(1990) 07 CAL CK 0034

In the Calcutta High Court

Case No : Matter No. Nil of 1990

Susanta Kumar Nayak — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 03-07-1990

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1990) 185 ITR 627

Hon'ble Judges : Susanta Chatterji, J

Bench : Single Bench

Advocate : Chakraborty, Moitra, for the Appellant;

Judgement

Susanta Chatterji, J.—Having heard Dr. Chakraborty for the petitioner and Mr. Moitra for the Income Tax authorities, it appears that the petitioner has come to this writ court challenging, inter alia, the impugned order passed by respondent No. 2, Income Tax Appellate Tribunal, Calcutta Bench, copy of which is annexure "G" to the writ petition. It is agreed by the learned lawyers of both sides that, upon consideration of the points of law, the matter may be disposed of and the question of granting an opportunity to file any affidavit does not arise. Looking at the impugned order, this court finds that the Income Tax Appellate Tribunal, while in seisin of the appeal, has since disposed of a petition filed by the assessee for stay of dues on the ground that the discretionary power vested in the Tribunal should not be exercised unless all the remedies available to the assessee are exhausted. The Tribunal has recorded the submissions of the departmental representative relying upon the decisions reported in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, and Empire Industries Limited and Others Vs. Union of India and Others, urging, inter alia, that the assessee has not exhausted all the remedies available before the Department, and, therefore, the Tribunal should not exercise its discretionary power to grant stay in the above case.

2. The attention of this court has been drawn to Assistant Collector of Central

Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, . It has been found that normally, the High Court should not, as a rule, in proceedings under Article 226 of the Constitution, grant any stay of recovery of tax save under very exceptional circumstances. The grant of stay, in such matters, should be an exception and not a rule. A levy or impost does not become bad as soon as the writ petition is instituted in order to assail the validity of the levy as bad at the very threshold of the proceedings. The only consideration at that juncture is to ensure that no prejudice is occasioned to the taxpayers in case they ultimately succeed at the conclusion of the proceedings. This object can be attained by requiring the body or the authority levying the impost to give an undertaking to refund or adjust against future dues, the levy of tax or rate or part thereof, as the case may be, in the event of the entire levy or part thereof being ultimately held to be invalid by the court without obliging the taxpayers to institute a civil suit in order to claim the amount already recovered from them. On the other hand, the court cannot be unmindful of the need to protect the authority levying the tax, and, at that stage, the court has to proceed on the hypothesis that the challenge may or may not succeed. This principle of law is not in doubt or in dispute. Every court and/or every statutory authority vested with the discretionary power has to exercise the same judicially. Law is made clear that no exercise of discretion can be made whimsically or arbitrarily. The authority is vested with the power to exercise discretion either in favour of the assessee or against the assessee but the authority cannot say that it shall not exercise the discretion as the assessee has other alternative remedies. It is an aspect not to exercise discretion while finding that there is an alternative remedy. The aforesaid decision does not indicate such a proposition at all.

3. The attention of this court is further drawn to another decision in Empire Industries Limited and Others Vs. Union of India and Others, . In particular, the attention of this court is drawn to the concluding portion of the decision where it has been observed that a good deal of arguments were canvassed before us for variation or vacation of the interim orders passed in these cases. Different courts sometimes pass different interim orders as the courts think fit. It is a matter of common knowledge that the interim orders passed by particular courts on certain considerations are not precedents for other cases which may be on similar facts. An argument is being built up nowadays that once an interim order has been passed by this court on certain facts specially in fiscal matters, in subsequent matters on more or less similar facts, there should not be a different order passed nor should there be any variation in all kinds of interim orders passed. It is submitted at the Bar that such variation creates discrimination. This is an unfortunate approach. Every Bench hearing a matter on the facts and circumstances of each case should have the right to grant interim orders on such terms as it considers fit and proper and if it had granted the interim order at one stage, it should have the right to vary or alter such interim orders.

4. The Hon''ble Supreme Court has further observed that a consensus has to be made in the matter of interim orders. It is needless to observe that no interim

order of any court is binding upon any other court unless a superior court varies in a connected matter and every court is entitled to pass an interlocutory order in its own wisdom and every discretion must be exercised judicially and not arbitrarily.

5. In the instant case, the Tribunal, in its own wisdom, has relied upon those two decisions as if, in the Department, there are other alternative remedies available to the petitioner and the assessee, without exhausting such procedure, cannot approach the Tribunal to exercise its discretion. The aforesaid decisions do not indicate such a proposition and, with great respect, this court finds that the Tribunal has not properly appreciated the aforesaid two decisions to withhold the exercise of its discretion by holding, inter alia, that the petitioner has other alternative remedies available.

6. The Tribunal, being in seisin of the appeal, is vested with the power to exercise its discretion. Had the Tribunal considered on merits and had it found that the petitioner has not been able to make out any case for obtaining any order at that stage, this court would not have found any ground to interfere with any order as it is settled in law that, unless a statutory authority passes a manifestly incorrect order causing perversity or injustice to the aggrieved party, the writ courts are slow to interfere by examining the decision-making process where the statutory authority like a Tribunal finds that the assessee has other alternative remedied and refrain from exercising the discretion, this court is of the view that there is miscarriage of justice.

7. In the instant case, the Tribunal has not at all exercised its discretion which is vested upon it in view of the misconception that other remedies are available to the petitioner to approach the Department once again. .

8. Considering this aspect of the matter, the writ petition is disposed of by setting aside the order of the Tribunal and the matter is remanded to the Tribunal again for reconsideration of the application for stay upon its merits and to exercise its discretion in accordance with law.

9. It is made clear that the prayer for stay as indicated above will be disposed of by the Tribunal as early as possible, preferably within a period of three months from the date of communication of this order. There will be stay of recovery proceedings till the disposal of the aforesaid application for stay as indicated above.

10. All parties will act upon a xeroxed copy of this dictated order signed by the court officer on the usual undertaking.