IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.8940 OF 2018

Raj Shipping .. Petitioner.
v/s.
The State of Maharashtra & Others .. Respondents.

Mr. V. Sridharan, Sr. Advocate with Mr. Prakash shah i/b. PDS Legal, for the Petitioner.
Mr. V. S. Sonpal, Special Counsel with Mr. C. D. Mali, for Respondent Nos.1, 2 and 4.

CORAM: M.S.SANKLECHA, &
M.S.SONAK, JJ.

DATE : 19th JUNE, 2019.

P.C:-

This Petition under Article 226 of the Constitution of India challenges the order dated 2nd April, 2018 passed by the Maharashtra Sales Tax Tribunal (the Tribunal). The impugned order dated 2nd April, 2018 disposed of the Petitioner's application for stay to the recovery of proceeding, in the pending Appeal. This by directing the Petitioner to pay an amount of 50% of the total tax due as a condition precedent for stay of the order dated 17th January, 2017 of the Dy. Commissioner of Sales Tax (Appeals) which forms the basis for recovery proceedings.

2 The Petitioner is in the business of supplying bunker fuels to various incoming and outgoing vessels within the port of Bombay. The Petitioner purchases bunker fuel from Oil Marketing Companies such as Indian Oil Corporation Ltd., and sells them to the vessels which are under Contract with Oil and Natural Gas Commission (ONGC). These vessels are deployed beyond the territorial limits of India but within the Exclusive Economic Zone. These bunker fuel is supplied by the Petitioner as ship

stores. The sale of the bunker oil is evidenced by the invoices issued to the shipping line owning the vessels.

3 During search operation, on17th December, 2014 by the investigation wing of the Respondent, it was found that the dealer was availing of Notification No. 1506 dated 30th November, 2006. The investigation officer was of the view that the Petitioner is not entitled to the benefit of the above Notification. This led the Petitioner to file a revised return for the period 2011-12. The Assistant Commissioner of Sales Tax, by order dated 28th March, 2016 held that sale of bunker fuel sold to vessels, attracts tax under the MVAT Act. It held that balance tax payable after taking inputs credit is Rs.7.70 Crores. Further, interest of Rs.4.71 Crores and he also imposed a penalty of Rs.7.70 Crores, leading to an aggregate demand of Rs.20.11 Crores.

4 Being aggrieved by the Assessment Order dated 28th March, 2016, the Petitioner filed an appeal to the Deputy Commissioner of Sales Tax (Appeals). However, without success, as the Petitioner's appeal was dismissed by an order dated 17th January, 2017. This led the Petitioner to file Second Appeal before the Tribunal. The appeal itself has been admitted as requirement of pre-deposit has been complied with by the Petitioner and is awaiting final disposal in its turn.

5 Pending the final disposal of its above appeal by the Tribunal, the Petitioner filed stay application, seeking a stay of recovery, consequent to the order dated 17th January, 2017 passed by the Dy. Commissioner of Sales Tax (Appeals). The amounts payable by the Petitioner to the Revenue under the above order dated 17th January, 2017 was Rs.20.11 Crores which was an aggregate of tax of Rs.7.71 Crores, interest of

Rs.4.71 Crores and penalty of Rs.7.70 Crores.

6 Before the Tribunal, the Petitioner urged the following submissions in support of its prayer for stay of the recovery proceedings consequent to order dated 17th January, 2017 of the Dy. Commissioner of Sales Tax (Appeals):-

(i) no tax is payable as the bunker fuel as supplied to ship in the territorial waters of India as it is beyond the territorial limits of the State;

(ii) the retail sale of petroleum products is not taxable and the bunker fuel supplied by them to vessels is in the nature of retail sales; and

(iii) the benefit of lower rate of taxes in respect of bunker oil supplied to foreign going vessels in terms of Schedule C to the said Act.

7 The impugned order of the Tribunal on a *prima facie* view found issue-wise as under:-

(i) above is concerned, it stands concluded against the Petitioner by the decision of this Court in Raj Shipping v/s. State of Maharashtra (Writ Petition No. 4552 of 2015) decided on 19th October, 2015;

(ii) above is concerned, the co-ordinate bench of the Tribunal in the case – M/s. Bhambani Shipping v/s. State of Maharashtra (VAT Appeal Nos. 138 and 139 of 2017) decided on 13th October, 2017 has held that *prima facie* it cannot be held that the Petitioner's sale of bunker fuel to vessels will qualify as retail sale; and

(iii) above is concerned, the Tribunal held that the Petitioner themselves have admitted that the vessel to whom the bunker fuel is sold are not foreign going vessel.

In the above view, the impugned order of the Tribunal directed a stay of the recovery consequent the order dated 17th January, 2017 of the Dy. Commissioner of Sales Tax (Appeals) on condition of depositing 50% of the tax amount of Rs.7.71 Crores i.e. Rs. 3.35 Crores. This is out of total dues of Rs.20.11 Crores.

8 Mr. Sridharan, the learned Senior Counsel for the Petitioner submits that the dispute arising in this case is a pure question of law. Therefore, stay of the recovery proceedings ought to have been granted on deposit of 10% of the tax payable. It is submitted that so far as issue nos. (i) & (ii) as urged before the Tribunal are concerned, he does not press it for the purposes of this Petition. However, so far as issue no. (iii) is concerned, it is submitted that in terms of the Schedule 'C' to the Act, the tax payable on bunker oil supplied to foreign going ships is chargeable to lower rate of tax. It is submitted that the term '*foreign going ships*' came up for consideration before the Hon'ble the Supreme Court in a customs matter i.e. in ***U.O.I. v/s. V. M. Salgaoncar & Bros (P) Ltd., 1998 (4) SCC 263,*** where it has been held that foreign gong vessel means a vessel capable of going abroad and its dominant use does not determine its true nature. Therefore, on this issue alone, the stay as pleaded must be granted or the matter be remanded for fresh consideration to the Tribunal on the above issue.

9 The grievance of the Petitioner before us is that the issue arising before the Tribunal was a pure question of law, thus the order passed by the lower authority ought to have been stayed on a deposit of 10% as offered by the Petitioner. In the alternative, it is prayed that the impugned order of the Tribunal dated 2nd April, 2018 be set aside and the

Tribunal be directed to re-consider the Petitioner's stay application.

10 Its trite law that the scope of examination of the appeal at the final hearing and an application for stay of an order, challenged in appeal, pending disposal of the appeal, is entirely different. At the final hearing, the appeal is considered in depth and all the facets of the case are considered. On the other hand, while hearing an application for stay of the order in challenge before the Tribunal, a *prima facie* view of the strength of the case before it is considered. Therefore, where the issue is concluded by a decision of the superior forum or on decision of the authority hearing the stay application, then it would be a factor warranting a stay. As against the above, if the issue is still open and requires consideration, then the Authority would exercise its discretion in granting a stay subject to such condition, as it deem appropriate so as to protect the interest of both the sides.

11 In the present facts, we note that the submission of the Petitioner were duly considered and a *prima facie* view was taken after consideration of facts and the prevailing law. The challenge to the impugned order before us by the Petitioner is entitlement of lower tax on bunker fuel in view of Schedule 'C' to the Act. This on the ground that the bunker fuel is supplied to foreign going vessels. We note this submission was considered by the Tribunal and rejected at the *prima faice* stage, as the Petitioner had conceded the position that the bunker fuels are supplied to vessels which are not foreign going vessels. Thus, in view of the above, no fault can be found with the *prima facie* view taken by the Tribunal. Mr. Sridharan, learned Sr. Counsel in support of the Petition seeks to submit that the meaning of the word '*Foreign Going Vessel*' stands concluded by the Apex Court in V. M. Salgaoncar & Bros (supra) where it

held that the Foreign Going Vessel need not itself go abroad but should be capable of going abroad. However, we note that the above decision was given in the context of the Customs Act, 1962 and not the said Act. Therefore, this issue would merit detailed consideration at the final hearing of the Appeal. The above decision not having been rendered under the Act, does not conclude the issue in favour of the Petitioner as claimed by it. Thus, taking into account the above facts, the impugned order of the Tribunal has directed the Petitioner to deposit Rs.3.35 Crores out of tax due of Rs.7.71 Crores i.e. 50% of the tax dues. However, if one takes into account the interest and penalty, which has been imposed by the order of the lower authority, the total due payable is Rs.21.11 Crores. In the aforesaid circumstances, the view of the Tribunal – directing the Petitioner to deposit 50% of the total tax due for stay of the order dated 17th January,2017 is a reasonable view. In the above view, no interference with the impugned order dated 2nd April, 2018 of the Tribunal, is called for.

12 Accordingly, **Petition dismissed**.

(M.S.SONAK,J.) **(M.S.SANKLECHA,J.)**