
(1998) 07 CAL CK 0004
In the Calcutta High Court
Case No : Writ Petition No. 1009 of 1998

Ruby Rubber Industries

APPELLANT

Vs

Commissioner of C. Ex.

RESPONDENT

Date of Decision : 02-07-1998

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35B, 35C, 35C(4), 35F

Citation : (1999) 63 ECC 17 : (1998) 104 ELT 330

Hon'ble Judges : Samaresh Banerjea, J

Bench : Single Bench

Judgement

Samaresh Banerjea, J.—The Petitioner No. 1 which is a partnership firm and Petitioner No. 2 who is a partner of the said firm have challenged in the instant Writ Application the validity of the Order dated 5th November, 1997 and February 11, 1998 passed by Customs Excise and Gold (Control) Appellate Tribunal being the Respondent No. 2, on the application made by the petitioners before the said Tribunal for stay of realisation of the Excise duty and penalty pending the hearing of the appeal preferred before the Tribunal.

2. By the order dated November 5, 1997 the Tribunal being of the view that the petitioners do not have a strong prima facie case and are not in a very poor financial position disposed of the application for stay by directing to pre-deposit an amount of Rs. 20 lakhs towards the Excise duty and Rs. 50,000/-towards penalty by each of the appellant before the Tribunal. It may be recorded that a sum of Rs. 40,10,177.00 p. was claimed as Excise duty and Rs. 5 lakh was imposed as a penalty on each of the appellant by the Adjudicating Authority.

3. After the passing of the said order the present petitioners applied before the Tribunal for modification of the Order dated 5th November, 1997 inter alia on the ground that the Tribunal while passing such order has not properly applied its mind, inasmuch it totally overlooked the unsecured loan of Rs. 56.50 lakhs and accordingly did not take into account the same while considering the current liabilities of the petitioners.

4. By the Order dated 11th February, 1998 the Tribunal had dismissed the aforesaid application for modification and merely extended the time for making such pre-deposit.

5. Before going into the merits of the challenge of the petitioners of the aforesaid two orders, it is first of all necessary for this Court to dispose of the preliminary points raised by the respondents viz., that the present Writ Application is not at all maintainable. It has been submitted by the learned Counsel appearing for the respondents that the Central Excise Act, 1944 itself provides that an appeal will lie from any order of such Tribunal to the Hon"ble Supreme Court and in such view of the matter without preferring such appeal the petitioners could not have invoked the Writ jurisdiction of this Hon"ble Court.

6. Attention of the Court has been drawn to Section 35L(b) of the Central Excise Act, 1944 which provides an appeal will lie to Supreme Court from any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment. It has been submitted that the aforesaid provision will clearly indicate that an appeal will lie to the Supreme Court not only against the final order passed by the Tribunal but against all other orders including an order relating to pre-deposit.

7. Special emphasis has been placed by the learned Counsel appearing for the respondents on the expression used in Clause (b) of Section 35L viz. "among other things". It has been submitted that such expression used clearly indicates that apart from the final order, against all other orders as well an appeal will lie to the Supreme Court. Reliance has been placed in this connection on the decision of Bombay High Court in the case of Colour-chem. Ltd. Vs. Union Of India, where three Judges' Special Bench of the Bombay High Court has held inter alia that since an appeal is provided against the impugned order of the Tribunal to the Supreme Court it was open to the aggrieved person to by-pass the remedy provided by the Legislature by way of appeal to the Supreme Court and come to the High Court invoking the writ jurisdiction challenging an order of the Tribunal.

8. The learned Counsel appearing on behalf of the Writ Petitioner, on the other hand, has submitted, inter alia, that the language of Section 35L of the said Act really indicates that u/s 35L(e), of the said Act an appeal to the Supreme Court lies only in case of an order passed by the Tribunal relating to the determination of questions having relation to the rate of duty of excise or the value of goods for purposes of assessment and not otherwise. It has been further submitted that the expression, "among other things", does not mean that an appeal to the Supreme Court would lie against whatever order the Tribunal may pass including an order in the matter of pre-deposit. It has been submitted, that an appeal before the Tribunal may involve determination of questions having relation, inter alia, to the rate of duty of excise or to the value of goods for purposes of assessment, imposition of penalty, confiscation of goods, plant, machinery etc.

and imposition of redemption fine in lieu of confiscation, disallowance of Modvat credit etc. An appeal before the Tribunal may involve one or more or all of these points and hence the Legislature used such expression "among other things". It has been further submitted that position would be clear when Section 35B of the Act is examined, which provides, when an appeal will lie to the Appellate Tribunal. It has been further submitted that Section 35C of the Act also clarifies such position. It has been further submitted that judgment of the Bombay High Court is not at all applicable in the instant case. Attention of the Court has also been drawn to the decision of the Supreme Court in paragraphs 27, 90, 91, 92, 93 and 99 in *L. Chandra Kumar Vs. Union of India and others*,

9. Having heard the learned Advocate appearing for the parties on such question, I am unable to accept the contention of the respondents that the writ petition is not maintainable, as an appeal lies u/s 35L, of the Act against an order passed by the Tribunal disposing of the application for stay and pre-deposit.

10. Section 35L(b) clearly provides that any order having a relation to the rate of duty of excise or to the value of goods for purposes of assessment will be appealable to the Supreme Court. Although much emphasis has been laid on the expression, "among other things", used in the said Section by the learned Counsel appearing for the respondent, in my view, such expression does not mean that appeal will lie against all orders passed by the Tribunal including an order passed in the matter of predeposit.

11. It has been rightly contended by the learned Counsel appearing on behalf of the petitioner that an appeal before the Tribunal may involve determination of many questions having relation to, inter alia, the rate of duty of excise or to the value of goods for purposes of assessment, imposition of penalty, confiscation of goods, plant, machinery etc. and imposition of the redemption fine in lieu of confiscation, disallowance of Modvat credit etc. An appeal before the Tribunal may involve one or more on all these points. It is because of the aforesaid reasons, the Legislature in its wisdom has used the expression, "among other things".

12. The intention of the Legislature, in my view, is absolutely clear from a plain reading of the aforesaid Section. Had it been the intention of the Legislature to make every order of the Tribunal including interlocutory order appealable to the Supreme Court, it was not at all necessary for the Legislature to provide that the appeal to the Supreme Court will lie against any order having a relation of rate of duty of the excise or the value of goods for purposes of assessment, thereby specifying the orders against which an appeal will lie before the Supreme Court, and it would be sufficient to provide that an appeal will lie to the Supreme Court against all decisions and orders of the Tribunal. But the Legislature in its wisdom has not done so, but has specified the situation when appeal will lie to the Supreme Court. The submission of the learned Counsel appearing for the respondents therefore cannot be accepted.

13. Such intention of the legislature is also clear from the scheme of Chapter VIA of the said Act which deals with appeal. It will appear from the various sections contained in the said Chapter that the legislature in its wisdom has specified the order against which an appeal will lie whether to the Commissioner of Appeals (under Section 35 of the Act) or to the Appellate Tribunal (under Section 35B of the Act).

14. Section 35 of the Act which provides for appeal to Commissioner of Appeals specifically provides that an appeal will lie to Commissioner of Appeals from any decision or order passed under the Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise. But Section 35L(b) does not provide that an appeal will lie to the Supreme Court from any order or decision of the Appellate Tribunal, but specifies the situation under which an appeal will lie to the Supreme Court. The scheme of the said Chapter will also clearly indicate that no provisions has been made of preferring an appeal against the order of the Appellate Tribunal for pre-deposit u/s 35L of the Act. Such position will be further evident from the fact that Section 35C(4) of the Act specifically provides that same as provided in Section 35G (which inter alia, provides for reference of question of law to the High Court) or Section 35L (which provides when an appeal will lie to the Supreme Court from the order of the Appellate Tribunal) order passed by the Appellate Tribunal or Appeal shall be final.

15. It will, thus, appear from the said scheme that orders passed u/s 35F of the Act are not at all appealable.

16. The decision of the Special Bench of the Bombay High Court upon which reliance has been placed need not engage our attention any further in view of the fact, in the said case, the Bombay High Court was considering a case where a final order of the Tribunal and not an order of pre-deposit was sought to be challenged before the Bombay High Court invoking its writ jurisdiction.

17. For the reasons aforesaid, I am of the view that the present writ petition is maintainable.

18. Coming now to the merits of challenge of the impugned order, it is now well settled through judicial precedence that while considering the question of dispensations of provisions of pre-deposit u/s 35F of the Central Excise Act, 1944, while forming the requisite opinion as to whether such deposit would cause undue hardship to the appellant, whether the appellant has got a prima facie case is a relevant factor to be taken into consideration for deciding the question of undue hardship.

19. The Tribunal in the instant case by the first order has held that the appellant does not have a strong prima facie case and the applicant firm is not in a very poor financial position. The application for modification of the order has been rejected on the ground that the question of unsecured loans has also been taken into consideration and tax will have priority over unsecured loans.

20. It has, however, rightly been contended by the learned Counsel appearing for the petitioner that it will appear from the impugned order dated November 3, 1997 disposing of the application of stay of the applicant that in considering the question whether undue hardship would be caused, the Tribunal in fact did not take into consideration such unsecured loans, although other factors were taken into consideration while considering the current liabilities.

21. That apart, it appears to this Court that the question which is relevant for consideration is not whether the tax will have priority over unsecured loans. Question is as provided u/s 35F itself, whether the pre-deposit will cause undue hardship and in determining question. Consideration of the amount of unsecured loan cannot be ruled out and is a relevant consideration.

22. On the question of prima facie case although it has been observed by the Tribunal that the appellant does not have a strong prima facie case, it does not appear to this case, that there has been a proper application of mind in that respect by the Tribunal.

23. Since now it is well settled that the existence of a prima facie case is also relevant consideration to be taken in consideration while determining the question whether pre-deposit will cause undue hardship., it is certainly necessary for the Tribunal to apply its mind to such question properly. It appears from the Memorandum of Appeal, certain legal question apart from the factual matter have also been raised referring to certain judicial pronouncements and question of limitation has also been raised.

24. It does not appear to this Court that the Tribunal considered such matters for coming to a prima facie finding whether a prima facie case is there.

25. It will also not be out of place to mention here that it is now well settled, through judicial precedence that the prima facie case not necessarily means that one must have a gilt edged case which is bound to succeed. Prima facie case always has been held by the Courts to be a case which is arguable and fit for trial and consideration.

26. Because of the reasons stated above, I am of the view that proper application of mind has not been made on such questions by the Tribunal.

27. I am, however, not inclined to go into such questions myself while exercising writ jurisdiction. I am of the view, it is for the Tribunal itself to go into such question afresh.

28. The impugned order dated November 3, 1998 (sic) as also February 11, 1998 therefore are hereby set aside. The Tribunal shall now consider the question of stay and waiver of pre-deposit as prayed for by the petitioner afresh in accordance with law as expeditiously as possible preferably within two months from the date of communication of this order.

29. Since no affidavit-in-opposition have been used by the respondents, the

allegations made in the writ petition will be deemed to have been not admitted by the respondents.

30. All parties are to act on an operative portion of this judgment on the usual undertaking.