

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition No. 4315 OF 2016

Haresh Nagindas Vora

...Petitioner

Versus

1.Union Of India

2.Principal Commissioner of Customs (General)

...Respondents

AND

Writ Petition NO. 4320 OF 2016

Sachin Laxmichand Shah

...Petitioner

Versus

1.Union Of India

2.2.Principal Commissioner of Customs (General)

...Respondents

Mr.Suresh Balasubramanian, for the Petitioner in both the Petitions.

Mr.Pradeep S.Jetly, for the Respondents in both the petitions.

**CORAM : S.V. GANGAPURWALA &
G.S. KULKARNI, JJ.**

RESERVED ON: 5th JUNE, 2017

PRONOUNCED ON : 19th JUNE,2017

JUDGMENT: (PER G.S.KULKARNI,J.)

1. Rule returnable forthwith. Respondents waive service.

By consent of the parties and at their request, taken up for final

hearing. As common question of law and facts arise, we dispose of both these petitions by this common judgment.

2. The principal prayer in the present petitions is a challenge to the constitutional validity of Section 129E of the Customs Act, 1962 (for short 'the Act'), as amended by the Finance Act No.2 of 2014 and brought into effect from 6 August 2014, prescribing a mandatory pre-deposit for filing an appeal before the Tribunal or the Commissioner (Appeals). The petitioners also challenge the common Order-in-Original dated 22 January 2016 passed on the show cause notice dated 24 August 2015, on the ground that the order is illegal being passed without considering the submissions of the petitioners.

Briefly the facts are:

3. The petitioners in each of the petitions are partners of one M/s. Bright International which is stated to be engaged in the business of export and import of goods. The genesis is, a search conducted at the premises of M/s. Bright International by the Directorate of Revenue Intelligence (DRI) wherein large number of

dubious invoices were recovered. The scrutiny of those invoices revealed that there were parallel invoices for various exports made by the partnership. Further scrutiny revealed that in 29 cases, one invoice indicated actual contract value and the other invoice indicated higher value which is used for availing undue duty drawbacks. It was also revealed that in the case of export of 71 shipping bills, some of the items exported were of the same value as mentioned in the actual value invoices recovered during search. The statements of both the partners of the firm were recorded under Section 108 of the Customs Act who admitted recovery of parallel invoices for the same goods exported by them. The partners also conceded that the invoices of higher value were submitted to the Customs at the time of export to avail higher duty drawback and the actual invoice is the one with the lesser value. Accordingly, a show cause notice dated 24 August 2015 was issued to the petitioner which was adjudicated by the impugned Orders-in-Original dated 22 January 2016/ 1 February 2016. The adjudicating officer concluded that the value of the goods exported through ICD Mulund was intentionally mis-declared in the documents submitted to the Customs to avail ineligible duty drawback thereby violating Section

50(2) of the Customs Act. It was held that the goods exported in 63 consignments as listed in Annexure A and B to the order with declared value of Rs.11,51,26,266/- and redetermined value of Rs.7,23,20,450/- were liable for confiscation under Section 113(i) of the Customs Act and that the firm was liable for penal action under Section 114(iii) and the partners-petitioners herein were liable for penal action under Section 114(iii), as also a penalty under Section 114AA of the Customs Act. Accordingly the adjudicating officer passed the following order:-

ORDER

i. I order that the declared value of Rs.11,51,26,266/- in respect of the goods exported under the 63 Shipping Bills be re-determined at Rs.7,23,20,450/- (Rupees Seven Crores Twenty Three Lakhs Twenty Thousand Four Hundred and Fifty only) in terms of Rule 3 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 and the eligible drawback determined accordingly.

ii. Excess duty Drawback amount of Rs.63,53,024/- (Rupees Sixty Three Lakhs Fifty Three Thousand Twenty Four Only) availed by M/s.Bright International is to be recovered under Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 along with interest under Section 75A of the Customs Act, 1962.

iii. I order confiscation of the goods of a total declared value of Rs.11,51,26,266/- exported by M/s.Bright International, vide 63 Shipping Bills under the provisions of Section 113(i) of the Customs Act, 1962. However, the same are not available for confiscation as already exported.

iv. I impose a penalty of Rs.1,00,00,000/- (Rupee One Crore only) on M/s.Bright International under Section 114(iii) of the Customs Act, 1962.

v. I impose a penalty of Rs.20,00,000/- (Rupee Twenty Lakhs only) on Shri.Harish Nagindas Vora under Section 114(iii) of the Customs Act,1962.

vi. I impose a penalty of Rs.2,00,000/- (Rupee Two lakhs only) on Shri.Harish Nagindas Vora under Section 114AA of the Customs Act,1962.

vii. I impose a penalty of Rs.20,00,000/- (Rupee Twenty Lakhs only) on Shri.Sachin Shah under Section 114(iii) of the Customs Act,1962.

viii. I impose a penalty of Rs.2,00,000/- (Rupee Two Lakhs only) on Shri.Sachin Shah under Section 114AA of the Customs Act,1962.

4. Against the above Order-in-Original, an appeal is maintainable under Section 128 of the Customs Act before the Commissioner of Customs (Appeal). During the course of the arguments, the learned Counsel for the petitioners appreciating the settled legal position that this Court in exercise of writ jurisdiction under Article 226 of the Constitution would not wield the powers of an Appellate Authority, confined his arguments on the issue of constitutional validity of Section 129E of the Customs Act, we accordingly keep the challenge to the Order-in-Original open to be agitated by the Petitioner before the appellate authority.

5. In assailing the legality of Section 129E of the Act, the contention interalia urged on behalf of the Petitioners is that the

provision is discriminatory and violative of Articles 14, 19 and 21 of the Constitution. It would be appropriate to extract the contention of the petitioner in the terms as set out in the ground 'A' on page 17 of the petition which reads thus:-

“... ..

That the impugned newly substituted Section 129E mandates pre-deposit of certain percentage of only the duty, in case where duty or duty and penalty are in dispute, and certain percentage of penalty where only penalty is in dispute before filing an appeal. It is submitted that therefore the said substitution is discriminatory between two identically placed classes, mandating one class to pre-deposit only certain percentage of duty where both duty and penalty are in dispute and mandating another class to pre-deposit certain percentage of penalty where only penalty is in dispute. The said amendment therefore, takes care of interest of revenue where by mandating to pre-deposit certain percentage of duty only where both duty and penalty are in dispute but imposes onerous and unreasonable condition where only penalty is in dispute ignoring the fact that the penalty is not considered as revenue and is therefore not a tax which needs to be safeguarded. It is further submitted that putting a class into advantageous position by mandating to pre-deposit only certain percentage of duty where both duty and penalty are in dispute and putting another class into disadvantageous position mandating to pre-deposit certain percentage of penalty where only penalty is in dispute is ultra vires of Articles 14, 19 and 21 of the Constitution of India and/or null and void.”

6. The next contention as urged on behalf of the Petitioners is that Section 129E as amended has taken away the powers earlier conferred on the appellate authority to waive the pre-deposit, upon forming an opinion that a pre-deposit would cause undue hardship. Further the Petitioners relying on the decision of the Supreme Court

in the case “*Mardia Chemicals Ltd. Vs. Union of India*”¹ contend that in the said case the provision mandating 75% of deposit under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) was held to be constitutionally invalid.

7. The revenue has contested the petitions and a reply affidavit of Mr.B.Bhattacharya, Principal Commissioner of Customs, dated 16 September 2016 has been filed. On behalf of the revenue it is contended that the challenge as raised is no more res integra in view of the decision of the Division Bench in the “*Nimbus Communications Ltd. Vs. Commissioner of S.T., Mumbai*”² as also following the said decision, the Division Bench also dismissed Writ Petition No.747 of 2017 in the very same case. It is contended that also other Writ Petitions in the case “*Ajit Babu Satam Vs. Union of India & Anr.*”³ and “*Deepak Sharad Jare Vs. Union of India & Anr.*”⁴ were dismissed by the Division Bench by order dated 3 October 2016.

1 ((2004) 4 SCC 311)

2 2016(44) S.T.R. 578 (Bom.)

3 Writ Petition No.7948 of 2015 Order dt.3.10.2016

4 Writ Petition No.9148 of 2015 Order dt.3.10.2016

8. Learned Counsel for the revenue contends that the substituted section has been introduced as a measure to facilitate trade, business and industry by speedy resolution of disputes before various appellate forums. It is submitted that the appellate authority's working hours were being consumed in disposing of applications for waiver on pre-deposit, these working hours can now be used for disposing of the main appeals preferred by the parties. It is submitted that even pre-deposit of disputed amount of duty or penalty for the longer period by the appellants is no more required after imposition of substituted Section 129E of the Act. The assesseees are no more required to deposit the entire disputed amount to prevent the recovery officer, for not resorting to any coercive measure for recovery of dues. It is submitted that waiver of pre-deposit under the pre-amended Section of 129E of the Act was not as a matter of right of the Appellants and the Appellate authority after due consideration of the facts and circumstances of the case could grant a waiver in appropriate cases. It is submitted that under the present disposition after the amendment, the assessee gets immunity from any coercive action for recovery of dues in case the appeal is pending before any appellate authority under Section 129 of the Act.

The respondents accordingly submit that the writ petitions be dismissed.

9. As noted above Section 129E, as it stands, has been substituted by the Act 21 of 2014 as brought into effect from 1 October 2014. To consider the challenge to the validity of Section 129E of the Act, it would be appropriate to extract the Section 129E of the Act as amended, which reads thus:-

129-E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal - The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal -

(i) under sub-section (1) of section 128, unless the appellant has deposited seven and a half per cent of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Commissioner of Customs;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 129-A, unless the appellant has deposited seven and a half per cent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129-A, unless the appellant has deposited 10 per cent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.”

It would also be appropriate to note the said provision as it stood prior to its amendment by the Act 25 of 2014, which reads as follows:-

“Section 129E prior to the amendment

129-E. Deposit, pending appeal, of (duty and interest) demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any (duty and interest) demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the (duty and interest) demanded or the penalty levied:

Provided that where in any particular case, the (Commissioner (Appeals)), or the Appellate Tribunal is of opinion that the deposit of (duty and interest) demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue;

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so decide such application within thirty days from the date of its filing.”

10. As seen from a plain reading of the provision, Section 129E 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. Sub-clause (i) and (ii) of Section 129E mandates deposit of 7.5% of the duty demanded or penalty imposed or both, in case of an appeal before the Commissioner (Appeals) (Section 128A) and before the Tribunal (Section 129A) respectively. Clause (iii) of Section 129E 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.

11. The intention of the Parliament in amending Section 129E 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 realities and to have a expeditious disposal of the statutory appeals which undoubtedly is a necessary requirement of effective trade, commerce and business, the Parliament in its wisdom amended the provisions of Section 129E 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 pre-amended 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 Vs. Collector of Customs (Preventive), Bombay**”⁵, 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 “**Nand Lal Vs. State of Haryana**”⁶ the Supreme Court referring to the earlier decision in **Anant Mills Co. Ltd vs State Of Gujarat & Ors.**⁷ 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.*

5 AIR 1988 SC 2010

6 AIR 1980 SC 2097

7 AIR 1975 SC 1234

State of Gujarat, AIR 1975 SC 1234)”

Thus by virtue of Section 129E 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 position in law, Section 129E of the Act cannot be held to be unconstitutional on the ground as assailed by the petitioner.

13. Learned Counsel for the revenue is quite right in relying on the decision in the case *Nimbus Communications Ltd. (supra)*, though it arises in the context of Section 35F of the Central Excise Act which is a provision pari materia to Section 129E of the Act. We may observe that the decision was rendered in deciding a central excise appeal, in which the question of law interalia as considered by the Court was that the right of appeal being a vested right, whether the provisions of law as applicable at the commencement of the lis would apply or the amended provisions as on the date of filing of

appeal would apply. Though the Court was not dealing with the validity of the provision, the Court considering the provisions of law and considering the decision of the Madras High Court in “*M/s.Dream Castle Vs. Union of India & Ors.*”⁸ and the Allahabad High Court in the case “*Ganesh Yadav Vs. Union of India*”⁹ held that Section 35F of the Central Excise Act did not defeat or render the vested right of appeal illusory and that the condition of pre-deposit is a reasonable condition and such condition did not defeat the vested right of appeal. The Court accordingly confirmed the order of the Tribunal directing the appellants therein to deposit the sum mandated by Section 35F(1) of the Central Excise Act

14. As regards the contention of the petitioners relying on the decision of the Supreme Court in ***Mardia Chemicals Ltd. Vs. Union of India*** (*supra*) that the condition of deposit of 75% was held to be invalid and therefore, Section 129E of the Act also is required to be held to be invalid, cannot be accepted. The submission in the present context is too far fetched. Under Section 129E of the Act, the requirement of deposit is 7.5% and 10%

8 2016(43) STR 25 (Mad)

9 2015(320) ELT 711 (All)

respectively as provided in sub-clauses (i), (ii) and (iii) of the said provision. As noted by us earlier such reasonable percentage of deposit cannot be labeled as unreasonable deposit. It is surely not a deposit of 75% as considered by the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (supra)* so as to render the right of appeal illusory. In our opinion, the petitioners' reliance on the decision in *Mardia Chemicals Ltd.* is completely misplaced.

15. In the light of the above discussion, we conclude that the Writ Petitions lack merit. The Writ Petitions are accordingly dismissed. No order as to costs.

(G.S.KULKARNI, J.)

(S.V. GANGAPURWALA, J.)