

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

+ Writ Petition No.7116 of 2018

% Date: 11-4-2018

ITC Ltd., India Tobacco Division, Thomson Road,
Visakhapatnam, Rep. by its Power of Attorney
Sanjay Singh, S/o. S.K. Singh, aged about 61 years
... Petitioner

Vs.

\$ 1. The State of A.P., Rep. by its Prl. Secretary,
Revenue Dept. (CT-II), Velagapudi,
Amaravathi, Guntur Dist., A.P.

2. The Appellate Deputy Commissioner (CT),
H.No.40-5-90/9B, Behind NVKR Towers,
Moghalraipuram, Vijayawada-520 010

3. The Assistant Commissioner (ST),
(Formerly Commercial Tax Officer),
Kurupam Market Circle, Visakhapatnam

... Respondents

! Counsel for Petitioner: Dr. M.V.K. Murthy

Counsel for Respondents: Mr. Shaik Jeelani Basha,
Standing Counsel

< Gist:

> Head Note:

? Cases referred:

1. (2005) 2 SCC 515

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Order: (per V.Ramasubramanian, J.)

Aggrieved by the condition imposed by the Appellate Deputy Commissioner while granting a stay of collection of disputed tax pending appeal, the petitioner has come up with the above writ petition.

2. Heard Dr.M.V.K.Murthy, learned counsel for the petitioner and Mr. Shaik Jeelani Basha, learned Special Standing Counsel for the department.

2. By Amendment Act No.9/1997, the State of Andhra Pradesh inserted Section 6(1A) in the Andhra Pradesh Tax on Luxuries Act, 1987, providing for the levy and collection of tax on the turnover of receipts over tobacconist, relating to the supply of luxuries. Section 4A was also inserted mandating registration of every tobacconist.

3. The validity of the amendment was upheld by a Bench of this Court by a judgment dated 12-11-1998. But by a decision dated 20-01-2005 reported in **Godfrey Philips (I) Pvt. Ltd. V. State of U.P.**¹, the amendment was held unconstitutional. Even while holding the levy of luxury tax on tobacco and tobacco products as unconstitutional, the Supreme Court held that if any of the petitioners had collected luxury tax from their customers, after obtaining

¹ (2005) 2 SCC 515

interim orders from the Supreme Court, they were obliged to remit the same to the Government.

4. After the judgment of the Supreme Court, the Commercial Tax Officer, Sarojini Devi Road Circle, Secunderabad, issued notices dated 24-11-2005 demanding payment of the luxury tax allegedly collected by the petitioner from its customers. The petitioner filed a reply denying the claim.

5. Thereafter, the Commercial Tax Officers of two different Circles filed a contempt petition in Contempt Petition (Civil) No.40 of 2006 on the file of the Supreme Court alleging that the petitioner wilfully disobeyed the direction of the Supreme Court. But the petitioner took a stand that they never collected luxury tax from the customers.

6. In the light of the claim and the denial, the Supreme Court appointed a firm of Chartered Accountants to verify whether the petitioner collected any amount towards luxury tax during the period from 01-4-1999 to 20-01-2005. The Auditors filed a report on 23-5-2013 holding that the petitioner did not collect any amount towards luxury tax.

7. The Supreme Court disposed of the contempt petition by a final order dated 06-02-2014, permitting the Commercial Tax Officers to issue show cause notices, if the petitioner had collected luxury tax but not remitted the same to the State Government. The Supreme Court gave liberty to the petitioner to raise all contentions in response to the show cause notices.

After considering the objections, the concerned authorities were directed to pass orders and the petitioner was given liberty to question any adverse order passed against them, before an appropriate forum.

8. The Supreme Court also clarified its order dated 06-02-2014 by a further order dated 11-02-2014 to the effect that it was open to the petitioner even to raise the question of maintainability of the proceedings.

9. Thereafter, a show cause notice was issued to the petitioner alleging that the petitioner collected a sum of Rs.62.80 Crores and retained the same. The petitioner gave a reply denying the collection of tax.

10. As a matter of fact, the first notice was issued in this regard by the concerned officer in Telangana State on 14-9-2014. The notice dated 07-8-2015 was actually issued by the competitive authority from Visakhapatnam.

11. When the petitioner brought to the notice of both the authorities that there cannot be a demand on parallel lines, the authority in Telangana issued a revised show cause notice contending that in view of Section 50 of the Andhra Pradesh Re-organisation Act, 2014, he had the authority to make a demand.

12. Challenging the show cause notice, the petitioner filed W.P.No.210 of 2017. It was disposed of by an order dated 23-01-2017 directing the petitioner to file a reply and

directing the officer of the Telangana State to pass orders after considering the reply.

13. But without being aware of the order dated 23-01-2017 passed in W.P.No.210 of 2017, the officer passed an order on 24-01-2017. This order was set aside by this Court by an order dated 30-01-2017 in W.P.No.2905 of 2017.

14. In the meantime, the officer at Visakhapatnam passed an order dated 04-02-2017 confirming the demand to the tune of Rs.62,80,29,344/-. Challenging the said order, the petitioner came up with a writ petition in W.P.No.7155 of 2017. At the time when the said writ petition came up for hearing, two other writ petitions filed by two different companies in W.P.Nos.7635 and 8240 of 2017 also came up for hearing. Though we found that there were not adequate grounds to allow the petitioners in all the writ petitions (including that of the present writ petitioner) to bypass the alternative remedy of appeal, we found that the writ petitions could not also be dismissed, as one of the important questions raised in the writ petition related to the availability of the alternative remedy provided under an Act, which itself had no application to persons like the petitioner, in view of the decision of the Constitution Bench striking down Section 6A. Therefore, even while admitting the writ petition, we directed the petitioner herein as well as the petitioner in the other writ petitions to file appeals. The operative portion

of the order passed by us in W.P.M.P.No.8784 of 2017 in W.P.No.7155 of 2017 is extracted as follows:

“(i) There will be a direction to the petitioner, without prejudice to their contentions in the writ petition, to avail the remedy of a statutory appeal under Section 11(1) of the A.P. Tax on Luxuries Act, 1987 as against the impugned order, within two (2) weeks from the date of receipt of a copy of this order. If an appeal is so filed, the Appellate Authority may condone the delay, entertain the appeal subject to compliance with the prescriptions contained in Section 11(2) and dispose it of in accordance with law, uninfluenced by any observation contained in this order. However, the filing of the appeal will not be taken to be an act on the part of the petitioner subjecting themselves to the jurisdiction of the authorities under the Act. The filing of the appeal will be without prejudice to the contentions of the petitioner in the main writ petition. Until a period of two weeks from the date of receipt of a copy of this order, the impugned demand shall not be enforced, so that the petitioner is able to file an appeal and also seek a stay before the Appellate Authority under Section 11(1) of the Act; and

(ii) till the issue is finally decided, the 3rd respondent is refrained from passing any order.”

15. Pursuant to the aforesaid order passed on 18-4-2017, the petitioner filed a statutory appeal before the 2nd respondent on 03-5-2017 along with a petition for stay of recovery of the demand. The said stay petition was disposed of by the 2nd respondent, by an order dated 25-10-2017, granting an interim stay on condition that the petitioner paid 60% of the demand within 30 days.

16. Challenging the condition imposed for the grant of stay, the petitioner came up with the writ petition in

W.P.No.38991 of 2017. The main contention of the petitioner in the said writ petition W.P.No.38991 of 2017, as recorded in paragraph-3 of the order passed in the said writ petition on 20-11-2017 was that after calling upon the petitioner to appear on 12-7-2017 for a hearing on the appeal petition, the 2nd respondent disposed of the stay petition. This Court accepted the contention and held that when a notice of hearing is issued indicating that the appeal was to be heard, the petitioner could not be expected to have gone prepared to argue the stay petition and that therefore a conditional order of stay could not have been passed without hearing the petitioner on the stay application. In that view of the matter, a Bench of this Court, by an order dated 20-11-2017, set aside the conditional order of stay passed on 25-10-2017 and remitted the matter back to the 2nd respondent to issue a fresh notice, hear the stay application and pass orders afresh.

17. Pursuant to the said order passed in W.P.No.38991 of 2017, the 2nd respondent issued a notice of hearing on 24-01-2018 and passed an order dated 15-02-2018, again granting interim stay on the very same condition viz., the payment of 60% of the demand within 30 days. It is against the said order that the petitioner has come back to square one.

18. As a matter of fact, the long history of this litigation which we have narrated above, need not actually find a place

in this order, since the present writ petition is against the imposition of a condition for the grant of a stay pending an appeal. But we were compelled to record the checkered history of the case for a specific purpose, which we shall advert to at the appropriate place.

19. The impugned order is challenged by Dr. M.V.K. Murthy, learned counsel for the petitioner, primarily on two grounds viz., (i) that despite the failure of the Assessing Authority to furnish all evidence and records as well as the original records to show how the demand was arrived at, the Appellate Authority imposed such an onerous condition and (ii) that the 2nd respondent took into account the parawise remarks submitted by the Assessing Officer on 09-02-2018, after the completion of the hearing on 24-01-2018, without even supplying a copy of the parawise remarks of the Assessing Officer, to enable the petitioner to meet the same.

20. It is true that in the fourth last paragraph of the impugned order (second para under the heading conclusion), the Appellate Authority has recorded a finding that the Assessing Officer failed to forward the evidence and records for causing any kind of analysis/verification. After taking note of this, the Appellate Authority found merit in the contention on behalf of the Department that if the petitioner had stopped the collection of tax as contended by them, the price of the goods ought to have decreased. Therefore, the non-furnishing of the evidence and records may tilt the balance in favour of

the petitioner, but may not entitle the petitioner to an absolute stay. If at all, the direction to deposit 60% of the demand may have to suffer on account of the findings in the fourth last paragraph of the order.

21. Insofar as the second ground of attack is concerned, it appears that one personal hearing was held on 24-01-2018 and therefore the Assessing Authority filed its parawise remarks on 09-02-2018. But the next date of personal hearing was on 14-02-2018. It is not known whether the copy of the parawise remarks filed by the Assessing Officer on 09-02-2018 was furnished on or before the next date of personal hearing viz., 14-02-2018.

22. If at all we hold that the non-furnishing of the copy of the parawise remarks tantamounted to violation of the principles of natural justice, we may be obliged to set aside the order and send it back for a fresh disposal. But considering the checkered history of the case, starting from the issue of the show cause notices in the year 2005, we are of the view that one more order of remand, after a first order of remand in W.P.No.38991 of 2017 will only multiply litigation. Every action of the respondents is challenged by the petitioner, right from the stage of show cause notice. Therefore, setting aside the impugned order and remanding the matter back to the Appellate Authority for a consideration of the stay petition afresh, would only keep the issue alive and pending without any finality.

23. Dr. M.V.K. Murthy, learned counsel for the petitioner, submitted that the appeal itself was heard partly on 12-7-2017 and that therefore the Appellate Authority can be directed to dispose of the appeal within a time frame and that during the said period the demand can be put on hold.

24. Though the above contention appears very attractive on the face of it, we do not think that we can do it today. This is for the reason that the very same argument was raised in W.P.No.38991 of 2017. But the Division Bench did not direct the Appellate Authority to complete the hearing and pass final orders. On the other hand, the Division Bench directed a fresh notice to be issued for a hearing in the stay petition and directed the Appellate Authority to pass orders afresh. Therefore, adopting the course of action suggested by the learned counsel for the petitioner, will tantamount to doing something that was not done by another Bench in the previous writ petition.

25. It is contended by Dr. M.V.K. Murthy, learned counsel for the petitioner, that none of the parameters for the consideration of an application for stay was applied by the 2nd respondent in the impugned order and that therefore the same deserved to be set aside.

26. It is true that there is no detailed analysis of *prima facie* case, hardship etc., in the impugned order. But the same would lead this Court only to pass an order creating one more round of litigation. We do not wish to do that in view of

the long history in this case. Repeated orders of remand passed on the ground that one or other parameters has not been considered, merely multiplies litigation but does not take both parties to the destination. Therefore, we are of the considered view that the petitioner could be granted stay pending disposal of the appeal, subject to a reasonable condition. It must be pointed out that insofar as sales tax and value added tax are concerned, every dealer is obliged to pay 12.5% of the disputed tax as a pre-condition for filing a first appeal. Once the first appeal is dismissed, the dealer will be entitled to file a second appeal, subject to payment of a further amount totalling to 50% of the disputed tax.

27. Insofar as luxury tax is concerned, no pre-deposit condition is prescribed for filing an appeal. Therefore, the petitioner has filed a statutory appeal pursuant to the order passed by this Court on 18-4-2017 in M.P.No.8784 of 2017 in W.P.No.7155 of 2017, without being obliged to make a pre-deposit. In other words, the petitioner has had the luxury of filing a first appeal (though pursuant to the directions of this Court) without making a pre-deposit, irrespective of whether they collected luxury tax or not. Hence, the petitioner cannot make much ado if they are made to deposit at least 12.5% of the demand. If petty and small time dealers are forced to pay 12.5% of the demand for filing an appeal in sales tax and VAT matters, there is no reason why the petitioner should not be

directed to pay at least a minimum amount for the grant of stay pending appeal.

28. Therefore, the writ petition is allowed, the impugned order is modified, granting an interim stay on collection of the disputed demand, subject to the condition that the petitioner deposits 12.5% of the demand within a period of 6 (six) weeks from the date of receipt of a copy of this order. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

J.UMA DEVI, J.

11th April, 2018.
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HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

Writ Petition No.7116 of 2018
[For Orders - per VRS, J.]



11th April, 2018.
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