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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 15431/2024

RAJESH GUPTA ALIAS SANJAY LALA .....Petitioner

Through: Mr. Bharat Singh, Advocate.

versus

UNION OF INDIA AND ORS .....Respondents

Through: Ms. Monica Benjamin, SSC. Mr. Aditya Singla, SSC, CBIC with Mr. Uman Mishra and Mr. Rudresh Akshay Sain Advocates. Mr. Jitesh Vikram Srivastava, SPC with Mr. Prajesh Vikram Srivastava, Advocate.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **06.11.2024**

CM APPL. 64772/2024 (exemption)

Allowed, subject to all just exceptions.

This application stands disposed of.

W.P.(C) 15431/2024

1. The instant writ petition has been preferred seeking the following reliefs:-

> "A. To issue a writ order in the nature of certiorari quashing and setting aside the impugned order of the Ld. Customs, Excise & Service Tax Appellate Tribunal, New Delhi dated 02.07.2024 (Annexure- P/1), impugned order of Ld. Customs, Excise & Service Tax Appellate Tribunal dated 10.10.2023 (Annexure-P/2), impugned order of Mr. Dinesh Kumar Gupta, Ld. Commissioner of Customs (Appeals) dated 21.03.2023 (Annexure-P/3), Impugned Order of Mr. Gauri Shankar Sinha Ld. Additional Commissioner of Customs dated 08.12.2021 (Annexure-P/4),

B. To issue a writ order or direction in the nature of mandamus commanding the respondents to restore the petitioner Application No-50264/2024 as the petitioner had deposited the penalty/pre-deposit fees of Rs. 10,25,000/- vide Challan Form TR6 dated 23.02.2024 which is 10% of the penalty amount of Rs.1,02,50,000/- as per section 129E of the Customs Act and same may be released to the petitioner; and/or

C. To pass an order by way of mandamus to the Custom Tribunal to hear this matter by condoning the delay, if any, on merit as the respondents have recovered the penalty amount/pre-deposit.

D. To pass an order to release the amount Rs 8,49,152/- confiscated from Petitioner's account, and goods and other attached documents, property, and accounts of the petitioner.

E. To pass an order of mandamus & writ of prohibition commanding respondents to withdraw the order for further attachment of property through local revenue/ Tehsil authority.

F. To pass an order of certiorari to strike down the statutory provision of section 129E of the Customs Act, 1962, violating the fundamental rights of the petitioner guaranteed under article 13 of the Constitution of India, wherein the respondents have imposed the Customs Act upon GST paid Indian goods.

G. To issue any other Writ Order/Direction as this Hon'ble Court may deem fit, just and proper in the facts and circumstances of the case.

H. Award the cost of the petition to the petitioner throughout."

2. Admittedly, the present writ petition is not the first foray of the writ petitioner in its attempt to assail and question the orders passed by the Commissioner of Customs (Appeals) as well as the **Customs, Excise and Service Tax Appellate Tribunal**[1]. As is evident from the record, assailing the order passed by the Commissioner of Customs (Appeals) dated 21 March 2023, the writ petitioner had approached the Allahabad High Court by way of Writ_Tax No. 452/2023. The said writ petition came to be dismissed with the said High Court observing

[1] CESTAT

as follows:-

> "4. While such submissions have been advanced by the parties, we decline to offer any interference in exercise of the extra ordinary jurisdiction under Article 226 of the Constitution. This being a dispute arising under fiscal statute involving questions of fact as to whether goods had been imported from outside the country or had originated within the country and whether they had been correctly described in the invoice document or not, those issues would require fact enquiries to be made and evidence to be appreciated before any firm conclusion may be reached. Further, in face of the petitioner having availed two statutory remedies, we find no justification for the petitioners now to avoid filing of second appeal before the Tribunal and seek adjudication in the writ proceedings, instead.
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> 5. At the same time, the writ petition was filed in the month of March, 2023 and the same is pending before this Court. We, therefore, consider it appropriate to dispose of the writ petition with liberty to the petitioners to file statutory appeal before the Tribunal. If such appeal is filed within two weeks from today in accordance with law, the Tribunal may treat the same to have been filed within time and proceed on merits and decide the same in accordance with law.
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> 6. <u>At last it has been submitted by learned counsel for the petitioners that filing of such appeal would invite onerous condition of pre-deposit. It is of no consequence, insofar as right of appeal is statutory and often hedged with similar condition. Those are for the assessee to comply to avail the remedy of appeal</u>."

3. As is evident from the above, the issue of a pre-deposit and such a condition being indelibly connected with the right of the writ petitioner to pursue the appellate remedy was directly raised. The contention of the petitioner that the condition of pre-deposit would be onerous came to be specifically negated by the High Court as would be evident from paragraph 6.

4. It appears that the appeal of the writ petitioner preferred thereafter before the CESTAT also came to be rejected on 10 October 2023 on account of a non-compliance with the condition of pre-

deposit as embodied in Section 129E of **The Customs Act, 1962**[2].

5. This too was subjected to challenge with the institution of yet another writ petition before the Allahabad High Court being Writ Tax No. 1356/2023. The said writ petition came to be dismissed on 01 December 2023 in the following terms:-

> "The petitioners have aggrieved by the order dated 10.10.2023 passed by the Customs, Excise & Service Tax Appellate Tribunal declining to entertain the appeal on the footing that the petitioners had not complied with the provisions of Section 129E of the Customs Act, by failing to make mandatory predeposit. The petitioners were remitted to the learned tribunal by a judgement of the Division Bench of this Court rendered in Writ Tax No.452 of 2023 (Rajesh Gupta (Sanjay Lala) and 2 others v. Union of India and 9 others) on 02.05.2023 after making the following observations :
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> > "6. At last it has been submitted by learned counsel for the petitioners that filing of such appeal would invite onerous condition of pre-deposit. It is of no consequence, insofar as right of appeal is statutory and often hedged with similar condition. Those are for the assessee to comply to avail the remedy of appeal.
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> > 7. The writ petition is disposed of, accordingly."
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> In the wake of the observations made by the learned Division Bench as well as the provisions of the Act, the writ petition (tax) is accordingly dismissed.
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> Needless to add, it is open to the petitioners to avail any other legal remedy as may be available to them."

6. It is thereafter that the writ petitioner has chosen to approach this High Court challenging not just the orders which formed the subject matter of the writ petitions filed before the Allahabad High Court but additionally seeking to question the validity of Section 129E of the Act itself.

7. Although it was open for the writ petitioner to have sought an

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[2] Act

appropriate declaration with respect to the validity of Section 129E of the Act if it were sought to be contended that it placed an onerous obligation, it chose not to do so at any stage of the proceedings which were instituted before the Allahabad High Court. Moreover, a submission to that effect duly addressed before that High Court came to be specifically negated.

8. We further note that the question of validity of Section 129E had been dealt by the Bombay High Court in **Haresh Nagindas Vora v. Union of India**[3] with the High Court observing as follows:-

> "**10.** As seen from a plain reading of the provision, section 129-E provides for deposit of certain percentage of duty demanded or penalty imposed or both, as a condition precedent for the appellate authority to entertain an appeal. Subclause (i) and (ii) of section 129-E mandates deposit of 7.5% of the duty demanded or penalty imposed or both, in case of an appeal before the Commissioner (Appeals) (section 128-A) and before the Tribunal (section 129-A) respectively. Clause (iii) of section 129-E provides for deposit of 10% of the duty demanded or penalty imposed or both in pursuance of the order appealed against. The first proviso provides that the amount which is required to be deposited under this section shall not exceed Rs. 10 crores.
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> **11.** The intention of the Parliament in amending section 129-E by the amending Act in question needs to be noted. Prior to the amendment, in view of the powers and discretion conferred with the appellate authority to waive/dispense with the pre-deposit, substantial time was expended on the adjudication of such applications and in deciding issues, as to whether, the contention of the applicant in the stay application, of an undue hardship is being caused, could be accepted to grant an appropriate waiver. Resultantly, orders on the stay application generated further litigation before the higher forums taking a toll on the valuable time of the tribunal delaying the adjudication of the appeals. This undoubtedly caused a serious prejudice to the parties before the Tribunal. Thus the aim of the amended provision is also to curtail litigation which had assumed high proportions, leaving no time to the appellate authorities to devote the same to important issues. Considering these hard realties and to have a expeditious disposal of the statutory appeals which undoubtedly is a necessary

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[3] 2017 SCC OnLine Bom 3013

requirement of effective trade, commerce and business, the Parliament in its wisdom amended the provisions of section 129-E of providing deposit of 7.5% and 10% respectively as sub-clauses (i), (ii) and (iii) respectively provide. If such is the aim and insight behind the provision, it certainly cannot be held to be unreasonable, onerous, unfair or discriminatory for two fold reasons. Firstly, the object of a public policy sought to be achieved by the amendment, namely speedy disposal of the appeals before the appellate authorities is a laudable object and cannot be overlooked, so as to label the provision as unreasonable and onerous and violative of Article 14 of the Constitution. Secondly that the amount which is required to be deposited is not unreasonable from what the earlier (pre amended) regime provided.

12. The contention of the petitioner that the provision is rendered discriminatory as it creates two different classes when it mandates pre-deposit of duty demanded or penalty imposed or both, and more particularly when penalty cannot be considered to be a revenue as it is not a tax requiring it to be safeguarded, also cannot be accepted. It may be pointed out that even the preamended provision stipulated for a deposit in case of appeals from orders levying penalty. This submission of the petitioners also cannot be accepted considering the decision of the Supreme Court in *Vijay Prakash D. Mehta and Jawahar D. Mehta* v. *Collector of Customs (Preventive), Bombay*, 1988 MhLJ Online (S.C.) 1 : (1988) 4 SCC 402 : AIR 1988 SC 2010, which lays down that right to appeal is a statutory right and not an absolute right, which can be circumscribed by the conditions in the grant. In 1980 MhLJ Online (S.C.) 2 : *Nand Lal* v. *State of Haryana*, 1980 Supp SCC 574 : AIR 1980 SC 2097 the Supreme Court referring to the earlier decision in *Anant Mills Co. Ltd.* v. *State of Gujarat*, 1975 MhLJ Online (S.C) I — (1975) 2 SCC 175 : AIR 1975 SC 1234 held as under:—

> "It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide the latest decision in *Anant Mills Ltd.* v. *State of Gujarat*, 1975 MhLJ Online (S.C.) 1 : (1975) 2 SCC 175 : AIR 1975 SC 1234)"

<u>Thus by virtue of section 129-E the right to appeal as conferred under the said provision is a conditional right, the legislature in its wisdom has imposed a condition of deposit of a percentage of duty demanded or penalty levied or both. The fiscal legislation as in question can very well stipulate as a requirement of law of a mandatory pre-deposit as a condition precedent for an appeal to be entertained by the appellate authority. In view of the above settled</u>

position in law, section 129-E of the Act cannot be held to be unconstitutional on the ground as assailed by the petitioner."

9. We are consequently of the opinion that the instant writ petition is thoroughly misconceived and is liable to be dismissed.

10. Ordered accordingly.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 06, 2024/DR