

(AFR)

Reserved on 27.03.2017

Delivered on 01.11.2017

Court No. - 24

1. **Case :-** MISC. BENCH No. - 45 of 2011
Petitioner :- M/S Surya Satellite
Respondent :- State of U.P. and others
Counsel for Petitioner :- Devendra Mohan Shukla
Counsel for Respondent :- C.S..C
2. **Case :-** MISC. BENCH No. - 180 of 2011
Petitioner :- M/S Star Vision Cable T.V. Network
Respondent :- State of U.P. and others
Counsel for Petitioner :- Devendra Mohan Shukla
Counsel for Respondent :- C.S.C.

Hon'ble Sudhir Agarwal,J.

Hon'ble Ravindra Nath Mishra-II,J.

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. In both these writ petitions, petitioners are challenging validity of sub-section 3 of Section 12, as inserted by U.P. Entertainment and Betting Tax (Amendment) Act, 2009 (hereinafter referred to as "Amendment Act, 2009"), in U.P. Entertainment and Betting Tax Act, 1979 (hereinafter referred to as "Act, 1979"), providing a condition for pre-deposit of one-third of disputed amount and the entire undisputed amount of tax before entertaining appeal preferred by Assessee against order of assessment.
2. Section 12 (3), as inserted by amendment Act, 2009, reads as under:

"(3) No appeal shall be entertained by the State Government unless the proprietor has paid the undisputed amount of the tax and at least one-third of the disputed amount, assessed under this Act."
3. Petitioners have also prayed that order passed by State of U.P., rejecting their appeals for non-deposit of one-third of disputed amount be quashed and appellate authority be directed to decide their appeals without enforcing requirement of pre-deposit under Section 12 (3) of Act, 1979, as amended by Amendment Act, 2009.

4. Sri Devendra Mohan Shukla, learned Counsel appearing for petitioners in both the matters, contended that appeal is first stage of adjudication and has been made an ineffective remedy by providing extremely onerous, impracticable and arbitrary condition of pre-deposit of one-third of disputed amount, ignoring the fact that Assessing Authority, if imposes wholly arbitrary and illegal liability upon an Assessee, which has no basis whatsoever, still Assessee cannot challenge such assessment order before appellate authority unless one-third of such disputed amount, which is also wholly arbitrary, illegal and confiscatory, is deposited. He submits that such a provision is patently arbitrary and places reliance on Supreme Court judgments in **Aanant Mills Company Limited Vs. State of Gujrat 1975 2 SCC 175; Seth Nand Lal Vs. State of Haryana 1980 (supp) SCC 574 and Mardia Chemicals Limited Vs. Union of India 2004 (4) SCC 311**. Submission is that right of appeal is a part of judicial review and condition of deposit of one-third of disputed tax renders the said remedy practically impossible to Assessee and, therefore, it is violative of Article 14 of the Constitution and liable to be struck down.

5. Per contra, learned Counsel for State, contended that assessment can be made under Section 12 (1) when certain conditions are flouted by a 'Proprietor' of an entertainment and such assessment is made after a reasonable opportunity of hearing is afforded to such person. Requirement of pre-deposit at the time of preferring an appeal is only one-third of disputed amount and as such cannot be said illusory, arbitrary and rendering remedy of appeal, nugatory.

6. We have carefully pondered over rival submissions and perused relevant statutory provisions as well as various judicial authorities on the subject.

7. Act, 1979 has been enacted by State Legislature to consolidate and amend laws relating to tax on entertainment, amusement and on certain forms of betting in State of U.P.

8. Both petitioners are engaged in business of providing entertainment to viewers through cable connections, after subscribing Television Network Services of various broadcasters. Dispute relates to liability of entertainment tax imposed upon petitioners by order of assessment made by concerned District Magistrate, passed under Section 12 (1) of Act, 1979.

9. Section 3 imposes tax on entertainment, requires a self-assessment and pre-payment of tax by “Proprietor of an entertainment” for something attributable to him. The occasion to make assessment under Section 12 (1) arises only in certain conditions when aforesaid liability of self-assessment and payment of due tax stand failed on the part of a proprietor of an entertainment. Section 12(1) reads as under:

"12. Assessment of tax. - (1) Where the Commissioner or the District Magistrate is satisfied that the proprietor of an entertainment, -

(a) has failed to give information as required under sub-section (1) of Section 5; or

(b) has failed to prepare or to submit true and full returns in the [prescribed forms or does not furnish return in respect of any entertainment within the stipulated time]; or

(c) possesses or has used duplicate tickets; or

(d) has fraudulently evaded or attempted to evade, the payment of tax due in any manner whatsoever,

he shall, after giving the proprietor a reasonable opportunity of being heard, assess to the best of his judgment, the amount of the tax due from the proprietor, and may also impose a penalty not exceeding [twenty thousand rupees] :

Provided that where either of the aforesaid officers has commenced a proceeding under this sub-section the other of them shall have no jurisdiction to proceed subsequently in respect of the same matter and any such subsequent proceeding, if commenced, shall be of no effect and shall be dropped.

[(1a) Any assessment made under this section shall be without

prejudice to any prosecution for an offence under this Act.]"

(Emphasis added)

10. Section 12 (2) provides a remedy of appeal to a person aggrieved by an order passed under Section 12 (1), before State Government, in such a manner, as may be prescribed. Sub-section (3) inserted by Amendment Act, 2009 w.e.f. 16.06.2009 provides a condition before entertaining an appeal and says that the person filing appeal shall pay undisputed amount of tax and at least one-third of disputed amount of tax. There is no provision for waiver or relaxation with regard to condition of pre-deposit of one-third amount of disputed tax, before an appeal is rendered entertainable.

11. It cannot be doubted that an appeal is not an inherent right, but can be conferred by Statute and only then one can have a right of appeal. It is in fact a creature of a Statue. Before considering the matter further, it would be appropriate to have an in-depth analysis of the authorities relied by learned counsel for petitioner in support of his submissions.

12. **Aanant Mills Company Limited Vs. State of Gujrat (supra)** is a judgment rendered by a Four Judges' Bench of Supreme Court. Cconstitutional validity of various provisions of Bombay Provincial Municipal Corporations Act (Bombay Act 59 of 1949) as amended by Gujarat Act No. 8 of 1968 and Act No. 5 of 1970 came up for consideration in this case. Assessment of property tax at Ahmedabad was made under Act, 1949. There was some increase in the ratable value fixed by competent authority. Entries of enhanced rates made in Assessment Books were challenged in writ petitions filed under Article 32 of the Constitution, which were decided vide judgment in **New Manek Spinning and Weaving Mills Co. Limited and others Vs. Municipal Corporation of City of Ahmedabad and others (1967) 2 S.C.R. 679**. Writ petitions were allowed and Court directed that State Legislature had no competence under entry 49 of State List, Seventh Schedule to the Constitution, to make a law for taxing plant and machinery, and Rule 7, was held beyond Legislative Competence.

Statute was again amended by insertion of Section 152 A. Then fresh assessments were made whereagainst appeals were preferred before Chief Judge of Court of Small Causes, Ahmedabad, but held not maintainable for non-deposit of tax by appellants under Section 406 (2) (e) of Act, 1949. Thereafter writ petitions were filed challenging assessment on the ground that Deputy Commissioner was not competent to make assessment and also that the provision of pre-deposit of tax under Section 406 (2) (e) was bad. Writ petition were allowed by Gujrat High Court holding that Deputy Commissioner was not competent to make assessment and secondly it also struck down Section 406(2) (e) being violative of Article 14. Under Section 406(2) (e) no appeal could have been heard against a tax unless amount demanded is deposited with Commissioner. However, there was a provision conferring power upon appellate Court, if in its opinion the deposit of amount by appellant will cause undue hardship, in its discretion, it could have dispensed with such deposit or part thereof, either unconditionally or subject to such condition as it may deem fit. Supreme Court held that condition of deposit of tax as a condition precedent to entertainment of appeal would not have effect nullifying right of appeal, particularly, when a discretion is vested in appellate Court to dispense with compliance of said requirement. Aforesaid provision only regulate right of appeal made available to a party. The object is to keep balance with regard to right of appeal to the person, who prefers appeal against Revenue. Such provision confers a right of appeal and at the same time prevents delay in payment of tax. Neither such a provision can be said to be discriminatory, violative of principle of equity under Article 14 of the Constitution nor it is otherwise beyond Legislative Competence. Provision does not have the effect of making invidious distinction or creating two classes with the object of meeting out different treatment to Assessee. It only spells out consequences flowing from the omission and default of a person who despite the fact that deposit of the amount found due from him, would cause him no hardship, declines of his own volition to deposit that amount. Supreme Court further

held that right of appeal is the creature of a statute. Without a statutory provision creating such a right, the person aggrieved, is not entitled to file an appeal. There is no bar that legislature while granting right of appeal cannot impose condition for exercise of such right. In the absence of any special reason Court held that there is no legal or constitutional impediment to imposition of such conditions. Court also referred to the existence of similar provisions under some other tax statutes and held that a disability or disadvantage arising out of a party's own default or omission cannot be taken as tantamount to creation of two classes, offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission. It consequently upheld validity of Section 406 (2) (e) of Act, 1949.

13. In **Seth Nand Lal Vs. State of Haryana (supra)** there was no provision for waiver or reduction of amount of pre-deposit still the provision making pre-deposit, a condition precedent for entertainment of appeal was held valid.

14. The validity of Section 129 (e) of Customs Act, 1962 came up for consideration in **Vijay Prakash D. Mehta and another Vs. Collector of Customs 1988 (4) SCC 402.** ; Upholding validity of aforesaid provision, Court observed that right to appeal is granted by statute. When right is granted and such grant is with a condition, it means that substantive right to appeal is available in the manner as contemplated under statute and not otherwise. Right is conditional one and legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration, therefore, would arise. Court said:

“Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.”

15. Supreme Court further held in **Vijay Prakash D. Mehta and another (Supra)**:

“It is not the law that adjudication by itself following the rules of natural justice would be violative of any right-constitutional or statutory, without any right of appeal, as such, if the statute gives a right to appeal upon certain conditions, it is upon fulfillment of those condition that the right becomes vested and exercisable to the appellant.”

16. There is a three Judges' judgment in **Shyam Kishore and others Vs. Municipal Corporation of Delhi and another 1993 (1) SCC 22**, wherein vires of Section 170 (b) of Delhi Municipal Corporation Act, 1957 (hereinafter referred to as “DMC Act, 1957”) was challenged on the ground that condition of pre-deposit for availing right of appeal is *ultra vires* of the condition. The Court examined the submission by referring to a distinction between right of suit and right of appeal. It referred to an earlier decision in **Ganga Bai Vs. Vijay Kumar and others 1974 (2) SCC 393** and observed:

“ Right of suit is an inherent right in every person to bring a suit of a civil nature, but the right of appeal inhere in no one and therefore an appeal for its maintainability must have clear authority of law.”

17. It also referred to and relied on its earlier decision in **Anant Mills Company Limited Vs. State of Gujarat (supra)** and **Vijay Prakash D. Mehta and another Vs. Collector of Customs (supra)** and quoted from the later judgment i.e. **Vijay Prakash D. Mehta (supra)** the following observations:

“Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.”.

The Court ultimately upheld the validity of Section 170 (b) of DMC Act, 1957.

18. Since the Court did not read that Section 17 as an appeal, in our view this judgment of **Mardia Chemicals Ltd. (Supra)** does not help the petitioner at all. Even otherwise, in the present case, requirement of deposit is only of one-third of disputed amount while two-third amount has been dispensed with. There is nothing on record and pleadings are also lacking to show that even this requirement of deposit of disputed amount is so onerous that it renders right of appeal, nugatory or virtually confiscatory in nature. We, therefore, find no merit in the submission that the aforesaid condition renders sub-Section 3 of Section 12, inserted by Amendment Act, 2009 in Act, 1979, is arbitrary and *ultra vires*.

19. Looking to the peculiar nature of the dispute and also the factum that petitioners appeal could not be entertained by appellate authority for want of compliance of Section 12 (3) and also considering interim order passed by this Court in the appeal, we provide, if petitioners have complied interim orders, appellate authority shall permit petitioners to deposit deficient one-third amount, if any, within one month and if certain condition is complied with by petitioners, their appeal shall be decided as expeditiously on merits by appellate authority.

20. Subject to aforesaid directions, challenge by petitioners to the validity of Section 12 (3), as inserted by Amendment Act, 2009, in Act, 1979 fails.

21. Subject to above directions, writ petitions accordingly, are **dismissed**. Interim order, if any, stands vacated.

Order Date :- 01.11.2017
Arvind/M.V.S.Chauhan