

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 5885 OF 2015

M/s. Vatan Textile Limited
Through its Directors
Shafique Ahmed Khan s/o. Hasan Khan **....Petitioner.**

Versus

The Union of India and Ors. **....Respondents.**

**WITH
WRIT PETITION NO. 1346 OF 2016**

M/s. Vatan Textile Limited
Through its Directors
Shafique Ahmed Khan s/o. Hasan Khan **....Petitioner.**

Versus

The Union of India and Ors. **....Respondents.**

Mr. R.F. Totala h/f. Mr. R.A. Karwa, Advocate for petitioners.

Mr. D.S. Ladda, Advocate for respondent Nos. 2 and 3.

**CORAM :T.V. NALAWADE AND
SMT. VIBHA KANKANWADI, JJ.
DATED : 24/11/2018.**

ORDER : [PER T.V. NALAWADE, J.]

1. The first proceeding is filed to challenge the order made by Custom, Central Excise and Service Tax Appellate Tribunal (in short 'C.E.S.T.A.T. '), West Zonal Bench in Application No. E/STAY/98320/14-Mumbai and second proceeding is filed to challenge the order made by the same Tribunal in Application No.

E/STAY/1385/09-Mumbai. Both the sides are heard.

2. Both the proceedings were filed under section 35 (f) of Central Excise Act, 1944 by the petitioner for relief of dispensing with/for relief of waiver of condition of pre-deposit of duty and penalty amount for filing appeal in the Tribunal. In the first proceeding, the liability to pay duty was around Rs.1.0032 Crore and C.E.S.T.A.T. had initially directed to deposit Rs. 25 % of this amount as pre-condition for entertaining the appeal. The appellant deposited the amount of Rs. six lakh out of Rs.25 lakh and then challenged the said order of C.E.S.T.A.T. by filing Writ Petition No. 2622/1996 in this Court. This Court set aside the order of C.E.S.T.A.T. on 26.6.2006 and remanded the matter with direction to consider the plea of 'technical hardship' raised by the present petitioner. After remand, the aforesaid amount was reduced by C.E.S.T.A.T. to make it Rs. 12 lakh. As already amount of Rs. six lakh was deposited, the remaining amount was deposited by the petitioner and then the appeal was decided by C.E.S.T.A.T. The matter was remanded back by C.E.S.T.A.T. to Assistant Commissioner, Central Excise. The Assistant Commissioner maintained the previous order by deciding the matter in the year 2013. This order was again challenged before C.E.S.T.A.T. and this time for entertaining this appeal C.E.S.T.A.T. directed the petitioner to deposit Rs. 20 lakh as pre-condition for

filing the appeal.

3. In the second proceeding, the liability of duty was assessed at Rs. 2.73 Crore and penalty of Rs. 1.35 Crore was also imposed for getting redemption of capital goods which were worth of Rs.5.29 Crore. The penalty of Rs.2.73 Crore was imposed in respect of capital goods in this case. C.E.S.T.A.T. ordered petitioner to deposit 50% of the customs duty and 50% of Central Excise Duty. This order was challenged in this Court by filing Writ Petition No. 3700/2011. This petition was also allowed by this Court and the matter was remanded back for considering the ground of technical hardship raised by the present petitioner. C.E.S.T.A.T. has reduced the pre-condition amount to make it Rs. 25% in place of 50%. This order is challenged now in the second proceeding.

4. It is the case of petitioner from both the proceedings that on 5.11.2014 the petitioner company came to be declared as sick industry under Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'S.I.C.A.') by the Board of Industries and Financial Reconstruction (in short 'B.I.F.R.') and the petitioner is preparing scheme for rehabilitation. It is contention of the petitioner company that this circumstance is not considered by C.E.S.T.A.T. even after directions given by this Court and so, the orders made by

C.E.S.T.A.T. which are challenged in the two proceedings are liable to be set aside.

5. The two proceedings relate to different periods. The industry was set up in the year 1994 and from the submissions and record, it can be said that atleast five orders were made of the assessment of duty and penalty against the petitioner company which are in respect of the period starting from the date of setting up of the company and all these orders are challenged by the petitioner company. In addition to present two petitions, there are three other petitions of the petitioner company like Writ Petition No. 2492/12, 2493/13 and 2532/12. The submissions made and the record show that total liability of the company to the respondents is more than Rs. 20 Crore at present and the liability may be more if the interest amount is considered. The submissions made and the record show that the other Court had made order in one petition to deposit amount of Rs. 21 lakh for getting the interim relief, but this order is not complied with. There was interim relief in the present two proceedings granted by this Court due to which the two proceedings remained pending and the appeals pending before C.E.S.T.A.T. did not make progress. It appears that due to pendency of these proceedings the amount due is also not deposited by the petitioner company. Only when this Court vacated the interim relief

as the counsels were changed atleast on two occasions in the present matters, the argument was advanced in both the matters.

6. In view of the grounds mentioned to challenge the orders made by C.E.S.T.A.T., the relevant portion of the provisions of Central Excise Act, 1944 which needs to be considered is mentioned below :-

"35-F. Deposit, pending appeal of duty demanded or penalty levied. -Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:"

7. The aforesaid provision of Central Excise Act shows that discretionary power is given to C.E.S.T.A.T., the appellate forum and the appellate forum can dispense with the pre-condition of depositing the amount of duty, penalty etc. if such condition would cause 'undue hardship' to the appellant (emphasis added).

8. When the matter involves use of discretion by Court/Tribunal, in ordinary course, the appellate Court or this Court in a proceeding like present one is not expected to interfere with such order. This Court can only ascertain as to whether for refusal to use discretion, there were some circumstances including the conduct of the party and whether case of undue hardship is made out by the appellant.

9. In the first order which was made by the Tribunal in the year 2006 in the first proceeding the Tribunal had mentioned a circumstance like increase in sales from the year 2002 to 2004, though losses were shown by the petitioner company. It was held that due to this circumstance and other circumstances, the petitioner had failed to make out prima facie case for total waiver. Thus, the ground of financial hardship from other angle was considered by the Tribunal. At that time, the relevant record of the company was also

considered by the Tribunal. In the second proceeding, the order made by the Tribunal shows that Tribunal has touched the merits of the grounds of challenge to the assessment also to ascertain as to whether there is some arguable case in the appeal. The learned counsel for petitioner submitted that this approach is not permissible. This Court holds that such submission cannot be accepted. When the Court is expected to use the discretion, the Court is expected to consider to some extent the merits of the grounds also. In the present case, that was more necessary due to peculiar facts of the present matter.

10. The submissions made and the record show that the appellant company had imported material for manufacturing of goods in India and for that 100% exemption in duty was taken at the time of importing the material. The reasoning given by the assessing authority and the order of the Tribunal also show that all the documents are considered by the department and the learned counsel for the petitioner company was asked to explain the things before the Tribunal also. There was no record to show that the goods which were cleared in domestic market were manufactured from indigenous domestic material alone. Further, there was no D.T.A. permission and goods were cleared in domestic market in the names of various fictitious units. Three units found on the record were being

managed by the same family. These manufacturing units were not having manufacturing facilities of their own and they had tried to show that goods were manufactured by outsourcing. This claim was found to be false and it was noticed that the units of the petitioner were used for manufacturing of the goods of these fictitious units and then the goods were cleared in domestic market. There was no satisfactory account of utilization of imported material of the petitioner company. Thus, the goods manufactured by the petitioner company were sold by using the names of some fictitious units. Thus, the peculiar modus operandi was used for evasion of duty. The assessing authority has imposed penalty not only on the petitioner company, but also on the other units which were shown to be managed by the same family. Thus, the activity involved fraud, criminal wrong and it was not only irregularity or mistake. Such circumstances, conduct of the party cannot be ignored by the Court or Tribunal while using discretionary power. Thus, apparently false record was prepared for evasion of duty. In spite of these circumstances, the concession is given by the Tribunal in condition of pre-deposit and the order shows that the order was made after 'keeping in view the financial condition and also the admitted liability'. Thus, other things like admitted liability in respect of duty are also considered by the Tribunal and financial condition is also considered.

11. The aforesaid circumstances show that false record was created, there was criminal wrong committed to avoid the liability to pay the duty to respondents. Even when sales had increased, by creating false record of aforesaid nature, the liability was avoided and money was diverted to other fictitious units. In view of these circumstances, the contention of the petitioner company that it was declared as sick unit cannot be considered. The discretionary power cannot be used in favour of such company, persons.

12. From the aforesaid circumstances, it can also be said that due to the orders made by this Court of allowing the petitions, the Tribunal gave more concession and the pre-condition amount was reduced. Unfortunately, such orders are made by the Tribunals and the Courts after the order of remand of the matter made by this Court. By filing proceedings in this Court and by filing applications for waiver of the pre-condition, the petitioner has apparently misused the process of law and petitioner has successfully avoided the payment of huge amount of duty, penalty and interest for more than 10 years.

13. The learned counsel for petitioner placed reliance on some observations made in the cases reported as

MANU/MH/0206/2004 [Universal Ferro and Allied Chemicals Ltd. Vs. Customs, Excise and Service Tax Appellate Tribunal and Ors.] decided by this Court and MANU/MH/0135/2005 [Polymermann (ASIA) P. Ltd. Vs. The Union of India (UOI) and Ors.]. The facts and circumstances of each and every case are always different. When it is a matter of use of discretion by the Court, the facts and circumstances of each case need to be considered separately. There is no dispute over the proposition made in the aforesaid two cases, but the present matter has peculiar circumstances, which cannot be ignored. At the cost of repetition, this Court wants to observe that even when appellant company does not deserve, concession to much extent is given to the appellant company by C.E.S.T.A.T. This Court holds that no interference is possible in the orders made by C.E.S.T.A.T. which are under challenge. In the result, both the proceedings stand dismissed.

[SMT. VIBHA KANKANWADI, J.]

[T.V. NALAWADE, J.]

ssc/