IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7195 of 2018

India Medtronic Pvt.Ltd .. Petitioner
Versus
The Union of India and others .. Respondents

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Mr. Prakash Shah I/b PDS Legal for the petitioner.
Mr.Pradeep S. Jetly for the Union of India.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H.DANGRE, JJ.

RESERVED ON : 9th JULY 2018

PRONOUNCED ON : 24th JULY 2018

JUDGMENT (Per SMT.BHARATI H. DANGRE, J)

1 The petitioner Company engaged in trading of medical devices such as pacemakers, heart valves, spinal implants, neurological implants, stents etc. registered under the law of United States of America, has invoked the jurisdiction of this Court being aggrieved by the detention order dated 28th September 2017 passed by the Deputy Commissioner of Customs in exercise of powers conferred by clause (a) of sub-

section 142 of Customs Act, 1962. By the said order, it is directed that the amount of Rs.29,41,301/- along with interest be recovered from any money payable to M/s.India Medtronics Pvt. Ltd, Andheri (East), Mumbai, by detaining and selling any goods belonging to the petitioner by the Officers of Customs and/or Officers of Central Excise all over India.

Before dealing with the relief sought in the petition, we would briefly refer to some chronological facts.

2 The petitioner company which is duly incorporated under the provisions of Companies Act is having its registered office at 1241, Solitaire Corporate Park, Building no.12, 4th floor, Andheri - Ghatkopar Link Road, Andheri (East) Mumbai. The respondent no.2 is the Commissioner of Customs (Import) whereas the respondent no.3 is the Commissioner of Customs (Appeals). Respondent nos.4 and 5 are the officers subordinate to the respondent no.2.

The petitioner is engaged in the import and trading of various medical devices and during the normal course of business, the petitioner imported A & V Plastic Tubings claiming the benefit of exemption under notification 17/2001-CUS dated 1st March 2001 from the Basic Customs duty and the Additional Duty under section 3(1) of the Customs Tariff Act, 1975. The petitioner has produced on record a copy of the Bill of Entry in relation to the said goods dated 7th June 2001. It is the case of the petitioner that the goods were assessed provisionally and he was allowed to clear the goods on the basis of Provisional Duty Bond at nil rate of duty by extending the benefit of Notification no.17/2001-CUS dtd.1/3/2001. The petitioner was assessed finally vide Order-in-Original passed by the Dy. Commissioner of Customs, Mumbai and the demand of Rs.29,41,301 along with interest, was confirmed against the petitioner. The petitioner was, however, denied the benefit of exemption under notification no.17/2001-Cus on the ground that the party had brought A.V. Tubings, although of medical grade but in running length, it needs to be cut into pieces subsequently so as to make it usable as an accessory for medical machines. The Order-in-Original recorded that the A.V. Tubings in the running length is not a complete accessory but an intermediate product for accessory and would not fall within the ambit and scope of the Custom notification dated 1st March 2001 at Serial No.3, 4, 8B.

3 Aggrieved by the said order dated 21st August 2009, the petitioner preferred an Appeal under Section 128 of the Customs Act to the Commissioner of Customs (Appeals) Mumbai, Zone-1 along with an application for grant of stay. It is to be noted that in the Appeal petition, the address to which the notices may be sent to the appellant was cited as under:-

> India Medtronics Pvt. Ltd 912/2, G.I.D.C, Makapura, Baroda and copy to be forwarded to Willingdon and Associates, Trident "C" Block, 3rd floor, Opposite Jerry Compound, Race Course, Baroda.

In the appeal, the Appellant prayed for setting aside of the impugned order passed by the Dy. Commissioner of Customs. A separate application was filed for stay and waiver of pre-deposit. In the said application, the appellant sought to invite attention of the Appellate Authority to the gross error committed by the adjudicating authority in denying the exemption benefit and that highlighted a *prima facie* case for grant of stay to the impugned order. Further in the application, the hardship faced by the appellant on being fastened with the burden, by the impugned order was also highlighted by stating that their financial condition is in bad shape due to business losses and poor liquidity. It was also stated that they owe huge debts and have no source of funds to meet the duty/penalty liability imposed on them. It was also stated that necessary evidence would be produced at the time of personal hearing on the stay application.

4 The Commissioner of Customs (Appeals) i.e. respondent no.3 took up the application for grant of stay filed by the petitioner appellant and on 22nd March 2012 made the following observation :

> *No one appeared for personal hearing on 08.02.2012 but written submission signed by Shri. Virendera Sancheti, Authorised Representative of the appellant has been submitted and reiterated the grounds of appeal. Party has sought grant to stay to the operation of impugned order dated 28.01.2010.*
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> *Considering the submissions, I direct the appellant to deposit the demand confirmed within one week from the date of issue of the order. On deposit of the said amount the appeal would be taken up on merit.*

5 Copy of the said order was forwarded to the petitioner on the address mentioned in the appeal memo with a copy to Willingdon and Associates on the address also given in the Appeal memo. The respondent no.3 took up the matter for hearing on 14th May 2012 when the petitioner was represented by a counsel for conduct of personal hearing. The counsel for the petitioner placed reliance on various case laws and made an earnest request to withdraw the interim order passed on 22nd March 2012. The respondent no.3 took note of the contention raised before him and was pleased to modify its interim order by directing the appellant to deposit 50% of the demand confirmed within two months from the date of the issue of the order. The respondent no.3 made the following observation in its order dated 16th June 2012.

> Shri Mayur Shroff, Advocate, appeared on 14.05.2012 before me for personal hearing. The applicant placed reliance on the various case laws covering directly the issue involved. The party requested for the withdrawal of the Interim Order No.15 dated 22.03.2012 on facts and merits. I note that the party's contention regarding the personal hearing and authorized representative appearing for the same is correct and allow modification of the same accordingly.

> The party has submitted the following case laws in their support in 2001(134) ELT 696(T) Olympic Pharmacare P.Ltd Vs. Commissioner of Customs and 2009 (245) ELT 596(T) Sutures India Pvt. Limited. They requested for reconsideration as the balance of convenience was in their favour and they had prima facie strong case in their favour.
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> Considering the submissions, I direct the Appellant to deposit 50% of the demand, confirmed within two months from the date of issue of this order. On deposit of the said amount, the appeal will be taken up on merit.
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> The Appellant is also directed to produce the necessary evidence of the deposit of the amount failing which the case will be dismissed without going into the merits of the case.

6 The petitioner has set out a case and the learned counsel Shri Prakash Shah appearing for the petitioner would submit that the Commissioner of Customs modified the interim order dated 22nd March 2012 by an order which was passed on 16th June 2012 and thereby directed the petitioner to pre-deposit 50% of the demand confirmed within two months, failing which the case will be dismissed without going into the merits of the case. It is then the case of the petitioner that

since there was no compliance of the order passed by the Commissioner on 16th June 2012, the Commissioner took up the matter for further hearing and on 13th September 2012, another order came to be passed, re-directing the appellant to comply with the interim order passed on 22nd March 2012. However, it is the specific case of the petitioner that this order dated 13th September 2012 was never served on the petitioner.

On failure to get any update from the Recovery Officials and in order to ascertain the status of the appeal, the petitioner filed an RTI Application and it is through an application dated 9th May 2017 the petitioner sought a copy of the order dated 13th September 2012, which he received on 26th May 2017. In response to the RTI Application, the petitioner was only provided the proof of dispatch from the department but it in no way, provided a proof of service of the order dated 13th September 2012 on the petitioner.

It is the specific case of the petitioner that on further inquiry from the department, it appears that even the department does not have any proof that the order dated 13th September 2012 is served on the petitioner. Thereafter, on 28th

September 2017, the petitioner was served with a detention order which is impugned in the present petition by which the respondent no.4 has instructed all the field officers to recover the demand confirmed by the Order-in-Original dated 21st August 2009 from all the monies payable to the petitioner. It further instructed to recover the said amount by detaining and selling the goods belonging to the petitioner. The petitioner attempts to canvass before us that when he approached the respondent no.3 inquiring about the status of his Appeal assailing the Order-in-Original dated 21st August 2009, he was made to understand that subsequent, to the order dated 13th September 2012, no further order has been passed by respondent no.3 on the appeal filed by the petitioner, either deciding or dismissing his appeal. The petitioner had addressed a detailed communication to the respondent no.3 on 15th January 2018 which has been placed on record in form of Exhibit-J. The petitioner requested the respondent no.4 to keep the proceedings initiated by the detention order in abeyance till any communication is received from respondent no.4. However, no communication was received by the petitioner and on 7th May 2018, he received a communication from respondent no.5 directing the petitioner to pay the purported dues of Rs.29,41,301/- along with interest within 10 days, failing which steps were directed to be taken to release the amount in accordance with the provisions of Section 142(1)(c) of the Act read with Rule 4 of the Customs (Attachment of Property of defaulter for Recovery of Government dues) Rule 1995. The petitioner is given an impression that the Appeal filed by the petitioner is still pending adjudication before respondent no.3. However, the petitioner has made a categorical statement that vide demand draft drawn on 12th June 2018, he has deposited an amount of Rs.14,71,651/- as a compliance of the interim order dated 22nd March 2012 read with Miscellaneous order dated 16th June 2012 read with the order dated 13th September 2012. He has also made a request for condoning the delay in compliance of the interim order by addressing a communication dated 13th June 2012.

7 In support of the petition, learned counsel Shri Prakash Shah would submit that the impugned detention order

is ex-facie erroneous, premature and without authority of law. He would submit that against the Order-in-Original passed on 21st August 2009, an Appeal was preferred to the respondent no.3 along with an application for stay. He would not dispute that on 13th September 2012, the respondent no.3 directed the petitioner to pre-deposit 15% of the demand confirmed by the Order-in-Original dated 21st August 2009 within two weeks from the date of receipt of the order. His specific submission is that the order dated 13th September 2012 was never received by the petitioner and therefore, he was not aware that he had an option of paying 50% of the demand confirmed within two weeks so as to list the appeal for final hearing on merits. The learned counsel would submit that he carried an impression that the Appeal is still pending, since nothing contrary was communicated to the petitioner. Shri Shah would submit that the pre-deposit of the amount as a condition precedent would not be a condition precedent for hearing an application for grant of stay and he would submit that in terms of Section 129E of the Customs Act, 1962, on consideration of the undue hardship pointed out by the appellant, Commissioner had directed an amount of 50% to be deposited but he was not made aware of an order passed by the Commissioner of Customs (Appeals) directing the appellant to deposit 50% of the demand confirmed within two months and it was only on deposit of such amount, the Appeal would be heard on merits. Shri Shah would submit that in absence of the petitioner having any knowledge of such an order, the amount was not deposited since the petitioner was under a bonafide impression that the Appeal was pending before the Commissioner of Customs (Appeals). Shri Shah would submit that in any contingency, now he has complied with the said stipulation of deposit of 50% of the amount which has been confirmed by the Order-in-Original and an amount of Rs.14,70,651/- deposited by him is sufficient compliance of section 129A of the Customs Act 1962. He would submit that in this backdrop, the impugned order of detention directing the recovery of the amount is pre-mature and bad in law, and his Appeal needs to be heard on its merits.

8 In response to the writ petition, the Dy. Commissioner of Customs has filed an affidavit on 9th July

2018. It is the specific case set out in the said affidavit that the Commissioner (Appeals) vide Order-in-Original No. 761/ MCH/AC/Gr.VB/2012 dated 12th September 2012 directed the petitioner to comply with the interim order dated 22nd March 2012 as no evidence of payment was brought on record by the petitioner. It is further stated that letter dated 28th September 2012 was issued to the petitioner directing them to deposit 50% of the demand confirmed along with the applicable interest. It is further stated that no payment has been made by the petitioner upto 13th June 2018. The affidavit also states that several letters were issued to the petitioners to comply with the orders, but neither the petitioners nor its representatives came forward to deposit the amount, which resulted into issuance of detention notice to all the field officials for recovery of government dues. It is also stated in the affidavit that the contention of the petitioner that he has never received any correspondence made by the Department regarding recovery which was issued on the address available on the file and the petitioner obtaining the order dated 13th September 2012 through RTI application is not acceptable. It is stated that the it was obligatory on the part of the petitioner to intimate the change in address to the Department (Appellate Authority) but the same was never done. It is also stated that the petitioner who were the appellant in the Miscellaneous Application which was filed after the interim order was passed on 22nd March 2012, was properly tracked by the petitioners. However, when the petitioner failed to get the complete relief and was directed to pay 50% of the duty involved, the petitioner chose to ignore the order. It is further stated that the contention of the petitioner that it never tracked for five years an order which they had themselves appealed, is far fetched. A categorical statement is made in the affidavit that the Miscellaneous Application filed by the petitioner was decided by the Commissioner (Appeals) i.e. respondent no.3 on 16th May 2012 with direction to pre-deposit 50% of the demand confirmed within two months from the date of issue of the order, failing which the case will be dismissed without going into merits of the case. It is further stated that the Commissioner (Appeal) by order dated 12th September 2012 had re-directed the petitioner to comply with the interim order within two weeks of the receipt of the order. However, on account of utter failure on part of the petitioner to comply with the direction, the Appeal filed by the petitioner was deemed as dismissed for non-compliance of the earlier Miscellaneous order dated 16th May 2012 and accordingly, the relevant entry in Appeal Register maintained in the section was taken. The learned counsel Shri Jetly relied on the said affidavit and would submit that there is no Appeal pending before the respondent no.3 and the petitioner has rather misconstrued the status of their appeal by treating the same as "still pending" for final decision, despite the fact that the condition of deposit of 50% of confirmed demand was not fulfilled. Mr. Jetly would submit that the petitioner after depositing the amount of Rs.14,71,651/- on 12th June 2018 did not approach the Commissioner of Customs (Appeals) for condonation of delay in compliance of the order and for restoration of the Appeal. He would submit that when the statute itself makes it imperative that whenever an appeal is to be filed and the decision or order appealed against, relates to any duty or interest demanded in respect of goods, the person desirous of appealing against such decision or order shall deposit the duty and the interest demanded or the penalty levied. He would submit that the proviso appended to section 129E conferred a discretion on the Commissioner to dispense with such deposit, on undue hardship being pressed into service. Shri Jetly would submit that the respondent no.3 has exercised the said discretion in favour of the petitioner and had modified its interim order dated 22nd March 2012, on 16th May 2012 and reduced the demand to the extent of 50%. Shri Jetly would submit that inspite of such concession being made in favour of the petitioner, no compliance was made by him in the period granted and since the Appeal was dismissed for non-compliance of the condition stipulated in the order dated 12th September 2012, the respondent authorities were perfectly justified in issuing the detention order dated 28th September 2017.

9 We have carefully considered the averments as contained in the petition and the affidavit in reply filed on behalf of the Revenue and also the oral submissions advanced on behalf of the learned counsel for the respective parties.

Chapter XV of the Customs Act, 1962 contains a provision for appeals and any person aggrieved by any decision or order passed under the Act by an Officer of customs lower in rank, than the Principal Commissioner of Customs or Commissioner of Customs, is entitled to invoke the remedy of Appeal to the Commissioner (Appeals) within 60 days from the date of communication of the order or decision. Section 128 prescribes the procedure to be followed by the Commissioner (Appeals) which contemplates an opportunity to the appellant to be heard if he so desires. By virtue of sub-section 4A, the Appeal is to be decided within a period of six months from the date which it is filed and the order of the Commissioner disposing of the appeal is to be in writing, stating the points for determination, the decision and the reasons for the decision.

Section 129E imposes a condition for entertainment of an Appeal by the Tribunal or the Commissioner (Appeals), as the case may be, and the existing Section 129E was substituted by Act No.25 of 2014 with effect from 6th August 2014. Prior to its substitution, the person desirous of appealing against a decision relating to any duty and interest demanded in respect of goods, not under the control of Custom Authorities or against any penalty levied under the Act, was mandated by the statute to deposit the duty and the interest demanded or the penalty levied prior to the Tribunal or the Commissioner (Appeals) entertaining any Appeal. Since in the present case, the Order-in-Original is dated 24th August 2009 and the petitioner has preferred an Appeal under Section 128 on 18th September 2009, he is governed by Section 129E as it stood prior to its amendment with effect from 6th August 2014.

As per the said provision, whenever any Appeal is filed against a decision or order, in respect of the goods which are not within the control of the custom authorities and it relates to any duty and interest or imposition of any penalty levied under the Act, it is imperative on the person desirous of filing such an appeal to deposit the amount of duty and the interest demanded or the penalty levied. By virtue of a proviso inserted to the said section, the Commissioner (Appeals) in a particular case, if he is satisfied that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) may dispense with such deposit, subject to such conditions as he may deem fit to impose so as to safeguard the interest of the Revenue. The application of such a nature which is filed before the Commissioner for dispensing with the deposit of duty and interest demanded or penalty levied shall be decided if it is possible to do so within 30 days from the date of its filing. The said section came to be amended by Act No.25 of 2014.

10 The right of Appeal is a creature of a statute and legislature is yet within its power to confer such a right subject to stipulation and conditions as long as they are not so onerous so as to amount to be unreasonable restriction on exercise of such right and making it illusory. Since right of Appeal cannot be claimed as an absolute right, it is necessarily to be exercised in the manner in which it can be availed as provided in a statute. Since it is a statutory right, it can be circumscribed by the conditions in its grant. If a statute enumerates certain conditions and provides that only on compliance of certain

conditions, the right of Appeal available under the statute can be availed, then it is imperative that those conditions/stipulations must be strictly adhered to and complied with. Section 129 provides conditional right of Appeal in respect of an Appeal against the duty demanded or penalty levied. Although the said section expressly does not provide for rejection of Appeal for non-deposit of duty of penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal failing which the Appellate Tribunal/Authority is fully competent to reject the Appeal. The said position of law has been laid down as early in the year 1988 by the Hon'ble Apex Court in case of ***Vijay Pradhan D. Mehta Vs. Collector of Customs***,[1] Their Lordships observed thus :-

> *These observations cannot be applied to the facts of this case. Here we are concerned with the right given under Section 129A of the Act as controlled by Section 129E of the Act, and that right is with a condition and thus a conditional right. The petitioner in this case has no absolute right of stay. He could obtain stay of realisation of tax levied or penalty imposed in an appeal subject to the limitations of Section 129E. The proviso gives a discretion to the authority to dispense with the*

1 1988 (4) SCC 402

> *obligation to deposit in case of "undue hardships". That discretion must be exercised on relevant materials, honestly, bona fide and objectively. Once that position is established it cannot be contended that there was any improper exercise of the jurisdiction by the Appellate Authority. In this case it is manifest that the order of the Tribunal was passed honestly, bona fide and having regard to the plea of 'undue hardship' as canvassed by the appellant. There was no error of jurisdiction or misdirection".*

It has been consistently held by the Hon'ble Apex Court as well as this Court that a reasonable condition imposed, by way of a statutory power exercising the right of Appeal, unless and until the said condition either defeats or renders the vested right of Appeal illusory, in no way affects the vested right of Appeal. The stipulation contained in Section 129E of deposit of duty amount ensured that the amount is secured and was included so as to protect the interest of the Revenue.

11 Mr.Shah does not dispute the said settled position of law and would submit that it was only on the factual background of the matters, since the order passed by the appellate authority on 12th September 2012 was not

communicated to the petitioner, 50% amount as modified by Appellate Authority could not be deposited.

12 If the mandate of the statute requires to make pre-deposit of some amount as a condition precedent, entertainment of an appeal by the appellate authority, then, compliance of the said condition is mandatory and we need not dilate on the settled positiion, which is also not disputed by the learned counsel for the petitioner Shri Prakash Shah. However, the petitioner is aggrieved by the fact that the respondent no.3 i.e. Commissioner of Appeal has himself modified the earlier order passed by it by passing an order on 16th May 2012 and has reduced the said amount by 50% and has exercised a discretion conferred upon him by first proviso to section 129E. The specific case of the petitioner is that the order passed by the Appellate Authority making it as a condition precedent for hearing of the appeal and directing dismissal of the appeal in absence of the amount being deposited was never communicated to the petitioner.

We find sufficient substance in the said argument advanced by Shri Shah as the Revenue in its affidavit has not tendered any document on record to rebut the said contention and in support of the stand of the revenue that the order passed on 13th September 2012 was communicated to the petitioner. It is apparent from record that when the petitioner filed an appeal, the address that was tendered was at G.I.D.C, Makapur, Baroda and when the order is passed on 12th September 2012, the said order has been forwarded to the petitioner at the same address i.e. M/s.India Medtronic Pvt. Ltd, 919/2, GIDC Estate, Makarpura, Baroda 390 010, and also to the Willingdon and Associates, Trident 'C' Block, 3rd floor, Opp GERI Compound, Race Course, Vadodara. Perusal of the cause title of the present petition would reveal that the address reflected by the petitioner as having its registered office is stated to be at 1241, Solitaire Corporate Park, Bldg No.12, 4th floor, Andheri Ghatkopar Link Road, Andheri (East), Mumbai. Further, a statement is made in the affidavit filed by the Deputy Commissioner of Customs that it was the duty of the petitioner to communicate the authorities with the changed address and the changed address was not informed by the petitioner to the department. It is thus clear that the said order which has been passed on 13th September 2012 making the condition of deposit of 50% amount as a condition precedent for hearing of appeal and in absence of which directing its dismissal was never communicated to the petitioner. Thus, the petitioner was never made aware of the fact that the Appeal filed by him resulted into a dismissal on expiry of period of two weeks from 12th September 2012. It is for the first time in the affidavit which is tendered on behalf of the Revenue the petitioner is made known that by deeming fiction, the appeal filed by him stand dismissed on expiry of period of two weeks from 13th September 2012 in view of the contingency that the petitioner has failed to deposit 50% amount as directed by the Commissioner (Appeals).

In any contingency, the petitioner has now deposited an amount of Rs.14,70,651/- on 12th June 2018 and the petitioner has also made a request to the Commissioner of Customs (Appeals) informing about the compliance of the order directing deposit of 50% of the demand duty. It is apparent that while addressing the said communication on 12th June 2012, the petitioner was not aware that the Appeal is dismissed and it is only in the reply it is disclosed that it is deemed to be dismissed. In such circumstances, the interest of justice would be served if the appeal filed by the petitioner is restored to its file and the Commissioner is directed to decide the same on its own merits.

In light of the aforesaid observation, we pass the following order :

The Appeal against Order-in-Original no.339/AC/GR.VB/RS/2008-09 pending on the file of respondent no.3 – Commissioner of Customs (Appeals) is restored to its file. Respondent no.3 – Commissioner of Customs (Appeals) is directed to decide the appeal by affording an opportunity of hearing to the petitioner and to decide the Appeal in terms of Section 128 of Customs Act, within a period of two months from the date of this order.

(SMT. BHARATI H. DANGRE, J.) **(S.C. DHARMADHIKARI, J.)**