

(1965) 09 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No's. 219 and 223 of 1964

A.S. Bava

APPELLANT

Vs

Collector of Customs and Others

RESPONDENT

Date of Decision : 28-09-1965

Acts Referred:

Central Excises and Salt Act, 1944 — Section 12, 35
Customs Act, 1962 — Section 129
Sea Customs Act, 1878 — Section 189

Citation : AIR 1966 Ker 195

Hon'ble Judges : M.S. Menon, C.J;V.P. Gopalan Nambiyar, J

Bench : Division Bench

Advocate : S. Narayanan Potti, N.K. Varkey and N. Dharmadan, for the Appellant; M.U. Issac, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambiyar, J.—The petitioner in these writ petitions is a Firm of dealers in Tobacco. By orders of adjudication dated 31-3-1903, the Assistant Collector of Customs. (2nd respondent) demanded the payment of duly from the petitioner under Rule 40 of the Central Excises and Salt Rules, 1944. A copy of the said order of adjudication has been filed in these O Ps as Ext P-1. The petitioner preferred appeals against these orders to the 1st respondent (The Collector of Customs). The 1st respondent sent a communication to the petitioner dated 9-3-1964, a copy of which has been produced as Ex. P-3 in these O. Ps. and which, for the sake of convenience is set forth below.

"GOVERNMENT OF INDIA MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)
OFFICE OF THE COLECTOR OF CUSTOMS AND CENTRAL EXCISE (CENTRAL EXCISE WING)

Calvetti Road. Post Box No. 13, Cochin-1 A No 63/53.

C No Va/2/34/63 Cr. Appeal dated 9th Jan 1964

To

Shri A. S. Bava, Tobacco Merchant, Mallan

cherry, Cochin-2 (By R P A D.)

Sir,

Sub: --Central Excise Tobacco Offence -- Illicit removal of -- Shri A S. Bava, Tobacco, Merchant Cochin Appeal hearing of -- Regarding

Ref: -- Your appeal dated 4-7-1963 and re-presentation dated 3-10-1963

The submissions in your petitions dated 8-10-1963, have been carefully considered by me and I find no reason to consider your appeal dated 4-7-1963 on merits, before the amount of duty demanded in the order C No. Va/13/6/62 (Issue No. 11/63) dated 31-3-1963 of the Asst. Collector of Central Excise, Trivandrum Division is deposited You are therefore requested to deposit the duty within 15 days from the date of the receipt of this letter, failing which the appeal will be rejected for non compliance of section 129 of the Customs Act 1962.

Yours faithfully

Sd/ (M. Ramchandran)

Copy to Shri. T. V. Kalyanasundaram Aiyer Advocate, Cochin-2 (by R P A. D)" The petitioner thereupon filed these O. Ps and prayed for

"(A) Issue of a writ of certiorari or other appropriate writ or order quashing the Ext P-3 order.

(B) Issue of a writ of mandamus or other appropriate writ of order enjoining the 1st respondent to hear and decide the petitioner's appeal Ex. P-2 without insisting on the payment of the duty as a condition to considering the appeal on its merits;

(C) And in case the 1st respondent was to reject the appeal for non-compliance with Section 129 of the Customs Act pending this original petition, then, to issue a writ of man-damus asking him to take back the appeal Ext. P-2 and decide it on its merits and

(D) Issue such other writs or orders as the nature of the case indicate as just and equitable."

2. Before the admission of these writ petitions, the appeals were dismissed for non compliance, by orders evidenced by Ext. P-4 dated 4th February 1964. The petitioner thereupon filed C. M. P. No. 1072 of 1965 in O. P. No. 219 of 1964 and C. M. P. No. 1071 of 1965 in O. P. No. 223 of 1964 to amend these O. Ps. by including an additional prayer as follows:

"(E) Issue a writ of certiorari or other appropriate order quashing Ext. P-4 order dated 4-2-1964 by the 1st respondent dis-missing the petitioner's appeal Ex.

P-2 for non compliance of the provisions of Section 129 of the Customs Act 1962 and direct him by a writ of mandamus to restore the said appeal and hear and decide it on its merits."

3. The question raised in these petitions is regarding the validity of the demand made by the communication evidenced by Ex P-5, and the dismissal of the appeals for non compliance with the same as evidenced by Ex P-4. The legal sanction for the demand evidenced by P-3, and for the subsequent dismissal of the appeals is traced to Section 129 of the Customs Act of 1962, made applicable to Central Excise adjudications u/s 12 of the Central Excises and Salt Act, 1944 by Government of India Notification No. 68 of 1963 dated 4-5-1963.

4. Section 12 of the Central Excises and Salt Act reads:

"12 Application of the provisions of Act VIII of 1878 to Central Excise duties -- The Central Government may, by notification in the official Gazette, declare that any of the provisions of the Sea Customs Act, 1878 relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation and procedure relating to offences, and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adopt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by Section 3."

5. In pursuance of the above provision notification No. 59/59 dated 18-7-1959, was issued by the Government of India, which, it is unnecessary to set out, as the same was superseded by notification No 08/59 to be referred to, later. The Sea Customs Act, 1878, was repealed by Customs Act 1962, and there is no controversy before us that in view of the said repeal reference to the repealed Act, in Section 12 of the Central Excises and Salt Act, should be understood as reference to the Customs Act of 1969.

6. The Customs Act of 1962 came into force on 1-2-1968, and the show cause notices, which preceded the orders of adjudication in these proceedings, were both issued prior to the commencement of the said Act. (On 16-7-1962 in O. P. No. 219 of 1964 and on 11-7-1962 in O. P. No. 228 of 1964).

7. Section 35 of the Central Excises and Salt Act, which provides for appeals reads:

"Appeals. (1) Any person deeming him self aggrieved by any decision or order passed by Central Excise Officer under this Act or the rules made thereunder may, within three months from the date of such decision or order, appeal therefrom to the Central Board of Revenue, or, in such cases as the Central Government directs, to any Central Excise Officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming altering or annulling the decision or order appeals against.

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation or penalty than has been adjudged against him in the original decision or order.

(2) Every order passed in appeal under this Section shall, subject to the power of revision conferred by Section 36, be final."

Section 189 of the Sea Customs Act, 1878 reads:

"Deposit, pending appeal, of duty demanded where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs Collector at the port where the dispute arises the amount demanded by the officer passing such decision or order.

When delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs Collector shall, upon such deposit being made cause such goods to be delivered to such owner.

If upon any such appeals it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs-Collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner. And Section 129 of the Customs Act, 1902 reads:

"(1) Where the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Customs authorities or any penalty levied under this Act, any person desirous of appealing against such decision or order shall pending the appeal, deposit with the proper officer the duty demanded or the penalty levied:

Provided that where in any particular case the appellate authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit.

(2) If upon any such appeal it is decided that the whole or any portion of such duty or penalty was not leviable, the proper officer shall return to the appellant such amount of duty or penalty as was not leviable."

8. After the coming into force of the Customs Act, 1962, the Government of India issued notification No. 68/63 dated 4-5-1963, the material part of which, reads as follows:

"G. S. R. In exercise of the powers conferred by Section 12 of the Central Excises and Salt Act, 1944 (1 of 1944), and in super-session of the notification of the Government of India in the Ministry of Finance (Department of Revenue) Central Excise No. 59/59 (G. S. R. No. 822 of 1959) dated the 18th July 1959, the Central Government hereby declares that the provisions of Sub-section (1) of Section 105, Section 110, Sub-section (2) of Section 115, Clause (a) of Section

118, Sections 119, 120, 121, 124, 129 and Clause (b) of Sub-section (1) of Section 142 of the Customs Act, 1962 (52 of 1962), relating to matters specified therein, shall be applicable in regard to like matters in respect of the duties imposed by Section 3 of the First mentioned Act, subject to the following modifications and alterations which the Central Government considers necessary and desirable to adopt those provisions to the circumstances "

(The rest of the notification is not material and is not reproduced).

9. On the basis of the above provisions the petitioner's counsel raised two contentions.

(1) the power conferred by Section 12 of the Central Excises and Salt Act is only to apply the provisions of the Sea Customs Act 1878 (or the Customs Act, 1962) regarding the procedure relating to appeals and the provision for deposit of duty before filing the appeal, is not a matter relating to procedure:

(2) that the provision regarding the deposit of duty, applicable if at all, is Section 189 of the Sea Customs Act, 1878, and not Section 129 of the Customs Act, 1962.

10. It is to be noticed that Section 35 of the Central Excises and Salt Act, 1944 provides for appeals in unqualified terms without any limitation or requirement of deposit of duty prior to, or during the pendency of the appeal Section 189 of the Sea Customs Act, 1878 and Section 129 of the Customs Act, 1962, according to us, seem to insist upon deposit as a condition precedent to filing the appeal. We are in agreement with the decision in *Digvijaysinhji Spinning and Weaving Mills Ltd., Jamnagar v. Collector of Customs, Baroda*, AIR 1958 Bom 305 para 7 where the same view was taken in regard to section 189 of the Sea Customs Act, 1878.

11. If such be the effect of these provisions, we cannot but regard them as placing a fetter on the substantive right of appeal, conferred in unqualified terms by Section 35 of the Central Excises and Salt Act, 1944, and to that extent as not being matters of "procedure relating to appeals" within the meaning of Section 12 of the Act. In *Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others*, the assessee submitted a return on 28th November 1947 under the provisions of the Central Provinces and Berar Sales tax Act, 1947, and was called upon to support the return, and eventually assessed on the 8th April 1950. The assessee preferred an appeal u/s 12(1) of the 1947 Act, which the authorities declined to admit, on the ground that the same was not accompanied by any proof of payment of the tax as required by Section 22(1) of the 1947 Act as amended on 25th November 1949. The assessee contended that his appeal was governed by the provisions of the unamended Section, which did not require any such deposit. In upholding the assessee's contention, the Supreme Court observed:

"That the amendment has placed a substantial restriction on the assessee's right of appeal cannot be disputed, for the amended Section requires the

payment of the entire assessed amount as a condition precedent to the admission of its appeal. The question is whether the imposition of such a restriction by amendment of the Section can affect the assessee's right of appeal from a decision in proceedings which commenced prior to such amendment and which right of appeal was free from such restriction under the Section as it stood at the time of the commencement of the proceedings."

12. After surveying the authorities on the question, at page AIR 122 STC 224 the Supreme Court observed :

"The above decisions quite firmly establish and our decisions in Janardan Reddy and Others Vs. The State, and in Ganpat Rai Hiralal and Another Vs. Aggarwal Chamber of Commerce Ltd., uphold the principle that a right of appeal is not merely a matter of procedure. It is a matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated, and before a decision is given, in the inferior Court. In the language of Jenkins. C. J. in Nana v. Shaik (1908) ILR 32 Bom 337 to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication."

Further down, at page AIR 128 STC 225 it is observed:

""There can be no doubt that the new requirement "touches" the substantive right of appeal vested in the appellant. Nor can it be overlooked that such a requirement is calculated to interfere with or fetter, if not to impair or imperil, the substantive right. The right that the amended Section gives is certainly less than the right which was available before. A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. Indeed the new requirement cannot be said merely to regulate the exercise of the appellant's pre-existing right but in truth whittles down the right itself and cannot be regarded as a mere rule of procedure."

13. In State of Bombay Vs. Supreme General Films Exchange Ltd., the question was whether an appeal from a suit instituted prior to the amendment of the Bombay Court-fees Act was liable to payment of the enhanced court-fee, required by the amended Act. In upholding that it was not, the Supreme Court observed:

"(12) it is thus clear that in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only, it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment."

14. We, think it unnecessary to refer to further and other authorities on the point in the light of the categorical pro-nouncements of the Supreme Court in the two cases noticed supra. We have no doubt, that the provision regarding deposit of the amount before preferring appeals or before hearing them cannot be regarded as a matter of procedure so as to fall within the purview of Section 12 of the Central Excises and Salt Act, 1944.

15. Our attention was drawn to the decision in *G. Sitaramaiah v. Collector of Central Excise, Hyderabad*, AIR 1960 Andh Pra 294 where a learned Judge of the Andhra Pradesh High Court held that what was inducted by Rule 215 of the Central Excises and Salt Rules was only the procedure in regard to deposit of duty pending the appeal and further ruled that there is nothing intrinsically illegal in a rule which prescribes limitations to the right of appeal. The decision also looks the view that the payment of the entire duty cannot be considered as a condition of filing the appeal. On this aspect, we have already expressed a contrary view, in agreement with the decision in AIR 1958 Bom. 305. Rule 315 of the Central Excises and Salt Rules, as it stood at the relevant time, read:

"(218) Application of certain provisions of Sea Customs Act, 1878-

The provisions of Sections 168, 189 and 192 of the Sea Customs Act, 1878, shall mutatis mutandis be applicable to any decision or order relating to any duty, fine or penalty leviable in respect of any goods under the Act."

16. The question before us is not whether a right of appeal conferred in unqualified terms by Section 35 of the Central Excises and Salt Act can be alienated by a statutory rule such as Rule 215 above. We express no opinion on the point. We may observe that rule 215 was deleted by notification of the Government of India dated 24-1-1959. We may further observe that a view contrary to what was held by the Andhra Pradesh High Court was taken in the decision reported in *Adarsh Textiles Mills v. Collector of Central Excise Delhi* ILR 1958 P&H 1343:60 Pun LR 205. The question whether the requirement of deposit before filing appeal was a matter of procedure was not raised or decided in the Andhra case. If the Andhra decision is to be understood as in any way holding that a restriction or impairment of a right of appeal is a matter of procedure, we would express our respectful dissent.

17. In the view we take, it is unnecessary to pronounce upon the second of the contentions urged by the petitioner's counsel, that the relevant provision for depositing duty, applicable if at all, is Section 189 of the Sea Customs Act, 1878 and not Section 129 of the Customs Act, 1962. We may however indicate that on the facts of the actual decision, and on the principle laid down by the Supreme Court in *Hosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others*, the contention would appear to be well founded. At page 124 of the report AIR STC 225 the Supreme Court observed:

"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."

18. We should notice the argument raised on behalf of the respondents, that the petitioner actually invoked the provisions of Section 129 of the Customs Act, 1962 in the appeals preferred by it and filed petitions along with the appeals praying to dispense with the requirement of deposit. This, it is said, would preclude the petitioner in proceedings under Article 226 of the Constitution, from contending against the applicability of the said Section. We are unable to agree. We do not think that the petitioner's conduct is sufficient to preclude it from agitating its rights in these proceedings. Besides, there is a total absence of jurisdiction in the 1st respondent, to call upon the petitioner to deposit the duty, before filing or hearing the appeal. We accordingly reject this contention.

19. It follows that the demand evidenced by Ext. P-3 requiring the petitioner in these cases to deposit the duty, and the dismissal of the appeals preferred by the petitioner evidenced by Ex. P-4 in these O. Ps. are unsustainable.

20. The O. Ps. are allowed. We quash the order evidenced by Ex. P-4 in each of these O. Ps. and direct the 1st respondent to hear and decide the appeals preferred by the petitioner in these cases, without insisting on the payment of duty as a condition to the filing or hearing and disposal of the appeals.

21. There will be no order as to costs.