THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

<u>WRIT PETITION No. 21923 OF 2016</u>

<u>ORDER</u>: (*per Hon'ble Sri Justice M.Satyanarayana Murthy*)

The Assessee, M/s. Hema Abodes Private Limited, filed the writ petition under Article 226 of the Constitution of India to declare the Order No.M/30071/2016 dated 20.06.2016 and Order No.M/30042/ 2016 dated 20.05.2016 r/w M/30029/2016 dated 14.12.2015 issued by the third respondent as arbitrary, illegal and violation of Article 14 of the Constitution and set aside the same by issuing a writ of Mandamus.

02. The petitioner is the assessee registered with Service Tax Department in the year 2005 with Service Tax Registration No.AABCH6201MST001 under the category of Construction of Residential Complex Service and paid tax under the same category, filed ST-3 Returns regularly before the officer concerned. The petitioner paid service tax of Rs.1,16,257/- for the year 2007-08 under the same category, however, he stopped payment of service tax for the subsequent year based on the clarification issued by the Central Board of Excise & Customs, New Delhi, vide letter F.No.332/35/2006-TRU dated 01.08.2006. In the light of clarification referred above, if the developer undertakes construction, then no service tax is attracted. Therefore, the petitioner did not pay tax for the subsequent period. The petitioner executed five projects, viz., Hema Plaza, Hema Vihar, Hema Vihar, Botcha Square, Hema Sapphire, etc.

03. The second respondent issued a show cause notice bearing C.No.IV/5/10/2012-AE-I dated 22.10.2012 raising demand for Rs.1,92,36,940/- being the service tax not paid on the Works Contract Service during the period from 2007-08 to 2011-12 and Rs.3,61,023/- being the service tax not paid on Renting of Immovable Property Service in respect

of renting of their premises during the period from 2009-10 to 2011-12 under the proviso to sub-section (1) of Section 73 of Finance Act, 1994. The petitioner submitted his reply dated 21.11.2013 explaining the reasons, but the second respondent passed the order in original No.VIZ-STX-001-COM-017-14 dated 21.02.2014 confirming the demand of service tax of Rs.60,57,253/- under the category of Works Contract Services for the year 2007-08 to 2011-12 and service tax demand of Rs.3,61,023/- under the category of Renting of Immovable Property for the period from 2009-10 to 2011-12 under Section 73(2), along with interest in terms of Section 75, and penalty of Rs.10,000/- under section 77 (1)(a), of the Finance Act, 1994, for failure to take registration under Works Contract Service. The second respondent substantially reduced the demand from Rs.1,95,97,963/- to Rs.64,18,286/- in violation of rules.

04. Aggrieved by the order of the second respondent, the petitioner preferred appeal No.ST/22242/2014 before the third respondent challenging the order passed by the second respondent. He also filed a stay petition No.ST/STAY/22516/2014 with a request to waive pre-deposit, but the third respondent vide order No.M/30029/2016 dated 14.12.2015 directed the petitioner to deposit Rs.30,00,000/- as pre-deposit within four weeks, waiving the balance of the demand and penalty till disposal of the appeal.

05. The petitioner filed a petition seeking clarification in view of wrong observation of the third respondent vide order No.M/30029/2016 dated 14.12.2015. The Tribunal by order dated 20.05.2016 held that those issues will be decided in appeal and extended time for deposit for another four weeks from 20.06.2016. In pursuance of the direction, the petitioner deposited Rs.5,00,000/- and again filed miscellaneous petition No.ST/MISC/30438/2016 in Appeal No.ST/22242/2014, for modification of the order dated 14.12.2015. Based on the legal position, the petition was dismissed granting four weeks time additionally for compliance of the direction. Thus, the order passed by the third respondent refusing to waive

pre-deposit is illegal and arbitrary and against the settled principles of law and prayed to set aside the same.

06. At the stage of admission, we heard Sri T.M.K. Chaitanya, learned counsel for the petitioner and Sri Sundari Prasad, learned Standing Counsel for Central Excise.

07. During the course of argument, the learned counsel for the petitioner reiterated the contentions urged in the writ petition, whereas the learned Standing Counsel for the respondents contended that the writ petition is not maintainable in view of remedy available under Section 35 G of the Central Excise Act, 1944 (for short, 'the Act') and supported the order of the Tribunal in all respects.

08. The petitioner is the assessee of Service Tax on the rolls of the second respondent. The second respondent issued show notice to the petitioner, and after considering explanation submitted by the petitioner, the second respondent passed an order in original No.VIZ-STX-001-COM-017-14 dated 21.02.2014 directing the petitioner to pay Rs.64,18,286/-. Thus, it is an order under challenge before the Tribunal is appellable under Section 35G of the Act.

09. Section 35G of the Act enables the aggrieved party to file an appeal to the High Court from every order passed in appeal by the appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

10. When an appeal is provided against the assessment and penalty order passed by the second respondent, which is a substantive right under the Act, the petitioner is not entitled to question the appellable order by filing the writ petition. When an alternative efficacious statutory remedy is

available to the party, the writ petition is not maintainable under Article 226 of the Constitution. On this ground alone, the writ petition is not maintainable and liable to be dismissed.

11. According to the petitioner, he filed an appeal against the demand in the order in original No.VIZ-STX-001-COM-017-14 dated 21.02.2014 before the third respondent and also filed an application to waive the pre deposit without specifying any reason. Therefore, the Tribunal passed an order directing the petitioner to deposit Rs.30,00,000/-, waiving the balance of the demand of pre deposit. Since no financial hardship was pleaded in stay petition No.ST/STAY/22516/2014, again the petitioner filed miscellaneous petition for clarification in ST/ MISC/30042/2016 in Appeal No.ST/22242/2014. The said miscellaneous petition was dismissed by the Tribunal on 20.05.2016.

12. Strangely, again the petitioner filed miscellaneous application, vide No.ST/MISC/ 30438/2016, seeking modification of the order, on the ground that the petitioner did not plead financial hardship, which is prerequisite for waiving pre-deposit. But the third respondent dismissed the petition, while extending four weeks time to comply the direction from the date of order. When a petition was filed for waiver of the pre deposit, it is the duty of the petitioner to raise a plea of financial hardship, but the petition filed without pleading of any financial hardship. The Tribunal is not under obligation to consider the alleged financial hardship and even in the second miscellaneous petition, by which the clarification was sought for, the petitioner did not raise the contention that the petitioner would be put to financial hardship, which is a pre requisite to waive pre deposit. But strangely another miscellaneous application was filed before the Tribunal raising contention that while filing the stay petition, the petitioner failed to raise a plea of financial hardship, but raised as an additional plea, after disposing of the original stay application and the application filed for clarification, subsequently. Hence, the Tribunal dismissed the application.

13. As the petitioner is entitled to file an appeal under Section 35G of the Act questioning any order passed by the Tribunal, the petitioner is required to plead and prove financial hardship to claim waiver of pre deposit. Instead of resorting to such statutory appeal, circumventing the provisions of law filed the present writ petition.

14. The substantial question of law as required under Section 35G of the Act need not be examined in the writ petition. While exercising the power of judicial review under Article 226 of the Constitution, the court is bound to consider the statutory obligation of the petitioner under relevant provision of law.

15. The main grievance of the petitioner is that it is running in loss and if pre-deposit is not waived, the petitioner would be put to undue hardship, which is an after thought, after passing the order in the original stay petition and in the miscellaneous application. According to Section 35F of the Act, the assessee is under obligation to make pre deposit of the disputed tax, unless it is waived.

16. According to the first proviso to Section 35F of the Act, where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of 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. According to the second proviso to Section 35F of the Act, it is the obligation of the authorities to protect the interest of revenue while waiving pre deposit and the pre deposit may be waived subject to proof of "undue hardship" that would be suffered by the assessee.

17. In the present facts and circumstances, the Tribunal directed the petitioner to deposit Rs.30,00,000/- as pre deposit while waiving the balance of disputed tax and penalty, though the petitioner did not plead financial

hardship at the earliest opportunity. Therefore, to claim waiver of pre deposit, it is for the assessee to establish that it would be put to undue hardship, if pre-deposit is not waived.

18. Section 35F of the Act and Section 129-E of the Customs Act makes pre-deposit mandatory in order to avail the remedy of an appeal before the CESTAT. The first proviso, an exception to the general rule, conferred power on the CESTAT, to dispense with such deposit "**subject to such conditions as may be imposed so as to safeguard the interests of revenue**" if the demand "would cause undue hardship."

19. Thus, it is evident from the proviso to Section 35-F of the Act and Section 129-E of the Customs Act, it is the duty of the assessee to establish that if pre-deposit is not waived, the assessee would be put to undue hardship. While granting such waiver of pre-deposit, the authorities concerned must keep in mind, the interest of revenue also (**The Commissioner of Central Excise, Guntur Commisionerate, Guntur v. M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada, represented by its Managing Director**[1]).

20. In **"Indu Nissan Oxo Chemicals Industries Limited v. Union of India**[2]**"** and in M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada's case (referred supra), it is made clear that the petitions for stay should not be disposed of as a matter of routine, unmindful of the consequences flowing from the order requiring the appellant to deposit full or a part of demand. Therefore, assessee has to made out a *prima facie* case, but that itself would not justify passing of interim order of waiver of pre-deposit. But if, on a cursory glance, it appears that the demand raised has no legs to stand, it would be undesirable to require the appellant to pay the full or a substantial part of the demand. There can be no rule of universal application in such matters, and the order should be passed keeping in view the factual aspects involved in the case. The Tribunal does not have the

license to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens faith in the impartiality of public administration, interim relief can be granted.(**Benara Valves Ltd. v. Commissioner of Central Excise**[3] and M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada's case (referred supra)).

21. At the same time, besides proof of *prima facie* case; balance of convenience and irreparable loss must also be taken in to consideration by the Tribunal or the authorities concerned to safeguard the interest of the revenue and impose certain conditions as my be required as held in "***Union of India v. Adani Exports Limited***[4]"

22. Before adverting to the facts of the case, it is appropriate to advert to the requirement specified in proviso to Section 35-F of the Act and Section 129-E of the Customs Act, 1952. The basic requirement to waiver of pre-deposit is 'undue hardship' to such person.

23. The word 'undue hardship' is not defined either under Customs Act or Central Excise Act. But the word "undue" means - More than necessary; wrongful, illegal, improper, wrong, unconscionable, immoderate, gratuitous, exorbitant, disproportionate, excess, redundancy. Similarly the word "hardship" means - Privation, suffering (hardship resulting from the regulation). Ordeal, adversity, oppression, woe, grief, unhappiness, agony, misery, difficulty, travail, misfortune, tribulation, burden, encumbrance, trial, torment, stress, cross, peril, blow, severity, desolation, harm, damage, casualty, deprivation, grievance, bane, destitution, suffering, pain as per West's Legal Thesaurus/Dictionary.

24. In the present case, the petitioner neither pleaded nor proved the financial hardship enabling the Tribunal to waive the pre deposit at the earliest opportunity. Only when the Tribunal rejected the waiver of part of the

pre deposit of tax demanded, the petition was filed. If the petitioner is really suffering from any financial hardship in case no waiver of pre deposit is ordered, he would have pleaded at the earliest opportunity. But for the reasons best known to him, the petitioner failed to raise such plea, thereby the third respondent rightly dismissed the miscellaneous petition No.ST/MISC/30438/2016 confirming the order in Stay petition MP No.ST/STAY/22516/2014.

25. The exercise of power under Article 226 of the Constitution is purely discretionary and such discretion has to be exercised judiciously. In the present petition, the petitioner wanted to take advantage of the situation, filing successive applications one after the other without raising specific plea of financial or undue hardship, which enables the Tribunal-third respondent to waive the pre deposit and it is a pre condition to entertain the appeal under Section 35F of the Act before the Tribunal and in the appeal under Section 35G of the Act before this Court.

26. In view of our foregoing discussion, we find no bonafidies in the claim of the petitioner regarding financial hardship as pleaded in the third application filed by the petitioner.

27. In the result, the writ petition is dismissed, but in the circumstances without costs.

28. Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

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[1] (Judgment of A.P. High Court Division Bench in CEA No.301 of 2010 dated 19.01.2011)

[2] (2007) 13 SCC 487

[3] (2009) 20 VST 297 (SC) = (2006) 13 SCC 347

[4] (2007) 13 SCC 207