(1992) 11 KAR CK 0033

In the Karnataka High Court

Case No : Writ Appeal No''s. 1626 to 1646 and 1653 and 1654/92

Assistant Collector of Customs APPELLANT

Vs

Associate Lumbers (P.) Ltd. RESPONDENT

Date of Decision : 09-11-1992

Acts Referred:
Customs Act, 1962 — Section 128, 129 A, 130 E

Citation : (1993) 41 ECC 230 : (1993) 63 ELT 605 : (1992) ILR (Kar) 3720 : (1993) 1 KarLJ 39

Hon'ble Judges : K.A. Swami, Acting C.J.;N.D.V. Bhat, J

Bench : Division Bench

Advocate : Shri Ashok Harnahalli, C.G.S.C, for the Appellant; Shri V. Lakshmikumaran, K.G. Raghavan and Naganand, for the Respondent

Judgement

K.A. Swami, Acting C.J.

1. At the stage of admission, the respondents are served and they are represented through their Counsel. As these appeals lie in a very narrow compass, the same are admitted and heard for final disposal.

2. The first batch of writ appeals are preferred against the order dated 15-6-1992 passed in Writ Petitions Nos. 5074 to 5076, 4865 to 4872, 1314 & 1315, 7117 & 7318, 9490, 9491 of 1989; and W.Ps. 18360 & 18361 of 1987, and 12290 & 12291 of 1988. The second batch of writ appeals are preferred against the order dated 15-6-1992 passed in Writ Petitions Nos. 13097 & 13098 of 1988.

3. The petitioners (respondents in these appeals) in the first batch of writ petitions referred to above, sought for a declaration that the goods imported by them under the various bills of entry produced in the respective writ petitions, were not exigible in view of the exemption granted by the Notification No. 160/88 dated 13-5-1988. They also sought for a writ in the nature of mandamus directing the authorities to permit release and clearance of the consignments imported by them under Bills of Entry without levy of auxiliary duty of customs in

excess of 5%; and costs of the writ petitions and for such other reliefs. Whereas the petitioners in W.Ps. 13097 & 13098/88 sought for a declaration that the Bills of Entry Nos. 1657 and 1656 dated 13-7-1988 (Ann. C & D in those W.Ps.) were classifiable under Entry 4403.33 of the Schedule to the Customs Tariff Act, 1975 and as such, they were entitled to the exemption under the Notification No. 88/88, dated 1-3-1988. They also further prayed for a direction to the respondents therein, the permit the petitioners to clear and release the goods imported by them under Bill of Entry Nos. 1657 and 1656 dated 13-7-1988, upon payment of auxiliary duty at the rate of 5% ad valorem. They also sought for quashing the adjudication order dated 22-8-1988 passed by the Assistant Collector of Customs, Mangalore, produced at Annexure-M, in which it was held that the goods imported by the petitioners were not exempted under Notification No. 88/88, dated 1-3-1988 and they were liable for payment of 45% ad valorem duty. Thus, in the second batch of writ petitions, there was a determination made by the Assistant Collector of Customs, Mangalore, that the goods imported by the petitioners therein, were liable for auxiliary duty at 45 per cent; whereas, in the first batch of writ petitions, there was no such determination. The petitioners therein straightaway approached this Court on the basis of the Bill of Entries. The first batch of writ petitions were heard together and decided by a common order and similarly, the second batch of writ petitions were heard together and decided by a common order separately passed, though all these writ petitions were heard together and decided on the same day.

4. Learned Single Judge has come to the conclusion that the question as to whether the goods imported by the petitioner are entitled to the exemption granted under the Notification : (1) No. 88 of 1988, dated 1-3-1988 and (2) No. 160/88, dated 13-5-1988, involves determination of question of fact, therefore, it has to be decided by the Assistant Collector of Customs. Learned Single Judge has specifically observed thus :

"It is true that unless conclusion are drawn on questions of fact this Court will not be in a position to appreciate the matter in a correct perspective."

As far as the other two writ petitions are concerned, it has been held by the learned Single Judge thus :

"It is difficult to understand as to how the inspection made on 23-8-1988 would have been borne in mind by the Assistant Collector in the Order made on 22-8-1988 unless the order had been ante-dated. Further, when the petitioners relied upon a decision of CEGAT and a note to that effect was also made in the course of the proceedings hardly there is any reference to that decision of the Tribunal. Decisions of the Tribunal are binding on the authority concerned and he is bound to consider the effect of the same unless the authority concerned is able to distinguish the decision either on law or facts or on principles. It would not be appropriate for the authority concerned to ignore decision of the Tribunal and pass orders. In the present case that is exactly what has been done by the Assistant Collector. Therefore, the impugned order passed by him cannot be sustained."

On the conclusion so arrived, the learned Single Judge has set aside the order of the Assistant Collector and remitted all the matters to the Assistant Collector for fresh determination both on facts and Law.

5. While remitting the matters to the Assistant Collector, the learned Single Judge has further directed in all these writ petition as follows :

"Further I also notice that during the pendency of these proceedings this Court had passed certain interim orders allowing the petitioners to remove the goods in question subject to the condition of furnishing Bank Guarantee to the extent of the duty likely to be imposed and if the benefit of the interim order is given to the petitioners until disposal of the proceedings by the CEGAT ultimately would adequately protect the interests of the petitioners. In this background though the learned counsel for the petitioners urged that this Court should itself decide the matter, considering all aspect of the matter I think it would be proper to adopt the course suggested on behalf of the respondents."

Now, the respondent in the writ petitions have come up in appeal. It is contended before us that it is not at all permissible to issue a direction in the nature of interim order to be operative beyond the date of the judgment and even to cover the appellate stage upto the stage of CEGAT, in the light of the provisions contained in Section 128, 129A, 129E and 130E of the Customs Act, 1962 (for short, the ''Act'').

5.1 On the contrary, it is contended on behalf of the respondents that as the learned Single Judge did not decide the writ petitions on merits and as there was a judgment of CEGAT on the point, which was in favour of the writ petitioners, the learned Single Judge took a view that it would be necessary to protect the interest of the writ-petitioners until the matter reached CEGAT; therefore it cannot be held to fall outside the purview of the jurisdiction of this Court either under Article 226 or Article 227 of the Constitution, because as per Art. 226, directions can also be issued by this Court for such other purpose, and the direction issued cannot at all be said to be unconnected with the main matter which was remitted to the Assistant Collector. It is also further contended that even if it is considered that Art. 226 does not enable the Court to give such directions to be operative beyond the date of decision, Art. 227 enables this Court, to issue direction of the nature of question, in the interest of justice and to protect the right of the petitioners. Alternatively it is submitted that now even if this Court were to repel to contentions of the respondents, the writ petitions be heard on merits. In the light of these contentions, the following points arise for consideration.

(i) Whether, in the facts and circumstances of the case, the directions of the nature issued in the writ petitions as quoted above, while remitting the matter to the Assistant Collector, for determination are permissible in law ? and

(ii) Whether the writ petitions are to be heard to merits as contended by the respondents ?

6. Point No. (i) : The facts which are no more in dispute, have already been stated. In these cases, the learned Single Judge has found it necessary that the relevant facts are to be found by the fact-finding authority; therefore, he has remitted the matter. It is an established position of law that in a petition under Art. 226 of the Constitution, normally, this Court, does not enter into disputed questions of facts. In such cases, the Court declines to exercise jurisdiction and directs the authority which is empowered under the Act, to determine the facts necessary for the purpose of the reliefs sought in a writ petition under Art. 226 of the Constitution. Therefore, the learned Single Judge, after having come to a conclusion that necessary facts are to be found by the fact-finding authority, remitted the cases. The question that arises for consideration is, whether after remitting the case, the direction of the nature given by the learned Single Judge is justified in law. It is true, the interim directions or orders are passed so as to ensure that the ultimate relief available to the party is not affected and the delay in deciding the case should not adversely affect the party. But, in a case where this Court declines to decide and considers it necessary that relevant facts are to be found by the fact-finding authority and remits the case for that purpose, and the law governing the case provides for an appeal against the order of the original authority and further appeal against the order of the first appellate authority and that law further prescribes certain conditions to be fulfilled or satisfied even for preferring an appeal, further appeal and the final appeal to the Supreme Court and also provides under what condition the interim orders are to be passed pending the appeal, whether this Court, while remitting the case would be justified in issuing a direction to overcome or supersede those conditions. At this stage, we may refer to the relevant provisions of the Act. It is not in dispute that the Assistant Collector is the original authority, who has to decide u/s 17 of the Act, as to whether the goods in question are entitled to the benefit of exemption as per the notifications referred to above. Under the aforesaid notifications, certain facts are to be determined in order to find out whether the petitioners are entitled to the benefit of those notifications viz. the classification of goods has to be determined. The order of the Assistant Collector is appealable and the appeal lies u/s 128 of the Act, to the Collector. Though Section 128 of the Act, gives a right of appeal, but along with the appeal, as per Section 129E, the appellant is required to deposit with the proper officer the duty demanded or the penalty levied. The proviso thereto further empowers the Collector (Appeals) or the Appellate Tribunal, if it is of the opinion that the deposit of any duty demanded or penalty levied would cause undue hardship to such person to dispense with such deposit subject to such condition as he or it may deem fit to impose so as to safeguard the interests of Revenue. Therefore, in order to prefer an appeal and to have it decided on merits, unless the Collector or Appellate Tribunal dispenses with the deposit of the duty demanded or penalty levied the appellant has to deposit the same. Similar provisions contained in

Imports and Exports (Control) Act, 1947 are held to be valid in Bangalore Fabrics Vs. Union of India (UOI), Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, It has been held by the Supreme Court in Vijay Prakash''s case that "the right of appeal contemplated u/s 129A and Section 129E is a conditional one and the legislature in its wisdom has imposed that condition of depositing duty demanded or penalty levied. Although Section 129E does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. The proviso, however, gives power to the Appellate Authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardship. It is a matter of judicial discretion of the Appellate Authority. That discretion must be exercised on relevant materials, honestly, bona fide and objectively. Once that position is established, it cannot be contended that there was any improper exercise of the jurisdiction by the Appellate Authority." Therefore, it is clear that the appellant cannot avail the right of appeal unless he complies with the proviso to Section 129E or satisfies the Collector or the Appellate Tribunal, as the case may be, that the condition of depositing the duty demanded or penalty levied would cause undue hardship to him. In that event, it is open to the Collector or the Appellate Tribunal, as the case may be, to exempt him from depositing duty demanded or the penalty levied. From the order of the Collector (Appeals), further appeal lies to the Customs, Excise and Gold (Control) Appellate Tribunal u/s 129A and from the order of the CEGAT, appeal lies to the Supreme Court.

6.1 Thus, it is clear that once the Asstt. Collector decides the case, unless the conditions laid down in the proviso to Section 129E, are fulfilled, the petitioners cannot have the appeal decided on merits. Now, the directions issued by the learned Single Judge without deciding the writ petition on merits, would amount to circumventing the provisions contained in Section 129E and would impinge upon the jurisdiction of the Appellate Collector and the CEGAT, because it is open to those two authorities to exempt the petitioners from depositing the duty demanded or penalty levied if the petitioners satisfy those authorities that such a condition would cause undue hardship to them. In the event they are not satisfied and the petitioners fail to deposit the amount, it would be open to those authorities to dismiss the appeals. Therefore, it follows that the direction issued in the writ petition is not in accordance with the provisions of law governing the subject-matter in question. Even if it is accepted that it is open to this Court while disposing of the writ petitions and remitting the matter to the authority concerned to issue such direction as may be necessary including a direction of the nature issued by the learned single Judge, such direction must be in accordance with law and it cannot be contrary to the provisions of the Act governing the matter. As we have already pointed out, the direction of the nature issued by the learned Single Judge, takes away the jurisdiction of the Appellate Collector and the CEGAT to consider the question as to whether the petitioners are entitled to have the appeal heard on merits without depositing the duty demanded and the penalty levied. Therefore, we are of the view that the directions given by the learned Single Judge, do not squarely fall within the provisions contained in Section 129E; hence, the same are not permissible in law. We may also point out that in The State of Orissa Vs. Madan Gopal Rungta, the Supreme Court has considered the question as to whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, after dismissing the writ petition without deciding on merits can issue interim relief operative beyond the period of the decision and has held thus :

"6. On behalf of the appellant, it was urged that the Court had no jurisdiction to pass such orders under Art. 226 under the circumstances of the case. This is not a case where the Court before finally disposing of a petition under Art. 226 gave directions in the nature of interim relief for the purpose of maintaining the status quo. The question which we have to determine is whether directions in the nature of interim relief only could be granted under Art. 226 when the Court expressly stated that it refrained from determining the rights of the parties on which a writ of mandamus or directions of a like nature could be issued. In our opinion, Art. 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of S. 80, Civil P.C. and in our opinion that is not within the scope of Art. 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any direction of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Art. 226 of the Constitution. In our opinion, the language of Art. 226 does not permit such an action. On that short ground, the judgment of the Orissa High Court under appeal cannot be upheld."

However, we have pointed out in the earlier portion of the judgment that even if it is assumed that such power is there it cannot be exercised contrary to the provisions of law governing the subject. Shri Naganand, learned Counsel appearing for the respondents in the second batch of appeals, contended that in The State of Orissa Vs. Madan Gopal Rungta, it was held by the Supreme Court that the Court had no jurisdiction to decide whereas, in the instant case, the Court had the jurisdiction to decide but nevertheless it refused to decide it therefore, it was open to the learned Single Judge to issue directions of the nature issued in these cases. It is not possible to accept this contention. In this case, the learned Single Judge has held that the writ petitions could not be decided on merits because the necessary facts are to be determined by the fact finding authority. Similarly, in Madan Gopal''s case also, certain facts were required to be determined which could properly be decided in the suit; therefore the Court refused to exercise the jurisdiction under Art. 226 of the Constitution. Hence, we are of the view that the observations made in para 6 of the judgment of the Supreme Court in Madan Gopal''s case squarely apply to the case on hand. Even otherwise, we have held that issuance of such directions would be opposed to the provisions contained in Section 129E of the Act. Accordingly, Point No. (i) is answered in the negative.

7. Point No. (ii) : It is not possible to accept the contention of learned Counsel for the respondents that this Court must decide the writ petitions on merits. In these cases, necessary facts are disputed; therefore the disputed questions of facts cannot appropriately be gone into by this Court in exercise of Art. 226 of the Constitution. Further, we do not think it necessary to go into those facts because the Act provides series of forums for determination of the facts. Initially, the jurisdiction is exercisable by the Assistant Collector, then there is first appeal to the Collector and then second appeal to the CEGAT which also can go into the question of facts and finally, appeal lies to the Supreme Court. Therefore, we do not think it necessary that in exercise of jurisdiction under Art. 226 of the Constitution, the question of facts in a case like this, need be gone into.

7.1 However, it is contended by Shri K. G. Raghavan, learned Counsel for the respondents in the first batch of appeals, that the matter is covered by the decision of this Court in Y. Moideen Kunhi and Others Vs. Collector of Central Excise, Bangalore and Others, which is affirmed by the Supreme Court in Collector of Central Excise, Madras Vs. Kutty Flush Doors and Furniture Co. (P) Ltd., : Collector of Central Excise, Madras Vs. Kutty Flush Doors and Furniture Co. (P) Ltd., It may be pointed out that in that case, necessary facts were found by the Tribunal and further the question involved was as to what was meant by "manufacture". That question was decided by the Tribunal. That it is so, is clear from para 5 of the judgment of the Supreme Court, which is as follow :

"It may be worthwhile to note that ''manufacture'' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more was necessary and there must be transformation; a new and different article must emerge having a distinct name, character or use. [See : Union of India (UOI) Vs. Delhi Cloth and General Mills, Having regard to the facts found in this case by the Tribunal, which ultimately is the final fact finding authority, we are of the opinion that regard being had to the principles for determining the questions which were correctly applied in the decision of the Tribunal, in the facts of this case, the conclusion of the Tribunal is unassailable."

Therefore, it is not possible to hold that the Supreme Court has laid down that in exercise of jurisdiction under Article 226 of the Constitution, this Court must go into the question of facts.

8. For the reason stated above, these appeals are entitled to succeed. Accordingly, they are allowed in the following terms :

The direction issued by the learned Single Judge that the interim order granted in the writ petitions shall ensure to the benefit of the petitioners until termination of proceedings before the CEGAT subject to the condition that the petitioners shall keep alive the Bank Guarantee until termination of the proceedings before CEGAT, is set aside. In other respects the orders of the learned Single Judge are not disturbed.

However, the submission made by the learned Central Government Standing Counsel that the Bank Guarantee furnished by the respondents (the writ petitioners) will not be enforced until the Assistant Collector decides the case, is placed on record.

