duty demanded or penalty levied would cause undue hardship to such person, the Appellate Authority might dispense with such deposit subject to such conditions as he might deemed fit to impose so as to safeguard the interest of revenue.

30. Pre-deposit of duty and penalty pending the hearing of an appeal is a statutory requirement u/s 35F of the Central Excise act 1944. Pre deposit might only be dispensed with, upon satisfaction that pre deposit would cause hardship and not otherwise.

31. An order disposing of an application for dispensation of the requirement of pre-deposit of the disputed duty and/or penalty has to be reasoned. Even though detailed reasons might not be necessary, some reasons are obligatory. The order

should disclose the process of reasoning that led to the decision.

32. The learned Tribunal could have waived pre deposit of disputed duty or penalty in part if it were satisfied that the deposit of the entire duty or penalty would cause financial hardship but not partial deposit or alternatively if the Tribunal were of the prima facie view that the disputed duty and/or penalty might only be partly sustainable. In the instant case the impugned order does not indicate how much of the disputed duty is prima facie sustainable, and how much is not.

33. The learned Tribunal could not have exercised its power to waive pre deposit of duty disputed, even in part without explaining the reason for doing so. The power of dispensation cannot be exercised arbitrarily or whimsically or for the asking. Satisfaction that pre-deposit of the duty demanded would cause undue hardship is the condition precedent for exercise of the power to dispense with the deposit either fully or in part.

34. As held by this Court in *Tijiya Steel v. Union of India* (supra) an order directing pre-deposit or an order waiving pre-deposit may not involve any question of law far less a substantial question of law and hence may not be appealable. An order directing deposit of disputed duty or penalty either in full or in part is not ordinarily appealable. It cannot, therefore, be said that the petitioner has an adequate efficacious alternative remedy.

35. Article 226 of the Constitution of India does not impose any limitation on the power of the High Court to issue writs, even when there is an alternative remedy. Where there is an efficacious alternative remedy this Court refrains from exercising its extra ordinary jurisdiction. This Court would not reject an application under Article 226 of the constitution of India where the remedy, if any, of appeal is uncertain as in the case of the appeals u/s 35G of the Central Excise Act 1944 which depend on subjective satisfaction of the Division Bench of the High Court, of existence of a substantial question of law.

36. In any case, there are at least 3 exceptions to the rule of alternative remedy. A writ application might be entertained where the order is in violation of principles of natural Justice, where the order has been passed under a law which is ultra vires or is otherwise without jurisdiction or in case of an order which is perverse. The impugned order is non-speaking and hence in violation of principles of natural Justice.

37. In the instant case, the Learned Tribunal has cursorily considered the merits of the case. The learned Tribunal has not at all considered the question of limitation. Admittedly, the demand was not raised within one year but almost after five years by invoking the extended period of limitation. The justification of such invocation has not at all been considered.

38. The Commissioner (Appeals) has not at all considered whether there was any fraud, misrepresentation or suppression with intent to defraud revenue to justify

the invocation of the extended period of limitation.

39. In *Nestle India Ltd. Vs. Commnr. of Central Excise, Chandigarh*, the Supreme Court held that the extended period of limitation is not invocable unless there is some positive act other than mere inaction or failure on the part of the manufacturer. There must be conscious or deliberate withholding of information by the assessee to invoke the larger period of limitation. In the instant case, there is not a whisper of the information that was deliberately withheld by the petitioner to avoid its liability to pay service tax.

40. In *Aban Loyd Chiles Offshore Limited and Others Vs. Commissioner of Customs, Maharashtra*, the Supreme Court held that when facts were within the knowledge of the department, invocation of extended period of limitation was not sustainable.

41. The Appellate Authority may dispense with pre-deposit subject to such conditions as it might deem fit to impose as to safeguard the interest of the revenue. In *Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another*, the Supreme court held as follows:-

"8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful to the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay application by referring to decisions in *Siliguri Municipality* and *Dunlop India Cases* (Supra) without analyzing factual scenario involved in a particular case.

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

12. As noted above there are two important expressions in section 35F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva Vs. State of*

Karnataka and others, that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be "undue" it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the interest of revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the interest of revenue."

42. The aforesaid view has been reiterated in *Pennar Industries Ltd. Vs. State of A.P. and Others*, *Ravi Gupta Vs. Commissioner Sales Tax, Delhi* and *Another, Monotosh Saha Vs. Special Director, Enforcement Directorate and Another*, ; *Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others*,

43. In *Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others*, the Supreme Court held:

"10. Principles relating to grant of stay pending disposal of the matters before the concerned forums have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

11. The applicable principles have been set out succinctly in *Siliguri Municipality and Others Vs. Amalendu Das and Others*, *Samarias Trading Co. Pvt. Ltd. Vs. S. Samuel and Others*, and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*,

12. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of

fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given."

44. In the instant case, the order impugned has been passed mechanically, without proper application of mind into the contentions of the assessee and in particular the fact that the assessee's licence of manufacture was withdrawn and the benefit of waiver of Central Excise on raw materials was taken away.

45. The learned Tribunal has apparently not applied its mind to the contention of the petitioner that the same manufacturing activity was being carried on. There was no change either in the factual situation or in law. Thirdly in the petitioner's own case a different Bench of the learned Tribunal had found that the activity of fractional distillation did not amount to manufacture.

46. The learned Tribunal overlooked the fact that M/s. Ganga Rasayanie's case also pertains to fractional distillation and not distillation. The scrutiny of the judgment reveals that the process involved in the case of M/s. Ganga Rasayanie was the process of fractional distillation. The learned Tribunal did not apply its mind to whether there was any difference even prima facie in the activity of the assessee over the years.

47. In *Monotosh Saha Vs. Special Director, Enforcement Directorate and Another*, the Supreme Court held that if on a cursory glance it appeared that the demand raised had no legs to stand, it should be undesirable to require the assessee to pay full or even substantive part of the demand. The Supreme Court held that petitions for stay should not be disposed of in a routine manner, and unmindful of consequences flowing from order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed in view of the factual scenario involved. The Supreme Court observed as follows:-

"9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Siliguri Municipality* and *Dunlop India* cases (supra) without analysing factual scenario involved in a particular case.

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the realization of penalty". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the realization of penalty have to be kept in view.

13. For a hardship to be "undue" it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the realization of penalty. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the realization of penalty. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as required to safeguard the realization of penalty.

16. The above position was highlighted in *Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another*, . The decision was rendered in relation to Section 35F of the Central Excise Act, 1944 where also identical stipulations exist.

18. The only other question that needs to be examined is whether any reduction of the amounts to be deposited as directed by the Tribunal is called for.

19. Undisputedly the appellant had deposited the amount which was directed to be deposited. However, for the balance amount demanded with a view to safeguard the realization of penalty the appellant shall furnish such security as may be stipulated by the Tribunal. On that being done, the appeal shall be heard without requiring further deposit if the appeal is otherwise free from defect."

48. In *Monotosh Saha (Supra)* the Supreme Court was not inclined to reduce the amount which had already been deposited. The Supreme Court directed the claimant to furnish such security as might be stipulated by the Tribunal and on such security being furnished the appeal was directed to be heard without requiring further deposit if the appeal was otherwise free from defect.

49. In *Ravi Gupta Vs. Commissioner Sales Tax, Delhi and Another*, the Supreme Court held:

"10. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

50. In *Pennar Industries Ltd. Vs. State of A.P. and Others*, the Supreme Court observed that in matters pertaining to grant of stay, pending disposal of appeal, though discretion is available the discretion has to be exercised judicially. On

merely establishing prima facie case, interim order of protection should not be passed. But if on a cursory glance it appeared that the demand raised had no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand.

51. There can be doubt as held by the Supreme Court that petitions for stay should not be disposed of in a routine manner and unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. Though there can be rule of universal application, orders have to be passed keeping in view the factual scenario involved. The orders have to be tested on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave private injury or can shake citizens' faith in impartiality of public administration interim relief can be given.

52. Compulsion to pay any unjust dues per se would cause hardship as held by the Supreme Court in *B.M. Malani Vs. Commr. of Income Tax and Another*,

53. In *Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay*, the Supreme Court held that a right to appeal is a statutory right and considering Section 129E of the customs Act, there was discretion in the authority to dispense with the application of pre-deposit in case of undue hardship.

54. For considering whether an appellant is in undue hardship the financial position of the company may be a relevant factor. To ascertain the financial position of the company the balance-sheet of the company may be examined. At the same time, compulsion to deposit an amount that is ex facie not due and payable would must certainly result in undue hardship.

55. Moreover, as observed by the Division Bench of Bombay High Court comprising Ferdino I. Rebello and D.G. Karnik, JJ. in *CEAT Limited Vs. The Union of India (UOI) and Others*, the Court cannot be oblivious of the state of economy and the need for companies to have sufficient liquidity to carry on business and/or industrial activity. Any burden by way of deposit of cash that is required to keep the business running and/or for expansion of business activities has an adverse effect on productivity, employment and the like.

56. As held by Ruma Pal, J. in *Bongaigaon Refinery and Petrochem. Ltd. Vs. Collr. of C. Ex. (A)*, undue hardship is not to be construed as financial hardship alone but covers prima facie strong case or even an arguable case in appeal. This Court was of the view that discretionary power must be exercised in favour of the assessee in the absence of good reasons to the contrary. The aforesaid view was reiterated by this bench in *Farmania Steel Works v. Union of India* reported in 2011 (274) E.L.T. 331 (Cal.).

57. In considering the question of waiver of pre deposit the Tribunal is bound to consider the prima facie merits of the case. Prima facie case does not mean a gilt

edged case as held by this Court in Ruby Rubber Industries Vs. Commissioner of C. Ex., The Tribunal is to examine whether the case made out by the appellant is an arguable one.

58. Where an assessee has a good prima facie case and the disputed duty or penalty has apparently been charged wrongfully, the requirement of pre deposit of the disputed tax or penalty is liable to be waived, since pre deposit of tax not payable by an assessee would in itself cause hardship to that assessee, as held by this Court in Bongaigaon Refinery & Petrochemicals Ltd v. Collector of Central Excise (supra).

59. The judgments of this Court in Ruby Rubber Industries (supra) and Bongaigaon Refinery & Petrochem Ltd. (supra) were followed by this Bench in Tijiya Steel Pvt. Ltd. and Another Vs. Union of India (UOI) and Others,

60. In M/s. Tijiya Steel Pvt. Ltd. (supra) this Court has observed that in considering the question of waiver of pre-deposit, two factors are of paramount importance, the financial capacity of the appellant and the prima facie case. The financial capacity of the appellant has to be considered in all cases, irrespective of the prima facie merits of the case. Even where an appellant has the financial capacity to deposit the disputed tax and/or penalty, pre-deposit might have to be waived if the appellant makes out a strong prima facie case.

61. Where there is a very good prima facie case, pre-deposit would have to be waived altogether. Where the appellant has an arguable case, pre-deposit might be waived on such conditions as would protect the interest of Revenue.

62. The impugned order which has been passed without considering the prima facie merits of the submissions of the petitioner, on the basis of purported reasons which are cryptic, cursory, vague, totally misconceived and no reasons in the eye of law, cannot be sustained and the same is set aside and quashed.

63. The learned Tribunal shall decide the issue of dispensation of pre-deposit afresh in accordance with law and in the light of the observations made above. The Tribunal may, if it so chooses, proceed to decide the appeal on merits, notwithstanding the pendency of any request for dispensation of pre-deposit.

64. The petitioner is also restrained from transferring, selling and/or encumbering its properties or from operating its bank accounts, except in usual course of business, pending disposal by the learned Tribunal of the application of the petitioner. The writ application is disposed of.

Photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously, subject to compliance with the requisite formalities.