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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.2138 OF 2008 IN
CUSTOM APPEAL NO.4 OF 2006

The Commissioner of Customs
(Preventive) ...Applicant
vs.
M/s.Bagwe Udyog Limited ...Respondent

Ms P.S.Cardoza i/b R. Ashokam for the applicant
None for the respondent

CORAM : A.S.OKA, &
RIYAZ I. CHAGLA,JJ.
DATE : AUGUST 14, 2017

P.C.:

1 This Notice of Motion is taken out by the appellant in Customs Appeal No.4 of 2006. The appeal was disposed of by a Division Bench of this Court by order dated 28th March 2006 which reads thus:

> “. Mr.A.J.Rana, the learned senior counsel submits that in fact nothing remains to be argued in this appeal as the goods were allowed to be cleared on 17th January 1996.
>
> 2 The appeal does not give rise to any substantial question of law.
>
> 3 Dismissed in limine.”

2 Against the said order, a Special Leave Petition was preferred by the applicant/appellant before the Apex Court which was disposed of by order dated 26th March 2007. The order of the Apex Court reads thus:

> "Learned Solicitor General applies for withdrawal of the Special Leave Petition with liberty to move the High Court. It needs to be mentioned that the impugned order is passed on the concession made by the senior counsel appearing for the Revenue. It is under these circumstances that an application Special Leave Petition is dismissed as withdrawn."

3 It appears from the averments made in the affidavit in support of this Notice of Motion that one more Appeal being Customs Appeal No.95 of 2007 was preferred by the applicant for challenging the same order which was subject matter of challenge in Customs Appeal No.4 of 2006. The said Appeal was not entertained by this Court by order dated 8th February 2008.

4 There is an affidavit in support of this Notice of Motion filed by Shri N. Balasubramaniam, Assistant Commissioner of Customs (Preventive). We have carefully perused the affidavit. In paragraphs I to IX there are factual averments leading to the filing of Appeal No.4 of 2006. In paragraph IXA, the applicant has stated thus:

"IXA)The department, inadvertently failed to bring to the notice of the Hon'ble Court that in situation such as this, it was very vital for the High Court to decide about the payment of the duty/penalty, which is otherwise due and payable in respect of goods that have been treated as offensive and the appeal in fact was preferred for that reason in as much as it was only realization of (duty/penalty etc.) department's dues that was the only relief and the main substantial question of law was exactly that as to whether such recovery is proper and legal. The fact that goods were already cleared was not any new situation that did not exist earlier. Despite this the appeal was preferred only to determine the legality of customs claim in the type of situations that had arisen. The statement of the Senior Counsel, in this context, as recorded, was also, therefore due to inadvertence. However, the existence of the dispute and the need to decide the substantial question of law, therefore, did not cease to exist. While the department expressed its regrets for this unintended resultant situation, the department, inter alia in public interest prays that the said issue be kindly determined by this Hon'ble Court."

(underline supplied)

5 The statements made in paragraph IXA to say the least are shocking. The order dated 28th March 2006 not only records concession by the learned senior counsel representing the applicant but it also records a finding that the appeal does not give rise to any substantial question of law. In paragraph IXA of the affidavit filed on 6th May 2008, the applicants have gone to the extent of suggesting statement made by the learned senior counsel in order dated 28th March 2006 has been recorded due to inadvertence.

6 As Appeal No.4 of 2006 was dismissed by holding that the appeal does not give rise to substantial question of law. Hence, no case is made out for recalling and for re-hearing the appeal on merits. Accordingly, the Notice of Motion is dismissed.

(RIYAZ I. CHAGLA,J.) (A.S.OKA,J.)