

M/S. BENARA VALVES LTD. AND ORS.

v.

COMMISSIONER OF CENTRAL EXCISE AND ANR.

NOVEMBER 23, 2006

[ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Central Excises and Salt Act, 1944—s.35-F—Stay/Dispensation of pre-deposit of duty and penalty—Demand of huge sum of duty and penalty—Direction of Tribunal to pay 25% of duty demanded/penalty—Application for stay of pre-deposit of duty and penalty—Rejected—On appeal, Held: Assessee already deposited Rs.34 lacs—Considering the difficulties highlighted by assessee, appeal be heard without further deposit, however assessee directed to furnish security to safeguard the interest of revenue.

Interim order—Principles governing grant of stay pending disposal of matter before concerned forums—Discussed.

Words and Phrases—Expression 'undue hardship'—Meaning of—Discussed.

The Central Excise Department found that appellants (BAPL and BVL) had been removing excisable goods from its factory clandestinely. Department raised demand of duty of Rs. 2 crores in respect of BAPL and also imposed penalty of same amount. Department also confirmed demand of Rs.24 lacs in respect of BVL and imposed penalty of equal amount. Additional penalties were imposed on several other persons. Aggrieved appellants filed appeals before Tribunal and also application for stay of demand of duty/penalty till disposal of appeals in terms of Section 35-F of Central Excises Act, 1944. Tribunal directed the appellants to pre-deposit 25% of duty demanded/penalty. On writ petition, High Court directed the extension of time to deposit the amount however, rejected the prayer for stay/dispensation of pre-deposit. Hence these appeals.

Disposing of the appeals, the Court

HELD: 1. In matters relating to grant of stay pending disposal of the matters before the concerned forums though discretion is available, the same

A has to be exercised judicially. [344-H; 345-A]

Silliguri Municipality and Ors. v. Amalendu Das and Ors., AIR (1984) SC 653; *M/s Samarias Trading Co. Pvt. Ltd. v. S. Samuel and Ors.*, AIR (1985) SC 61 and *Assistant Collector of Central Excise v. Dunlop India Ltd.*, AIR (1985) SC 330, relied on.

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2. 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 the 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.

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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/

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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.

3.1. The two significant expressions used in Section 35F of the Central Excises Act, 1944 are "undue hardship to such person" and "safeguard the interests of revenue". [346-C]

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3.2. 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. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. 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. [346-D-G]

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3.3. The other aspect relates to imposition of condition to 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

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safeguard the interest of revenue. [346-H; 347-A]

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S. Vasudeva v. State of Karnataka and Ors., AIR (1994) SC 923, referred to.

4. The question that needs to be examined is whether any reduction of the amounts to be deposited as directed by the Tribunal is called for. It appears that pursuant to the direction given by this Court, the appellants have paid Rs.4 lakhs and Rs.30 lakhs within the time stipulated. Considering the nature of dispute and difficulties highlighted by the appellants seeking dispensation of pre-deposit, appeals be heard without requiring the appellant to further deposit. However, for the balance of the amount demanded, with a view to safeguard interest of the Revenue, the appellants shall furnish such security as may be stipulated by the Tribunal. [347-B-D]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No.5166 of 2006.

From the Judgment and Order dated 13-7-2006 of the High Court of Judicature at Allahabad in C.M.W.P. No.1095/2006.

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WITH

C.A. Nos. 5167 of 2006.

Sushil Kumar Jain, Pratibha Jain, Puneet Jain and U.N. Goyal for the Appellants.

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The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

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Challenge in these appeals is to the order passed by the Allahabad High Court dismissing the writ petitions filed by the appellants who had filed the writ petitions questioning correctness of the order passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (in short the 'Tribunal') dealing with the applications filed for staying recovery of duty and penalty imposed pending disposal of the appeals before the Tribunal. Allegations against the appellants were to the effect that they were removing excisable goods clandestinely without payment of duty and without raising Central Excise invoices/bills under the guise of estimates/rough estimates to their front trading firms which they called 'houses' and consequently to the ultimate customer. Searches were conducted at the premises of manufacturing units

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A and other connected concerns, through whom the goods were allegedly sold. During the search, incriminating documents were allegedly recovered from various premises and statements of the concerned persons have also been recorded.

B After issuing notice under Central Excise Act, 1944 (in short the 'Act'), Central Excise Rules, 1944 (in short the 'Rules') and Central Excise Rules, 2001 (in short the '2001 Rules') the Commissioner of Central Excise, Kanpur demanded Rs.2,05,31,762/- from M/s Benara Automotives Pvt. Ltd. (in short 'BAPL') and penalty of equal amount was imposed under Section II AC of the Act. Additionally, penalties were imposed on six other persons. The Commissioner also confirmed the demand of Rs.24, 24,813/- in respect of M/s Benara Valves Ltd. (in short 'BVL') and imposed penalty of equal amount. Additionally, Rs.1,00,000/- each was imposed on several other persons. Appeals were preferred before the Tribunal challenging the determination. Prayer for stay of realisation of demands raised till disposal of the appeals in terms of Section 35 F of the Act was made. The Tribunal directed as follows:

D "Therefore, considering the facts and circumstances of all these cases, we direct the applicant to pre-deposit the following amounts within eight weeks under Section 35F of the Central Excise Act:

E (1) M/s. BAPL and M/s. BVL are directed to pre-deposit twenty-five percent of the duty demanded from them:

(2) The other applicants are directed to pre-deposit twenty-five percent of the penalties imposed on them".

F Questioning correctness of the order passed by the Tribunal, writ petitions were filed. By the impugned orders, the High Court directed extension of time to comply with the Tribunal's order. However, the prayer for dispensation of deposit was rejected.

G Learned counsel for the appellants submitted that demands raised will not stand the test of appeal as correct legal and factual position were not kept in view while adjudicating the issues. Mr. B. Dutta, learned Additional Solicitor General for the respondents submitted that demands have been raised after detection of large scale manipulations and evasions and no relief should be extended to such dishonest manufacturers. According to him, neither any *prima facie* case has been established, nor any case of irreparable loss or balance of convenience has been made out.

H Principles relating to grant of stay pending disposal of the matters

before the concerned forums have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

The applicable principles have been set out succinctly in *Siliguri Municipality and Ors. v. Amalendu Das and Ors.*, AIR (1984) SC 653 and *M/s Samarias Trading Co. Pvt. Ltd. v. S. Samuel and Ors.*, AIR (1985) SC 61 and *Assistant Collector of Central Excise v. Dunlop India Ltd.*, AIR (1985) SC 330.

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 the 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.

It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Siliguri Municipality* and *Dunlop India* cases (supra) without analysing factual scenario involved in a particular case.

Section 35-F of the Act reads as follows:

“35F. *Deposit, pending appeal, of duty demanded or penalty levied.*—

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case the Commissioner (Appeals)

A or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue:

B Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.”

C 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.

D 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 v. State of Karnataka and Ors.* AIR (1994) SC 923 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.

F 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.

G The word “undue” adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

H The other aspect relates to imposition of condition to 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. A

In the instant case Tribunal has rightly observed that the rival stands have to be examined in detail with reference to material on record. . B

The only other question that needs to be examined is whether any reduction of the amounts to be deposited as directed by the Tribunal is called for. C

It appears that pursuant to the direction given by this Court on 18.8.2006, the appellants have paid Rs.4 lakhs and Rs.30 lakhs within the time stipulated. Considering the nature of the dispute and the difficulties highlighted by the appellants seeking dispensation of deposit, we direct that the appeals shall now be heard without requiring further deposit, if the appeals are free from other defects in accordance with law. However, for the balance of the amount demanded, with a view to safeguard interest of the Revenue, the appellants shall furnish such security as may be stipulated by the Tribunal. D

The appeals are accordingly disposed of. No costs.

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Appeals disposed of.