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

CENTRAL EXCISE APPEAL NO. 109 OF 2014

M/s Omkar Engineering Co. ..Appellant.
Vs.
Customs, Excise & Service Tax Appellate Tribunal & Anr. ..Respondents.

Mr. Vipin Jain i/b Mr. Prabhakar K. Shetty for Appellant.
Mr. P.S. Jetly a/w Mr. S.D. Bhosale for Respondent No.2.

CORAM: B.R. GAVAI &
A.S. GADKARI, JJ.

DATE : 7th April 2015.

P.C.:

1 The appeal challenges an order dated 12th August 2013 passed by the learned Customs, Excise & Service Tax Appellate Tribunal, Mumbai thereby directing the appellant to deposit an amount of 25% of the service tax in the application filed by the appellant for waiver of pre-deposit.

2 The notice was issued to the Appellant calling upon them to as to why they should not be held liable for payment of service tax for the services rendered namely “Business Auxiliary Services”. The

Commissioner of Excise and Service Tax by order dated 18th October 2012 held that the Appellant is liable for payment of service tax and also levied penalty on the Appellant. Being aggrieved, an appeal came to be preferred before the learned CESTAT along with application for waiver of pre-deposit. The said application was partly allowed by directing the Appellant to deposit 25% of the amount demanded. Being aggrieved thereby, the present appeal is filed.

3 Shri Jain, the learned Counsel appearing for the Appellant submits that the learned Tribunal has totally erred in directing deposit of 25% amount. He submits that in the facts of the present case, the learned Tribunal ought to have waived the entire amount. The learned Counsel submits that the case of the Appellant is that the Appellant does not carry out processing activities, but carries an activity which is a part of manufacturing activitiy, and therefore would not fall within the ambit of service tax. The learned Counsel further submits that the other 65 units doing almost similar job, have been held to be doing manufacturing activities by the Commissioner of Central Excise, Surat and as such the Appellant is being given discriminatory treatment.

4 Shri Jetly, the learned Counsel appearing for the Respondent No.2- Commissioner of Central Excise on the contrary submits that the appeal arises out of the interlocutory order. He submits that unless discretion which is vested in the learned Tribunal is found to be exercised in the perverse manner, this Court would not interfere with the same. Insofar as the order of the Commissioner of Central Excise, Surat is concerned, the learned Counsel submits that the Revenue has already challenged the said judgment before the learned Sales Tax.

5 By now it is a settled law that while considering an application for waiver of pre-deposit, the Tribunal or the Appellate Authorities are directed to take into consideration three factors namely, prima facie case, undue hardship and the interest of Revenue. A reference in this respect would be made to the judgment of the Apex Court in the case of ***Benara Valves Ltd Vs. Commissioner of Central Excise, reported in 1006(204) E.L.T. 513 (S.C.).*** It has been further held that the word 'undue hardship' would mean something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. It would mean that expecting a person to do something which he is not expected to do.

6 In the present case, the learned Tribunal while considering the application of the appellant has referred certain clauses of the Agreement along with principle on whose behalf the work is carried out. The learned Tribunal while relying on the terms and conditions of the Agreement has found that certain processes on the material supplied by the Ship-builder are required to be carried out by the appellant at his works as per work terms and conditions of the contract. Whether factually this has been done or not is a matter which is required to be decided on the basis of material placed before the learned Tribunal. However, it cannot be said that the observation made by the learned Tribunal is not on the basis of the document which is not part of the record. The perusal of the terms and conditions which are found at page 46 of the paper-book, would fortify the findings given by the learned Tribunal. In that view of the matter, it cannot be said that the view taken by the learned Tribunal is perverse.

7 In any case, the learned Tribunal found ssme substance in the case of the appellant and has directed him to deposit only 25% of the demand and not the entire 100% amount. It can thus be clearly seen that the learned Tribunal has taken into consideration the factors i.e. prima facie case and the interest of the Revenue.

8 Insofar as the third factor i.e. undue hardship is concerned, it does not appear that the said contention was pressed before the learned Tribunal. In that view of the matter, the learned Tribunal is not expected to give finding on that issue.

9 In that view of the matter, we see no case is made out for interference and no substantial question of law arises for consideration of this Court.

10 At this stage, Shri Jain requests for 8 weeks' time for deposit of the amount as directed by the Tribunal. We find the request is reasonable and we accordingly direct the appellant to deposit the amount within 8 weeks. It is, further, made clear that if the amount is deposited within a period of 8 weeks, the learned Tribunal to decide the appeal on its own merits.

(A.S. GADKARI, J.) **(B.R. GAVAI, J.)**