
(2014) 05 CAL CK 0008
In the Calcutta High Court
Case No : W.P. No. 6088 (W) of 2012

Shyam Sel and Power Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A 35F
Customs Act, 1962 — Section 129E

Citation : (2015) 323 ELT 531

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

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

Judgement

Indira Banerjee, J.

1. In this writ application the petitioner has challenged Order No. S-400-405/Kol/2011, dated 1st December, 2011 passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Regional Bench, Kolkata in S.P. Nos. 559-564/2009 in Excise Appeal Nos. 390-395/2009, directing the petitioner to pre-deposit of an amount of Rs. 60 Lakhs within a period of 8 weeks, as a condition precedent for proceeding with the appeal, and further directing that on deposit of the said amount of Rs. 60 Lakhs, the requirement to pre-deposit the balance amount of duty and penalty and penalty on the Director would stand waived. The petitioner has also challenged Order No. M-67/Kol/2012, dated 20th February, 2012 passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Regional Bench, Kolkata, refusing to modify the aforesaid order and directing the petitioner to pre-deposit Rs. 60 Lakhs and report compliance on 28th March, 2012.

2. The short question involved in this appeal is whether the learned Tribunal was justified in directing the petitioner to deposit Rs. 60 Lakhs as a condition for

hearing the appeals.

3. The petitioner No. 1 carries on business, inter alia, of manufacture of diverse goods, which are excisable commodities, including re-rolled steel products, non-alloy steel ingots and sponge iron. The petitioner No. 1 has various units in West Bengal.

4. The petitioners claim to sell their finished products to independent buyers and also to their sister concerns on stock transfer basis. According to the petitioners, the petitioners supply manufactured goods to their sister concerns on payment of duty, visited the registered office of the petitioner No. 1 at Kolkata. Thereafter, on the allegation that the petitioners were clearing goods to their sister concerns at lesser value than the value at which goods were sold to independent buyers, a show-cause notice No. C. No. 11(8)28/AE/CE/Bol/2004, dated 2nd January, 2007, was issued to the petitioner No. 1.

5. In the show-cause notice it was alleged that the petitioner had undervalued manufactured goods cleared from its factory between 1st April, 2004 and 31st March, 2005, particulars of which are as follows:-

(A) Under Valuation

(i) M/s. SSL (Sponge Iron Division - II):

(ii) M/s. SSL (Unit I & II):

(iii) M/s. SSL (Poly Sel. Division):

(B) (1) STOCK TRANSFER TO SISTER UNITS

(a) M/s. SSL (Unit I & II):

(b) M/s. SSL (SID I)

(c) M/s. SSL (Poly Sel Division):

(B) (II) (a) M/s. SSL (Power Division):

(b) M/s. SSL (SID-I):

6. The petitioner was called upon to show-cause why the differential duty should not be recovered along with interest and penalty. By a letter dated 9th July, 2007 the petitioner duly replied to the aforesaid show-cause notice in details dealing with all the allegations and/or contentions in the show-cause notice.

7. Section 11A of the Central Excise Act, 1944, as it stood at the material time when the show-cause notice was issued, is set out hereinbelow for convenience:-

11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.--(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund,

as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within [one year] from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words one year, the words "five years" were substituted.

8. Any duty of excise that is not levied or not paid, or is short levied or short paid, may be recovered by issuing a show-cause notice on the person chargeable with the duty, within one year from the relevant date. It is only where duty has not been levied or paid or has been short levied or short paid or has erroneously been refunded by reason of fraud, collusion, willful misrepresentation or suppression of facts or where there has been contravention of any provision of the Central Excise Act or the Rules made thereunder, with intent to evade payment of duty, a show-cause notice calling upon the person chargeable to duty to pay the duty not paid or short paid, may be issued within five years. A perusal of the show-cause notice issued to the petitioner indicates that the demand for differential duty was in respect of the period from 2002-2003 till 31st March, 2005. The duty necessarily had to be recovered by issuing a show-cause notice within one year. No show-cause notice could have been issued after 1st April, 2006, even in respect of the last consignments specified in the show-cause notice, unless the Revenue was able to make out a case of fraud, collusion, willful mis-statement or deliberate suppression of facts or contravention of any specific provision of the Central Excise Act or the Rules made thereunder with intent to evade payment of duty.

9. Prima facie there is not a whisper in the show-cause notice of any fraud, collusion, willful mis-statement, suppression of facts or of contravention of any particular provision of the Central Excise Act, 1944. There is only a sweeping, vague averment that the petitioner No. 1 appeared to have deliberately undervalued the goods cleared to its sister units, with intent to evade payment of differential Central Excise Duty and Educational Cess.

10. Prima facie goods cleared by the various units of the petitioner No. 1 to sister concerns and/or units were disclosed and duty was paid thereon. It is doubtful whether it can be said that there was any such suppression of facts or any such contravention of the Central Excise Act to entitle the Revenue to invoke the extended period of limitation. These observation are, however, only prima facie

observations which will not influence the adjudication of the pending appeals on merit.

11. The learned Commissioner confirmed the demand and imposed Penalty on the petitioners. The petitioners appealed whereupon the learned Tribunal remanded the matter to the learned Commissioner on the ground that the Commissioner had applied a method of valuation contrary to the method approved by a larger Bench of the Tribunal.

12. Thereafter de novo proceedings were held. The petitioners claim to have submitted all documents pertaining to the disputed period i.e. from 2002 to 2005, to show that there was no undervaluation of the goods transferred to the sister concerns/units, and in any case not deliberate undervaluation to evade duty.

13. The petitioners have alleged that after the matter was finally heard on 28th May, 2008, and after the petitioners had also submitted written submissions, the Commissioner called for reports from the jurisdictional Commissioner in respect of sales made by the petitioners to independent buyers and to sister concerns/units.

14. On or about 27th February, 2009 the Assistant Commissioner of Central Excise, Assansol I Division submitted his report and on 9th March, 2009, the learned Deputy Commissioner, Burdwan Division, submitted his report. These reports were taken into consideration by the Commissioner before confirming the demand as raised in the impugned show-cause notice.

15. Mr. Pranab Kumar Dutta, appearing on behalf of the petitioners submitted that the learned Commissioner sought for the aforesaid reports from the learned Deputy Commissioner and the learned Assistant Commissioner behind the back of the petitioners and relied upon the said reports without furnishing copies of the same to the petitioners. In doing so, the learned Commissioner acted in flagrant violation of the principles of natural justice.

16. By an Order in original No. 48/COMMR/BOL/9, dated 19th March, 2009 issued on 26th March, 2009, the learned Commissioner again confirmed the demand of Rs. 1,75,55,032/- as raised in the show-cause notice and imposed penalty of Rs. 1,85,09,989/- on the petitioner Nos. 1 to 5 and penalty of Rs. 10 Lakhs on the petitioner No. 6.

17. Mr. Datta submitted that the order having been passed by placing reliance on reports obtained behind the back, of the petitioners, without giving copies of the reports to the petitioners, and without giving the petitioners opportunity to make submissions on such reports, the same was in violation of principles of natural justice. Against the aforesaid order the petitioners filed appeals being Excise Appeal Nos. 390-395/2009 in the Customs Excise and Service Tax Appellate Tribunal. East Regional Bench, Kolkata and also filed applications for dispensation of pre-deposit of the disputed duty and penalty, which have given rise to the

order impugned in this writ petition.

18. "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 filing."

19. Section 35F provides that pending an appeal, the appellant is required to deposit the duty demanded or the penalty levied with the Appellate Authority. 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 deem fit to impose, so as a) safeguard the interest of Revenue.

20. Pre-deposit is to be waived in case of extreme hardship. Just as financial inability to make pre-deposit can lead to hardship, payment of an amount which is not payable, under compulsion, also leads to hardship. It is well settled by judicial precedents both of this Court and of the Supreme Court that when a strong prima facie case is made out, pre-deposit must be waived. Even where the assessee has an arguable case, pre-deposit should be waived. However, in such a case the Appellate Authority might have to secure the interest of the revenue in the manner he deems appropriate.

21. In considering the question of waiver of pre-deposit, the Appellate Authority is bound to consider the prima facie merits of the case. Prima facie case does not mean gilt edged case as held by this Court in Ruby Rubber Industries Vs. Commissioner of C. Ex., . The Appellate Authority is to examine, whether the case made out by the appellant is an arguable one.

22. Where an assessee has a good prima facie case, and the disputed duty and/or penalty has apparently been charged wrongfully, the requirement of pre-deposit of the disputed tax and/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 and Petrochem. Ltd. Vs. Collr. of C. Ex. (A), .

23. 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, .

24. 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 good prima facie case.

25. 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. In fact, learned Tribunal was conscious of its duty to consider the prima facie case and accordingly recorded a prima facie finding with regard to the merit of the demand, but cursorily without properly applying its mind to the issues involved in the appeal.

26. In Farmania Steel Works v. Union of India reported in 2011 (274) E.L.T. 331 (Cal.) this Court set aside an order of pre-deposit because the order did not disclose reasons for directing pre-deposit of rupees four lakhs. In this case too the reasons for directing lump sum deposit of Rs. 60 lakhs have not been disclosed.

27. In Amitava Sana v. CESTAT reported in 2007 (215) E.L.T. 173 (Cal.) this Court in effect and substance held that an order of the Appellate Authority for pre-deposit of a lump sum amount, which was devoid of reasons for deposit of that amount, was in flagrant violation of principles of natural justice.

28. In CEAT Limited Vs. The Union of India (UOI) and Others, a Division Bench of Bombay High Court observed:

"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."

29. The Appellate Authority has, under Section 35F of the Central Excise Act,

been conferred with discretion to waive pre-deposit in a case where pre-deposit would cause undue hardship to the appellant. As held by a Division Bench of this Court presided over by P.D. Desai. C.J. in J.N. Chemical (Pvt.) Ltd. Vs. CEGAT, where enabling or discretionary power is conferred on a public authority, the words which are permissive in character may be construed as involving a duty to exercise the power. Thus, where the facts and circumstances of the case warrant dispensation of pre-deposit, pre-deposit must be dispensed with.

30. In J.N. Chemical (Pvt.) Ltd. (supra) the Division Bench found that the appellant was covered by another decision of the Tribunal. The Division Bench, therefore, examined the findings with regard to prima facie case and observed that it was impossible for the Tribunal to arrive at the conclusion that it could not be said that the appellant had a good prima facie case.

31. In ITC Limited Vs. CC (Appeals) and CE and Others, a Division Bench of Allahabad High Court held that while the Court should not grant stay of recovery for the asking, at the same time, while considering an application for waiver of pre-deposit, the Court must apply its mind as to whether the appellant has a strong prima facie case on merits. If an appellant having a strong prima facie case on merits is asked to deposit the amount assessed or penalty imposed, it would cause undue hardship to the appellant.

32. The Appellate Authority may dispense with pre-deposit subject to such conditions as it might deemed 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 under hardship and also to stipulate condition as required to safeguard the interest of revenue."

33. 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*, .

34. 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*, . 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.

35. 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, on which, the question of jurisdiction to issue a show-cause notice for realizing a demand, depends. Admittedly, the demand was not raised within one year but almost two/three years by-invoking the extended period of limitation.

36. The justification of invocation of the extended period of limitation has not been considered at all. The learned Tribunal has not addressed to itself the

question of whether the show-cause notice made out any case of fraud, collusion, misrepresentation or suppression with intent to defraud revenue to justify the invocation of the extended period of limitation. Nor has the learned Tribunal applied its mind to the question of violation of natural justice raised by the petitioner.

37. It is well-settled that violation of principles of natural justice vitiates an order. The learned Tribunal should have examined at least *prima facie*, whether there was violation of the principles of natural justice, which the learned Tribunal has not done.

38. 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.

39. 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. In the instant case, *prima facie*, the clearances were well within the knowledge of the Revenue, and duty was paid thereon.

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

"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."

41. Moreover, as observed by the Division Bench of Bombay High Court comprising Rebello and 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.

42. An ad hoc amount of Rs. 60 lakhs has been directed to be deposited by way of pre-deposit. The impugned order does not disclose the reason for directing deposit of Rs. 60 lakhs. The amount of Rs. 60 lakhs has been directed to be deposited taking into account the total liability of the appellant, in the order under appeal, including penalty and interest.

43. Even assuming that prima facie case was in favour of the demand, insofar as recovery of duty is concerned, the learned Tribunal did not consider whether imposition of 100% penalty was justified in the particular facts of the case.

44. The power to dispense with pre-deposit may be discretionary. However, it is well-settled, that when facts and circumstances of the case warrant exercise of discretion to waive pre-deposit, pre-deposit would have to be waived. Of course, conditions may be imposed to safeguard the interest of the Revenue, as held by the Supreme Court in Union of India (UOI) and Another Vs. Adani Exports Ltd. and Another, cited by Mr. Maity appearing for the respondents.

45. The condition precedent for exercise of power to waive pre-deposit is prima facie satisfaction of the Appellate Authority that pre-deposit would result in undue hardship to the appellant. The Appellate Authority cannot whimsically and arbitrarily waive pre-deposit or even part thereof. Pre-deposit can be waived in part either on satisfaction that payment of the amount that is waived would cause financial hardship to the appellant, but the appellant is, in the financial position to make payment of the rest of the duty and penalty without undue hardship, or alternatively when the Appellate Authority is prima facie satisfied that the appellant has been able to make out a strong prima facie case for setting aside of a part of the duty levied and/or penalty imposed corresponding to the amount, of which pre-deposit is waived. In the instant case, the impugned order does not disclose the reason for directing pre-deposit of Rs. 60 lakhs only and waiving deposit of the balance duty and penalty.

46. The impugned orders cannot be sustained and the same are set aside and quashed. The Commissioner shall consider the stay application afresh in the light of the observations made above. Needless to mention that it will be open to the learned Tribunal to impose terms and conditions for dispensation of deposit to protect the interest of Revenue. The learned Tribunal may, if it so chooses, hear out the appeal itself, notwithstanding pendency of the stay application. Since the appeal has been pending for a long time, the appeal shall be disposed of expeditiously preferably within four months from the date of communication of this order.

47. The petitioners are also restrained from selling, transferring or encumbering their properties or from operating their bank accounts except in the usual course of business till the disposal of the appeals and/or applications for waiver of pre-deposit, whichever is earlier. Photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously, subject to compliance with the

requisite formalities.