(2008) 11 MAD CK 0114

In the Madras High Court

Case No : Wrti Appeal No. 335 of 2006 and W.A.M.P. No. 699 of 2006

Assistant Commissioner of Customs APPELLANT

Vs

C. Bharani Exports RESPONDENT

Date of Decision : 10-11-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128(1)
Tamil Nadu General Sales Tax Act, 1959 — Section 30(1)

Citation : (2009) 16 STR 260

Hon'ble Judges : V. Dhanapalan, J;S.J. Mukhopadhaya, J

Bench : Division Bench

Advocate : T.S. Sivagnanam, for the Appellant;

Judgement

S.J. Mukhopadhaya, J.—This appeal has been preferred by the Assistant Commissioner of Customs and two others against the order dated 24th January 2006 in W.P. No. 26479 of 2005 whereby the learned Judge while observing that the respondent (writ petitioner) has given a valid explanation for the delay, set aside the order passed by the appellate authority and remitted the matter with direction to decide the appeal in accordance with law.

2. The main plea taken by the appellants is that the High Court under Article 226 of the Constitution of India cannot condone the limitation beyond the period prescribed under the statute for the purpose of determination of appeal on merits.

3. It appears that the respondent (writ petitioner), who was carrying on business of exporting cotton shirts, exported goods to the value of Rs. 8,45,082/-under Shipping Bill No. 650 dated 1st May 1988 and claimed drawback for a sum of Rs. 1,43,834/-, which was allowed and paid back on 6th January 1998. Subsequently, the first appellant herein issued a show cause notice calling upon the respondent (writ petitioner) as to why the drawback paid to him be not recovered on account of non-realisation of the sale proceeds within the period

allowed under the Foreign Exchange Regulation Act. Having not received any reply, the first appellant passed an order directing the respondent (writ petitioner) to pay a sum of Rs. 1,43,834/-. Against the said order, the respondent (writ petitioner) preferred an appeal before the second appellant but after a delay of 46 days. The second appellant - appellate authority refused to condone the delay and dismissed the appeal as time-barred. "

4. Learned Counsel appearing on behalf of the appellants submitted that the appellate authority has power to condone 30 days delay under the proviso to Section 128(1) of the Customs Act, 1962. In the present case, as the appeal preferred by the respondent (writ petitioner) was with 46 days delay, the appellate authority, having no jurisdiction to condone such delay, rightly dismissed the appeal as time-barred. He also placed reliance on a Division Bench decision of this Court in Indian Coffee Workers'' Co-op. Society Ltd. v. Commissioner of Commercial Taxes, Chennai and Ors. 2002 (1) CTC 406 and some other judgments.

5. In spite of service of notice, the respondent refused to appear and contest this appeal.

6. We have heard the learned Counsel appearing on behalf of the appellants.

7. The respondent (writ petitioner) has not disputed that the appeal was filed with 46 days delay and that the appellate authority was empowered to condone only 30 days delay under the proviso to Section 128(1) of the Customs Act, 1962.

8. Similar question fell for consideration before a Division Bench in Indian Coffee Workers'' Co-op. Society Ltd. case 2002 (1) CTC 406 (supra) wherein on behalf of the assessee, similar plea was taken that this Court has got ample power under Article 226 of the Constitution of India to condone the delay and can direct the appellate authority to dispose of the matter on merits. After hearing the parties, the Division Bench held as follows:

The legal position is as follows:

(a) An appeal u/s 30(1) of the Tamil Nadu General Sales Tax Act, 1959 has to be filed within 30 days before the appellate Assistant Commissioner. The appellate Assistant Commissioner is empowered to condone the delay for further period of 30 days if sufficient cause for not presenting the appeal in time is shown and satisfied by the appellate authority.

(b) Under no circumstances, the appellate authority has power to condone the delay beyond 30 days.

(c) While the High Court exercising the jurisdiction under Article 226 of Constitution of India, approves the correctness of the order of the appellate authority, it has no power to direct the appellate authority to consider the appeal on merits as otherwise it would be nothing but Court extending the period of limitation.

(d) Even if the High Court accepts the explanation given by the assessee for not filing the appeal within the period prescribed under the Act, it cannot direct the appellate authority to consider the matter on merits as the High Court exercising jurisdiction under Article 226 of Constitution of India, cannot re-write the provisions of the Act.

9. As in the present case, we find that the case of the respondent (writ petitioner) is covered by the decision of the Division Bench of this Court in Indian Coffee Workers'' Co-op. Society Ltd. case 2002 (1) CTC 406 (supra), following the decision aforesaid, we set aside the order dated 24th January 2006 passed by the learned single Judge in W.P. No. 26479 of 2005 and allow the writ appeal. However, there shall be no order as to costs. Connected Miscellaneous Petition is closed.

