(1987) 06 AP CK 0007

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 18231, 18233, 11693 and 13000 of 1986 and 1104 of 1987

State of Andhra Pradesh — APPELLANT

Vs

Hindustan Shipyard Limited and Others — RESPONDENT

Date of Decision : 11-06-1987

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (1988) 68 STC 220

Hon'ble Judges : C. Sriramulu, J;B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : K. Srinivasa Murthy, S. Dasaratharama Reddi, P. Venkatarama Reddy and S. Krishna, for the Appellant; T. Ramam, for the Respondent

Judgement

B.P. Jeevan Reedy, J.—The limited question that arises in this batch of writ petition is whether the Tribunal has the power to grant stay in appeals before it pertaining to the assessment years falling prior to 1st July, 1985. The Tribunal has taken the view in a matter reported in Satyanarayana Traders v. State of A.P. (1985) 1 STJ 130 ap that it has such a power. The correctness of the said view is challenged herein.

2. For a proper appreciation of the question arising herein it is necessary to refer to certain provisions of the Act as they stood prior to the Amendment Act 18 of 1985 and also thereafter. We shall first refer to the position obtaining prior to the Amendment Act. Section 19 provided for an appeal by the dealer against an order of assessment or against an order reopening the assessment. The power of reopening the assessment could be exercised under sub-section (4) of section 14 by the assessing authority. Sub-section (4-C) of section 14 however vested the said power in the higher officers as well, i.e., in the Deputy Commissioner and Joint Commissioner. Sub-section (2-A) of section 19 conferred power on the appellate authority to stay the collection of tax pending disposal of the appeal before it. Sub-section (2-B) provided that where the appellate authority refused

to grant stay under sub-section (2-A), the appellate may prefer a revision to the Joint Commissioner who was empowered to grant stay of collection of tax in dispute pending disposal of the appeal by the appellate authority. Sub-section (2-C) provided further that where a second appeal is preferred by the dealer to the Tribunal, the stay granted by the Joint Commissioner under sub-section (2-B) shall be effective pending disposal of such appeal by the Tribunal, but where the order of stay was one passed by the appellate authority under sub-section (2-A), such order of stay shall not be effective or operative pending the appeal before the Tribunal unless the Joint Commissioner, on an application made by the dealer in that behalf, made a specific order to that effect. Section 21(1) provided for an appeal to the Tribunal. The appeal was provided to the Tribunal both against an appellate order passed by the appellate authority u/s 19, as also against an order reopening the assessment passed by the Joint Commissioner or Deputy Commissioner suo motu u/s 14(4-C) or an order in revision passed under sub-section (2) of section 20 by the appropriate authority. [This sentence has been substituted as per the order of the Court dated 24-12-1987] Sub-section (6) provided that no appeal shall be entertained by the Tribunal unless it is accompanied by satisfactory proof of the payment of tax as determined in any appeal u/s 19, or revision u/s 20.

3. Sub-section (6) was struck down, as being violative of article 14 of the Constitution of India, by a Bench of this Court in K. Balakrishnaiah Vs. Commercial Tax Officer and Others, with the result that the Tribunal was granting stay pending the appeals, in appropriate cases, in exercise of its incidental/ ancillary power to grant stay. In other words, the Tribunal was holding the view that the substantive power of hearing the appeal conferred upon it, also conferred upon it the incidental/ancillary power to grant stay pending such appeal in appropriate cases.

4. The above position continued till 1st July, 1985, when the aforesaid Amendment Act came into force. The Amendment Act does not touch sub-section (2-A), (2-B) or (2-C) in section 19. It, however, introduces a new sub-section, i.e., sub-sections (6) and another sub-section, i.e., sub-section (6-A) in section 21. Sub-sections (6) and (6-A) introduced by the Amendment Act read as follows :

"(6) Where a dealer, objecting to an order passed or proceeding recorded by a Deputy Commissioner of Commercial Taxes suo motu under sub-section (4-C) of section 14 or under sub-section (2) of section 20 has preferred an appeal to the Appellate Tribunal, the Joint Commissioner may, on an application filed by the dealer, subject to such terms and conditions, as he may think fit, order stay of collection of the tax under dispute pending disposal of the appeal by the Appellate Tribunal.

(6-A) The payment of tax and penalty, if any, due in accordance with the order of the first appellate authority or of the Deputy Commissioner suo motu under sub-section (4-C) of section 14 or in revision u/s 20, in respect of which an appeal has been preferred under sub-section (1), shall not be stayed pending disposal of the appeal."

An analysis of these two sub-sections yields the following position :

(1) Where an appeal is preferred to the Appellate Tribunal against an appellate order, no stay shall be granted pending such appeal before the Appellate Tribunal.

(2) Where, however, the appeal preferred to the Appellate Tribunal is a first appeal i.e., where the appeal is preferred against an order of the Deputy Commissioner passed u/s 14(4-C) or u/s 20(2), stay can be granted, not by the Tribunal but by the Joint Commissioner to whom an application must be made by the dealer in that behalf.

5. The result of the above provisions is that the Tribunal has been deprived altogether of the power to grant stay pending the appeal. The validity of the provision depriving the Tribunal of this power altogether is not questioned before us. What is, however, in issue is whether the said deprivation has retrospective effect or not. That is the limited question we have to answer.

6. It is contended by the learned Government Pleader for Commercial Taxes, that the power to grant stay hitherto exercised by the Tribunal with reference to incidental/ancillary power was only procedural in nature - in other words, it was not a vested right. Ir so, there is no question of saving of such power. On the other hand, it is contended by Sarvasri P. Venkatarama Reddy, S. Dasaratharama Reddi, T. Ramam and Sri S. Krishna, learned counsel for the respondents-assessees, that the said power cannot be said to be procedural in nature and that such a power must be held to be available in respect of all the proceedings relating to all the assessment years falling prior to 1st July, 1985 and also in respect of provisional assessments relating to the months falling prior to 1st July, 1985.

7. On a consideration of the rival submissions, we are inclined to agree with the respondents'' counsel. The approach adopted by the learned Government Pleader to call the said power a procedural one and on that basis to say that it is not saved, is, in our opinion, not the right approach to adopt. The Tribunal was granting stay hitherto in exercise of its incidental/ancillary power which is an adjunct of, and flows from the substantive power to entertain and hear the appeal, conferred upon the Tribunal. We do not find it possible to separate this incidental/ancillary power from the substantive power. The substantive power to entertain and hear the appeal remains undisturbed. May be so, submits the learned Government Pleader, the said incidental power is clearly taken away with retrospective effect. We find it difficult to agree. The retrospective affect must be given either by express language, or must arise by necessary implication. We are not satisfied that any such intention is evidenced by the Amendment Act. We can illustrate our view by giving an example. Take a situation where the very right of appeal has been taken away by the Amendment Act. In such a situation, it cannot be disputed that in the case of assessment years falling prior to the

Amendment Act, the right of appeal would be saved, and would be available. If the right of appeal remains available, the incidental/ancillary power to grant stay pending such appeal would also remain available. The question is whether the position would be worse where the right of appeal is retained undisturbed but where the incidental power flowing therefrom is taken away by the amending statute - particularly when it does not say clearly that it is taken away with retrospective effect ? We think not. We may also notice that the Appellate Tribunal is a quasi-judicial Tribunal. It is manned by a judicial officer of the rank of a District Judge, besides another non-judicial member. The appeal lies to it against the orders of the departmental authorities. In the hierarchy, the Appellate Tribunal is the first independent Tribunal. In such case, we would lean in favour of preserving such a power of the Tribunal rather than leaning the other way. Of course, this concern comes into play only where the language of the amending statute is not clear on the question of restrospectivity.

8. For all the above reasons, we hold that the incidental/ancillary power of the Appellate Tribunal to grant stay continues and is available in respect of all appeals relating to assessment years falling prior to 1st July, 1985 as also in respect of provisional assessment proceedings relating to the months falling prior to 1st July, 1985.

9. The writ petitions are dismissed, subject to the above observations. There shall be no order as to costs. Advocate''s fee Rs. 150 in each.

10. Writ petitions dismissed.

