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**(2010) 09 CAL CK 0089**

**Calcutta High Court**

**Case No:** APO No. 344 of 2010 and WP No. 484 of 2009

Brahmaputra Carbon Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision:** Sept. 13, 2010

**Citation:** (2011) 268 ELT 221

**Hon'ble Judges:** Kanchan Chakraborty, J; Kalyan Jyoti Sengupta, J

**Bench:** Division Bench

**Advocate:** Banerjee, for the Appellant; Roychowdhury, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

1. This appeal is against an interim judgment and order dated 17-6-2010 passed by the Learned Trial Judge, whereby and where-under the Learned Trial Judge refused to modify the earlier interim order dated 3-5-2010. The Learned Trial Judge by its order dated 3-5-2010 (hereinafter referred to as the first order) on an interlocutory application has granted ad interim relief in the manner as follows;-"If any amount has already been recovered on the basis of the order of the Tribunal that shall abide by the result of the application. If any further amount is to be recovered then the revenue shall not take steps for recovery, if the Petitioner secures the amount payable to the satisfaction of the Assistant Commissioner, Central Excise."

2. The brief fact of the case is required to be recorded while dealing with the appeal.

3. On 3-2-2010 the Division Bench of this Court had allowed the appeal preferred by the present Appellant against the dismissal of the writ petition dated 16-11-2009. By the said order the Appeal Court after having set aside remanded the matter for fresh hearing. The relevant portion of the said judgment and order of the Appeal Court is reproduced hereunder:

We accordingly desire that the matter may be heard out afresh within eight weeks from the date of drawing attention of the Hon"ble Judge to this order.

4. While allowing the said appeal the Division Bench observed that once the writ petition is admitted for hearing and direction for affidavit having been given at the time of final hearing the writ petition cannot be dismissed on the ground of alternative remedy. On that proposition of law the said appeal was allowed.

5. It appears that in spite of the aforesaid direction of the Appeal Court the writ petition for some reason or other should was not heard out for which we do not want to probe into the matter. There may be varieties of reasons for not disposing of the matter within the time fixed by the appeal Court.

6. No interim order was passed in the writ petition at the early stage not even by the Appeal Court on earlier occasion. It was thought that writ petition would be disposed of within eight weeks as desired by the Appeal Court.

7. Taking advantage of pendency of the writ petition without any interim protection the Respondents started taking coercive measure by way of recovery of the amount in terms of the order of the Learned Tribunal which is impugned in the writ petition. Naturally, the Appellant had no option but to file an interlocutory application being GA 2651 of 2009 for appropriate interim relief. In the said application appropriate interim protection was asked for and the Learned Trial Judge on 3-5-2010 after having noted the judgment and order of the Appeal Court was pleased to pass interim order in the manner quoted as above.

8. The Appellant before us having found aforesaid order not being expressive, made an application for modification of the said order by filing an application being GA 2005 of 2010. On that application the impugned judgment and order has been passed. We noticed that the Learned Trial Judge has given direction for filing affidavit, as it was done in the earlier interlocutory application.

9. Mr. Banerjee, appearing in support of the Appellant submits that the Learned Trial Judge ought to have disposed of the writ petition in terms of the direction and time-limit of the Appeal Court. In spite of having heard, the learned Trial Judge instead of hearing the writ petition only dealt with the interim application and did not grant appropriate protection. According to him order of the Learned Tribunal impugned in the writ petition is patently illegal and is not supported by law. He calls upon us to hear out the writ petition itself as the Learned Trial judge did not find time to dispose of the writ petition in terms of the direction of the Appeal Court. The bogie of alternative which is sought to be advanced in this case over and over again is not entertain able in view of the judgment rendered by us on previous occasion and now this point is hit by the principles of res judicata, since no challenge has been made against the aforesaid Division Bench judgment and order.

10. Mr. Banerjee, further submits that if the impugned order of Tribunal is allowed to be operative then the recovery will be made from the third party, it cannot be done under the law as the third party is not answerable or liable to pay any duty and this duty has to be paid by the manufacturer. The ultimate consumer is not required

to pay. Mr. Roychowdhury, Learned Senior Counsel submits that the refusal to modify the earlier interim order does not call for any interference, moreover the matter is pending. The earlier interim order passed in the writ petition sufficiently protects the interest of the writ Petitioner. The said earlier interim order has not been challenged.

11. Under such circumstances, since the writ petition is pending no interference is called for.

12. We have taken into consideration of the contention of both the learned Counsel. We are unable to accede to the request of Mr. Banerjee to hear out the writ petition itself, since on earlier occasion we have decided that it must be done by the learned Trial Judge more over we cannot hear out the writ petition usurping the jurisdiction of the Learned Trial Judge. While dealing with the appeal against an interim order the writ petition should not be heard on merit. Hence, we declined to take up the hearing of the writ petition. Even by consent of the parties the jurisdiction of the Trial Court cannot be conferred upon the Appeal Court.

13. We find that on earlier occasion the Appeal Court requested the Learned Trial Judge to dispose of the writ petition within eight weeks and with this idea at that stage no interim order was passed when appeal was allowed. We find in the first interim order the learned Trial Judge though having taken note of the judgment and order of the Appeal Court which stipulates the time limit of hearing of the appeal, was pleased to deal with the application for interim relief only and no endeavour was made to hear out the writ petition although by that time eight weeks time limit having been expired. We find that interim order passed by the Learned Trial Judge in the first application was not appealed against. The only question is whether it needs to be modified to make it operative or not. We are of the view that since the writ petition could not be heard within the time limit some interim measure is required. The learned Trial Judge by the first order has granted some relief but something more has to be provided, because it is not the fault of the Appellant/writ Petitioner but it is that of the Court for the writ petition could not be heard out within the time limit as stipulated by the Appeal Court. The well known maxim *actus cur neminem gravabit* is absolutely applicable in this case. It has been mentioned by the learned Trial Judge in the first interim order the Petitioner is to secure the amount payable to the satisfaction of the Assistant Commissioner of Central Excise. I think this measure of security is good enough to take care interest of the revenue but what would be the formal method of security is the moot question and it needs clarification and we think that the learned Trial judge ought to have clarified about nature of the security. Having regard to the facts and circumstances of the case where no evasion of duty or non chargeability of duty is involved in this case, the security as provided in the first order would be usual personal bond to be furnished by the Appellant, if any fresh recovery is sought to be made. In the event any recovery is sought to be made from the third party it is for the third party to take

steps and it is not for the Appellant to take care of their interest and affectation. It is open for them to approach the appropriate forum. However, if any action is taken against the third party then the third party will not be entitled to take action against the Appellant. This interim order will continue till the disposal of the writ petition and it has to be understood the request of the Appeal Court to the Learned Trial Judge is a mandate and that mandate as far as practicable has to be respected.

14. We accordingly, once again request the Learned Trial Judge without wasting any further time, to decide the writ petition itself within fortnight from date of production of this order without fail. Since Mr. Roychowdhury submits that the affidavit-in-opposition to the writ petition is ready to be filed and the same may be filed at the time of hearing of the writ petition, however, copy of the same shall be supplied in course of tomorrow to the Advocate on record of Mr. Banerjee's client. Affidavit-in-reply may be made ready for affirmation within a period of two weeks from date, and the same may be filed at the time of hearing.

15. The application is disposed of.

16. It is recorded that affidavit-in-opposition is handed over with the Advocate on record of Mr. Banerjee, by Mr. Roychowdhury.

17. Certified Photostat copy of this order, be made available to the parties, if applied for upon compliance of usual formalities.