IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2883 OF 2018

United Projects. … Petitioner.
V/s.
The State of Maharashtra through
the Commissioner of State Tax and others. … Respondents

AND

A.S. WRIT PETITION NO. 13754 OF 2018

Larsen & Toubro Limited. … Petitioner.
V/s.
The State of Maharashtra and others. … Respondents.

Vikram Nankani, Senior Advocate with Sandeep Ghaterao and Sachine Shintre i/b. N.V.Tapre for the Petitioner in WP No.2883/2018.

Prakash Shah with Jas Sanghvi i/b. PDS Legal for the Petitioner in A.S.WP No.13754/2018.

Ashutosh Kumbhakoni, Advocate General with S.B.Lolge, "A" Panel counsel, V.A. Sonpal, Special Counsel, Akshay Shinde, "B" Panel counsel, Jyoti Chavan, AGP and Shruti Vyas, AGP for the Respondents.

CORAM : M.S. SANKLECHA AND
NITIN JAMDAR, JJ.

DATE : 14 October 2019.

P.C. :

The petitioners are aggrieved by the refusal of registration of their appeals filed under the Maharashtra Value Added Tax Act since they have not deposited the ten per cent of the disputed amount now mandated under the amended provision of Section 26 of the Act. They have challenged the validity of the amended provisions and the legislative competence of the State.

2. The MVAT Act was brought into force with effect from 1 April 2005. The Act was to consolidate and amend the laws regarding levy and collection of tax on sale and purchase of certain goods in the State of Maharashtra. The Act was amended from time to time. Section 2 of the Act deals with the definition of the terms under the Act. Section 2(8) defines Dealer and various categories enumerated which would fall under the definition of Dealer. Goods were defined under section 2(12) as meaning every kind of movable property not being the properties mentioned in the said sub-section such as newspaper, actionable claims, money, stock, share etc. The sale was defined under section 2(24) as the sale of goods within the State for cash or deferred payment excluding the categories listed. The Chapter-II of the Act deals with the incidence and levy of tax. The incidence of tax is provided in Section 3, and certain goods on which tax was not leviable were referred to under Section 5 of the Act. Chapter-III deals with Sales Tax Authorities and the Tribunal. The Sales Tax Authorities as enumerated under Section 10 include

Joint Commissioners, Deputy Commissioners, Assistant Commissioners, Sales Tax Officer. Section 11 of the MVAT Act provides for the establishment of the Tribunal and the procedure to be followed by the Tribunal. Chapter-IV deals with registration of the dealer, its procedure and the consequence of non-registration. Chapter-V deals with returns and assessment by the Sales Tax Officer and the audits. Section 23 deals with the assessment of the return to be filed by the dealer. An elaborate methodology is laid down in this section as to how the return is to be processed and the proceeding has to be initiated. Section 24 empowers the Commissioner to rectify mistakes. Section 25 deals with the power to review. Section 26, which is the subject of the present petitions, deals with appeals. This is in short the scheme of the MVAT Act.

3. The Constitution (One Hundred and First Amendment) Act, 2016 of 16 September 2016 introduced a national Goods and Services Tax (GST) from 1 July 2017. The GST subsumes several indirect taxes levied by Central and State Governments. A special provision of Article 246A regarding GST is inserted in the Constitution. This Article enables the Union and States to legislate in respect of the GST. A new Article, Article 269A deals with levy and collection of GST in the course of inter-state trade or commerce. The tax collected is to be apportioned between the Union and the States in the manner as provided by Parliament by law on the recommendations of the Goods and Services Tax Council. Changes

were carried out to the Lists in the Seventh Schedule to the Constitution, more particularly to entry 54 in the list II, which dealt with the right of the State government to levy a tax on goods. Earlier under the Entry No 54, the State Government could collect tax on sale or purchase of goods other than the newspaper. After the amendment, the entry relates only to the taxes on the sale of petroleum crude, high-speed petrol, natural gas and aviation turbine fuel and alcoholic liquor for human consumption.

4. Meanwhile, Section 26 of MVAT Act was amended by the State Legislature on 15 April 2017. Sub-section (6A), (6B) and (6C) of section 26 were added, which read as under:

> *"26. Appeals:-*
>
> *….. ….. ….. ….. ….. ….. ….. …..*
>
> *(6A) No appeal against an order, passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, shall be filed before the appellate authority in first appeal, unless it is accompanied by the proof of payment of an aggregate of the following amounts, as applicable,—*
>
> *(a) in case of an appeal against an order, in which claim against declaration or certificate, has been disallowed on the ground of non-production of such declaration or, as the case may be, certificate then, amount of tax, as provided in the proviso to sub-section (6),*
>
> *(b) in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) above and also tax liability on other grounds, then, an amount equal to 10 per cent of the amount of tax, disputed by the appellant so far as such tax liability*

pertains to tax, on grounds, other than those mentioned in clause (a),

(c) in case of an appeal against an order, other than an order, described in clauses (a) and (b) above, an amount equal to 10 per cent. of the amount of tax disputed by the appellant,

(d) in case of an appeal against a separate order imposing only penalty, deposit of an amount, as directed by the appellate authority, which shall not in any case, exceed 10 per cent. of the amount of penalty, disputed by appellant:

Provided that, the amount required to be deposited under clause (b) or, as the case may be, clause (c), shall not exceed rupees fifteen crores.

(6B) No appeal shall be filed, before the Tribunal, against an order, which is passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, unless it is accompanied by the proof of payment of an aggregate of following amounts, as applicable,—

(a) in case of an appeal against an order, in which claim against declaration or certificate has been disallowed on the grounds of non-production of such declarations or, as the case may be, certificates then, amount of tax, as provided in the proviso to sub-section (6),

(b) in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) above and also tax liability on other grounds, then, an amount equal to 10 per cent. of the balance amount of disputed tax, so far as such tax liability pertains to tax, on grounds, other than those mentioned in clause (a),

(c) in case of an appeal against an order, other than an order, described in clauses (a) and (b) above, an amount equal to 10 per cent. of the balance amount of disputed tax,

(d) in case of an appeal against any other order, an

amount, as directed by the Tribunal :

Provided that, the amount required to be deposited under clause (b) or, as the case may be, clause (c), shall not exceed rupees fifteen crores.

Explanation.— For the purposes of clause (b) or clause (c) of sub-section (6B), the expression, "balance amount of disputed tax" shall mean an amount of disputed tax, which remains outstanding, after considering the amount paid, as directed by the appellate authority in first appeal under clause (b) or, as the case may be, clause (c), respectively of sub-section (6A).

(6C) The appellate authority or, as the case may be, Tribunal shall stay the recovery of the remaining disputed dues, in the prescribed manner, on filing of an appeal under sub-section (6A) or, as the case may be, sub-section (6B)."

Thus a precondition for the deposit of the part amount was stipulated for filing an appeal.

5. The stipulation of deposit under the amended MVAT Act came up for consideration of the Division Bench of this court. The Maharashtra Sales Tax Tribunal, Nagpur had dismissed the appeal filed by one Anshul Impex Private Limited for not depositing ten percent of the disputed tax as required under the provision of section 26(6B)(b) of the MVAT Act. Anshul Impex Private Limited filed a Sales Tax Appeal No.2/2018 at the Nagpur Bench of this Court. The Division Bench considered whether the Tribunal had committed an error in dismissing the appeal as not maintainable for want of deposit of ten percent of the amount assessed, to give

retrospective effect to the amendment introduced on 15 April 2017 to Section 26 of the Maharashtra Value Added Tax Act, 2002. The Division Bench held that since the relevant year was 2010-11 and *lis* started in the year 2011, a right accrued to the appellant to be governed by the unamended provisions. The question of law was, answered, and the proceedings were remitted to the Maharashtra Sales Tax Tribunal, Nagpur[1](*Anshul Impex Pvt. Ltd. V. State of Maharashtra)*

6. The State of Maharashtra filed a Special Leave to Appeal No.6310/2010 challenging the judgment and order passed by the Division Bench in *Anshul Impex*. The Supreme Court by order dated 11 March 2019 summarily dismissed the SLP.

7. On 6 March 2019, the State of Maharashtra promulgated an Ordinance No. VI OF 2019, the Maharashtra Tax Laws (Amendment and Validation) Ordinance, 2019. Section 5 of the Ordinance reads thus:

> *5. Amendment of section 26 of Mah. IX of 2005.*
>
> *In section 26 of the Value Added Tax Act, after sub-section (6C), the following Explanation shall be inserted and shall be deemed to have been inserted with effect from the 15th April 2017, namely :—*
>
> *"Explanation.—For the removal of doubts, it is hereby clarified that, the provisions of sub-sections (6A), (6B) and (6C) shall be applicable for any appeal, against all*

1 STAX No.2/18 decided on 28 Sept.2018

> *such orders, referred to in those sub-sections, irrespective of the period to which the order, appealed against, relates or irrespective of the date on which the proceedings in respect of such order have commenced.".*

This provision sought to clarify that sub-sections 6A, 6B and 6C shall apply for any appeal will operate irrespective of the period to which the order is under challenge. The ordinance thereafter has resulted in an amending Act, titled the Maharashtra Tax Laws (Amendment and Validation) Act, 2019.

8. Various petition have been filed challenging the conditions imposed sub-sections 6A, 6B and 6C of Section 26 and the subsequent Explanation and the orders passed refusing to permit the filing of the appeals. By consent of the learned counsel appearing for the parties, we have taken up the present two petitions and have permitted the counsel for the petitioners in the other petitions to address us on the questions of law. The facts in the present petitions are that the Petitioners filed an appeal along with an application for a stay to the Appellate Authority. A communication was addressed by the Appellate Authority to the Petitioners referring to the amended section 26(6A) of the MVAT Act that unless payment, as specified under this section, is made, the appeal will not be entertained. Aggrieved, the Petitioners have approached this Court by way of the present petitions.

9. We have heard Mr. Vikram Nankani, Senior Advocate, Mr.

Prakash Shah learned Advocate for the Petitioners and Mr. Ashutosh Kumbhakoni, learned Advocate General for the State, The learned counsel also submitted a compilation of documents and written submissions.

10. Broadly three issues have emerged from the submissions : (a) Whether the State of Maharashtra, after the 101st constitutional amendment dated 16 September 2016, has legislative competence to amend the MVAT Act to enact the mandatory condition of pre-deposit of the disputed amount for filing appeal regarding the goods; (b) Whether the explanation to section 26 of the MVAT Act nullifies the decision of the Division Bench of this Court in the case *Anshul Impex* and takes away the right of the assessee to file an appeal without statutory deposit in respect of assessment orders passed before 15 April 2017, and (c) Whether the decision of the Division Bench of this Court in *Anshul Impex* requires reconsideration.

11. On the question of legislative competence, the Petitioners have contended that the source of power to legislate of the State of Maharashtra is from the articles of the Constitution of India. The entries in Schedule VII to the Constitution are the fields of legislation. After coming into force the 101st constitutional amendment, various articles of the Constitution have been amended. The Goods and Service Tax as defined under Article 366(12A) of the Constitution has been introduced and Article 246A of the

Constitution has been inserted. The changes are made in Entry 54 in List-II of Schedule-VII. This entry refers to tax to be levied by the State only in respect of five items. According to the Petitioners, the amendment to section 26 can only relate to these five items mentioned in Entry-54 of List-II and the power to legislate regarding other goods has ceased to exist. In short, it is contended that post-101st constitutional amendment, the MVAT Act can be continued in the form as it existed before 16 September 2016 and no amendment be carried out, and if the amendment is carried out, it will be related to only those items now mentioned in Entry-54 of List-II. According to the State, the entries in the Lists of Schedule-VII are fields of legislation and not the sources of the legislative power. These entries do not impose any restriction on the legislative power and only are enabling in nature. It is contended that the 101 constitutional amendment is simultaneous with the substitution of Entry-54 and the term 'goods' would include any kind of goods and even those goods not listed in the modified Entry-54. The MVAT Act has not been repealed and since the Act itself have been invoked for filing appeals, 2017 and 2019 amendments to the MVAT Act would cover the appeals. The State points out that at least on twenty four occasions, after coming into force of the 101 constitutional amendment, the MVAT Act has been amended to cover all goods and most of the amendments are beneficial to the assessees and huge benefits have been taken. In short, the legislative competence of the State Legislature to make the impugned amendments can be referred

to Article 246, 246A, and also to Article 323B of the Constitution which deals with tribunals.

12. On the Explanation, the petitioners contend there is no amendment to sub-sections 6A to 6C of Section 26, nor is sub-section of Section 26 deleted or amended, and the explanation is only a case of legislative overruling. It is contended that legislative overruling is permissible only for curing any defect pointed out in a judicial decision. If the decision is not based on any defect but on a legal interpretation, there cannot be any legislative overruling. It is contended that the decision in *Anshul Impex* was not based on any defect or construction of the language of the 2017 amending provision. Thus the 2019 amendment, i.e. explanation, is invalid because it encroaches upon the powers of the judiciary seeking to overrule a decision with no legal basis. There is nothing in sub-sections 6A to 6C, expressly or by implication, to apply to assessment years before 15 April 2017. The Explanation seeks to impose a new condition which did not exist, and is absent in sub-sections 6A to 6C to Section 26 of the MVAT Act. The Explanation violates Article 14 of the Constitution because it discriminates between two assessees in the same assessment year and the delay in passing the assessment orders by the authorities. The State responds that the Explanation is inserted with a specific deeming effect and takes away the basis of the decision in *Anshul Impex*. The 2019 amendment, clarifies the intention of the Legislature in inserting the said new provisions by

2017 amendment. The 2019 amendment removes the doubt created by the judgment delivered in *Anshul Impex*. Even if it is assumed that the 2017 Amendment created a doubt such confusion/doubt is now cleared by adding the Explanation by the 2019 amendment. The subsequent amendment of 2019 takes away the very basis of the judgment delivered in the case of *Anshul Impex*. The subsequent amendment clarifies the scope, applicability and effect of the first amendment of 2017 and takes the matter beyond any doubt or dispute.

13. On the third point, regarding law laid down in *Anshul Impex*, the learned Advocate General contends that the decision in *Anshul Impex* has not considered the entire position of law and has referred to only a part of the law regulating the right of appeal. Mr. Nankani and Mr. Shah submit that the law laid down in *Anshul Impex* is correct and being a decision of the co-ordinate bench we should follow the same.

14. For the reasons we have elaborated later in this decision, we are unable to agree with the view taken in *Anshul Impex* and are of the opinion that the issues need to be referred to the larger bench.

15. The decision on the above three issues above would have the following sequence. If we hold that the State of Maharashtra had no legislative competence to bring in the amendment to section 26 of the MVAT Act post 101st constitutional amendment for all goods

except five now present in entry 54, the Petitioners will succeed and no further issue needs to be determined. However, if we hold that the State of Maharashtra has the legislative competence, then the issue would arise, what is the effect of the Explanation. If it is held that the Explanation takes away the basis of the decision of the *Anshul Impex* retrospectively and clarifies that sub-sections 6A, 6B and 6C to section 26 will apply even for the assessment years before the amendment i.e. 15 April 2017, then the petitions will have to be dismissed. However, if it is held that the Explanation does not take away the basis of *Anshul Impex,* then the law laid down in *Anshul Impex* will have to be followed, and the Petitioners would be entitled to succeed. After hearing the parties for some time, a peculiar position has arisen because we are in *prima facie* agreement with the learned Advocate General on the issue of legislative competence and with the argument of the petitioner that the Explanation encroaches upon the powers of the judiciary as it seeks to overrule a decision with no legal basis. We are also in respectful disagreement with the view expressed in *Anshul Impex*. A question has arisen as to the position of the findings given on the above two issues if the matter is referred to the larger bench. The Counsel for the parties agree that even if findings are given regarding the two issues and the third issue is referred to the larger bench. These findings would remain only as *prima facie* findings with no jurisprudential status. The Counsel took time to examine whether a part controversy can be decided and partly, the issue can be referred to the larger bench. The learned

Counsel inform that they have not come across any rule or a decision where such a course of action can be adopted. The Petitioners contend the first two issues should also be referred to the larger bench for consideration. According to Petitioners, the issue regarding the effect of 101st amendment regarding legislative competence of the State have arisen for the first time in this form in the country and is of importance. The learned Advocate General fairly placed on record the decision in the case of Ambarish *Rangshashi Patnigere and Ors. v State of Maharashtra and Ors.*[2] in Writ Petition No. 1797 of 2011 wherein, the entire matter was referred to the larger bench for consideration.

16. We now explain why we cannot persuade ourselves with the view taken in *Anshul Impex.*

17. The Division Bench in *Anshul Impex* had framed two issues for consideration:

> *"(1) Whether the Tribunal has committed an error in dismissing the appeal as not maintainable for want of deposit of 10% of the amount assessed, so as to give retrospective effect to the amendment introduced on 15.04.2017 to Section 26 of the Maharashtra Value Added Tax Act, 2002?*
>
> *(2) Whether in the facts and circumstances of the case the respondent was competent to initiate action of coercive recovery under Section 33 of the Act even before expiry of*

2 2012(1) Mh.L.J. 900

the period prescribed to prefer an appeal ?"

The first question is of relevance. The decisions in *Hoosein Kasam Dada (India) Ltd. V. The State of Madhya Pradesh*[3]; *Garikapatti Veeraya V. N. Subbiah Choudhury*[4]; *UTI Mutual Fund V. Income Tax Officer*[5]*; Satya Nand Jha V. Union of India*[6] were cited before the Division Bench. The Division Bench considered Section 26 of the MVAT Act. Thereafter, the Division Bench analyzed the decisions cited. For convenience, the discussion in the case of *Anshul Impex* is reproduced below :-

> *"12) In view of facts involved in the appeal and submissions advanced as aforesaid, amended provisions of section 26(6-B) of the Act of 2002 when perused, read as under:*
>
> > *"No appeal shall be filed before the Tribunal against an order, which is passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation Act, 2017 (Mah. XXXI of 2017), unless it is accompanied by the proof of payment of an aggregate of following amounts, as applicable -*
> > *a) in case of an appeal against an order, in which claim against declaration of certificate has been disallowed on the grounds of non-production of such declarations or as the case may be, certificates then amount of tax, as provided in the proviso to sub-section (6).*
> > *b) in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) above and also tax liability on other grounds, then, an amount*

3 AIR 1953 SC 221
4 AIR 1957 SC 5
5 (2012) 345 ITR 71 (Bom.)
6 Petition for Spl.Leave(C) No.31297/16.

equal to 10 per cent of the balance amount of disputed tax, so far as such tax liability pertains to tax on grounds, other than those mentioned in clause (a),

c) in case of an appeal against an order, other than an order described in clauses (a) and (b) above, an amount equal to 10 per cent of the balance amount of disputed tax,

d) in case of an appeal against any other order, an amount as directed by the Tribunal.

Provided that the amount required to be deposited under clause (b) or, as the case may be, clause (c) shall not exceed rupees fifteen crores."

So far as present appeal is concerned, provisions of section 26 (6-B)(c) are found attracted, which refer to deposit of an amount equal to 10% of balance amount of disputed tax along with appeal presented before Tribunal. It is not disputed that the said amended provision came into effect from 15/4/2017. It is also not disputed that review order passed by respondent no.4 was challenged by initiating proceedings on 13/4/2017 itself and that the amended provision has no retrospective effect.

13) Facts in the case of Messers Hoosein Kasam Dada (India) Ltd., referred supra and relied by appellant, are identical as would reveal that during continuation of the assessment proceedings, there was an amendment to Section 21 of the C.P. and Berar Sales Tax Act, 1947. Being aggrieved by the order of assessment, the assessee on 10/5/1950 preferred an appeal to the Sales Tax Commissioner, Madhya Pradesh, under section 22(1), Central Provinces and Berar Sales Tax Act, 1947 (hereinafter referred to as "the Act"). The appeal not having been accompanied by any proof of the payment of the tax in respect of which the appeal had been preferred, the authorities, after giving the assessee several adjournments, declined to admit the appeal. The assessee moved the Board of Revenue,

Madhya Pradesh by a revision application against the order of the Sales Tax Commissioner contending that his appeal was not governed by the proviso to Section 22(1) of the Act as amended on 25/11/1949 by the Central Provinces and Berar Sales Tax (Second Amendment) Act (Act 57 of 1949), but was governed by the proviso to Section 22(1) of the Act as it stood when the assessment proceedings were started, i.e. before the said amendment. The Board of Revenue took the view that as the order of assessment was made after the amendment of the Section and the appeal was filed thereafter, such appeal must be governed by the provisions of law as it existed at the time the appeal was actually filed and that the law as it existed before the filing of the appeal could not apply to the case.

The assessee thereupon moved the High Court of Madhya Pradesh under Articles 226 and 227 of the Constitution of India praying, amongst other things, for a writ of mandamus or an appropriate order directing the Sales Tax Commissioner to admit and hear the appeal without demanding payment of the amount of Sales Tax assessed by the Assistant Commissioner of Sales Tax. The High Court dismissed the application on 2/8/1951. The assessee applied to the High Court for leave to appeal to this Court, which was also dismissed by the High Court on 14/3/1952. The assessee thereupon applied to Supreme Court for special leave to appeal on 12/5/1952. The Supreme Court granted special leave to appeal, but such leave was limited to the question of the effect of the amendment to Section 22 of the Act on the petitioner's appeal to the Sales Tax Commissioner, Madhya Pradesh and took the view that the other questions sought to be raised by the assessee would have to be decided by the Sales Tax Commissioner in case the appeal succeeded, as the Hon'ble Supreme Court in that appeal was concerned only with the limited question of effect of the amendment to Section 22 of the Act.

Section 22(1) of the Act was originally expressed in the 12 stxa2.18 following terms :

> *"22(1) Any dealer aggrieved by an order under this Act may, in the prescribed manner, appeal to the prescribed authority against the order :*
> *Provided that no appeal against an order of assessment, with or without penalty, shall be entertained by the said authority unless it is satisfied that such amount of tax or penalty or both as the appellant may admit to be due from him, has been paid."*

The relevant portion of Section as amendment runs as follows :

> *"Section 22(1) - Any dealer aggrieved by an order under this Act may, in the prescribed manner, appeal to the prescribed authority against the order :*
>
> *Provided that no appeal against an order of assessment, with or without penalty shall be admitted by the said authority unless such appeal is accompanied by a satisfactory proof of the payment of the tax, with penalty, if any, in respect of which the appeal has been preferred."*

It is clear from the language used in the proviso to Section 22(1) as it stood prior to the amendment that an aggrieved assessee had only to pay such amount of tax as he might admit to be due from him, whereas under the proviso to Section 22(1) as amended the appeal has to be accompanied by satisfactory proof of payment of the tax in respect of which the appeal had been preferred. The contentions of the assessee was that as the amendment has not been made retrospective, its right of appeal under the original Section 22(1) remains unaffected and that accordingly as it does not admit anything to be due it was not liable to deposit any sum along with its appeal and the Commissioner was bound to admit its appeal and had no jurisdiction or power to reject it on the ground that it had not been accompanied

by any proof of payment of the tax assessed against the appellant as required under the amended proviso and the Board of Revenue and the High Court were in error in not directing the Commissioner to admit the appeal.

14) In the background of above facts, Hon'ble Apex Court, after considering various judgments, took a view that pre-existing right of appeal is not destroyed by the amendment, if the amendment is not made retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turns, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right. As the old law continues to exist for the purpose of supporting the pre-existing right of appeal, that old law must govern the exercise and enforcement of that right of appeal and there can then be no question of the amended provision preventing the exercise of that right. It is further observed that the finding of the appellate Authority that it has no option or jurisdiction to admit the appeal unless it be accompanied by the deposit of the assessed tax as required by the amended proviso to Section 22(1) of the Act overlooks the fact of existence of the old law for the purpose of supporting the pre-existing right and really amounts to begging the question. The new proviso is wholly inapplicable in such a situation and the jurisdiction of the Authority has to be exercised under the old law, which so continues to exist. The Hon'ble Apex Court also observed that -

> *"whenever there is a proposition by one party and an opposition to that proposition by another, a `lis' arises. It may be conceded, though not deciding it, that when the assessee files his return a `lis' may not immediately arise, for under Section 11(1), the Authority may accept the return as correct and complete. But if the authority is not satisfied as to the correctness of the return and calls for evidence, surely a controversy*

arises involving a proposition by the assessee and an opposition by the State. The circumstance that the authority who raises the dispute is himself the judge can make no difference, for the authority raises the dispute in the interest of the State and in so acting only represents the State. It will appear from the dates given above that in this case the `lis' in the sense explained above arose before the date of amendment of the Section. Further, even if the `lis' is to be taken as arising only on the date of assessment, there was a possibility of such a `lis' arising as soon as proceedings started with the filing of the return or at any rate, when the authority called for evidence and started the hearing and the right of appeal must be taken to have been in existence even at those dates. For the purposes of the accrual of the right of appeal, the critical and relevant date is the date of initiation of the proceedings and not the decision itself."

The Hon'ble Apex Court in the above-said set of circumstances thus observed that for the purpose of accrual of right of appeal, the relevant date is of initiation of proceedings and not the decision.

15) In the appeal in hand, admittedly review proceedings in respect of assessment order passed on 30/10/2014 for the financial year 2010-11 were initiated on 13/4/2017, which came to be decided on 27/7/2017 while the amended provisions of Section 26(6B) of the Act of 2002 came into force with effect from 15/4/2017. In that view of the matter and on relying on the law laid down as above, we find that relevant date to hold applicability of amended provisions or otherwise shall be the date on which proceedings were initiated and not the date of decision.

16) In the case of Garikapatti Veeraya vs. N. Subbiah Choudhury (1957 AIR SC 540), once again issue of right of appeal came to be considered by the Hon'ble Apex

Court wherein apart from the case of Messrs Hoosein Kasam Dada (India) Ltd., cited supra, various other judgments are considered and following principles are laid down:

> *(i) The legal pursuit of a remedy, suit, appeal and second appeal are really, but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*
> *(ii) The right of appeal is not a mere matter of procedure, but is a substantive right.*
> *(iii) The institution of the suit carries with it the implication that all rights of appeal, then in force are preserved, to the parties thereto till the rest of the career of the suit.*
> *(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of the appeal.*
> *(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."*

In view of above stated legal pronouncements and as appellant has admittedly filed his return sometime in the year 2011, he is having right of appeal, which does not speak of pre-deposit of 10% of the disputed tax.

17) Similar issue is once again considered by the Apex Court in the case of National Traders and others vs. State of Karnataka (Civil Appeal No. 4579/2007) wherein on considering effect of amendment on right to appeal, it is held in para 2 of its judgment that the amendment made

by the State of Karnataka shall be prospective in nature from the date of its coming into force.

18) As against this, having considered submissions made for respondents and the law laid down in the case of Satya Nand Jha (supra) decided along with bunch of petitions, facts therein are distinguishable as against the facts involved in the appeal in hand, as challenge in that case was to Section 35F of the Central Excise Act, 1944, which is reproduced 17 stxa2.18 below for the purpose of convenience as it stood prior to amendment, i.e. prior to 6/8/2014 :

> *"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 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 under Section 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."

After amendment, Section 35F, which came into effect is as under :

"35F Deposit of certain percentage of duty demanded or penalty imposed before filing appeal :The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal:

(i) under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an Officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 35B, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of Section 35B, unless the appellant has deposited ten per cent of the duty in case where duty or duty and penalty are in dispute or

penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this Section shall not exceed rupees ten crores.

Provided further that the provisions of this Section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

Explanation - For the purposes of this Section "duty demanded" shall include :

(i) amount determined under Section 11D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules, 2001 or the Central Credit Rules, 2002 or the Cenvat Credit Rules, 2004."

Thus, it is found that before Section 35F of the Central Excise Act, 1944 was amended, power was vested with the Authority to dispense with or waive the deposit subject to conditions as may be deemed fit to impose so as to safeguard the interest of revenue. However, after amendment to Section 35F, no Authority or Tribunal has a power to waive or dispense with such deposit. As such, we find this to be material difference in the cases relied by appellant than the law relied by the respondents.

19) The amended provisions of Section 26(6B) of the Act of 2002, which require consideration in the present appeal, are already reproduced above. Section 27 of the Act of 2002 refers to appeals. Sub-section 1(c) thereof contemplates that appeal from every order, not being an order mentioned in sub-section (2) of this Section and sub-section (2) of Section 85 passed under this Act or rules or notifications, shall lie, if the order is made by a Joint Commissioner or Additional Commissioner, Advance Ruling Au-

thority or the Commissioner, to the Tribunal. As such, under Section 26(6) the appellate Authority or the Tribunal, as the case may be, may, while admitting the appeal, pending the disposal of the appeal, stay the order appealed against in full or part, subject to such conditions or restrictions as it may deem necessary including a direction for depositing of a part or whole of the disputed amount by the appellant. Thus, for filing appeal, there was no requirement to deposit any amount under sub-section (6) of Section 26 as it then stood and for grant of stay to disputed amount, orders were required to be passed by the Tribunal, while according to amended provisions of Section 26(6B), no appeal shall be filed before the Tribunal against an order, which is passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation Act, 2017, unless it is accompanied by the proof of payment of an aggregate of following amounts as applicable -

(a) .....
(b) ....
(c) in case of an appeal against an order, other than an order, described in clauses (a) and (b) above, an amount equal to 10 per cent of the balance amount of disputed tax.
(d) .....

As such, we find that before amendment, there was no requirement to deposit any amount at the time of filing appeal, but it is only if stay was to be granted, some amount was to be deposited as per orders of the appellate Authority or as the case may be. Thus, to answer the first question formulated as aforesaid, we are required to consider if the amended provisions of Section 26(6B) of the Act of 2002 directing deposit of 10% of the disputed tax as a pre-condition for filing of appeal before Tribunal are applicable to appellant.

20) Perused of impugned judgment reveals that the order which was challenged before the Tribunal is dated 27/7/2017, i.e. after amended provision came

into effect on 15/4/2017, thus the Tribunal held that appellant was statutorily bound to deposit an amount equal to 10 per cent of the balance amount of disputed tax as a pre-condition for admission of appeal. However, the Tribunal has failed to consider the fact of initiation of review proceedings on 13/4/2017 as stated above when admittedly amended provisions were not in force. Having considered the facts and for the reasons aforesaid, it is clear that amended Section 26(6B) of the Act of 2002 requiring appellant to deposit 10% of the disputed tax is not applicable to appellant since lis started in the year 2011 while effect of amendment is prospective with effect from 15/4/2017. Accordingly, question no.1 framed as aforesaid is replied holding that the Tribunal has committed an error in dismissing the appeal as not maintainable for non payment of amount aforesaid, i.e. 10% of the amount assessed."

18. As the above-reproduced discussion shows that the foundation in *Anshul Impex* is that the date of initiation of proceedings is relevant for an appeal. The Division Bench referred to the position of law that the right to file an appeal accrues on the initiation of the proceedings. Following this legal position, the Division Bench held that for the assessment orders were passed before the amendment to section 26 on 15 April 2017, the condition of pre-deposit was not applicable. The Petitioners have supported this view taken in the case of *Anshul Impex*. As regards the dismissal of Special Leave Petition challenging the decision in *Anshul Impex* by the Supreme Court, the Counsel for the parties rightly agree that it being a summary dismissal at the threshold, it cannot operate as a merger.

19. The right of appeal and the power of the legislature to impose a condition of deposit of an amount has arisen for consideration in various decisions. Some of these, relied upon by the parties are: Supreme Court in *Nimbus Communications Ltd v. Commissioner of Sales Tax* 2016[7]; Division Bench of Allahabad High Court in the case of *Ganesh Yadav v. Union of India*[8] Division Bench of this Court in *Anant Mills Co. Ltd. v. State of Gujarat and Others*[9], Constitution Bench in *Seth Nand Lal and Another vs. State of Haryana and Others*[10], Supreme court in *Videocon International Limited v. Securities and Exchange Board of India*[11]. The law laid down in the above decisions is as follows. The right of appeal is a creature of the statute. Without a statutory provision creating such a right, the person aggrieved is not entitled to file an appeal. An appellate remedy is available in different packages. The right of appeal is a vested right, and the right of appeal accrues to a litigant as on and from the date on which the *lis* commences. Such a right is governed by the law which prevails on the date of institution of the suit or proceeding and not by the law that prevails at the date of the decision or on the date of filing an appeal. The legislature, while granting the right of appeal can impose conditions for exercising such right. A statutory provision imposing a condition of deposit regulates the right of appeal in the matters of Tax legislations. The

7 SCC OnLine Bom 6792

8 1 (All 2015 (320) ELT 71)
9 4(1975)2 SCC175
10 1980 (Supp) SCC 574
11 (2015) 4 SCC 33

object is to balance the right of appeal with a need for the speedy recovery of the tax. Such provisions, while conferring a right of appeal, seek to prevent the delay in the realization of tax. These conditions therefore, merely regulate the right of appeal. Such conditions, however, have to be imposed by express words or by necessary implications. A vested right of an appeal can be taken away by the legislature by express or by necessary intendment and not otherwise. The conditions imposed however, cannot be so oppressive that in effect, it takes away the right of appeal. In the case of *Garikapatti Veeraya*, which *Anshul Impex* refers to, the Supreme Court, after taking a review, has laid down these principles:

> *(i) The legal pursuit of a remedy, suit, appeal and second appeal are really, but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*
>
> *(ii) The right of appeal is not a mere matter of procedure, but is a substantive right.*
>
> *(iii) The institution of the suit carries with it the implication that all rights of appeal, then in force are preserved, to the parties thereto till the rest of the career of the suit.*
>
> *(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of institution of the suit or proceeding and not by the law that prevails at the date of its decision or*

at the date of filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

Thus the right of appeal is a no doubt a vested right, but such right can be taken away for express or necessary intendment.

20. In this context, the scheme of the sub-sections 6A, 6B and 6C of Section 26 will have to be seen in totality. Sub-section 6A states that: No appeal against an order, passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, shall be filed before the appellate authority in first appeal, unless it is accompanied by the proof of payment of an aggregate of the following amounts, as applicable. The words used in section 26(6A), in particular to the words “on or after the commencement of the Maharashtra Tax Laws" are important. The words “on or after” "shall be filed" "unless it is accompanied" can be treated as the express intention of the legislature to make the right of appeal conditional. The learned Advocate General has also argued that the condition imposed is not oppressive as upon deposit of ten percent of the amount a stay is automatically granted for the remaining ninety percent of the amount. According to the learned Advocate General, a balance is achieved by the compulsory deposit of ten per cent and automatic

stay of ninety per cent of the amount disputed between the right of appeal and the interest of the State to raise revenue. Therefore though a vested right of appeal has accrued, the right is expressly made conditional and is not so oppressive that it takes nullifies the right of appeal.

21. The Learned counsel for the Petitioners could not dispute the contention of the learned Advocate General that the implications of the words used in Section 26(6A) amounting express intention of the legislature to make the right of appeal conditional, have not been considered by the Division Bench in *Anshul Impex.* The decision in *Anshul Impex* proceed on the ground that the appeal is governed by the legal position on the date of order of assessment. *Anshul Impex,* though it has noticed the decisions of the Supreme Court in *Hoosein Kasam Dada (India) Ltd.* and *Garikapatti Veeraya,* which refers to the right of the legislature to curtail the right of appeal or make it conditional, does not comment on the same.

22. This leaves us with two options. One is to distinguish the decision in the case of *Anshul Impex* on the ground that it is *per incuriam* and decide the challenge. The second option is to refer the issue to a larger bench. The learned Advocate General fairly submitted that he is not raising the contention that the decision is *per incuriam*, but he contends that the matter be referred to the larger bench. The Division Bench in *Anshul Impex* has analyzed the

decisions in the case of *Hoosein Kasam Dada (India) Ltd.* and *Garikapatti Veeraya* and also considered the very same amended provisions. Since the Division Bench has considered the very same controversy and the decisions of the Supreme Court on the subject, as a matter of propriety, we would prefer to take the second option of referring the issue for consideration of the larger bench. We are cognizant that the first option available to us, but, as a matter of judicial propriety, we do not take the same. Also, as noted earlier, we find it prudent and necessary that all the three issues need to be referred to the larger bench. Rules framed on the Appellate Side and Original Side of this Court also envisage such a course of action. Rule 8 of the High Court (Appellate Side) Rules and Rule 28 of the High Court (Original Side) Rules enable placing of the matter before the learned Chief Justice to refer it to the larger bench, on both counts, that the issue is of wider importance and also if one Division Bench does not agree with the view taken by another Division Bench.

22. As a result, we direct the Registry to place papers and proceedings of the present two writ petitions before the learned Chief Justice to obtain suitable directions to place the following questions of law for the opinion of the Larger Bench of this Court:

(a) Whether the State of Maharashtra has legislative competence to enact the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017 and the Maharashtra Tax Laws (Amendment and

Validation) Act, 2019 to amend the provisions of the Maharashtra Value Added Tax Act, 2002 to incorporate mandatory pre-deposit for filing appeals against the assessment orders pertaining to all the goods after 16 September 2016 that is post 101 Constitutional Amendment Act, 2016?

(b) Whether Explanation to section 26 of the MVAT Act introduced with effect from 15 April 2017 by the Maharashtra Tax Laws (Amendment and Validation) Act, 2019 takes away the right of the assessee to file an appeal without statutory deposit in respect of orders passed for the assessment years prior to 15 April 2017 and whether the Explanation nullifies the decision of the Division Bench of this Court (Nagpur Bench) in the case of Anshul Impex Pvt. Ltd. v. State of Maharashtra in Sales Tax Appeal No.2/2018?

(c) Whether the decision of the Division Bench in the case of Anshul Impex Pvt. Ltd. v. State of Maharashtra laying down that right of filing appeal accrues on the date of order of assessment and requirement of mandatory pre-deposit introduced by way of amendment does not apply to the orders passed in the assessment years prior to 15 April 2017, is a correct proposition since the right of appeal can be made conditional by the Legislature with express indication and, therefore, the decision in the case of Anshul Impex Pvt. Ltd. v. State of Maharashtra requires reconsideration by the Larger Bench?

23. The operative portion of the order has been released earlier.

24. Place the petitions on board after 12 weeks under the caption for directions.

NITIN JAMDAR, J. M.S. SANKLECHA,J.