State Of Haryana vs M/S.Maruti Udyog Ltd. & Ors on 7 September, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2941, 2000 (7) SCC 348, 2000 AIR SCW 3290, 2000 (6) SCALE 304, (2000) 6 SUPREME 211, 2000 (4) LRI 1036, 2000 (9) SRJ 40, (2000) 10 JT 166 (SC), (2001) 1 SCJ 161, (2001) 124 STC 285, (2001) 1 KANTLJ(TRIB) 219, (2000) 6 SCALE 304

Bench: K.T. Thomas, R.P. Sethi

CASE NO.:
Special Leave Petition (civil) 9680 of 1999

PETITIONER:
STATE OF HARYANA

Vs.

RESPONDENT:
M/S.MARUTI UDYOG LTD. & ORS.

DATE OF JUDGMENT: 07/09/2000

BENCH:
K.T. Thomas & R.P. Sethi.

JUDGMENT:

SETHI,J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J What is the ambit and scope of the words "unable to pay the whole of the amount of tax assessed" used in proviso to Sub-section (5) of Section 39 of the Haryana General Sales Tax Act, 1973, is the question of law requiring our interpretation in this appeal by special leave. It is contended on behalf of the appellant that the inability mentioned in the proviso refers to the financial position of the assessee, whereas the respondents contend that the words "unable" used in the Section is of wider amplitude being not restricted to only financial position of the assess.

In order to determine the rival contention it is necessary to have a resume of the facts leading to the filing of the present appeal. The respondent, M/s.Maruti Udyog Limited a public limited company (hereinafter referred to as "the Company"), having its factory at Gurgaon in the State of Haryana is engaged in the business of manufacture and sale of various types of cars, namely, Maruti 800, Omni and Esteem, etc. along with their spare parts. The Company is a registered dealer under the Haryana General Sales Tax Act, 1973 (hereinafter referred to as the "Act") and the Central Sales Tax Act, 1956 (hereinafter referred to as the "Central Act") with the Excise & Taxation Officer, Gurgaon. For the Assessment Year 1986-87, the Company was assessed to tax by the Excise & Taxation Officer, Gurgaon vide his orders dated 20th November, 1990 under the Act and the Central Act. On 16th March, 1992, the Deputy Excise & Taxation Commissioner (I), Gurgaon served a notice on the Company proposing to suo motu revise the assessment orders of the Excise & Taxation Officer, Gurgaon dated 20th November, 1990 on the grounds that the orders were illegal and improper for the reasons specified in the notice served. Subsequently, the suo motu revised assessment orders were passed enhancing the gross turnover of the Company by adding excise duty in the turnover returned by it and assessed by the Excise & Taxation Officer, Gurgaon disallowing part of the amount of rebate allowed by the Assessing Authority. The turnover of Omni product was taxed at the rate of 10% instead of 6% treating the same as "Vans". Aggrieved by the aforesaid order, the Company filed an appeal before the Haryana Sales Tax Tribunal (hereinafter referred to as the "Tribunal"), challenging the enhancement of turnover along with an application for stay of recovery of demand and entertainment of appeal without prior payment of tax and interest as required under Sub-section (5) of Section 39. The application was rejected on 29th June, 1992 and the Company given time to deposit the entire amount within a period of one month.

Feeling aggrieved, the Company filed writ petition No.10088 of 1992 in the High Court of Punjab and Haryana at Chandigarh which was disposed of on 7.8.1992 directing the Company to furnish bank guarantee for the additional demand for entertainment of appeal, instead of depositing the whole amount in terms of Sub-section (5) of Section 39 of the Act. The appeal filed by the Company was disposed of by the Tribunal by remanding the case to Deputy Excise and Taxation Commissioner for fresh decision after giving the Company a reasonable opportunity of being heard. The Deputy Excise and Taxation Commissioner vide its order dated 29th March, 1994 again revised the orders and created additional demand of Rs.23,10,995/- under the Act and Rs.78,44,607/- under the Central Act.

Feeling aggrieved, the Company again filed an appeal before the Tribunal along with application for stay of recovery of demand and entertainment of appeal without prior demand of tax and interest. Such application was rejected on 7.9.1994 giving the Company time to deposit the entire demand by 30th November, 1994. The Company again filed writ petition No.16537 of 1994 in the High Court against the order of the Tribunal rejecting its application. On 5.12.1994, the High Court quashed the order of the Tribunal and directed it to pass a speaking order after hearing the Company in accordance with law. The Tribunal vide its order dated 20th February, 1998 rejected the application of the Company relying upon a Full Bench Judgment of Punjab & Haryana High Court in M/s.Emerald International Ltd., Ludhiana v. State of Punjab & Ors. [STI (1997) Pb. & Hn. High Court 113] and directed the Company to deposit the amount within a period of one month. Not satisfied, the Company again filed writ petition No.6932 of 1998 in the High Court which was

allowed on 4.12.1998 vide the judgment impugned in this appeal.

Before appreciating the legal position, it is necessary to refer to the averment made by the Company in its application seeking stay of recovery of demand and entertainment of appeal without prior payment of tax and interest. The only ground taken in that application was:

> "That the petitioner has not collected any additional tax from the customers and is unable to deposit the amount of additional demand created by patently illegal orders."

Section 39 of the Act confers a right of appeal upon the assessee against any original order including an order under Section 40 passed under the Act and the Rules made thereunder. Sub-section (5) thereof provides:

> "No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied, that the amount of tax assessed and the penalty and interest, if any, recoverable from the persons has been paid.
>
> Provided that the said authority, if satisfied that the person is unable to pay the whole of the amount of tax assessed, or the penalty imposed, or the interest due, he may, if the amount of tax and interest admitted by the appellant to be due has been paid, for reasons to be recorded in writing, entertain the appeal and may stay the recovery of the balance amount subject to the furnishing of a bank guarantee or adequate security in the prescribed manner to the satisfaction of the appellate authority."

Provided further that in the case of an appeal against any order which has to be communicated by the appropriate authority to the appellant, the period of sixty days shall commence from the date of receipt of the copy of the order by the appellant and in the case of an appeal against any other order made under this Act, the time spent in obtaining the certified copy of the order shall be excluded in computing the period of sixty days."

There cannot be any dispute that right of appeal is the creature of the statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of a superior court to redress the error of court below, if any. No right of appeal can be conferred except by express words. An appeal, for its maintainability, must have a clear authority of law. Sub-section (5) of Section 39 of the Act vests a discretion in the appellate authority to entertain the appeal if it is filed within sixty days and the amount of tax assessed along with penalty and interest, if any, recoverable from the persons has been paid. The aforesaid restriction is subject to the proviso conferring discretion upon the appellate authority to dispense with the deposit of the amount only on proof of the fact that the appellant was unable to pay the amount. Before deciding the appeal, the appellate authority affords an opportunity to the party concerned to either pay the amount or make out a case for the stay in terms of proviso to Sub-Section (5) of Section 39 of the Act. Once the conditions specified under sub-section (5) of Section 39 are complied with, the appeal is born for

being disposed of on merits after hearing both the sides.

Interpreting the word "entertain" in relation to the filing of an appeal, as is also the mandate of Sub-Section (5) of Section 39 of the Act this Court in Lakshmiratan Engineering Works Ltd. vs. Asstt.Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur and another (AIR 1968 SC

488) observed:

> "To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word 'entertained' in the context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The dictionary meaning of the word 'entertain' was brought to our notice by the parties, and both sides agreed that it means either to deal with or admit to consideration. We are also of the same opinion. The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso? Is it 'entertained' when it is filed or is it 'entertained' when it is admitted and the date is fixed for hearing or is it finally 'entertained' when it is heard and disposed of? Numerous cases exist in the law reports in which the word entertained or similar cognate expressions have been interpreted by the courts. Some of them from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. For the present, we must say that if the legislature intended that the word 'file' or 'receive' was to be used, there was no difficulty in using those words. In some of the statutes which were brought to our notice such....under Order 41 Rule 1 of the Code of Civil Procedure it is stated that a memorandum shall not be filed or presented unless it is accompanied etc. in S.17 of the Small Causes Courts Act, the expression is 'at the time of presenting the application'. In Section 6 of the Court Fees Act, the words are 'File' or 'shall be received'. It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word 'entertain' and it must be accepted that it has used it advisedly. The word has come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them.....
>
> In our opinion these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration'. It would, therefore, appear that the direction to the Court in the proviso to S.9 is that the Court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the Court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai C.J.) holds that the words "accompanied by" showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be accompanied by satisfactory proof, it had to be in

> the shape of something tangible, because no tangible thing can accompany a document like the memorandum of appeal. In our opinion, making 'an appeal' the equivalent to the memorandum of appeal is not sound. Even under Order 41 of the Code of Civil Procedure the expressions "appeal" and "memorandum of appeal" are used to denote two instinct things. In Wharton's Law Lexicon, the word 'appeal' is defined as 'the judicial examination of the decision by a higher court of the decision of an inferior court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited. For purposes of limitation and for purposes of the rules of the Court it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax."

The object of Sub-section (5) of Section 39 of the Act is to ensure the deposit of amount claimed from an assessee in case of an appeal filed against the tax demanded. However, power is given to the Appellate Tribunal to relieve him from the rigor of above restriction under the circumstances spelt out in the proviso of the aforesaid Section. Sub-section (5) regulates the exercise of right of appeal conferred upon an assessee under Section 39 of the Act, the object being to keep in balance the right of the aggrieved person and the right of the State to speedy recovery of tax. The Full Bench of the Punjab & Haryana High Court in M/s.Emerald International Ltd. (supra) considered the scope of Section 39(5) of the Act and concluded:

> "As a sequal to our discussion on the question of law referred to us the following conclusions can be deduced:
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> (a) The appeal is a creation of a statute and in case a person wants to avail of the right of appeal, he has to accept the conditions imposed by the statute.
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> (b) The right of appeal being a creature of Statute the legislature could impose conditions for exercise of such a right. Neither there is a constitutional nor legal impediment for imposition of such a condition.
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> (c) The right of appeal is neither natural nor inherent attaching to a litigation and such a right neither exists nor can be assumed unless expressly given by the Statute.
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> (d) Even if, this Court was to interpret the bare provisions of two Statutes, i.e., The Punjab General Sales Tax Act and the Haryana General Sales Tax Act, it could safely be held that there is a complete bar to the entertainment of an appeal by the Appellate Authority without the payment of tax amount unless the Authority is satisfied that the dealer is unable to pay the amount so assessed and only in the situation the appellate authority for the reasons to be recorded in writing can entertain the appeal without deposit of the payment of such amount.

(e) Neither on the wording nor in view of the spirit of the Punjab and Haryana Acts is possible to hold that the Appellate Authority should see the prima facie nature of the case while hearing the stay matter.

(f) The factum of tax assessed being illegal cannot be a relevant consideration for grant of stay by an appellate authority.

(g) The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India in rarest of the rare cases in the given facts and circumstances, can grant stay and waive the condition of pre-deposit of tax and the existing alternative remedy in such circumstances would be no ground to refuse interference."

We find substance in the submission of Mr.K.T.S. Tulsi, Senior Advocate that the inability mentioned in the proviso refers to the paying capacity and financial position of the Company and its scope cannot be widened to the extent as suggested by Mr.Nariman. The word "pay" with its grammatical variation and cognate expressions, when used with reference to the tax amount, means "deliver and render"

the amount, it indicates the discharge of an obligation rather than an investment of money. "To pay" is a generic term and the rest of the proviso refers to the modes of payment. It may mean the payment of the amount of tax assessed. The dictionary meaning of the "payment" is the performance of an obligation for the delivery of money. In legal contemplation "payment" is the discharge of an obligation by the delivery of money or its equivalent. The word "unable" used in the proviso has been defined to mean 'not having sufficient strength, power and means'. In relation to money, it means insufficiency of funds. It follows, therefore, that the inability to pay the amount is referable to the paying capacity of the person concerned and not his legal or actual liability to pay the amount demanded. It has to be kept in mind that the payment made under the proviso only enables the appellate court to entertain the appeal for adjudication and does not decide the rights of the parties.

The Act has been enacted and the right of appeal provided with a dual purpose of protecting the interests of the assessee and also to safeguard the interests of the Revenue. The provision appears to have been made to explore further sources for raising Revenue of the State. This Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. & Ors. [1985 (1) SCC 260] oberved that "..No governmental business or for that matter no business of any kind can be run on mere bank guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required."

In the instant case the prayer was made to grant stay on the ground that "the petitioner has not collected any additional tax from the customers and is unable to deposit the amount of additional demand created by patently illegal orders". The respondent Company nowhere mentioned to or referred its inability to pay the amount on account of its alleged financial difficulties or incapacity to make the requisite payment. The legality of the additional demand created could not be made the basis for insisting to entertain the appeal without prior payment, as that would have required the determination on the merits of the appeal. Relying upon the Full Bench judgment of the jurisdictional court in M/s.Emerald International Ltd.'s case, the Tribunal was competent in passing the order (Annexure P-8) which was impugned in the High Court. The Division Bench of the High Court was not justified in ignoring the Full Bench judgment and the judgment of another Bench of coordinate jurisdiction while allowing the writ petition of the Company. The Division Bench even failed to mention the circumstances which justified the passing of the order for allowing the writ petition with direction to the Tribunal for disposal of the appeal on furnishing of the bank guarantee by the Company. Merely because the Tribunal had insisted upon the payment of the amount in terms of proviso to Sub- section (5) of Section 39 of the Act, should not have annoyed the court while granting the relief in exercise of its powers under Article 226 of the Constitution. The impugned order being contrary to settled principles of law cannot be sustained and is accordingly set aside.

Shri R.F. Nariman, learned counsel made a last and alternative plea that in case this Court is not inclined to uphold the impugned judgment, a relief may be granted to the respondent for dispensing with the deposit of the interest portion at least on the amount of Central sales tax assessed by the order challenged in the statutory appeal. Since no such plea was made before the appellate Tribunal, we are not considering such a plea now. However, we permit the respondent to make such a plea before the appellate Tribunal after depositing the entire balance amount. If any such plea is made within 15 days after depositing the entire balance amount, the appellate Tribunal shall take a decision thereon before considering the statutory appeal on merits.

The appeal is disposed of accordingly.