IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 132 OF 2014

M/s. Landmark Construction	**}**	**Appellant**
versus		
The Commissioner, Service Tax	**}**	
Mumbai – II	**}**	**Respondent**

WITH
CENTRAL EXCISE APPEAL NO. 170 OF 2014

M/s. Landmark Enterprise	**}**	**Appellant**
versus		
The Commissioner, Service Tax	**}**	
Mumbai – II	**}**	**Respondent**

Mr. Bharat Raichandani with Mr. Mahesh Raichandani i/b. Mr. Vaibhav P. Patankar for the Appellants.

Mr. Vijay Kantharia with Ms. Anamika Malhotra for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- AUGUST 31, 2015

P.C. :-

These Appeals of the Assessees challenge the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Bench at Mumbai dated 24th October, 2013.

2) Mr. Raichandani learned Counsel appearing in support of these Appeals submits that the same raise three substantial questions of law and in the language formulated by the Assessees.

3) It is urged that the Tribunal could not have non-suited these Assessees simply because they failed to comply with the condition imposed while granting interim stay. The grant of interim stay during the pendency of the Appeal on terms and conditions and the subsequent non compliance thereof should not visit the Assessees with a drastic order of dismissal of the Appeal without adjudication on merits. There is thus a duty in law to adjudicate on merits irrespective of such non-compliance. Therefore, the restoration application was made and even the restoration application stands dismissed by the impugned order, copy of which is at pages 26 and 27 of the paper book (CEXA/132/2014).

4) Mr. Raichandani submits that this is squarely raising a substantial question of law fully covered by a Judgment of the Hon'ble Supreme Court of India in the case of *Balaji Steel Re-Rolling Mills vs. Commissioner of Central Excise and Customs* reported in **2014 (310) ELT 209 (SC)**.

5) On the other hand, Mr. Kantharia appearing for the Respondent supports the order of the Tribunal and submits that from a discretionary order of this nature, no substantial question of law will arise. The Appeal of the Appellant/Assessee was dismissed by a self operative order. That self operative order is pursuant to the earlier

direction of grant of stay issued on 16th May, 2013. In other words, non compliance with this order and the condition imposed therein results in dismissal of the Appeal without adjudication on merits. This position was accepted throughout by the Appellants, as the said order dated 16th May, 2013 was never questioned by the Assessees/Appellants in higher Court. It is proceeding on this assumption that an application for restoration was made and which came to be dismissed only because the Appellants/Assessees failed to comply with the direction therein, namely to deposit the balance/deficit amount as per the condition of stay, within eight weeks from the date of issuance of the impugned order. The date of compliance thereof is stated to be 13th November, 2013.

6) Mr. Kantharia therefore would submit that the Appeals do not raise any substantial question of law and should be dismissed.

7) We have perused the memo of Appeals in both these matters. We have also perused the impugned order of the Tribunal and other material forming part of the paper book. We have also perused the statutory provisions brought to our notice and the Judgment of the Hon'ble Supreme Court of India.

8) The principle laid down in the said decision of the Hon'ble Supreme Court of India and the conclusion is binding on us. However, the position before us is that on 16th May, 2013 in the two statutory Appeals, the Appellants applied for stay/interim relief. An order was passed on that date and which is taking note of all the submissions canvased including of financial hardship. As against the total amount and directed to be deposited, namely, Rs.3,04,73,375/- and Rs.1,00,30,630/-, the Tribunal directed 1/3rd of the same being deposited within six weeks and report compliance by 23rd July, 2013. This is a demand of Service Tax and which stood confirmed.

9) The Appellants did not question this order and there is substance in the contention of Mr. Kantharia that it allowed the time to run and come to an end. The entire compliance was never reported and of a condition imposed voluntarily. The acceptance of the condition being not in issue, all that the Appellants did was to take a chance and apply for restoration of the Appeal, which stood dismissed. The restoration application was dealt with by the Bench of the Tribunal and by the impugned order what it did was to extend the time to comply with the conditional stay order dated 16th May, 2013. Even that extension is not availed of and now it is complained that the Appeal is dismissed without adjudication on merits.

10) Now by taking assistance of the law laid down by the Hon'ble Supreme Court of India the defaulting parties raise the issue of the Tribunal's lack of power to dismiss a statutory appeal for want of prosecution in order to get over their lapses and defaults. They do not question the initial conditional order. After the time is over, they make an application for restoration and if that is also disposed of resulting in a conditional order against them, they challenge this order on the restoration application and raise the issue of the Tribunal's lack of power to dismiss the Appeal without any adjudication on merits. We do not think that such litigants deserve sympathy or there should be a premium on their lapses and deficiencies by an order from higher Court granting unconditional restoration of the Appeal and directing the Tribunal to decide the same on merits. It would be a travesty of justice if such an approach is adopted in all cases of this nature. We are therefore of the view that the Tribunal's order in the peculiar circumstances of this case is fully justified and no fault can be found therewith. The discretion to restore the matter has been exercised judiciously.

11) Since the Appeal of the Appellants before us in the Tribunal has already stood dismissed without adjudication on merits, in the larger interest of justice, we grant a final opportunity to the

Assessees/Appellants and if within a period of three months from today the Appellants report compliance of the conditional stay order dated 16th May, 2013 and produce proof before the Tribunal in that regard, the Tribunal shall decide the Appeal of the Assessees, by restoring it to its file, on merits and in accordance with law. Any default in compliance with this order passed today would result in the Appeal being dismissed without adjudication on merits. We clarify that we would not entertain any application for extension of time. In addition to the deposit within three months, we direct the Appellants to pay costs quantified at Rs.25,000/- in both the Appeals. The costs also shall be paid to the Revenue within the above period.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**