IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 380 OF 2019

M/s. West Coast Ingots Pvt. Ltd.
a Company incorporated under the
Companies Act, 1956 and having
its office at Kundaim Industrial
Estate, Kundaim- Goa and represented herein
by its Director Mr. Achintya Mittal,
Major in age. ... Petitioner

Versus

1. STATE OF GOA,
through its Chief Secretary,
having office at Secretariat,
Porvorim, Goa.

2. ASST. COMMISSIONER OF COMMERCIAL TAXES,
Government of Goa,
Vikrikar Bhavan, MG Road,
Panaji- Goa- 403 001.

3. COMMERCIAL TAX OFFICER,
Government of Goa, Vikrikar Bhavan,
MG road,
Panaji – Goa – 403 001. ... Respondents

Mr. Y.V. Nadkarni and Mr. Sanket Kamat, Advocates for the petitioners.

Mr. D.J. Pangam, Advocate General with Mr. S. Redkar, Additional Government Advocate for the respondents.

Coram:- M. S. SONAK &
NUTAN D. SARDESSAI, JJ.

Date:- 17th September, 2019

ORAL JUDGMENT : (per M.S. Sonak, J.)

Heard Mr. Y.V. Nadkarni and Mr. S. Kamat, learned Counsel for the petitioner and Mr. Pangam, learned Advocate General with Mr. Redkar, learned Additional Government Advocate for the respondents. With the consent and at the request of the learned Counsel for the parties we proceed to dispose of the petition finally in terms of the order earlier made on the issue of final disposal.

2. In this case, the authorities under the Goa Tax on Entry of Goods Act, 2000 (the said Act) served a demand notice on the petitioner on 6th May, 2016. The petitioner, aggrieved by such demand notice/assessment instituted an appeal in terms of Section 28 of the said Act, before the Assistant Commissioner of Commercial Taxes, who is the designated First Appellate Authority.

3. By order dated 5th February 2018, the First Appellate Authority, dismissed the appeal on the ground that the petitioner had failed to deposit the entire demanded tax amount with the respondents. For doing this the First Appellate Authority, referred to the provisions of Section 28 of the said Act including in particular, Section 28 (3) of the said Act.

4. The petitioner aggrieved by the order dated 5th February, 2018 made by the First Appellate Authority, instituted a second appeal before the Administrative Tribunal (Tribunal) by invoking the provisions of Section 29 of the said Act. The Tribunal, has also dismissed this second appeal, upholding the interpretation of the First Appellate Authority regards the provisions of Section 28(3) of the said act. Hence, the present petition.

5. Mr. Nadkarni, learned Counsel for the petitioner submits that Section 28 (3) (a) of the said Act provides that no appeal against an order of assessment shall be entertained by the Appellate Authority unless it is accompanied by satisfactory proof of the payment of tax and penalty "*not disputed*" in the appeal. He submits that in the present case, the tax amount in its entirety was disputed by the petitioner and therefore, there was no question of payment of the said amount to the said respondents. He submits that in these circumstances the First Appellate Authority was not right in even

refusing to entertain the petitioner's appeal on the ground of any alleged failure on the part of the petitioner in disputing the demanded tax amount, which was seriously disputed.

6. Mr. Nadkarni, learned Counsel submits that if the interpretation of the First Appellate Authority as approved by the Tribunal has to be sustained then, the provisions of Section 28 (3) of the Act are liable to be declared as ultra vires the Constitution of India. He submits that the provision would then be harsh and arbitrary, inasmuch as it would deprive all the petitioners of even of a right of a single appeal to the Appellate Authority.

7. Mr. Nadkarni, therefore, submits that this Court should, therefore, hold that the deposit or the payment of the entire demanded amount is not at all a prerequisite for entertainment of the appeal. In the alternate, Mr. Nadkarni submits that Section 28(3) of the said Act, to the extent it requires the entire demanded amount to be paid as precondition for entertainment of the Appeal, be declared as ultra vires and unconstitutional.

8. Mr. D.J. Pangam, learned Advocate General counters the contentions of Mr. Nadkarni. On the issue of challenge to the vires, the learned Advocate General submits that a right to appeal is never an inherent right. He submits that therefore the legislature is always competent to hedge such right with the requirement of pre-deposit.

He relies upon decision of the Division Bench of this Court in the case of *Walchandnagar Industrial Limited v/s. The Municipal Corporation of the City of Pune and Ors.* reported in 2014 (2) All MR 766, in which, the Division Bench of this Court has upheld the constitutional validity of similar provisions.

9. Mr. D.J. Pangam, learned Advocate General further submits that the Tribunal in the present case has exercised powers under Section 29 of the said Act which empowers the Tribunal to issue directions for payment of tax notwithstanding the fact that the appeal has been preferred against it. He submits that direction for deposit of taxes has not even been questioned by the petitioner. He submits that for failure to comply with the directions, the Tribunal, was quite justified in dismissing the petitioner's appeal. He therefore submits that there is no jurisdictional error in the view taken by both by the First Appellate Authority or the Tribunal and therefore, this petition may be dismissed.

10. The rival contentions now fall for our determination.

11. The provisions of Section 28 of the said Act, read as follows:

28. Appeals.– (I) Any person objecting to any order affecting him passed under the provisions of this Act may appeal to such authority as may be prescribed (hereinafter referred to *as the "appellate authority").*

(2) The appeal shall be preferred within sixty days,–

(i) in respect of an order of assessment, from the date on which the notice of assessment was served on the appellant, and

(ii) in respect of any other order, from the date on which the order was communicated to the appellant: Provided that the appellate authority may admit an appeal preferred after the period of sixty days aforesaid but within a further period of one hundred and eighty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within that period.

(3)(a) No appeal against an order of assessment ***shall be entertained by the appellate authority unless it is accompanied by satisfactory proof of the payment of the tax and penalty not disputed*** *in the appeal.*

(b) Notwithstanding that an appeal has been preferred under sub-section (1), the tax or other amount shall be paid in accordance with the order against which the appeal has been preferred:
Provided that the appellate authority may in its discretion, give such directions as it thinks fit in regard to the payment of tax or other amount payable under clause (b) if the appellant furnishes sufficient security to its satisfaction in such form and in such manner as may be prescribed.

(4) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(5) In disposing of an appeal, the appellate authority may, after giving the appellant a reasonable opportunity of being heard,

(a) in the case of an order of assessment or penalty,–

(i) confirm, reduce, enhance or annul the assessment or penalty or both;

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed; or

(iii) pass such other orders as it may think fit; and

(b) in the case of any other order, confirm, cancel or vary such order.

(6) Every order passed on appeal under this section shall, subject to the provisions of sections 29 to 34, be final.

[emphasis supplied]

12. Sub Section 3 (a) of Section 28, in terms provides that no appeal against an order of assessment shall be "*entertained*" by the Appellate Authority unless it is accompanied by satisfactory proof of the payment of the tax and penalty "*not disputed*" in the appeal.

13. The aforesaid provision speaks about the very entertainment of the appeal. This means that if the appellant fails to produce satisfactory proof of payment of the tax and penalty "*not disputed*" in the appeal, the Appellate Authority will be justified in not even

entertaining the appeal, much less proceed to decide the appeal on merits. However, what is significant in these provisions is the requirement to pay and produce satisfactory proof of the payment of tax and penalty which is "*not disputed*" in the appeal. Requirement, therefore, is to pay the undisputed amount, as a precondition for the very entertainment of the appeal. Once the undisputed amount is paid and satisfactory proof of payment is produced before the First Appellate Authority, the Appellate Authority is required to "*entertain the appeal*" in terms of Section 28 (3)(a) of the said Act.

14. There is a difference in the phraseology employed in Sections 28(3)(a) and 28(3)(b) of the said Act. Section 28(3)(a) refers to the very entertainment of the appeal and provides that no appeal against an order of assessment shall be entertained by the appellate authority, unless, it is accompanied by satisfactory proof of payment of tax and penalty *"not disputed in the appeal".* In contrast, Section 28(3)(b) provides that notwithstanding that an appeal has been preferred under Section 28(1), the tax or other amount, shall be paid in accordance with the order against which the appeal has been preferred. The proviso only confers discretion upon the appellate authority to give such directions as it thinks fit in regard to the payment of tax or other amount *"payable under clause (b)",* if the

appellant furnishes security to its satisfaction, in such form and in such manner, as may be prescribed.

15. The aforesaid means that the discretion in terms of the proviso to Section 28(3)(b) is to be exercised in respect of the tax or other amount payable under Section 28(3)(b) which, in turn, refers to the *"order against which the appeal has been preferred".* This means that Section 28(3)(a) of the said Act refers to the payment of tax and penalty *"not disputed in the appeal".* In contrast, Section 28(3)(b) refers to the amount in the order, against which the appeal has been preferred i.e. even the disputed amount. Non-payment of the "*undisputed*" amount may lead to the "*non-entertainability*" of the very appeal. However, no such inference can be drawn in regard to the nonpayment of the disputed amount. According to us, the First Appellate Authority, as well as the Tribunal, failed to notice this crucial distinction.

16. The provision in Section 28(3)(b) merely provide that merely because an appeal has been preferred under sub Section (1) of the said Act, that by itself, does not absolve the appellant of the liability to pay tax in accordance with the order against which the appeal has been preferred. The phraseology employed clearly suggests that the amount referred to under Section 28(3)(b) is the amount which may be disputed by the appellant because the appellant has appealed against

the order before the First Appellate Authority. The provision therefore requires payment of such amount by the appellant to the respondent failing which, the respondents, will be at liberty to recover such amount from the appellant notwithstanding the fact that an appeal is pending against the main order.

17. The proviso to Section 28(3)(b) further provides that the appellate authority may in its discretion issue directions as it thinks fit in regard to the payment of tax or other amount payable under clause (b), if the appellant furnishes security to its satisfaction in such form and in such manner as may be prescribed. This means that the Tribunal can issue appropriate directions even in relation to the disputed amount, provided no doubt, the appellant furnishes sufficient security to its satisfaction. The proviso really suggests that the First Appellate Authority, inter alia, has the power to even stay the recovery of the disputed amount, no doubt by requiring the appellant to furnish appropriate security in order to secure the disputed amount pending the disposal of the appeal.

18. However, there is nothing in the provisions of Section 28 (3)(b) of the said Act or it's proviso to suggest that the failure to deposit even the disputed tax amount renders the first appeal before the First Appellate Authority as not maintainable or for that matter, there is nothing in the provisions of Section 28(3)(b) of the said Act to

suggest that the First Appellate Authority cannot even entertain the appeal unless the appellant deposits even the disputed amount or pays the disputed amount to the respondents in terms of the order against which the appeal has been preferred.

19. The legislature in this case, has made a distinction between the situations contemplated under Section 28(3)(a) and 28(3)(b). Section 28(3)(a) deals with the issue of '*entertainability*' of the appeal. The appeal cannot be entertained by the First Appellate Authority only when the appellants fails to pay and produce satisfactory proof of the payment of the tax and penalty '*not disputed*' in the appeal. However, when it comes to the payment of the disputed amount, there is no provision which goes to the root of entertainability or maintainability of the appeal for want of payment or deposit of the disputed amount.

20. Therefore, the First Appellate Authority was not right in the view taken by it, in its order dated 5th February 2018. The First Appellate Authority has proceeded on the basis that since there was a failure on the part of the appellant to pay even disputed amount, the appeal itself was not entertainable. This view, according to us, is not in consonance with the provisions of Section 28(3)(a) of the said Act. The first appeal was very much maintainable before the First Appellate Authority as there was no issue of failure to pay the "*undisputed*" amount of tax and penalty involved in the matter.

21. Merely because the appeal was maintainable, the appellants were not absolved from their liability to pay the tax and penalty amount in accordance with the order appealed against. If the appellants were not interested in securing any interim relief or if the appellants failed to comply with any directions for the deposit of the amount, the respondents would be justified in taking coercive steps as are permissible under the law to recover the said amount. However, on the said ground, the First Appellate Authority could not have refuse to even entertain the appeal instituted by the petitioners.

22. The First Appellate Authority was, therefore, not right in even refusing to entertain the Petitioner's appeal. Such refusal was entirely based upon failure to appreciate the distinction between the provisions in Sections 28(3)(a) and 28(3)(b) of the said Act. The Tribunal again, in itself not appreciating the distinction and in upholding the view taken by the First Appellate Authority, has itself failed to exercise the jurisdiction vested in it. Accordingly, the orders of the First Appellate Authority and the Tribunal warrant interference, in the facts and circumstances of the present case.

23. In view of the aforesaid, the issue of constitutional validity or vires of Section 28(3) of the said Act, really does not arise, or, in any case, is merely academic. However, even, otherwise, we agree with the submission of the learned Advocate General that right to appeal

is not an inherent right and, therefore, it is always open to the legislature to hedge such right with some reasonable and non-arbitrary preconditions. The observations in *Walchandnagar Industries* (supra) also prima facie support this view. However, taking into consideration the view which we have taken in regard to the interpretation of the provisions of Section 28(3) of the said Act, according to us, there is no further reason to go into the issue of constitutional validity of the provisions in Section 28(3) of the said Act, in this petition.

24. Upon our query, Mr. Nadkarni, learned Counsel for the Petitioner, submits that the Petitioner is not desirous of claiming any interim relief in the context of demand of tax and penalty, because the Petitioner may not be in a position to make any payment or offer any security. Mr. Nadkarni, upon instructions, therefore, made it clear that the Petitioner was not pressing for any interim relief, at this stage.

25. Accordingly, we clarify that merely because we have held that the Petitioner's appeal was maintainable before the First Appellate Authority and, merely because we propose to restore such First Appeal to the file of the First Appellate Authority that, by itself, will not preclude the Respondents from taking out appropriate proceedings, including coercive proceedings in terms of law, to

recover the amount of tax and penalty in terms of the orders made before the First Appellate Authority.

26. In the result, we set aside the orders dated 05/02/2018 and 12/12/2018, made by the First Appellate Authority and the Tribunal, respectively; restore the Petitioner's First Appeal to the file of the First Appellate Authority; and direct the First Appellate Authority to dispose of the Petitioner's appeal, on merits and in accordance with law, as expeditiously as possible.

27. Rule is made partly absolute to the aforesaid extent. There shall, however, be no order as to costs.

28. All concerned to act on the basis of an authenticated copy of this order.

NUTAN D. SARDESSAI,J. **M.S. SONAK,J.**

ssm/mv