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

CUSTOMS APPEAL NO. 53 OF 2018

Shri Ravindrakumar R. Garg	..	Appellant.
v/s.		
Commissioner of Customs (Export) & Another	..	Respondents.

Mr. Ashok Singh with Mahi Lalka and Mr. R. N.Gaonkar, for the Appellant.
Mr. Ram Ochani, for the Respondents.

CORAM: A.S.OKA &
M.S.SANKLECHA, JJ.
DATE : 15th APRIL, 2019.

P.C:-

This Appeal under Section 130 of the Customs Act, 1962 (the Act) challenges the order dated 19th December, 2016 passed by the Customs Excise and Service Tax Appellate Tribunal (the Tribunal). The impugned order dated 19th December, 2016 dismissed the Appellant's appeal before it. This for failure to comply with the Tribunal's order dated 17th October, 2016, directing the Appellant to deposit 20% of the penalty amount confirmed by the adjudicating authority, for the purposes of entertaining the appeal on merits.

2 The Appellant has urged the following re-framed question of law for our consideration:-

> *" Whether on the facts and in the circumstances of the case and in law was the Tribunal justified in dismissing the appellant's appeal for non-compliance of an order on pre-deposit even when it notices that rectification application to rectify the order on pre-deposit was pending?'*

3 The Appeal is admitted on the above substantial question of law. As the dispute is within a narrow compass, at the request of the Counsel for the parties, the appeal itself is taken up for final disposal.

4 Briefly, the facts leading to this appeal are that the penalty of Rs.1.37 Crores was imposed upon the Appellant under Section 112(b) of the Act by the Commissioner of Customs i.e. the adjudicating authority. This was by a common order dated 7th May, 2014 of the adjudicating authority amongst others in respect of the Appellant.

5 Being aggrieved with the order dated 7th May, 2014 of the adjudicating authority, the Appellant preferred an appeal to the Tribunal. Alongwith its appeal, the Appellant also filed an application for dispensing with the requirement of pre-deposit of penalty in terms of Section 129E of the Act for the purposes of its appeal being heard on merits.

6 On 17th October,2016, the application for dispensing with the requirement of pre-deposit to entertain the Appellant's appeal was taken up for consideration by the Tribunal. At that time, the Appellant was absent. On 17th October, 2016 itself, the Tribunal by its common order directed the Appeal of the Appellants to be entertained on merits, subject to the Appellant's therein depositing 20% of the penalty imposed by the order dated 7th May, 2014 of the adjudicating authority. This direction amongst others was also issued to the Appellant.

7 Thereafter, the Appellant took out an application for rectification/ modification of the order dated 17th October,2016 passed by the Tribunal. However, before the above modification application could be listed for hearing, the Appellant's appeal was listed before the Tribunal on 19th December, 2016. At that time again, the Appellant was absent nor was he represented by any Advocate. Thus, the Tribunal by order dated 19th December, 2016 dismissed the Appellant's appeal on account of the failure to deposit the amount of 20% of penalty imposed by the adjudicating authority, as directed by its order dated 17th October, 2016. This after noticing the fact that the application for modification of the order dated 17th October, 2016 taken out by the Appellant on 15th December, 2016 was pending before it. The aforesaid fact is even recorded by the Tribunal in its impugned order dated 19th December, 2016.

8 It is the above impugned order dated 19th December, 2016 which is challenged in this appeal. It is the case of the Appellant before the Tribunal as well as before us that the duty escaped on account of the Appellant at the highest was Rs.4.85 lakhs. However, the penalty imposed upon the Appellant was Rs.1.37 Crore, thus, arbitrary and against the principle of proportionality.

9 We find that the Appellant did not appear before the Tribunal on 17th October, 2016 (when order of pre-deposit was made) nor on 19th December, 2016 (when appeal itself was dismissed). This inspite of notice. Nevertheless, we find that the Tribunal had on 19th December, 2016 itself noted the fact as recorded in the impugned order that an application for rectification of the order dated 17th October, 2016 was

pending for consideration. On the above fact being noted, the Tribunal ought not to have disposed of the appeal finally for non- compliance with the earlier order dated 17th October, 2016 without first considering the Appellants' rectification application. This, the Tribunal is obliged to do even in the absence of the party. Therefore, the fair and just thing for the Tribunal to do was to list the Rectification Application on board and dispose of the same before taking up the appeal for final disposal. This the Tribunal did not do. In fact, this manner of dealing with an appeal by the Tribunal is deprecated. This only leads to injustice and multiplicity of proceedings.

10 Therefore, in the above view, the substantial question of law is answered in the negative i.e. in favour of the Appellant-Assessee and against the Respondent-Revenue. The Tribunal ought to have first heard and decided the rectification application in respect of its earlier order dated 17th October, 2016, directing pre-deposit before dismissing the Appellant's appeal for non-compliance with the order dated 17th October, 2016.

11 In the above view, we set aside the impugned order dated 19th December, 2016 of the Tribunal and restore the appeal to the Tribunal for fresh consideration. The Tribunal is directed to first take up the Appellant's rectification application, seeking rectification of its order dated 17th October, 2016 and deciding on it, before taking up the appeal for consideration. In the above view, the order dated 17th October, 2016 passed by the Tribunal, directing the pre-deposit within a period of eight weeks from 17th October, 2016, is extended for a further period of 8 weeks from today. We direct the Tribunal to first dispose of the pending

rectification application of the Appellant at the earliest within the period of five weeks from today. The appeal would thereafter, be decided as expeditiously as possible, subject to the order that would be passed on the Rectification Application.

12 Accordingly, the **Appeal** is **disposed of** in the above terms.

(M.S.SANKLECHA,J.) **(A.S.OKA,J.)**