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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 4016/2016 & CM No.16941/2016

M/S PIONEER CORPORATION

..... Petitioner

Through: Mr Sachin Datta, Senior Advocate with
Ms Nanda Devi Dekka and Ms N.Suhrawardy,
Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Ms Monika Arora, CGSC for
Respondent No.1

Mr Jaindra, Advocate for Ms Sonia Sharma,
Senior Standing counsel for CBEC/Respondent
No.2.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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02.06.2016

1. The challenge in this writ petition is to the Circular dated 16th September, 2014 issued by the Central Board of Excise and Customs (CBEC) and a Circular dated 14th October, 2014 issued by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in the matter of mandatory pre-deposit of 7.5%/10% as the case may be for filing an appeal before the CESTAT in terms of amendment in Section 35F of the Central Excise Act, 1944 (CE) Act with effect from 6th August 2014.

2. The consequential prayer is that this Court should declare that, where the lis had originated, by means of initiation of proceedings before the lower

adjudicating/appellate authorities before 6th August 2014, the appeal filed before the CESTAT against the appellate or adjudication order should be governed by Section 35F of the CE Act as it stood prior to 6th August, 2014. A further consequential relief that is sought is for a direction to the CESTAT to hear and decide the appeal filed by the Petitioner against the Adjudication Order dated 18th May, 2015 passed by the Principal Commissioner of Customs along with the application for stay/ waiver of pre-deposit “without requiring any mandatory pre-deposit to be made by the Petitioner.

3. Mr Sachin Datta, learned Senior counsel appearing for the Petitioner, submitted that notwithstanding the decision of the Allahabad High Court in ***Ganesh Yadav v. Union of India 2015 (320) E.L.T. 711 (All.)*** which has been followed by this Court in the decision dated 21st October, 2015 in Customs Appeal No.19/2015 (***Anjani Technoplast Ltd. v. The Commissioner of Customs***), the order dated 25th April, 2016 in W.P.(C) No.3380/2016 (***Suvidha Signs Studios Pvt. Ltd. v. Union of India***) and order dated 10th May, 2016 in W.P.(C) No.927/2015 (***Rajdhani Flora & Infrastructure Developers Pvt. Ltd. v. Union of India***), this Court should re-visit the issue of the validity of the above circulars which have been issued pursuant to the changes made in Section 35F of the CE Act with effect from 6th August, 2014.

4. As far as the above pleas are concerned, the Court is not persuaded to re-consider its aforementioned orders which followed the decision of the Allahabad High Court in ***Ganesh Yadav (supra)***. In other words, the Court is not prepared to reopen the question of the validity of Section 35F of the

CE Act.

5. In terms of the amended Section 35 F of the CE Act the CESTAT can insist on a mandatory pre-deposit of 7.5%/10% of the demand of duty in respect of all appeals pending as on tha date. As far as the present case is concerned, although the initial adjudication order was passed on 23rd December 2010, that order was set aside by the CESTAT on 13th December, 2011 and the matter remanded to the Commissioner of Customs for a fresh adjudication. In the second round, a fresh adjudication order was passed by the Principal Commissioner on 18th May, 2015. An appeal was then filed by the Petitioner before the CESTAT along with an application for stay/waiver of pre-deposit. The further appeal having been filed after the amendment to Section 35F CE Act would be governed by the said amended provision.

6. In the present case, the adjudication order has confirmed the demand against the Petitioner in the sum of Rs.2,82,49,444/- and a penalty of the equal amount. the further the case of the Petitioner is that in view of the financial hardship of the Petitioner, this Court should in exercise of its powers under Article 226 of the Constitution waive the requirement of pre-deposit. Mr Sachin Datta drew the attention of the Court to the following lines in para 9 of the decision of the Allahabad High Court in ***Ganesh Yadav*** in support of the above plea:

“9. Parliament while amending the provisions of Section 35F of the Act has required the payment of 7.5 percent of the duty in case the duty and penalty are in dispute or the penalty where such penalty is in dispute. In the case of an appeal to the Tribunal against an order passed by the Commissioner

(Appeals), the requirement of deposit is 10% of the duty or as the case may be, the duty or penalty or of the penalty where the penalty is in dispute. The first proviso restricts the amount to be deposited to a maximum of Rs. 10 crores. Prior to the amendment, the Commissioner (Appeals) or the Appellate Tribunal were permitted to dispense with such deposit in a case of undue hardship subject to such conditions as may be imposed so as to safeguard the interest of the revenue. Stay applications and the issue of whether a case of undue hardship was made out, gave rise to endless litigation. There would be orders of remand in the litigative proceedings. All this was liable to result in a situation where the disposal of stay applications would consume the adjudicatory time and resources of the Tribunal or, as the case may be, of the Commissioner (Appeals). Parliament has stepped in by providing a requirement of a deposit of 7.5% in the case of a First Appellate remedy before the Commissioner (Appeals) or to the Tribunal. The requirement of a deposit of 10% is in the case of an appeal to the Tribunal against an order of the Commissioner (Appeals). This requirement cannot be regarded or held as being arbitrary or as violative of Article 14. Above all, as the Supreme Court held in *Shyam Kishore* (supra), the High Court under Article 226 of the Constitution is vested with the jurisdiction in an appropriate case to dispense with the requirement of pre-deposit and the power of the Court under Article 226 is not taken away. This was also held by the Supreme Court in *P. Laxmi Devi* (supra) in which the Supreme Court observed that recourse to the writ jurisdiction would not be ousted in an appropriate case. Whether the writ jurisdiction under Article 226 should be exercised, having due regard to the discipline which has been laid down under Section 35F of the Act, is a separate matter altogether but it is important to note that the power under Section 226 has not been, as it cannot be, abridged.”

7. This Court, at the request of Mr Datta, adjourned the case by its order

dated 13th May, 2016 to enable the Petitioner to place on record the documents in support of the plea that the Petitioner proprietary concern had ceased for exist as such. At this stage, it must be recalled that the Petitioner is a Proprietary concern of which Mr Pankaj Chopra is the sole Proprietor. Pursuant to the leave granted by this Court an additional affidavit has been filed by Mr Pankaj Chopra on 12th May, 2016 in which he explains that the Petitioner is no longer in existence since 2007 and that it has no source of income. He relies on the letter dated 18th December, 2006 issued by the Indian Oil Corporation Ltd. placing the Petitioner on a 'holiday list' and debarring it for a period of three years thereafter. Mr Datta also refers to the adjudication order dated 18th May, 2015 in which the submission of the Petitioner that it is no longer functional has been recorded by the Principal Commissioner.

8. What has been recorded in the aforementioned Order-in-Original is that Mr Chopra joined hands with one Mr Anoop Chawla and an Australian Company to start a joint venture with M/s Samarth Designs Pvt. Ltd. and new entity came into carried out the same line of business as the Petitioner. While Mr Chopra may have decided to close the Petitioner's operations, in reality, the liability of the Petitioner as a legal entity to pay arrears of statutory duties did not cease. In other words, it was not as if Samarth Designs Pvt. Ltd. took over the liabilities of the Petitioner. It is stated that at no stage was a resolution regarding taking over the existing liabilities of the Petitioner passed by the Directors of Samarth Designs Pvt. Ltd.

9. In that view of the matter, it cannot be said that with the Petitioner ceasing

its business operations, it ceased to exist as a legal entity for the purposes of its liability under the Central Excise law. In other words, the Petitioner shall continue to be liable to pay Central Excise Duty as a legal entity notwithstanding that it may have ceased to carry on business from a particular date. Unlike a company or partnership firm both of which can be dissolved unless there is an express provision in the law permitting taking over of the liability of the Proprietary concern the proprietary concern cannot unilaterally declare itself as non-existent

10. Under Section 35 F of the CE Act as it stood prior to 6th August 2014, a discretion was available to the CESTAT to consider the financial hardship and accordingly determine the pre-deposit amount. That discretion has been consciously sought to be curtailed and thus an amendment was made to Section 35 F CE Act requiring making of a pre-deposit of 7.5% in all cases subject to an upper cap of Rs.10 crores. A direction, therefore, to the CESTAT that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35F with effect from 6th August, 2014.

11. While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35 F cannot possibly be taken away, the Court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out for such interference. Having heard the submissions of Mr Datta and having perused the adjudication order, the Court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of

the pre-deposit as far as the Petitioner's appeal before the CESTAT is concerned.

12. For all the above mentioned reasons, the writ petition is dismissed but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

JUNE 02, 2016
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