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

CENTRAL EXCISE APPEAL NO. 239 OF 2017

The Commissioner of Central Excise & Customs Nashik – II Commissionerate … Appellant

Versus

M/s. Nashik Forge Pvt. Ltd. …Respondent

Mr. Swapnil Bangur, with Mr. J.B. Mishra for the Appellant.

CORAM: M.S.SANKLECHA & RIYAZ I. CHAGLA, JJ.
DATED: 17TH SEPTEMBER, 2018.

PC:-

1. This Appeal under Section 35G of the Central Excise Act, 1944 challenges the order dated 27th January, 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal).

2. The Revenue has urged the following questions of law for our consideration:-

> ***(a) "Whether the Tribunal committed substantial error of law by allowing Respondent's appeal without examining the case on merit in spite of charge made out in the notice emphasizing contravention of the provisions of Rule 8(3A) of Central Excise Rules, 2002?***
>
> ***(b) Whether denial of Cenvat credit under Rule 8(3A) of Cenvat Credit Rules, 2004 for a temporary period due to assessee's own default and for the purpose of discipling the assessee only can be***

construed as a breach of fundamental right to business as enshrined in Article 19(1) (g) of the Constitution of India?"

3. The proceedings against the Respondents were commenced on the basis of violation / breach of Rule 8(3A) of the Central Excise Rules, 2002. The impugned order of the Tribunal has noted that Rule 8(3A) of the Central Excise Rules, 2002 has been struck down as unconstitutional by the High Courts of Gujarat, Madras & Punjab & Harayana by the following judgments:

(a) Indsur Global Ltd. Vs. Union of India [1]

(b) Shreeji Surface Coatings P. Ltd. Vs. Union of India[2]

(c) Malladi Drugs & Pharmaceuticals P. Ltd. Vs. Union of India[3]

(d) Sandley Indus. Vs. Union of India[4]

4. In the above view the impugned order allows the Respondent's Appeal as the Rule under which the proceedings were commenced against the Respondent were held to be unconstitutional.

5. We find that when a provision has been declared unconstitutional by a Court, then the Tribunal is bound to follow it

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1 2014 (310) ELT 833 (Guj)

2 2015 (320) ELT 764. (Guj.)

3 2015 (323) ELT 489 (Mad.)

4 2015 (326) ELT 256 (P & H)

as held by this Court in ***C.C.E., Mumbai – III Vs. Valson Dyeing Bleaching & Printing Works***[5]***.*** In the above case, the Tribunal allowed the Appeal of the Respondent holding that the basis of the proceeding therein was on account of breach of notification No. 42 of 1998 (NT) 10th December, 1998. This notification had been declared *ultra vires* by the Madras High Court in the case of ***Beauty Dyers Vs. Union of India***[6]***.*** This Court after placing reliance upon its earlier decision in the case of ***C.I.T. Vs. Godavaridevi Saraf***[7] which held that the Tribunal was justified in following the judgment of the Madras High Court in the case of ***Beauty Dyers (Supra)***. Once the provision has been declared *ultra vires* by any High Court then one has to proceed on the basis that the provision which has been declared as unconstitutional is non-existant. Therefore, unless a contrary decision is given by any other competent Court, the Tribunal in the state has to proceed with the decision of the other High Court as it is the law of land and binding upon it. Nothing has been shown to us as to why we should not follow the decision of our Court in ***Valson Dyeing (Supra)*** and ***Godavaridevi Saraf (Supra)***. No submission has been made before us as to why the decision of the other High

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5 2010 (259) E.L.T. 33 (Bom.)

6 2004 (166) E.L.T. 27 (Mad.)

7 (1978) 113 ITR 589.

Courts declaring Rule 8(3A) of the Central Excise Rules, 2002 unconstitutional, should not be accepted by this Court.

6. In the above view, the question as proposed do not give rise to any substantial questions of law.

7. Accordingly, the Appeal is dismissed.

(RIYAZ I. CHAGLA J.) **(M.S.SANKLECHA, J.)**