

M/s. Panch Sheel Udyog Vs The Union of India and Others

Court: Jharkhand High Court

Date of Decision: Nov. 30, 2012

Acts Referred: Central Excises and Salt Act, 1944 & Section 35F Finance Act, 1994 & Section 65, 83

Citation: (2013) 31 STR 517

Hon'ble Judges: Prakash Tatia, C.J; Jaya Roy, J

Bench: Division Bench

Advocate: M.S. Mittal and Mr. Sumeet Gadodia, for the Appellant; Ratnesh Kumar, Sr. SCC Excise, for the Respondent

Final Decision: Allowed

Judgement

1. Heard learned counsel for the parties. The present matter has peculiar facts, in as much as, the writ petitioner sought exemption from condition

of pre-deposit u/s 35F of the Central Excise Act, 1944 as well as u/s 83 of the Finance Act, 1994 for maintaining his appeal under the provisions

of the Act of 1944. The petitioner's said prayer for grant of exemption from the condition of pre-deposit of the entire amount was considered by

the Commissioner (Appeals), Central Excise and Service Tax, Ranchi without giving opportunity of hearing to the petitioner under assumption that

no hearing of petitioner is required. The said Commissioner vide order dated 19.12.2011, directed, rather say, permitted the petitioner to deposit

50% of the confirmed demand amount so as to fulfill the condition of pre-deposit.

2. The petitioner, being aggrieved against the order of the Commissioner (Appeals), Central Excise and Service Tax, Ranchi, approached this

Court by filing writ petition being W.P.(T) No. 441 of 2012 Said writ petition was allowed by the Division Bench of this Court vide order dated

03.02.2012 and the order of the Commissioner (Appeals), Central Excise and Service Tax, Ranchi was set aside and the said authority was

directed to pass fresh order after giving opportunity of hearing to the writ petitioner. The Commissioner (Appeals), Central Excise and Service

Tax, Ranchi, after hearing the petitioner, vide impugned order dated 11.04.2012 withdrew that benefit which was given to the writ petitioner when

he was not heard and directed the petitioner to deposit full demand amount. Therefore, if petitioner would not have got the opportunity of hearing,

he would have to deposit 50% of the confirmed demand created by the impugned order which was under challenge before the appellate authority

and when petitioner was given opportunity of hearing, he is directed to pay the entire amount of demand. The petitioner, therefore, is aggrieved

against the subsequent order passed by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi dated 11.04.2012.

3. Learned counsel for the writ petitioner vehemently submitted that the appellant was given two contracts, one by TISCO and another by

JUSCO. It is submitted that both contracts are similar and they are for providing cleaning service by the writ petitioner. So far as one contract is

concerned, that has been treated to be a cleaning service contract by the revenue and tax has been levied accordingly because of the reason that

cleaning service was provided for industrial unit which could have been levied. But, so far as another contract is concerned, that contract is also a

cleaning service contract but it is not given for any commercial or industrial building or premises and it is for residential colony. According to

learned counsel for the petitioner, in present case, the contract in question cannot be said to be a contract falling under the contract for

Management, Maintenance or Repair Service"" and in particular, a contract for ""Maintenance"" in contrast to another contract referred above.

According to learned counsel for the writ petitioner, such stand has been taken by the revenue only because of the reason that if, this contract is

treated to be a contract for cleaning services, then it will not fall and will not be covered under Clause 24(b) of Section 65 of the Finance Act,

1994 as the contract is for residential premises and colonies which have not been included in the definition of cleaning activity referred above.

Therefore, the revenue interpreted the contract and wrongly included the service of the petitioner to be service for ""maintenance"". Learned counsel

for the petitioner drew our attention to the various clauses of the contract and also drew out attention to the facts noted by the original authority in

the original order to demonstrate before us that the contract in question is not the contract for maintenance but it was a cleaning activity contract for

residential area of the unit who gave the contract to the writ petitioner.

4. Learned counsel for the petitioner vehemently submitted that in view of the position made clear by letter No. B1/6/2005 TRU dated

27.07.2005 also, therefore, there is no tax liability of the writ petitioner. It is submitted that petitioner is asked to pay certain amount which he is

not liable to pay, in that situation, it may result into undue hardship because of the demand only. Learned counsel for the petitioner also submitted

that there is a strong prima-facie case in favour of the petitioner and Hon"ble Supreme Court in the case of Benara Valves Ltd. and Others Vs.

Commissioner of Central Excise and Another, has considered in detail what is ""undue hardship"" which is required to be considered while passing

orders of interim nature in such type of matters. The said case of Benara Valves Ltd. has been considered by the Division Bench of this Court (in

which one of us Justice Prakash Tatia, C.J. was member) in the case of Tata Motors Limited Vs. Union of India & Others (W.P.(T) No. 705 of

2012) decided on 15.02.2012. In the case of Tata Motors (Supra) it appears, inadvertently citation has wrongly been mentioned as (2006) 204

SCC 513 (SC), whereas correct citation is Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, and equivalent

citation is Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, . It is submitted that so far as undue hardship and all

other considerations are concerned, those were considered by the same lower appellate authority on earlier occasion when it passed the order

dated 19.12.2011 and partly allowed the petitioner's application for exemption from the condition of pre-deposit by directing it to deposit 50% of

the confirmed demand. However, when the same authority again considered the matter, then missed the scope of consideration which should be at

the time of passing of the interim order. It is submitted that the same authority, in more detail, discussed the merit of the case and did not consider

prima facie merit of the case. It is submitted that in view of the fact that virtually similar contract has been considered to be a cleaning service

contract by the revenue then in that situation, it was a pure question of law as it involves interpretation of documents and earlier order passed by

the authority for similar agreement. Therefore, in view of the various provisions which have been shown to us, the petitioner has strong prima facie

case and in case the relief of exemption from payment of pre-deposit is not granted, undue hardship will result to the petitioner as according to the

petitioner, the revenue could not show that particular burden created by the impugned order is in proportion to the liability of the petitioner.

5. Learned counsel for the revenue vehemently submitted that Hon"ble Supreme Court in the case of Benara Valves Ltd. and others Vrs.

Commissioner of Central Excise and Another has clearly considered in what circumstances the courts may grant interim order with respect to the

condition of pre-deposit and what is the meaning of undue hardship. Learned counsel for the revenue seriously questioned the merit in the case of

challenge to the impugned order which was challenged before the appellate authority. According to learned counsel for the revenue, from any angle

if the contract is examined, it squarely falls within the ambit of providing maintenance service to the company who gave the contract, may it be, in

relation to the colony or garden. The order passed by the adjudicating authority is well reasoned order and cogent reasons have been given by the

adjudicating authority who fastened the liability upon the writ petitioner. Therefore, there is no prima-facie case in favour of the writ petitioner,

much less to resulting into any undue hardship to the petitioner.

6. We have considered the submissions of the learned counsel for the parties and perused the agreement in question and the reasons given by the

Commissioner(Appeals), Central Excise Service Tax, Ranchi in its order dated 11.04.2012. We are of the considered opinion that the same

authority, on earlier occasion, when it decided the application without giving opportunity of hearing to the writ petitioner, partly allowed the

application of the petitioner and directed the petitioner to deposit 50% of the confirmed demand for maintaining the appeal and when this Court

directed the same authority to give opportunity of hearing to the writ petitioner, it rejected the application of the writ petitioner for exemption from

condition of pre-deposit.

7. Be that as it may, so far as prima-facie case is concerned, we are of the considered opinion that the issue as has been considered by the

appellate authority i.e., Commissioner (Appeal) Central Excise Service Tax, Ranchi, itself shows that the issue of not only question of fact but

question of law has been successfully raised by the writ petitioner before the appellate authority even at the time of arguing the application for

exemption from condition of pre-deposit. It appears that the appellate authority virtually proceeded to examine the issue as though it was deciding

the appeal itself and instead of finding out the prima-facie case, it has virtually recorded the findings on the issues. It is not a case of mere more

details of the fact or even of law in the impugned order but it is a case where probably the authority, influenced by the detailed arguments of the

parties, proceeded to record very many findings. However, we are making it clear that those observations shall be treated to be only prima-facie

observations of the authority and not the findings on the issue finally.

8. After going through the contents of the agreement and definition of the cleaning activities as given in Clause 24(b) of Section 65 of the Finance

Act, 1994, there may be prima-facie force in the submission of the learned counsel for the petitioner that the cleaning activities may not include the

activities undertaken by the petitioner when it is for the residential complex or colony and the plea of the petitioner that the work awarded to the

petitioner of the nature mentioned even in the order passed by the original authority may not fall in the category of ""maintenance"". There is also

prima facie, force in the submission of the learned counsel for the revenue that there are overlapping works, hence, some of the works have been

clearly mentioned in the agreement to be the work of maintenance. In view of those arguments of learned counsel for the parties, the matter is

required to be considered by the fact finding authority carefully to find out the nature of the contract after taking into account the another contract

obtained by the petitioner itself from the same company and after taking into account all the facts of the work to be done by the petitioner and to

find out whether the contract is a contract for maintenance or it is a contract of service for cleaning activities. In view of the above reasons, we are

of the considered opinion that there is prima-facie case in favour of the writ petitioner.

9. So far as the question of undue hardship is concerned, we are of the considered opinion that the Commissioner(Appeals), Central Excise,

Ranchi itself was of the view in the order dated 19.12.2011 that the petitioner should deposit 50% of the confirmed demand, then in that situation,

there was no justification for putting the petitioner in worse position than the earlier order which was passed ex-parte asking the petitioner to

deposit 50% of the confirmed demand for maintaining the appeal. Therefore, the question of undue hardship has already been assessed by the

authority itself when it passed the order dated 19.12.2011 and we are of the considered opinion that in that fact situation, the petitioner's

application for exemption from condition of pre-deposit deserves to be allowed in terms of the relief as granted by order dated 19.12.2011.

10. Learned counsel for the petitioner submitted that the order passed in W.P.(T) No. 2233 of 2012 in the case of The Tinsplate Company of India

Ltd. Vs. Union of India and others, this Court, after considering the fact of petitioner's case of that writ petition itself, has granted relief to the writ

petitioner of M/s. Tinsplate Company to the effect that in view of the delay already caused in the litigation, the appellate authority may decide the

appeal within three months from the date of receipt of the copy of the order and till then, requirement of condition of pre-deposit shall remain

suspended. Learned counsel for the petitioner submitted that in view of the said judgment of this Court, similar relief may be granted to the present

petitioner and the appellate authority may be directed to decide the appeal within stipulated period and till then, the condition of pre-deposit may

be dispensed with.

11. We are of the considered opinion that a larger issue was involved in the case of Tinsplate Company Ltd. and that was with respect to the right

of the applicant before the appellate authority of hearing in the matter of seeking relief of dispensing with the condition of pre-deposit and that issue

has already been decided by the Division Bench of this Court vide Judgment dated 12.10.2012 (in which one of us Justice Prakash Tatia, C.J. was

member), therefore, that relief was granted to the writ petitioner in peculiar facts of the case following the judgment passed by different High

Courts but such relief cannot be made a precedent so as to invite all such appellants who are before the appellate authority to seek similar relief of

deciding their appeals within stipulated period and till then, the condition of pre-deposit may be dispensed with. If such orders are passed in routine

manner and required to be followed in all cases, then virtually it will make section 35F of the Central Excise Act, 1944 redundant. We may also

observe that the High Court normally will not direct sub-ordinate courts or tribunals or appellate authorities to decide the matter on priority basis

simply because the party has approached the High Court so as to deny the early hearing to all others, who could not or who have not approached

the High Court. It is better to leave the docket of the lower Court and appellate Court according to discretion of lower Court and appellate Court.

In view of the above reasons, since the judgment in the case of Tinplate Company giving interim relief is not a precedent, we are of the considered

view that in the facts of the case, the petitioner is not entitled to same relief in view of the facts of this case. However, the writ petition of the

petitioner is partly allowed. The impugned order dated 11.4.2012 passed by the Commissioner(Appeals), Central Excise and Service Tax, Ranchi

is set aside. The application of the writ petitioner is allowed to the extent that the writ petitioner may now deposit 50% of the confirmed demand

before the appellate authority within a period of one month from today. We are making it clear that none of the observations made above be

treated to be any decision or finding or even observation on the merits of the case of any of the parties.