IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9378 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and

MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 & 2 -Yes

3 to 5 - No

GOEL SCIENTIFIC WORKS LIMITED

Versus

COMMISSIONER OF CENTRAL EXCISECUSTOMS

Appearance:

MR MR RN BHAGATJI FOR MR FB BRAHMBHATT for Petitioner

MS A MEHTA for respondents

CORAM : MR.JUSTICE C.K.THAKKER and

MR.JUSTICE R.P.DHOLAKIA

Date of decision: 29/01/98

ORAL JUDGEMENT (Per: C.K.Thakker,J.)

This petition is filed by the petitioner for quashing and setting aside an order passed by the Customs, Excise and Gold (Control) Appellate Tribunal (`CEGAT' for short), West Regional Bench, Mumbai, in Appeal No.913/RV of 1997 alongwith Stay Petition

No.555/RV/1997 dated November 6, 1997. By the said order, CEGAT dismissed the appeal filed by the petitioner under Sec.35F of Central Excise Act, 1944 (hereinafter referred to as `the Act').

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#. The petitioner is a Company carrying on business at Ajwa Road, Vadodara in marketing Scientific and Laboratory Glassware made from Glass Tubing and Glass Rods. A show-cause notice was issued by the Commissioner of Central Excise & Customs, Vadodara (respondent No.1 herein) on February 1, 1996, inter alia alleging that the first respondent had received information that the petitioner had engaged itself in manufacture of Glass Chemical Plants for Industrial use, classifiable under Entry 7015.00 of Schedule to Central Excise Tariff Act, 1985, without obtaining necessary certificate for the purpose and it was liable to pay excise on that basis. Ultimately an order was passed by the first respondent on February 14, 1997, holding the petitioner liable to pay excise duty. The order passed by the Commissioner is subject to appeal before CEGAT. The petitioner preferred such appeal on June 20, 1997. CEGAT entertained the appeal and passed a conditional order. Paragraph 5 of said order reads as under:-

> "On merits the classification of the product is arguable. Therefore, having regard to their financial position as putforth before us in their provisional Balance sheet 31.3.1997 which shows sales revenue of over Rs.1.00 crore, we are of the view that for the purpose of hearing the appeal on merits, the applicants should pre-deposit an amount of Rs.1.00 crore on or before 31.7.1997, and subject to compliance with this direction, the pre-deposit of the balance amount of duty and of the penalty on the appellants is dispensed with and recovery is stayed, pending the disposal of the appeal." (Emphasis supplied)

#. From above order, it is clear that the case of the appellant was found to be arguable by CEGAT. Regarding deposit, however, the Tribunal directed the appellant to pre-deposit an amount of Rs.1.00 crore on or before July 31, 1997. Matter was then adjourned to August 8, 1997. It appears that the appellant could not deposit the amount within the stipulated period. It is undisputed that thereafter time was also extended. But during extended period also, amount could not be paid. Ultimately by an order dated November 6, 1997, which is

impugned in the present petition, the appeal came to be dismissed as the condition of pre-deposit was not complied with. Paragraph 3 of the order dated November 6, 1997 reads thus:

> "We find that the stay order of 20.6.1997 has been passed after duly considering their financial position as reflected in their provisional balance sheet for the period ending 31.3.1997. No new ground has thereafter been made out for any modification of the stay order. Since the appellant has not complied with the stay order, the appeal is consequently dismissed under Sec.35F of the central Excise Act, 1944."

#. We have heard Mr.R.N.Bhagatji as instructed by Mr.Brahmbhatt, learned counsel for the petitioner and Ms.A.Mehta for the respondents. Learned counsel for the petitioner raised various contentions. It was submitted that the order was illegal, ultra vires and unconstitutional inasmuch as no order could have been passed directing the petitioner to pre-deposit substantial amount of Rs.1.00 crore. It was also stated that the Tribunal committed an error of law in observing that the petitioner did not pay the amount. Because of financial constraints and inability, the petitioner was unable to pay the amount. There was an error apparent on the face of the record committed by the first respondent in observing that there was suppression of material facts by the petitioner. All necessary and relevant facts have been brought to the notice of the department and relevant records of several years were submitted. Only in February 1996, suddenly and abruptly, the department issued notice and alleged that there was suppression of fact by the petitioner. It was urged that in past the department was also satisfied that the case did not fall under Entry 7015. Because of that only, MODVAT facility was not extended in favour of the petitioner. The Counsel argued that when CEGAT observed that there was "an arguable case" in favour of the appellant, it was not appropriate on its part to dismiss the appeal without hearing the same on merits only on the ground that condition of pre-deposit was not complied with. The Counsel stated that the petitioner is ready and willing to go on with the matter for final hearing before CEGAT and if this Court directs that such appeal should be disposed of by CEGAT within a stipulated time, say within a month, the petitioner has no objection and the petitioner will make its submission on merits. But if the petitioner will not be heard on merits, irreparable injury and loss would be caused. Though the petitioner

has "full-proof" case, it will not see "the light of the day". According to Mr.Bhagatji, if, only on the ground of non-fulfillment of condition, the appeal will not be heard on merits, the action would be violative of principles of natural justice and fair play. Such action would result in factory being closed and business being wound up. It would also cause serious prejudice to 100 employees who will be deprived of their livelihood. Appropriate course in such circumstances, according to the counsel, would be to direct the petitioner to furnish bank guarantee and/or security and by asking the petitioner to file an undertaking that during the pendency of appeal before CEGAT, neither the Company nor its Officers, servants or other personnel, would transfer or assign any property nor will create any encumbrance over it and by directing the Tribunal to dispose of appeal on merits. Certain decisions were also cited.

#. Ms.Mehta for the respondents, on the other hand, supported the order passed by CEGAT. A preliminary contention was raised that an alternate and equally efficacious statutory remedy is available to the petitioner under Sec.35F of the Act. The petitioner has to approach the Supreme Court by invoking Sec.35L and extraordinary remedy under Article 226 of the Constitution invoked by the Company is not proper.

#. On merits, it was submitted that right of appeal is a statutory right and neither an inherent nor a natural right. When a statute provides a right of appeal, it can impose conditions for exercise of such right. If, while entertaining appeal, an order was passed and the petitioner was directed to deposit a particular amount, such order was discretionary. Ordinarily, in exercise of extraordinary powers under Article 226 of the Constitution, this Court will not interfere with such discretionary actions unless the power has been exercised arbitrarily or unreasonably. In the instant case, according to her, it cannot be said that power has been exercised in an arbitrary or unreasonable manner especially when in spite of extension of time, the petitioner did not deposit the amount. It also cannot be said that the Tribunal could not have passed such an order. By passing the impugned order, the Tribunal has not committed an error of law, much less an error of law apparent on the face of the record which requires interference by this Court.

#. Having heard learned counsel for the parties, we are of the opinion that preliminary objection raised by Ms.Mehta cannot be upheld. Sec.35L reads as under:

"Appeal to the Supreme Court:- An appeal shall lie to the Supreme Court from-

(a) any judgment of the High Court delivered on a reference made under section 35G in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after the passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or

(b) any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment."

#. In the instant case, reliance was placed on Clause (b) of Sec.35L. Prima facie, in our opinion, cases covered by Clause (b) of Sec.35L relate to "adjudication" by the Tribunal and not like the present case. Hence, without expressing final opinion on that question, we would not like to dismiss the petition on that ground.

#. On merits, however, we are not persuaded to hold that action taken by CEGAT is illegal, arbitrary or otherwise unreasonable. Our attention was invited to several documents. It is in the realm of appellate power and at least one authority empowered under the Act to decide the question has decided that the case falls under Entry 7015 for which the petitioner has to pay excise. No doubt, CEGAT was of the opinion that the appellant has an "arguable case", but in undoubted exercise of power, the Tribunal passed a conditional order directing the appellant to pay an amount of Rs.1.00 crore, (i.e. about 33.33%) as pre-deposit which cannot be termed as arbitrary or unreasonable.

##. Now, so far as right of appeal is concerned, as held by Supreme Court in Anant Mills Company Limited Vs. State of Gujarat and others, AIR 1975 SC 1234, such a right is a statutory right and if a statute provides that an appeal shall not lie unless conditions are fulfilled, conditions must be satisfied. In an appeal against assessment, first the appellant has to pay tax. Such a provision cannot be said to be arbitrary and/or violative

of Article 14 of the Constitution of India as creating discrimination between those who pay the tax and those who do not. In Anant Mills, constitutional validity of Sec.406 of Bombay Provincial Municipal Corporations Act, 1949 was challenged. A bar was created under sub-sec.(2) of Sec.406 to entertainment of appeal by a person who has not deposited an amount of tax due from him being arbitrary and violative of Article 14 of the Constitution. This Court, in Anant Mills Company Limited Vs. State of Gujarat and others, (1973) 14 GLR 826, upheld the contention. The matter reached the Apex Court. Considering the nature of right of appeal and reversing that part of decision of this Court, the Hon'ble Supreme Court observed:-

> "The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income-tax Act, 1922. The proviso to that section provided that "..... no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused, by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and

we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution especially when that disability or disadvantage operates upon all persons who make the default or omission."

##. In the instant case, right to appeal is conferred under Sec.35F of the Act. Sec.35F reads thus:-

Deposit, pending appeal, of duty demanded or penalty levied:- Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the Control of Central Excise 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 adjudicating authority the duty 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 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."

##. Substantive provision of Sec.35F enacts that a person desirous of filing appeal against an order or a decision has to deposit the amount of duty or the penalty levied upon him. The Appellate Authority can dispense with "such deposit subject to such conditions" as it deems fit. Thus, the Appellate Authority has power to pass an appropriate order with regard to the amount or extent of deposit to be made and in exercise of that power, CEGAT had passed an order on June 20, 1997. In our opinion, such an order could have been passed by CEGAT. It is not disputed that the petitioner did not comply with that direction. It is also clear from the record that time was extended but even within the extended period, the amount was not paid. We specifically asked the learned counsel for the petitioner as to even now the petitioner is willing to pay the amount as per the direction of the Tribunal. The

counsel, however, stated that it is not possible for the petitioner to deposit the amount.

##. Our attention was invited by the learned counsel for the petitioner to Regina Vs. Barnet London Borough Council, Ex-parte Nilish Shah; (1982) 1 Q.B. 688 (HL) and also a decision of Court on appeal in the same case and observations by Lord Denning in his classic work "Closing Chapter". In our opinion, however, the case related to interpretation of statutes. We are afraid, the ratio laid down in that case would not apply to the facts of the case in hand.

##. Reliance was also placed on the following decisions:

1. G.T.C. Industries Ltd. Vs. Collector of Central Excise, 1994 (72) E.L.T. 535 (Delhi);

2. Bongaigaon Refinery & Petrochem. Ltd. Vs. Collector of Central Excise (A), Calcutta, 1994 (69) E.L.T. 193 (Calcutta);

3. Almin & Glose (Pvt.) Ltd. Vs. Collector of Central Excise & Customs, 1991 (55) E.L.T. 165 (Madras); and

4. Rubicon Vs. Collector of Central Excise, 1989 (44) E.L.T. (Kerala).

It is true that in some of the decisions, it has been observed that amount which could be recovered by the appellant from "Sundry Debtors" could not be taken into account. In our opinion, however, it cannot be said that discretion has been exercised arbitrarily or unreasonably.

##. It is also argued that no order regarding deposit of amount could have been passed and for that, our attention was invited on a decision of the Supreme Court in Union of India and another Vs. Jesus Sales Corporation, (1996) 4 SCC 69. The facts of that case were entirely different. There the Company was a "sick unit" governed under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). There is a statutory provision under Sec.22 of the Act and considering that provision, the order was passed. The counsel, no doubt, submitted that though in the instant case, the petitioner was not declared as sick unit under SICA, if the order is allowed to stand, the Company will close down and hence, ratio laid down in Jesus Sales

Corporation would apply. In our opinion, however, when provisions of SICA are not applicable as the unit is not declared as sick unit, the ratio laid down by the Supreme Court does not assist the petitioner.

##. For all these reasons, we are of the view that it cannot be said that the order passed by CEGAT is without jurisdiction or there is jurisdictional error in passing such order. There is no substance in the petition. The petition deserves to be dismissed and is accordingly dismissed. Notice is discharged. No order as to costs.

##. Learned counsel for the petitioner prays that the petitioner intends to approach higher forum. He, therefore, prays that ad-interim relief may be granted for some time so as to enable the petitioner to approach higher forum. When we have not entertained the petition and summarily dismissed it, the prayer cannot be granted. Order accordingly.

Sd/-

(C.K.Thakker,J.)

Sd/-

29-01-1998 (R.P.Dholakia,J.)

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