

M/S Army Welfare Housing Organisation vs Union Of India & Ors on 20 September, 2024

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 13260/2024
M/S ARMY WELFARE HOUSING ORGANISATION

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Through: Mr. Yogendra Aldak, Mr.
Kunal Kapoor, Ms. Purvi, Mr.
Yatharth, Advs.

versus

UNION OF INDIA & ORS.
Through:

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA
ORDER

% 20.09.2024 CM APPL. 55401/2024 (Ex.) Allowed, subject to all just exceptions. This application stands disposed of.

W.P.(C) 13260/2024 & CM APPL. 55400/2024 (Interim Stay)

1. Notice. Since the respondents are duly represented by learned counsel, let a reply be filed within a period of two weeks from today. The petitioner shall have a week therefrom to file a rejoinder affidavit.

2. We take note of the challenge which stands raised with the writ petitioner seeking waiver of the pre-deposit condition bearing in mind the principles of undue hardship as enunciated by this Court in the case of Ajay Sagar v. Principal Commissioner of Customs (Import)¹ where we had held as follows:

"2. The petitioner is constrained to approach this Court since Section 129E of the Act no longer incorporates a provision which 2023 SCC OnLine Del 6024 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/11/2024 at 14:48:57 may be invoked by either the Commissioner (Appeals) Customs and Central Excise or the Customs, Excise & Service Tax Appellate Tribunal to waive the condition of pre-deposit in case of undue hardship. It becomes pertinent to note that Section 129E of the Act as it stood prior to its amendment by Finance Act (No.

2) of 2014 had conferred a discretion on the Commissioner (Appeals) as well as the CESTAT to dispense with the deposit liable to be made for the purposes of an assessee pursuing an appeal where it was found that the deposit of duty, interest or penalty levied would cause undue hardship.

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4. Our attention was drawn to the recent decision rendered by a Division Bench of the Court in Mohd. Akram Uddin Ahmed v.

Commissioner Appeals Customs and Central Excise where the question of the power of a High Court to dispense with the requirement of pre-deposit and to frame appropriate directions reducing the burden on an assessee in extraordinary and exceptional circumstances was answered in the following terms:--

"26. The petitioners placed reliance on judgments of Coordinate Benches of this Court in Pioneer Corpn. case [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], Narender Yadav case [Narender Yadav v. Commr. of Customs, 2019 SCC OnLine Del 12415] and Shubh Impex case [Shubh Impex v. Union of India, 2018 SCC OnLine Del 8793] to canvas the argument that the court has in special circumstances, waived the payment of mandatory pre-deposit amount as envisaged in Section 129-E of the Act.

27. A Coordinate Bench of this Court in Pioneer Corpn. case [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], where the court, while discussing the amendment made to Section 35-F of the Central Excise Act, 1944 (hereinafter referred to as "the CE Act") (which section is pari materia to Section 129-E of the Act and also requires a pre-deposit in the case of an appeal), held that prior to the amendment of Section 35-F 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 This is a digitally signed order.

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"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 35-F with effect from 6-8-2014. While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35-F 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 supplied)

28. The Coordinate Benches of this Court in Narender Yadav case [Narender Yadav v. Commr. of Customs, 2019 SCC OnLine Del 12415] and Shubh Impex case [Shubh Impex v. Union of India, 2018 SCC OnLine Del 8793], both of which, while dealing with the amended provision of Section 129-E of the Act, have permitted waiver of the mandatory pre-deposit as is envisaged in the said provision but, in exceptional circumstances.

29. In Narender Yadav case [Narender Yadav v. Commr. of Customs, 2019 SCC OnLine Del 12415], 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 129-E 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 This is a digitally signed order.

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without insisting upon the requirement of pre- deposit; it is accordingly directed to be waived...."

30. In Shubh Impex case [Shubh Impex v. Union of India, 2018 SCC OnLine Del 8793], a direction to make a pre- deposit of Rs. 1.27 crores, being 7.5% of the duty imposed, under Section 129-E of the Act was challenged by the appellant. While discussing the judgment in Pioneer Corpn. case [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], a Coordinate Bench of this Court recognised 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 Corpn. v. Union of India [Pioneer Corpn. v. Union of India, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], 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 35-F 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."

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31. Another Coordinate Bench of this Court in Manoj Kumar Jha v. DRI [Manoj Kumar Jha v. DRI, (2019) 365 ELT 166], 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 para 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 supplied)

32. The Allahabad High Court in Ganesh Yadav case [Ganesh Yadav v. Union of India, 2015 SCC OnLine All 9174], while upholding the requirement of pre-deposit under Section 35-F 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 (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 v. MCD [Shyam Kishore v. MCD, (1993) 1 SCC 22] 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 This is a digitally signed order.

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(emphasis supplied) xxx xxx xxx

34. A Coordinate Bench of this Court in Dish TV India Ltd. case [Dish TV India Ltd. v. Union of India, 2020 SCC OnLine Del 2580], 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 129-E of the Act noted the fact that the petitioner's annual turnover for Financial Year 2018- 2019 was more than Rs. 6000 crores and that the mandatory pre-deposit would be a miniscule percent thereof, has directed the pre-deposit be made.

35. The Coordinate Bench in Dish TV India Ltd. case [Dish TV India Ltd. v. Union of India, 2020 SCC OnLine Del 2580] relied on the previous decision in Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST [Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST, 2019 SCC

OnLine Del 12414 : (2019) 368 ELT 579] and Anjani Technoplast Ltd. v. Commr. of Customs [Anjani Technoplast Ltd. v. Commr. of Customs, 2015 SCC OnLine Del 13070 : (2015) 326 ELT 472] to hold that waiver of pre-deposit cannot be granted.

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41. Thus, an analysis of the conspectus of law as enunciated above gives a clear understanding that after passing of the Amendment Act on 6-8-2014, the amended Section 129-E of the Act and also Section 35-F of the CE Act shall be applicable in those cases where the appeal has been filed after 6-8-2014.

42. 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 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.

43. It was held by the Allahabad High Court, speaking through Dr. D.Y. Chandrachud, Chief Justice (as His Lordship then was) in Ganesh Yadav case [Ganesh Yadav This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/11/2024 at 14:48:58 v. Union of India, 2015 SCC OnLine All 9174] 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 35-F 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 supplied)"

5. As would be evident from the conclusions recorded in Mohd. Akmam Uddin Ahmed, the Court came to conclude that notwithstanding the amendments introduced in Section 129E of the Act, the powers conferred upon a High Court by Article 226 of the Constitution stand preserved and would not detract from its authority to either waive the condition of pre-deposit or to grant a right of appeal subject to a deposit being made lower than the minimum as prescribed in Section 129E of the Act. Our Court had also approved the judgment rendered by the Allahabad High Court in Ganesh Yadav v. Union of India which had held that whether the invocation of the jurisdiction of the High Court under Article 226 of the Constitution is merited or not would be one which would have to be considered on the basis of the facts obtaining in individual cases.

6. Mohd. Akmam Uddin Ahmed thus constitutes an authoritative precedent for the proposition that Section 129E of the Act as it stands presently, would not detract

from the powers of a High Court in appropriate cases to absolve assesses' of the financial burden flowing from the requirement of a pre deposit. However, the judgment enters a note of caution by holding that the said power would be liable to be invoked in "rare and deserving" cases or where extraordinary situations and circumstances warrant the exercise of that discretion.

7. While affirming the principles that were enunciated in *Narender Yadav v. Joint Commissioner of Customs (Exports)*, the Court in *Mohd. Akmam Uddin Ahmed* reaffirmed the principle that the writ jurisdiction would be liable to be exercised "in rare but compelling and deserving cases, when the cause of justice requires such reduction". We are thus left only to consider whether the case of the petitioner would fall in the rare and exceptional category.

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12. From the material gathered in the course of investigation, the statements attributed to the persons involved including the petitioner as well as the conclusions drawn and recorded in the Order-in-Original it is manifest that the respondents had found that the petitioner was complicit and actively involved in the evasion of This is a digitally signed order.

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3. We take note of the primary contention which is addressed in challenge to the demand of service tax with it being submitted that since the petitioner was undertaking construction activity for its own members, it would be the principle of "mutuality" that would apply and consequently it would not be liable to be viewed as a taxable service falling under Section 65(105)(zzz-h) of the Finance Act, 1994.

4. List again on 22.10.2024.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 20, 2024/neha This is a digitally signed order.

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