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

CUSTOMS APPEAL NO. 88 OF 2015

Shri Bhavin Vyas	}	**Appellant**
versus		
Commissioner of Customs,	}	
CSIA Airport	}	**Respondent**

Mr. Advait M. Sethna with Mr. Dhirendra P. Singh for the appellant.

None for the respondents.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- MARCH 20, 2017

P.C. :-

1. This appeal challenges an order passed by the tribunal dated 18th November, 2014 dismissing the petitioner's appeal before the tribunal by taking recourse to section 129-E of the Customs Act, 1962. Section 129-E of the Customs Act, 1962 reads as under:-

> "**129-E 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 128, 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 customs lower in rank than the Commissioner of Customs;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 129-A, 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;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129-A, 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:

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 (No. 2) Act, 2014."

2. The tribunal found that the order-in-original is dated 24th June, 2014. However, the right of appeal and guaranteed to the appellant is by the above quoted section. That section itself requires the appellant to deposit a sum equivalent to 7.5% of the duty demanded or penalty imposed or both under the order-in-original. If this condition stipulated by section 129-E(i) is not complied with, it cannot entertain the appeal. The second proviso to this section makes it clear that this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014. Admittedly, this is not a position emerging from the record of the present case. Therefore, the condition imposed of deposit of 7.5% penalty of Rs.2.5 crores on the appellant was not complied

with. The appeal was lodged on 8th September, 2014. Enough time was granted by the tribunal to comply with this condition, namely, to deposit a sum of 7.5% of the penalty amount. That was a pre-condition for hearing of the appeal. That was not complied with till 18th November, 2014. It is in these circumstances that the tribunal dismissed the appellant's appeal without adjudication.

3. The only argument canvased before us is that the tribunal could not have taken recourse to the second proviso because the order-in-original, from which the appeal arose, is dated 24th June, 2014. That is prior to 6th August, 2014, on which date section 129-E as quoted above, as amended, came into force. This argument was noted not only by a Division Bench of this court in the case of *Nimbus Communications Limited vs. Commissioner of Service Tax, Service Tax-VI, Mumbai and Ors.*[1], decided on 25th July, 2016, but in several other judgments, one of which was in the case of *Ganesh Yadav vs. Union of India*[2]. After noting this precise argument, the Allahabad High Court negatived it in the case of *Ganesh Yadav* (supra). The Division Bench, of which one of us (S. C. Dharmadhikari, J.) was a party, followed the judgment of Allahabad High Court and agreed with its conclusion.

1 **Central Excise Appeal No. 161 of 2016**
2 **2015 (320) ELT 711**

4. In these circumstances, we do not think that the similar argument, which was specifically considered and negatived by a Division Bench of this court can be raised again. We are of the opinion that the tribunal was right in applying the amended provision and as quoted above. There is no legal infirmity or perversity in the order impugned before us. Consequently, the appeal does not raise any substantial question of law. It is dismissed.

(B.P.COLABAWALLA, J.) (S.C.DHARMADHIKARI, J.)