(2013) 04 BOM CK 0135

In the Bombay High Court

Case No : Writ Petition No. 2169 of 2013

Amber Aniruddha Mufti APPELLANT

Vs

Commissioner of Customs (Appeals) RESPONDENT

Date of Decision : 04-04-2013

Acts Referred:

Citation : (2013) 295 ELT 509 : (2013) 23 GSTR 341

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : V.B. Singh with Satish S. Sharma, for the Appellant; Pradeep S. Jetly, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Rule; with the consent of Counsel for the parties returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal. The petition is directed against an order of the Commissioner of Customs (Appeals) calling upon the petitioner to effect deposit of Rs. 7.50 lakhs; this order having been passed on an application for waiver of pre-deposit u/s 129E of the Customs Act, 1962.

2. In pursuance of a notice to show cause dated 20 September, 2010, an order of adjudication has been passed against the petitioner on 30 March, 2012 imposing a penalty of Rs. 15 lakhs u/s 114 of the Customs Act, 1962. The allegation against the petitioner is that he was involved in a fraudulent export of fabric and ready made garments of inferior quality by grossly inflating the value of the export goods so as to avail of duty drawback or, as the case may be, DEPB benefits. Upon the passing of the order of adjudication, the petitioner has filed an appeal before the Commissioner (Appeals) and sought a waiver of the pre-deposit of the penalty imposed. By a notice dated 27 August, 2012, the petitioner was granted an opportunity of a personal hearing on the application for stay on 10 September, 2012. By a communication dated 7 September, 2012, a copy of which has been placed on record during the course of hearing, the

Advocate for the petitioner had sought a postponement of the personal hearing on the ground that he was preoccupied in a part heard petition before this Court on the date of hearing that was fixed. The Commissioner (Appeals) relied on a circular of the C.B.E. & C. dated 30 March, 1999 which states that the grant of a personal hearing on a petition for stay would be more of an exception than the rule and that while there would be no irregularity if a stay petition is disposed of without a personal hearing, nonetheless a reasoned order should be passed in an objective manner. After adverting to the provisions of Section 129E, the Commissioner of Customs (Appeals) has indicated only the following reasons in support of the direction for the deposit of an amount of Rs. 7.50 lakhs;

I find that the instance case is prima facie case made out in favor of the revenue. Therefore, considering the balance of convenience, I order for pre-deposit of a part of the penalty amount as under before proceeding to decide the case finally.

3. The Supreme Court, in a decision in Union of India and another Vs. M/s. Jesus Sales Corporation, , construed the provisions of Section 4M of the Import & Export (Control) Act, 1947. The Supreme Court held that under the second proviso to Section 4M, no appeal could be entertained unless the amount of penalty has been deposited. Hence, the power which was conferred by the third proviso to grant a dispensation of pre-deposit on grounds of undue hardship being a discretionary power was held as being by way of an exception. The Supreme Court held that an order passed after taking into consideration the points raised in the appeal or in the application shall not be held to be invalid merely on the ground that no personal hearing was afforded. The decision took note of the fact that while Section 4M(2) requires the Appellate Authority to furnish a reasonable opportunity of being heard if the appellant so desires, such a requirement could not be read impliedly in the third proviso of sub-section (1) which deals with the disposal of stay applications. At the same time, the Supreme Court emphasized that the discretion ought to be exercised objectively after taking into consideration all the relevant facts and circumstances while considering whether the deposit of penalty should be dispensed with and if so, unconditionally or subject to condition:

But it need not be impressed that when the Appellate authority has been vested with the discretion to dispense with such deposit unconditionally or on conditions, then it has to apply its mind on that question like a quasi-judicial authority taking into consideration all the facts and circumstances of the case including the undue hardship which has been pointed out on behalf of the appellant. In that proviso the two expressions ''opinion'' and ''discretion'' both have been used. In view of the settled position that whenever a statutory authority has to form an opinion on a question, it does not mean that it has to be formed in a subjective or casual manner. That opinion must be formed objectively on relevant considerations. Same is the position in respect of the exercise of discretion. The framers of the Act require such Appellate authority to exercise its discretion in a reasonable and rational manner taking into consideration the relevant facts and circumstances of a particular appeal while considering the question as to whether the deposit of the amount of the penalty be dispensed with unconditionally or subject to the conditions.

4. This decision of the Supreme Court has subsequently been followed, though in different contexts inter alia of service jurisprudence in (i) Ganesh Santa Ram Sirur Vs. State Bank of India and Another, , (ii) Oriental Bank of Commerce and Another Vs. R.K. Uppal, . The decision of the Supreme Court in Patel Engineering Limited Vs. Union of India (UOI) and Another, followed the earlier decision in Jesus Sales Corporation (supra) in the context of an order of blacklisting. The judgment in Jesus Sales Corporation (supra) binds this Court. Hence an order on an application for waiver of pre-deposit cannot be regarded to be invalid merely on the ground that a personal hearing was not afforded. But an order is susceptible to challenge if the grounds on which undue hardship has been pleaded have not been objectively considered. The quality of objectivity must be disclosed in the reasons for the order. The order must objectively deal with whether a strong prima facie case has been made out as well as the question of financial hardship. Section 128A of the Customs Act, 1962 provides for the procedure in appeal and stipulates that the Commissioner (Appeals) shall give an opportunity to the appellant to be heard, if he so desires. This is at the stage of the hearing of the appeal. Before that stage arrives, Section 129E stipulates a requirement of deposit of the duty and interest or penalty levied under the Act pending an appeal. The proviso confers upon the Commissioner of Appeals, or as the case may be, upon the Tribunal to grant a waiver of the deposit of duty and interest or penalty on grounds of undue hardship subject to such conditions, as may be imposed to safeguard the interests of the revenue.

5. The impugned decision of the Commissioner of Customs (Appeals) has relied upon a circular of the C.B.E. & C. dated 30 March, 1999. That circular, it would appear, was quashed by a learned Single Judge of the Madras High Court in ITC Limited Vs. Commissioner of Central Excise (A), . Subsequently on 6 April, 2000, another circular was issued by the C.B.E. & C. emphasizing that the Commissioner of Appeals while passing an interim order ought not to pass non-speaking orders so as to obviate an allegation or complaint of a lack of application of mind by the authorities or a bias towards the revenue. The circular reiterates the requirement of a speaking order. A Full Bench of the Delhi High Court in M/s J.T. (India) Exports and another Vs. Union of India and another, , after considering the judgment of the Supreme Court in Jesus Sales Corporation (supra) held that even if a statute is silent in regard to a hearing being given to a party whose rights and interests are likely to be affected, the requirement to follow a fair procedure before taking a decision must be read into the statute, unless the statute provides otherwise.

6. In the present case, the record before the Court would indicate that the Commissioner of Customs (Appeals) had by his notice dated 27 August, 2012 called upon the petitioner to remain present for the hearing of the application for

stay. The Commissioner had hence thought it fit to hear the Petitioner on the application for stay. There was no prohibition upon the Commissioner furnishing an opportunity of a personal hearing. An adjournment was sought before the Commissioner by a letter dated 7 September, 2012. The Commissioner has proceeded to dispose of the stay application simply with a bald observation that a prima facie case has been made out in favour of the revenue and, that considering the balance of convenience a pre-deposit of a part of the penalty was required to be made. The judgment of the Supreme Court in Jesus Sales Corporation (supra), while holding that an order on an application for waiver of pre-deposit would not be invalid merely on the ground that no personal hearing had been afforded, nonetheless, holds that it is incumbent upon a quasi-judicial authority which is vested with the discretion to grant a waiver of deposit to take an objective decision after considering all relevant facts and circumstances having a bearing on the issue of undue hardship. In the present case, the order of the Commissioner (Appeals) does not reflect any application of mind whatsoever to the twin requirements of whether a prima facie case had been made out by the appellant as well as on the issue of financial hardship. The consequence of non-compliance with an order of pre-deposit is serious. The appeal would be liable to be dismissed for failure of deposit. Hence, it is incumbent upon the authority which adjudicates upon an application for waiver of pre-deposit to objectively consider whether the grounds on which a waiver is sought constitute undue hardship to the assessee. The authority is entitled to impose conditions to secure the interests of the revenue.

7. In the circumstances, we are of the view that the petition ought to be allowed by setting aside the impugned order of the Commissioner of Customs (Appeals) dated 12 February, 2013 and by remitting the proceedings back to the authority for a fresh decision on the application for waiver of pre-deposit. In order to facilitate this exercise, we quash and set aside the impugned order dated 12 March, 2013 and restore the proceedings for a fresh decision in accordance with law, from the stage of the notice dated 27 August, 2012. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.