(2014) 12 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition (L) No. 3213 of 2014

Smita Conductors Ltd. APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 16-12-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 6A
Constitution of India, 1950 — Article 226

Citation : (2015) 317 ELT 426

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Deepak Bapat, Advocate for the Appellant; B.B. Sharma, AGP, Advocate for the Respondent

Judgement

1. By this Writ Petition under Article 226 of the Constitution of India and moved urgently, the Petitioner is seeking to quash and set aside an order dated 14th July, 2014 passed in Appeal No. 355 of 2014 and another order passed in Rectification Application No. 63 of 2014 in the same Appeal. That order on the Rectification Application is dated 30th October, 2014. The orders, which are annexed as Exhibits ''D'' and ''G'', are thus challenged on several grounds.

2. It is urged that firstly the Appellate Authority had before it not only an application for stay filed by the Petitioner, but the substantive Appeal itself. The same set of arguments were being canvassed by both sides on the stay application as well as the Appeal. The Appellate Authority would have been well advised in taking up the Appeal and not the stay application. Assuming that course was permissible in law and it was permissible to decide the stay application, the Appellate Authority lost sight of the fact that the Petitioner is a manufacture of compact conductors, gap conductors, aluminium conductors etc. and a factory of the Petitioner is located at Silvasa, Dadra & Nagar Haveli, which is a Union Territory. The Nariman Point office is nothing but a registered office of a limited company. In the financial year 2008-09, the Petitioner imported goods

at Nhava Sheva port and they were raw materials for the Silvasa factory. After clearance, they were dispatched directly to M/s. Associated Aluminium Ltd. of Silvasa for carrying out some process and as per the instructions given by the Petitioner''s Silvasa factory. As the address on the documents pertaining to the import was of the Mumbai office of the Petitioner, the Assistant Commissioner of Sales Tax (Assessing Officer) formed an opinion that the import has been made by the Mumbai office. He passed an order of assessment on 28th June, 2013 i.e. under the Central Sales Tax Act, 1956 (CST) by holding that the direct dispatch of the goods from Nhava Sheva port to Silvasa was a stock transfer, within the meaning of section 6A of the CST and made by the Petitioner''s Mumbai office. In the absence of declaration in Form ''F'' being produced, he treated the said transaction as deemed sale and levied taxes thereon at Rs. 50,96,660/-. In addition, interest and penalty was levied making the total sum of Rs. 1,34,42,440/-.

3. This order was impugned by the Petitioner by filing a First Appeal and before the Deputy Commissioner of Sales Tax, Appeals-VI, Mumbai on 9th October, 2013. Admittedly, this Appeal is pending. The Petitioner''s Counsel, therefore, submits that, apprehending coercive measures, an application for stay was made, on which, an order was passed on 5th April, 2014, thereby directing deposit of the entire sum demanded in terms of the assessment order.

4. Aggrieved by this order, the Petitioner filed an Appeal being VAT Appeal No. 355 of 2014 and which was partially allowed reducing the sum to Rs. 50,96,660/-.

By this order, the Petitioner was aggrieved as the contention going to the root of the case has not been dealt with. Hence, it preferred the Rectification Application. The rejection of the Rectification Application is therefore vitiated by error of law apparent on the face of record.

5. The learned Counsel appearing for the Petitioner relies upon one order passed by this Court in Central Excise Appeal (L) No. 102 of 2011 and another by the Calcutta High Court in the case of Crystal Cable Industries Ltd. vs. Union of India.

6. After perusing the Writ Petition and the annexures thereto, we are not impressed by any of these submissions. Firstly, the Tribunal did not force the Petitioner to argue the application for waiver of the deposit or stay. It is the Petitioner who moved such an application in the pending Appeal and apprehending that there would be recovery by coercive means. Therefore, the first contention has no merits. As far as other contentions are concerned, we are of the opinion that any question which is going to the root of the case would definitely require the first Appellate Authority to apply its mind fully to the facts and equally the provisions of law. If that course is decided to be adopted at a final hearing of the Appeal, we can hardly fault the first Appellate Authority. While passing the order on the stay application, the appellate authority adverted to all the contentions raised by the Petitioner and found that the Petitioner must

satisfy the authority by not only producing cogent and satisfactory material but equally by his oral argument that there was compliance with the provisions of law and the burden on the Assessee/Petitioner has been discharged in terms thereof. Therefore, while adverting to the rival contentions, the Tribunal found that if this was not a case of a deemed sale, then, it was necessary for the Petitioner to have produced Form ''F''. If that requirement was not prima facie complied with, then, it was incumbent on the Petitioner to satisfy the first appellate authority that the goods have been imported for use as raw materials at Silvasa factory. That document would indicate that some processing thereon was required to be undertaken, therefore these goods have been handed over to the distinct party and on instructions of the factory. It was not therefore a import for the Mumbai office. In these circumstances and until that opportunity has been availed of, the appellate authority found that the dues or the amount due to the Revenue ought to be secured.

7. We do not find any reason to interfere with such a discretion and exercised by the first appellate authority. The Tribunal has, in scaling down the amount from Rs. 1,34,42,440/- to 50,96,660/-, exercised its discretion reasonably and judiciously. It has not in any manner non-suited the Appellant/Petitioner before us. It is the Petitioner who repeatedly questioned a discretionary and equitable interim order by seeking to rectify it. If the initial exercise undertaken by the Tribunal was not faulty, then, its refusal to review the interim order cannot be termed as arbitrary. The orders passed therefore cannot be said to be perverse. We do not see how in Writ Jurisdiction we can take any other view and desired by the Petitioner. That jurisdiction is equally discretionary and equitable.

8. The course adopted in Central Excise Appeal (L) No. 102 of 2011 cannot be applied in all cases and to all facts and circumstances. There, this Court was of the opinion that the order of the Customs, Excise and Service Tax Appellate Tribunal on an application for waiver of pre-deposit of duty together with interest and penalty raised only one point. Therefore, the Appeal challenging such an order was entertained by this Court and particularly when it raised a substantial question of law. In dismissing that Appeal finally, this Court adverted to similar stay orders and passed by the Tribunal. In such circumstances, it was only a dismissal of an Appeal arising out of an order of the Tribunal on the application seeking waiver of condition of pre-deposit and stay. The Appeal was not disposed of on merits. The Court has rendered only prima facie observations as is clear from paragraphs 12 and 13 of that order.

9. Similarly, the order passed by the Calcutta High Court in the case of Crystal Cable Industries Ltd. (supra) will not assist the Petitioner. There as well the argument noted was that there was alternate and equal efficacious remedy of Appeal. The Court found that the term or expression "every order passed in Appeal by the Appellate Tribunal" is qualified by a rider, that is, satisfaction of the High Court that the case involves a substantial question of law. Therefore the Appeal is not automatic. Hence, it was not termed to be a remedy which was

efficacious as to enable the High Court to refuse to exercise its discretion and entertain the Writ Petition under Article 226 of the Constitution of India. Once again, what the learned Single Judge of the Calcutta High Court, and with respect, has done is to consider the application for waiver of predeposit of disputed duty and penalty in the case of undue hardship. Finding on facts that this was a case of undue hardship that the relief was granted. We do not find how such an order can be said to be disposing of the Appeal finally on merits or dealing with the controversy allegedly going to the root of the case. By no stretch of imagination can both orders be termed as final orders. In the above analysis, no assistance can be derived by these orders by the Petitioner before us. We do not find any merit in the Writ Petition. It is dismissed. However, we clarify that the dismissal of the Writ Petition shall not influence the Appellate Authority in dealing with and deciding the Appeal on merits and in accordance with law. The Petitioner shall comply with the condition imposed on it within six weeks from today.

