A UNION OF INDIA AND ANR.

v.

ADANI EXPORTS LTD. & ANR.

NOVEMBER 12, 2007

B

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Customs Act, 1962; S.129E/Foreign Exchange Management Act, 1999; Ss. 49(3) and 49(4)/Foreign Exchange Regulations Act, 1973;
C *S.50:*

Misuse of foreign exchange by mis-declaration of description and over invoicing of imported goods—Show-cause-Notices—Revenue imposing penalty against noticees—Appeals along with application for
D *dispensation of pre-deposit of penalty filed by noticee—Application for pre-deposit rejected by Foreign Exchange Appellate Tribunal—Challenge to—Allowed by High Court remitting the matter to adjudicating authority—On appeal, Held: Pending appeal before Tribunal, High Court was not justified in going into merits and*
E *remitting the matter to adjudicating authority—As the Tribunal already passed consequential order on the basis of order passed by High Court, impugned order and the order passed by Tribunal set aside—Tribunal directed to take up appeals afresh without insistence on pre-deposit—Directions issued.*

F **Show-cause-Notices were issued by Revenue to respondents and others for the alleged violation of certain provisions of the Customs Act 1962. Later, Adjudicating Authority passed the orders, which were challenged by the respondents before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). Show-cause-**
G **Notices were also issued by the Revenue under Foreign Exchange Management Act, 1999. The Authorities passed orders in terms of the Foreign Exchange Regulation Act, 1973. The adjudicating authority found the noticees guilty of the charges and in terms of the powers conferred under Section 50 of the Foreign Exchange**

H

Regulation Act read with Section 49(3) and 49(4) of the Foreign Exchange Management Act imposed certain amount as penalties on them. Questioning correctness of the adjudication order, appeals along with application for dispensation of pre-deposit of penalty were preferred by the respondents before the Foreign Exchange Appellate Tribunal. The application was rejected by the Tribunal. Aggrieved, the respondents filed a writ petition before the High Court. High Court set aside the order passed by the adjudicating authority and remitted the matter to the adjudicating authority. Hence the present appeal.

Appellant-Union of India contended that the approach of the High Court is clearly unsustainable. High Court itself noticed that the primary challenge was to the order passed by the Tribunal relating to pre-deposit. Though some grounds were taken relating to the merits of the adjudication, the High Court should not have dealt with them and should have left those matters to be adjudicated by the Tribunal.

Respondent-assessee submitted that earlier there was an order passed by CESTAT which was in favour of the respondents-noticees. Therefore, the High Court was justified in remitting the matter to the adjudicating authority.

Disposing of the appeal, the Court

HELD: 1.1. It is not in dispute that the respondents have filed appeals before the Tribunal; and that primary challenge in the writ petitions before the High Court was to the order relating to pre-deposit, therefore, the High Court was not justified in going into the merits and expressing its views and thereafter remitting the matter to the Tribunal. Such a course was not available to be adopted.

[Para 8] [978-G, H]

1.2. The Tribunal has highlighted the relevant aspects while rejecting the prayer for dispensation of pre-deposit. The three aspects to be focused while dealing with such applications are (a) *prima facie* case (b) balance of convenience and (c) irreparable loss.

The Tribunal categorically found that these factors were established by the respondents. Even when Tribunal decides to grant full or partial stay it has to impose such conditions as may be necessary to safeguard the interest of Revenue. This is an imperative requirement under Section 129E of the Customs Act. Normally, therefore, this Court would have asked the respondent assessee to comply with the orders of Tribunal, by setting aside the impugned order. But considering the fact that the Tribunal already passed consequential order on the basis of the High Court's order dated 18.8.2006, the impugned order passed by the High Court and the consequential order passed by the Tribunal are set aside. The Tribunal is directed to take up the appeal without insistence on pre-deposit. The parties are directed to appear before the Tribunal without any further notice on 3.12.2007. [Para 9] [979-A, B, C, D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5152 of 2007.

From the final Judgment and Order dated 5.4.2006 of the High Court of Gujarat at Ahmedabad in S.C.A. Nos. 1569, 1570 and 2000/2006.

A. Subha Rao, Dr. Shamsuddin, B.K. Prasad and T. Srinivas Murthy for the Appellants.

Dushyant Dave, Tarun Gulati, Gaurav Singh, Shweta Verma, Bina Gupta, Praveen Kumar and Jaiveer Shargill for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Gujarat High Court, setting aside the order passed by the Appellate Tribunal for Foreign Exchange (for short 'Tribunal') dated 4th January, 2006 in Appeal nos. 199, 500 and 501 of 2006 whereby the application for dispensation of pre-deposit was rejected.

3. Background facts in a nutshell are as follows:-

On the basis of the alleged violation of certain provisions of the

Customs Act 1962 (in short the 'Act') notices were issued to certain noticees including the present respondents primarily on the ground of mis-declaration as to the description and narration of the goods imported and on the ground of over-invoicing so far as valuation is concerned and consequentially misusing foreign exchange. Show-cause notices were issued by the adjudicating authority and on consideration of the submissions and replies filed, the orders in original were passed by the Commissioner of Customs (hereinafter referred to as the 'Commissioner'). The orders passed by the original authority were challenged by the respondents before the Customs, Excise and Service Tax Appellate Tribunal, Bangalore (in short 'CESTAT'). Notices were also issued under Foreign Exchange Management Act, 1999 (in short 'Management Act'). The Additional Director General passed orders in terms of the Foreign Exchange Regulation Act, 1973 (in short 'the Regulation Act') which has been repealed along with the provisions of the Foreign Exchange Management Act 1999 (in short the 'Management Act'). The order was passed after considering the replies and submissions in response to the show-cause notices. The adjudicating authority found the noticees guilty of the charges and in terms of the powers conferred under Section 50 of the Regulation Act read with Section 49(3) and 49(4) of the Management Act imposed the following penalties:

(A) A penalty of Rs.7,50,00,000/- (Rupees Seven Crores fifty lakhs only) on Shri Dharmesh P. Shah, Proprietor of M/s. Vaishal Impex, (noticee No.1).

(B) A penalty of Rs.4,00,000/- (Rupees Four Crores only) on M/s. Adani Exports Limited, (noticee No.2).

(C) A penalty of Rs.2,00,00,000/- (Rupees Two Crores only) on Shri Rajesh Adani, Director of M/s. Adani Exports Limited. (noticee No.3).

4. Questioning correctness of the adjudication order, appeals were preferred before the Tribunal. Along with the appeals, application for dispensation of deposit of penalty amount was filed. The same was rejected as noted above by order dated 4.1.2006.

5. The Tribunal was of the view that neither any prima facie case

A was made out nor the financial stringency established to warrant dispensation of pre-deposit. A writ petition was filed before the Gujarat High Court primarily questioning the said order and also incidentally questioning legality of the proceedings. The High Court not only dealt with the impugned order before it relating pre-deposit aspect but also the merits
B of adjudication. It elaborately discussed the merits of the adjudication proceedings, though it itself noted that the Special Civil Applications were filed questioning correctness of the order relating to pre-deposit. Not only the High Court held that the order directing deposit was unsustainable but also held that the order of adjudication was unsustainable, overlooking
C the fact that the appeals were pending before the Tribunal. The High Court set aside the order passed by the adjudicating authority and remitted the matter to the adjudicating authority i.e. the Additional Director General.

6. In support of the appeal learned counsel for the appellant submitted that the approach of the High Court is clearly unsustainable.
D High Court itself noticed that the primary challenge was to the order passed by the Tribunal relating to pre-deposit. Though some grounds were taken relating to the merits of the adjudication, the High Court should not have dealt with them and should have left those matters to be adjudicated by the Tribunal. Instead of doing that, the High Court set aside the order
E referring to certain observations made by CESTAT in other cases. It is further submitted that the view taken by CESTAT in those cases has been questioned before this Court and the appeal has been admitted. In that view of the matter the order passed by the High Court is clearly unsustainable.

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7. Learned counsel for the respondent on the other hand submitted that there was an earlier order passed by CESTAT which was in favour of the respondents-noticees. Therefore, the High Court was justified in remitting the matter to the adjudicating authority.

G 8. It is not in dispute that the respondents have filed appeals before the Tribunal. As noted by the High Court, primary challenge in the writ petitions was to the order relating to pre-deposit. While dealing with that the High Court was not justified in going into the merits and expressing its views and thereafter remitting the matter to the Tribunal. Such a course
H was not available to be adopted.

9. The Tribunal has highlighted the relevant aspects while rejecting the prayer for dispensation of pre-deposit. The three aspects to be focused while dealing with such applications are (a) *prima facie* case (b) balance of convenience and (c) irreparable loss. The Tribunal categorically found that these factors were established by the respondents. Even when Tribunal decides to grant full or partial stay it has to impose such conditions as may be necessary to safeguard the interest of revenue. This is an imperative requirement under Section 129E of the Act. Normally, therefore, we would have asked the respondent assessee to comply with the orders of Tribunal, by setting aside the impugned order. But considering the fact that the Tribunal already passed consequential order on the basis of the High Court's order on 18.8.2006, we dispose of the appeal with following directions:

(a) Impugned order passed by the High Court and the consequential order passed by the Tribunal on 18.8.2006 are set aside.

(b) The parties are directed to appear before the Tribunal without any further notice on 3.12.2007.

(c) The Tribunal shall take up the appeal by hearing them without insistence on pre-deposit.

(e) The appeals shall be heard on day to day basis.

(f) The respondent shall file an undertaking before the adjudicating authority to liquidate the demands, if any, sustained by the Tribunal subject of course, to the right of appeal if any, within eight weeks from the date of receipt of Tribunal's order. This of course would be subject to any order of interim protection, passed in the appeal.

10. The appeal is accordingly disposed of without any order as to costs.

S.K.S. Appeal disposed of.