HIGH COURT OF GUJARAT (*D.B.*)

D C W LIMITED
Versus
COMMISSIONER (APPEALS)

Date of Decision: 18 January 1997

Citation: 1997 LawSuit(Guj) 46

Hon'ble Judges: R A Mehta, C K Thakker

Eq. Citations: 1997 2 GLR 913, 1998 97 ELT 424, 1997 4 GCD 513

Case Type: Special Civil Application

Case No: 10622 to 10624 of 1996

Subject: Excise

Acts Referred:
Central Excise And Salt Act, 1944 Sec 35F

Final Decision: Petition allowed

Advocates: Nanavati Associates, K S Nanavati, Paresh M Dave, H M Mehta, Ketan A Dave

Cases Cited in (+): 6
Cases Referred in (+): 2

R. A. MEHTA, ACTG. C. J.

[1] Rule. Mr. Ketan Dave, learned Counsel waives service of Rule for and on behalf of the respondents.

[2] In all these applications, the petitioners make their grievance that though they have preferred appeals with the application for stay and for waiver of condition of pre-deposit or penalty, the said applications are not decided and in the mean time coercive recovery is being enforced.

[3] Applications of this kind are frequent in this Court and other Courts and the Courts are required to hear and to pass orders, which can easily be avoided. Several orders have been cited passed by different Courts and Benches directing the appellate

authority to decide the applications in given time and to stay coercive recovery unconditionally, till stay applications are decided. This may create unwarranted impression in some cases because the High Court may grant stay without going into merits and without imposing any condition.

[4] Section 35F of the Central Excise Act, 1944 reads 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 Authority 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 :
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> Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit or 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".

[5] Similar provisions are there under the Imports and Exports (Control) Act, 1947, Sec. 4-M(l). In the case of Union of India & Anr. v. M/s. Jesus Sales Corporation, JT 1996(3) SC 597, the Supreme Court reversed the Full Bench judgment of Delhi High Court. The Delhi Court had held that oral hearing had to be given by the Appellate Authority and on that ground the writ petition was allowed and the order passed by Appellate Authority was quashed and a direction was given to afford an opportunity to hear on the question as to whether the appeal should be entertained without deposit of the penalty imposed.

[6] In para 5 of the judgment the Supreme Court observed that if this principle of affording personal hearing is extended whenever the statutory authorities are vested with the powers to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. The Supreme Court also observed that though it may be open to the appellate authority to give personal hearing, any order passed without affording personal hearing shall not be held to be invalid merely on the ground that no personal hearing can be afforded. This was all the more important in the context of excise and revenue matters. When the authority has determined a tax liability or has imposed a penalty, then the requirement that before the appeal is heard such tax or penalty shall be deposited, cannot be held to be unreasonable. For that, the case of Shy am Kishore

v. Municipal Corporation of Delhi (JT 1992(5) SC 335) was relied upon, wherein it is held that the requirement of pre-deposit is not unconstitutional.

[7] In this background Supreme Court held that normal rule is that before filing the appeal or before the appeal is heard, the person concerned should deposit the amount which he has been directed to deposit as a tax or penalty. The non-deposit of such amount is an exception. The Appellate Authority is vested with the discretion to dispense with such deposit unconditionally or subject to such conditions as it may impose. Having regard to this the Supreme Court held that if the Appellate Authority has rejected the prayer of the appellant to dispense with the deposit unconditionally or has dispensed with such deposit subject to some conditions without hearing the appellant on perusal of the petition filed on behalf of the appellant for the said purpose, it cannot be held that the order itself is vitiated and liable to be quashed being violative of principles of natural justice. The Supreme Court also held in para 7 that the Appellate Authority has also been vested with the discretion to dispense with such deposit unconditionally or on conditions and it should also apply its mind on that question like a quasi-judicial authority taking into consideration all the facts and circumstances of the case including the undue hardship which may be pointed out. Same is the position in respect of discretion and its exercise in reasonable and rational manner taking into consideration the relevant facts and circumstances of a particular appeal while considering the question as to whether deposit of the amount or the penalty be dispensed with unconditionally or subject to the conditions. Ultimately the Supreme Court confirmed the order of the Appellate Authority whereby conditional stay was granted without personal hearing and reversed the Full Bench judgment of the Delhi High Court.

[8] This judgment has been referred only with a view to show that such applications can be decided expeditiously. The apprehension of the Appellate Authority that large number of appeals are filed every month with applications for stay and waiving of pre-deposit, in that case hearing of the applications very often takes as much time as final disposal of the appeal itself and therefore, it becomes difficult for the Appellate Authority to hear the stay applications expeditiously. It has also pointed out the difficulties about paucity of infrastructure and staff. On behalf of the petitioners also it is pointed out that though there is large number of litigations from Gujarat region or Ahmedabad region, the Appellate Authorities are in Bombay or away from Ahmedabad and that also causes undue delay in hearing and disposal of the stay applications. On behalf of the Appellate Authority it is pointed that the experience shows that when stay applications are heard, hardly 1% or 2% of the cases in which stay is granted or conditions of pre-deposit are waived.

[9] We do think that any of these reasons can justify not deciding the stay applications. The appellate forum is provided with a view to provide channel and remedy for redressal of grievances; and whenever there is any case for giving any kind of stay or waiver unconditionally or subject to the conditions, has to be considered and appropriately dealt with by passing appropriate orders. It is pointed out by the Supreme Court that it is not necessary to give personal hearing in every case, if the authority can decide the stay application judiciously with appropriate application of mind to the facts and circumstances of the case.

[10] Even in a given case where the Appellate Authority feels that the application requires further hearing, such authority can always consider the questions by way of some temporary or ad-interim measure directing part-payment/s of deposit till further hearing of the application and pass further orders after hearing and consideration. That would prevent continuance of stay orders beyond reasonable time. At the same time, it gives relief to the appellant by making payments in part.

[11] There cannot be any valid reason for not hearing the stay application for number of months or till final hearing of the appeals. On behalf of the petitioners our attention has been drawn to the orders of the Appellate Tribunal (CEGAT), wherein it has been directed that on receipt of stay and misc. applications, the Registrar shall immediately furnish to the person presenting the application, the date of hearing which will be same day in the second week thereafter and if the day is a holiday, the next working day or on the same day in second week. Several orders of this Court have also been cited before us where the directions have been given to dispose of the stay application within specified time and not to enforce coercive recovery during that period. If the applications for stay and waiver of pre-deposit are not decided till final hearing of the appeals anomalous situation would arise as to hearing and maintainability. Even if the Appellate Authority was to dismiss the appeal on merits that may not be in a position to render it on the ground that there is no pre-deposit and consequently that appellant may not get an opportunity to agitate the questions on merits before higher forum.

[12] Section 35F provides as a condition precedent to the maintainability of an appeal that the appellant should deposit with the adjudicating authority the duty demanded or the penalty levied. Unless, therefore, the requirement of pre-deposit has been dispensed with under the proviso to Sec. 35F, the said pre-condition is required to be fulfilled.

[13] Therefore, no appeal can be maintained, entertained or finally heard by the Commissioner (Appeals) unless Sec. 35F is complied with, i.e., unless the duty or penalty in question is pre-deposited or the requirement of pre-deposit is dispensed

with. Therefore, it is obligatory for the Commissioner (Appeals) to decide applications under Sec. 35F before taking up any appeal for further hearing or final disposal.

[14] Further, not deciding an application under Sec. 35F for a long time or even at any time before entertaining an appeal or finally deciding it, is also not in the interest of revenue. If the application under Sec. 35F is decided by the Commissioner (Appeals) promptly, the same would ensure pre-deposit either of the whole of the amount of duty or penalty in question or such part of the aforesaid amount whose pre-deposit has not been dispensed with.

[15] While the Legislature has provided for statutory appeal, it has also provided for statutory condition of pre-deposit. It also provides the period of limitation. During this period of limitation of 90 days there is no statutory stay or automatic stay of recovery and enforcement of that order. But there are guidelines and circulars which provide that for the period of limitation the recovery may not be enforced. With the result that till last date of limitation stay application may not be filed and if filed on the last date which is the date to enforce the order of expiry of the period. The Appellate Authority may not be in a position to hear the stay application immediately and some hardships might arise. The parties which move the application leaving sufficient time to the Appellate Authority to consider and decide the matter, they may also not get any relief when the Appellate Authority does not pass the orders in time. The result is that those parties have unnecessarily to rush to the High Court and the High Court has to hear the matters which can easily be avoided.

[16] Having regard to the all these circumstances, we find that the Appellate Authorities are required to be directed that whenever such applications for stay and/ or waiver of condition of pre-deposit are made, they shall hear expeditiously and pass appropriate orders expeditiously and preferably within a month and if it is not possible to pass final orders on such applications, it can pass appropriate ad-interim orders subject to such conditions as may be necessary at that stage so as to see that interest of both the sides are taken care and the litigant does not carry a feeling that his request did not receive timely attention by the judicial forum.

[17] If the authorities fail to discharge their statutory functions, the High Court will be unnecessarily burdened with the hearing of the cases which are required to be heard by the statutory authorities constituted under the relevant Statute, and the Legislative intention may be frustrated.

[18] We, therefore, direct that the Appellate Authorities shall pass appropriate orders on the stay applications expeditiously and preferably within four weeks of such application.

[19] If the Appellate Authority does not decide the stay application the parties have to rush to the High Court; and the High Court may have to pass orders in such cases and give directions to hear stay application and may stay the recovery till the stay applications are decided. It would, therefore, be in the interest of everyone as well as in the interest of judicial administration that this kind of unnecessary litigation and multiplicity of litigation is avoided.

[20] The coercive recovery need not be stopped by the High Court only on the ground that the Commissioner (Appeals) has not taken up any application for stay for hearing and has not decided the same. It is to be noted that the Revenue does not generally enforce recovery for a period of 3 months after the passing of the order in original. Of course, there is a 3 months limitation provided in the Act for filing appeals. This time is enough not only to file appeal and application for interim relief but also for obtaining interim orders. Applications for stay against recovery of excise dues or against the requirement of pre-deposit of the duty and penalty in question, are expected to be filed as soon as possible after the order-in-original is passed. They cannot wait for almost entire period of 3 months if they want urgent orders against recovery of central excise dues. Since the Appellate Commissioner is required now to decide the stay application or applications for dispensing with the requirement of pre-deposit under Sec. 35F, within a period of 4 weeks from the date of filing such applications, the 3 months moratorium accepted by the department voluntarily in order to provide relief to the parties concerned and so as to enable them to apply to the Appellate Authorities for interim relief, should be considered sufficient and reasonable. A party can very well file appeal within about a month of the date of the impugned order. Naturally, stay application also should be filed along with the appeal. The Appellate Commissioner is expected to decide the stay applications/applications under Sec. 35F for dispensing with the requirement of pre-deposit, within one month. The department is not going to enforce recovery for a period of three months from the date of order-in-original.

[21] It is not necessary and it is not in public interest to provide that coercive recovery should not be enforced until the stay application or application under Sec. 35F is decided by the Commissioner (Appeals). Three months' time from the date of the serving of the order-in-original should be considered enough for any party to approach the Appellate Authority for appropriate interim relief. Now fortified by this Court's orders, the Commissioner (Appeals) and the parties can expect the stay application to be decided within one month. Therefore, the protection against coercive recovery is not necessary to be extended beyond 3 months as otherwise it would only encourage parties to sit pretty until the last week of 3 months' period and then await the Commissioner (Appeals)'s orders of stay and till then not to pay excise dues.

[22] Three months time is itself a sufficient protection particularly when the Commissioner (Appeals) is required to decide stay application within one month from the date on which the same is filed.

[23] Further, in case any step towards coercive recovery is initiated in the meantime, the party should approach the appellate authority for urgent orders, pending the hearing and decision of the stay application or application under Sec. 35F for dispensing with the requirement of pre-deposit.

[24] Further, it is made clear that it will be open for the forum to pass ad-interim orders on stay applications within four weeks and, if necessary, to keep the stay application pending for passing further orders of granting and/or refusing, modifying and vacating the interim orders.

[25] In the result, these petitions are allowed. Rule is made absolute by directing the authorities that they shall decide the stay applications within four weeks and till then coercive recovery shall not be enforced.

Petitions allowed.