IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CUSTOMS APPEAL NO. 71 OF 2014

M/s. Nidhi Textiles } Appellant
versus
The Commissioner of Customs }
(Adjudication) } Respondent

Mr. R. V. Desai-Senior Advocate with Mr. R. V. Shetty and Mr. K. R. Chaudhari for the Appellant.

Mr. Pradeep S. Jetly for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.
DATED :- FEBRUARY 25, 2015

P.C. :-

This Appeal of the Assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai. The first order is passed on an application seeking dispensation of the condition of pre-deposit and stay of recovery. The Tribunal heard this application and by a very lengthy order running into 66 pages, directed the Appellant before us to deposit a sum of Rs.1 crore, meaning thereby, it did not waive the condition of pre-deposit in its entirety. The Appellant/Assessee could not comply with this condition, therefore, its Appeal was dismissed. Later on, two applications were made, firstly to relieve the Appellant/Assessee from this condition or in the alternative to give some time by reducing the amount initially demanded. Even these applications have been dismissed.

2) Mr. Desai-learned Senior Counsel appearing for the Assessee submits that the Appeal raises substantial questions of law. They are formulated as under:-

> "A) Whether the CESTAT is justified in dismissing the Appeal of the Appellant only on failure to pre-deposit and without considering on merits for nonest order passed by the adjudicating authority without jurisdiction?
>
> B) Whether the CESTAT is justified in directing the Appellant to deposit Rs.1 crore when the order of the adjudicating authority is nonest and no legs to stand in law?
>
> C) Whether the CESTAT is justified in directing the Appellant for pre-deposit of Rs. 1 crore when the impugned orders are contrary to section 14 of the Customs Act, 1962 read with Notification No. 95 of 2007 – Cus(N.T.) dated 13th September, 2007 thereunder?
>
> D) Whether the provisions of section 28(1) and section 125 of the Customs Act, 1962 are applicable to the facts of this case at all? If not, whether the order of adjudicating authority, pre-deposit order of the CESTAT and consequently dismissal of the appeal of the CESTAT are tenable in law?
>
> E) Whether the Commissioner of Customs (Adjudication) could pass an order on SCN without setting aside the orders of final assessment allowing export?
>
> F) Whether the CESTAT is justified in rejecting the appeal of the Appellant thereby upholding the order-in-original which is contrary to settled law that customs authority do not have any jurisdiction to order confiscation and penalty under Customs Act in the cases of export under DEPB?"

3) Mr. Desai would submit that at the *prima facie* stage, conclusive findings have been rendered by the Tribunal. When such a lengthy order has been passed and by considering minutes details, then, there is nothing left for argument at the hearing of the Appeal. Even if

the Appellant had complied with the condition of pre-deposit, he would have faced several adverse findings and conclusions in the order of the Tribunal on the application seeking waiver of the condition of pre-deposit.

4) Alternatively, Mr. Desai would submit that assuming a lengthy order was required, yet, the basic material should have been taken into consideration. The fundamental and basic material and in terms of sub-section (1) of section 14 of the Customs Act, 1962 is the valuation on the basis of the price prevailing in the export market and of the goods which are subject matter of importation by the Assessee. This aspect has been completely omitted from consideration and without obtaining any such valuation and in terms of the legal provision. Reliance is placed on a certificate issued by the Consulate in Dubai. The Consulate possesses neither requisite experience nor expertise and in matters of the nature particularly of determination of customs duty. Therefore, to hold that *prima facie* case of fraud is made out and gross over-valuation, something more was required other than this certificate. In such circumstances, the Tribunal was not justified in imposing unreasonable condition of deposit of Rs.1 crore. Even that has been imposed without considering the financial hardship. The financial hardship was specifically pleaded, but the Tribunal found that

no material has been produced in support thereof. That was completely incorrect. In any event, now the Assessee is out of business and therefore, this Court may take lenient view of the matter.

5) Mr. Jetly appearing for the Revenue would support the impugned order. He submits that the lengthy order was required because of several contentions and reliance on case law including conflicting views of several High Courts and the Tribunal. Therefore, the Tribunal cannot be faulted. Considering the extent of fraud and over-valuation, the condition, as imposed, is reasonable. The discretion is exercised judiciously by the Tribunal. Therefore, no interference is required with such an order of the Tribunal and the Appeal does not raise any substantial question of law. Hence, it should be dismissed.

6) After having heard both sides, we are of the view that the Tribunal's order imposing a condition of pre-deposit of Rs.1 crore and thereafter rejecting the Appeal for non compliance raises at least two substantial questions of law. They are formulated as under:-

> "a) Whether the CESTAT is justified in directing the Appellant for pre-deposit of Rs.1 crore when the impugned orders are contrary to section 14 of the Customs Act, 1962 read with Notification No. 95 of 2007 – Cus(N.T.) dated 13th September, 2007 thereunder?
> b) Whether the provisions of section 28(1) and section 125 of Customs Act, 1962 are applicable to the facts of this case at all? If not, whether the order of adjudicating authority, pre-deposit order of the CESTAT and consequently dismissal of the Appeal of the CESTAT are tenable in law?"

7) We are mindful of the fact that even in matters of the above nature, namely, application seeking stay and waiver of the condition of pre-deposit, the Tribunal must apply its mind. The Tribunal must take into consideration relevant and germane tests particularly whether a *prima facie* and arguable case is made out and if there is any financial hardship and whether that aspect has been pleaded and sufficiently proved. Thus, the rights of the parties and their equities have to be balanced. This balance has to be struck by exercising the discretion judiciously and not arbitrarily and whimsically. The Tribunal is not expected to pass virtually final order at such a stage. Very often, the Hon'ble Supreme Court has reminded subordinate Courts and Tribunals that they do not hold a mini trial at an interlocutory stage. That they are only required to find out a *prima facie* case and in whose favour the balance of convenience lies and who would suffer irreparable loss and injury. The parties and Counsel may canvass and advance detailed submissions. They may go into merits of the controversy in somewhat details and support their arguments with the aid of case law. The Tribunal is not expected only to dispose of interim applications, but take up Appeals and which are piled up for years together. The Tribunal has, on its daily Board not only such interlocutory applications, but equally the Appeals for final hearing. They are to be taken up seriatim. Therefore, the Tribunal must ensure that it gets adequate time to take

up the Appeals and for final disposal, so that the parties and lower authorities are guided not only in terms of interpretation and exposition of law by the Tribunal's final orders and for application to given facts and circumstances. That is equally the duty of the Tribunal as a last fact finding authority and while supervising the subordinate authorities. We wonder if the Tribunal has passed such a lengthy order at the interlocutory stage, when it will get time for all this. In the present case, the Tribunal has referred to the conflicting views and opinions of different High Courts. It has also referred to several conflicting decisions and orders of its own and chose to analyse each of them and while deciding an interlocutory application. This is really uncalled for.

8) We also find some force in the complaint of Mr. Desai that undue importance and weightage cannot be given only to one document such as a certificate but all other materials such as statements under section 108 of the Customs Act. The over all and broad view has to be taken, therefore, it was not necessary to refer to all the statements and the role of a particular person in the alleged fraud and perpetrated on the public exchequer. It may be that a very serious case of fraud was brought before the Tribunal and in terms of the orders of the adjudicating authorities. However, the Tribunal has yet to decide as to whether there is a fraud, who is guilty and who can be punished for it.

If it has to independently appraise and appreciate the factual material at the hearing of the Appeal, then, it should not be influenceed by some findings and observations in the orders of the adjudicating authority. It was not a final hearing of the Appeal.

9) In the above facts and circumstances and finding that the party like the Assessee has been completely non-suited because of its failure to comply with the condition of pre-deposit of Rs.1 crore, we are of the view that this Appeal deserves to be allowed partly. If the Appellant before us deposits a sum of Rs.30 lacs within a period of 6 weeks from today, the Tribunal shall restore the Appeal to its file and decide it on its own merits and in accordance with law, uninfluenced by any tentative and *prima facie* findings. We clarify that each of the observations in the impugned order shall be treated as tentative and *prima facie*. They are to be construed as having been made for the disposal of the interlocutory application alone. Equally, our findings also should not influence the Tribunal at the hearing of the Appeal. This Appeal is allowed in the above terms. No costs.

(SUNIL P. DESHMUKH, J.) **(S.C.DHARMADHIKARI, J.)**