

M/s. Pearl Enterprises and Amandeep Kansal Vs Union of India and Customs Excise and Service Tax Appellate Tribunal, Principal Bench

Court: High Court of Himachal Pradesh

Date of Decision: Dec. 21, 2011

Acts Referred: Central Excises and Salt Act, 1944 " Section 35B, 35F
Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 " Rule 41

Hon'ble Judges: Rajiv Sharma, J; Kurian Joseph, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Justice Kurian Joseph, C.J.

Consistency in rendering judgments or passing interim orders is an integral element of legal propriety and

judicial discipline. Judicial discipline is of the basis of integrity of the Institution. Even a stray aberration in such foundational values, will affect the

image of the Institution as fair and impartial. Inconsistent orders passed by a Judicial Officer in the same fact situation will undermine and shake the

faith of the people in the judicial system and rule of law and leave an imprint in the mind of the litigant that he has been discriminated. The whole

purpose of the protector-Institution is to prevent discrimination and arbitrariness. Hence, such Institutions shall not give rise to even a remotest

feeling or situation of being in-consistent in their orders lest they should be accused of being partial and unfair.

2. The above guiding principles having served as background to the instant case, we may briefly refer to the fact situation. In the nature of the order

we propose to pass in this case, it is not necessary for us to go in detail to the merits of the case. The first petitioner was a partnership firm till

December, 2009, whose unit at Baddi in Himachal Pradesh was engaged as a job worker for Colgate Palmolive India Ltd. Petitioner was also a

registered service provider paying service tax under the category of "Business Auxiliary Services". The Central Excise has taken the view that the

activities thus carried out by the petitioner amounted to manufacture, thus attracting excise duty. The petitioners contested the same on merits and

also claimed exemption from payment of excise duty on the ground that the unit is situated within the notified area and thus entitled to exemption

from payment of central excise duty. Both the contentions have been rejected and second respondent imposed excise duty on the petitioner as per

order dated 31.5.2010. An appeal was filed u/s 35 B of the Central Excise Act, 1944, before the Customs, Excise and Service Tax Appellate

Tribunal, New Delhi, as per Annexure P-15. Annexure P-16, application for stay and waiver of pre-deposit u/s 35F of the Central Excise Act,

1944, was also filed therewith. The petition was posted on 7.9.2011. It is the case of the petitioners and it appears also so from the impugned

order that an adjournment had been sought by the junior Advocate. However, by a detailed order, the same was rejected and the Tribunal

directed the deposit of an amount of eight crores out of the demand for duty to the tune of around fifteen crores and penalty for an equal amount.

On the next day of the impugned order i.e. 8.9.2011, identical issue came up for consideration before the Tribunal, at the interlocutory stage u/s

35F of the Act in the case of M/S Vasantham Enterprises. Incidentally, it is also worth noting that one of the Members of the Tribunal which

passed Annexure P-18, order dated 7.9.2011, was also Member in the Bench, hearing the application u/s 35 F, filed by M/S Vasantham

Enterprises. The Tribunal by order dated 22.9.2011, dispensed with the condition of pre-deposit of duty and penalty and the stay petition was

allowed un-conditionally. It was a case where duty around rupees thirty seven crores was imposed. The petitioner moved Annexure P-20,

application seeking recall of order dated 7.9.2011. That application was rejected, as per Annexure P-23, order, wherein it has been stated that it

was the discretion of the Tribunal to pass interim orders depending on the facts and circumstances of each case. It was also observed that it was

not a fit case for exercise of power under Rule 41 of the CESTAT (Procedure), Rules, 1982. Those two orders, Annexure P-18 and P-23 are

under challenge alongwith the dependent orders, in this Writ Petition.

3. Heard, Sh. Joseph Vellapally, learned senior counsel for the petitioners and Sh. Rajiv Jiwan, Central Government Counsel, appearing for the

respondents.

4. Interim order, no doubt is at the discretion of the judicial forum. But that discretion is not an arbitrary discretion. Discretion does not mean the

arbitrary fiat of the person in the office passing the orders. The decision has to be informed by reasons, objectivity and transparency. Whim and

caprice are alien to judicial process. Consistency in passing orders is a vitally relevant factor, while exercising discretion in passing judicial orders,

lest it should be mis-understood as an exercise of arbitrary power and attribution of motives. Exercise of arbitrary powers is the pre-Constitution

concept and approach by the despotic monarchs. Constitutional Institutions vested with judicial powers are to exercise their powers on proper

application of mind, weeding out all extraneous considerations and they should act fairly and impartially. Consistency is one of the hallmarks of the

judicial discipline, particularly in passing interlocutory orders.

5. The Supreme Court of India in *Birbal versus Ghaziabad Development Authority*, reported in (2006) 10 SCC 305, in the fact situation of

deposit at the appellate stage of land acquisition compensation has held that there must be consistency in passing judicial orders. The view was

followed with more emphasis in the recent judgment in *State of U.P. and Others Vs. Hirendra Pal Singh etc.*, While dealing with the exercise of

power u/s 35 F of the Central Excise Act itself, a Division Bench of the Bombay High Court in *Hindustan Petroleum Corporation Limited Vs. The*

Union of India (UOI), Ministry of Law and Justice and The Commissioner of Central Excise-II, has set aside the in-consistent orders and

remanded the matter to the Tribunal holding at paragraph 9, as follows:

9...The Tribunal as a judicial body must follow principles of consistency when it decides cases. The lack of consistency is clear on the face of the

record. In fact, as noted earlier the Tribunal has now passed a third order on 14th December 2009 on a stay application arising of an appeal filed

by the petitioner by which the view taken in the first order dated 11th September, 2009 is reiterated and a direction has been issued for the deposit

of an amount of Rs 1 crores towards a demand of duty. Faced with this situation, we are of the considered view that it would be appropriate to

remit the proceedings back to the tribunal for reconsideration of the matter having regard to the observations made by this Court earlier Judicial

orders must be passed by the Tribunal with a greater degree of circumspection and application of mind. Whim and caprice are alien to the judicial

process. Consistency, based on judicial precedents should be the norm.

6. The High Court of Kerala in *Joy Vs. Regional Transport Authority*, has been sharpen and stronger while holding that:

3. Judicial discipline demands consistency in rendering judgments. A judicial Officer may hold different views on various aspects. A Judicial officer

may err and pass contradictory orders inadvertently. But once it is brought to the knowledge of the Judicial Officer, he is duty bound to keep track

of consistency. Inconsistent orders passed by a judicial officer almost in the same fact situation and that too on the same day, would give rise to

complaint of discriminatory treatment, which will undermine the people's faith in judicial system and the rule of law. It will cause resentment and

anguish and make an imprint in the mind of the litigant that he has been discriminated. A Judicial officer may err and pass illegal orders, but he shall

not err in consistency. He should be consistent even in illegality.

7. In the factual matrix we have referred to above, we have no doubt in our mind that the Tribunal should have invoked the power under Rule 41,

once a petition producing also the order passed in Vasantham Enterprises (Annexure P-19), was brought to the notice of the Tribunal, in the

interest of justice and for securing the ends of justice, otherwise the inconsistent orders would shake the faith of a citizen in the impartiality of the

Tribunal or such other judicial forums.

8. Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982, followed by CESTAT, also is an inherent

power vested with the Tribunal to be exercised for securing the ends of justice. The provision had come up for a judicial scrutiny before the Apex

Court in M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise, wherein it has been held as follows:

5. Rule 41 gives CEGAT vide powers to make such orders or give such directions as might be necessary or expedient to give effect or in relation

to its order or to prevent abuse of its processor, most importantly, to secure the ends of justice.

If, in a given case, it is established that the respondent was unable to appear before it for no fault of his own, the ends of justice would clearly

require that the ex parte order against him should be set aside. Not to do so on the ground of lack of power would be manifest injustice. Quite

apart from the inherent power that every tribunal and court constituted to do justice has in this respect, CEGAT is clothed with express power

under Rule 41 to make such order as is necessary to secure the ends of justice. CEGAT has, therefore, the power to set aside an order passed ex

parte against the respondent before it if it is found that respondent had, for sufficient cause, been unable to appear.

9. We may, since the original order is also under attack, advert to some of the guiding principles with regard to passing of interim orders u/s 35 F

of the Act. The principles are no more res integra in view of the detailed analysis of the provisions and guiding principles laid down by the Apex

Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, wherein it has been held at paragraphs 8, 11, 12, 13,

14 and 15, as follows:

8. It is true that on merely establishing a Prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears

that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of demand. Petitions for

stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or

part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual

scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority 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 given.

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of revenue". Therefore,

while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to

safeguard the interest of Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35(F). One is undue hardship. This is a matter within the special knowledge of

the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this

Court in *S. Vasudeva Vs. State of Karnataka and others*, that under Indian conditions expression "Undue hardship" is normally related to

economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it.

Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be "undue" it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to

the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances

warrant.

15. The other aspect relates to imposition of condition of safeguard the interest of revenue. This is an aspect which the Tribunal has to bring into

focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of revenue. Therefore, the Tribunal while

dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate condition as

required to safeguard the interest of revenue.

10. In an earlier decision, *Mehsana Dist. Co-op. Milk P.U. Ltd. Vs. Union of India (UOI)*, it has also been held that prima-facie merits of the case

and financial hardships are also relevant factors to be considered u/s 35 F of the Act.

11. Though the petitioner had pleaded that the net profit of petitioner No.1 during the relevant period was merely 18.71 lacs, there is hardly any

reference to the same while considering financial hardships. As held by the Apex Court in *Benara Valves Ltd case* (supra), the undue hardship to

the person is a relevant factor to be taken into consideration u/s 35 F of the Act.

12. For all the above reasons, we are of the view that the stand taken by the Tribunal while passing the impugned orders require fresh

consideration. Accordingly, we set aside Annexures P-18 and P-23 and all other dependant orders. There will be a direction to the Tribunal to

consider Annexure P-16, stay application, referring to all relevant factors, referred to above, and pass fresh orders after affording an opportunity

for hearing to the petitioners. The Writ Petition is allowed, as above. Pending application(s), if any, shall also stand disposed of.