In the High Court of Judicature at Madras

Dated : 20.4.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN
and
The Honourable Mr.Justice M.V.MURALIDARAN

Writ Petition No.21698 of 2015 and MP.No.1 of 2015

M/s.Tiruchitrambalam Projects Ltd.
(formerly known as Thiruchittampalam
Associates India Ltd.), rep.by its
Managing Director Mr.S.K.Revimaniyen ...Petitioner

Vs

1.Customs, Excise and Service Tax
Appellate Tribunal, Chennai-6.

2.The Commissioner of Central Excise,
Central Revenue Building,
Tirunelveli-7. ...Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the first respondent in Misc. Order No.41984 of 2014 dated 18.11.2014, quash the same and direct the first respondent to examine the prima facie merits of the case in the stay application.

For Petitioner : Mr.Joseph Prabhakar

For Respondent-2 : Mr.P.Mahadevan, SCGSC
R1 : Tribunal

Order of the Court was made by V.RAMASUBRAMANIAN,J

This writ petition arises out of an order passed by the Tribunal, directing the petitioner to make a predeposit of Rs.2 crores, as a condition for entertaining the appeal and for grant of stay.

2. Heard Mr.Joseph Prabhakar, learned counsel for the petitioner and Mr.P.Mahadevan, learned Senior Central Government Standing Counsel for the second respondent.

3. This writ petition actually went before a learned Single Judge. The learned Single Judge reserved orders on 18.1.2016, after being confronted with a decision of the Division Bench of this Court in Metal Weld Electrodes Vs. CESTAT, Chennai [(2014) 299 E.L.T. 3 (Mad.)], to the effect that the orders passed on an application for waiver of predeposit is appealable and that the writ petitions are not maintainable.

4. Thereafter, the learned Judge directed the matter to be posted before the Division Bench in view of the fact that if an appeal is filed, it should come only before the Division Bench. Another reason why the learned Judge directed the matter to be posted before the Division Bench was the fact that the Division Bench was seized of an appeal in C.M.A.No.585 of 2016 where the question as to whether an appeal could be entertained in certain circumstances or not had been raised. This is how the writ petition has come up before us. Finding that C.M.A.No.585 of 2016, along with which the present writ petition was directed to be tagged, was maintainable, we have disposed of the said appeal independently. Therefore, we have taken up this writ petition separately.

5. Metal Weld Electrodes was a acase, which comprised of several writ petitions, challenging certain orders passed by the Tribunal either on applications for stay or on applications for waiver of predeposit. The Single Judge, before whom the batch of cases came up, made a reference of the question as to whether an appeal would lie against such applications, under Section 35G of the Central Excise Act or Section 130 of the Customs Act.

6. It was contended on behalf of the Department that appellate remedy is the only remedy and that the writ petitions were not maintainable. But, it was contended by the assessees that as against certain orders, no substantial question of law can be raised and that in such circumstances, only a writ petition could be maintained. After referring to the decision of the Supreme Court in Rajkumar Shivhare Vs. Assistant Director, DoE [2010 (4) SCC 772], a Division Bench of this Court answered the question referred to them in Metal Weld Electrodes, in paragraph 80 as follows :

> "Thus, by considering all the above facts and circumstances, we answer the reference as follows:
>
> The order passed by the CESTAT in terms of Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962 is appealable in terms of Section 35G of the Excise Act, 1944 or Section 130 of the Customs Act, 1962."

7. After answering the reference in paragraph 80, the Division Bench held in paragraph 81 of Metal Weld Electrodes that the writ petitions are not maintainable. Therefore, a question now arises as to whether writ petitions are maintainable as against orders passed

by the Appellate Authorities or the Tribunal, on applications for stay or applications for waiver of predeposit condition.

8. To the extent that the Division Bench of this Court interpreted in Metal Weld Electrodes, the expression 'any order' to mean all orders and held that therefore, appeals are maintainable against these orders, we have no quarrel. But, the opinion expressed by the Division Bench in Metal Weld Electrodes in paragraph 81 of its decision that writ petitions are not maintainable, cannot be accepted by us for two reasons.

9. The first reason is that in the second part of paragraph 38 of Rajkumar Shivhare, the Supreme Court has carved out certain exceptional circumstances, in which, the writ petitions are maintainable. Therefore, the reading of Rajkumar Shivhare by the Division Bench in Metal Weld Electrodes may not be fully correct. The second reason as to why we cannot agree with the opinion expressed by the Division Bench in Metal Weld Electrodes (paragraph 81) is that the question referred to the Bench has already been answered in paragraph 80. What is stated in paragraph 81, is an opinion, which appears to have been recorded as a corollary to what was recorded in paragraph 80. But, whatever is the answer provided in paragraph 80 to the reference alone can be taken as having arisen directly for consideration before the Division Bench. It is too well settled that a judgment is a precedent for what it lays down and not what follows out of it.

10. Therefore, we are of the considered view that the answer given in paragraph 80 of its decision by the Division Bench in Metal Weld Electrodes, is perfectly correct. But, at the same time, in exceptional circumstances carved out in the second part of paragraph 38 of the decision of the Supreme Court in Rajkumar Shivhare, the writ petitions are also maintainable.

11. However, such writ petitions cannot be posted before Single Judges. They have to be posted only before the Division Benches dealing with tax cases. This will avoid the assessees' attempts to have two remedies before this Court as against an order, against which, even an appeal would normally lie before a Division Bench. Having said that, let us come to the case on hand.

12. The grievance of the writ petitioner is that without considering any of the issues raised, the Tribunal has passed a conditional order for a predeposit. According to the writ petitioner, they are executing a work for Government Departments as well as engaged in constructing houses to tsunami victims and that all of them are completely exempt.

13. This aspect, though raised by the writ petitioner, has not at all been considered by the Tribunal while deciding the application for waiver.

14. Therefore, the writ petition is allowed, the impugned order is set aside and the application for predeposit is directed to be heard by the Tribunal with reference to the contentions raised and decided in accordance with law. No costs. Consequently, the above MP is closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

To

1.The Customs,
Excise and Service Tax Appellate Tribunal,
Chennai-6.

2.The Commissioner of Central Excise,
Central Revenue Building,
NGO Colony
Tirunelveli-7.

1 cc to Mr. Joseph Prabakar, Advocate, Sr. 24428
1 cc to Mr.P. Mahadevan, Advocate, Sr. 24254

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and MP.No.1 of 2015

EV (CO)
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