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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CUSAA 19/2015 & CM APPL 21127/2015

ANJANI TECHNOPLAST LTD

..... Appellant

Through: Mr. Sushil K. Tekriwal and Dr. Mamta
Tekriwal, Advocates.

versus

THE COMMISSIONER OF CUSTOMS

..... Respondent

Through: Mr. Satish Kumar, Senior standing
counsel.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

20.10.2015

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Dr. S. Muralidhar, J.

1. This appeal by Anjani Techoplast Limited, under Section 130 of the Customs Act, 1962 ('Act'), is directed against the impugned judgment dated 7th July 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal ('CESTAT') whereby the appeal in SR. No. 50577/2015 filed by the Appellant was dismissed on the ground that the Appellant failed to make a pre-deposit of 7.5% of the duty demanded in terms of Section 129 E of the Act.

2. The brief facts leading to the filing of the present appeal are that pursuant to a show-cause notice ('SCN') issued to the Appellant on 10th July 2014

regarding non-fulfilment of its export obligations, an order was passed by the Commissioner of Customs (Export) on 10th October 2014 confirming a demand of duty of Rs. 5,96,03,154.51 payable by the Appellant under Section 143 (3) read with Section 28 of the Act. By said order the Appellant was held liable to pay interest and penalty of Rs. 1,49,00,000 under Section 112 of the Act.

3. Aggrieved by the above order, the Appellant filed the aforementioned appeal before the CESTAT which came up for hearing on 7th July 2015. After noticing the fact that Appellant had failed to make the pre-deposit of 7.5% of the duty demanded in terms of Section 129E of the Act, and relying on the decision of the Allahabad High Court in ***Ganesh Yadav v. Union of India 2015 (320) ELT 711 (All)***, the CESTAT dismissed the appeal.

4. Mr. Sushil Tekriwal, learned counsel for the Appellant, submitted that the amendment to Section 129E of the Act brought into effect from 6th August 2014 would not apply to the case of the Appellant since the SCN was issued prior thereto on 10th June 2014. He urged that the CESTAT erred in dismissing the appeal on account of non-compliance of the amended Section 129E of the Act. Reliance was placed on the decision of the Single Judge of the Kerala High Court in ***Muthoot Finance Limited v. Union of India 2015 LawSuit (Ker) 238*** and the decision dated 12th June 2015 of the High Court of Judicature at Madras in Writ Petition No. 12546 of 2015 (***Fifth Avenue Sourcing (P) Limited v. Commissioner of Service Tax***).

5. Mr. Satish Kumar, learned Senior standing counsel for the Respondent, on

the other hand referred to the relevant paragraphs of the decision of the Allahabad High Court in *Ganesh Yadav v. Union of India* (*supra*) and submitted that the legal position was clear that the amended Section 129 E of the Act would apply to all appeals filed on and from the date of the enforcement of the amended Section 129E of the Act.

6. At the outset it must be noticed that both Section 35F of the Central Excise Act, 1944 ('CE Act') as well as Section 129 E of the Act were amended by the Finance Act No.2 of 2014, with effect from 6th August 2014, to provide for mandatory pre-deposit of a fixed percentage of the duty demanded as a pre-condition to the CESTAT entertaining an appeal. For an appeal against the order passed by an officer of the rank of the Commissioner of Customs and below it was 7.5% and for an appeal against the order of the Commissioner (Appeals) it was 10%. The first proviso to Section 129 E stated that the pre-deposit made thereunder would not exceed Rs. 10 crores. The second proviso to Section 129E of the Act clarified that the said provision would not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

7. The amendment to Section 35F of the CE Act was challenged before the Allahabad High Court in *Ganesh Yadav v. Union of India* (*supra*). The facts of that case were that an adjudication order was passed on 31st March 2015 confirming the demand of service tax on the Assessee. Penalty was also levied. When the Assessee was called upon to make the mandatory deposit of 7.5% of the duty for his appeal to be entertained, the Assessee

preferred a writ petition challenging the constitutional validity of Section 35 F of the CE Act as amended with effect from 6th August 2014. The Division Bench of the Allahabad High Court noticed that prior to the said amendment, the CESTAT had a discretion to waive the amount of the pre-deposit either wholly or in part subject to certain conditions being fulfilled. The Assessee had to demonstrate, apart from a *prima facie* case, that it would be subject to undue hardship. The CESTAT could in those circumstances pass appropriate orders, subject to conditions, so as to safeguard the interests of revenue. This provision gave rise to further rounds of litigation before the High Court as well as the Supreme Court. In the above background, the Allahabad High Court held the amendment to Section 35 F of the CE Act (corresponding to the amended Section 129 E of the Act) not be arbitrary or irrational. It, therefore, negated the challenge to its constitutional validity.

8. In ***Ganesh Yadav v. Union of India*** (*supra*) the Allahabad High Court next dealt with the specific contention of the Assessee therein that the amended Section 35 F of the CE Act which was brought into effect from 6th August 2014, would not apply to the Assessee since the SCN to it was issued on 19th September 2013. It was contended that the amendment to Section 35F cannot “retrospectively abridge or curtail the right of appeal which vested in the Petitioner upon the issuance of a notice to show cause on 19th September 2013.” After considering the decision of the Constitution Bench of the Supreme Court in ***Garikapatti Veeraya v. N. Subbiah Choudhury AIR 1957 SC 540*** and certain other decisions of the Supreme Court including ***Hoosein Kasam Dada (India) Limited v. State of Madhya***

Pradesh AIR 1953 SC 221, Jose Da Costa v. Bascora Sadasiva Sinai Narcornim (1976) 2 SCC 917, Ramesh Singh v. Cinta Devi AIR 1996 SC 1560 and Mohd. Saud v. Dr. (Maj.) Shaikh Mahfooz (2010) 13 SCC 517, the Allahabad High Court concluded in para 17 of its judgment as under:

“17. Thus, the principle of law which emerges is that the right of appeal is a vested right and the right to enter a superior Court or Tribunal accrues to a litigant as on and from the date on which the lis commences although it may actually be exercised when the adverse judgment is pronounced. Such a right is governed by the law which prevails on the date of institution of the suit or proceeding and not by the law that prevails at the date of the decision or on the date of the filing of an appeal. Moreover, the vested right of an appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.”

9. Dealing with the specific question as to whether the amended Section 35F of the CE Act would apply to the case of the Assessee, the Allahabad High Court held that the words in the amended Section 35 F indicated that on and after the date of its enforcement an Assessee in appeal was required to deposit the stipulated percentage of duty and if it failed to do so, the CESTAT shall not entertain the appeal. The amended Section 35 F would, therefore, apply to all appeals filed on and from the date of the enforcement of the amended Section 35 F of the CE Act. The Allahabad High Court declined to concur with the view expressed by the learned Single Judge of the Kerala High Court in *Muthoot Finance Limited v. Union of India* (*supra*) which in turn referred to the interim order passed by the High Court of Telangana and Andhra Pradesh in *K. Rama Mohanarao v. Union of India 2015 TIOL 511 HC-AP-CX*.

10. The decision of the learned Single Judge of the Kerala High Court in ***Muthoot Finance Limited v. Union of India*** (*supra*) was rendered in a case involving a challenge to a finalised demand of service tax passed in the year 2012. The learned Single Judge refused to entertain the writ petition since the Petitioner in that case had an effective statutory remedy before an appellate Tribunal. The High Court nevertheless stated that the appellate Tribunal would consider the application filed by the Petitioner for waiver of as pre-deposit on merits under the Finance Act 1994 as it stood prior to the amendment introduced with effect from 16th August 2014. With the greatest respect to the learned Single Judge who delivered the above decision it is not understood how, pursuant to the dismissal of the writ petition, any direction could have been issued as to how the interim application that might be subsequently filed should be decided by the appellate Tribunal. Secondly, the High Court appears to have proceeded on the basis that the interim order passed by the High Court of Telangana and Andhra Pradesh in ***K. Rama Mohanarao v. Union of India*** (*supra*) was consistent with the legal position that the institution of a suit carried with it an implication that all rights of appeal then in force are preserved to the parties. A demand of tax raised by way of a SCN does not get crystallised till there is an adjudication of the SCN. There can be no parallel therefore with the institution of a suit. Thirdly, the clear language of the second proviso to amended Section 35 F of the CE Act, the validity of which was not in challenge before either the Kerala High Court or the High Court of Telangana and Andhra Pradesh High Court in ***K. Rama Mohanarao v. Union of India*** (*supra*) does not permit such an interpretation. The Court is therefore unable to concur with the view of the learned Single Judge of the Kerala High Court in ***Muthoot***

Finance Limited v. Union of India (*supra*) or of the High Court of Telangana and Andhra Pradesh in *K. Rama Mohanarao v. Union of India* (*supra*).

11. The decision of the learned Single Judge of the Madras High Court in *Fifth Avenue Sourcing (P) Ltd. V. Commissioner of Service Tax* (*supra*) also proceeds on the basis that the date of issuance of an SCN by itself creates a vested right in the noticee as regards the appeal that may be filed against the adjudication order pursuant to such SCN. As already observed, it is possible that pursuant to an SCN, the adjudication proceedings may be dropped if the adjudication authority comes to the conclusion that no demand requires to be created. Consequently, the relevant date if at all would be the date of creation of the demand which does not get crystallised till the adjudication order confirming the demand is passed. In any event, as far as the amended Section 129E of the Act is concerned, its wording is unambiguous. It opens with the words “The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal.... unless the appellant deposits the percentage of the demanded duty as stipulated in clauses (i), (ii) or (iii) thereunder.” The wording of the second proviso to the amended Section 129 E is also unambiguous. It makes it clear that the amended provision would not apply to appeals and stay applications already "pending" before the appellate authority "prior to the commencement of the Finance (No. 2) Act, 2014", i.e. 6th August 2014. In other words, it would apply to all appeals filed on or after the said date. Therefore, what is to be seen is the date of filing of the appeal. If the appeal is filed on or after 6th August 2014 then the condition stipulated in the amended Section 129E of

the Act has to be fulfilled for the appeal to be entertained.

12. The Court notes that as far as the present case is concerned, the CESAT had to apply the second proviso to the amended Section 129 E of the Act since the appeal before it was filed after 6th August 2014. Before this Court there is no challenge in these proceedings to the validity of the amended Section 129 E of the Act. As regards the interpretation of the amended Section 129 E of the Act, the Court concurs with the decision of the Allahabad High Court in *Ganesh Yadav v. Union of India* (*supra*) in the context of the identically worded Section 35 F of the CE Act and holds that the amended Section 129 E of the Act will apply to all appeals filed under Section 130 of the Act on or after 6th August 2014.

13. In the present case, the Appellant deposited a sum of Rs. 4,95,532 on 8th May 2015 which was admittedly not 7.5% of the demanded duty as confirmed by the order dated 10th October 2014 by the Commissioner of Customs (Export). This had to necessarily result in the dismissal of its appeal by the CESTAT.

14. No substantial question of law arises for determination. The appeal and the pending application are dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 20, 2015/Rk