THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLR SRI JUSTICE M.SATYANARAYANA MURTHY

C.E.A.NO.32 OF 2013

JUDGMENT: {Per the Hon'ble Sri Justice Ramesh Ranganathan}

This appeal under Section 35G of the Central Excise Act, 1944 ("the Act" for brevity) is preferred against the order passed by the Customs, Excise, Service Tax Appellate Tribunal, Bangalore (CESTAT) in application No.ST/Stay/536/2012 and appeal No.ST/829/2012 dated 02.07.2013.

On an application filed by the appellant herein, seeking waiver of pre-deposit, the Tribunal decided the main appeal itself, and remanded the matter to the Original Adjudicating Authority i.e., the Commissioner, Customs, Central Excise and Service Tax, with a direction to the appellant to deposit Rs.1.25 crores within eight weeks from the date of the order, and to report compliance before the original adjudicating authority. The original adjudicating authority was directed, after noting compliance, to proceed to adjudicate the matter after giving the appellant a reasonable opportunity of hearing to present their case and, thereafter, to pass a reasoned order after taking into consideration the submissions made by the appellant. The Tribunal also recorded the submission made on behalf of the counsel for the appellant that they would render full co-operation to the original adjudicating authority.

Aggrieved by the order of the CESTAT directing them to deposit a sum of Rs.1.25 crores, the appellant has invoked the jurisdiction of this Court under Section 35G of the Act. Sri C.V.Narasimham, learned counsel for the appellant, would submit that, on setting aside the order and remanding the matter to the adjudicating authority to pass an order afresh, the Tribunal lacks jurisdiction to direct the appellant to deposit Rs.1.25 crores; and, in the absence of any specific provision in the Central Excise Act conferring any such power on the Tribunal, the order of the Tribunal is without jurisdiction and necessitates being set aside. Learned counsel would rely on **Maa Mahamaya Industries Ltd., v. C.C.E. Commissioner & S.T.,Visakhapatnam** and **National Oxygen Limited v. Commissioner of Customs, Chennai**.

On the other hand, Sri Jalakam Sathyaram, learned Standing Counsel for the Central Excise Department, would submit that, while remanding the matter to the adjudicating authority, CESTAT has the power to pass an order imposing such conditions as it considers reasonable; and power is specifically conferred on the Tribunal, under Section 35C of the Act, to pass such an order instead of passing an order on the application for waiver of pre-deposit, and keeping the appeal pending on its file. He would rely on the judgment of Punjab & Haryana High Court in **Shiv Seva Sadan v. Commissioner of Central Excise, Ludhiana**, and submit that the S.L.P., preferred thereagainst i.e., in S.L.P. (Civil) No.17825 of 2009, was dismissed by the Supreme Court on 10.08.2009.

Section 35C(1) of the Central Excise Act enables the Appellate Tribunal, after giving the parties to the appeal an opportunity of being heard, to pass such orders thereon as it thinks fit confirming, modifying or annulling the decision or order appealed against or to refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal thinks fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

Sri Jalakam Sathyaram, learned Standing Counsel, would submit that the words "***such directions as the Appellate Tribunal thinks fit***" in Section 35C of the Act, enables the Tribunal to impose conditions while remanding the matter to the appellate authority; and the Tribunal was justified, in the present case, in remanding the matter to the appellate authority with a condition that the appellant deposits Rs.1.25 crores before the adjudicating authority, as against the total demand of approximately Rs.10.5 crores (Rs.5.23 crores tax and Rs.5.23 crores penalty).

Before examining the rival contentions, it is useful to take note of that what this Court, the Madras High Court and Punjab & Haryana High Court have held in this regard. In **Maa Mahamaya Industries Ltd.**[1], a Division Bench of this Court held that the Tribunal does not have any inherent power to pass appropriate orders to meet the ends of justice; the Tribunal is a creature of the statute with specific powers mentioned in the statute itself; there is no provision in the Act for depositing any money for adjudication; and imposition of any such condition is without jurisdiction. In **National Oxygen Limited**[2], while examining the scope of Section 129B of Customs Act, 1962 which is in *para materia* with Section 35C of the Act, the Madras High Court held that the statutory provision did not empower the Tribunal to impose a condition for setting aside the order appealed against, and in remitting back to the appellate authority; the Tribunal is a creature of the statute, and it has to perform its functions in accordance with the power conferred on it; giving directions to the original authority while remitting back is one thing, but imposing a pre-condition is a different thing altogether; no such power is vested with the Tribunal; there is a difference between "direction" and "pre-condition"; "direction" means giving certain guidance or command; "condition" means fulfilment of another thing or act to which it is made dependant; condition is a restraint or bridle annexed and joined to a thing so that, by non-performing, a certain contingent event would not happen as such; the terminology "as it thinks fit", without having regard to the subsequent terminology used in provision such as confirming, modifying or annulling the order appealed against, would not clothe the Tribunal with the power to impose conditions for the purpose of remitting the matter back with a direction to conduct *de novo* inquiry; and the order of the Tribunal was arbitrary. In **Shiv Seva Sadan**[3], the Punjab & Haryana High Court held that there was no bar under the Act that, while referring the case back to the original authority, the Tribunal cannot impose any condition. It is no doubt true that the Special Leave Petition filed against the judgment of the Punjab & Haryana High Court was dismissed. However, dismissal of an S.L.P. does not attract the doctrine of merger, and the judgment in **Shiv Seva Sadan**[3] cannot be said to be the judgment of the Supreme Court.

What we are confronted with is the divergence in views, one which found favour with the Division Bench of this Court and the Madras High Court, and opposite view which found favour with the Punjab & Haryana High Court. Section 35C of the Act, on which reliance is placed by Sri Jalakam Sathyaram, learned Standing Counsel, confers power on the Appellate Tribunal to confirm, modify or annul the order under appeal. It also confers power on the Tribunal to refer the case back to the authority which passed such a decision or order, with such directions as the Tribunal may think fit for fresh adjudication or decision. The directions, which Section 35C of the Act, empowers the Tribunal to issue are those which relate to the fresh adjudication by the adjudicating authority. The requirement of depositing a part of the amount, for a fresh adjudication, does not fall within the ambit of Section 35C of the Act.

Section 35F of the Act (prior to its amendment by Act 22 with effect from 06.08.2014) required the appellants, pending appeal, to deposit, with the

adjudicating authority, the duty demanded or the penalty levied. Under the proviso thereto where, in any particular case, the Tribunal is of the view that the deposit of duty demanded, or penalty levied, would cause undue hardship to such person, it may dispense with such deposit subject to such conditions so as to safeguard the interests of the revenue. A specific power was conferred on the Tribunal, under the pre-amended Section 35F of the Act, to waive
pre-deposit either in its entirety, or in part, subject to the conditions stipulated therein.

In the present case, the Tribunal disposed of both the stay petition and the appeal by a common order. If any such condition had been imposed in the application for waiver of pre-deposit, the Tribunal could then not be faulted for imposing such a condition pending disposal of the main appeal. The fact, however, remains that, in the present case, the Tribunal has disposed of the main appeal itself, and has remanded the matter to the adjudicating authority. No power is conferred on the Tribunal to require the appellant to deposit money as a pre-condition for the matter being examined afresh by the adjudicating authority. The powers conferred on CESTAT are circumscribed by the provisions of the Central Excise Act, Customs Act and the Finance Act. In the absence of any specific provision, conferring any such power on Tribunal, being brought to our notice, we have no reason to disagree with the view taken by this Court in **Maa Mahamaya Industries Ltd.**[1], and the Madras High Court in **National Oxygen Limited**[2]. The view taken by the Punjab & Haryana High Court, that there is no bar in the statute disabling the Tribunal from passing such an order, does not commend acceptance as the CESTAT, a creature of the Central Excise Act, cannot travel beyond the provisions of the Act or exercise powers not conferred on it by the said Act.

To the limited extent that the CESTAT imposed the condition of pre-deposit of Rs.1.25 crores, the order of the Tribunal must be and is, accordingly, set aside. The order of the Tribunal, in remanding the matter to the adjudicating authority, does not necessitate interference. As the duty demanded is in excess of Rs.5.23 crores, we consider it appropriate to direct the Commissioner (adjudicating authority) to decide the matter with utmost expedition, and in any event not later than three (3) months from today. Sri C.V.Narasimham, learned counsel for the appellant, would fairly submit that the appellant would co-operate in the early disposal of matter by the adjudicating authority, and within the time stipulated by this Court.

The appeal is disposed of accordingly. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAMESH RANGANATHAN, J)

(M.SATYANARAYANA MURTHY, J)

23rd November 2015

Note: Issue CC by 27.11.2015

B/O

RRB