**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on:19.05.2015

**+ W.P.(C) 1334/2015 & CM 2337/2015**

**PEPSI FOODS PVT. LTD. (NOW MERGED WITH PEPSICO INDIA HOLDING PVT. LTD** …. Petitioner

**versus**

**ASSISTANT COMMISSIONER OF INCOME TAX & ANR** …..Respondents

**+ W.P.(C) 1934/2014 and CM 4053/2014**

**PEPSI FOODS LTD. (NOW PEPSICO INDIA HOLDINGS PVT. LTD.** ….Petitioner

**versus**

**DEPUTY COMMISSIONER OF INCOME TAX&ORS** ….Respondents

**+ W.P.(C) 1935/2014 and CM 4054/2014**

**PEPSI FOODS LTD.** ….Petitioner

**versus**

**DEPUTY COMMISSIONER OF INCOME TAX &ORS** **....**Respondents

**+ W.P.(C) 2326/2014 and CM 4885/2014**

**ERICSSON AB** ….Petitioner

**versus**

**ADDL. DIRECTOR OF INCOME TAX, ORS** ….Respondents

**+ W.P.(C) 2465/2014 and CM 5130/2014**

**ERICSSON AB** ….Petitioner

**versus**

**ADDITIONAL DIRECTOR OF**

**INCOME TAX &ORS** …Respondents

**+ W.P.(C) 3650/2014 and CM 7417/2014**

**PEPSI FOODS LTD. (NOW PEPSICO INDIA HOLDINGS** …Petitioner

**versus**

**DEPUTY COMMISSIONER OF INCOME TAX &ANR** …Respondents

**+ W.P.(C) 4280/2014 and CM 8604/2014**

**ASPECT SOFTWARE INC** ….Petitioner

**versus**

**ASTT. DIRECTOR OF INTERNATIONAL TAXATION & ORS** ….Respondents

**Advocates who appeared in this case:-**

| | |
|---|---|
| For the Petitioner in Pepsi Foods Ltd. | : Mr Deepak Chopra with Mr Piyush Singh, Mr Amit Shrivastava, Mr Harpreet Ajmani, Ms Rashi Khanna and Ms Ananya Kapoor |
| For the Petitioner in Ericsson Ab | : Mr M.S. Syali, Sr. Adv.with Mr Mayank Nagi, Harkunal Singh and Mr Tarun Singh |
| For the Petitioner in WPC 4280/2014 | : Ms Rashmi Chopra |
| For the Respondent/Revenue | : Mr Rohit Madan, Mr N.P. Sahni, Mr Ruchir Bhatia & Mr Akash Vajpai |
| For the Respondent/UOI | : Mr Vivek Goyal and Mr Rohan Khare |

**CORAM:**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**
**HON'BLE MR JUSTICE SANJEEV SACHDEVA**

## JUDGMENT

**BADAR DURREZ AHMED, J**

1. These writ petitions are taken up together because they raise a common issue and, that is, the challenge to the constitutional validity of the

third proviso to Section 254(2A) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). An alternative prayer has also been made to read down the provisions of the said proviso to Section 254 (2A) of the said Act to mean that the power of the Income Tax Appellate Tribunal to grant interim relief is co-terminus with the main power of disposal of the appeal, as stipulated in Section 254(1) of the said Act. In each of these petitions, initially stay was granted by the Income Tax Appellate Tribunal. But, the period of 365 days from the grant of initial stay has elapsed and in view of the provisions of Section 254(2A), as it stands now, the Tribunal cannot grant any further extension of the stay even though the appeals filed by the petitioners before the Tribunal are pending. The delay in the disposal of the appeals is also not on account of any conduct attributable to the petitioners.

2. The Constitutional validity of the third proviso to Section 254(2A) and, particularly, to the amendment introduced therein by virtue of the Finance Act, 2008, with effect from 01.08.2008, which added the words – 'even if the delay in disposing of the appeal is not attributable to the assessee'– is in question before us. The case of the petitioners is that prior to the said amendment, in a decision of the Bombay High Court in the case of

***Narang Overseas Private Limited v. Income Tax Appellate Tribunal*: 295 *ITR 22 (Bombay)***, the third proviso to Section 254(2A) had been read down in such a manner that even if the period of 365 days from the initial grant of stay had expired, the Tribunal could extend the stay granted, provided the delay was not attributable to the assessee. The amendment brought about by the Finance Act, 2008 sought to nullify this reading of the third proviso to Section 254(2A) of the said Act by introducing the words – 'even if the delay in disposing of the appeal is not attributable to the assessee'. It was urged on the part of the petitioners that the right of appeal is not inherent, but once it has been granted, it has to be construed as one which effectively redresses the grievances. It was further contended that the right to obtain a stay of demand/ penalty was integral and cardinal to an effective right of appeal. It was also contended that the introduction of the above mentioned words by virtue of the amendment of 2008 has made the right of appeal illusory and the amendment is, therefore, clearly arbitrary and contrary to the provisions of the Article 14 of the Constitution of India. It was also contended that the said amendment introduces a classification which has no nexus with the object sought to be achieved. In the first place, it clubs assessees belonging to two different categories as one class. It was

contended that the assessees, who are not responsible for any delay in the hearing of the appeal, have been clubbed together with those assessees to whom the delay was attributable. Therefore, the persons belonging to different groups/ classes have been clubbed together in one category and this has caused hostile discrimination against those assessees who are law abiding and did not cause any delay in the hearing of their respective appeals. This, in itself, was violative of Article 14 of the Constitution of India and, therefore, the amendment introduced by virtue of the Finance Act, 2008 was liable to be struck down, as being invalid.

3. The learned counsel for the petitioners referred to several decisions in support of their contentions. They were:-

(i) ***ITO v. M. K. Mohammed Kunhi: 71 ITR 815 (SC)***;

(ii) ***Wire Netting Store, Delhi & Another v. Regional Provident Fund Commissioner & Others: (1984) 1 ILR 76 (Delhi) (DB)***;

(iii) ***Mardia Chemicals Limited & Others v. Union of India and Another: (2004) 4 SCC 311***;

(iv) ***Narang Overseas Private Limited v. Income Tax Appellate Tribunal: (2007) 295 ITR 22 (Bombay) (DB)*** ;

(v) ***PML Industries Limited v. CCE & Another: 2013 (30) STR 113 (Punjab and Haryana High Court) (DB)***;

(vi) ***CIT v. Maruti Suzuki (India) Limited: (2014) 362 ITR 215 (Delhi) (DB)***; and

(vii) ***Dr Subramanian Swamy v. Director, CBI: (2014) 8 SCC 682(SC)***

4. On the other hand, the learned counsel for the revenue submitted that there was nothing wrong with the amendment brought about in 2008 inasmuch as all it did was to clarify the legislative intent and make it explicit. What was already provided under the said Act in the third proviso to Section 254(2A) has merely been clarified. It was contended that there has been no class treatment given by the legislature and that the said provision is not discriminatory. The intention behind the amendment was to clarify that the period of stay cannot be extended beyond 365 days under any circumstances. A reference was also made to this Court's decision in ***Maruti Suzuki (India) Limited*** *(supra)*. Reliance was also placed on a decision of the Bombay High Court in the case of ***Jethmal Faujimal Soni v. Income Tax Appellate Tribunal: (2011) 333 ITR 96*** and ***V. M. Salgaocar and Brothers v. Board of Trustees of Port of Mormugao and Another: (2005) 4 SCC 613***.

5. At this point, it would be relevant to set out the provisions of Section 254 (2A), including its provisos, which reads as under:-

"**254. Orders of Appellate Tribunal.**

(1) xxxx xxxx xxxx xxxx

(1A) xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx

(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) or sub-section (2A) of section 253:

**Provided** that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order and the Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order:

**Provided further** that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty-five days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed:

**Provided also** that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, which

shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee.

(2B) xxxx xxxx xxxx xxxx

(3) xxxx xxxx xxxx xxxx

(4) xxxx xxxx xxxx xxxx"

(underlining added)

6. Section 254 (2A) stipulates that the Appellate Tribunal, where it is possible, may hear and decide the appeal within a period of four years from the end of the financial year in which such appeal is filed under Section 253(1), (2) or (2A). Initially, there was no proviso to Section 254(2A). The provisos were added, for the first time, by virtue of the Finance Act, 2001. At that point of time, the provisos inserted by the Finance Act, 2001 read as under:-

"**Provided** that where an order of stay is made in any proceedings relating to an appeal filed under sub-section (1) of section 253, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

> **Provided further** that if such appeal is not so disposed of within the period specified in the first proviso, the stay order shall stand vacated after the expiry of the said period."

7. It is clear from the above that with effect from 01.06.2001, it was stipulated that where an order of stay had been granted, the Appellate Tribunal was required to dispose of the appeal within a period of 180 days from the date of said order. It was further provided that if appeal was not disposed of within the specified period of 180 days, the stay order would stand vacated after the expiry of the said period. As pointed out by the learned counsel for the revenue, the Courts, while interpreting the said provisos, as they stood with effect from 01.06.2001, did not limit the powers of the Tribunal to pass fresh orders of stay on expiration of the period of 180 days. Consequently, by virtue of the Finance Act of 2007, with effect from 01.06.2007, the three provisos, as they stand today, except the last portion of the third proviso, which reads as – 'even if the delay in disposing of the appeal is not attributable to the assessee'–, were substituted for the provisos which had earlier been inserted by the Finance Act of 2001. Thereafter, by virtue of the Finance Act, 2008, the third proviso was substituted by the existing proviso with effect from 01.10.2008, the difference being that the

expression – 'even if the delay in disposing of the appeal is not attributable to the assessee'– was now added by virtue of the amendment of 2008.

8. Prior to the amendment of 2008, the provisos clearly stipulated that, in the first instance, a stay order could be passed for a period, not exceeding 180 days from the date of said order, and that the Tribunal was required to dispose of the appeal within that period. The second proviso stipulated that in case the appeal was not so disposed of within the period initially stipulated by the Tribunal, the Tribunal could, on an application made on this behalf by the assessee and on being satisfied that the delay in disposing of the appeal was not attributable to the assessee, extend the period of stay for a period or periods, provided that the aggregate of the period originally allowed and the period or periods so extended, would not, in any case, exceed 365 days. The Tribunal was also required to dispose of the appeal within the period or periods of stay so extended or allowed. The third proviso stipulated that if the appeal had not been disposed of within the period of 365 days, the order of stay would stand vacated after the expiry of such period. This provision came up for consideration before the Bombay High Court in ***Narang Overseas*** *(supra)*. The exact question which was considered by the Bombay

High Court was whether the third proviso to Section 254(2A) of the said Act had the effect of denuding the Tribunal of its incidental power to grant interim relief. A Division Bench of the Bombay High Court, after considering various provisions and decisions, observed as under:-

> "20. It would not be possible on the one hand to hold that there is a vested right of appeal and on the other hand to hold that there is no power to continue the grant of interim relief for no fault of the assessee by divesting the incidental power of the Tribunal to continue the interim relief. Such a reading would result in such an exercise being rendered unreasonable and vilative of Article 14 of the Constitution. Courts must, therefore, construe and / or give a construction consistent with the constitutional mandate and principle to avoid a provision being rendered unconstitutional."
>
> xxxx xxxx xxxx xxxx
>
> "23. We are of the respectful view that the law as enunciated in Kumar Cotton Mills (P) Ltd. (supra) should also apply to the construction of the third proviso as introduced in Section 254(2A) by the Finance Act, 2007. The power to grant stay or interim relief being inherent or incidental is not defeated by the provisos to the sub-section. The third proviso has to be read as a limitation on the power of the Tribunal to continue interim relief in a case where the hearing of the appeal has been delayed for acts attributable to the assessee. It cannot mean that a construction be given that the power to grant interim relief is denuded even if the acts attributable are not of the assessee but of the revenue or of the Tribunal itself. The power of the Tribunal, therefore, to continue interim relief is not overridden by the language of the third proviso to Section 254(2A). This would be in consonance with the view taken in Kumar Cotton Mills (P) Ltd. (supra). There would be power in the Tribunal to extend the period of stay on good cause

being shown and on the Tribunal being satisfied that the matter could not be heard and disposed of for reasons not attributable to the assessee."

9. From the above extract, it is evident that the Bombay High Court was of the view that if it were to be held that the Tribunal, while it had the power to pass an order in an appeal, did not have the power to continue the grant of interim relief for no fault of the assessee, the result would be rendered unreasonable or violative of Article 14 of the Constitution. In other words, the Bombay High Court took the view that the Tribunal had the power to extend the stay beyond the period of 365 days, provided the delay in disposal of the appeal was not attributable to the assessee. The Bombay High Court also took the view that if the third proviso to Section 254(2A) were not interpreted in such manner and it was to be held that the Tribunal had no power to extend the period of stay beyond a period of 365 days even though the delay was not attributable to the assessee then, the provision would run afoul of Article 14 of the Constitution and would have to be struck down as such. While observing this, the Bombay High Court was mindful that the Courts are required to construe and/ or to give a construction to a provision which was consistent with the constitutional mandate so as to avoid a provision being rendered unconstitutional. It is in this light that the Bombay

High Court read down and interpreted the third proviso (prior to the amendment of 2008) to not take away the power of the Tribunal to extend the period of stay beyond 365 days, provided, of course, that the delay in disposing of the appeal was not attributable to the assessee.

10. The Notes on Clauses pertaining to the Finance Bill, 2008, to the extent relevant, read as under:-

> "*Clause 46* seeks to amend section 254 of the Income-tax Act, relating to orders of the Appellate Tribunal.
>
> Sub-section (2A) of the said section provides that the Income-tax Appellate Tribunal, where it is possible, may hear and decide an appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) of section 253.
>
> The first proviso to this sub-section provides that the said Appellate Tribunal may, on merit, pass an order of stay in any proceedings relating to an appeal. However, such period of stay cannot exceed 180 days from the date of such order and the said Appellate Tribunal shall dispose of the appeal within the specified period of stay.
>
> The second proviso to this sub-section provides that where the appeal has not been disposed of within the said specified period and the delay in disposing of the appeal is not attributable to the assessee, the Appellate Tribunal can further extend the period of stay originally allowed. However, the aggregate of period originally allowed and the period so

extended should not exceed 365 days. The Appellate Tribunal is required to dispose of the appeal within the extended period.

The third proviso to this sub-section provides that if such appeal is not decided within the period allowed originally or the period or periods so extended or allowed, the order of stay shall stand vacated after the expiry of such period or periods.

The intention behind these provisions have been very clear that the Appellate Tribunal cannot grant stay either under the original order or under any subsequent order, beyond the period of 365 days in aggregate.

To make this intention clear, it is proposed to amend section 254 of the Income-tax Act and further provide that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty five days, even if the delay in disposing of the appeal is not attributable to the assessee.

This amendment will take effect from 1st October, 2008."

From the above, it is evident that the object behind the introduction of the words – 'even if the delay in disposing of the appeal is not attributable to the assessee'– was to make it clear that the aggregate of the period originally allowed and the period or periods so extended or allowed was not to, in any case, exceed 365 days, even if the delay in disposing of the appeal was not attributable to the assessee.

11. It is evident that the amendment introduced by virtue of the Finance Act, 2008 had nullified the effect of the decision of the Bombay High court in ***Narang Overseas*** *(supra)*. The said provision, after its amendment by virtue of the Finance Act, 2008, came up for consideration before this Court in ***Maruti Suzuki (India) Limited*** *(supra)*. The following observations made by a Division Bench of this Court in that case are relevant:-

> "26. In view of the aforesaid discussion, we have reached the following conclusion:-
>
> (i) In view of the third proviso to Section 254(2A) of the Act substituted by Finance Act, 2008 with effect from 1st October, 2008, tribunal cannot extend stay beyond the period of 365 days from the date of first order of stay.
>
> (ii) In case default and delay is due to lapse on the part of the Revenue, the tribunal is at liberty to conclude hearing and decide the appeal, if there is likelihood that the third proviso to Section 254 (2A) would come into operation.
>
> (iii) Third proviso to Section 254 (2A) does not bar or prohibit the Revenue or departmental representative from making a statement that they would not take coercive steps to recover the impugned demand and on such statement being made, it will be open to the tribunal to adjourn the matter at the request of the Revenue.
>
> (iv) An assessee can file a writ petition in the High Court pleading and asking for stay and the High Court has power and jurisdiction to grant stay and issue directions to the tribunal as may be required. Section 254(2A) does not prohibit/bar the

> High Court from issuing appropriate directions, including granting stay of recovery.
>
> 27. We have not examined the constitutional validity of the provisos to Section 254 (2A) of the Act and the issue is left open."
>
> (underlining added)

12. From the above extract, it is evident that the Division Bench was not called upon and did not examine the constitutional validity of the provisos to Section 254(2A) of the said Act and left the issue open. It is only on a plain reading of the provisos, as they existed, that the Division Bench came to the conclusion that the Tribunal had no power to extend stay beyond a period of 365 days from the date of the first order of stay but that an assessee could file a writ petition in the High Court asking for stay even beyond the said period of 365 days and the High Court had the power and jurisdiction to grant stay and issue directions to the Tribunal and that Section 254(2A) did not prohibit / bar the High Court from issuing appropriate directions, including grant of stay of recovery. A similar view was taken by the Bombay High Court in ***Jethmal Faujimal Soni*** *(supra)*. But that decision was also rendered on a plain meaning of the provisos, as they stood. There was no challenge to the constitutional validity of the third proviso to Section

254(2A) of the said Act after the amendment introduced by the Finance Act, 2008. No decision of any High Court has been brought to our notice by the learned counsel for the parties, wherein the constitutional validity of the third proviso to Section 254(2A) of the said Act has been examined.

13. At this point, we may also refer to certain other observations of the Division Bench in ***Maruti Suzuki (India) Limited*** *(supra)*. The Court had examined various data with regard to the filing of appeals, pendency of appeals and stay orders granted by the Tribunal etc.. Paragraphs 21, 22 and 23 are of material importance and they are reproduced herein below:-

> "21. Information/data in this regard was received vide letter dated 30th January, 2014 written by Assistant Registrar, Tribunal. The relevant portion of the said letter reads as under:-
>
> > "a) Number of appeals filed before the Tribunal by the assessee and the revenue is as under:-
> >
> > | Year | Assessee | Revenue | Total |
> > |---|---|---|---|
> > | 2011 | 3359 | 3013 | 6372 |
> > | 2012 | 3593 | 3462 | 7055 |
> > | 2013 | 3975 | 3102 | 7077 |
> > | Total | **10927** | **9577** | **20504** |
> >
> > b) No data is available with regard to average time taken for disposal of the appeal before the Tribunal.

c) (i) The year-wise details of the stay orders passed by the Tribunal are as under:-

| Year | Number of stay orders |
|---|---|
| 2011 | 173 |
| 2012 | 278 |
| 2013 | 321 |

(ii) The complete details in respect of each and every appeal where stay order was passed is annexed as Annexure-1, 2 & 3.

d) The year-wise details of the cases/appeals which remained pending beyond 365 days of the stay order are as under:-

| Year | Number of appeals disposed-off after 365 days or pending for more than 365 days |
|---|---|
| 2011 | 90 Appeals |
| 2012 | 131 Appeals |
| 2013 | 36 Appeals |

e) The year-wise details of the number of appeals disposed of within 365 days from the date of grant of stay are as under:-

| Year | Number of appeals disposed-off within 365 days or pending within 365 days |
|---|---|
| 2011 | 83 Appeals |
| 2012 | 147 Appeals |
| 2013 | 285 Appeals" |

> 22. The aforesaid data does not mention the quantum of demand, which was subject matter of stay, but the position is certainly not bleak and unpalatable. Most of the appeals in which stay had/has been granted, were/are being disposed of within 365 days. Number of appeals, which were not disposed of within 365 days of grant of stay, have come down sharply in the year 2013. Grant of stay by the tribunal is not a matter of right, but is decided by a speaking order, recording prima facie view on merits. In case there is an error or the tribunal has erred in granting stay, Revenue is not without remedy and can approach the High Court in accordance with law.
>
> 23. We do not have figures or data on whether the demands raised, which was subject matter of stay, was sustained/upheld or were deleted by the tribunal. Merits and justification of additions is examined by the appellate forums and demands raised have relevance when they are sustained by the tribunal/High Court and the Supreme Court."

14. From the above data, it is evident that the number of stay orders granted by the Tribunal in the years 2011, 2012 and 2013 do not even amount to 10% of the appeals filed by assessees before the Tribunal. Furthermore, even a fewer number of appeals, in which stay orders have been passed, remain pending beyond the period of 365 days. It is in this light that the Division Bench observed that most of the appeals in which stay had/has been granted were/are being disposed of within 365 days. The Division Bench also observed that the grant of stay by the Tribunal was not a matter of right but was decided by a speaking order, recording the *prima*

*facie* view on merits. Furthermore, in case there was an error, the revenue was not without remedy and could approach the High Court in accordance with law. From the above figures, it is evident that there is a very small percentage of appeals before the Tribunal which remain pending beyond the period of 365 days in which stay orders were granted.

15. We may also refer to paragraph 17 of the decision in ***Maruti Suzuki (India) Limited*** *(supra)* which was relied upon by the revenue. The said paragraph reads as under:-

> "17. In these circumstances, we have examined whether we can read down the third proviso, by applying principles of equity, justice and fair play and also the principle that the court should interpret a provision in a manner that it does not lead to arbitrary results or make it violative of Article 14 or would render it unconstitutional. However, it is clear to us that the legislative mandate has to be respected and the courts do not legislate but interpret the statute as a legislative edict. The third proviso after amendment, undoubtedly bars and prohibits the tribunal from extending interim stay order beyond 365 days. It stipulates deemed vacation and imposes no fault consequences in strict terms. The language is clear and therefore has to be respected. However, the provision does not bar or prohibit an assessee from approaching the High Court by way of writ petition for continuation, extension or grant of stay. Fairly, the standing counsel for Revenue accepts and admits that in spite of Section 254(2A), the High Court has power to grant and extend stay where the appeal is pending before the tribunal. The constitutional power and right is available and has not and cannot be curtailed. The powers of the High Court under

Articles 226 and 227 form a part and parcel of the basic structure of the Constitution and cannot be over written and nullified as held by the Constitutional Bench in ***L. Chandra Kumar versus Union of India,*** (1997) 3 SCC 261. Thus, the High Court in appropriate matters can grant or extend stay even when the tribunal has not been able to dispose of an appeal within 365 days from the date of grant of initial stay. This perhaps appears to be and apparently is the intention of the Parliament. High Court while granting or rejecting the writ petition will examine the factual matrix, record reasons as to who is to be blamed and is responsible for the default and can also issue appropriate directions or orders for expeditious and early disposal of the appeal. The provision will propel and ensure that the tribunal will try and dispose of and decide appeals within 365 days of the grant of stay order. The Bombay High Court in ***Jethmal Faujimal Soni vs. Income Tax Appellate Tribunal*** [2011] 333 ITR 96, had occasion to deal with a similar situation and entertained the writ petition. In the said case constitutional validity of the third proviso inserted in Section 254(2A) of the Act by Finance Act, 2008, w.e.f. 1st October, 2008 was challenged It was observed that the proviso enacted a stringent provision as a result of which even if the delay in disposing of the appeal was/is not attributable to the assessee, the stay stands vacated after 365 days. Thus, the tribunal was/is under binding duty and obligation to dispose of the appeal within the said time, particularly when the fault was not on the part of the assessee. In the said case, directions were issued for expeditious disposal of the appeal and it was also directed that the Revenue shall not take coercive steps for enforcing demand subject matter of the appeal."

(underlining added)

16. At this juncture itself, we may reiterate that the decision of the Division Bench in ***Maruti Suzuki (India) Limited*** *(supra)* was based on an

interpretation of the third proviso to Section 254(2A) as it stands. The constitutional validity of the same had not been examined. It only spelt out the legislative intent and that was more than clear that no stay could be granted by the Tribunal beyond the period of 365 days under any circumstances. The question that we have to examine is whether this intention of the legislature is not hit by Article 14 of the Constitution of India. We may also point out that the fact that judicial review was available to an assessee under Article 226 of the Constitution, would not, in any way, add to or subtract from the issue of constitutional validity of the third proviso to Section 254(2A).

17. It would now be relevant to examine the decision of the Supreme Court in ***Mohammed Kunhi*** *(supra).* The question before the Supreme Court was whether the Income Tax Appellate Tribunal had power under the relevant provisions of the said Act to stay the recovery of the realization of the penalty imposed by the departmental authorities on an assessee during the pendency of an appeal before it. In that case, the Tribunal had declined to order any stay holding that it had no power to grant such a prayer. We must be mindful of the fact that at that point of time Section 254(2A) was not

there in the said Act. The said provision was introduced with effect from 01.06.1999 by the Finance Act, 1999. In the absence of any specific provision, permitting the Tribunal to grant stay, the question arose as to whether the Tribunal had the power to stay the proceedings as also the collection of penalties pending the appeal. The High Court of Kerala held that the Tribunal had such power and that the power was incidental and ancillary to its appellate jurisdiction. The Supreme Court observed that the powers, which had been conferred by Section 254 on the Appellate Tribunal, were of the widest possible amplitude and, therefore, must carry with them, by necessary implication, all powers and duties incidental and necessary to make the exercise of those fully effective. Finally, the Supreme Court concluded by holding:-

> "13. Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when Section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in

proper cases to make such orders for staying proceedings as will prevent the appeal if successful from being rendered nugatory.

14. A certain apprehension may legitimately arise in the minds of the authorities administering the Act that if the Appellate Tribunals proceed to stay recovery of taxes or penalties payable by or imposed on the Assessees as a matter of course the revenue will be put to great loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunals. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."

(underlining added)

18. From this decision, it is evident that the power to grant a stay is incidental or ancillary to the appellate jurisdiction of the Tribunal. It is also clear that the power of stay exercised by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws and it is only when a strong *prima facie* case is made out that the Tribunal would consider whether to stay the recovery proceedings and on what conditions. The stay is also granted in

deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal would be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal. These words of the Supreme Court were indeed prophetic, as can be discerned from the data which has been referred to by a Division Bench of this Court in ***Maruti Suzuki (India) Limited*** *(supra)*, which shows that in less than 10% of the appeals filed by assessees, the Tribunal has granted stay orders and in a very few of such cases, the appeals are pending beyond the period of 365 days stipulated under the provisions, as they now stand.

19. A reference has been made to ***Mardia Chemicals Limited*** *(supra)*. The passages referred to were paragraphs 55, 61 and 80, which read as under:

> "55. We may then turn to the arguments raised on behalf of the petitioners that the remedy before the Debts Recovery Tribunal under Section 17 of the Act is illusory, burdened with onerous and oppressive condition of deposit of 75% of the amount of the demand notice before an appeal can be entertained by the Tribunal. We feel that it would be difficult to brush aside the challenge made to the condition of such a deposit. Sub-section (2) of Section 17 itself says that no appeal shall be entertainable unless the borrower has deposited the aforesaid sum of amount claimed. Much stress has been given in reply to the proviso to sub-section (2) of Section 17, according to which the Tribunal has power to waive or reduce

the amount. While waiving the condition of depositing the amount or reducing it, the Tribunal is required to record reasons for the same. It is submitted for the respondents that in an appropriate case, DRT which is presided over by a Member of a Higher Judicial Service, would exercise its discretion and may waive or reduce the amount required to be deposited in deserving cases. It is, therefore, not an absolute condition which must in all cases and all circumstances be fulfilled irrespective of the special features of a particular case."

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"61. In the case of Seth Nandlal (supra), while considering the question of validity of pre-deposit before availing the right of appeal the Court held:

> "right of appeal is a creature of the statute and while granting the right the legislature can impose conditions for the exercise of such right *so long as the conditions are not so onerous as to amount to unreasonable restrictions* rendering the right almost illusory."
>
> (emphasis supplied).

While making said observation this Court referred to the decision in the case of Anant Mills Co. Ltd. (supra). In both the above noted decisions this Court had negated the plea raised against pre-deposit but in the case of Seth Nandlal (supra) it was found that the condition was not so onerous since the amount sought to be deposited was meager and that too was confined to the landholding tax payable in respect of the disputed area i.e. *the area or part thereof which is declared surplus by the Prescribed Authority* (emphasis supplied) after leaving the permissible area to the appellant. In the above circumstances it was found that even in the absence of a provision conferring discretion on the appellate authority to waive or reduce the amount of pre- deposit, it was considered to

be valid, for the two reasons indicated above. The facts of the case in hand are just otherwise."

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"80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The above noted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section

> 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.
>
> 3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.
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> 4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.
>
> 5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court."

20. The learned counsel for the petitioners had also referred to a decision of the Division Bench of the Punjab and Haryana High Court in ***PML Industries Limited*** *(supra)*. Although that decision pertained to Section 35C (2A) of the Central Excise Act, 1944, the provision under consideration was somewhat similar. It pertained to the waiver of pre-deposit at the stage of an appeal pending before the Central Excise Service Tax Appellate Tribunal.

The provision indicated that the waiver would stand vacated after 180 days. In that context, the question arose, as to whether the second proviso to Section 2A of Section 35C was directory and that the Tribunal, in appropriate circumstances, could extend the period of stay beyond 180 days. While considering the said question, the Punjab and Haryana High Court held as under:-

> "51. Though the right of appeal is a creation of Statute and it can be exercised only subject to the conditions specified therein, but the conditions specified have to be in relation to the assessee as something which is required to be complied with by the assessee. But where the assessee has no control over the functioning of the Tribunal, then the provision of vacation of stay cannot be sustained.
>
> 52. The assessee having preferred appeal and that Tribunal being satisfied that condition for dispensing with the pre-deposit of duty demanded and penalty levied is made out, is compelled to pay the duty demanded and penalty levied, if the appeal is not decided within 180 days. The assessee has no control in respect of matters pending before the Tribunal; in the matter of availability of infrastructure; the members of the Tribunal and the workload. Therefore, for the reason that the Tribunal is not able to decide appeal within 180 days, the vacation of stay is a harsh and onerous and unreasonable condition. The condition of vacation of stay for the inability of the Tribunal to decide the appeal is burdening the assessee for no fault of his. Such a condition is onerous and renders the right of appeal as illusory. An order passed by a judicial forum is sought to be annulled for no fault of assessee. Therefore, in terms of judgments in Anant Mills Ltd. and Seth Nandlal cases (supra), such condition of automatic vacation of stay on the

> expiry of 180 days, has to be read down to mean that after 180 days the Revenue has a right to bring to the notice of the Tribunal the conduct of the assessee in delay or avoiding the decision of appeal, so as to warrant an order of vacation of stay. If the provision is not read down in the manner mentioned above, such condition suffers from illegality rendering the right of appeal as redundant.
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> xxxx xxxx xxxx xxxx
>
> 54. Consequently, the second proviso in sub-section (2A) of Section 35C is ordered to be read down to mean that after 180 days, the Revenue has a right to seek vacation of stay on proof of the fact that the assessee is the one, who is defaulted or taken steps to delay the ultimate decision."

The said Court read down the provision in question in much the same manner as did the Bombay High Court in the case of ***Narang Overseas*** *(supra)*. The object being that, if the provision were to be read strictly, it would render the right of appeal to be illusory and for no fault of the assessee.

21. The decision in ***Wire Netting Store, Delhi*** *(supra)* was relied upon by the learned counsel for the petitioners for the proposition that the availability of a constitutional remedy would not remove the lacuna of a provision which was inherently unconstitutional. There can be no dispute with this proposition. The provision which is challenged, as being violative of Article

14 of the Constitution, would have to be tested on its own without recourse to the availability of the remedy of judicial review under Article 226 of the Constitution.

22. In ***Dr Subramanian Swamy*** *(supra)*, a Constitution Bench of the Supreme Court, while considering the parameters which needed to be kept in mind in determining whether a particular provision of a statute was violative of Article 14 or not, made the following observations:-

> "46. In *Air India v. Nergesh Meerza and Ors.* : (1981) 4 SCC 335, the three-Judge Bench of this Court while dealing with constitutional validity of Regulation 46(i)(c) of Air India Employees' Service Regulations (referred to as 'A.I. Regulations') held that certain conditions mentioned in the Regulations may not be violative of Article 14 on the ground of discrimination but if it is proved that the conditions laid down are entirely unreasonable and absolutely arbitrary, then the provisions will have to be struck down. With regard to due process clause in the American Constitution and Article 14 of our Constitution, this Court referred to *State of West Bengal v. Anwar Ali Sarkar* : (1952) SCR 284, and observed that the due process clause in the American Constitution could not apply to our Constitution. The Court also referred to *A.S. Krishna v. State of Madras*: 1957 S.C.R. 399 wherein Venkatarama Ayyar, J. observed:
>
> > "13. ….The law would thus appear to be based on the due process clause, and it is extremely doubtful whether it can have application under our Constitution."

47. In *D.S. Nakara and Ors. v. Union of India*: (1983) 1 SCC 305, the Constitution Bench of this Court had an occasion to consider the scope, content and meaning of Article 14. The Court referred to earlier decisions of this Court and in para 15, the Court observed:

> "15. Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question.""

xxxx xxxx xxxx xxxx

**"Court's approach**

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognized and these are (i) discrimination, based on an impermissible or invalid classification and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated

> legislation or by way of conferment of authority to pass administrative orders-if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

It is clear that where a legislation is sought to be challenged, as being unconstitutional or violative of Article 14 of the Constitution, the Court must keep in mind the principles relating to the applicability of Article 14 in relation to invalidation of a legislation. The two dimensions of Article 14 in its application to legislation and for rendering legislation invalid are well settled and these are – (i) discrimination, based on an impermissible or an invalid classification and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders. The Constitution Bench also cautioned that the Courts need to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be

considered to be as good or even more effective, like any issue of social, or even economic policy.

23. Keeping in mind the principles set out by the Supreme Court in ***Dr Subramanian Swamy*** *(supra)*, we need to examine whether the present challenge to the validity of the third proviso to Section 254(2A) can be sustained. This is not a case of excessive delegation of powers and, therefore, we need not bother about the second dimension of Article 14 in its application to legislation. We are here concerned with the question of discrimination, based on an impermissible or invalid classification. It is abundantly clear that the power granted to the Tribunal to hear and entertain an appeal and to pass orders would include the ancillary power of the Tribunal to grant a stay. Of course, the exercise of that power can be subjected to certain conditions. In the present case, we find that there are several conditions which have been stipulated. First of all, as per the first proviso to Section 254(2A), a stay order could be passed for a period not exceeding 180 days and the Tribunal should dispose of the appeal within that period. The second proviso stipulates that in case the appeal is not disposed of within the period of 180 days, if the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to extend the stay for

a period not exceeding 365 days in aggregate. Once again, the Tribunal is directed to dispose of the appeal within the said period of stay. The third proviso, as it stands today, stipulates that if the appeal is not disposed of within the period of 365 days, then the order of stay shall stand vacated, even if the delay in disposing of the appeal is not attributable to the assessee. While it could be argued that the condition that the stay order could be extended beyond a period of 180 days only if the delay in disposing of the appeal was not attributable to the assessee was a reasonable condition on the power of the Tribunal to the grant an order of stay, it can, by no stretch of imagination, be argued that where the assessee is not responsible for the delay in the disposal of the appeal, yet the Tribunal has no power to extend the stay beyond the period of 365 days. The intention of the legislature, which has been made explicit by insertion of the words – 'even if the delay in disposing of the appeal is not attributable to the assessee'– renders the right of appeal granted to the assessee by the statute to be illusory for no fault on the part of the assessee. The stay, which was available to him prior to the 365 days having passed, is snatched away simply because the Tribunal has, for whatever reason, not attributable to the assessee, been unable to dispose of the appeal. Take the case of delay being caused in the disposal of

the appeal on the part of the revenue. Even in that case, the stay would stand vacated on the expiry of 365 days. This is despite the fact that the stay was granted by the Tribunal, in the first instance, upon considering the *prima facie* merits of the case through a reasoned order.

24. Furthermore, the petitioners are correct in their submission that unequals have been treated equally. Assessees who, after having obtained stay orders and by their conduct delay the appeal proceedings, have been treated in the same manner in which assessees, who have not, in any way, delayed the proceedings in the appeal. The two classes of assessees are distinct and cannot be clubbed together. This clubbing together has led to hostile discrimination against the assessees to whom the delay is not attributable. It is for this reason that we find that the insertion of the expression – 'even if the delay in disposing of the appeal is not attributable to the assessee'– by virtue of the Finance Act, 2008, violates the non-discrimination clause of Article 14 of the Constitution of India. The object that appeals should be heard expeditiously and that assesses should not misuse the stay orders granted in their favour by adopting delaying tactics is not at all achieved by the provision as it stands. On the contrary, the clubbing together of 'well behaved' assesses and those who cause delay in

the appeal proceedings is itself violative of Article 14 of the Constitution and has no nexus or connection with the object sought to be achieved. The said expression introduced by the Finance Act, 2008 is, therefore, struck down as being violative of Article 14 of the Constitution of India. This would revert us to the position of law as interpreted by the Bombay High Court in ***Narang Overseas*** *(supra),* with which we are in full agreement. Consequently, we hold that, where the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases. The writ petitions are allowed as above.

25. Consequently, the petitioners may approach the Tribunal for extension of stay in each of the cases before us and till the Tribunal passes such orders, the interim orders granted by us in these matters shall continue. The petitioners shall move the Tribunal within four weeks from the date of this judgment. The parties are left to bear their own costs.

**BADAR DURREZ AHMED, J**

**SANJEEV SACHDEVA, J**

**MAY 19, 2015**
**SR**