

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 23-12-2008

CORAM

THE HONOURABLE MR.S.J.MUKHOPADHAYA
ACTING CHIEF JUSTICE

AND

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

WRIT APPEAL No.1637 OF 2006

M/s.Trendy Moods,
represented by its Proprietor
Mr.Mukesh Gupta. ... Appellant

-vs-

- 1.Customs, Excise and Gold (Control) Appellate Tribunal
(now known as Customs, Excise and
Service Tax Appellate Tribunal),
No.26, Haddows Road,
Shastri Bhavan Annexe,
Chennai-600 006.
- 2.Commissioner of Customs,
Customs House,
Rajaji Salai,
Chennai-600 001. ... Respondents

Appeal under clause 15 of the letters patent of Writ
Appeal against the order dated 13.11.2006 made in WP No.5966 of
2000.

WP No.5966 of 2000: Petition praying to this Court to issue a writ
of Certiorarified Mandamus calling for the records of the first
respondent culminating in stay order Nos.89 & 90/2000 dated 1.2.2000
in Appeal Nos.268 & 269 of 1999 and quash the same and direct the
first respondent to dispose of the Appeal Nos.C/268 & 269/99 without
any pre-deposit of duty and penalty.

For appellant : Mrs.L.Maithili
for M/s.R.Sashidharan.

For respondents : Mr.P.Mahadevan,
Senior Central Government Standing Counsel.

J U D G M E N T

V.DHANAPALAN, J.

Appellant is a merchant, exporting various goods, apart from importing raw-materials. He was granted an Advance Licence on 01.04.1992 under Duty Exemption Scheme. As per the said Scheme, exporters are allowed to import inputs i.e., raw-materials, components, consumables, packaging materials and mandatory spares required for the manufacture of a given finished product known as 'resultant product', without payment of import duty on such inputs, subject to the condition that a specified quantity of the resultant product should be exported within a specific time limit and the foreign exchange against such exports should be realised. The licence in question permitted the import of 81 MTs. of Cassia, subject to the condition that 1000 Kgs. of Cassia Oil should be exported. The appellant effected imports of 80.534 MTs. of Cassia against the Advance Licence. Duty free imports were allowed in terms of Customs Notification No.159/90.

2. As a result of certain allegations made by the Directorate of Revenue Intelligence, a show cause notice, dated 07.09.1995, was issued to the appellant, alleging certain violations, and demanding duty of Rs.38,91,449/-, by disallowing the duty exemption availed, for which the appellant sent a reply, pursuant to which, the second respondent, namely, Commissioner of Customs, by his Order-in-Original No.13 of 1999, dated 15.03.1999, directed the appellant to pay Rs.26,54,175/-, towards customs duty, in addition to a penalty of Rs.2.50 lakhs on the firm and a personal penalty of Rs.25,000/- on the Power of Attorney Holder of the appellant. The said order was challenged by the appellant in Appeal Nos.C/268 and 269 of 1999 before the first respondent, namely, Customs, Excise and Service Tax Appellate Tribunal (in short, "the Appellate Tribunal") along with Stay Application Nos.151 and 152 of 1999. The Appellate Tribunal, by its Stay Order Nos.89 and 90 of 2000, dated 01.02.2000, directed the appellant to deposit a sum of Rs.13.00 lakhs within two months, observing that if such amount was deposited and compliance reported, the balance amount of duty, penalty, personal penalty etc., stood waived and recovery thereof stayed during the pendency of the appeals. It was also made clear that if the amount was not deposited within the stipulated time, the appeals would be liable for dismissal.

3. The said order of the Appellate Tribunal, dated 01.02.2000, was challenged before this Court in W.P.No.5966 of 2000, whereupon, a learned single Judge, by an order, dated 13.11.2006, modified the order of the Appellate Tribunal, directing the appellant to deposit a sum of Rs.8.00 lakhs instead of 13.00 lakhs. The correctness of the said order is under challenge in this Writ Appeal.

4. The only contention of the learned counsel for the appellant is that the appellant is not doing any gainful business and hence the direction for pre-deposit will lead to financial hardship to the appellant. The learned counsel would cite the following authorities :

(i) *J.N.Chemical (Pvt.) Ltd. v. CEGAT*, 1991 (53) E.L.T.543 (Cal.) :

"7.....On the facts and circumstances of the case, there was full justification for the exercise of the power vested in the Tribunal to dispense with the requirement of pre-deposit inasmuch as the case of the appellant was fully covered by the decision of a Special Bench of the Tribunal and still to insist upon the deposit of duty demanded and penalty levied would indubitably cause undue hardship to the appellant. The power to dispense with such requirement is conferred on the Tribunal to be exercised precisely in cases like these and, if it is not exercised under such circumstances, this Court will require it to be so exercised."

(ii) *Sri Krishna v. Union of India*, 1998 (104) E.L.T.325 (Del.) :

"8.The order of the Tribunal should show if the pleas raised before it, have any merit *prima facie* or not. If the appellant has such a *prima facie* strong case as is most likely to exonerate him from payment and still the Tribunal insists on the deposit of the amount it would amount to undue hardship."

(iii) *Mehsana Dist.Co.op.Milk P.U.Ltd. v. Union of India*, 2003 (154) E.L.T.347 (S.C.) :

"By the impugned order, the appellants

have been directed to deposit an amount of Rs.30 lakhs by way of pre-deposit. The reasoning given in support of such order is wholly unsatisfactory. The appellate authority has not at all considered the *prima facie* merits and has concentrated upon the *prima facie* balance of convenience in the case. The Appellate Authority should have addressed its mind to the *prima facie* merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors."

(iv) *Jay Engineering Works Ltd. v. Commissioner of Customs, Chennai*, 2003 (162) E.L.T.680 (Tri.-Bang.) :

"The appellants had applied for the advance licence for the standard inputs as identified by the Standard Input/Output Norms against exports already made of ceiling fans. The imported goods viz., aluminium alloy having been actually used for manufacture of top and bottom covers and fans found to have been exported, the allegation of mis-declaration is not invocable."

(v) *Northern Doors (P) Ltd. v. Commissioner of Central Excise, Kanpur*, 2005 (182) E.L.T.450 (All.) :

"While deciding the application, Court must apply its mind as to whether the appellant has a strong *prima facie* case on merit. If an appellant, having strong *prima facie* case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restraint on the appellant."

(vi) *I.T.C.Ltd. v. Commissioner (Appeals), Cus.& C.Ex., Meerut-I*, 2005 (184) E.L.T.347 (All.) :

"It is clear that the Court should not grant interim relief/stay of the recovery merely by asking of a party. While

considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong prima facie case on merit. If an appellant, having strong prima facie case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restraint on the appellant running in a good financial condition."

(vii) *Bhavya Apparels (P) Ltd. and Another v. Union of India and Another*, 2007 (10) Supreme Court Cases 129 :

"Section 129-E of the Act would be attracted where the goods in question are not in the custody of the Revenue. The said provision, therefore, would be attracted only when the ingredients thereof exist."

5. Conversely, the learned Senior Central Government Standing Counsel, appearing for the respondents, would submit that the EXIM Policy does not provide for stocking of the duty free imports and later on selling the same in the local market either before or after completion of export obligation; the duty free imports in this case can in no way be considered as 'replenishment materials', as the appellant is not a manufacturer and no attempt had been made to replenish the raw-materials used in the manufacture of export products, but the same had only been kept as stock; hence, by no stretch of imagination, these duty exempt material, kept as stock, can be termed as replenished material and disposed of as per Customs Notification No.159/90 and that the appellant is having sufficient means to pay the pre-deposit. In support of his contention, the learned Senior Central Government Standing Counsel has relied upon the following decisions :

(i) *Benara Valves Ltd. and Another v. Commissioner of Central Excise and Another*, 2006 (13) Supreme Court Cases 347 :

"13. For a hardship to be 'undue', it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it."

"14. The word "undue" adds something more than just hardship. It means, an excessive hardship or a hardship greater than the circumstances warrant."

(ii) *Monotosh Saha v. Special Director, Enforcement Directorate & Another*, 2008 AIR SCW 6004 :

"8. It is true that on merely establishing a *prima facie* case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest..."

19. Undisputably, the appellant had deposited the amount which was directed to be deposited. However, for the balance amount demanded with a view to safeguard the realization of penalty, the appellant shall furnish such security as may be stipulated by the Tribunal. On that being done, the appeal shall be heard without requiring further deposit if the appeal is otherwise free from defect."

6. We have heard the learned counsel for the parties; considered the rival submissions and also gone through the records, coupled with the authorities cited.

7. The questions as to the violation of Duty Exemption Scheme and the liability of the appellant have to be decided in the appeal filed before the first respondent Appellate Tribunal. In this connection, it is more relevant to refer to Section 129-E of The Customs Act, 1962, which reads as under :

"129E. 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 duty and interest demanded or penalty levied :

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of the 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."

8. The above Section would make it clear that in order to entertain any appeal against the decision or order relating to any duty and interest demanded in respect of goods, which are not under the control of the customs authorities, or any penalty levied, the person, preferring appeal, has to deposit with the proper officer duty and interest demanded or penalty levied, which is mandatory. However, in any particular case, if the Commissioner (Appeals) or the Appellate Tribunal is satisfied that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person, the said authorities may dispense with such deposit, subject to such conditions as they may deem fit to impose.

9. In this case, originally, in the show cause notice, duty was demanded at Rs.38,91,449/-. Thereafter, on explanation by the appellant, the second respondent, namely, Commissioner of

Customs, by his Order-in-Original No.13 of 1999, dated 15.03.1999, restricted the demand to Rs.26,54,175/-, towards customs duty, in addition to a penalty of Rs.2.50 lakhs on the firm and a personal penalty of Rs.25,000/- on the Power of Attorney Holder of the appellant, instead of Rs.38,91,449/-. Again, the said sum was reduced to Rs.13.00 lakhs by the Appellate Tribunal. Finally, the said sum of Rs.13.00 lakhs was curtailed to Rs.8.00 lakhs by the learned single Judge. Though no prima facie case, undue hardship or financial constraint was shown by the appellant, the Appellate Tribunal and the learned single Judge were lenient enough to reduce the duty to Rs.13.00 lakhs and thereafter to Rs.8.00 lakhs respectively. At this stage, if the said amount of Rs.8.00 lakhs is further reduced or waived, the interest of the revenue will be jeopardised. Hence, the appellant cannot be allowed to prefer the appeal without pre-deposit, which is a necessary requirement for entertaining the appeal by the Appellate Tribunal, as per Section 129-E. It is to be stated that the pre-deposit to be made by the appellant will not in any way prejudice his case, as the matter shall be decided by the Appellate Tribunal on merit and in accordance with law.

10. With regard to the grievance of the appellant that because of the hardship, he is unable to make pre-deposit, the point is to be decided as to whether there is any undue hardship, based on which the appellant is entitled for waiver. As regards undue hardship, a proposition has been laid down by the Supreme Court in a number of decisions. A Division Bench of this Court, on an earlier occasion, considered two of the decisions of the Supreme Court, namely, (i) *S.Vasudeva v. State of Karnataka & Ors.*, AIR 1994 SC 923, and (ii) *M/s.Benara Valves Ltd. & Ors. v. Commissioner of Central Excise & Anr.*, 2006 (12) SCALE 303, in an unreported judgment, dated 08.01.2008, passed in W.A.Nos.1138 to 1144 of 2007. In *S.Vasudeva's* case, the Supreme Court held that the expression "undue hardship" is normally related to economic hardship. "Undue" means something, which is not merited by conduct of the claimant or is very much disproportionate to it. Undue hardship is excessive hardship, that is not warranted by circumstances. In *M/s.Benara Valves Ltd.'s* case, the Apex Court observed that for a hardship to be 'undue', it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it. It was also observed therein that the word "undue" adds something more than just hardship. It means, an excessive hardship or a hardship greater than the circumstances warrant.

11. In the case on hand, the capacity of the appellant to pay the amount having been noticed and in the absence of any

financial burden, it cannot be construed that there is an undue hardship for the appellant to resort to claim waiver of pre-deposit. Therefore, the decisions, relied upon by the appellant, are not applicable to the present case.

12. The other aspect relates to imposition of condition to safeguard the interest of revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of revenue. Therefore, the Appellate Tribunal, while dealing with the plea of the appellant for waiver of pre-deposit, has considered the materials available on record and stipulated a condition, as required, to safeguard the interest of revenue.

13. Under the circumstances, we are of the considered opinion that the plea of the appellant for waiver of pre-deposit cannot be countenanced. However, with a view to give the appellant an opportunity, we afford a further time of 15 days to deposit the amount of Rs.8.00 lakhs, as ordered by the learned single Judge, if not already deposited. In the event of such deposit, the Appellate Tribunal is directed to take up the appeal for hearing and decide the matter on merit and in accordance with law.

14. With the above observation, this Writ Appeal is dismissed. No costs. Consequently, the connected M.P.No.1 of 2006 also stands dismissed.

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Asst.Registrar

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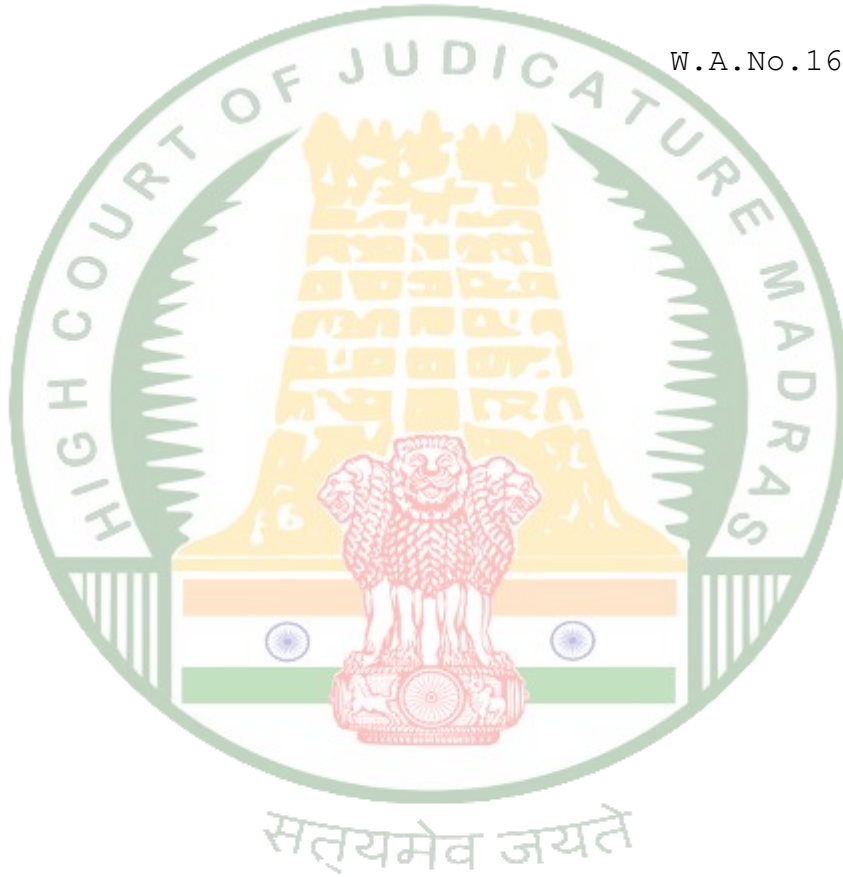
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+1cc to Mrs. L.Maithili, Advocate Sr 72069

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W.A.No.1637 OF 2006



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