IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4675 OF 2017

The Security Guards Board for Brihanmumbai and Thane District and Anr.	}	**Petitioners**
versus		
The Union of India and Anr.	}	**Respondents**

Mr. Rajendra Sheth with Ms. Pinky Chainani for the petitioners.

None for the respondents.

CORAM :- S. C. DHARMADHIKARI & PRAKASH. D. NAIK, JJ.
DATED :- APRIL 27, 2017

P.C. :-

1. By this petition under Article 226 of the Constitution of India, the petitioners pray for issuance of a writ of certiorari to call for records and quash and set aside an order-Exhibit 'R' dated 21st December, 2016. A further writ claimed is a mandamus so as to direct the respondents to forthwith withdraw or cancel the said order.

2. Before we proceed further, we must set out the nature of the order that is impugned. Exhibit 'R' is that order and a copy of which is at page 231 of the paper book. It is an order-in-original and passed by the office of the Commissioner of Service Tax,

Mumbai VII. The show cause notices dated 31st March, 2015 and 26th April, 2016 raising a demand of Rs.49,10,73,448/- and Rs.55,11,86,197/- are issued to the petitioner-Security Guards Bord for Greater Mumbai and Thane District. The show cause notices are premised on the fact that the Board was constituted in order to regulate the employment of private security guards employed in factories and establishments in Mumbai and Thane districts and to make better provision for their terms and conditions of employment and welfare and for matters connected therewith. A scheme known as Maharashtra Private Security Guards (Regulation of Employment and Welfare) Scheme, 2002 has also been framed under Section 3(1) of the parent Act. The Board is a tripartite body, consisting of representatives from registered employers, the security guards and the State Government. The Act styled as Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 applied to hired persons who worked as security guards in any factory or establishment through agencies but it did not apply to persons/employees who were direct and regular employees of the factory or establishment.

3. After referring to the Act and the scheme in great details, the show cause notices proceed to allege that the amount has

been calculated because the Board renders services. The services are referable to a statute, namely, the Finance Act, 1994. It is on this premise that the tax was sought to be imposed. A detailed reply was given to the show cause notices, after which, there was a personal hearing. On examination of all the materials, the order-in-original upholds the demand and that is how the operative order at pages 260-261 has been made.

4. We specifically invited the attention of Mr. Sheth to the remedy of an appeal available under the Central Excise Act, 1944. It is common ground that the service tax as levied by the statute is assessable and recoverable by the authorities under the Central Excise Act, 1944. So much of the regime, as is available for the above purpose, under the Central Excise Act, 1944, has to be made available for the levy, assessment and recovery of service tax under the Finance Act, 1944. Therefore, the authorities exercise their power in terms of the Central Excise Act, 1944.

5. The only contention raised by Mr. Sheth is that the remedy of appeal is conditional. The appeal can be entertained only when there is compliance reported with the pre-condition of deposit of 7.5% amount of service tax confirmed together with interest and penalty. This is highly arbitrary and excessive given the nature

of the functions performed by the Board and it being a statutory authority.

6. Mr. Sheth has invited our attention to not only the provisions of the Act, but a judgment of the Hon'ble Supreme Court of India in the case of *Vizagapatnam Dock Labour Board vs. Stevedors Association, Vishakhapatnam and Ors.*[1].

7. Thereafter, our attention is invited to another judgment of the Hon'ble Supreme Court of India in the case of *Hussan Mithu Mhasvadkar vs. Bombay Iron and Steel Labour Board and Anr.*[2], decided on 7th September, 2001.

8. It is also submitted that the petitioners have been brought under the service tax net only by an amendment. In these circumstances, compelling the petitioners to abide by this pre-condition of the statute and of securing the demand to the extent of 7.5% of the tax and interest/penalty demanded would negate the right of appeal. The Board has no finance and resources of its own. It would face enormous difficulties in making arrangements for this deposit. In these circumstances, we should interfere in our writ jurisdiction and grant necessary safeguards and protection.

1 **AIR 1970 SC 1626**
2 **Appeal (Civil) 11189 of 1995**

9. We are unable to agree with Mr. Sheth for more than one reason. The Central Excise Act, 1944 has been amended by the Finance Act, 2015. The remedy of appeal against the order-in-original is available by section 35-B, namely Appeal to the Appellate Tribunal. By a further provision and incorporated in the statute, namely, section 35-F, the Tribunal or the Commissioner (Appeals), as the case may be, are mandated not to entertain any appeal. This provision reads as under:-

> "**35-F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.** - The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal. -
>
> (i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;
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> (ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35-B, unless the appellant has deposited seven and a half per cent. of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;
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> (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35-B, unless the appellant has deposited ten per cent. of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against:
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> Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:
>
> Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance Act (No. 2) of 2014.

Explanation – For the purposes of this section "duty demanded" shall include;-

(i) amount determined under section 11-D;

(ii) amount of erroneous CENVAT credit taken;

(iii) amount payable under rule 6 of the CENVAT Credit Rules, 2001 or the CENVAT Credit Rules, 2002 or the CENVAT Credit Rules, 2004."

10. Prior to this substitution by Finance Act 2 of 2014, this provision reads thus:-

"35-F. Deposit, pending appeal of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

Explanation.-For the purpose of this section "duty demanded" shall include;-

(i) amount determined under section 11-D;

(ii) amount of erroneous CENVAT credit taken;

> *(iii) amount payable under rule 57-CC of Central Excise Rules, 1944;*
>
> *(iv) amount payable under rule 6 of CENVAT Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;*
>
> *(v) interest payable under the provisions of this act or the rules made thererunder."*

11. A Division Bench of this court presided over by one of us (S.C.Dharmadhikari,J.) had an occasion to consider the argument that by the prior regime, it was open for the Tribunal to dispense with the requirement of pre-deposit and it was possible for the appellant to seek a waiver therefrom. Now, such a stipulation is absent. Now, it is mandated that 7.5% of the duty demanded or penalty imposed or both has to be deposited. If the Tribunal finds that there is no compliance with this requirement, then, it cannot entertain the appeal.

12. The precise argument that there would be prejudice caused to the appellants and who may be statutory bodies, authorities, public sector undertakings and Government companies etc. was considered. The Division Bench found and while agreeing with another Division Bench of the High Court of Allahabad that this condition has been imposed advisedly. That is to curtail litigation. That is because earlier the stay applications consumed enormous time of the Tribunal and equally of the higher courts.

Now, a reasonable condition has been imposed. Now, it is not necessary to go into any issues or merits and once there is a security in the form of deposit, then, the appeal can be entertained and adjudicated on merits. Fruitless and avoidable litigation generated by interim/stay applications has been now curtailed.

13. Even otherwise, we do not find any substance in the argument of Mr. Sheth that it is impossible for the Board to arrange and make any deposit. What we have found from a perusal of the 1981 Act is that the Board is set up and established in the State of Maharashtra by a statute. That statute of 1981 enables, by section 6, constitution of a Board. It could be a single member Board. Its powers and duties are enumerated in section 8 and what is clear from the provisions is that it can submit its accounts to the State Government. The accounts are audited and even the determination of moneys due from employers, principal employers and security guards enables the Board to generate funds. Equally, it is not as if the State Government cannot contribute anything. In appropriate cases, the Board can approach the State Government and for necessary financial assistance or grant.

14. We do not think that there is a financial hardship and of such nature as would enable us to hold that the statute imposes a excessive or onerous condition so as to avail of the right of appeal. Pertinently, neither the provisions are challenged nor the stipulation as aforesaid. The writ petition is filed only on the ground that it is not possible for the Board to arrange for the pre-deposit. We do not think that this is enough for us to entertain this petition.

15. We are mindful of the Act of 1981 and the judgments of the Hon'ble Supreme Court of India so also the role, duties and functions of the Board. However, once we find that there is an alternative and equally efficacious remedy, where all issues of fact and law can be considered, then, there is no need to entertain this writ petition.

16. As a result of the above discussion, the writ petition fails and it is dismissed. There would be no order as to costs.

17. At this stage, Mr. Sheth prays for six weeks' time to comply with the statutory condition as enumerated above. This request is opposed by the respondents.

18. After having heard both sides on this point, we are of the opinion that interest of justice would be served if we grant the request of Mr. Sheth. If the Petitioners report compliance with the statutory pre-condition within a additional time of six weeks from the date of receipt of a copy of this order, then, the appeal would be entertained and heard on merits. In the event there is no compliance reported within this additional time, then, all statutory consequences shall follow. We clarify that we have not expressed any opinion on the merits.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**