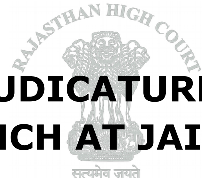

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Civil Writ Petition No. 4837/2024

M/s Mangalam Cement Ltd., Aditya Nagar, Morak, Kota (Raj.) Through Its Authorised Signatory Sh. Vinay Kumar Jain S/o Lt. Sh. Madan Lal Jain, Aged About 56 Years, R/o Aditya Nagar, Morak, Kota (Raj.).

----Petitioner

Versus

1. State Of Rajasthan, Through Secretary, Finance Department, Secretariat, Jaipur.
2. Appellate Authority, Commercial Taxes Department, Kota (Raj.)
3. Commercial Taxes Officer, Commercial Taxes, Circle-Ramganjmandi, Kota (Raj.).

----Respondents

For Petitioner(s)	:	Mr. RB Mathur, Sr. Adv. assisted by Mr. Falak Mathur & Mr. Varnit Jain
For Respondent(s)	:	Mr. Bharat Vyas, AAG assisted by Ms. Niti Jain Bhandari

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HON'BLE THE CHIEF JUSTICE MR. MANINDRA MOHAN SHRIVASTAVA
HON'BLE MR. JUSTICE BHUWAN GOYAL

Order

18/04/2024

1. With the consent of the parties, the matter is heard finally.

2. A short issue, purely of law, arises for consideration in this petition.

3. Quintessential facts, necessary for determination of the controversy involved in the writ petition, are that the petitioner is a company incorporated under the Companies Act and is engaged in manufacturing of cement. In the matter of consumption of electricity, the petitioner is liable for payment of electricity duty

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under Rajasthan Electricity (Duty) Act, 1962. According to petitioner, it was subjected to assessment with regard to its liability for payment towards electricity duty and earlier it was assessed also in the year 2019 but, later on, on certain instructions issued by the Commissioner, it was subjected to fresh reassessment which culminated in order dated 11.08.2023 and a separate demand notice dated 14.03.2024.

4. Aggrieved by the said order, the petitioner preferred statutory appeal available under the provisions of Rule 11 of the Rajasthan Electricity (Duty) Rules 1970 (for short, 'the Rules of 1970'). The petitioner also submitted an application for stay of recovery. That application, however came to be rejected vide order dated 06.12.2023, which is impugned in this petition.

5. Pointed submission of learned counsel for the petitioner is that the Appellate Authority has failed to exercise jurisdiction vested in it by law by assuming and proceeding on erroneous presumption that it does not have power to grant stay, though it has authority to decide the appeal. Relying upon plethora of decisions in the cases of **(1) ITO, Cannanore vs. M.K. Mohammed Kunhi (1969) 71 ITR 815, (2) M/s Om Kothari Family Trust and Others vs. JDA (1969) 1 WLC 25, (3) Maheshwari Agro Industries vs. Union of India reported in (2012) 2 RLW 1912, (4) Dr. Sushil Kumar vs. Union of India (2015) 1 WLC 309, (5) APR Jewellers Private Limited vs. The Commissioner of Income Tax (Appeals), Hyderabad-I and Ors. (2022) 446 ITR 275, (6) Manohar Singh vs. Union of India (2015) 2 RLW 1322 Raj., (7) DCIT vs. Pepsi Foods Ltd. (2021) 7 SCC 413** and **(8) M.P. Cement Manufacturers'**

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Assn. vs. State of MP (2004) 2 SCC 249, learned counsel for the petitioner would submit that the Appellate Authority completely unmindful of its authority under law to consider and pass orders on the prayer for stay, has rejected the application as not maintainable.

6. Learned AAG, at the outset, raised an objection that if the petitioner was aggrieved by the order passed by the Appellate Authority, he had a remedy of preferring review, as provided under Rule 11A of the Rules of 1970, therefore, the ground which has been raised in this petition could not have been raised before the Revisional Authority. As the petitioner has an alternative efficacious remedy, this petition is not maintainable.

7. Ordinarily, we would not have interfered with the order passed by the Appellate Authority rejecting the stay application, had there been consideration of the merits of the application. In that case, certainly we would have relegated the petitioner to avail the remedy of revision, as provided under Rule 11A of the Rules of 1970.

8. Present case however is of exceptional nature for the reason that the Appellate Authority, on an erroneous assumption of law, has failed to exercise jurisdiction vested in it by law which is jurisdictional defect and not mere error of fact or law. A perusal of the order shows that the Appellate Authority was of the view that it does not have power to stay, therefore, that was the main reason for rejecting the application for stay without due consideration of the case as to whether a case was made out or not.

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9. In our considered opinion, the view taken by the Appellate Authority is completely erroneous and unsustainable in law. It is well settled principle that statutory authority/Appellate Authority having power to decide a matter has implicit jurisdiction and authority to pass such orders which are incidental in nature including the order of interim nature unless there is expressed or implied prohibition to pass interim order or incidental orders. This principle was propounded by the Hon'ble Supreme Court way back in the case of **ITO, Cannanore vs. M.K. Mohammed Kunhi (1969) 71 ITR 815.** The principle propounded in that case which continues to apply even today, is as below:-

> 6.There can be no manner of doubt that by the provisions of the Act or the Income Tax Appellate Tribunal Rules, 1963 powers have not been expressly conferred upon the Appellate Tribunal to stay proceedings relating to the recovery of penalty or tax due from an assessee. At the same time it is significant that under Section 220(6) the power of stay by treating the assessee as not being in default during the pendency of an appeal has been given to the Income Tax Officer only when an appeal has been presented under Section 246 which will be to the Appellate Assistant Commissioner and not to the Appellate Tribunal. There is no provision in Section 220 under which the Income Tax Officer or any of his superior departmental officers can be moved for granting stay in the recovery of penalty or tax. It may be that under Section 225 notwithstanding that a certificate has been issued to the Tax Recovery Officer for the recovery of any tax (the position will be the same with regard to penalty) the Income Tax Officer may grant time for the payment of the tax. In this manner he can probably keep on granting extensions until the disposal of the appeal by the Tribunal. It may also be that as a matter of practice prevailing in the department the Commissioner or the Inspecting Assistant Commissioner in exercise of administrative powers can give the necessary relief of staying recovery to the assessee but that can hardly be put at par with a statutory power as is contained in Section 220(6) which is confined only to the stage of pendency of an appeal before the Appellate Assistant Commissioner. The argument advanced on behalf of the appellant before us that in the absence of any express

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provisions in Sections 254 and 255 of the Act relating to stay of recovery during the pendency of an appeal it must be held that no such power can be exercised by the Tribunal, suffers from a fundamental infirmity inasmuch as it assumes and proceeds on the premise that the statute confers such a power on the Income Tax Officer who can give the necessary relief to an assessee. The right of appeal is a substantive right and the questions of fact and law are at large and are open to review by the Appellate Tribunal. Indeed the Tribunal has been given very wide powers under Section 254(1) for it may pass such orders as it thinks fit after giving full hearing to both the parties to the appeal. If the Income Tax Officer and the Appellate Assistant Commissioner have made assessments or imposed penalties raising very large demands and if the Appellate Tribunal is entirely helpless in the matter of stay of recovery the entire purpose of the appeal can be defeated if ultimately the orders of the departmental authorities are set aside. It is difficult to conceive that the legislature should have left the entire matter to the administrative authorities to make such orders as they choose to pass in exercise of unfettered discretion. The assessee, as has been pointed out before, has no right to even move an application when an appeal is pending before the Appellate Tribunal under Section 220(6) and it is only at the earlier stage of appeal before the Appellate Assistant Commissioner that the statute provides for such a matter being dealt with by the Income Tax Officer. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, 3rd Edn., Articles 5401 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat's Civil Law Cushing's Edn., Vol. 1 at p. 88, it has been stated:

"It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it."

7. Maxwell on Interpretation of Statutes, 11th Ed., contains a statement at p. 350 that "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdictio data

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est, ea quoge concessa esse videntur, sine quibus jurisdictio explicari non potuit". An instance is given based on Ex parte Martini that "where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced".

8. The High Court in the present case has referred to certain decisions under the Motor Vehicles Act in which the question arose whether an interim order of stay could be passed although Section 64 (2) of the Motor Vehicles Act as amended did not expressly confer a power on the authority to pass such an order. It was held in those cases that the power to stay was a necessary corollary to the power to entertain an appeal or revision : Swarnambiker Motor Service v. Wahita Motor Service; Themmalpuram Bus Transport Ltd. v. Regional Transport Officer. The Full bench decision in Dharmadas v. State Transport Appellate Tribunal related to the question whether a remand could be ordered in exercise of appellate jurisdiction under Section 64 of the Motor Vehicles Act in the absence of any express power to that effect existing in the statute. It was held that the power to remand was incidental to and implicit in the appellate jurisdiction created by Section 64. According to the decision in the Burhanpur Tapti Mill Ltd. v. Board of Revenue, Madhya Pradesh. since the Board of Revenue had the power to adjudge the correctness of an order passed by the Commissioner under Section 22-B reopening an assessment the Board had also the power to stay the fresh assessment proceedings started by the Assistant Commissioner in pursuance of that order. It was said that the general principle was that in a taxing statute there was no room for what could be called the equitable construction, but that principle applied only to the taxing part of the statute and not to the procedural part. It has further been observed that "where the legislature invests an Appellate Tribunal with powers to prevent an injustice, it impliedly empowers it to stay the proceedings which may result in causing further mischief".

9. It is well-known that an Income Tax Appellate Tribunal is not a court but it exercises judicial powers. The Tribunal's powers in dealing with appeals are of the widest amplitude and have in some cases been held similar to and identical with the powers of an appellate court under the Civil Procedure Code. See CIT v. Hazarimal Nagif and New India Assurance Co. Ltd. v. CIT, Excess Profits, Bombay City. In Polini v. Hazarimal Nagi and Co. and New India Assurance Co. Ltd.] appeal to grant stay at p. 443:

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"It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of first instance before the first trial, and to the court of appeal before the second trial, as to the court of last instance before the hearing of the final appeal."

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10. The aforesaid principle has been succinctly reiterated and restated in various decisions. In a later decision, in the case of **DCIT vs. Pepsi Foods Ltd. (supra),** the principle laid down earlier in the case of **M.K. Mohammed Kunhi (supra)** was affirmed.

11. In view of the above consideration, we have no doubt in our mind that the Appellate Authority abdicated its function and failed to exercise jurisdiction while rejecting the application for stay without deciding it on merits. Therefore, even though there is an alternative remedy, we are inclined to exercise our discretion.

12. In view of the above, the impugned order is set aside on that count alone. The Appellate Authority/Commercial Taxes Department, Kota is directed to consider the application for grant of stay on its own merits.

13. We must hasten to add here that we have not expressed any opinion on the merits of the case.

14. With the above observations, the petition stands allowed. Pending application, if any, also stands disposed of.

(BHUWAN GOYAL),J (MANINDRA MOHAN SHRIVASTAVA),CJ

KAMLESH KUMAR-RAHUL/6

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