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

CUSTOMS APPEAL NO. 86 OF 2016

Mydream Properties Private Limited. … Appellant.
V/s.
Commissioner of Customs (Imports),
Mumbai. … Respondent.

Mr.Hormaz Daruwalla with Mr.S.A.K.Najam Es-Sani i/b. Maneksha and Sethna for the appellant.

Mr.Pradeep S. Jetly for the respondent.

CORAM : A.S.OKA AND A.K.MENON, JJ.

DATE : 8th December 2017.

<u>ORAL JUDGMENT</u>: (Per A.S.Oka, J.)

This appeal was admitted by order dated 28th August 2017 by framing following substantial question of law:

> "Whether the Customs, Excise and Service Tax Appellate Tribunal has no more jurisdiction to entertain an Application for stay of the order impugned before it?

The appeal was ordered to be disposed of at the admission stage. Accordingly, the appeal was taken up yesterday for final hearing.

2. A reference to few factual aspects would be necessary. On 5th June 2015, an order-in-original was passed by the Commissioner of Customs confirming the demand of the differential duty. Under the said order, penalty was imposed on the petitioner. In this petition, we are concerned with the direction issued under clause (vii) of paragraph- 47 of the order-in-original dated 5th June 2015, which reads thus:

> "(vii) I confiscate the goods of ascertained Assessable Value of Rs.17,89,45,942/- (i.e. Rs.17,74,67,817/- for the Yacht + Rs.14,78,125/- for the 'V-SAT connection with dish antenna) imported under the Bill of Entry N 911190 dated 11.09.2009 Section 111 (m) & 111(l) of the Customs Act, 1952. However, I give an option to the importer to redeem the goods on payment of redemption fine of Rs 1,75,00,000/- (Rupees One Crore Seventy Five Lakhs Only) under Section 125 of the Customs Act, 1962"

It is the case of the petitioner which is not disputed that the petitioner complied with the mandatory requirement of the deposit of 7.5% of the duty and the penalty in dispute as required by section 129E of the Customs Act, 1962 (for short "the Customs Act"). The petitioner made an application before the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (for short "Appellate Tribunal") invoking inherent jurisdiction of the Appellate Tribunal seeking stay of the direction regarding deposit of redemption fine and/or praying for dispensing with the requirement of deposit of redemption fine. By the impugned order dated 18th April 2016, the said application made by the petitioner has been rejected by the Appellate Tribunal by holding that the Tribunal was powerless to entertain the application for interim relief.

3. The learned counsel appearing for the petitioner invited our attention to the powers of the Appellate Tribunal under Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (for short “Procedure Rules”). He submitted that apart from the fact that being an appellate authority there are inherent powers vesting in the Appellate Tribunal to grant interim relief, even under Rule 41 of the Procedural Rules, sufficient powers are vested in the Appellate Tribunal to stay the recovery of the redemption fine in the interests of justice. He relied upon various decisions to which we have made a reference in the subsequent part of the judgment.

4. The learned counsel appearing for the respondent opposed the petition by pointing out that after section 129E is brought on statute book, once the appellant before the Tribunal complies with the requirement of deposit of 7.5% of the duty and penalty, the authorities are precluded from taking any steps to recover the balance amount of duty and penalty subject matter of challenge in an appeal till the disposal of the appeal. He submitted that in view of compliance of the statutory requirement of deposit made by the petitioner, till the disposal of the appeal, the department cannot take any further steps on the basis of the order of confiscation. He submitted that there is an option given in the order-in-original to the petitioner to redeem the goods on payment of

redemption fine and, therefore, there is no question of anybody recovering the redemption fine during the pendency of the appeal. He submitted that thus, after making compliance with the requirement of statutory deposit under section 129E of the Customs Act, there is no occasion for the Tribunal to entertain any application for interim relief. It is submitted that in the absence of any express provision either in the Act or the Procedure Rules, there is no inherent power vested in the Appellate Tribunal to grant interim relief.

5. We have given careful consideration to the submission. In the present case, under the order-in-original, duty and penalty were made payable by the petitioner. 7.5% of the total duty and penalty demanded has already been deposited by the petitioner. Reliance was placed on the circular dated 16th September 2014 bearing No.984/08/2014-CX issued by the Central Board of Excise and Customs, Government of India. Clause- 4 of the said circular is material. Clauses- 4.1 to 4.3 of the said circular read thus:

> "**4. Recovery of the Amounts during the pendency of Appeal:**
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> 4.1 Vide Circular No.967/1/2013 dated 1st January 2013, Board has issued detailed instructions with regard to recovery of the amounts due to the Government during the pendency of stay applications or appeals with the appellate authority. This Circular would not apply to cases where appeal is filed after the enactment of the amended Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962.

> 4.2 No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% of 10% deposited in terms of Section 35F of Central Excise Act. 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/ assessee shows to the jurisdictional authorities:
> (i) proof of payment of stipulated amount as pre-deposit of 7.5% / 10%, subject to a limit of Rs.10 crores, as the case may be; and
> (ii) the copy of appeal memo filed with the appellate authority;
>
> 4.3 Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeal) / Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over the above the amount deposited under the provisions of Section 35F/ 129E may be initiated unless the order of the Tribunal is stayed by the High Court/ Supreme Court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment."
>
> (underlines supplied)

6. Hence, in view of the circular, as far as the penalty and differential duty payable under the impugned order-in-original are concerned, no steps can be taken to recover the balance amount till the disposal of the appeal.

7. Perusal of the application filed by the petitioner shows that the application contained a prayer to dispense with the requirement of

deposit of redemption fine. Thus, the prayer was for permitting the petitioner to redeem the goods without payment of redemption fine. The question is whether the Appellate Tribunal has jurisdiction to entertain such an application. Our attention was invited to the decision in the case of ***Mr.Venugopal Engineering Ltd. v. Union of India***[1], and, in particular what is held in paragraph- 13, which reads thus:

> 13. The appellant has also made a grievance of the Tribunal refusing to reconsider the appellant's application for stay of the redemption fine of Rs.78 lakhs. We find that the Tribunal in its order dated 19 August 2011 has held that in terms of Section 129E of the Act, there is no requirement to predeposit the redemption fine for the purpose of hearing the appellant's appeal on merits. We find that no exception could be taken to the above view of the Tribunal. The stay on redemption fine would normally follow from a stay of the order being challenged before the Tribunal. The jurisdiction of the Tribunal to stay the order being appealed against before it is not under Section 129E of the Act but is in the exercise of its inherent power as an Appellate Authority. This power is to be exercised in exceptional circumstances. In this case, nothing has been brought to our notice to show circumstances which would warrant the Tribunal exercising its inherent power to stay the order dated 30 November 2011 of the Commissioner of Customs or the redemption fine imposed therein.

(underline added)

8. It is true that the said decision was rendered before section 129E was amended. The amendment was made with effect from 6th

1 Customs Appeal No.6/2013 decided on 10th June 2014

August 2014. Prior to the said amendment, the requirement of the statute was of the pre-deposit of entire amount of disputed duty as well as penalty and there was a power vested in the Appellate Tribunal to waive the requirement of the pre-deposit. According to us, the fact that this decision was rendered prior to the amendment to section 129E is immaterial as what is held by the Division Bench is that there is an inherent power vested in the Appellate Tribunal to stay the order appealed against before it. The said view taken by the Division Bench is well supported by a leading decision of the Apex Court in the case of ***Income-Tax Officer, Cannanore v. M.K.Mohammed Kunhi***[2]. In the said decision, the Apex Court had an occasion to consider the powers of the Appellate Tribunal under section 254 of the Income Tax Act, 1961 (for short "Income Tax Act"). Sub-section (1) of section 254 of the Income Tax Act reads thus:

> "254. Orders of Appellate Tribunal.- (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit:

The Apex Court also considered sub-sections (5) and (6) of section 255 of the Income Tax Act. Sub-section (5) reads thus:

> (5) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the

2 (1969) 71 ITR 815 (SC)

> discharge of its functions, including the places at which the Benches shall hold their sittings."

The Apex Court observed that there can be no manner of doubt that under the provisions of the Income Tax Act or the Income Tax Appellate Tribunal Rules, 1963, powers have been expressly conferred upon the Appellate Tribunal to stay the recovery of penalty or tax due from the assessee. In fact, the Apex Court noted that under section 220(6) of the Income Tax Act, a power has been conferred on the Income-Tax Officer to grant stay during the pendency of the appeal. After considering the relevant provisions, Maxwell on Interpretation of Statutes and other material, the Apex Court held thus

> "It is well known that an Income-tax Appellate Tribunal is not a court but it exercises judicial powers. <u>The Tribunal's powers in dealing with appeals are of the widest amplitude and have in some cases been held similar to and identical with the powers of an appellate court under the Civil Procedure Code</u> : See Commissioner of Income tax, Bombay City v. Hazarimal Nagji & Co. (5) and New India Assurance Co. Ltd. v. Commissioner of Income tax, Excess Profits Tax (6). In Polini v. Gray (7), this is what Jessel M.R. said about the powers of the Court of Appeal to grant stay at page 443:
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> "It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, and not obtain merely a barren success.
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> (1)[1956] 2 M.L.J. (Sh.N.) 12.(4) [1995] 6 S.T.C. 670,

> (2) A.I.R. 1957 Ker. 142 (5) [1962] 46 I.T.R. 1168, (3) [1962] M.L.J. 1133, (6) [1957] 31 I.T.R. 844, (7) [1879] 12 Ch.D 438.
> Page No.: 0821
>
> That principle, as it appears to me, applies as much to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal".
>
> (underline added)

The Apex Court distinguished certain decisions pointed out which held that the Appellate Tribunal does not possess any power to grant stay. Ultimately, the Apex Court proceeded to held thus:

> "Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. <u>In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when section 254 confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory</u>.
>
> A certain apprehension may legitimately arise in the minds of the authorities administering the Act that, if the Appellate Tribunal proceed to stay recovery of taxes

> or penalties payable by or imposed on the assessees as a matter of course, the revenue will be put to great loss because of the inordinate delay in the disposal of appeals by the Appellate Tribunals. It is needless to point out that the power of stay by the Tribunal is not likely to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."
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> (underline added)

In so many words, the Apex Court held that the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. It was further held that when section 254 confers appellate jurisdiction on the Appellate Tribunal, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. It was held that this statutory power carried with it the duty, in proper cases, to make such orders for staying proceeding as will prevent the appeal, if successful from being rendered nugatory. The Apex Court put a caveat by observing that the power to grant interim relief cannot be exercised by the Tribunal in a routine manner considering the special nature of taxation and revenue laws. It is observed that only when a strong *prima facie* case is made out that such power can be exercised.

9. The learned counsel for the petitioner has relied upon Rule 41 of the Procedural Rules. Rule 41 reads thus:

> "41. **Orders and directions in certain cases.-** The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure tile ends of justice."

In the case of ***J.K.Syntehtics Ltd. v. Collector of Central Excise***[3], the Apex Court dealt with the issue of interpretation of Rule 41. The Apex Court held that the Appellate Tribunal is clothed with express power under Rule 41 to make such order as it necessary to secure the ends of justice. In the facts of the case, it was held that the Appellate Tribunal has power to set aside the order passed *ex parte* against the respondent before it.

10. The learned counsel appearing for the respondent has relied upon the decision of the Apex Court in the case of ***Commissioner of Income-Tax, Delhi v. Bansi Dhar & Sons***[4]. In the said case, the Apex Court was dealing with the power to grant interim relief pending a reference to this Court or the Apex Court. This decision will have no application as the Apex Court observed that after making a reference, the appeal remains pending and, therefore, the Appellate Tribunal retains its jurisdiction and can grant interim relief pending the reference.

3 AIR 1996 SC 3527
4 (1986) 157 ITR 665 (SC)

11. We have already reproduced the relevant part of the circular dated 16th September 2014. Once a compliance is made by assessee by making deposit as required under section 129E of the Customs Act, it is provided that no recovery for balance amount can be initiated pending the appeal. Thus, the deposit of the requisite amount prevents recovery of impugned demand of duty and penalty or duty or penalty as the case may be, during the pendency of any appeal. In the present case, we are concerned with the direction in clause (vii) of paragraph-47 of the impugned order which has been quoted earlier.

12. As held earlier, the Appellate Tribunal dealing with an appeal under the Customs Act has incidental or ancillary powers to grant appropriate interim relief. As appellate jurisdiction has been conferred on the Appellate Tribunal, by necessary implication, in a given case, the Appellate Tribunal has power to grant appropriate interim relief. The interim relief can be granted where, in a given case, the order impugned is very harsh and *prima facie* illegal. The interim relief can be granted in various circumstances including in a case where the failure to grant interim relief may render the appellate power nugatory. In a given case, pending an appeal, the Appellate Tribunal can permit redemption of confiscated goods subject to deposit of a part of redemption fine and subject to furnishing of security, bank guarantee etc. for the balance amount. It all depends upon the facts and circumstances of the individual case. Needless to add that where the Tribunal is dealing with such an

application for grant of interim relief, the power to grant interim relief cannot be exercised in a routine manner or as a matter of course as the Tribunal is dealing with taxation and revenue laws and as public exchequer is involved. It is obvious that only when a strong *prima facie* case is made out that the Tribunal can grant appropriate interim relief. The Tribunal can always impose conditions for balancing the interests of the revenue and the assessee and for ensuring that that the amount of demand is secured in some form.

13. Therefore, in our considered view, the opinion expressed by the Appellate Tribunal in the impugned order is not correct. There is power vested in the Appellate Tribunal to grant interim relief subject to constraints which we have observed above.

14. As the Appellate Tribunal has not dealt with the merits of the case made out in the miscellaneous application, an order of remand will have to be made.

15. Accordingly, we pass the following order:

<u>O R D E R</u>

(i) The impugned order dated 18th April 2016 is hereby quashed and set aside and the application bearing No.C/MA(Ors)94791/15 dated 28th August 2015 is restored to the file of the Customs, Excise and Serviced Tax Appellate

Tribunal, West Zonal Bench, Mumbai. The said application shall be decided afresh in the light of law laid down by this Court in this judgment;

(ii) We request the Appellate Tribunal to decide the said application as expeditiously as possible and preferably within a period of three months from the date on which an authenticated copy of this judgment and order is produced before the it;

(iii) All contentions on merits of the application are kept open;

(iv) Appeal is partly allowed on the above terms with no order as to costs.

(A.K.MENON, J.) (A.S.OKA, J.)