(2013) 10 MAD CK 0147

Madras High Court

Case No: Writ Petition No''s. 24615, 13468, 23799 to 23801, 25303, 28613 to 28616, 22029, 17988, 11819, 28770, 27425, and 28299 of 2012, W.P. No''s. 14461, 22077, 24921, 25209, 25475, 1682 17278, 21298, 21299, 23020, 23021, 26283, 20965, 20966, 26120, 27268 and 27

M/s. Metal Weld Electrodes and Metro Trading Company (Electrodes) P. Ltd.		APPELLANT
	Vs	
The Customs, Excise and Service Tax and The Commissioner of Central Excise		RESPONDENT

Date of Decision: Oct. 30, 2013

Citation: (2014) 299 ELT 3 : (2014) 25 GSTR 126 : (2013) WritLR 1041

Hon'ble Judges: N. Paul Vasanthakumar, J; K. Ravichandrabaabu, J

Bench: Division Bench

Advocate: A.K. Jayashankaran Nambiar, for Mr. C. Mohan for M/s. King and Partridge in W.P. No. 17988 of 2012, Mr. Arvind P. Dattar, for K. Vaitheeswaran in W.P. Nos. 22077, 24921, 25209 and 25475 of 2013, Mr. Mohammed Shaffiq in W.P. No. 13468 and 23799 to 23801 of 2012, Mr. Joseph Prabhakar for M.N. Bharathi in W.P. Nos. 14461, 26283, 26120 and 27268 of 2013, Mr. S. Venkatachalam in W.P. No. 24615 of 2012, Mr. S. Sivanandam in W.P. No. 25303 of 2012, Mr. S. Lokaiah in W.P. Nos. 28613 to 28616 of 2012, Mr. S. Jaikumar in W.P. No. 22029 of 2012 and W.P. Nos. 20965, 20966 of 2013, Mr. V. Balasubramanian in W.P. No. 11819 of 2012, Mr. N. Viswanathan in W.P. No. 28770 of 2012, Mr. K.V. Subramanian Association in W.P. No. 27425 of 2012, Mr. S. Ramachandran in W.P. No. 28299 of 2012, Mr. M.A. Kalam in W.P. No. 1682 of 2013, Mr. K. Jayachandran in W.P. Nos. 17278 and 27331 of 2013 and Mr. S. Murugappan in W.P. Nos. 21298, 21299, 23020 and 23021 of 2013, for the Appellant; P. Mahadevan, Central Govt. Standing Counsel in W.P. Nos. 24615, 23799 to 23801 of 2012, Mr. Vikram Ramakrishnan, CGSSC in W.P. No. 13468 of 2012, 24921, 27331 and 26120 of 2013, Mr. K. Rajasekar in W.P. No. 25303 of 2012, Mr. S. Thirumanavalan for R1 in W.P. No. 28613 to 28616 of 2012, Mr. V. Sundareswaran, CGSSC for in W.P. Nos. 22029, 27425, 28299 of 2012, W.P. Nos. 22077, 25209, 25475, 1682, 20965, 20966, 23020, 23021 and 26283 of 2013, Mr. T. Chandrasekaran, SCGSC in W.P. No. 17988 of 2012 and 27268 of 2013, Mr. S. Xavier Felix, SCGSC in W.P. No. 11819 of 2012, Mr. S. Haja Mohideen Gisthi, SCGSC in W.P. No. 28770 of

2012, Mr. E. Vijay Anand in W.P. No. 14461 of 2013 and Mr. Santhanaraman in W.P. No. 17278 of 2013, for the Respondent

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Judgement

@JUDGMENTTAG-ORDER

K. Ravichandrabaabu, J.

All these writ petitions are placed before us for answering a reference made by a learned single Judge of this Court in his order dated 19.3.2013. Before the learned single Judge, the orders of the Customs, Excise and Service Tax Appellate Tribunal (in short Tribunal) made either in interim application for stay or application seeking for dispensation of pre-deposit, were challenged. The Revenue raised a preliminary objection with regard to the maintainability of these writ petitions, by contending that as against those orders passed by the Tribunal, an appeal, either u/s 35G of the Central Excise Act or u/s 130 of the Customs Act, alone is maintainable. The Revenue, in support of such submission, relied on the decision of the Apex Court reported in Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, . The learned counsel for the petitioners argued that writ petition is maintainable and in some cases this Court and other High Courts entertained the writ petitions, though in some cases writ petitions were dismissed on the ground of availability of alternative remedy of filing appeal.

2. The learned Judge, after considering the rival submissions and considering the various decisions rendered by different High Courts, has observed that there is enough confusion in different Courts as to how such an interlocutory order should be dealt with and that there has to be a clarity to a person approaching the High Court as to which is the correct forum. The learned Judge after considering the decision of the Apex Court rendered in Raj Kumar Shivhare''s case, also observed that it has to be considered as to whether the above decision rendered in the case of Foreign Exchange Management Act 1999 (FEMA, 1999) would be applicable to the provisions of the Central Excise Act, 1944 and the Customs Act, 1962 when there is a clear distinction in the manner in which the interlocutory order should be considered and the manner in which the final order in appeal should be disposed of by the Tribunal.

3. Thus, the learned Judge directed the Registry to place the matter before the Hon''ble Chief Justice for referring the matter to an appropriate Bench for deciding the issue as to whether the order passed by the CESTAT in terms of Section 35F of the Excise Act, 1944 or Section 129-E of the Customs Act, 1962 is appealable in terms of Section 35G of the Excise Act 1944 or Section 130 of the Customs Act, 1962. Accordingly, the matter is placed before us by the Hon''ble the Chief Justice for answering the above said reference.

4. Mr. A.K. Jayashankaran Nambiar, learned Senior Counsel appearing for the petitioner in W.P. No. 17988 of 2012 etc., has submitted as follows:-

The procedure of pre-deposit is not a procedure with regard to appeals and hence any order passed by the CESTAT on an application for waiver of pre-deposit is not an order passed in appeal. Section 35C and Section 129B of the respective enactments deal with the orders of the Appellate Tribunal and clearly indicate that only those orders alone can be passed by the Appellate Tribunal. Therefore, Section 35G and Section 130 of the respective enactments that deal with appeals to the High Court can only be seen as dealing with such orders viz., final order passed by the CESTAT and not against the interim orders. The requirement of pre-deposit is only pending disposal of the appeal and therefore it is not a condition precedent for filing an appeal. Pre-deposit procedures are separate proceedings unconnected with the appeal proceedings. CESTAT cannot dismiss the appeal for failure to comply with the order of pre-deposit. If the order of pre-deposit is not an order appealable u/s 35G /130, then the remedy lies to the parties to challenge the same under Article 226 of the Constitution of India. In support of his submissions, he relied on the following decisions:-

1. Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others,

2. Competition Commission of India Vs. Steel Authority of India Ltd. and Another,

3. Excel Rubber Products Vs. Addl. Collector of C. Ex. and Customs,

5. Mr. Aravind P. Dattar, learned Senior Counsel appearing in W.P. No. 22077 of 2013 etc., submitted as follows:-

Fore more than 25 years, till the decision was made in Raj Kumar Shivare''s case, persons aggrieved by the orders passed u/s 35F /129E viz., pre-deposit orders, have only filed writ petitions before the High Courts, as reference to the High Court was not maintainable. Even after the abolition of reference provision and introduction of appeal provision, writ petitions are being filed. The decision in Raj Kumar Shivhare''s case was made in the context of FEMA, 1999. Pre-deposit orders are only interim orders not passed in appeal but in appeal proceedings. Section 35G(1) is the substantive right whereas Section 35G(2) is only the procedure. An order to be challenged before the High Court in appeal should be an order determining the final issues arising between the parties in the appeal before the appellate Tribunal. Therefore, an order passed u/s 35F is not a final determination. If remedy is not available under the Act, then the remedy under Article 226 of the Constitution of India has to be permitted. The term "every order" shall not include interim order u/s 35F. A decision made on one enactment cannot be applied to another enactment. Against an order made by the Commissioner of Appeals u/s 35F, no appeal would lie before the Tribunal u/s 35B. The same analogy is to be applied even in respect of the appeals to be filed before the High Court. The other High Courts which followed Raj Kumar Shivhare''s case have not considered the scheme of the relevant Acts. There

can be only one appeal u/s 35G or 130 and not many appeals at many points of time. It is impossible that any substantial question of law would arise out of an interlocutory order that deals only with prima facie nature of the case. A substantial question of law would arise only from the order which finally decides the rights of the parties in controversy. In support of his submissions, the learned Senior Counsel relied on the following decisions:-

1. S. Mohan Lal Vs. R. Kondiah,

2. Visvas Promoters P. Ltd. Vs. The Income Tax Appellate Tribunal Chennai Bench "B" and The Assistant Commissioner of Income Tax,

3. 2012 (279) ELT 358 (Hindustan Petroleum Corporation Ltd., Vs. Commissioner of Customs, Mangalore)

4. Union of India (UOI) Vs. Classic Credit Ltd.,

5. Videocon Industries Ltd. Vs. The Commissioner of Customs,

6. Mr. Shaffiq, learned counsel appearing for the petitioner in W.P. No. 13468 2012 etc., has submitted as follows:

The rejection of an appeal at the initial stage of filing of an appeal is not an order made in appeal. To maintain an appeal u/s 35G, final determination of the parties are essential. Raj Kumar Shivhare''s case was decided under a different context and in respect of a different enactment whereas the present enactments have contrary legislative intent. In support of his submissions he relied on the following decisions:

1. State of Orissa and others Vs. M/s. Krishna Stores,

2. State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others,

3. Ambica Industries Vs. Commissioner of Central Excise,

4. Shaw Wallace and Co. Ltd. Vs. Income Tax Appellate Tribunal and Others,

5. Central Bank of India Vs. Shri Gokal Chand,

6. Union of India (UOI) and Another Vs. Guwahati Carbon Ltd.,

7. Mr. Joseph Prabakar, learned counsel appearing for some of the petitioners submitted as follows:-

Section 35G excludes certain orders which can be appealed against before the Supreme Court. Therefore, final determination is necessary for filing appeal u/s 35G. Six months'' time is given u/s 35G for filing an appeal before the High Court. Therefore, pre-deposit orders granting only limited time for compliance cannot fit in within the scope of Section 35G. Even availability of an alternative remedy cannot take away the power under Article 226 of the Constitution of India to entertain a writ petition. In support of his submissions, he relied on the decision reported in

Columbia Sportswear Company Vs. Director of Income Tax, Bangalore, .

8. Mr. Murugappan, learned counsel appearing for some of the petitioners has submitted as follows:-

The phrase "every order passed in appeal" used u/s 35G has to be read as "order passed in every appeal". Therefore, the word "every" is to mean the final order passed in appeal.

9. The other learned counsels appearing for the petitioners raised similar points and ultimately adopted the arguments advanced by the learned Senior Counsels.

10. Per contra, Mr. Sundareswaran learned counsel for the Revenue appearing in some matters has advanced his submissions which are adopted by the other learned counsels for Revenue. His submissions are as follows:-

Clause 136 of Finance Bill reveals the intention. The decision rendered by the Apex Court in Raj Kumar Shivhare''s case would squarely apply to the cases involving Central Excise Act, 1944 as well as Customs Act, 1962 since FEMA, Central Excise Act and Customs Act are pari materia same. Right of appeal against any order is conferred under the enactment itself and therefore filing of writ petitions against the interim orders cannot be entertained. When an alternative remedy is available, no writ would lie. In support of his submissions the learned counsel relied on the following decisions:-

1. Obeetee Textiles Pvt. Ltd. Vs. Commissioner of Central Excise,

2. Arun Kumar Gupta Vs. Directorate of Revenue Intelligence,

3. 2009 (239) ELT 226 (Varadhalakshmi Mills Ltd., Vs. Commissioner of C.EX. Madurai)

4. Auram Jewellery Export (P) Ltd. Vs. Union of India (UOI),

5. 2010 (262) ELT 236 (Kissan Gramodyog Sansthan Vs. Commissioner of C.Ex., Kanpur)

6. An unreported decision of Punjab and Haryana High Court made in C.W.P. No. 13288 of 2012 (M/s. Surya Air Products (P) Ltd., Vs. Union of India and Others) dated 15.1.2013.

7. SKS Ispat and Power Ltd. Vs. Commissioner of Customs and Excise,

11. We have given our careful consideration to the submissions made by both sides and also perused all the materials placed before us.

12. In order to answer the above reference, it is better to first understand the scheme of both Acts viz., the Central Excise Act, 1944, and Customs Act, 1962. First, let us look into the Central Excise Act, 1944. Chapter II of the Central Excise Act deals with levy and collection of duty. Section 3 to Section 12 of the said Act are placed under Chapter II. Chapter III deals with powers and duties of officers and land

holders. Section 12E to Section 23 deal with such powers and duties and are placed under Chapter III. Chapter V deals with Settlement of cases. Section 31 to Section 32P deal with Constitution of Settlement Commission, its jurisdiction and powers etc., Chapter VI deals with adjudication of confiscations and penalties. Section 33 to Section 34A are placed under Chapter VI which deal with power of adjudication and the adjudication procedure etc. Chapter VIA deals with Appeals. Section 35, 35A to 35R and 36 are placed under Chapter VIA. In these cases, as we are concerned only with the appeal procedures and its scope, it is better to analyse those provisions under Chapter VIA of the Central Excise Act in detail.

13. Section 35 contemplates appeals to be filed before the Commissioner (Appeals). Sub-section (1) of Section 35, thus contemplates that any person aggrieved by "any decision or order " passed under the said Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals). Thus, it is clear that as against any decision or order of an adjudicating authority or by a Central Excise Officer, an appeal would lie u/s 35 before the first Appellate Authority.

14. Section 35B deals with Appeals to the Appellate Tribunal. Sub-section (1) of Section 35B refers as to what are all the orders which can be appealed against before the appellate Tribunal. For proper appreciation, Sections 35B(1) is extracted hereunder:-

35B. Appeals to the Appellate Tribunal. (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-

(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) u/s 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise u/s 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Central Excise, either before or after the appointed day, u/s 35A, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect'' of any order referred to in clause (b) if such order relates to,-

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty:

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed u/s 109 of the Finance (No. 2) Act, 1998.

Provided further that the Appellate Tribunal may, in its discretion, refuse, to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where-

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed [fifty thousand rupees]

15. A perusal of the above provision of law would show that any person aggrieved by any of the orders referred to under sub-section (1), may file an appeal to the Appellate Tribunal. In other words, only those orders or decisions referred to under sub-clauses (a) to (d) of sub-section (1) can be challenged before the Appellate Tribunal and the appeals are maintainable only against those orders. If original order of adjudication was passed by the Commissioner of Central Excise himself as an adjudicating authority, an appeal is maintainable before the Appellate Tribunal under sub-clause (a) of Section 35B(1) as against such decision or order. Likewise, an order passed by the Commissioner (Appeals) u/s 35A is also appealable as provided u/s 35B(1)(b). Therefore, it is clear that an order passed by the first appellate authority, viz., the Commissioner (Appeals), has to be challenged before the Tribunal and such appeal is maintainable u/s 35B(1)(b). It is to be noted at this juncture that such order of the Commissioner of Appeals may be an order resulting in a proceedings, where the challenge was made against any decision or order passed by the Central Excise Officer.

16. Sub-section (6) of Section 35B deals with the format of appeal to be filed before the Tribunal. Under the said sub-section, it is stated that an appeal to the Appellate Tribunal should be filed in the prescribed form. Rule 6 of Central Excise (Appeals) Rules 2001 deals with the Form of appeal etc., to the Appellate Tribunal, wherein it is stated that an appeal under sub-section (1) of Section 35B shall have to be made in Form No. E.A-3. Form No. E.A. 3 is shown under Annexure 38 of Annexures to

CBEC''s Excise Manual of Supplementary Instructions and the same is extracted hereunder:-

ANNEXURE-38

Form No. E.A.-3
[See Rule 6]

Form of Appeal to Appellate Tribunal u/s 35B of the Act In the Customs, Excise and Gold (Control) Appellate Tribunal Appeal No.... of.... 2001.... Appellant.

Vs

.... Respondent.

1. The designation and address of the authority passing the order appealed against.

2. The number and date of the order appealed against.

3. Date of communication of a copy of the order appealed against.

4. State/Union territory and the Commissionerate in which the order/decision of assessment/penalty/fine was made.

5. Designation and address of the adjudicating authority in cases where the order appealed against is an order of the Commissioner (Appeals).

6. Address to which the notices may be sent to the appellant.

7. Address to which the notices may be sent to the respondent.

8. Whether the decision or order appealed against involves any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment or not; difference in duty or duty involved, or amount of fine or penalty involved or value of goods involves, as the case may be.

9.i. Description and classification of goods

ii. Period of dispute

iii. Amount of duty, if any, demanded for the period mentioned in item (i)

iv. Amount of refund, if any, claimed for the period mentioned in item (ii)

v. Amount of fine imposed

vi. Amount of penalty imposed

vii. Market value of seized goods.

10. Whether duty or penalty is deposited; if not, whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).

11. Whether the appellant wishes to be heard in person?

12. Reliefs claimed in appeal.

Statement of facts
Grounds of appeal
Signature of the authorized
Representative,
if any
Signature of the appellant.

Verification

I,.... the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

Verified today, the.... day of.... 2001....

Signature of the authorised

Representative,
if any
Signature of the appellant.

Notes.-

1. The grounds of appeal and the form of verification shall, if the appeal is made by any person, other than the Commissioner of Central Excise be signed by the appellant in accordance with Rule 3.

2. The appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy).

3. The form of appeal shall be in English (or Hindi) and should set forth, concisely and under distinct heads, the grounds of appeal without any argument or narrative and such grounds should be numbered consecutively.

4. The fee of Rs. 200.00 required to be paid under the provisions of the Act shall be paid through a crossed bank draft drawn in favour of the Assistant Registrar of the Bench of the Tribunal on a branch of any nationalised bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

(Emphasis supplied)

17. A close scrutiny of the above Form No. E.A-3 would show that Sl. No. 10 of the said Form requires a statement from the appellant as to whether duty or penalty is deposited, if not, whether any application for dispensing with such deposit has been made. It further requires that if such duty or penalty is deposited, a copy of the

challan under which the said deposit was made, shall have to be furnished along with the appeal. Thus, it is manifestly clear that the duty or penalty against which such an appeal is filed, has to be mandatorily deposited along with the appeal by enclosing the challan in proof of the same or it should be stated by the appellant as to whether an application for dispensing with such deposit is filed along with the appeal.

18. Sub-section 7 of Section 35B deals with the interim applications for grant of stay or for rectification of the mistake or for any other purpose or for restoration of an appeal or an application. It is pertinent to note at this juncture that the application for dispensation of pre-deposit can be made under this provision of law, as sub-clause (a) of sub-section (7) contemplates filing an application "for any other purpose" also.

19. Section 35C deals with the nature of the orders to be passed by the Appellate Tribunal and the same is extracted hereunder:-

35C. Orders of Appellate Tribunal.

(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being, heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

Though Section 35C contemplates the passing of pass final orders by the Tribunal, a perusal of Section 35B(7) would further show that the Tribunal is to pass orders on interim applications also. Therefore, it cannot be contended that only the order passed u/s 35C are the orders passed by the Tribunal which alone can be appealed against. Section 35B(7) reads thus:-

Section 35B:-

.....

(7) Even application made before the Appellate Tribunal,

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees;

Provided that no such fee shall be payable in the case of an application filed by or on behalf of the Commissioner of Central Excise under this sub-section.

20. Section 35F contemplates deposit of duty demanded or penalty levied pending appeal and the same is extracted hereunder:-

Section 35F Deposit, pending appeal, of duty demanded or penalty levied.

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise 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 adjudicating authority the duty demanded or the penalty levied:

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

Explanation. For the purposes of this section duty demanded shall include,

(i) amount determined u/s 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under rule 57CC of Central Excise Rules, 1944;

(iv) amount payable under rule 6 of Cenvat Credit Rules, 2001 or Cenvat Credit Rules, 2002 or Cenvat Credit Rules, 2004;

(v) interest payable under the provisions of this Act or the rules made thereunder.

21. A perusal of Section 35F would show that a person desirous of filing an appeal either before the Commissioner (Appeals) or before the Appellate Tribunal shall have to deposit the duty demanded or penalty levied, pending such appeal. Though such deposit is required to be made "pending the appeal" as found u/s 35F, it does not mean or can be construed that such deposit can be filed at any time after filing the appeal and during its pendency. Even though the phrase "pending the appeal" is used u/s 35F, a conjoint reading of Section 35B (6) contemplating of filing the appeal in the prescribed form, Rule 6 of the Central Excise (Appeals) Rules 2001 contemplating the Form in which the appeal has to be filed and Form No. E.A-3 more particularly, Sl. No. 10 of the same requiring deposit of such duty or penalty along with appeal, would show that the said deposit of duty or penalty has to be made either before filing the appeal or along with the appeal and not any time after filing of the appeal. Thus, the phrase "pending the appeal" used u/s 35F is to be taken to mean that such deposit has to be made either before or atleast along with the appeal. If no such deposit is made, then the appellant has to file an application

for dispensing with such deposit and he has to necessarily state as to whether any such application is filed as required under Sl. No. 10 of the Form No. E.A. 3.

22. No doubt, the first proviso to Section 35F empowers the Commissioner (Appeals) or the Appellate Tribunal to dispense with such deposit subject to such conditions so as to safeguard the interests of the revenue, if such an authority is of the opinion that the deposit of the duty or penalty would cause undue hardship to the appellant. Thus, the Commissioner (Appeals) and the Appellate Tribunal have to bear in mind the twin tests viz., the undue hardship to the appellant and the interests of revenue, while considering the application for dispensation of such deposit.

23. It is also to be noted at this juncture that it is not in all cases of appeals, such deposit is mandatory. Only in respect of appeals, where the subject goods are not under the control of Central Excise authorities, the deposit have to be made as contemplated u/s 35F. In other words, if the subject goods are under the control of Central Excise authority and has not reached the hands of the assessee, there is no necessity for making any such pre-deposit. The prime intention of the legislation of Section 35F, therefore, is to safeguard the interests of revenue. However, if the appellant pleads some hardship, then the same has to be considered and ultimately a decision has to be taken as to whether the pre-deposit has to be dispensed with subject to certain conditions and by applying the said twin test. By exercising the power vested under the first proviso, the Commissioner (Appeals) or the Appellate Tribunal shall pass orders on the application seeking for dispensation of pre-deposit, either by directing the appellant to deposit the duty or penalty in full or in lesser percentage by taking note of the hardship as well as the interests of the Revenue. As and when any such orders are passed, more particularly, by the Tribunal, the same are being challenged before the High Courts, mostly by filing writ petitions. Only in the year 2010, the Apex Court in Raj Kumar Shivhare''s case has held that an appeal is maintainable even against such interlocutory orders of pre-deposit.However, now the present dispute is raised by questioning the applicability of the said decision, which came to be made in a case under FEMA, 1999, to the cases dealing with the Central Excise Act, 1944 and Customs Act, 1962. Thus, the crucial and most relevant provisions of law for deciding the issue on hand are Section 35G of the Central Excise Act, 1944 and Section 130 of the Customs Act, 1962. Both these provisions of law deal with appeal to High Court from the order of the Appellate Tribunal. Before discussing the above said provisions, let us also examine the scope of appeal under the Customs Act, 1962.

24. Unlike The Central Excise Act, 1944, The Customs Act, 1962, contains as many as 161 sections. For limited purpose of considering the issue on hand, we can straight away go to Chapter XV of the said Act which deals with Appeals and Revision. Section 128 deals with Appeals to Commissioner (Appeals). The said provision is similar to that of Section 35 of the Central Excise Act, 1944. Section 129A deals with appeals to the Appellate Tribunal. The above said provision is similar to that of

Section 35B of the Central Excise Act. Section 129B deals with the nature of orders to be passed by the Appellate Tribunal. This again is exactly identical to that of Section 35C of the Central Excise Act. Section 129E deals with deposit of duty and interest demanded or penalty levied pending the appeal. This again is similar to that of Section 35F of the Central Excise Act. Section 130 deals with Appeal to High Court as against the order passed by the Tribunal. This again is similar to Section 35G of the Central Excise Act. Therefore, for further discussion of this issue, we would like to refer only the provisions under the Central Excise Act, 1944 for the purpose of convenience as the relevant provisions under both Acts are in pari materia i.e., one and the same.

25. Now, let us consider the scope of Appeal to High Court u/s 35G of the Central Excise Act, which reads as follows:-

SECTION 35G. Appeal to High Court. -

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

(Emphasis supplied)

26. A careful analysis of the above provision of law would show as follows:-

While sub-section (1) reads that an appeal shall lie to the High Court from "every order passed in appeal by the Appellate Tribunal", sub-section (2) further contemplates that the Commissioner of Central Excise or the other party aggrieved may file an appeal to the High Court against "any order passed by the Appellate Tribunal ". The phrase used in sub-section (1) viz., "every order passed in appeal by the Appellate Tribunal" is not used under sub-section (2). On the other hand, a different phrase is used viz., " any order passed by the Appellate Tribunal". While the words "in appeal" are used in sub-section (1), the same are conspicuously absent in sub-section (2). Likewise, instead of the word "every", the word "any" is used under sub-section (2). No doubt, under sub-section (1), it is stated that such appeal shall lie before the High Court only if it is satisfied that the case involves a substantial question of law. However, when we peruse sub-section (2), though it specifically contemplates filing of an appeal against "any order passed by the Appellate Tribunal", still such appeal under this sub-section shall have to be filed only in the

form of a memorandum of appeal precisely stating therein the substantial question of law. Thus, it could be seen that both sub-section (1) and sub-section (2) are not intending with same kind of appeals before the High Court against the same kind of orders of the Tribunal. However, both the appeals are maintainable only when they involve a substantial question of law.

27. A question may arise as to whether sub-section (2) can be treated as an independent provision of sub-section (1) and whether is it not the procedure explained for filing an appeal under sub-section (1). It is well settled that a legislative intent has to be gathered from the plain language of the particular provision of law when there is no ambiguity in reading such provision. As already discussed supra, while framing the law, the legislature at its wisdom carefully used different phrases at sub-sections (1) and (2). Certainly both phrases cannot be termed as having one and the same meaning intending for an appeal against the final order alone. There cannot be any presumption that a particular language used in a particular provision of law is without having any meaning for the same. The Full Bench of this Court in the decision reported in K. Arockiyaraj Vs. The Chief Judicial Magistrate, Srivilliputhur and The Housing Development Finance Corporation Limited, in which one of us (N. Paul Vasanthakumar, J.) was a party has decided the issue based on the language used in Section 14(1) of the SARFAESI Act, 2002 that is as to whether the Chief Judicial Magistrate in Non-Metropolitan areas can exercise the power of Chief Metropolitan Magistrate, or District Magistrate alone can exercise such power in Non-Metropolitan areas. After considering various decisions of the Apex Court, the Full Bench at paragraph 34 has held as follows:-
34. The literal interpretation is to be given if the words in the statute are clear and unambiguous and the object of the enactment should be borne-in-mind while interpreting the statute...

In conclusion, the Full Bench held that in terms of the statutory provision in Non-Metropolitan areas the Chief Judicial Magistrate cannot be approached and the competent authority is the District Magistrate or his delegate.

28 Further, in Raj Kumar Shivhare case, the Apex Court has considered the words "any order or "decision" of the Appellate Tribunal and found that it means "all orders". No doubt, the said decision was made in respect of the provisions under FEMA, 1999. However, the interpretation given by the Apex Court to the word "any" to mean "all" cannot be construed as an interpretation given only in respect of the particular enactment alone. Likewise, the over all interpretation given to the phrase "order or decision of the Appellate Tribunal" to mean that all decisions or orders of the Appellate Tribunal, also should be taken as an interpretation to the phrase "any order or decision", wherever it occurs even in respect of other enactments. Normally courts will take aid from the decisions of superior courts while interpreting a particular word or phrase in an enactment. Such exercise can not be found fault with unless an express restriction is made in the said decision itself. Therefore, the

phrase "any order" is to be construed as "all orders of the Appellate Tribunal". In our considered view, such interpretation of the Apex Court, has to be applied with all force even in respect of other enactments wherever such phrase is used, unless an express contrary intention is provided in those enactments itself.

29 Here in this case, the relevant enactments are Central Excise Act, 1944 and Customs Act, 1962. In both these enactments, the phrase used under sub-section (1) of Section 35G and 130 of those enactments respectively is "every order passed in appeal" by the Appellate Tribunal. If "any" is to be construed as "all" as held in Rajkumar Shivare''s case, it goes without saying that "every" also should have the same meaning. Further, the phrase "in appeal" cannot be confined to mean that only the final orders passed in the appeal. If the final order alone was intended as an order to be appealed against under sub-section (1) of both the provisions, then there was no necessity for the legislature to have the word "every". In other words, the legislature at its wisdom thought fit to give the plurality definition to the "order passed in appeal" by specifically using the word "every" in that phrase. Needless to say that interim orders are also orders passed in the appeal and they are not passed outside the scope of the appeal or as an independent or parallel orders.

30 In fact, a comparative study of Section 35G of FEMA, 1999 Section 35G of Central Excise Act and Section 130 of Customs Act would further make it clear that the scope of filing appeal before the High Court against the order of the Appellate Tribunal passed in Appeal, is further widened or enlarged by providing sub-section (2) of 35G and Section 130 of Central Excise Act and Customs Act respectively. It is pertinent to note at this juncture that no such sub-section (2) is available u/s 35 of FEMA, 1999. For proper appreciation of the intention of the legislation, it is better to have comparative look of the relevant Sections 35, 35G and 130 of the FEMA, Central Excise Act and Customs Act which are extracted hereunder:-

FEMA, 1999

THE CENTRAL EXCISE ACT, 1944

THE CUSTOMS ACT, 1962

34 Appeal to High Court -

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days. Explanation.-In this section High Court means;-

(a) The High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

SECTION 35G. Appeal to High Court. - (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

SECTION 130.

Appeal to High Court. - (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Customs or the other party; Or personally works for gain; and

(b) Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and eighty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -(a) has not been determined by the Appellate Tribunal; or (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be Provided that

nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which (a) has not been determined by the Appellate Tribunal; or (b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges w decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section. opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

31. From a careful perusal of the above provisions of law, it would make it clear without any ambiguity that sub-section (2) of both the provisions under the Central Excise Act and the Customs Act has further widened or enlarged the scope of filing an appeal before the High Court with a specific and definite intention that such appeal is not to be confined only against " every order passed in appeal" but also against "any order passed by the Appellate Tribunal".

32. A vital difference between sub-section (1) and sub-section (2) is to be noted at this juncture. The words "in appeal" is conspicuously absent under sub-section (2). Moreover, a further reading of Sub-section (2) would also show that a specific phrase is used viz., "such appeal under this sub-section" which has been dealt with further under clauses (a) to (c). Therefore, in our considered view, no words are used in these provisions of law either loosely or unintentionally. The legislature at its

wisdom thought fit to enlarge the scope of appeal by providing sub-section (2) with a specific expression "any order passed by the Appellate Tribunal" Thus, it is crystal clear that even as against the interim orders passed by the Appellate Tribunal, a remedy of filing of an appeal is always available u/s 35G and 130 of the respective Acts.

33. No doubt that both the appeals, one against the final order and the other against interim order, can be filed only if they involve a substantial question of law. Why the legislature thought fit to impose such a condition is a crucial question that needs to be answered at this juncture. We have already discussed the scheme of both the enactments. The appeal before the Appellate Tribunal is either filed as a second appeal, if it is an appeal against the order made by the Commissioner of Appeals or as a first appeal if it is filed against the order made by the Commissioner himself as adjudicating authority. At this juncture, it is to be noted that in both these cases, undoubtedly and admittedly the Tribunal is the final fact finding authority. Therefore, the Tribunal has to render its finding on facts which finding is to be treated and considered as a finding by the final fact finding authority unless such findings are stated to be perverse or against the facts pleaded or proved. Then, by raising it as a question of law, the affected party may file an appeal before the High Court. In any event, as the Tribunal is the final fact finding authority, the consideration before the High Court in the appeal preferred u/s 35G or 130 is to be confined only with the substantial questions of law raised and not on facts or any other aspect.

34. One more important aspect that has to be noted at this juncture is that under both the enactments, there is no specific bar for filing an appeal against the interim orders passed by the Tribunal. More specifically, either Section 35F of Central Excise Act or Section 129E of the Customs Act does not specifically prohibit the parties from challenging the orders passed by the Tribunal in their application for waiver of pre-deposit. On the other hand, as we found supra, sub-section (2) of Section 35G as well as Section 130 of the respective Acts, specifically permits filing of appeal against any order passed by the Appellate Tribunal.

35. Keeping these position of law and principles in our mind, let us now proceed to consider the contentions of the respective parties.

36. The core contention of the petitioners is that as against the interim order passed by the Tribunal, there is no appeal provision provided before the High Court under the Central Excise Act, 1944 and Customs Act, 1962. According to them, what is provided u/s 35G of the Central Excise Act and Section 130 of the Customs Act is the appellate remedy only against the final order passed in the appeal. They further seek this Court to distinguish the decision rendered by the Apex Court in Raj Kumar Shivhare''s case by contending that the same was rendered by considering the scope of FEMA and not in respect of the Central Excise Act or Customs Act. Thus, they contend that Raj Kumar Shivhare''s case is not applicable to the issue on hand.

It is their further contention that no question of law would arise against interim orders, more particularly, against an order made u/s 35F and therefore no appeal is maintainable against such orders before the High Court u/s 35G or 130 of respective Act.

37. No doubt, mostly, writ petitions alone were filed before various High Courts of this Country against the pre-deposit orders made by the Tribunal and they were entertained till the decision of the Apex Court was made in Raj Kumar Shivhare''s case. No other decisions rendered by the Apex Court is placed before us, either taking a contrary view or expressly limiting the scope of applicability of the above decision to the other enactments. The only dispute that is raised by the petitioners in these cases is that the said decision was made under FEMA, 1999 and that the appeal provision u/s 35 of the FEMA, 1999 is totally different and distinguishable from the appeal provisions u/s 35G of the Central Excise Act and 130 of the Customs Act and hence the ratio laid down in that case is not applicable to the present cases.

38. We do not agree with the above contentions. We have already discussed in detail about the scope and ambit of Section 35G and 130 of the respective Acts. We have also found that sub-section (2) of Section 35G and 130 of respective Acts enlarged the scope of appeal before the High Court with a specific intention of providing appeal against any order passed by the Appellate Tribunal. Whether the phrase "any order passed by the Appellate Tribunal" would include even an interim order is the question, which, the petitioners seeks this Court to answer in negative.

39. We are unable to appreciate their contentions for the simple reason that the phrase "any order passed by the Appellate Tribunal" has to have the same meaning as given by the Apex Court in Raj Kumar Shivhare''s case. For better appreciation, we can straight away refer the findings rendered by the Apex Court in Raj Kumar Shivhare''s case.

40. At this juncture, we make it very clear that though the said decision is rendered in respect of a dispute arising out of FEMA 1999, it is needless to say that the interpretation given in the above said decision in respect of the phrase "any decision or order" of the Appellate Tribunal has to be applied, without any hesitation, to the appeal provisions under the subject matter enactments viz., Central Excise Act and Customs Act also. The ratio laid down in the above case would certainly apply in respect of the cases covered under Central Excise Act and Customs Act also. The following paragraphs of the above decision are relevant to be quoted as under:

19. The word ''any'' in this context would mean ''all''. We are of this opinion in view of the fact that this Section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of Statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by Statute, as it is barred here u/s 34 of FEMA, is an inherent right (See Section 9 of the Civil Procedure Code) but a right of appeal is always conferred by Statute. While conferring such right

Statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by this Court on the basis of an interpretative exercise.

20. u/s 35 of FEMA, the legislature has conferred a right of appeal to a person aggrieved from ''any'' ''order'' or ''decision'' of the Appellate Tribunal. Of course such appeal will have to be on a question of law. In this context the word ''any'' would mean ''all''.

26. In the instant case also when a right is conferred on a person aggrieved to file appeal from ''any'' order or decision of the Tribunal, there is no reason, in the absence of a contrary statutory intent, to give it a restricted meaning. Therefore, in our judgment in Section 35 of FEMA, any ''order'' or ''decision'' of the Appellate Tribunal would mean all decisions or orders of the Appellate Tribunal and all such decisions or orders are, subject to limitation, appealable to the High Court on a question of law.

27. In a case where right of appeal is limited only from a final order or judgment and not from interlocutory order, the Statute creating such right makes it clear [See Section 19 of the Family Courts Act, 1984] which is set out below:;(19). Appeal (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

PROVIDED that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991]

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment or order of a Family Court.]

(Emphasis supplied)

29. By referring to the aforesaid schemes under different Statutes, this Court wants to underline that the right of appeal, being always a creature of a Statute, its nature, ambit and width has to be determined from the Statute itself. When the language of the Statute regarding the nature of the order from which right of appeal has been

conferred is clear, no statutory interpretation is warranted either to widen or restrict the same.

30. The argument that writ jurisdiction of the High Court under Article 226 of the Constitution is a basic feature of the Constitution and cannot be ousted by Parliamentary legislation is far too fundamental to be questioned especially after the judgment of the Constitution Bench of this Court in L. Chandra Kumar Vs. Union of India and others, . However, that does not answer the question of maintainability of a writ petition which seeks to impugn an order declining dispensation of pre-deposit of penalty by the Appellate Tribunal.

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal Statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go bye by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating the aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

41. The above findings rendered by the Apex Court, in fact, answer all the queries raised by the petitioners herein. Thus, it is clear that unless there is a specific bar in the statute itself against filing appeal against interlocutory orders or there is an express provision saying only a final order of the Tribunal is appealable, the scope of filing appeal contemplated u/s 35G and 130 cannot be narrowed down or restricted as contended by the petitioners by judicial interpretation. At paragraph 29, the Apex Court has categorically observed that when the language of the statute is clear regarding the nature of the order from which right of appeal has been conferred, no statutory interpretation is warranted either to widen or restrict the same.

42. In fact, the Apex Court has compared Section 19 of the Family Courts Act, 1984 with that of Section 35 of FEMA to observe so. Therefore, the petitioners are not right in saying that the above decision rendered by the Apex Court made in respect of FEMA cannot be applied or compared with the appeal provisions under the Central Excise Act and Customs Act.

43. Further, while considering the writ jurisdiction under Article 226 of the Constitution of India, the Apex Court in clear and categorical terms has observed in the above decision that where there is a complete lack of jurisdiction of the Tribunal or there has been violation of rules of natural justice or where the Tribunal acted under a provision of law which is declared ultra vires, the High Court can exercise its jurisdiction to grant the relief under Article 226 of the Constitution of India. The relevant paragraph 38 of the above decision is extracted hereunder:-

38. Learned counsel for the respondents relied on a judgment of this Court in Seth Chand Ratan Vs. Pandit Durga Prasad (D) by Lrs. and Others, . Learned counsel

relied on paragraph (13) of the said judgment which, inter alia, lays down the principle, namely, when a right or liability is created by a Statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. However, the aforesaid principle is subject to one exception, namely, where there is a complete lack of jurisdiction of the tribunal to take action or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law which is declared ultra vires. In such cases, notwithstanding the existence of such a tribunal, the High Court can exercise its jurisdiction to grant relief.

44. Subsequent to the above decision, by following the same, another decision was rendered by the Apex Court in United Bank of India Vs. Satyawati Tondon and Others, . The said decision was made in respect of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). While considering the issue with regard to the maintainability of writ petition before the High Court, the Apex Court has observed as follows:

Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass

interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

.....

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

45. The grievance of the petitioners herein is that no substantial question of law could be raised as against the pre-deposit order and therefore the appeal cannot be filed. We are unable to appreciate this contention. Even while passing the interim orders, the Tribunal would certainly go into the prima facie case and based on such factual consideration and also by taking note of the hardship pleaded and proved by the appellant as well as by considering the interests of the Revenue, it would pass orders on the waiver application. Therefore, if a party is aggrieved against such order passed by the Tribunal, it is always open to such party to challenge the same by filing an appeal. Whether a substantial question of law would arise in such cases or not would depend upon the facts and circumstances of each case and therefore, there cannot be any general or uniform presumption that no substantial question of law would arise in all pre-deposit orders. In any event, we do not think that such objection or contention can be made any more after the decision of the Raj Kumar Shivhare''s case where also the Apex Court has considered the same issue and held that even as against interim orders of pre-deposit, the appeal alone is maintainable and not a writ petition. In fact the issue before the Apex Court was as to whether a writ petition is maintainable against an order of the Tribunal made in the pre-deposit application. A bare perusal of the facts of the Raj Kumar Shivhare''s case would show that the Tribunal therein refused to dispense with the pre-deposit of penalty by the appellant viz., Raj Kumar Shivhare. Challenging the said order of the Tribunal, a writ petition was filed before the High Court, Delhi. A preliminary objection was raised by the Revenue that the High Court of Delhi did not have territorial jurisdiction to decide the matter. Accepting the said objection, the High Court of Delhi dismissed the writ petition on the ground that it lacks territorial jurisdiction. The said order of the High Court was challenged by the appellant before the Hon''ble Supreme Court. The Apex Court, while dismissing the appeal has observed at paragraphs 9, 10, 11, 12 and 44 as follows:-

Though High Court dismissed the writ petition on the issue of territorial jurisdiction, it missed a rather fundamental issue which is discussed hereunder.

10. At the commencement of the hearing, this Court questioned the very maintainability of the Writ Petition against an order of the Tribunal in view of the provisions of Section 35 of FEMA.

11. The Learned Counsel for the appellant sought to answer this query by contending that (a) the remedy u/s 35 of FEMA is only against a final order, (b) this question was not raised before the High Court, (c) the writ jurisdiction of the High Court is part of the basic structure of the Constitution and such jurisdiction cannot be ousted in view of Section 35 of FEMA, (d) all the High Courts in India, are entertaining writ petitions challenging an interim order passed by such Tribunals.

12. In our judgment, none of the answers given by the learned counsel are tenable for the reasons discussed below.

For the reasons discussed above, this Court is of the opinion a writ petition is not ordinarily maintainable to challenge an order of the Tribunal. We, therefore, dismiss the appeal, of course for reasons which are different from the ones given by the High Court in dismissing the writ petition.

46. Thus, it is seen that the Apex Court has gone into the very maintainability of the writ petition itself and gave the categorical findings as discussed supra. Therefore, when the said decision itself is on the question of maintainability of appeal against pre-deposit order, the petitioners cannot contend and raise the very same issue since such contention is directly against the ratio laid down by the Apex Court in the above said case.

47. In a recent decision made in Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., , the Apex Court, while considering the scope of Section 35L and 35G of the Central Excise Act, has observed as follows:-

4. We reiterate that the High Court, under Article 226 of the Constitution of India, has vast powers as this Court has under Article 32 of the Constitution of India, but such powers can only be exercised in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta2. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23)

23. when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.

9. A Bench of three learned Judges of this Court in Titaghur Paper Mills Co. Ltd. v. State of Orissa3 held: (SCC p. 440, para 11)

11. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed.

10. In other words, existence of an adequate alternative remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (see Rashid Ahmed v. Municipal Board, Kairana).

11. In Whirlpool Corpn. v. Registrar of Trade Marks5 this Court held: (SCC pp. 9-10, para 15)

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

12. Keeping the above principles in view let us notice the fact situation.

13. Section 35-G of the Central Excise Act, 1944 reads as under:

35-G. Appeal to High Court. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

This provision deals with the appeals to the High Court. Under this provision, an appeal shall lie to the High Court from the order passed in an appeal by the Appellate Tribunal on or after the first day of July, 2003 if the order of the Tribunal does not relate, among other things, to the determination of any question having relation to rate of duty or to value of goods.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the

Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent assessee.

48. The Division Bench of this court in the decision reported in 2005 (2) MLJ 246 (M/s. Nivaram Pharma Private Limited Vs. The Customs, Excise and Gold (Control), Appellate Tribunal, South Regional Bench, Madras and Others) has observed that a writ petition is not maintainable when there is a statutory remedy of appeal available more particularly in fiscal matters. The relevant paragraphs are extracted hereunder:-

3. The writ petition had been filed before the learned single Judge against the order of the CEGAT dated 09.07.1997.

4. We are surprised that this writ petition was entertained at all. There was a clear alternative remedy against the order of the CEGAT dated 09.07.1997 by means of filing a Reference Application before the CEGAT u/s 35G(1) of the Central Excise Act (hereinafter referred to as the Act) and if that application was rejected by the CEGAT there was a second alternative remedy of approaching this Court u/s 35G(3) of the Act seeking a direction to the CEGAT to make a reference to this Court.

5. It is well settled by a series of decisions of the Supreme Court that particularly in tax matters there should be no short circuiting of the statutory remedies, vide Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, , Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, .

7. A Constitution Bench of the Supreme Court in Veerappa Pillai Vs. Raman and Raman Ltd. and Others, held that as the Motor Vehicles Act is a self contained code and itself provides for a forum for appeal/revision, the writ jurisdiction should not be invoked in matters relating to its provisions. A similar view was taken in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, .

15. There are well settled principles of writ jurisdiction and Judges also must exercise self-discipline. It has been repeatedly held by the Supreme Court that in tax matters there should be no short circuiting the statutory remedies of appeal, revision, etc. We are therefore surprised that in this case the learned single Judge did not observe this well settled principle of self-discipline and entertained the writ petition despite existence of statutory remedies.

49. The principle as to how a taxing statute is to be construed is well settled. The Apex Court in very many decisions has categorically observed that taxing statute should be strictly construed and the intention of the legislature is to be gathered from the words used in the statute. It is also held by the Apex Court in Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd., that in interpreting a taxing statute, equitable considerations are entirely out of place nor can taxing statute be interpreted on any presumptions or assumptions and the Court must look squarely at the words of the statute and interpret them. All these principles have been reiterated in a recent decision of the Apex Court in 2010 (14) SCC 751 (Commissioner of Central Excise, Chandigargh V. Doaba Steel Rolling Mills), wherein at paragraphs 25 to 28 it is observed as follows:-

25. The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be.

26. On the principles of interpretation of taxing statutes, the following passage from the opinion of Late Rowlatt, J. in Cape Brandy Syndicate Vs. Inland Revenue Commissioners has become the locus classicus and has been quoted with approval in a number of decisions of this Court:

....in a taxing act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

27. In Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd. (AIR 1961 SC 1047), J.C. Shah, J. observed thus:

11..... In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency.

28. In Mathuram Agrawal Vs. State of Madhya Pradesh, , D.P. Mohapatra, J. speaking for the Constitution Bench, stated the law on the point in the following terms:

12.... The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in

interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.

50. A Full Bench of this Court in a decision reported in 2008 (1) L.W. 47 (G. Karmegam and Others Vs. The Joint Sub-Registrar and Others) wherein one of us (N. Paul Vasanthakumar, J.) was a party, has held at paragraphs 17, 18, 19 as follows:-

17. A Larger Bench of the Apex Court, in Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, , held that it is a well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous; a statute is an edict of the legislature; the language employed in a statute is the determinative factor of legislative intent; the first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself and that the question is not what maybe supposed and has been intended but what has been said.

18. It is the bounden duty of the court to infer and gather the intention of the legislature, before proceeding to interpret a statute. The function of the Courts is only to expound and not to legislate. The Courts have to look essentially to the words of the statute. The legislative intention i.e., the true or legal meaning of an enactment in the light of any discernible purpose or object, which comprehends the mischief and its remedy, to which enactment is directed. This formulation later received approval of the Supreme Court in Reema Aggarwal Vs. Anupam and Others, . The Courts cannot interpret a statute in the way they have developed the common law. Even though the Courts possess powers to lay down common law principles, they cannot exercise such powers in respect of statutes.

19. Intention of the Legislature" is a common, but very slippery phrase, which, if popularly understood, may signify anything from the intention embodied in enactment to speculative opinion as to what the legislature would have meant, although there has been omission to enact it. A note of caution is also there, when the language of the legislation has only one meaning, considerations of harshness, injustice or inconvenience will not induce the Court to change the meaning by interpretation. The well known rule of interpretation of statute is that it is elementary that the primary duty of the Court is to give effect to the intention of the legislature, as expressed in the words used by it, and no outside consideration can be called in aid to find out the intention.

51. Thus, from the categorical observation of the Hon''ble Full Bench made in the above case it is clear that the Court has to give effect to the intention of the legislature as expressed in the words used by it and when the language of the legislation has only one meaning, considerations of harshness, injustice or inconvenience will not induce the Court to change the meaning by interpretation. Therefore, when sub-clause (2) of Section 35G is very clear without any ambiguity, to show that an appeal is maintainable against any order passed by the Tribunal, this Court cannot interpret the said provisions as claimed by the petitioners that such provision of law is not intended against interim orders. It is needless to say that intention of the legislation is to be gathered only from the language used therein and not from the pleadings of the parties.

52. It is to be noted at this juncture that there is no statutory definition given in the Act as to what is the meaning of "any order" and "every order". Thus, in the absence of such statutory definition, only the literal meaning has to be given to those words. Above all the Apex Court has considered the word "every order" in Raj Kumar Shivhare''s case and held that it means all orders passed by the Tribunal. Therefore, there cannot be any second view on this aspect.

53. In Ajoy Kumar Banerjee and Others Vs. Union of India (UOI) and Others, the Apex Court at paragraph 26 has observed as follows:-

26. Interpretation of a provision or statute is not a mere exercise in semantics but an attempt to find out the meaning of the legislation from the words used, understand the context and the purpose of the expressions used and then to construe the expressions sensibly. Primarily, if the words are intelligible and can be given full meaning, courts should not cut down their amplitude. Secondly, the purpose or object of the conferment of the power must be borne in mind.

54. It is contended by the learned counsel appearing for the petitioners that sub-section (2) of Section 35G and 130 of the respective Acts is only procedural; whereas sub-section (1) alone is a substantive provision for filing an appeal before this Court. Therefore, they contend that sub-section (2) cannot have an independent scope. We have already discussed in detail about these two provisions viz., sub-section (1) and sub-section (2) of the relevant appeal provisions and found that the intention of the legislature is not one and the same in respect of both these sub-sections. Needless to say that a procedural provision can only explain the substantive provision and cannot expand or enlarge its scope. In other words, a procedural provision has to simply explain as to how an appeal contemplated in the substantive provision has to be filed. In this case, it is not so. Sub-section (2) is not simply explaining only the procedure of filing appeal. On the other hand, it specifically says against which order such appeal would lie. If the argument of the learned counsels has to be accepted in this aspect, then sub-section (2) need not have the phrases "any order passed by the Appellate Tribunal" and "such appeal under this sub-section". Therefore, we reject their contentions as unsustainable.

55. Another contention raised by them is in respect of granting short time to comply with the pre-deposit orders and therefore, such order cannot be construed as an order to be appealed against since appeal time is 180 days granted under the statute itself. That cannot be the ground or reason to hold that such interim orders are not appealable u/s 35G or 130. We have already found that pre-deposit is a condition precedent and not a condition to be followed. Therefore, once an order of pre-deposit is passed, it is for the party aggrieved either to comply with the said order within the time stipulated therein or to file an appeal before the High Court u/s 35G or Section 130. Further, as we have already observed earlier that the Tribunal being the final fact finding authority has to render its finding on facts, though prima facie, while considering the application seeking for stay or waiver of pre-deposit. If a conditional order is made on pre-deposit application and when the same has not been complied with, it may result in dismissal of the appeal itself as observed by the Apex Court reported in Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others, . Therefore, the parties are not precluded from questioning the order passed in the pre-deposit application either by way of filing an appeal against such an order itself or against the final order made in the appeal by raising the substantial question of law on both occasions, since dismissal of the appeal for not complying with the conditional order in effect, is a final order passed in the appeal.

56. At this juncture, it to be noted that sub-section (9) of Section 35G contemplates that the provisions of the CPC relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under that section. Order 41A of CPC deals with appeals to be filed before the High Court and Order 42 deals with Appeals from Appellate decree. Order 41 Rule 5 CPC contemplates that an appeal shall not operate as a stay of proceedings under a decree or order appealed from. Therefore, it is for the appellant to approach the appellate Court and seek for stay of the order or decree, which is appealed against.

57. Considering all these facts and the position of law as discussed supra, we are of the view that the contention of the petitioners that granting of short time to comply with the pre-deposit orders would prevent them from filing an appeal before the High Court cannot be countenanced. Needless to say that prescribing a period of limitation for filing an appeal does not mean or be construed that within such period of limitation, the said order cannot be put into operation unless a statutory bar is provided against doing so. Further, the party intends to file appeal need not wait till the last date of limitation to file appeal.

58. A decision of the Hon''ble Supreme Court reported in S. Mohan Lal Vs. R. Kondiah, is relied on by the petitioners to contend that a decision of one enactment cannot be applied to another enactment. A bare perusal of the above said decision would show that the Apex Court has only observed that the word "business" must be interpreted in the context of statute in which it occurs and not in the context of

other statutes or in the manner alien to the context of the statute concerned. We do not think that such decision is in any way helpful to the petitioners in this case, more particularly when the provisions of appeal remedy in all the three enactments, viz., FEMA, Central Excise Act and Customs Act are similar in nature.

59. Likewise, the other decision relied on by the petitioners reported in Visvas Promoters P. Ltd. Vs. The Income Tax Appellate Tribunal Chennai Bench "B" and The Assistant Commissioner of Income Tax, rendered by a learned single Judge of this Court is also not helping the petitioners in any manner. When the statute is very clear that an appeal is maintainable against any order of the Tribunal, then there is no necessity for giving any further interpretation as observed by the Apex Curt in Raj Kumar Shivhare''s case.

60. The petitioners also relied on the decision reported in Videocon Industries Ltd. Vs. The Commissioner of Customs, , wherein the Division Bench of the Bombay High Court has held that an appeal against an order of pre-deposit is not maintainable. The Division Bench of the Bombay High Court though made a reference to Raj Kumar Shivhare''s case, had however distinguished the same by holding that appeal against interlocutory order including the order of pre-deposit is not maintainable as the said order does not in any way amount to determination of any question having a relation to the rate of duty or value of the goods. We have given careful consideration to the above said decision. We are unable to subscribe to the above view expressed by the Bombay High Court for the simple reason that the Division Bench therein has proceeded to decide the issue only by considering the sub-section (1) of Section 130 of the Customs Act to observe that the pre-deposit order is not determining any question relating to the rate of duty or value of goods. Unfortunately, the Division Bench has not further considered and analysed the scope of sub-section (2) of Section 130, where the scope of appeal is widened against any order passed by the Appellate Tribunal.
Therefore, with great respect to the learned Judges, we are unable to accept the view expressed by them in the above decision.

61. The decision of the Hon''ble Supreme Court reported in Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others, is cited on the side of the petitioners to contend that non-deposit of duty or penalty would result in rejection of the appeal. We do not find that the above decision is helping the petitioners in any manner in respect of the issue involved in these cases.

62. Competition Commission of India Vs. Steel Authority of India Ltd. and Another, is cited to contend that in the absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party. There is no quarrel about this proposition. In the very same decision, the Apex Court at paragraph 52 has observed as follows:-

52. A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is just dicere, not jus dare. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

(Emphasis supplied)

Thus, from the reading of the above observation made by the Apex Court, it is clear that literal construction is to be given keeping the legislative intent in mind. Such legislative intent has already been found by us that an appeal is maintainable even against the interim orders. More over, sub-section (2) in Section 35G and 130 of respective enactments is very much available creating a right on the parties.

63. The decision reported in Excel Rubber Products Vs. Addl. Collector of C. Ex. and Customs, is cited to contend that non-compliance with the requirement of pre-deposit will not affect the maintainability of the appeal. We do not think that such is not the issue before this Court and therefore, the said decision is also not relevant for consideration.

64. The decision reported in 2012 (279) ELT 358 (Hindustan Petroleum Corporation Ltd., Vs. Commissioner of Customs, Mangalore) is cited to contend that appeal is not maintainable against the pre-deposit orders. A Division Bench of the Karnataka High Court has held that pre-deposit is rule and waiver is an exception and in respect of an order passed in such waiver application, appeal cannot be maintained before the High Court. Unfortunately, it appears that the decision of the Raj Kumar Shivhare''s case was not placed before the Division Bench of the Karnataka High Court. Therefore, without referring to the said decision, the Division Bench has come to such conclusion. With great respect, we are unable to accept the view expressed therein as we are bound to follow the decision of the Apex Court in Raj Kumar Shivhare''s case.

65. Likewise, the decision rendered by the Delhi High Court reported in Union of India (UOI) Vs. Classic Credit Ltd., holding that the writ petition is maintainable is also a decision rendered earlier to the decision of the Apex Court made in Raj Kumar Shivhare''s case. Therefore, with great respect, we are not in a position to accept the view expressed by the Delhi High Court.

66. The decision reported in State of Orissa and others Vs. M/s. Krishna Stores, relied on by the petitioners'' side is not relevant to the issue on hand. In that case, what was considered is the summary rejection of the appeal at the initial stage. As the issue before this Court is not similar to the issue involved in the above said case, the

same is not relevant for consideration.

67. State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others, is cited to contend that what the word "appeal" would mean. At paragraph 10 of the said decision, the Apex Court has observed that a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority is also an appeal.

68. In the decision reported in Ambica Industries Vs. Commissioner of Central Excise, , the Apex Court has considered as to which is the appropriate High Court to entertain an appeal where the first forum was located in a State other than the State where the Appellate Tribunal was located. In our considered view, such decision is not with reference to the issue on hand and therefore, the same is not helping the petitioner in any manner.

69. Shaw Wallace and Co. Ltd. Vs. Income Tax Appellate Tribunal and Others, is cited to contend that the order passed without jurisdiction can be quashed in writ proceedings even if there is an alternate remedy. There is no quarrel about the said proposition. In fact, the said point was considered by the Apex Court in Raj Kumar Shivhare''s case and held in similar line at paragraph 38.

70. The decision reported in Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., was cited to contend writ jurisdiction is not ousted even if there is an efficacious alternative remedy is available. The Apex Court at paragraph No. 4 has held as follows:-

4. We reiterate that the High court, under Article 226 of the Constitution of India, has vast powers as this Court has under Article 32 of the Constitution of India, but such powers can only be exercised in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice.

After holding so, in the very same decision the Apex Court has also observed at paragraph 15 as follows:-

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent assessee.

Thus, from the above decision of the Apex Court, it is clear that exercise of jurisdiction under Article 226 of the Constitution of India cannot be resorted to when there is an effective alternative remedy unless under the circumstances stated at paragraph 4 of the above said decision.

71. In Central Bank of India Vs. Shri Gokal Chand, , the Apex Court has observed that even an interlocutory order passed u/s 37(2) of the Delhi Rent Control Act, 1958 is an order passed under the Act and is subject to appeal u/s 38(1) provided it affects some right or liability of any party. Therefore, the above decision is not helping the petitioner in any manner.

72. Columbia Sportswear Company Vs. Director of Income Tax, Bangalore, is cited to contend that Advance Ruling of the Authority has to be challenged before the High Court under Articles 226 and/or 227 of the Constitution of India. The issue before the Apex Court in that case is as to whether the Authority under Advance Ruling is a Tribunal within the meaning of Articles 136 and 227 of the Constitution of India and whether the Authority has a duty to act judicially and is amenable to writ jurisdiction. The Apex Court has held that such Authority is a Tribunal within the meaning of expression in Articles 136 and 227 of the Constitution of India and is a body acting in judicial capacity. We do not think that the issue in that case before the Apex Court has got any relevance to the issue before us. Therefore, the said decision is also not relevant for consideration.

73. Per contra, the learned counsels appearing for the Revenue cited various decisions in support of their submissions, which are discussed hereunder.

74. In Auram Jewellery Export (P) Ltd. Vs. Union of India (UOI), , a Division Bench of the Allahabad High Court has held that appeal is maintainable as against the order of pre-deposit.

75. In SKS Ispat and Power Ltd. Vs. Commissioner of Customs and Excise, , a learned single Judge has held that writ is not maintainable against the direction of the CESTAT to make pre-deposit.

76. Likewise a learned single Judge of this Court in the decisions reported in Arun Kumar Gupta Vs. Directorate of Revenue Intelligence, and 2009 (239) ELT 226 (Varadhalakshmi Mills Ltd., Vs. Commissioner of C.EX. Madurai) has held that writ is not maintainable as against pre-deposit orders.

77. In a recent unreported decision of Punjab and Haryana High Court made in C.W.P. No. 13288 of 2012 (M/s. Surya Air Products (P) Ltd., Vs. Union of India and Others) dated 15.1.2013, the Division Bench has considered the very same issue in detail and by following the Raj Kumar Shivhare''s case and that of Bombay High Court and Allahabad High Court reported in Indoworth India Ltd. Vs. Customs, Excise and Service Tax Appellate Tribunal and Commissioner of Customs and Central Excise, ; 2010 (251) ELT 365 (All) (Auram Jewellery Export (P) Ltd., Vs. Union of India)

respectively, has held that an order passed by the Tribunal on an application for waiver of pre-deposit of duty is an order passed in appeal and is thus appealable in terms of Section 35G of the Act.

78. We have already noted that, there is no contra decision rendered by the Apex Court subsequent to Raj Kumar Shivhare''s case is placed before us. On the other hand, by following the above decision, a subsequent decision of the Apex Court in Satyawati Tandon case was rendered by holding that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the statute, which decision has been discussed supra.

79. Thus, by considering all the above facts and circumstances, we answer the reference as follows:-

The order passed by the CESTAT in terms of Section 35F of the Central Excise Act, 1944 or Section 129-E of the Customs Act, 1962 is appealable in terms of Section 35G of the Excise Act, 1944 or Section 130 of the Customs Act, 1962.

Since all these writ petitions are filed by contending that there is no appellate remedy available against these pre-deposit orders and as we have held in this reference that appellate remedy is available against those orders u/s 35G of the Central Excise Act, 1944 or u/s 130 of the Customs Act, 1962, we find that all these writ petitions are liable to be dismissed on the ground of maintainability. Accordingly, all the writ petitions are dismissed as not maintainable, however by giving liberty to the petitioners to file appeal u/s 35G of the Central Excise Act, 1944 or u/s 130 of the Customs Act, 1962, wherever it applies. It is made clear that as we are dismissing the writ petitions only on the ground of maintainability, the petitioners are entitled to canvass the correctness of the order passed by the Tribunal in their appeal by raising all the grounds as well as the substantial questions of law available to them. As we are inclined to dismiss these writ petitions without considering the contentions on merits and by granting liberty to file appeal, the parties are directed to maintain status quo as on date for a period of three weeks from today. Consequently, the connected M.Ps. are closed. No costs.