FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH : NAGPUR.

CIVIL APPLICATION (cat) No. 20 OF 2015
(In Central Excise Appeal St. No. 15105/15)

Nagpur Business Forms Pvt. Ltd.

v.

Customs, Excise & Service Tax Appellate Tribunal & anr.

Office Notes, Office Memoranda of Coram appearances, Court's orders or directions and Registrar's orders.	Courts's or Judge's orders

Coram : B.P .Dharmadhikari and V.M.Deshpande, JJ.

Date : 12th JANUARY, 2016

Heard Advocate Parchure for the applicant and Advocate Deshpande for the non-applicants/respondents.

It is not in dispute that CESTAT by the order passed on 29.7.2013 ordered pre-deposit of 50%, which roughly works out to Rs. Fifteen lac. During the pendency of the proceedings before this Court, an amount of Rs.ten lac was already deposited with the Department while an amount of Rs. Five lac has been deposited with the Registry of this Court.

In the present application, prayer is to condone delay of 365 days in filing appeal under Section 35(g) of Central Excise Act.

Advocate Deshpande strongly opposes the prayer. He points out the deliberate conduct of the appellant/applicant. He submits that it shows nothing but *mala fide*. We find that the order of pre-deposit dated 29.7.2013 was questioned before this Court in a writ petition and that writ petition was then withdrawn to exhaust the remedy of statutory appeal. Before filing of said appeal, the appellate forum dismissed the appeal preferred by the applicant on 28.1.2014 for non-compliance of the order of pre-deposit of 50%. Against this order, the applicant filed another writ petition. That writ petition was withdrawn to avail remedy of statutory appeal and ultimately the present appeal under Section 35(g) has been filed. In the appeal, there is a challenge to the order dated 29.7.2013 and also to the order dated 28.1.2014. In this situation, though we find that there are some lapses on the part of the applicant/appellant, it cannot be said that those lapses are with any oblique motive. He also deposited pre-deposit amount in the meanwhile. The applicant/appellant appears to have acted as per the legal advice. In this situation, subject to payment of costs of Rs.1,000/- to the respondents within two weeks from today, we condone the delay and direct the Registry to register the appeal.

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Today, the Court has condoned the delay subject to payment of costs to be paid to the respondents within two weeks.

Challenge in the present appeal is to the order dated 29.7.2013 directing pre-deposit of 50% and later order dated 28.1.2014 dismissing the appeal under Section 35-A of the Act for want of pre-deposit amount.

Advocate Parchure submits that financial hardship apart from merits of the matter were pressed into service before the first appellate authority, namely the Commissioner (Appeals) and the same were also reiterated before the CESTAT. Perusal of the application for grant of stay shows in paragraphs 11 and 23 grounds regarding financial hardship. Advocate Parchure submits that those grounds are not looked into by the said authorities.

Advocate Deshpande submits that the contents in paragraphs 11 and 23 in the stay application are too general in nature and, therefore, deserve no importance.

With the assistance of respective counsel, we have perused the application and also the order dated 29.7.2013. The only substantial question of law to be looked into is, whether the ground of financial hardship needed to be considered by the CESTAT.

Effort is made out by the appellant to point out his financial hardship and the cash flow. Appellant submitted that he has been continuously overdrawing from the bankers. It is further submitted that these grounds were brought to the notice of Commissioner (Appeals). Thus, these events needed appreciation by CESTAT. While considering the issue of pre-deposit, CESTAT is not only expected to consider the prima facie case but also balance of convenience and for that purpose financial hardship, if any. If the appellant does not plead the same, CESTAT would not be required to consider it. But if there was any pleading to that effect, CESTAT was bound to go into the same. Impugned order does not show any consideration of financial hardship. Impugned order dated 29.7.2013, therefore, suffers from jurisdictional error. Even if pleadings are deficient or ground is not available on facts, that finding is to be reached by CESTAT only.

At this stage, we are not inclined to set aside the order dated 29.7.2013 because in the meanwhile, pre-deposit as envisaged therein, has already been made. We allow the respondents to withdraw the amount deposited with the Registry of this Court along with the interest accrued thereon. In view of this, dismissal of appeal by the later order dated 28.1.2014 is unsustainable. That order is quashed and set aside and the appeal is restored to the file of CESTAT for its adjudication in accordance with law.

Parties are directed to appear before CESTAT on 08.2.2016 and to abide by its further instructions in the matter.

JUDGE **JUDGE**

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