IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CUSTOM APPEAL NO.110 OF 2015

M/s. KCF Impex Pvt. Ltd. .. Appellant
Vs
The Commissioner of Customs (Import). .. Respondent
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Shri M.H. Patil along with Shri Sachin Chitnis i/b Aparna Hirandagi for the Appellant.
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CORAM : A.S. OKA & RIYAZ I. CHAGLA, JJ

DATED : 7TH AUGUST 2017

P.C.

1. Heard learned counsel appearing for the Appellant. The Appellant preferred an Appeal before the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai challenging the order dated 7th March 2015 passed by the Commissioner of Customs (Imports) JNCH, Nhava Sheva, arising out of an order in Original No.133 of 2014-15. The Adjudicating Authority by an order in Original confirmed the duty demand of Rs.7,13,45,045/- along with interest thereon against the Appellant. The Appellate Tribunal by the first impugned order dated 16th October 2014 directed the Appellant to make a pre-deposit of Rs.1 Crore in addition to the amount already paid by the two Appellants within a period of eight weeks from the said date.

The Paragraph 6 of the first impugned order reads thus:

> "6. In the light of the foregoing, we direct the main appellant M/s.KCF Impex Pvt. Ltd. to make a pre-deposit of Rs.1.0 Crore (Rs.One crore only) in addition to the amount already paid and the co-appellants, Sri Vivek Kumar Agrawal and Sri. Sunil Lakhotia, to make a pre-deposit of Rs.10 lakhs each, within a period of 8 weeks and report compliance by 16/12/2014. The pre-deposit of Rs.One crore would only cover the differential duty liability on the 44 consignments of Gambier Star after adjusting the pre-deposit of about Rs.1.49 crore paid during investigation and appropriated in the impugned order. On such compliance, pre-deposit of the balance of dues adjudged against the appellants shall stand waived and recovery thereof stayed during the pendency of the appeals."

2. Thereafter, an Application for modification of the order dated 16th October 2014 was made by the Appellant which was dismissed by an order dated 23rd January 2015 passed by the Appellate Tribunal which is also impugned in this Appeal. Another Application made by the Appellant for modification of the order dated 16th October 2014 was dismissed by an order dated 17th March 2015. As a result of failure of the Appellant to comply with the order of pre-deposit dated 6th April 2015, the Appeal preferred by the Appellant before the Appellate Tribunal has been dismissed.

3. The first submission of the learned counsel appearing for the Appellant was that the Appellant had specifically pleaded financial hardship before the Tribunal when the Application for interim relief was argued on 15th September 2014. He invited our attention to the averments made in the Application for modification (Exhibit-J) and in particular in Clause (B) thereof. Secondly, he relied upon the statutory amendment made with effect from 6th August 2014 requiring the deposit of 7.5%. His submission is that some of the High Courts held that though the amendment was brought into force with effect from 6th August 2014, it will apply to the Appeals filed prior to 6th August 2014. He, however, invited our attention to a decision of a Division Bench of this Court in the case of ***Nimbus Communications Limited v. Commissioner of S.T., Mumbai-IV***[1], wherein a view is taken that the amendment which was brought into force on 6th August 2014 was not applicable to the Appeals filed prior to the said date. Lastly he invited our attention to the ground taken in the modification application that considering the amendment in Section 28 of the Customs Act, 1962, the Delhi High Court has been pleased to grant stay of operation of amendment carried out to Sub-section (11) of Section 28 of the Customs Act, 1962. He submitted that the substantial question of law arises for consideration of the Court in view of the aforesaid submissions.

1 2016(44) S.T.R. 578 (Bom.)

4. We have perused the impugned orders. In the first impugned order dated 16th October 2014, there is a categorical finding recorded by the Appellate Tribunal in Paragraph 5.7 that the Appellants have neither pleaded any financial hardship nor they have placed any evidence before the Tribunal in support of such a claim. We have carefully perused the averments made in the Application for modification of the said order. It is not the contention of the Appellant in the said Application that when the matter was argued before the Appellate Tribunal on 15th September 2014, the issue of financial hardship was canvassed by the Appellant. The contention raised in Clause (B) of the modification Application is that in the said Application of stay, the case of financial hardship was pleaded.

5. In the said Application and in the Appeal before the Appellate Tribunal, the Appellant may have pleaded several grounds and factual aspects but the question is that whether the same were agitated before the Appellate Tribunal during the course of hearing on 15th September 2014. It is not the case made out in the modification application that a specific plea on the financial hardship or financial constraint was raised on 15th September 2014 during the course of the submissions and was not considered. On the contrary, it appears that though the financial constraint was pleaded in the said application, it was not agitated at the time of hearing on 15th September 2014. The

submissions made by the Consultant appointed by the Appellant during the hearing of the Application for modification have been noted in Paragraph 3 of the second impugned order dated 23rd January 2015. We find that the Consultant appointed by the Appellant did not argue before the Appellate Tribunal that at the time of hearing of interim relief application, the issue of financial hardship was canvassed and was not dealt with. During the course of hearing of the second Application for modification which was decided by the third impugned order dated 17th March 2015, the only ground which was canvassed was that the Bank did not advance loan to the Appellant.

6. Therefore, we find no error in the approach of the Appellate Tribunal when in the first impugned order dated 16th October 2014, it was held that the Appellant neither pleaded the financial hardship nor placed any material in support of such a plea. Accordingly, there was absolutely no merit in the Applications for modification which have been decided against the Appellant by the two other impugned orders. Only on the ground of interim stay granted by a High Court to the amendment in Section 28 of the Customs Act, 1962, the Appellate Tribunal has not committed any error when the first impugned order of compulsory deposit was made. No substantial question of law arises on the basis of the order of the High Court.

7. Thus, in our opinion, there is absolutely no merit in this Appeal. We may note here that when we made a query to the learned counsel appearing for the Appellant whether the Appellant is in a position to comply with the order of pre-deposit, he states that the Appellant is not in a position to do so. Hence, we are not extending the time granted for deposit.

8. Accordingly, the Appeal is dismissed.

9. There shall be no orders as to costs.

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