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Court : Andhra Pradesh

Decided On : Aug-14-2002

Reported in : 2002(5)ALD481

Judge : S.R. Nayak and ;Dubagunta Subrahmanyam, JJ.

Acts : Water (Prevention and Control of Pollution) Cess Act, 1977 - Sections 3(2), 3(7) and 7

Appeal No. : WP Nos. 24554 of 1999 and Batch

Appellant : A.P. Gas Power Corporation Limited, Owner of Gas Turbo Power Station

Respondent : Appellate Committee, Water (Prevention and Control Pollution) Cess Act and anr.

Advocate for Def. : S.V. Bhatt, Adv. for ;Kalyanram, Adv.

Advocate for Pet/Ap. : S. Ravi, Adv.

Disposition : Writ petitions allowed

Judgement :

S.R. Nayak, J.

1. On remand of the proceedings by the Apex Court these three writ petitions are placed before us for hearing.

2. The above writ petitions are filed by the petitioners assailing the assessment orders passed under the provisions of the Water (prevention and control of pollution) Cess Act, 1977 (for short the 'Act'). WP No.24554 of 1999 relates to the assessment for the period from 1-8-1990 to 31-1-1992 and from 1-2-1992 to 31-1-1999. The primary authority made assessment in respect of these two spells on 29-4-1999. WP No.8023 of 2001 relates to the assessment for the period from 1-2-1999 to 30-9-1999 and the order of the assessing authority is dated 6-9-2000. WP No.8101 of 2001 relates to the assessment for the period from 1-10-1999 to 31-8-2000 and the date of assessment order is 26-12-2000. In other words these three writ petitions are filed assailing the assessment for the period from 1-8-1990 to 31-8-2000 as affirmed by the appellate authority under Section 13 of the Act.

3. A Division Bench of this Court, on an earlier occasion, dismissed all the three writ petitions by its judgment and order dated 27-6-2001.

4. The petitioners aggrieved by the said judgment preferred Civil Appeal Nos.1276-1278 of 2002 before the Apex Court. The Apex Court by its judgment and order dated 15-2-2002 allowed the Civil Appeals and set aside the judgment of the Division Bench of this Court dated 27-6-2001 and remanded the proceedings to this Court with a direction to hear and dispose of the writ petitions on merits after deciding the second question indicated in the order. The order of the Hon'ble Supreme Court reads as follows:

'Leave granted.

The notice that was issued on the special leave petitions stated that the matter might be disposed of at this stage by setting aside the order under challenge, insofar as it pertained to the second contention, and restoring the writ petitions to

the file of the High Court for consideration thereof.

The first contention that was raised before the High Court related to the applicability of the statute to the appellants' industries. The High Court found that the statute did apply and this finding is not in dispute.

The consequential contention raised on behalf of the appellants was that, in any event, the condition of the industries was such that the statute would not apply. This contention was not considered by the High Court for the reason that, according to the High Court, having interpreted the statute, in matters not whether one or the other aspect had not been considered by the Statutory Tribunal. We fail to appreciate this finding.

We are of the view that the High Court ought to have applied its mind to whether, given the state of the industries, the Act could be made applicable to them.

Accordingly the civil appeals are allowed. The order under appeals are set aside, insofar as it relates to the second contention raised on behalf of the appellant before the High Court. The Writ Petitions (Nos.24554/1999, 8101/2001 and 8023/2001 shall stand restored to the file of the High Court to be considered on merits, insofar as the second contention, aforementioned, is concerned. This shall be done expeditiously.

Till such time as the writ petitions are heard and disposed of afresh as afore-stated, no coercive steps for recovery shall be taken against the appellants.

No order as to costs.'

These writ petitions are, therefore, placed before us for hearing.

5. We have heard the learned Counsel for the petitioners and Sri Bhatt, learned standing Counsel for the A.P. Pollution Control Board. Although the Supreme Court remanded the proceedings to consider the question that even if accepting that the Act applies to the petitioner-industry also, having regard to the state of the petitioner-industry, whether the cess under Section 3 of the Act could be imposed. At the time of hearing, the learned Counsel for the petitioners restricted the attack

to the rate of cess and the rebate available to the petitioners-industry under Section 7 of the Act. According to the learned Counsel for the petitioner, the assessing authority and the appellate authority have erred in law in assessing the cess under Section 3(2)(a) of the Act and that provision has no application at all and in fact having regard to the facts and circumstances of the case and the details furnished in the return, the assessing authority ought to have determined the liability of the cess only under Section 3(2) of the Act. The learned Counsel also contended that the petitioner-industry is also entitled to rebate contemplated under Section 7 of the Act. The learned Counsel further contended that the assessment order passed by the assessing authority is totally cryptic and they do not reflect due application of mind on the part of the assessing authority to the facts of the case. The learned Counsel would also contend that even the appellate authority did not apply its mind though it has referred to the rival contentions of the parties in great elaboration.

6. Sri Bhatt, learned standing Counsel for the Board on the other hand contended that the assessing authority was justified in assessing the liability of the petitioner-industry under Section 3(2)(a) of the Act. According to the learned standing Counsel, the petitioner-industry failed to comply with the provisions of Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 (for short the 'Water Act') and, therefore, there was justification for the assessing authority to levy cess on the petitioner-industry under Sub-section (2)(a) of Section 3 of the Act. The learned Counsel would also point out that before the assessment orders were passed, the petitioner-industry was put on notice regarding the non-compliance of statutory requirement on the basis of which it could be assessed under Sub-section (2)(a) of Section 3 of the Act. The learned standing Counsel would draw our attention to what is slated in paragraphs 5 and 6 of the order of the appellate authority dated 8-3-2001 and contend that the appellate authority having considered the rival contentions of the parties recorded its opinion in para 12(c) of its order.

7. It is well settled that taxing provision should be construed strictly. The power of the respondents to levy cess under the Act is not in controversy. Undoubtedly the assessing authority under the Act has power to assess under Sub-section 2(a) of

Section 3 of the Act, which prescribes the conditions precedent to so assess. One of the conditions precedent to assess under Sub-section 2(a) is that the assessee has failed to comply with the provisions of Section 25 of the Water Act. It is the case of the assessing authority that the petitioner-industry despite the demand did not install the water meter to measure the quantum of water consumed and, therefore, it has violated the mandate of Section 25 of the Water Act. Meeting this allegation on the part of the assessing authority it was contended by the assessee before the appellate authority by stating thus:

'a. The quantum of water being drawn for both the units being 330 cusecs, it is not possible to measure such huge quantity by meters and the quantity of water drawn and discharged will have to be measured based on the number of working hours of the cooling water pumps and the same is an accepted practice as per the notification No.GSR 378(E) dated 24-7-1978, Cess Rules, 1978.

b. Under Section 4, meters will have to be installed to measure the quantify of water consumed. In the instant case, it is not possible to install meters in view of the fact that huge quantify of water is involved. However, the quantity of water that is drawn is being measured in terms of the capacity of the pumps installed and the number of hours it is used. Further, there is no consumption of water as the quantity of water being discharged is, equivalent to the quantity of water being drawn. As such there is no necessity for water meters.'

8. The above contention of the assessee is noticed by the appellate authority at page 5 of the order. Of course, the appellate authority has also noticed the rival contention of the assessing authority with regard to non compliance of the provision under Section 25 of the Water Act. In the words of the Appellate Authority the contention of the respondent assessing authority is as follows:

'a. The Rule 3(1), 3(2), 3(3) and 3(4), read with Section 4 of the Water (Prevention and Control of Pollution) Cess Act, 1977, are extracted as follows:

i. For the purpose of measuring and recording the quantity of water consumed, every consumer shall affix water meters Venturi meters or Orifice meters with integrators and recorders in conformity with the standards laid down by the Bureau

of Indian Standards (formerly Indian Standards institution) and where no standards have been laid down by that institution, in conformity with such standard as may be specified by the Board.

ii. Wherever, the meters referred to in Sub-section (1) are not available, the consumer shall install V-notches or rectangular notches with indicators and records or pressure gauges and pumping installations, after obtaining the permission of the assessing authority.

iii. Every consumer shall provide a separate meter for assessing the quantity of water used for each of the four purposes mentioned in column (1) of Schedule II of the Act.

iv. The meters shall be affixed at the entrance of the water supply connections within the premises of the consumer or at any other place to be approved by the assessing authority, so that such meters are easily accessible for inspection and maintenance and for other purposes of the Act.

Provided that the place where the meter is affixed shall, in no case be at a point before which water has been tapped by the consumer for utilisation for any purpose whatsoever,

b. In the instant case, the Appellant Company has neither affixed any water meters, Venturi meters or Orifice meters with integrators and recorders in conformity with the standards laid down by Bureau of Indian Standards or Assessing Authority nor installed V-Notches or Rectangular Notches with integrators and records or pressure gauges and dumping installations with the permission of the Assessing Authority.

Thus, the Appellant has not complied with the following:

i. Non-compliance of [he provisions of the Section 25 of the Water Act, 1974 (condition No. 15 of the Water Consent Order).

ii. Non-compliance of the Section 4 of the Water Cess Act, 1977.

c. The contention of the Appellant that it is not possible to install meters in view of the fact that huge quantity of water is involved is not correct. Major industries like M/s Visakhapatnam Steel Project, M/s ITC-Bhadrachalam Paper Boards Ltd., M/s A.P. Paper Mills Ltd., M/s Heavy Water Plant (Manugur) etc., which are consuming large quantities of water have installed devices for measuring large quantities of water.'

9. Quite curiously the appellate authority without due application of mind and without stating any reasons either to accept or reject the plea of the assessee or that of the department recorded its finding in the following manner in sub-para (c) of Paragraph 12 of the order which reads as follows:

'c. The contention of the Appellant that they have measuring devices for measurement of water was not accepted by this committee. The Appellant has also not obtained any permission from the Assessing Authority for the installation of measuring devices.'

10. Having regard to the factual plea taken by the assessee and the alternative method adopted by the assessee to measure the water consumed, the assessing authority and the appellate authority ought to have considered the plea of the assessee and given the reasons either for accepting or rejecting the assessee's claim. If such consideration is not insisted, as quite often said and reiterated by the Constitutional Courts, judicial review would become rather impossible because the reviewing Court would not be in a position to know what are the factors or reasons which weighed with the decision-making authority. In the instant case, the assessee has stated that having regard to the huge quantity of water consumed by the industry, installation of water meters was not possible. The assessee has also stated that in order to measure the water consumed by the industry an alternative fool-proof method is adopted. The records placed before this Court do not satisfy us that either the assessing authority or the appellate authority has considered the plea of the assessee and applied its mind before recording the finding.

11. Secondly, the rebate claimed by the petitioner under Section 7 of the Act could be denied only if either of the two conditions specified in the proviso to that section do not exist and the question whether those conditions exist or not is a question of

fact and nothing is placed before us to satisfy that the assessing authority or the appellate authority have applied their mind to the particulars furnished by the assessee in the returns with his covering letter in Lr. No. SEO&M;/GTPS/ F.site/D. 163/99 dated 13-2-99. As could be seen from the return appended to the letter in the remarks column the assessee has stated thus:

'The quantity of water quantifying for rebate has been claimed deducting commencing of units GT1 stage I 31-8-1990, GT2 stage II 2-3-1991. ST-6 Stage-I, 17-3-1992, GT stage-II 31-3-1997. ST 6 stage-II, 23-12-97. Hence the quantify for stage-II is only from 4/97. Both in stages I&II, once through cooling system is adopted for condenser cooling. Therefore whatever water is drawn passes through condenser and then disposed off into the western Delta main Canal or Panchayat pumping scheme with a temperature wise not exceeding 5 degree C. Hence the eligibility for rebate.'

12. Both the authorities have not referred to, much less considered the materials placed before them by the assessee. Therefore, it becomes necessary to undertake the fact-finding exercise in order to appreciate the claim of the assessee that it should be assessed only under Section 3(2) of the Act and it is entitled to rebate envisaged under the proviso to Section 7 of the Act. Under Article 226 of the Constitution, it is not appropriate for this Court to undertake the investigation of disputed facts particularly where the statutory fact-finding authorities have not undertaken such exercise. On that short ground, we are inclined to allow the writ petitions and set aside the assessment orders impugned in the writ petitions. But, at the same time we hasten to add that the petitioner assessee cannot have any valid objection to pay the cess under Section 3(2) of the Act. However, the learned Counsel for the petitioner would contend that since the petitioner industry is also entitled to rebate under Section 7 of the Act and that has to be set off against the total liability arising under Section 3(2) of the Act, the learned Counsel would pray that the petitioner industry may be directed to pay a sum of money which is equivalent to the liability of the petitioner under Section 3(2) of the Act, minus the rebate available to the petitioner industry under the proviso to Section 7 of the Act. We do not think that it is necessary for us to give consequential direction with a mathematical precision, as the matter is required to be remanded to the assessing

authority to assess the liability of the petitioner. Suffice it to state that an equitable arrangement pending further adjudication of the claims would serve the ends of justice.

13. In the result and for the foregoing reasons, we allow all the three writ petitions and set aside the impugned assessment orders as affirmed by the appellate authority subject to the petitioner industry depositing or paying Rs. 1,13,000/- (Rs. One lakh and thirteen thousand only) within a period of one month from today. The proceedings shall stand remitted to the assessing authority with a direction to assess the liability of the petitioner industry under Section 3 of the Act de novo in the light of this judgment and after giving a fair and reasonable opportunity to the assessee to put forth its case. No costs.

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