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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.59 OF 2011

M/s. Orange City Alloys Pvt. Ltd.]
 (formerly M/s. Saggu Castings Pvt. Ltd.)]
 a company incorporated under the]
 Companies Act, 1956 and having its]
 Registered office at Khasra No.40/2,]
 Village Bhilgaon, Kamptee Road,]
 Nagpur - 440 026.] ..Appellant.

V/s.

Commissioner of Central Excise,]
 Nagpur, having his office at Telengkhedi]
 Road Civil Lines, Nagpur-440 001.] ..Respondent.

CENTRAL EXCISE APPEAL NO.64 OF 2011

M/s. Shridhar Castings Pvt. Ltd.]
 a company incorporated within the]
 meaning of Companies Act, 1956]
 and having its Registered office at]
 26 Kms., Nagpur Saoner Road,]
 Nagpur - 400 001.] ..Appellant.

V/s.

Commissioner of Central Excise,]

Nagpur, having his office at Telengkhedi]
 Road Civil Lines, Nagpur-440 001.] ..Respondent.

CENTRAL EXCISE APPEAL NO.60 OF 2011

M/s. Shiva Steel Industries (Nagpur) Ltd.]
 a company incorporated within the]
 meaning of Companies Act, 1956]
 and having its Registered office at]
 Khadoli, Bhandara Road,]
 Nagpur - 441 202.] ..Appellant.

V/s.

Commissioner of Central Excise,]
 Nagpur, having his office at Telengkhedi]
 Road Civil Lines, Nagpur-440 001.] ..Respondent.

CENTRAL EXCISE APPEAL (LOD) NO.63 OF 2011

M/s. Trimurthi Ispat Ltd.]
 a company incorporated within the]
 meaning of Companies Act, 1956]
 and having its Office at Sheela Complex]
 Amravati Road, Wadi, Nagpur - 400 023.] ..Appellant.

V/s.

Commissioner of Central Excise,]
 Nagpur, having his office at Telengkhedi]

Road Civil Lines, Nagpur-440 001.] ..Respondent.

CENTRAL EXCISE APPEAL (LOD) NO.71 OF 2011

AND

CENTRAL EXCISE APPEAL (LOD) NO.72 OF 2011

M/s. Shiva Steel Industries (Nagpur) Ltd.]
a company incorporated within the]
meaning of Companies Act, 1956]
and having its office at Village Kadholi,]
N.H. No.7, Bhandara Road,]
Nagpur - 441 905.] ..Appellant.

V/s.

Commissioner of Central Excise,]
Nagpur, having his office at Telengkhedi]
Road Civil Lines, Nagpur-440 001.] ..Respondent.

Mr. V. Shridharan, senior Advocate with Prakash Shah i/b. PDS Legal for appellant in all the appeals.

Mr. V.H. Kantharia for respondent in all the appeals.

CORAM : SHRI MOHIT S. SHAH, CHIEF JUSTICE,
J.P. DEVADHAR AND
SMT. R.S. DALVI, JJ.

JUDGMENT RESERVED ON : 21ST OCTOBER, 2011

JUDGMENT PRONOUNCED ON : 9TH NOVEMBER, 2011

JUDGMENT (PER J.P. DEVEDHAR, J.)

1) A Division Bench of this Court at Mumbai by its order passed in these group of appeals on 12th October, 2011 has found it difficult to agree with the decision of the Aurangabad Bench in the case of M/s. S.R.J. Peety Steels Pvt. Ltd. V/s. Union of India dated 20th July, 2011 in First Appeal No.706 of 2011 with Civil Application No.5013 of 2011 and formulated a question for consideration by a larger Bench. Accordingly, this larger Bench is constituted to consider the question framed by a Division Bench of this Court. The question framed by the Division Bench (Coram Dr. Justice D.Y. Chandrachud and Mr. Justice A.A. Sayed) reads thus :-

" Whether the decision of the Division Bench in SRJ Peety Steel Pvt. Ltd. V/s. Union of India (First Appeal 706 of 2011 with C.A. 5013 of 2011) delivered on 20th July, 2011 remanding the proceedings back to the Tribunal requires reconsideration since the Division Bench did not express any view prima facie that the decision in Nasik Strips Pvt. Ltd. and Mithunlal Gupta Bhavshakti Steelmines Pvt. Ltd. (supra) involved similar facts and particularly when (i) The Tribunal had distinguished the decision in Nasik Strips Pvt. Ltd. and (ii) The Tribunal had followed the decisions of the Supreme Court involving a similar issue of principle ? "

2) Though it is not necessary to refer to the facts for deciding

the question referred to this Bench, for better appreciation of the dispute involved herein, we may set out a few facts in the case of M/s. Orange City Alloys Pvt. Ltd. being Central Excise Appeal No.59 of 2011. The appellant M/s. Orange Alloys Pvt. Ltd. (the assessee' for short) is engaged in the manufacture of excisable goods namely, "iron and steel ingots" ('final products' for short) falling under Chapter 72 of the Central Excise Tariff Act, 1985. The said final product is manufactured in an electrical induction furnace by utilising the inputs such as electricity and waste and scrap of melting scrap, pig iron, cast iron, etc.

3) On receiving information that the assessee was evading payment of central excise duty by suppressing production (showing less production than actual) in the statutory records and clearing the same without payment of central excise duty, the Central Excise Officers visited the factory premises of the assessee on 25th October, 2005 and took custody of certain documents. The Central Excise Officers have also recorded statements of various persons connected with the manufacture and sale of the above final products.

4) Scrutiny of the documents particularly the correspondence between the assessee and the supplier of induction furnace revealed that the average power consumed by the assessee for the manufacture of one M.T. of the final product was between 900-925 KWH upto 17th

October, 2005 and thereafter at 850-860 units per metric tonne. However, it was noticed that the electricity actually consumed by the assessee was much more than required for the quantity of the final products recorded in the books maintained by the assessee. The total quantity of electricity consumed by the assessee during the period from 16-12-2003 to 24-11-2008 was 7,91,87,789 units and on the basis of 925 units per MT upto 20/10/2005 and 860 units per MT after 20/10/2005, the assessee ought to have recorded production of 89,887.239 MTS of iron & steel ingots, whereas in the books the quantity of production recorded was 53,568.721 MTS. Thus, the unaccounted production was to the extent of 36,318.518 MTS, which was cleared clandestinely without payment of central excise duty

5) In view of the apparent discrepancy in the production of the final products recorded in the books and utilisation of electricity as inputs in the manufacture of iron and steel ingots, a show cause notice was issued on 9th January, 2009 calling upon the assessee to show cause as to why the central excise duty amounting to Rs.11,51,83,109/- on 36,318.518 MTS of ingots allegedly manufactured and clandestinely cleared during the period from 16-12-2003 to 24-11-2008 should not be demanded and recovered under the proviso to Section 11A(1) of the Central Excise Act, 1944 ('the Act' for short) together with interest under Section 11AB of the Act. The assessee was further called upon to show

cause as to why penalty under Section 11AC of the Act and under Rule 25 of the Central Excise Rules, 2002 should not be imposed for the alleged contravention of the provisions of law. The assessee opposed the show cause notice by filing a detailed reply.

6) By an order in original dated 1st June, 2009, the adjudicating authority namely, the Commissioner of Customs & Central Excise, Nagpur held on the basis of the electricity consumed during the relevant period and other evidence gathered during the course of investigation that the assessee had unaccounted production of ingots to the extent of 36,318.518 MTS which was cleared clandestinely without payment of central excise duty amounting to Rs.11,51,83,110/- (Rs.11.51 crores). The adjudicating authority further recorded a finding (see para 1.9.3.3. of the order in original) that the assessee to cover up the clandestine clearances, procured bogus purchase invoices of trading goods and cleared the unaccounted finished excisable goods in the garb of clearing the traded goods. The adjudicating authority further recorded a finding at para 1.10.8 of the order in original that the assessee had shown very high burning losses apparently to accommodate unaccounted production of finished goods, which were apparently cleared without payment of duty.

7) It is relevant to note that as per the technical opinion report

of Dr. N.K. Batra of IIT, Kanpur, the energy requirement of induction furnaces for producing 1 M.T. of iron and steel ingots from melting scrap ranges between 555 to 754 KWH, whereas, according to the article published by Shri R.P. Varshney, the executive Director of All India Induction Furnaces Association, the energy requirement for the production of 1 M.T. of iron and steel ingots ranges from 650 to 820 units. However, the adjudicating authority computed the unaccounted production on the basis of the electricity admitted to have been consumed by the assessee as reflected in the letters addressed by the assessee to the supplier of electric induction furnaces. The unaccounted production of iron and steel ingots and its clandestine clearance was further corroborated by the purchase bills of traded goods which were found to be bogus and even the burning loss of electricity claimed by the assessee was found to be abnormally high.

8) Accordingly, by order in original dated 1st June, 2009, the adjudicating authority confirmed the demand and recovery of the said amount of Rs.11,51,83,109/- (Rs.11.51 crores approximately) from the assessee under Section 11-A(1) of the Act with interest under Section 11AB of the Act. The adjudicating authority imposed penalty of Rs. 11,51,83,109/- (Rs.11.51 crores approximately) under Section 11AC of the Act and penalty of Rs.1,15,18,311/- (Rs.11.51 crores approximately) under Rule 25 of the Central Excises Rules, 2002. The adjudicating

authority has also imposed personal penalty on the Director of the assessee Company.

9) Challenging the aforesaid order in original dated 1st June, 2009, the assessee filed an appeal before the CESTAT with an application seeking waiver of pre-deposit of the duty and penalty imposed by the order in original dated 1st June, 2009. The CESTAT Mumbai Bench, by its common order dated 28th February, 2011 disposed of the said application filed by the assessee along with 37 similar applications filed by various other manufacturers seeking waiver of pre-deposit. By the said order, the CESTAT directed all the assessees, except in the case of M/s Shree Steel Castings to deposit 50% of the duty demanded along with 25% of the amount of penalty imposed within the time stipulated therein.

10) Being aggrieved by the order of the CESTAT dated 28th February, 2011, one assessee namely M/s. SRJ Peety Steels Pvt. Ltd. situated at Aurangabad filed Central Excise Appeal (wrongly numbered as First Appeal) bearing No.706 of 2011 and took out Civil Application No.5013 of 2011 seeking waiver of pre-deposit. By an order dated 20th July, 2011 the said appeal as well as the civil application were heard and disposed off finally by consent of the parties. The said order passed by the Aurangabad Bench dated 20th July, 2011 reads thus :-

" 1. Admit. By consent, the appeal is heard finally forthwith. The appeal has been preferred by the original assessee against the judgment and order passed by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT" for short), Mumbai, dated 28.2.2011, on an application for an interim relief. The CESTAT has directed the assessee to deposit 50 per cent of the amount of duty demanded along with 25 per cent of the penalty imposed, within four weeks from the date of receipt of the said order. In the event the assessee complied with the order, there would be waiver of condition of pre-deposit and stay to the recovery of balance amount of duty and penalty.

2. Mr. Godsay, the learned Advocate for the appellant has pointed out several decisions of the CESTAT, wherein, the CESTAT has granted full waiver of the deposit, as an interim relief, where the facts are similar to the present case. These decisions have been rendered in **Nasik Strips Pvt. Ltd. vs. Commissioner of Central Excise, Nasik, reported in 2011 (263) E.L.T. 606** and **Mithunlal Gupta Bhavshakti Steelmines Pvt. Ltd. vs. Commissioner of Central Excise and Customs, Nashik, [Appeal Nos.E676 and 677 of 2009, with Stay Applications No.E/Stay-977 and 978 of 2009]**.

3. The learned Advocate for the appellant further pointed out that the Division Bench of this Court in **Wardha Coal Transport Pvt. Ltd. vs. Union of India, reported in 2009 (3) Bom.C.R. 306**, has observed that once the Tribunal has granted full waiver in similar cases, it would not be proper to take a different view and deny

waiver of pre-deposit. According to Mr. Godsay, the Division Bench has not denied the waiver of pre-deposit and, in stead, has directed the Tribunal to decide the appeal in accordance with law. He, therefore, contends that the matter ought to be remanded to the Tribunal to decide it afresh, after considering the aforesaid orders.

4. We have heard the learned counsel for the respondent who has submitted that no substantial question of law has been raised by the appellant and that the CESTAT has not committed any error in directing the appellant to deposit a part of the duty and penalty.

5. In our view, the matter deserves to be remanded to the Tribunal, as the Tribunal should take a consistent view regarding pre-deposit when the facts and circumstances in the matters before it are similar. Accordingly, the matter is remanded to the Tribunal. The Tribunal will take into consideration its earlier orders in **Nasik Strips Pvt. Ltd. and Mithunlal Gupta Bhavshakti Steelmines Pvt. Ltd. (supra)** while deciding whether the appellant herein is entitled to waiver of predeposit. The appellant to appear before the Tribunal on 22.8.2011.

6. The Appeal is allowed, accordingly. No Orders as to costs. Civil Application stands disposed of. "

11) Challenging the very same order of CESTAT dated 28th February, 2011, these group of six appeals were filed before this Court at Mumbai. When these appeals were placed before the Division Bench of

this Court for admission, counsel for the appellants submitted that the appeals be disposed off in terms of the order passed by the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra). The Division Bench at Bombay found it difficult to follow the Division Bench decision of the Aurangabad Bench and accordingly formulated the aforesaid question for consideration by the larger Bench.

12) Mr. Shridharan, learned senior Advocate appearing on behalf of the appellants submitted that the Aurangabad Bench has merely remanded the matter without laying down any proposition of law and in such a case, the question of disagreeing with the decision of the Aurangabad Bench does not arise at all. In any event, he submitted that challenging the decision of the Aurangabad Bench dated 20th July, 2011, the revenue had filed Special Leave Petition (S.L.P.) on the very same ground which are sought to be canvassed before this Court and the said S.L.P. has been dismissed by the Apex Court on 30th September, 2011. Thus the decision of the Aurangabad Bench has attained finality and, therefore, the question of considering the validity of Aurangabad Bench decision does not arise at all.

13) Mr. Shridharan further submitted that even on merits the decision of the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) cannot be faulted, because, the CESTAT by its

impugned order dated 28th February, 2011 had erroneously disagreed with its earlier decision in the case of *Nasik Strips Pvt. Ltd. V/s. CCE* reported in *2011 (263) E.L.T. 606 (Tri. Mumbai)* and that he could demonstrate at the hearing of the appeal that the Tribunal in the case of *Nasik Strips Pvt. Ltd. (supra)* had correctly granted full waiver of pre-deposit. Mr. Shridharan further submitted that the CESTAT in the case of *Mithunlal Gupta Bhavashakti Steelmines Pvt. Ltd. V/s. CCE* ('Mithunlal Gupta' for short) by its order dated 8th April, 2011 has disagreed with the impugned decision of the CESTAT dated 28th February, 2011 and has granted full waiver of pre-deposit. In these circumstances, it is submitted by Mr. Shridharan that the Aurangabad Bench was justified by setting aside the impugned order of the CESTAT dated 28th February, 2011 in the case of *M/s. SRJ Peety Steels Pvt. Ltd. (supra)* and remanding the case for fresh decision in accordance with law.

14) Mr. Shridharan further submitted that in the event of this Court coming to the conclusion that the Aurangabad Bench was not justified in remanding the matter for fresh consideration, then and in that event, the assessee must be given an opportunity to establish that the decision of the CESTAT in the case of *Nasik Strips Pvt. Ltd. (supra)* is the correct decision and the impugned decision dated 28th February, 2011 is erroneous.

15) Mr. Kantharia, learned advocate appearing on behalf of the revenue on the other hand submitted that the revenue involved in all the 38 cases covered under the impugned order of the CESTAT dated 28th February, 2011 is approximately to the extent of Rs.400/- crores and the pre-deposit directed by the impugned order dated 28th February, 2011 collectively comes to approximately Rs.150 crores. Counsel for the revenue submitted that once the CESTAT by the impugned order dated 28th February, 2011 has found that its earlier decision in the case of Nasik Strips Pvt. Ltd. (supra) was contrary to the decision of the Apex Court and accordingly ordered pre-deposit, the Aurangabad Bench could not have set aside the impugned decision of the CESTAT without assigning any reasons. Accordingly, counsel for the revenue submitted that the decision of the Aurangabad Bench must be held to be erroneous and contrary to law.

16) We have carefully considered the rival submissions.

17) The basic dispute raised in all these appeals is, whether the CESTAT by the impugned order dated 28th February, 2011 was justified in not following its earlier decision in the case of Nasik Strips Pvt. Ltd. (supra) and directing the appellants herein to make pre-deposit of 50% of the central excise duty confirmed by the adjudicating authority and directing pre-deposit of 25% of the penalty imposed by the adjudicating

authority.

18) As noted earlier, the impugned decision of the CESTAT dated 28th February, 2011 is a composite order covering 38 assesseees and in the case of one such assessee namely M/s. SRJ Peety Steels Pvt. Ltd. (supra), the Aurangabad Bench has quashed the order dated 28th February, 2011 and directed the CESTAT to pass a fresh order after considering the decisions of the CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) and Mithunlal Gupta (supra). Since a Division Bench of this Court at Mumbai has found it difficult to follow the decision of the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra), the present appeals are placed before this larger Bench for considering the question formulated by the Division Bench of this Court at Mumbai.

19) Thus, the question to be considered by this larger Bench is restricted to the validity of the order passed by the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) and not the validity of the impugned order of CESTAT dated 28th February, 2011 declining to grant full waiver of pre-deposit. Accordingly, we restrict our decision to the question as to whether the Aurangabad Bench was justified in setting aside the impugned order dated 28th February, 2011 in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) without assigning any reasons and

whether the Aurangabad Bench was justified in directing the CESTAT to pass a fresh order by considering the decisions of the CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) and Muthunlal Gupta (supra) without recording a finding that the said decisions were applicable to the case of the appellants.

20) The preliminary objection raised by the counsel for the appellants is that in view of the dismissal of the S.L.P. filed by the revenue against the decision of the Aurangabad Bench, it must be held that the decision of the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) has attained finality and the validity of the said decision cannot be questioned after the dismissal of the S.L.P. There is no merit in the above contention, because, it is well established in law that dismissal of an S.L.P. in limine does not constitute a binding precedent. Recently, the Apex Court in the case of *Bhakra Beas Management Board V/s. Krishan Kumar Vij & Anr.* reported in (2010) 8 Supreme Court Cases 701 following its earlier decision in the case of *Kunhayamed V/s. State of Kerala* reported in (2000) 6 SCC 359 has held that mere dismissal of an S.L.P. in limine at the preliminary stage does not constitute a binding precedent and accordingly correctness of any order passed by the High Court against which an S.L.P. has been dismissed in limine could still be challenged subsequently. In the present case, the S.L.P. filed against the Aurangabad Bench has been

dismissed by the Apex Court by simply recording "Dismissed". Therefore, in the facts of the present case, the dismissal of the S.L.P. against the decision of the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) does not preclude the Co-ordinate Bench from questioning the correctness of the decision rendered by the Aurangabad Bench. Accordingly, the preliminary objection raised by the counsel for the appellants cannot be sustained.

21) The next argument advanced by the counsel for the appellants is that, since the Aurangabad Bench has merely remanded the matter without any direction to the CESTAT to decide the waiver of pre-deposit application in any particular manner, no fault can be found with the decision of the Aurangabad Bench. We see no merit in the above contention because, firstly, without finding fault with the impugned decision dated 28th February, 2011, the said decision could not be set aside and secondly, the Aurangabad Bench in fact has remanded the matter with direction to the CESTAT to pass a fresh order after considering the decisions of the CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) and Mithunlal Gupta (supra).

22) It is relevant to note that the decision in the case of Nasik Strips Pvt. Ltd. (supra) was delivered by a Division Bench of the CESTAT on 9th July, 2010 wherein full waiver of pre-deposit was granted. The

very same Bench of CESTAT in its subsequent decision dated 28th February, 2011 which is impugned in these appeals has held that at the hearing in the case of Nasik Strips Pvt. Ltd. (supra), the decision of the Apex Court in the case of *Bhagwati Ispat Pvt. Ltd. V/s. CCE, Bhopal* reported in 2007 (211) E.L.T. 21 (S.C.) was not brought to their notice. Thus, the Division Bench of the CESTAT in its impugned order dated 28th February, 2011 has held that the full waiver of pre-deposit granted in the case of Nasik Strips Pvt. Ltd. (supra) was contrary to the decision of the Apex Court in the case of *Bhagwati Ispat Pvt. Ltd. (supra)* and accordingly directed the appellant to deposit 50% of duty and 25% of penalty imposed by the adjudicating authority.

23) When the CESTAT by the impugned decision dated 28th February, 2011 has directed the appellants therein including SRJ Peety Steels Pvt. Ltd. to make pre-deposit on the basis of the decision of the Apex Court in the case of *Bhagwati Ispat Pvt. Ltd. (supra)*, the Aurangabad Bench could not have set aside the impugned decision of CESTAT dated 28th February, 2011 without recording a finding as to why the decision of the Apex Court in the case of *Bhagwati Ispat Pvt. Ltd. (supra)* was not applicable to the case of the appellants. Since no reasons are given for setting aside the impugned decision of CESTAT dated 28th February, 2011, it is difficult to ascertain the basis on which the Aurangabad Bench set aside the impugned decision of CESTAT

dated 28th February, 2011. When a decision of the lower authority is set aside, it is advisable on the part of the higher Court to set out the reasons for setting aside the order so that such errors are not committed again by the lower Courts in the future. Therefore, in the facts of the present case, the Aurangabad Bench was not justified in simplicitor setting aside the order of CESTAT dated 28/2/2011 especially when the impugned decision was based on a decision of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra).

24) Moreover, the Aurangabad Bench was not justified in directing the CESTAT to pass fresh order after considering the decision of CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) especially when the CESTAT in its impugned decision has categorically recorded a finding that the decision in the case of Nasik Strips Pvt. Ltd. was contrary to the decision of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra). Without going into the question as to whether the decision of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. was applicable to the case of the appellant or not, the Aurangabad Bench could not have set aside the impugned order dated 28th February, 2011 and directed the CESTAT to pass fresh order after considering the decision of CESTAT in the case of Nasik Strips Pvt. Ltd.(supra).

25) Similarly, the Aurangabad Bench was not justified in

directing the CESTAT to decide the issue of pre-deposit afresh by considering the subsequent decision of CESTAT in the case of Mithunlal Gupta (supra), because, firstly, the Aurangabad Bench has not recorded any finding to the effect that the case of Mithunlal Gupta (supra) was similar to the case of the appellants. Unless such finding was recorded, the question of considering the decision in the case of Mithunlal Gupta (supra) does not arise. Secondly, the CESTAT in the case of Mithunlal Gupta (see para 7) has declined to follow the impugned decision dated 28th February, 2011, not on the ground that the said decision was erroneous but on the ground that there were, apart from electric consumption, other facts on the basis of which pre-deposit order has been passed. When the CESTAT in the case of Mithunlal Gupta (supra) specifically records that the facts of the cases covered under the impugned order dated 28th February, 2011 are not comparable with the facts in the case of Mithunlal Gupta (supra), the Aurangabad Bench could not have directed the CESTAT to decide the matter afresh after considering the decision in the case of Mithunlal Gupta (supra). Thirdly, in the case of Mithunlal Gupta (supra), the CESTAT has not considered the ratio laid down by the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra) whereas the CESTAT by its impugned order dated 28th February, 2011 has directed to make pre-deposit on the basis of the decision of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra). Therefore, without considering the applicability of the decision

of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra) to the facts in the case covered under the impugned order dated 28th February, 2011, the Aurangabad bench could not have directed the CESTAT to pass fresh order after considering the decision of CESTAT in the case of Mithunlal Gupta (supra).

26) In any event, when there were divergent views of the CESTAT, the proper course for the Aurangabad Bench was to dispose of the appeal on merits instead of setting aside the impugned decision dated 28th February, 2011 without assigning any reasons and directing the CESTAT to pass a fresh order after considering the decisions in the case of Nasik Strips Pvt. Ltd. (supra) and Mithunlal Gupta (supra), especially when the CESTAT in its decision dated 28th February, 2011 has declined to follow its decision in the case of Nasik Strips Pvt. Ltd. (supra) in view of the decision of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra).

27) Since the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) has neither found fault with the impugned decision dated 28th February, 2011 nor has it endorsed the views expressed by the CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) and Mithunlal Gupta (supra), the CESTAT would be in a dilemma as to whether passing pre-deposit order on the basis of the decision of the

Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra) was erroneous or the High Court wants the CESTAT to follow its earlier decision in the case of Nasik Strips Pvt. Ltd. (supra) even if it is contrary to the decision of the Apex Court. Such a dilemma could have been avoided if the Aurangabad Bench had heard the appeal on merits instead of remanding the matter with a direction to pass fresh order after considering the decision in the case of Nasik Strips Pvt. Ltd. which according to the impugned decision of CESTAT was contrary to decision of the Apex Court in the case of Bhagwati Ispat Pvt. Ltd. (supra).

28) For all the aforesaid reasons, we answer the question referred to us by holding that the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra) was not justified in remanding the proceedings back to the CESTAT for reconsideration without expressing its view as to the validity of the impugned order dated 28th February, 2011 or the validity of the orders of the CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) and Mithunlal Gupta (supra). Accordingly, we hold that the decision of the Aurangabad Bench cannot be treated as precedent and the Division Bench of this Court would be within its power to dispose of the appeals on its own merits without being bound by the decision of the Aurangabad Bench in the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra).

29) We make it clear that we have not expressed any opinion as to the correctness of the impugned order dated 28th February, 2011 or the correctness of the decisions of the CESTAT in the case of Nasik Strips Pvt. Ltd. (supra) and Mithunlal Gupta (supra). It would be open for the Division Bench to decide the appeals on merits and in accordance with law. Contentions of both sides are kept open.

30) The reference is disposed of accordingly with no order as to costs.

CHIEF JUSTICE

(J.P. DEVADHAR, J.)

(SMT. R.S. DALVI, J.)