

**HIGH COURT OF ANDHRA PRADESH AT AMARAVATI**

**W.P.No.37753 of 2022**

Between:

M/s. RNK Agro & Chemicals Pvt Ltd.,  
Rep. by its Accounts Manager,  
Sri M. Kalyan Chakravarthy,  
Plot No.16/7/51, 1<sup>st</sup> lane, Rama Murthy Nagar,  
Nellore – 524 002.  
Registered Office at 3-6-665/3, Street No.10,  
Himayatnagar, Hyderabad - 500029.

.. Petitioner

And

The Deputy Commercial Tax Officer-II,  
O/o the Commercial Tax Officer, Nellore-III Circle,  
Nellore, Andhra Pradesh and eight others.

.. Respondents

DATE OF JUDGMENT PRONOUNCED: 11.08.2023

**SUBMITTED FOR APPROVAL:**

**HON'BLE SRI JUSTICE U. DURGA PRASAD RAO  
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO**

1. Whether Reporters of Local newspapers  
may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be  
marked to Law Reporters/Journals? Yes/No
3. Whether Their Ladyship/Lordship wish to  
see the fair copy of the Judgment? Yes/No

**U. DURGA PRASAD RAO, J**

**T. MALLIKARJUNA RAO, J**

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**\*HON'BLE SRI JUSTICE U.DURGA PRASAD RAO  
AND  
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO  
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Vs.

\$ The Deputy Commercial Tax Officer-II,  
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Nellore, Andhra Pradesh and eight others..

.. Respondents

<GIST:

>HEAD NOTE:

! Counsel for petitioner: Sri A. Sarveswar Row.

Counsel for respondents: Sri Y. Vivekananda, Learned Government Pleader for  
Commercial Taxes-II

? CASES REFERRED:

1. 1998 68 STC 220 AP
2. 1999 SCC OnLine AP 558

**HON'BLE SRI JUSTICE U. DURGA PRASAD RAO  
AND  
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO  
W.P.No.37753 of 2022**

**ORDER:** (*Per Hon'ble Sri Justice U. Durga Prasad Rao*)

Heard learned counsel for the petitioner Sri A. Sarsweswar Row and Sri Y. Vivekananda, learned Government Pleader for Commercial Taxes-II representing the respondents.

2. In essence, the submission of learned counsel for the petitioner is that aggrieved by the assessment order dated 14.03.2019 passed by the 2<sup>nd</sup> respondent, the petitioner filed appeal before the Appellate Deputy Commissioner, Tirupathi/3<sup>rd</sup> respondent and the 3<sup>rd</sup> respondent vide his order in ADC Order No.ZL370620OD34741, dated 11.06.2020 rejected the appeal on the main ground that the petitioner filed appeal after 128 days from the date of receipt of original Assessment Order. Aggrieved, the petitioner filed appeal TA No.1/2022 on the file of AP VAT Appellate Tribunal, Visakhapatnam/5<sup>th</sup> respondent and the same is pending for hearing. Along with appeal, the petitioner also filed a stay application in TMP No.29/2022 in TA NO.1/2022 and the same is posted for hearing on 17.11.2022. However, for non-appointment of chairperson of the AP VAT Tribunal, the matter could not be taken up and in the meanwhile respondent No.1 issued notice dated 03.11.2022 for recovery

of disputed tax and also issued garnishee notices 05.11.2022 to the respondents 6 to 8 banks with which the petitioner maintains his accounts for recovery of the disputed tax which is illegal. Learned counsel for the petitioner thus prays to declare the action of respondent No.1 as illegal and direct the respondent No.2 not to take any steps for recovery of the balance disputed tax till disposal of the appeal in TA No.1/2022 pending before the respondent No.5.

3. Learned GP opposed the petition contending that in term of Section 31(3)(c) of AP VAT Act, 2005 r/w Rule 40 of AP VAT Rules, 2005, AP VAT Appellate Tribunal, Visakhapatnam/5<sup>th</sup> respondent has no jurisdiction to entertain the stay petition and therefore recovery of the tax need not be stopped on the ground that the petitioner filed stay application in the appeal filed before the 5<sup>th</sup> respondent. He prayed to dismiss the writ petition.

4. Per contra, the contention of learned counsel for the petitioner is that when an appellate tribunal is vested with power and jurisdiction to hear the appeal, it goes without saying that it has been vested with the ancillary power of passing interlocutory orders including stay order in the interest of justice and such a power is inherent in the appellate tribunal.

5. The point for consideration is whether the AP VAT Appellate Tribunal/5<sup>th</sup> respondent has no jurisdiction to entertain the stay application pending appeal before it in the circumstances of the present case?

6. We gave our anxious consideration to the above respective arguments. In order to decide whether in terms of Section 31(3)(c) of AP VAT Act r/w Rule 40 of AP VAT Rules, 2005 stay petition is maintainable before the AP VAT Appellate Tribunal, Visakhapatnam/5<sup>th</sup> respondent or not, the relevant provisions have to be perused. They read thus:

*Appeals and Revisions*

- (a) **31. Appeal to Appellate Authority:-** (1) Any VAT dealer or TOT dealer or any other dealer objecting to any order passed or proceeding recorded by any authority under the provisions of the Act other than an order passed or proceeding recorded by an Additional Commissioner or Joint Commissioner or Deputy Commissioner, may within thirty days from the date on which the order or proceeding was served on him, appeal to such authority as may be prescribed:

Provided that the appellate authority may within a further period of thirty days admit the appeal preferred after a period of thirty days if he is satisfied that the VAT dealer or TOT dealer or any other dealer had sufficient cause for not preferring the appeal within that period:

“Provided further that the Commissioner may, in general but not in specific cases and in such circumstances, in which the appellate authorities are not able to discharge their normal functions due to natural calamities, public agitations or other similar reasons, notify the period of time to be excluded for the purpose of computation of the time limit for filing of appeals prescribed under the sub-section.”  
(Inserted by Act No.4 of 2016, dated 12.01.2016)

Provided further that an appeal so preferred shall not be admitted by the appellate authority concerned unless the dealer produces proof of payment of tax, penalty, interest or any other amount admitted to be due, or of such installments as have been granted, and the proof of payment of twelve and half percent of the difference of the tax, penalty, interest or any other amount, assessed by the authority prescribed and the tax, penalty, interest or any other amount admitted by the appellant, for the relevant tax period, in respect of which the appeal is preferred.

(2) The appeal shall be in such form, and verified in such manner, as may be prescribed and shall be accompanied by a fee which shall not be less than Rs.50/- (Rupees fifty only) but shall not exceed Rs.1000/- (Rupees one thousand only) as may be prescribed.

(3) (a) Where an appeal is admitted under sub-section(1), the appellate authority may, on an application filed by the appellant and **subject to furnishing of such security or on payment of such part of the disputed tax within such time as may be specified, order stay of collection of balance of the tax under dispute pending disposal of the appeal;**

(b) Against an order passed by the appellate authority refusing to order stay under clause(a), the appellant may **prefer a revision petition within thirty days from the date of the order of such refusal to the Additional Commissioner or the Joint Commissioner who may subject to such terms and conditions as he may think fit, order stay of collection of balance of the tax under dispute pending disposal of the appeal by the appellate authority;**

(c) Notwithstanding anything in clauses (a) or (b), **where a VAT dealer or TOT dealer or any other dealer has preferred an appeal to the Appellate Tribunal under Section 33, the stay, if any, ordered under clause (b) shall be operative till the disposal of the appeal by such Tribunal, and, the stay, if any ordered under clause (a) shall be operative till the disposal of the appeal by such Tribunal, only in case where the Additional Commissioner or the Joint Commissioner on an application made to him by the dealer in the prescribed manner, makes specific order to that effect.**

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- (b) **Rule 40(1) : Application for Stay when appeal is filed before the Appellate Tribunal:-** (1) In a case where stay of collection of the tax or penalty under dispute is granted by the Appellate Deputy Commissioner under clause (a) of sub-section (3) of Section 31 and on disposal of the appeal by such Appellate Deputy Commissioner under sub-section (4) of Section 31, the appellant files an appeal to the Appellate Tribunal, he may apply to the Additional Commissioner

(Commercial Taxes)(Legal) or Joint Commissioner (Commercial Taxes)(Legal) for the continuance of the stay granted under clause (a) of sub-section (3) of Section 31 by the Appellant Deputy Commissioner until the appeal filed before the Appellate Tribunal is disposed of.

7. Thus, section 31(3)(c) says that pending the appeal before the AP VAT Appellate Tribunal U/s 33, the stay earlier granted under section 31(3)(b) shall be operative till disposal of the appeal by the AP VAT Appellate Tribunal. However, in the present case the facts would show the petitioner has not applied for stay before the 4<sup>th</sup> respondent as his appeal was rejected at the threshold as it was filed beyond condonable period of delay. Therefore, the question of 4<sup>th</sup> respondent refusing to grant stay and thereupon the petitioner obtaining stay by preferring a revision before Additional Joint Commissioner or the Joint Commissioner in terms of Section 31(3)(b) does not arise. Consequently, the question of continuation of said stay pending the appeal before AP VAT Appellate Tribunal in terms of Section 31(3)(c) also does not arise.

8. Be that it may, in terms of Rule 40 AP VAT Rules, 2005, the petitioner, pending his appeal before AP VAT Appellate Tribunal, has to apply for stay before the Additional Commissioner (Commercial Taxes) (legal) or Joint Commissioner (Commercial Taxes) (legal) for the continuation of the stay granted under section 31(3)(a) by the Appellate

Deputy Commissioner until the appeal filed before AP VAT Appellate Tribunal is disposed of. This situation also does not arise because the petitioner did not move any stay application before Appellate Deputy Commissioner/4<sup>th</sup> respondent inasmuch as, as stated supra, his appeal was dismissed at the inception and therefore there was no occasion for him to file any stay application before the Appellate Deputy Commissioner. Therefore, the question of said authority granting stay and the petitioner in terms of Rule-40 praying the Additional Commissioner or Joint Commissioner to continue his stay granted by Appellate Deputy Commissioner till disposal of his appeal before the AP VAT Appellate Tribunal also does not arise.

9. Thus briefly stating, the present case projects a situation where the petitioner had no occasion to file a stay application before Appellate Deputy Commissioner/4<sup>th</sup> respondent and consequently the question of the said authority either allowing or dismissing the said stay application did not occur. In essence, the petitioner for the first time files the stay application straight away before the AP VAT Appellate Tribunal. Hence the situations covered by Section 31(3)(c) and Rule 40 have not arisen in the instant case. In that view, the crucial question is whether AP VAT

Appellate Tribunal can entertain the stay application and dispose it on merits.

10. The contention of learned Government Pleader is that whether in a situation of Appellate Deputy Commissioner himself granting stay while appeal was pending before him or upon his refusal, stay being granted by the Joint Commissioner or Additional Commissioner, in both these occasions, when main appeal is pending before the AP VAT Appellate Tribunal, the said Tribunal has not been vested with power to grant stay because the AP VAT Act and its Rules have not conferred stay granting power on AP VAT Appellate Tribunal. On the other hand, such power is taken away from AP VAT Appellate Tribunal by virtue of Section 33(6)(b) of the AP VAT Act.

11. We examined the said contention. It is true, as rightly submitted by learned counsel for the petitioner, when a substantive power of deciding an appeal is vested with an Appellate Court or Tribunal, the incidental/ancillary power of passing interlocutory orders including stay order shall also be deemed to be vested with the aforesaid Appellate Authority for rendering complete justice as otherwise the appeal will become *otiose* and the said Appellate Institution will be redundant. This will be against the public interest. In **State of Andhra Pradesh v.**

**Hindustan Shipyard Limited**<sup>1</sup> the division bench of Common High Court of Andhra Pradesh was dealing with the question whether the Tribunal has the power to grant stay in appeals pertaining to the Assessment Years fallen prior to 01.07.1985 because w.e.f the said date, Section 21 of APGST Act, 1956 was amended and sub section 6 and 6(a) were introduced. Section 6(a) created an express embargo of granting stay pending disposal of the appeal filed against the order of first appellate authority or deputy commissioner suo moto or in revision. The division bench was considering the issue whether the said deprivation of the power to grant stay has retrospective effect or not. In that context, the division bench has held

“On a consideration of the rival submissions, we are inclined to agree with the respondents’ counsel. The approach adopted by the learned Government Pleader to call the said power a procedural one and on that basis to say that it is not saved, is, in our opinion, not the right approach to adopt. The Tribunal was granting stay hitherto in exercise of its incidental/ancillary power which is an adjunct of, and flows from the substantive power to entertain and hear the appeal, conferred upon the Tribunal. We do not find it possible to separate this incidental/ancillary power from the substantive power. The substantive power to entertain and hear the appeal remains undisturbed. May be so, submits the learned Government Pleader, the said incidental power is clearly taken away with retrospective effect. We find it difficult to agree. **The retrospective affect must be given either by express language, or must arise by necessary implications. We are not satisfied that any such intention is evidenced by the Amendment Act.** (emphasis supplied)”

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<sup>1</sup> 1988 68 STC 220 AP

**12. In Penguin Textiles Ltd., Hyderabad v. State of Andhra Pradesh<sup>2</sup>** also, similar view was expressed by full bench of A.P. High Court. It is stated thus:

“11. As a prelude to the discussion of the core question, we may recapitulate certain well-settled principles relevant to the remedy of appeal/revision and the passing of interim orders pending such appeal/revision. As long back as in the year 1968, the Supreme Court ruled in *ITO v. Mohammed Kunhi*, 71 ITR 815, that even though no express provision exists, the appellate Tribunal must be held to have power to grant stay as an incident of its appellate jurisdiction. It was observed:

"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 proceeding as will prevent the appeal if successful from being rendered nugatory."

12. Be it noted that the above proposition enunciated by the Supreme Court will hold good only when there is no express provision one way or the other. There is no room to apply the doctrine of incidental or implied powers when the Legislature makes a specific provision debarring the grant of stay or otherwise placing fetters on the appellate or revisional authority to grant stay.”

**13.** Applying the above jurisprudence, it can be said that the incidental or ancillary power to pass interlocutory orders in the main appeal is inherent or intrinsic in its substantive power of the Appellate Court or Tribunal to decide the appeal pending before it unless such ancillary or incidental power is taken away by an express provision or by necessary implication. We now therefore have to examine whether such stay granting power is expressly or impliedly taken away from the AP VAT

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<sup>2</sup> 1999 SCC OnLine AP 558

Appellate Tribunal. In this regard, it is apposite to peruse Section 33 of the AP VAT Act.

14. Section 33 reads thus:

**33. Appeal to the Appellate Tribunal.** – [(1) Any dealer objecting to an order passed or proceeding recorded:-

- (a) by any authority, on appeal under Section 31; or
- (b) by the Additional Commissioner or Joint Commissioner or Deputy Commissioner under sections 21 or 32 or 38; or
- (c) By any authority following the ruling or order passed under Section 67;

may appeal to the Appellate Tribunal within sixty days from the date of service of the order or proceeding on him.]

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(6)(a) Where a VAT dealer or TOT dealer or any other dealer, objecting to an order passed or proceeding recorded by a Deputy Commissioner under Section 21 or 32 has preferred an appeal to the Appellate Tribunal, the Additional Commissioner, or the Joint Commissioner may, on an application filed by the dealer, subject to such terms and conditions, as he may think fit, order stay of collection of the tax under dispute pending disposal of the appeal by the Appellate Tribunal;

(b) The payment of tax and penalty, if any, due in accordance with the order of the first appellate authority or of the Deputy Commissioner under Section 21 or in revision under Section 32, in respect of which an appeal has been preferred under sub-section (1), shall not be stayed pending disposal of the appeal.

Thus, as can be seen, while under Section 33(1), a VAT Appellate Tribunal has been conferred jurisdiction to entertain an appeal against the orders specified in that sub-section, *including against order passed on*

*appeal under Section 31* as in the present case, Section 31 (6)(b) creates an express embargo on the stay granting power of VAT Appellate Tribunal pending disposal of appeal passed against different orders including the *order of the first appellate authority*. Therefore, in view of the clear manifestation made by the express provision, we agree with the contention of learned GP that AP VAT Appellate Tribunal is not vested with the power or jurisdiction to entertain the stay application and pass orders in the present situation.

**15.** To sum up our discussion on the aspect of stay granting powers,

- (i) As per Section 31(3)(a), pending disposal of the appeal, an appellate authority may on the application of the appellant and subject to conditions mentioned therein may order stay of collection of balance of the tax under dispute. After disposal of the appeal, if the appellant is aggrieved by the order of appellate authority and files an appeal under section 33(1) before VAT Appellate Tribunal, he can file a stay application in terms of Rule 40 of the AP VAT Rules before the Additional Commissioner (CT)(Legal) or Joint Commissioner (CT)(Legal) for continuance of the stay earlier granted under Section 31(3)(a) by the Appellate Deputy Commissioner until the disposal of appeal before the VAT Appellate Tribunal and the said authority may pass suitable order thereon.
- (ii) Pending appeal before the appellate authority under Section 31 and if the said authority refused to grant stay, then in terms of Section

31(3)(b), the appellant may prefer a revision petition before Additional Commissioner or the Joint Commissioner and the said authority subject to such terms and conditions may grant stay of collection of balance of the tax pending disposal of the appeal before the appellate authority. Then as per Section 31(3)(c), such stay granted by Additional Commissioner or Joint Commissioner shall be operative till disposal of the appeal preferred by the appellant under Section 33 before the VAT Appellate Tribunal.

- (iii) Under Section 33(6)(b), the Appellate Tribunal which entertains an appeal against an order under Section 31 shall not stay the payment of tax and penalty pending disposal of appeal, inasmuch as, in the said provision it is expressly mentioned that the payment of tax and penalty shall not be stayed pending disposal of the appeal.

**16.** Thus, the relevant provisions of the AP VAT Act and its Rules pellucidly state that in none of the above contingencies, the VAT Appellate Tribunal is vested with the power to grant stay pending the appeal before it. The present petitioner's case fall within the category (iii) above, as he for the first time prays for stay before the AP VAT Appellate Tribunal, but the said Authority for the above reasons cannot entertain the stay application. This point is answered accordingly.

**17.** In the light of the above legal position obtained, the petitioner's prayer to declare the action of respondent No.1 in issuing the notice and Garnishee notice pending the stay petition in TMP No.29/2022 in TA

No.1/2022 before the AP VAT Appellate Tribunal as illegal, cannot be considered on that ground. However, in our considered view, this Court by exercising its plenary power under Article 226 of the Constitution, pass appropriate order to meet the ends of justice.

**18.** Accordingly, there shall be stay of collection of the demanded tax amount as per the Assessment Order dated 14.03.2009 pending disposal of appeal TA No.1/2022 filed by the petitioner before the AP VAT Appellate Tribunal, Visakhapatnam, on the condition of the petitioner depositing 75% of the demanded tax (inclusive of the tax if any deposited by him pending the successive appeals and otherwise) within four weeks from the date of receipt of the copy of this order.

The writ petition is accordingly disposed of. No costs. As a sequel, interlocutory applications, pending if any shall stand closed.

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**U. DURGA PRASAD RAO, J**

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**T. MALLIKARJUNA RAO, J**

11.08.2023  
Krk / mva