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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO. 34 OF 2016

Parimal D. Mehta … Appellant

vs.

The Commissioner of Central Excise … Respondent

WITH
CENTRAL EXCISE APPEAL NO. 32 OF 2016

M/s. Meegora Steels Pvt. Ltd. … Appellant

vs.

The Commissioner of Central Excise … Respondent

……….

Mr. R. V. Desai, Senior Advocate a/w. Mr. K. R. Chaudhari & Mr. R. V. Shetty for Appellants in both matters.
Ms. P. S. Cardoza for Respondent in both matters.

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CORAM : A.S. OKA & A.K. MENON, JJ.
DATE : 10th OCTOBER, 2017

P.C.

1. Submissions were heard in the morning session of the learned Senior Counsel representing the appellant.

2. Appeal No. 32 of 2016 is filed by the assessee taking an exception to the judgment and order dated 2nd June, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), West Zonal Bench (for short "Appellate Tribunal").

3. By the impugned order dated 2nd June, 2015 the Appellate Tribunal dismissed the appeal on the ground of non compliance of the requirement of Section 35F of the Central Excise Act, 1944 (for short "the said Act"). The appeal was dismissed on the ground that the amount equivalent to 7.5% of the duty or penalty as per Section 35F of the said Act was not deposited by the appellant.

4. In Central Excise Appeal No. 34 of 2016, the challenge is to the same order dated 2nd June, 2015 passed by the Appellate Tribunal by which another appeal preferred by the appellant in the said Appeal has been dismissed on the same ground.

5. In both the cases, the appeal were filed after 1st October, 2014 when amendment made to Section 35F of the said Act had come into force.

6. The submission of the learned Senior Counsel appearing for the appellant is that on the date on which a lis comes into existence, a right to avail of the Statutory remedies available on that date vests in the litigant and by subsequent legislative amendment, the said vested right cannot be taken away. He invited our attention to the decision of the Division Bench of this Court in the case of ***Nimbus Communication Limited vs. Commissioner of Service Tax, Service Tax VI and Another***[1] which holds that the amended Section 35F of the Central Excise Act, 1944 is valid. The

1 **Central Excise Appeal No. 161 of 2016 decided on 25th July, 2016**

same decision holds that Section 35F as amended would apply to all appeals preferred after 6th August, 2014 even if the lis in respect of the same had commenced prior to the said date. His submission is that the said decision of the Division Bench in the case of *Nimbus Communication (supra)* is not a binding precedent.

7. He relied upon the decision of the Apex Court in the case of ***Hoosein Kasam Dada (India) Limited vs. State of Madhya Pradesh and Others.***[2] He submitted that though there is a reference to the said decision in the Judgment of the Division Bench in the case of *Nimbus Communication (supra),* the law laid down by the Apex court has not been considered. He urged that right which is vested in the litigant on the date of institution of the proceeding could not be taken away by a retrospective amendment.

8. He also relied upon another decision of the Apex court in the case of ***Ramesh Singh & Anr vs. Cinta Devi & Others.***[3] He placed reliance on a recent decision of the Apex court in case of ***K. Raveendranathan Nair vs. Commissioner of Income Tax & Another***[4]. He also relied upon decision of a Division Bench of this Court in the case of ***M/s. Vaibhav Steel***

2 1983 (13) E.L.T. 1277 (S.C.)

3 1996 SCC (3) 14

4 Civil Appeal No. 3131 of 2006 dated 10th August, 2017

Corporation vs. The Additional Commissioner of Sales Tax (VAT) and Others*[5]*.

9. He submitted that in the present case, the appellant is not in a position to make a deposit of 7.5% amount as provided under Section 35F and that is how the vested right of preferring an appeal has been taken away. He urged that a different view will have to be taken by this Bench.

10. Learned counsel appearing for the appellant relied upon the extracts of certain commentaries. The learned Counsel appearing for the respondent supported the impugned judgment and order.

11. We have carefully considered the submissions. In the case of *Nimbus communication (supra),* the Division bench decided three questions of law which were formulated in paragraph 2 of the said decision which read thus :

> *"(1) The right of appeal being a vested right, whether the provisions of law as applicable at the commencement of the lis would apply or the amended provisions as on the date of filing of appeal would apply ?*

5 Writ Petition No. 1735 of 2013 decided on 26th November, 2013

(2) Whether the second proviso to the amended section 35F can be interpreted as provided expressly or by necessary intendment that amended section 35F would apply to all appeals filed after 6.8.2014, even if the lis in respect of the same has arisen prior to 6.8.2014 ?

(3) Whether the amended section 35F of the Central Excise Act, 1944, w.e.f. 06.08.2014, reduces or puts fetters upon the vested right of appeal that an appellant has or the same increased the scope of the appellate package, thereby no impinging upon the vested right of the appellant ?"

12. Before the Division Bench, reliance was placed on the principles laid down in the case of ***Garikapatti Veeraya vs. N. Subbiah Choudhary***[6]**.** It was urged that the right of appeal is vested on the date on which a lis originates. The Division bench in paragraph 17 observed that such view is consistently taken by the Apex Court in the Appeals under Section 96 of the Code of Civil Procedure,1908.

13. After considering the various decisions of the Apex Court, the Division Bench upheld the validity of Section 35F and held that Section 35F as amended does not defeat or render the vested right of appeal illusory.

6 AIR 1957 SC 540

Paragraph 15 of the judgment shows that the decision in the case of *Garikapatti Veeraya (supra) and Hoosein Kasam Dada (supra)* were considered.

14. Now we turn to the decision in the case of *Hoosein Kasam Dada (supra)*. In paragraph 4 of the decision, the Apex Court observed that by amendment, the proviso to sub Section (1) of Section 22 of the Central Provinces and Berar Sales Tax Act, 1947 places substantial restrictions on the assessee's right of appeal as the amended proviso required deposit of the entire assessed amount as a condition precedent to the admission of the Appeal.

15. In the case of *Ramesh Singh (supra),* the Apex Court was dealing with a claim for compensation arising under Motor Vehicles Act, 1939. The said Act was repealed by the Motor Vehicles Act,1988. The argument was that for challenging an award made under the Motor Vehicles Act, 1939 after repeal of the Act of 1939, while preferring an appeal, the compliance with the provisions of 1988 Act is required to be made. The Apex Court negatived the said contention. In the case of *Vaibhav Steel Corporation (supra),* the Division Bench of this Court did not deal with the issue which has arisen for consideration in this appeal.

16. In the case of *K. Raveendranathan Nair (supra),* the Apex Court dealt with the case where issue was of substantial enhancement in Court fees payable on appeals. The Court held that in appeal, the Court fee payable was equivalent to the Court fee payable on the date on which the cause of action for commencement of the lis arose.

17. At this stage, we may make a reference to the amended as well as unamended section of 35F. Under unamended Section, the requirement was of deposit of the entire duty or penalty demanded. There was a discretion vested in the Appellate Authority to waive the said deposit. The amended Section 35F provides that only 7 ½ % of the duty or penalty in dispute will have to be paid as a condition for entertaining an appeal.

18. It will be also necessary to record that the Division Bench upheld the constitutional validity of Section 35F and held that amended Section 35F will apply to all appeals filed after 6th August, 2014, even if lis in respect of the same has commenced prior to 6th August, 2014.

19. Apart from the fact that the decision of the Division bench cannot be said to be *per curiam,* we find that the view taken by the Division Bench in the case of *Nimbus Communication (supra)* is based on consideration of several binding precedents. As far as this Bench is concerned, being a co-ordinate bench, we are respectfully bound by the said view. The appellant has neither demonstrated that the said decision is *per curiam* nor has

satisfied this Court that the decision requires reconsideration by a larger bench. We concur with the view taken by the Division Bench in the case of *Nimbus Communication (supra)*. Hence, no substantial question of law arises.

20. Appeals are dismissed with no orders as to costs.

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