Amol

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 476 OF 2024

Lalit Kulthia & Anr ...Petitioners

Versus

Commissioner of Customs
(Appeals) Mumbai III & Ors ...Respondents

Ms Riya Soni, *(through VC), i/b, Vipul Patil, for the Petitioners.*

Mr Karan Adik, *for the Respondent-Customs.*

Mr Ruju Thakker, *for the Respondent-DRI.*

CORAM **M.S. Sonak &**
Jitendra Jain, JJ.
DATED: **06 December 2024**

PC:-

1. Heard Learned counsel for the parties.

2. The Petitioners seek a direction on the 1st Respondent i.e., Commissioner of Customs (Appeals), to admit the Petitioners' appeal without insisting on a pre-deposit as stipulated in Section 129E of the Customs Act, 1962. The second direction is to restore the appeal, which is already dismissed for want of pre-deposit.

3. Ms Soni argued that no penalty can be imposed on gold without foreign marking. She submitted that out of 12 gold bars, only one had foreign marking, and the assessor found

gold of 99.5 and not 99% in another. She submitted that in these peculiar circumstances, the customs authorities had no jurisdiction to impose any penalty.

4. Ms Soni relied on **Pioneer Corporation Vs Union of India**[1] and **Mohammed Akmam Uddin Ahmed and Others Vs Commissioner Appeals Customs and Central Excise and Others**[2] to submit that in appropriate cases, a Court exercising its jurisdiction under Article 226 of the Constitution can waive the requirement of pre-deposit. She submitted that the Petitioners are not able to pay the pre-deposit.

5. Ms. Soni's contentions on the merits are irrelevant, apart from the fact that they do not impress us much. Based on these contentions, an argument about the penalty being without jurisdiction cannot be sustained. In any event, we are not required to discuss the merits of this matter; therefore, we do not go into the merits of the matter.

6. The relief the Petitioners seek contradicts Section 129E of the Customs Act, which contemplates a pre-deposit. In **Kotak Mahindra Bank Pvt Ltd Vs. Ambuj A Kasliwal and Others**[3], the Hon'ble Supreme Court has held that even the High Court should not direct the appellate authorities to admit and hear appeals unaccompanied by the minimum pre-deposit requirement under the statute. The Hon'ble Supreme Court held that discretion under Article 226 of the

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1 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63

2 (2023) 2 HCC (Del) 398 : 2023 HCC OnLine Del 2450

3 2021 3 SCC 549

Constitution of India cannot be exercised against the mandatory requirement of statutory provision.

7. In **Manjit Singh Vs Union of India**[4], decided by the Coordinate Bench of this Court on 18 October 2022, relief of waiver of the minimum pre-deposit of 7.5% of the penalty under Section 129E of the Customs Act was declined. This decision considers all the contentions raised in this Petition and discusses earlier precedents on the subject.

8. Therefore, based on the decision of the Hon'ble Supreme Court and this Court, no case is made to grant any relief to the Petitioners.

9. Incidentally, the Petitioners had instituted Writ Petition No. 2884 of 2017 in this Court to challenge the Order-In-Original without resorting to the appellate remedy. The said Petition was disposed of by order dated 6 June 2019. In paragraph 8 of our order, we clarified that the Petitioners would have to satisfy other requirements for filing an appeal, including the statutory requirement of pre-deposit in terms of Section 129E of the Customs Act. The Petitioners never challenged our order dated 6 June 2019 but chose to institute an appeal without the pre-deposit. After such appeal was not entertained, this Petition was filed, and the relief contrary to the statutory provisions was sought from this Court. Such relief cannot be granted in exercising our discretionary jurisdiction under Article 226 of the Constitution of India.

10. The decisions of the Delhi High Court, which were relied upon by Ms Soni, have not considered the decision of the

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[4] 2023 (383) ELT 308 (Bom)/(2022) 1 Centax 91 (Bom.) (Writ Petition No. 673 of 2020)

Hon'ble Supreme Court in the case of **Kotak Mahindra** (supra). That apart, in **Mohammed Akmam** (supra), the Delhi High Court was dealing with a case of poor daily wage earners. The Petitioners, who are dealing with gold and diamond jewellery, cannot compare themselves with poor daily earners.

11. Even if in the **Pioneer Corporation** (supra), the Delhi High Court rejected the Petitioner's contentions that upon the Petitioner ceasing its business operations, it ceased to exist as a legal entity for the purpose of its liability under the Central Excise Law. The Court held only in rare and deserving cases where a clear justification is made out for such interference can a waiver be granted. Apart from the fact that **Pioneer Corporation** does not consider the Hon'ble Supreme Court's decision in **Kotak Mahindra**, we are satisfied that this is not some rare and deserving case where waiver could be granted, assuming we could, in the exercise of our extraordinary jurisdiction grant such waiver.

12. For the above reasons, we dismiss this Petition without any orders of cost.

(Jitendra Jain, J) **(M.S. Sonak, J)**