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

WRIT PETITION NO.1810 OF 2018

Kantilal Bhaguji Mohite } Petitioner

Vs

Commissioner, Central Excise }
and Service Tax-Pune III } Respondent

Ms.Sangita Dongare i/b Abhaysingh A. Shinde for the Petitioner.

Mr.J.B. Mishra for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
M. S. KARNIK, JJ.

DATE :- FEBRUARY 14, 2019

P.C. :-

1. We have heard both sides.

2. It is argued by the petitioner's counsel that the impugned order of the Customs, Excise and Service Tax Appellate Tribunal dismissing the appeal, without any adjudication on merits is, per-say illegal. It is violative of the constitutional mandate of Article 14 and 19(1)(g) of the Constitution of India. The argument before us is that even if the provisions of Section 35-F of the Central Excise Act, 1944 are imperative or mandatory, still, if no compliance is made of the provisions of pre-deposit, the Tribunal cannot dismiss the appeal without adjudication on merits. The powers of the Tribunal in that behalf are clear. The Tribunal has

power to confirm, modify or annual the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary. However, the Tribunal is not empowered to dismiss the appeal without adjudication on merits simply because the condition imposed by Section 35-F of the Central Excise Act to obtain interim stay or relief against recovery is not complied with. That would not empower the Tribunal to dismiss the appeal without adjudication on merits.

3. We do not enter into larger controversy for the simple reason that Section 35-F of the Central Excise Act is dealing with deposit of certain percentage of duty demanded or penalty imposed before filing the appeal. The wording of the Section is clear. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal unless the precondition is satisfied. Thus, the amount required to be deposited having been clearly stated, there is no escape from the consequences and the appeal cannot be entertained without compliance with the condition of deposit. Thus, this is a right of appeal created by the Statute and that right is conditional.

4. In the instant case, the petitioner before us desires to have an adjudication on merits without complying with this condition. The Tribunal gave him enough time to comply with that condition. Once the Tribunal found that the condition is not complied with, then, it was not open to it to adjudicate the matter on merits. In the instant case, the writ petition only contains the grounds on merits. We are not concerned with the merits of the appeal. For that to be entertained, there is a condition prescribed by the Statute. That condition was not complied with. Once that condition was not complied with, the appeal was not entertainable.

5. As a result of the above discussion, we do not find any merit in the writ petition. In the event, the petitioner/original appellant complies with the statutory condition of pre-deposit within four months from the date of receipt of a copy of this order and reports compliance to the Tribunal, the Tribunal shall restore the appeal of the petitioner/original appellant for adjudication on merits. In the event this condition is not complied with, the appeal to stand dismissed and, then, it will be construed that this Court has not interfered with the impugned order at all.

6. The argument of the learned counsel that this Court in writ jurisdiction can waive this condition or relax or dilute its rigors,

is without any merit. The writ jurisdiction is not meant to grant any benefit to parties like the petitioner or to enable him to get over such precondition. Once the statutory precondition for entertaining an appeal has been upheld and that does not violate the mandate of Article 14 and 19(1)(g) of the Constitution of India nor does it make the right of appeal illusory, then, this writ petition cannot be entertained. It is dismissed, but subject to above.

(M.S.KARNIK, J.) **(S.C.DHARMADHIKARI, J.)**