
(2008) 12 AHC CK 0024
In the Allahabad High Court

Auram Jewellery Export (P) Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Customs Act, 1962 — Section 129B
Penal Code, 1860 (IPC) — Section 406, 409

Citation : (2010) 251 ELT 365

Hon'ble Judges : Amitava Lala, J;A.P. Sahi, J

Bench : Division Bench

Judgement

Amitava Lala, J.—This is an appeal of the appellant-company challenging the order dated 23rd September, 2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi. The contention of the appellant is that it manufactures and exports gold jewellery. It received 15 Kgs. of imported gold (admittedly 8 Kgs. by way of purchase and 7 Kgs. by way of loan) from M/s. Metal and Mineral Trading Corporation Limited (for short MMTC). They were required to manufacture gold jewellery and export the same directly in respect of gold purchased by them and through MMTC in respect of gold taken on loan. On 18th March, 1996, strong room of the appellant was sealed by the customs authorities on account of alleged malpractice and series of summons were issued and correspondences were exchanged aiming to verify factual position of availability of stock. On 26th April, 1996, the strong room was broken in presence of panch witnesses and no gold was found. The appellant made allegation that the gold has been taken away by the customs officers/MMTC officials by breaking open the strong room when the responsible persons of the appellant company were not present in the unit. A criminal complaint was filed against the appellant by MMTC before the appropriate court of Magistrate and the appellant/s was/were discharged by order dated 20th August, 1999, the relevant portion of which is as follows:

From the above discussion I find that the above gold was not entrusted to the accused but ownership of the gold had passed on to the accused for practical

purposes. Even the delay in the export of gold ornaments does not appear to be because of the accused but the role of the officers of MMTC appears to be existent in creating this dispute. If MMTC levels the charge of breach of settlement and the agreement against the accused the case of compensation for that is already pending before the Arbitration. No, prima facie case of misappropriation of the said gold dishonestly and with criminal intention, conversion into his own use and its disposal contrary to the contract and the provisions of law is made out. On the other hand, it is patent instance of arbitrariness of the officers of MMTC and abuse of authority which should be taken notice of by the Government of India so the purpose for which the corporation was established is not frustrated. There appears to be no appropriate ground to me to frame the charges under Sections 406, 409 I.P.C. against the accused. The charge is baseless and the accused may be discharged at this stage.

2. However, a show cause notice was issued on 22nd December, 1998 upon the appellant/s on the ground that the export obligations have not been fulfilled and gold procured duty free has not been accounted for and accordingly duty was sought to be demanded from MMTC/the importer and penalties were sought to be imposed on MMTC and the appellant. Vide order dated 13th April, 2005, the Commissioner of customs confirmed the demand of duty of Rs. 54,47,775/- from MMTC and imposed penalty of Rs. 75,00,000/- upon them. In addition, he imposed penalty of Rs. 25,00,000/- was imposed upon the appellant company and Rs. 25,00,000/- upon its Director.

3. The appellant contended before the Tribunal that the appellant company has been taken over by U.P. State Financial Corporation as they were not able to repay the loan taken from them. The company is not functioning and facing acute financial hardships. The director of the company has not misappropriated the gold and he was also facing acute financial hardship and an affidavit to that effect has also been filed.

4. The Tribunal held that passing of the order by the concerned Magistrate discharging the appellant/s from the charge of misappropriation of gold does not absolve them of the obligation to account for duty free gold acquired by them for the purpose of making ornaments and exports. In view of the fraudulent nature of the case, the custom department contended therein that there should be pre-deposit of entire amount of penalties imposed upon the appellant. The tribunal prima facie held that appellant company is directly responsible for accounting in respect of gold on both the counts. On their own actions and omissions, they rendered the gold liable for confiscation and therefore, made themselves liable for penalty. The plea of financial hardships has to be considered with a lot of reservations. Prima facie, they are involved in fraudulent activities. No prima facie case of waiver of entire amounts of penalties has been made out by the appellant/s.

5. Taking the entire facts and circumstances into account, the Tribunal directed the appellant company to deposit a sum of Rs. 5,00,000/- within 8 weeks from

that date, the director to deposit a sum of Rs. 1,00,000/- within 8 weeks from that date and to report compliance by 28th November, 2008. Subject to deposit of the amounts as above, the pre-deposit of balance amount of penalties are waived and recovery thereof stayed till disposal of the appeals. It is also made clear that in the event of failure to deposit the amounts as mentioned above, the appeal of the defaulting appellant shall stand dismissed without further notice to the concerned appellant.

6. The appellant has already deposited a sum of Rs. 1,00,000/- as pre-deposit for the Director but did not deposit Rs. 5,00,000/- for the company due to acute financial hardships and preferred this appeal.

7. According to Mr. U.N. Sharma, learned Senior counsel appearing for the appellant, there are various substantial questions of law involved in this appeal as stated below:

A. Whether the Appellate Tribunal can impose separate penalty upon the Company as well as its Managing Director?

B. Whether penalty upon the Company could have been imposed when the assets of the company have already been sold and the liability falls squarely upon the Managing Director?

C. Whether common appeals can be decided after deposit of penalty by one of the appellants on similar facts and circumstances?

8. However, we find that real substantial question available before us is question No. B. In any event, the questions of law involved herein are substantial questions of law or not, is also a substantial question of law. Therefore, the appeal, unlike the case of reference or a writ petition, may not be disposed of on any prima facie view. In any event, presently we are confined to the question of pre-deposit required under law to be deposited by the appellant for the purpose of hearing of the appeal on merits.

9. Mr. S.P. Kesarwani, learned Additional Chief Standing Counsel for the Union of India contended before this Court that the appeal is not maintainable from the order of pre-deposit. According to him, the orders which are required to be passed by the appellate tribunal u/s 129B of the Customs Act, 1992 (for short the Act) are appealable orders. He said that the order of pre-deposit is to be governed by Section 129E of the Act which is as follows:

129E. Deposit, pending appeal, of [duty and interest], demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any [duty and interest] demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal deposit with the proper officer [duty and interest] demanded or penalty levied:

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of the opinion that the deposit of [duty and interest] 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 and interest 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.

10. Therefore, no appeal can lie from such orders to the High Court. But according to us, such submission cannot be held to be justifiable when an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003, if the High Court is satisfied that the case involves a substantial question of law as per Section 130 of the Act. At least question No. B cannot be said to be not a question of law. Such Section 130 of the Act is required to be repealed w.e.f. 28th December, 2005 but no such repeal has been given effect to as yet, therefore, admittedly we are to be governed by such Section 130 of the Act.

11. According to us, the words, "every order passed in appeal" do not apparently exclude the jurisdiction of the High Court in determining the question of pre-deposit as u/s 129E of the Act. Question of appeals etc. are to be governed by Chapter XV of the Act, which includes both, the final order and any order in connection with the appeal. Therefore, unless it is specifically excluded under such Chapter, we do not find any thing contrary from the plain reading of Chapter XV, particularly, Section 130 of the Act made for appeal to High Court. Had it been the case of only final order, there was no scope for the Legislature to incorporate the aforesaid words u/s 130 that "every order passed in appeal" is appealable, because solitary final order is required for disposing the appeal. That apart, the order impugned necessitated deposit and in default, automatic dismissal of the appeal. Hence, the order impugned possesses essence of finality.

12. Thus, in totality, we are unable to persuade ourselves to agree with the contention of the learned Additional Chief Standing counsel appearing for the customs department and accordingly hold that the appeal is maintainable.

13. Now, let us confine ourselves to the question of pre-deposit. In case of pre-deposit, the distinction with regard to waiver fully or substantially, is not unknown to this Court. In many occasions, it has been done by the tribunal itself and in many occasions, by the High Court either in appeal or under writ jurisdiction, if any one wants to invoke the same. But in considering the cause of imposition of pre-deposit, the Court has to follow certain parameters.

14. On the question of pre-deposit, we have taken note of four single Bench

judgments of Calcutta High Court delivered by one of us (Amitava Lala J.) having persuasive value of those judgments based on several Supreme Court and High Court judgments. Reportings of judgments are as follows:

1. Shree Krishna Engineering Industries and Another Vs. CCE, Commissioner and Others,
2. Smithkline Beecham Consumer Healthcare Ltd. Vs. CCE (A),
3. 2000 (121) E.L.T. 602 (Cal.), Mercantile Company v. Commissioner of Central Excise.
4. 2000 (117) E.L.T. 544 (Cal.), Timeken India Limited v. Asstt. Commr. of Customs, NSCBI Airport.

15. Out of above referred judgments, in first one i.e. Shree Krishna Engineering (supra), Court was pleased to frame out guidelines for the purpose of passing appropriate order on the question of pre-deposit, which are as follows:

18. To that extent the petitioner cited three judgments reported in 1995 (80) E.L.T. 12 (S.C.) (Pamwi Tissues Ltd. v. Collector of Central Excise), 1993 (64) E.L.T. 387 (All) (Kamal Bidi Factory v. CEGAT) and Triton Valves Limited Vs. CEGAT, to establish that hardship of the company should be considered on the basis of appropriate parameter of the case. In the first case, the Supreme Court held that since the petitioner is a sick unit there cannot be any embargo on hearing the appeal without the deposit being made. So far as the second matter is concerned, that financial capacity of the assessee has to be ascertained and the Appellate Authority cannot act arbitrarily. In the third judgment it was considered on the basis of the paragraphs 18 and 19 of such same that the impact of having to secure a deposit of large number of amount is a factor of relevance in considering the question of hardship. The Tribunal has to avert the adverse impact of the requirement of the pre-deposit on the operation of the Petitioner No. 1 concerned.

19. The question of dispensation of pre-deposit in case of preferring appeal either in the Central Excise Act or in the Customs Act cannot proceed on the basis of any fixed principle but depending upon the facts and circumstances of each case. Therefore, in the instant case, apart from the description as aforesaid, certain points are to be jotted down hereunder to come to an appropriate conclusion. It is also significant to know what are the circumstances on which the other Courts dispensed with the pre-deposits.

20. Although no one cited a judgment reported in Smithkline Beecham Consumer Healthcare Ltd. Vs. CCE (A), which was delivered by this Court in respect of dispensation of pre-deposit on the basis of the prima facie case and what would be the materials to be considered for such reasons but for the sake of justice I want to draw certain inferences from such judgments. From the referred judgments therein certain principles can be formulated hereunder in respect of dispensation of pre-deposit:

(a) Prima facie case can not necessarily means that one must have a gilt-edged case which is bound to succeed. Prima facie case always has been held by the Courts to be a case which is arguable and fit for trial and consideration;

(b) Prima facie case in merit which is most likely to exonerate him from payment and still Tribunal insists on pre-deposit of the amount it would amount to undue hardship;

(c) Prima facie case is the conduct of the parties which has to be taken into consideration while it is to be decided whether the deposit has to be dispensed with or not.

On the other hand, case of the authority would be:

(a) Loss of revenue;

(b) Intention of the party;

21. Therefore, these are the balancing factors for the parties for coming to an appropriate conclusion by the authority for the purpose of dispensation of the pre-deposits.

16. Although the referred case is under Central Excise Act but the principle parimateria applicable even to the Customs Act. In those cases, financial capacity and the hardship were also considered by the Court based on various materials available therein. Each case has its independent view point.

17. In the instant case, the imposition of penalty upon the appellant company as well as the Director is for a sum of Rs. 50,00,000/- wherein pre-deposit is required to be given by the company for a sum of Rs. 5,00,000/- and for the Director a sum of Rs. 1,00,000/-. So far as the liability of the Director is concerned, it has already complied with. So far as the liability of the company is concerned, this appeal has been preferred by the pen of the Director himself. Excepting the question of hardship, no other question is raised by the appellant herein. On the other hand case of the revenue is the element of fraud. Apparently imposition of pre-deposit is not so absurd which can be interfered with, particularly when intention of the appellant is under question. Interest of revenue is edging over the interest of appellant. On enquiry we have also come to know that the company is inclined to make pre-deposit in the form of security other than cash or bank guarantee.

18. Now, the real question before us is not only the pre-deposit but also giving effect of the order of pre-deposit. Shri Deepak Gupta, Director of Company has represented before the Tribunal in two capacities. Firstly, in his individual capacity and secondly, as Director of the Company. The Company has already been taken over by U.P. State Financial Corporation admittedly. Hence, whatever pre-deposit is required to be given, the same will be given by the Director of the Company.

19. Therefore, in modifying the order of the tribunal to the extent of imposition

of pre-deposit to the Company, we direct the Director of appellant Company to make the pre-deposit for a sum of further two lakhs and rest will be secured in any form other than cash or bank guarantee, but to the satisfaction of the tribunal. Compliance of further pre-deposit will be made within a period of three weeks from the date of the order. Subject to the pre-deposit, the appellant will be heard on merit.

20. With the above order, the appeal is disposed of without imposing any cost.