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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 42 OF 2016

1. Aafloat Textiles India Ltd

formerly known as Akai Impex Ltd., a company registered under the Companies Act, 1956, having its registered office at Ostwal Oranate, Shop No.130, 1st Floor, B-Wing, Building No.2, Jesal Park, Bhayander (E), Thane, Maharashtra and a factory, inter alia at S.No. 1/1/2, Village Chinchpada Pati-Vasona Cross, Silvassa – 396 230, D & NH (UT)

...Appellant

Versus

**1. The Commissioner of Central Excise
Vapi,**

Having his office at 4th Floor, Adarshdham Building, Opp. Town Police Station, Vapi.

...Respondent

Mr. Prakash Shah, with Mr. Jas Sanghvi, i/b PDS Legal for Appellant.

Mr. A.S. Rao for Respondent.

**CORAM: A.S. OKA &
 RIYAZ I. CHAGLA, JJ.**

JUDGMENT RESERVED ON 11TH SEPTEMBER 2017

JUDGMENT PRONOUNCED ON 5th OCTOBER 2017

ORAL JUDGMENT :- (Per Riyaz I. Chagla J.)

1. The Appellant by the present Appeal is challenging order dated 21st October 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad (for short “**Appellate Tribunal**”).

2. The Appellants are a company registered under the Companies Act, 1956 and engaged, *inter alia* in the manufacturing of mainly Partially Oriented Yarn (“**POY**”). The Appellants had made a referred application to the Board of Industrial and Financial Reconstruction (“**B.I.F.R.**”). Pursuant to the application, BIFR by order dated 4th September 2003 declared the Appellants as a sick industrial company in terms of Section 3 (1) (o) of the Sick Industrial Companies (Special Provisions) Act, 1985. The factory of the Appellants has been closed since 2004. The Appellants were investigated on account of their not having paid National Calamity Contingent Duty (“**NCCD**”) leviable on Polyester Filament Yarn and summons were issued by the Directorate General of Central Excise Intelligence, Vapi on 7th May 2004. The Appellants

forward their response to the summons. By show cause notice dated 29th July 2004, Appellants were called upon to show cause as to why the NCCD should not be recovered and penalty imposed upon them as well as penalty imposed upon the General Manager of the Appellants under the provisions of the Finance Act. It appears that the Appellants did not receive notice of the hearing fixed pursuant to the show cause notice as the factory had been closed in 2004. The Additional Commissioner, Central Customs, Vapi by Order-in-Original dated 21st July 2005 confirmed the demands of NCCD and imposed penalty upon Appellant as well as General Manager of the Appellant under the provisions of the Finance Act. The Appellants filed an Appeal against the said order-in-original dated 21st July 2005 along with application of the stay before the Commissioner (Appeals) Central Excise, Customs, Vapi. The notices for hearing were never received and therefore, the Appellants could not attend the personal hearing. The Commissioner (Appeals), Central Excise and Customs, Vapi, by an Order-in-Appeal dated 10th March 2006 dismissed the Appeal as well as the stay application filed by the Appellants by upholding

the order-in-original passed by the Additional Commissioner. The Appellant filed Appeal against the Order-in-Appeal dated 10th March 2006 passed by the Commissioner (Appeals), Central Excise & Customs, Vapi along with the stay and waiver of deposit application before the Appellate Tribunal. The Appellate Tribunal by *ex parte* order dated 12th January 2007 dismissed the stay application filed by the Appellants and granted liberty to the Appellants to deposit amount of NCCD and penalties payable under the order impugned before it within eight weeks. In the meanwhile, the BIFR recommended winding up of the Appellants company on 15th November 2006. An order of winding up was passed by the BIFR on 31st January 2007. The Appellants could not deposit the amount directed to be deposited by the Appellant Tribunal. By an order dated 14th March 2007, the Appeal filed by the Appellants was dismissed for non-compliance of the pre deposit order dated 12th January 2007. The Appellants filed an application for restoration of the Appeal / Stay application praying for restoration holding that the Appellants had made out a case for restoration of the Appeal. The Restoration Application was dismissed on the ground that the

Appellant had not made a case for restoration of the Appeal. The Appellants have challenged the impugned order in the present appeal.

3. Mr. Prakash Shah, learned counsel appearing for the Appellants has submitted that the Appellate Tribunal has not taken into consideration the reason for the non compliance of the pre-deposit order dated 12th January 2007. Mr. Shah submitted that the order dated 12th January 2007 had been passed *exparte* and that the Appellants had not received notice of the hearing before the Appellate Tribunal. The impugned order dated 14th March 2007 dismissing the Appeal was again passed *exparte* as the Appellants had not received notice of the hearing since the factory had been closed since 2004. Mr. Shah submitted that the Appellants had been declared a Sick Industrial Company by the order of the BIFR and that they had been closed since 2004 and hence were unable to comply with the order of pre-deposit passed by the Appellate Tribunal and had accordingly applied for waiver of the pre-deposit amount together with restoration of the Appeal which had been dismissed *exparte*. The BIFR

had also ordered winding up of the Appellants and assets of the Appellants were taken over by the ARCIL on 6th February 2008. It was accordingly submitted by Mr. Shah that in this situation, the Appellants were unable to pay pre-deposit amount as ordered.

4. Mr. Rao learned counsel appearing for the Respondent has supported the impugned order of the Appellate Tribunal.

5. We have carefully considered the arguments. We are of the view that the Appellants have not made any effort to attend the hearings before the Appellate Tribunal and / or place the recommendation of the BIFR for winding up of the Appellants Company on 15th November 2006 before the Appellate Tribunal when the stay application came up for hearing on 12th January 2007.

6. Paragraph 6 of the impugned order reads thus:-

“As regards the reliance placed by the Id. Counsel on the proceedings before BIFR, we find that the BIFR authorities, though recommended for winding up of the company

on 15th November 2006, the said letter / notice was not produced before the Tribunal when the stay matter came up for disposal on 12th January 2007. We also notice that winding up order of Hon'ble High Court was recalled by their Lordships only in May 2014. Nothing prevented the Appellant from appearing before the Tribunal when the matter was listed for stay and subsequently for compliance on 14th March 2007 and bring to notice of the Bench the factual matrix.

7. The Appellate Tribunal has held that the Appellants had not bothered to comply with the orders passed by the Appellate Tribunal. It appears that the Appellants were only interested in prolonging the proceedings as also noticed by the Appellate Tribunal and the Appellate Tribunal had given ample opportunities to the Appellants for complying with their prior orders. The Appeal had been dismissed in March 2007 but the Appellants chose to file the Application for restoration of Appeal only in April 2013 i.e. over six years later and the Appellants have not been able to justify the delay in preferring the restoration application. It is not open for the Appellants to contend that they were not aware of the dismissal of their Appeal for non-compliance. We concur with the view taken by the Appellate Tribunal.

8. We accordingly find no merit in the Appeal preferred by the Appellants and accordingly dismiss the present Appeal. There shall be no order as to costs.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)