

(2011) 11 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 6847 of 2011

TVC Sky Shop Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Constitution of India, 1950 — Article 225, 226

Citation : (2013) 290 ELT 220

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Prakash Shah with Jas Sanghavi instructed by PDS Legal, for the Appellant; A.S. Rao with S.D. Bhosale, for the Respondent

Judgement

1. These proceedings are directed against an order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), dated 13 May 2011. The petitioners are the appellants before the CESTAT against an order-in-original passed by the Commissioner of Central Excise dated 5 January 2009. The petitioners had sought a stay of the recovery of the dues. The impugned order of the Tribunal would indicate that the stay applications were listed before the Tribunal and were heard on 21 February 2011. The Tribunal delivered its decision on 13 May 2011. The Tribunal in paragraph 8 of its judgment observed as follows:

We have carefully considered the rival submissions. We find that the appeal itself can be disposed of at this stage. Therefore, after allowing the stay petition, we take up the appeal for disposal.

The grievance of the petitioners is that in the proceedings before the Tribunal submissions were made only in the stay application seeking waiver of pre-deposit of duties, interests and penalties. According to the petitioners, no indication was furnished by the Tribunal at the stage of the hearing that the appeals would be taken up for hearing and final disposal and that it was inclined to grant a waiver of pre-deposit. The following grounds have been raised in the petition in support

of the submission:

A. It is submitted that, admitted what was heard by the Respondent No. 2 on 21st February 2011, was an application u/s 35F of the Central Excise Act, 1944, filed by the Petitioners seeking waiver of pre-deposit of dues, interest and penalties. The Petitioners made submissions on the said stay application u/s 35F of the Act. No indication was given by the Respondent No. 2 that it proposes to dispose off the appeals finally.

B. It is submitted that the Respondent No. 2 never put the Petitioners or even remotely indicated that it proposes to finally disposed off the appeals. The Petitioners were never given an opportunity to make submissions for the hearing of the appeals. The Petitioners made submissions, as stated above, only on the waiver of pre-deposit of the duties, interest and penalties and did not make and could not have made any submissions on the merits of the case, on the footing that the appeals themselves are being taken up for hearing.

C. It is submitted that the Respondent No. 2 reserved its order after hearing the Petitioners and the learned Departmental Representative on 21st February 2011, on the said application for waiver u/s 35F of the Act. It is only when the order was communicated to the Petitioners vide letter dated 25th May 2011, that the Petitioners realized that the Respondent No. 2 has finally disposed off the appeals and rejected all the contentions of the Petitioners, except entitlement to the credit of the input and input services.

D. It is submitted that the impugned order of the Respondent No. 2 is clearly in breach of the principles of natural justice. The Petitioners ought to be put to notice by the Respondent No. 2 that it proposes to dispose off the appeals finally and an opportunity ought to be given to the Petitioners to make submissions on merits on the footing that the appeals themselves will be heard finally.

2. Counsel appearing on behalf of the Revenue has not disputed during the course of the submissions the factual position that the Tribunal had heard only the stay applications and not the appeals themselves on 28 February 2011.

3. Counsel appearing on behalf of the Revenue has raised a preliminary objection to the maintainability of the petition under Article 225 of the Constitution on the ground that since the appeals have been disposed of by the Tribunal, an alternate remedy of an appeal is available against the decision of the Tribunal. Ordinarily we would have been inclined to remit the petitioners to the remedy of an appeal against the decision of the Tribunal if the petitioners had been heard on the merits by the Tribunal. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , the law has been settled by the Supreme Court. The Supreme Court has held that under Article 226 the High Court has a discretion whether or not to entertain a petition. Where an alternative remedy is available, the High Court would not normally exercise its jurisdiction. However, an alternative remedy would not operate as a bar in at least three contingencies (i) where the petition has been filed for an enforcement of fundamental right; (ii)

where there has been a failure of the principles of natural justice; or (iii) where the order or proceeding is wholly without jurisdiction or the vires of an enactment are challenged. In the present case, it is evident from the record that the proceedings which were listed before the Tribunal on 21 February 2011 consisted of the applications for waiver of pre-deposit. The Tribunal has itself observed in Paragraph 8 of its order that while allowing the said petition, it was of the view that the appeal could be disposed of at that stage. If the Tribunal was inclined to dispose of the appeal, parties ought to have been placed on notice of this in order to enable them to make submissions on the merits of the appeals. That evidently has not been done. The impugned order of the Tribunal therefore suffers from a fundamental breach of the principles of natural justice.

4. The petitioners are aggrieved by the order passed by the Tribunal disposing of the appeals. The Tribunal has granted in its composite order a waiver of the requirement of pre-deposit and has then proceeded to dispose of the appeal. During the course of the hearing, in response to a query of the Court, Counsel appearing on behalf of the petitioners fairly stated that he would have no objection if the order of the Tribunal is set aside in its entirety and the proceedings are remitted back to the Tribunal for consideration afresh. Accordingly, we set aside the impugned decision of the Tribunal dated 13 May 2011 purely on the ground that there was a breach of the principles of natural justice and restore both the stay application and the appeals to the file of the Tribunal. It would be open to the Tribunal to pass fresh orders on the applications for stay. In the event that the Tribunal is inclined to take up the appeals for hearing and final disposal, parties may be placed on notice of the aforesaid fact before the Tribunal proceeds to a final disposal. The petition is accordingly disposed of.

5. There shall be no order as to costs. Counsel appearing on behalf of the petitioners undertakes to pay the deficit Court fees for each of the petitioners, if not already paid within a period of one week from today.