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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Judgment pronounced on : **28.04.2023**+ **W.P.(C) 1242/2022 & CM APPL. 3625/2022****MOHAMMED AKMAM UDDIN AHMED & ORS.** Petitioners

Versus

**COMMISSIONER APPEALS CUSTOMS AND CENTRAL
EXCISE & ORS.**

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Ms Riya Soni, Advocate.

For the Respondents : Mr Akshay Amritanshu, Sr. Standing Counsel with Mr Ashutosh Jain, Advocates for Respondents No. 1 & 2.
Mr Bhagvan Swaroop Shukla, CGSC, Mr Jitendra Kumar Tripathi and Mr Sarvan Kumar, Advocates for Respondent No. 3/Union of India.**CORAM:****HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MS JUSTICE TARA VITASTA GANJU****[Physical Court Hearing/ Hybrid Hearing (as per request)]****JUDGMENT****TARA VITASTA GANJU, J.:****TABLE OF CONTENTS**

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Preface:

1. The present Petition has been filed by the Petitioners, *inter-alia*, challenging the constitutional vires of Section 129E of the Customs Act, 1962 [hereinafter referred to as “the Act”] and seeking a direction to Respondents to admit the Appeal filed by the Petitioners without pre-deposit of the mandatory duty as stipulated in Section 129E of the Act.
- 1.1 The Petitioners have submitted that they belong to poor families and live in Islam Nagar, Hojai, Assam, and are not well-educated youth. In support of their plea, the Petitioners No. 1 and 3 have filed an income certificate dated 13.12.2021 issued by the Office of the Circle Officer, Hojai, Assam, showing an annual income of Rs. 1,00,000/- (Rupees One Lakh). The Petitioners further stated that they are earning their livelihood through agriculture and by selling small quantities of Agarwood. The Petitioners have submitted in the Petition that the goods seized by the Customs Authorities were purchased by them, and the bills were attached to the Reply to the Show Cause Notice. The Petitioners have also stated that the goods seized were wrongly assessed at very high market value, and the penalty has been levied based on an incorrect assessment of the goods. The Petitioners have further submitted that their right of Appeal under Section 129E of the Act cannot be exercised as they are

not financially sound and hence, unable to pay the mandatory pre-deposit as required to challenge this levy.

Background:

2. The undisputed facts for the purpose of this Petition are as follows:
 - 2.1 The Petitioners were travelling from Assam to Delhi, and they intended to depart for Bangkok on 20.09.2019. They were carrying three handbags and five trolley bags. The screening of the bags carried by the Petitioners at IGI Airport revealed that the Petitioners were carrying Agarwood Chips and Agarwood Oil. Agarwood Chips weighing 120 Kgs, along with 4.5 Kgs of Agarwood Oil (approximately), recovered from the Petitioners, which were collectively valued at Rs. 6,36,00,000/- by the Customs Authorities.
 - 2.2 Since the Petitioners failed to produce any valid document for the export of the said Agarwood Chips, the Petitioners' act of carrying Agarwood Chips and Agarwood Oil was held to be in contravention of the provisions of the Act read with the provisions of the Foreign Trade (Development & Regulation) Act, 1992, and the same were confiscated under Section 113 of the Act. Accordingly, a Show Cause Notice dated 16.03.2020 [hereinafter referred to as "the SCN"] issued under Section 124 of the Act, was served upon the Petitioners by the Office of the Commissioner of Customs, for the said confiscated Agarwood Chips and Agarwood Oil.
 - 2.3 The Petitioners filed a common Reply to the SCN on 16.03.2020. Although the copy of the Reply to the SCN was not filed with the

Petition, the Order-in-Original dated 13.07.2021 [hereinafter referred to as “the OIO”] reproduces the Reply. As per the OIO, the Petitioners were represented before the Respondent No. 1 and 2 through Counsel and were accorded a personal hearing on 01.03.2021 as well.

2.4 After hearing the contentions of all the parties, the Respondent No. 2 by its OIO held that the Petitioners do not possess valid documents for the export of the Agarwood Chips and Agarwood Oil and have thus contravened the provisions of the Act. The OIO held that the goods are liable for absolute confiscation and imposed a penalty on each of the Petitioners as under:

- “(i) *Absolute confiscation of the seized goods collectively amounting to Rs. 6,36,00,000/-.*
- “(ii) *Penalty of Rs. 15,00,000/- on Petitioner No. 1 under Section 114 of the Customs Act, 1962.*
- “(iii) *Penalty of Rs. 75,00,000/- on Petitioner No. 2 under Section 114 of the Customs Act, 1962.*
- “(iv) *Penalty of Rs. 25,00,000/- on Petitioner No. 3 under Section 114 of the Customs Act, 1962.*
- “(v) *Absolute confiscation of the bags used to conceal the seized goods.”*

2.5 Aggrieved by the OIO, the Petitioners filed three Appeals on 27.10.2021 before Respondent No. 1 along with an application for exemption/stay qua deposit of the mandatory condition of the pre-deposit of 7.5% of the penalty for filing an Appeal. One such Appeal (of Petitioner No. 2) has been placed before this Court.

2.6 The Superintendent (Appeals) by its letter dated 08.11.2021, returned all three Appeals to the Petitioners, as the mandatory payment of

7.5% of the penalty imposed under Section 129E of the Act was not made.

2.7 This has led to the filing of the present Petition.

Submissions of the Petitioners:

3. The Petitioners raised a challenge to the constitutional validity of Section 129E of the Act. As has already been noted in Order dated 27.04.2022 passed by this Court, the Supreme Court, by its Judgment dated 28.02.2022, in the matter titled as ***Chandra Sekhar Jha V. Union of India & Anr.***¹ has sustained the wholesomeness of this provision. As a matter of fact except for the prayer, no submissions were advanced on the purported unconstitutionality of Section 129E of the Act. Hence, we do not need to advert to this any further.
4. The Petitioners have stated that the export of cultivated variety of Agarwood Chips and Agarwood Oil is free and not prohibited by Sl. No. 60(b) of Schedule – 2 of Export Policy, Table – B, Chapter 12. The Petitioners have also relied on Notification No. 45/2015-2020 dated 29.11.2021 on Amendment in Export Policy of Agarwood Oil and Agarwood Chips and Powder, (which describes the policy conditions for the export of Agarwood Chips and Powder and Agarwood Oil), stating that it is only by the amendment of said policy that the seized products have become prohibited. However, at the time of the seizure by the Customs Authorities on 20.09.2019, the said policy was not in force.

¹ 2022 SCC OnLine SC 269

4.1 It is also submitted by the Petitioners that the seized goods were wrongly valued by the Respondents. In this regard, the Petitioners relied upon a Draft Policy for Sustainable Utilisation of Agarwood of the Ministry of Environment and Forests [hereinafter referred to as “the Draft Policy”]. It is submitted on behalf of the Petitioners that the Draft Policy values Agarwood from “*a few dollars per kilo for the lowest quality, to over thirty thousand US Dollars for top quality oil and resinous wood.*” The Petitioners state that the Agarwood Chips seized were purchased from the local market and are of the lowest grade valued between Rs. 140/- to Rs. 1,200/- per Kg and thus Respondent No. 2 has wrongly valued the seized goods.

Submissions of the Respondents:

5. On the other hand, it is contended by Respondent No.2 that Agarwood is an endangered species and is covered under Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flaura [hereinafter referred to as “CITES”]. CITES is an international multilateral treaty to protect endangered plants and animals from the threats of international trade, a treaty to which India is a signatory. The export of Agarwood is also restricted in terms of the Foreign Trade Policy 2015-2020 and the same can be exported only after the submission of permission/license from the competent authority. Since, the Petitioners failed to produce any valid documents for the export of the Agarwood Chips and Agarwood Oil, the goods were seized on 20.09.2019 and confiscated.

5.1 The Respondent No. 2 has also relied on the preliminary examination report dated 20.09.2019, which has been given by the Wildlife Inspector, Wildlife Crime Control Bureau (NR), New Delhi [hereinafter referred to as “the Wildlife Inspector”], which states that on examination of the baggage belonging to the Petitioners, “*it was found to contain wooden Chips in assorted sizes and shapes/different grades, of Agar wood (aquilaria malaccensis), 120 kg (Nt. Wt.) and 4.5 kg Agarwood Oil*”. This report further states that the confiscated species is included in Appendix II of CITES and the export of this species of Agarwood is prohibited for exportation vide DGFT Notification No. 2 (RE-98)/1997-2002 dated 13.04.1998. However, the copy of this notification has not been filed by the Respondents.

Case Laws cited:

6. The Counsel for the Petitioners had submitted that the Petitioners are poor, daily wagers, and the impugned provision prevents them from exercising their statutory right to Appeal. The Petitioners have filed submissions/compilations of judgments wherein the Coordinate Benches of this Court have, in rare and deserving circumstances, allowed a waiver of this pre-deposit provision. In this regard, the following judgments have been relied upon:

- (i) ***Pioneer Corporation Vs. Union of India***²;
- (ii) ***Narender Yadav Vs. Joint Commissioner of Custom***

² 2016 SCC OnLine Del 6758

*(Exports)*³;

- (iii) *Shubh Impex Vs. Union of India & Ors.*⁴;
- (iv) *Texplas India Pvt. Ltd. Vs. Commissioner Customs, International Container Depot*⁵;
- (v) *Chandra Sekhar Jha* case (supra).

6.1 The Counsel for Respondent No.2, on the other hand, has averred that there is no power of waiver conferred on the Court, insofar as pre-deposit of penalty is concerned. The Counsel for the Respondent No. 2 has relied on the following judgments to state that Section is unambiguous and that there is a mandatory requirement of pre-deposit prior to the filing of an Appeal:

- (i) *Chandra Sekhar Jha* case (supra);
- (ii) *Dish TV India Limited Vs. Union of India & Ors.*⁶;
- (iii) *Nimbus Communication Limited Vs. Commissioner of Service Tax*⁷;
- (iv) *Ganesh Yadav Vs. Union of India & Ors.*⁸.

District Magistrate's Report:

7. Since it was contended by the Counsel for the Petitioners that the Petitioners do not have the financial wherewithal to make a pre-deposit as is required under Section 129E of the Act and that the

³ W.P. (Civil) 195/2019-[Delhi High Court]

⁴ 2018 SCC OnLine Del 8793

⁵ 2020 SCC OnLineUtt 459

⁶ 2020 SCC OnLine Del 2580

⁷ 2016 SCC OnLine Bom 6792

⁸ 2015 SCC OnLine All 9174

Petitioners belong from poor families in Islam Nagar, Hojai, Assam, by Order dated 27.04.2022, this Court had directed the District Magistrate, District Hojai in the State of Assam to place a report before this Court as regards the income and assets of all three Petitioners.

7.1 Pursuant to the said Order, the office of the Deputy Commissioner, Hojai, Government of Assam, has given a report dated 16.06.2022. The relevant extract of the report has been reproduced below:

“With reference to the subject cited above, I have the honour to inform regarding income and assets report of the petitioners in connection with W.P.(C) 1242/2022 & CM APPL.3625/2022 as mentioned below:

1) *Mohammed Akram Uddin Ahmed, S/o Mohammed Abdul Mannan is a resident of Vill- Islampur, Mouza- Hojai, Dist.- Hojai (Assam). There is 1.33 Hectare Land in his father's name at Vill.- Fatehpur and Islampur, the present govt. value of the land is Rs. 51,50,000/- (Fifty One Lakhs Fifty Thousand Rupees) Only. He is a daily wage earner.*

2) *Bahar Uddin, S/o- Murakib Ali is a resident of Vill- Matikhola, Mouza- Namati, Dist.-Hojai (Assam). There is 0.02 Hectare Land in his name at Vill.-Matikhola, the present govt. value of his land is Rs. 57,680/- (Fifty Seven Thousand Six Hundred Eighty Rupees) Only. He is a daily wage earner.*

3) *Ikbal Hussain, S/o Moin Uddin is a resident of Vill- Islampur, Mouza- Hojai, Dist.- Hojai (Assam). There is no land in his or his father's name. He is a daily wage earner.....*

[Emphasis is ours]

7.2 The gist of the aforesaid report is that all the three Petitioners, i.e., Mohammed Akram Uddin Ahmed, Bahar Uddin, and Ikbal Hussain, are residents of villages in District Hojai, and are daily wage earners

with little or no means. Therefore, the poor financial condition of the Petitioners stood confirmed by the aforesaid report.

The Statute :

8. For ready reference, Section 129E of the Act is reproduced hereunder:

“Section 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, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Principal Commissioner of Customs or 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, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, 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 ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, 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. (25 of 2014)”

- 8.1 The words used in the Section state that the Tribunal or Commissioner (Appeals) shall not entertain an Appeal unless 7.5% of the penalty in dispute has been deposited.
- 8.2 A plain reading of the second proviso to the Section also makes it clear that the provisions of Section 129E of the Act shall not be applicable to stay applications and Appeals pending before 06.08.2014.
- 8.3 In the present case, to file an Appeal, the mandatory pre-deposit to be made by each of the Petitioners, would be as follows:
 - (i) A pre-deposit of Rs. 1,12,500/- [7.5% of the penalty of Rs. 15,00,000/-] by Petitioner No. 1;
 - (ii) A pre-deposit of Rs. 5,62,500/- [7.5% of the penalty of Rs. 75,00,000/-] by Petitioner No. 2;
 - (iii) A pre-deposit of Rs. 1,75,000/- [7.5% of the penalty of Rs. 25,00,000/-] by Petitioner No. 3.

Discussions on Case Law:

9. Both parties have cited judgments in support of their diametrically opposite contentions, while the Petitioners have relied on decisions of this Court in support of their plea that the mandatory pre-deposit of 7.5% of the penalty in dispute can be waived in certain circumstances. The Respondents have argued that no waiver can be permitted under the provision of Section 129E of the Act.
- 9.1 The Petitioners placed reliance on judgments of Coordinate Benches

of this Court in ***Pioneer Corporation*** case (supra), ***Narender Yadav*** case (supra) and ***Shubh Impex*** case (supra) to canvas the argument that the Court has in special circumstances, waived the payment of mandatory pre-deposit amount as envisaged in Section 129E of the Act.

9.2 A Coordinate Bench of this Court in ***Pioneer Corporation*** case (supra), where the Court, while discussing the amendment made to Section 35F of the Central Excise Act, 1944 [hereinafter referred to as “the CE Act”] (*which Section is pari materia to Section 129E of the Act and also requires a pre-deposit in the case of an Appeal*), held that prior to the amendment of Section 35F of the CE Act, a discretion was available to the Central Excise and Service Tax Appellate Tribunal [hereinafter referred to as “CESTAT”] to consider financial hardship and accordingly determine the pre-deposit amount post the amendment, a direction of waiver of the pre-deposit would be contrary to the express legislative intent of the amendment. However, it further held that the jurisdiction of the High Court under Article 226 cannot be taken away and that such power should be used only in rare and deserving cases where a clear justification is made out for such interference as follows:

“9.A direction, therefore, to the CESTAT that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35F with effect from 6thAugust, 2014. While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35F cannot possibly be taken away, the Court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out of such

interference. Having heard the submissions of Mr. Datta and having perused the adjudication order, the Court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the pre-deposit as far as the petitioner's appeal before the CESTAT is concerned".

[Emphasis is ours]

- 9.3 The Coordinate Benches of this Court in ***Narender Yadav*** case (supra) and ***Shubh Impex*** case (supra), both of which, while dealing with the amended provision of Section 129E of the Act, have permitted waiver of the mandatory pre-deposit as is envisaged in the said provision but, in exceptional circumstances.
- 9.4 In ***Narender Yadav*** case (supra), a Coordinate Bench of this Court, while recording that the Petitioner was a salaried employee drawing Rs. 14,500/- per month [i.e., Rs. 1,74,000/- per annum] and that the Order-in-Original did not give any reasons for the penalty imposed on the Petitioner, directed that the requirement of pre-deposit under Section 129E of the Act be waived. The relevant extract is below:

".... The petitioner's grievance is that as H-Card holder, imposition of over Rs.3.8 crores penalty in the overall circumstances of the case, given that the Order-in-Original did not record any specific adverse finding against him, is unwarranted. The petitioner, therefore, seeks a direction that the requirement of pre-deposit as a condition for the hearing and disposal of the appeal – before the Commissioner (Appeal), should be dispensed with.

The Court has considered the submissions, and the fact that the Order-in-Original discloses no reason why penalty was imposed upon the petitioner - a salaried employee drawing Rs.14,500/- per month. In the circumstances, the petitioner's appeal to the Commissioner (Appeals) shall be heard on its merits without insisting upon the requirement of pre-deposit; it is accordingly directed to be waived....."

[Emphasis is ours]

9.5 In ***Shubh Impex*** case (supra), a direction to make a pre-deposit of Rs.1.27 crores, being 7.5% of the duty imposed, under Section 129E of the Act was challenged by the Appellant. While discussing the judgment in ***Pioneer Corporation*** case (supra), a Coordinate Bench of this Court recognized the existence of the power available to the Court under Article 226 of the Constitution *albeit* under rare and compelling circumstances. The Court thus directed that a pre-deposit be made in the sum of Rs. 5 Lakhs in addition to the token pre-deposit already made by the Appellant therein. The relevant extract is below:

“10. Given the aforesaid facts, while we are inclined to accept the preliminary objection of the respondents on the alternative remedy, we are also inclined to interfere and relax the condition of pre-deposit. We would direct that on the petitioner making a pre-deposit of Rs. 5,00,000/- in addition to Rs. 3,70,008/-, the appeal which would be filed by the petitioner would be entertained by the first appellate authority. The pre-deposit would abide by the result of the appeal. First Appeal, if preferred within 21 days, would not be rejected on the ground of limitation.

*11. In ***Pioneer Corporation v. Union of India***, 2016 (340) ELT 63 (Del), a Division Bench of this Court has held that the High Court while exercising writ jurisdiction under Article 226 of the Constitution can exercise discretion and reduce the pre-deposit in rare and deserving case, notwithstanding the amendment made under Section 35F of the Customs Act [sic - Central Excise Act].*

The statute has not withdrawn or taken away the said power vested in the Writ Court, which should be exercised in rare but compelling and deserving cases, when the cause of justice requires such reduction.”

[Emphasis is ours]

9.6 Another Coordinate Bench of this Court, in the case of *Manoj Kumar Jha v. DRI*,⁹ allowed the Appeal to be prosecuted on payment of partial pre-deposit, given the financial stringency of the Appellant in the case, subject to the furnishing of bond or reasonable security. Reference can be made to paragraph 3 of this judgment, which reads as follows:

“3. To this Court, it appears that the petitioner is a man of limited means it is not clear whether any prosecution has been launched against the petitioner. In these circumstances, in view of the material on record which suggests that the petitioner has very limited means to deposit any amounts, this Court is of the opinion that the relief is warranted. The requirement of pre-depositing of any amount directed to be waived, however, the petitioner shall furnish a bond and also provide reasonable security having regard to the list of immovable properties produced before the Court. Subject to this, the requirement of pre-deposit is hereby waived. The petitioner’s appeal shall be revived and now CESTAT shall proceed to hear the parties on its merits after issuing adequate notice to the counsel.”

[Emphasis is ours]

9.7 The Allahabad High Court in the *Ganesh Yadav* case (supra), while upholding the requirement of pre-deposit under Section 35F of the CE Act as mandatory and dismissing the constitutional challenge, held that the High Court under Article 226 of the Constitution of India is vested with the jurisdiction in an appropriate case to dispense with the requirement of a pre-deposit. Reliance is placed on the following extract:

“8. The requirement of a deposit of 10% is in the case of an appeal to the Tribunal against an order of the Commissioner

⁹ 2019 (365) ELT 166 (Del)

*(Appeals). This requirement cannot be regarded or held as being arbitrary or as violative of Article 14. Above all, as the Supreme Court held in *Shyam Kishore* (supra) the High Court under Article 226 of the Constitution is vested with the jurisdiction in an appropriate case to dispense with the requirement of pre-deposit and the power of the Court under Article 226 is not taken away. This was also held by the Supreme Court in *P. Laxmi Devi* (supra) in which the Supreme Court observed that recourse to the writ jurisdiction would not be ousted in an appropriate case.....”*

[Emphasis is ours]

10. The Respondent No. 2, in addition to placing reliance on *Chander Shekhar Jha* case (supra), has also relied on the judgment of a Coordinate Bench of this Court in *Dish TV India Ltd.* case (supra) as well as a Coordinate Bench of the Bombay High Court in *Nimbus Communications* case (supra).
 - 10.1 A Coordinate Bench of this Court in *Dish TV India Limited* case (supra), in a matter concerning the import of satellite/viewing cards by the Petitioner Company, upheld the mandatory pre-deposit in view of the amendment to the Act. The aforesaid judgment while discussing the amendment of Section 129E of the Act noted the fact that the Petitioner's annual turnover for FY 2018-2019 was more than Rs. 6,000 crores and that the mandatory pre-deposit would be a minuscule percent thereof, has directed the pre-deposit be made.
 - 10.2 The Coordinate Bench in the *Dish TV India Limited* case (supra) relied on the previous decision in the matter of *M/s Diamond Entertainment Technologies Pvt. Ltd. v Commissioner CGST*

Commissionerate Dehradun and Anr.¹⁰ and Anjani Technoplast Ltd. v Commissioner of Customs¹¹ to hold that waiver of pre-deposit cannot be granted.

10.3 An analysis of the **Anjani Technoplast** case (supra) shows that the issue before the Coordinate Bench was whether the amended Section 129E of the Act would apply to all the appeals filed on and from the date of enforcement of the amended provision, i.e., from 06.08.2014. The Coordinate Bench held that the wordings of the second proviso to Section 129E of the Act were unambiguous and the amended provision would not apply to any appeals pending before the Appellate Authority which have been filed prior to 06.08.2014. Thus, amended provision would apply to all appeals filed on or after 06.08.2014 as follows :

"In any event, as far as the amended Section 129E of the Act is concerned, its wording is unambiguous. It opens with the words 'The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal.... unless the appellant deposits the percentage of the demanded duty as stipulated in clauses (i), (ii) or (iii) thereunder.' The wording of the second proviso to the amended Section 129 E is also unambiguous. It makes it clear that the amended provision would not apply to appeals and stay applications already "pending" before the appellate authority "prior to the commencement of the Finance (No. 2) Act, 2014", i.e. 6th August 2014. In other words, it would apply to all appeals filed on or after the said date. Therefore, what is to be seen is the date of filing of the appeal. If the appeal is filed on or after 6th August 2014 then the condition stipulated in the amended Section 129E of the Act has to be fulfilled for the appeal to be entertained."

[Emphasis is ours]

¹⁰ W.P.(C) 10091/2019 (Delhi High Court- dtd 18.09.19)

¹¹ 2015 (326) ELT 472 (Del.)

10.4 The decision of the Coordinate Bench of this Court in ***M/s Diamond Entertainment*** case (supra), while refusing to permit the petitioner to prosecute its appeal before CESTAT without complying with the conditions of the mandatory pre-deposit did not, in fact, rule out that in exercise of its inherent powers under Article 226 of the Constitution of India. It was held that the Appellant may be allowed to prosecute its appeal without the payment of the pre-deposit amount. Reliance is placed on Paragraph 11 of this judgment which reads as follows:

“11. Thought it may be argued that, this Writ Court, in exercise of the inherent powers conferred on it by Article 226 of the Constitution of India in appropriate cases, may allow the appellant to prosecute its appeal before the CESTAT, without requiring to pay the mandatory pre-deposit...”

[Emphasis is ours]

10.5 In ***Nimbus Communications*** case (supra), a Coordinate Bench of the Bombay High Court has upheld the requirement of mandatory pre-deposit in the case of an Appeal filed after 06.08.2014, while discussing Section 35F of the CE Act. The issue that arose before the Court was whether the law as applicable on the date of commencement of the *lis* or on the date of filing of the appeal would govern the dispute. The case was disposed of by consent of the parties holding that the amended provisions would not apply to those appeals and applications which were pending prior to 06.08.2014, regardless of the date of commencement of the *lis*.

11. The judgments in the ***Dish TV India Ltd.*** case (supra), ***M/s Diamond***

Entertainment case (supra), **Anjani Technoplast** case (supra) and **Nimbus Communications** case (supra) are distinguishable on facts as these judgments were primarily adjudicating the following two questions of law:

- (i) The issue of challenge to the constitutional validity of Section 129E of the Act and Section 35F of the CE Act; and
- (ii) Whether the law as applicable pre-amendment (on or before 06.08.2014) in (i) above, would be applicable in the circumstances where the infringing act or the *lis* occurred prior to the amendment.

11.1 The Supreme Court in **Chander Shekhar Jha** case (supra), put a quietus to this issue. The question that arose in this case was whether the Appellant is to be governed by the provisions of the unamended Section 129E of the Act, since the incident in question related to the year 2013. While noting that the amendment has come into force on 06.08.2014, the Supreme Court held that applications and appeals, which were pending as on 06.08.2014 before the Appellate Authority, would be governed by the unamended provision, however, for all appeals filed thereafter, the amended provision of the Act would apply. The relevant extract is reproduced herein below:

“.... The amended provision, as we have already noticed has come into force from 06.08.2014. Therefore, in regard to stay applications and appeals which were pending before any Appellate Authority prior to commencement of The Finance (No. 2) Act 2014, Section 129E as substituted would not apply. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision.”

[Emphasis is ours]

12. Thus an analysis of the conspectus of law as enunciated above gives a clear understanding that after passing of the Amendment Act on 06.08.2014, the amended Section 129E of the Act and also Section 35F of the CE Act shall be applicable in those cases where the Appeal has been filed after 06.08.2014.

12.1 However, as discussed above, the Coordinate Benches of this Court have exercised and, thus, preserved the power as available under Article 226 of Constitution of India, 1950 to either waive the pre-deposit condition or to grant the right to appeal subject to a part deposit or security. The power, *albeit*, has been exercised only in rare and exceptional cases.

12.2 It was held by the Allahabad High Court, speaking through Dr. D.Y. Chandrachud, Chief Justice (as his Lordship then was) in the ***Ganesh Yadav*** case (supra) that:

“8. Whether the writ jurisdiction under Article 226 should be exercised, having due regard to the discipline which has been laid down under Section 35F of the Act, is a separate matter altogether but it is important to note that the power under Section 226 [sic : Article 226] has not been, as it cannot be, abridged.”

[Emphasis is ours]

12.3 The question that, therefore, arises is whether the present case is an appropriate case for this Court to exercise its jurisdiction under Article 226 of the Constitution of India to dispense with the requirement of a pre- deposit.

Agarwood : Species and Export:

13. To better understand the contention of the parties with respect to the goods, i.e., Agarwood Chips and Agarwood Oil and the valuation thereof in the present case, it is also necessary to advert to the 'The Assam Agarwood Promotion Policy 2020' of the Assam Government [hereinafter referred to as "the Agarwood Policy"]. Paragraph 1 explains the usage of Agarwood for medicinal, aromatic and even religious purposes. Paragraph 4 of the Agarwood Policy, *inter-alia*, sets forth that the Agarwood species called *Aquilaria Malaccensis* is a critically endangered tree species in India and is included in Appendix II of CITES, i.e., potentially threatened species.

13.1 The Petitioners have contended that the export of Agarwood Chips and Agarwood Oil is free and not prohibited, while the Respondents contend that the export of Agarwood is prohibited under the DGFT notification dated 13.04.1998 [hereinafter referred to as "1998 Notification"].

13.2 A review of the 1998 notification would show that the export of *Aquilaria Malaccensis* species of Agarwood is in fact not prohibited but "restricted". The export is subject to fulfilment of certain conditions which include production of a Certificate of Cultivation from the Regional Deputy Director (Wildlife), or Chief Conservator of Forests or Divisional Forest Officers of the State concerned; the requisite permit for export under CITES and/or other requisite formalities.

13.3 While both the Petitioners as well as the Respondent No.2 have agreed that the species *Aquilaria Malaccensis* is an endangered species, they differ on whether the goods seized belong to the high grade *Aquilaria Malaccensis* species of Agarwood or a lower grade different species.

13.4 The Petitioners have stated that they were carrying low grade Agarwood which is not restricted for export.

13.5 The Respondent No.2, in the OIO places reliance on the report of the Wildlife Inspector dated 20.09.2019 [*see Paragraph 5.1 supra*] to contend that the goods seized are of the *Aquilaria Malaccensis* species. However, the OIO misses a crucial aspect of the report of the Wildlife Inspector, wherein it is stated that “*different grades of Agarwood were seized*”. Paragraph 20 of the OIO in fact concludes that the seized goods are prohibited/restricted goods without going into the ‘*species*’ or ‘*grades*’ of the Agarwood Chips seized. This is important as without going into the ‘*grade*’ and ‘*species*’ of Agarwood Chips and Oil, it is not possible to ascertain its valuation.

Discussion on Valuation and Prices:

14. It is noticed that the report of the Wildlife Inspector referred to in Paragraph 5.1 above is a “*preliminary examination report*”. This report was made after the examination of the baggage of the Petitioners at IGI Airport, Delhi at the time of seizure of the goods on 20.09.2019. The report does not set forth any price/value or grade of the goods seized but identifies the seized goods as “*Agarwood*

assorted size and shape/different grades of aquilaria malaccensis".

The OIO does not refer to any "Final Report" or further examination of the seized goods after 20.09.2019.

14.1 The penalty imposed on the Petitioners has been based on the price and valuation by the Respondents No.1 and 2 of the goods seized. The Petitioners have stated that they had purchased the goods seized from the local market of Hojai, Assam. The Petitioners have submitted that the international market value of Agarwood Chips and Agarwood Oil as per the Agarwood Policy is high, however the goods seized were of the lowest grade purchased from the local market. It is submitted by the Petitioners that the market value of Agarwood Chips and Agarwood Oil ranges from Rs. 140/- to Rs. 1,200/- per Kg and that the invoices for the seized material showing such purchase have been placed before the adjudicating authorities along with their Reply to the SCN.

14.2 The Petitioners have also filed a few invoices in support of their contentions of price variation with the Appeal. One is dated 13.09.2019 in the name of an entity called "*Rare Enterprise, Mehrauli, Delhi*" showing a sale of Agarwood Chips of *Aquillaria Agallocha*, i.e., a low grade species of Agarwood at prices ranging between Rs. 950/- to Rs.1600/- per Kg. The second invoice is in the name of Petitioner No. 2 and dated 15.09.2019 showing a sale of 5 Kg of Agarwood Oil at Rs. 6,000/- per kg. Two other invoices are dated March, 2018 showing a price of Agarwood Oil at Rs. 1,200/-

per Kg and Rs. 475/- per Kg for different varieties of Agarwood Chips.

15. The Respondents on the other hand, have maintained that the same valuation for entirety of the goods seized. Paragraph 1.8 of the SCN shows that the Agarwood Chips have been “*provisionally*” valued at Rs. 5,00,000/- per Kg, while the market value of Agarwood Oil has been assessed at the rate of Rs. 8,00,000/- per Kg. The relevant extract is below:

“Therefore, the said wooden chips of Agar wood total weighing 120 kgs having, Market value of Rs. 6 crores approx (Provisional international Market value taken at the rate of Rs. 5 lakh per Kg) and Agarwood oil weighing 4.5 Kgs having, market value of Rs 36 lakh (Provisional Market value taken at the rate of Rs. 8 lakh per Kg) approx are seized...”

[Emphasis is ours]

- 15.1 This “*provisional*” valuation appears to be taken verbatim from the *Panchnama* dated 20.09.2019 [hereinafter referred to as “the *Panchnama*”]. The relevant extract of the *Panchnama* is below:

“Therefore, the said wooden chips of Agar wood total weighing 120 kgs having, Market value of Rs. 6 crores approx (Provisional international Market value taken at the rate of Rs.5 lakh per Kg) and Agar wood oil weighing 4.5 Kgs having, market value of Rs 36 lakh (Provisional Market value taken at the rate of Rs. 8 lakh per Kg) approx were seized by the customs officer under the provisions of section 110 of the Customs Act, 1962.”

[Emphasis is ours]

- 15.2 Three separate Orders passed under Section 110(1) of the Act [Seizure Memos], each dated 20.09.2019 also identically value the Agarwood Chips and Agarwood Oil in terms of the *Panchnama* at Rs.5 Lakhs per Kg for Agarwood Chips and Rs. 8 Lakhs per Kg for

Agarwood Oil.

15.3 As stated above, the SCN adopts the same “*provisional international market value*” as stated in the *Panchnama*/Seizure Memos. No clue is provided in the SCN as to the basis of valuation assigned to Agarwood Chips and Agarwood Oil.

16. Although the OIO references the report of the Wildlife Inspector, which sets out that chips of different grades were recovered, there is no reference to the prices assigned to each different grade of Agarwood in the OIO. The same value has been assigned to the entire 120 Kgs seized. The SCN sets forth the valuation of the seized goods and the penalty imposed on each of the Petitioners, based on this “*provisional international market value*”. The OIO only reproduces the valuation as set forth in the SCN, the *Panchnama* and Seizure Memos and reiterates that the value of the Agarwood Chips is at the rate of Rs. 5,00,000/- per Kg, while the Agarwood Oil is valued at the rate of Rs. 8,00,000/- per Kg.

16.1 The OIO further clarifies that the quantum of penalty has been imposed keeping in consideration “*the mens rea*”, i.e., intent of smuggling and the specific roles of all the three Petitioners in the whole act of attempt to smuggling.

16.2 However, as can be seen from the table below, the penalty imposed on each Petitioner appears to be a different percentage value of the goods recovered from each of them [see last column titled ‘*Penalty Imposed*’]. There appears to be no logic or rationale for same.

S. No.	Detail description of goods	Net Weight of Agarwood (in Kg.) approx	Provisional value of the recovered Agarwood (in Rs.)	Net Weight of Agar wood oil (in Kg.) approx	Provisional value of the recovered Agarwood Oil (in Rs.)	Total Provisional value of the recovered Agarwood and Agarwood Oil (in Rs.)	Penalty Imposed (in Rs.)	Penalty Imposed in %
1.	Agarwood Chips and Agarwood Oil [Petitioner No. 1]	21	1,05,00,000/-	4.5	36,00,000/-	1,41,00,000/-	15,00,000/-	9.4 times of value of recovered goods.
2.	Agarwood Chips [Petitioner No. 2]	50	2,50,00,000/-	-	-	2,50,00,000/-	75,00,000/-	3.33 times of value of recovered goods.
3.	Agarwood Chips [Petitioner No. 3]	49	2,45,00,000/-	-	-	2,45,00,000/-	25,00,000/-	9.8 times of value of recovered goods.
	Total	120	6,00,00,000/-	4.5	36,00,000/-	6,36,00,000/-	1,15,00,000/-	

17. The Agarwood Policy also becomes relevant to put the prices of the Agarwood Chips and Agarwood Oil in perspective. Paragraph 4 of the Agarwood Policy sets forth that the market value of the Agarwood Chips ranges from Rs. 15,000/- to Rs. 2,50,000/- per Kg, and market value of Agarwood Oil ranges from Rs.43,000/- to Rs.10,32,000/- per Kg depending on the variety, in India and in the international market, the price of the top quality Agarwood Oil and wood can vary from a few dollars per Kg to over \$30,000/-per Kg.

The relevant extract is as follows:

“Three grades of oil are being extracted from the agar namely Boya, Boha and Khara. The rate also varies from Rs. 500/- to Rs. 1000/- per tola (Boya) and Rs. 2200/- to 2800/- per tola (Boha) and Rs. 6000/- to 12000/- per tola (Khara 1st Jal) in the North East Market (i.e. 11.66 gram = 1 Tola and 86 Tola = 1 Kg). However, in the international market, the value of first grade Agarwood Oil is extremely more than two times high like prices range from few US dollar per kilo for the lowest quality to over thirty thousand dollars for top quality oil and resinous wood. The Agarwood chips is also a high value starting from Rs. 15,000/- to Rs. 2,50,000/- per kg called as Jura, Muri, Challa, Sisor, etc.”

Conclusion:

18. From the aforesaid discussions, it is clear that the price and valuation of Agarwood Chips and Agarwood Oil varies hugely depending on its grade and variety.
- 18.1 The prices relied upon by the Petitioners are not the same as those stated in the Agarwood Policy. These are also very different from the valuation relied upon by Respondent No. 1 and 2 to impose the penalty under the Act.
- 18.2 As discussed above, the “*provisional*” valuation appears to be taken verbatim from the *Panchnama* and the seizure memos dated 20.09.2019. The SCN adopts the same valuation for the goods seized and the OIO only reproduces this valuation.
- 18.3 The Respondents have not placed on record any document in support of the value/price of the Agarwood Chips and Agarwood Oil which was “*provisionally*” valued at Rs. 5,00,000/- per Kg and Rs. 8,00,000/- per Kg respectively, to levy the penalty on the Petitioners. The OIO arrives at this valuation without any discussion on the price. The OIO also relies on the report of the Wildlife Inspector which also does not mention any price, but clearly mentions that there were different grades in the Agarwood Chips seized. No final report on the value/price of the variety of Agarwood Chips and Agarwood Oil seized is placed on record or even relied upon by Respondents.
- 18.4 The valuation of the goods seized, is also not in terms of the prices as

set forth in the Government of Assam's Agarwood Policy. No proper calculation has been made for the penalty levied. The penalty imposed on the Petitioners has been imposed based on a provisional valuation. The penalty imposed is therefore without any legal basis and cannot be sustained.

19. The principle enunciated in the judgments of *Pioneer Corporation* case (supra), *Narender Yadav* case (supra), *Shubh Impex* case (supra), *Manoj Jha* case (supra) and *Ganesh Yadav* case (supra) is that the Court has the power to exercise discretion to waive requirement of pre-deposit of penalty in 'rare and deserving cases' where a clear justification is made out for interference. In *Narendra Yadav* case (supra), this Court had found that the Order-in-Original did not give any reasons for the penalty imposed on the Petitioners and hence was unwarranted. In *Shubh Impex* case (supra), the Court found that the condition of pre-deposit would completely disable and paralyse the business of the Appellant and given the financial condition and background of the Appellant would suffer financial breakdown and irreparable harm. The *Manoj Jha* case (supra) held that since the Petitioner has very limited means to deposit any amounts, the relief to him is warranted.
20. Admittedly, the Petitioners are poor daily wage earners who are unable to make a challenge to the seizure and confiscation on account of the penalty imposed on them. The aforesaid discussion on the prices and valuation of Agarwood Chips and Agarwood Oil suggest, *albeit, prima facie*, that no proper valuation of the goods seized was

carried out by the Respondents.

20.1 The Allahabad High Court in the *Ganesh Yadav* case (supra) while upholding the constitutional validity of Section 35F of the CE Act has enunciated that the statute may, at times, impose conditions as a requirement of filing an appeal. However, a condition which is unduly onerous will render the right to appeal as a nought. It was held that:

“3.As a first principle of law, a right of appeal is a statutory right and it is open to the legislature which confers a remedy of an appeal to condition the appeal subject to compliance with conditions. A fiscal legislation can stipulate a requirement of pre-deposit as a condition precedent to an appeal to be entertained. The restraint on the power of the legislature to do so, is that the condition which is prescribed should not be so onerous so as to restrict or abrogate the right of appeal altogether. A condition which is unduly onerous will render the right of appeal illusory and would hence run the risk of being held to be arbitrary and of being violative of the fundamental right conferred by Article 14 of Constitution.”

[Emphasis is ours]

20.2 Therefore, given the financial position and the wherewithal of the Petitioners, an opportunity needs to be given to them to contest the valuation so imposed by the Respondents, which, otherwise cannot be contested by them. Thus, we consider the case of the Petitioners to be an appropriate case to exercise our discretion in the matter concerning waiver of pre-deposit of penalty.

21. The Writ Petition is allowed. Respondent No. 1 is directed to decide the Appeals preferred by the Petitioners on merits, without insisting on the requirement of pre-deposit.

- 21.1 In case the Petitioners, or any one of them, file their respective Appeal's within 6 weeks of receipt of a copy of the Judgment, the same shall be considered on its merits without insisting on pre-deposit and shall not be dismissed on the ground of limitation.
- 21.2 Resultantly, the Petition and the pending Application shall stand closed. There shall, however, be no orders as to costs.

**(TARA VITASTA GANJU)
JUDGE**

**(RAJIV SHAKDHER)
JUDGE**

APRIL 28, 2023/ ha