

(2003) 12 KAR CK 0072
In the Karnataka High Court
Case No : Writ Petition No. 40932 of 2003

Cascade Systems

APPELLANT

Vs

Deputy Commissioner of Customs

RESPONDENT

Date of Decision : 18-12-2003

Acts Referred:

Citation : (2004) 91 ECC 586 : (2004) 165 ELT 400 : (2004) 2 KCCR 144 SN

Hon'ble Judges : R. Gururajan, J

Bench : Single Bench

Advocate : G.V.K. Murthy and P.E. Umesh, for the Appellant; P.S. Dinesh Kumar, CGSC, for the Respondent

Judgement

R. Gururajan, J.—Petitioner M/s. Cascade Systems is seeking a writ of certiorari to quash Annexure-C an intimation dated 18.8.2003 issued by the Respondent.

2. Petitioner is engaged in the business of import and sale of computer peripherals. In the month of September 1998, petitioner had imported processors (integrated circuits) and got them cleared by customs duty as applicable to integrated circuits falling under Chapter Heading 8542.19 of the Customs Act. Additional Commissioner of Customs, Bangalore issued a notice dated 11.1.1999 asking the petitioner to show cause as to why customs duty amounting to 3,42,950.00 is not to be demanded from him as the goods imported are populated circuit boards classifiable under Chapter Heading 8473.30 of the Customs Tariff Act. Petitioner requested the Additional Commissioner to adjourn personal hearing from 23.10.2001 to the first week of November 2001. However, the Additional Commissioner, ignoring the said communication, passed an order on 31.10.2001, Aggrieved by the order at Annexure-A passed by the Additional Commissioner of Customs, petitioner filed an appeal before the Commissioner of Customs (Appeals), Bangalore. He rejected the appeal in terms of Annexure-B dated 16.7.2003. Petitioner states that an appeal lies against the order of the Commissioner of Customs (Appeals) to the Tribunal. It has to be filed within three months from the receipt of the

order in terms of the statute. Petitioner states that he had time to file an appeal to CEGAT ("Tribunal" for short) upto 19.10.2003 against the order dated 16.7.2003, and he says that in the meanwhile a notice has been issued by the respondent demanding duty from the petitioner. Petitioner states that no coercive recovery can be undertaken in the light of a remedy available to him by way of an appeal to the Tribunal. His further submission is that until the appeal time is over, no proceedings can be taken by way of recovery by the Department. With these facts and grounds, petitioner wants Annexure-C the recovery proceedings to be set aside by this Court.

3. Respondent has entered appearance through Shri P.S. Dinesh Kumar, learned Senior Standing Counsel for the Central Government. They have filed a statement of objection objecting to the grant of prayers made in this petition. They have also filed a subsequent circular bearing No. 396/29/98-CX dated 2.6.1998.

4. Heard the learned counsel for the parties. Parties have placed before me four circulars.

5. Shri G.V.K. Murthy, learned counsel for the petitioner argues before me that he has time to file an appeal to CEGAT till 19.10.2003. Therefore, according to him, no recovery proceedings can be initiated by the Department. He strongly relies on a circular of 1990 in support of his submissions.

6. Per contra, Shri Dinesh Kumar, learned Senior Standing Counsel for the Central Government, appearing for the respondent would say that subsequent to the 1990-Notification a fresh notification has been issued on 2.6.1998. He says that in terms of the said notification one month time is granted by the Department.

7. After hearing the learned counsel for the parties, I have carefully perused the material on record.

8. Admitted facts reveal of an adverse order against the petitioner. Petitioner has a statutory remedy of second appeal before the Tribunal. He has time till 19.10.2003. In the meanwhile, on 18th August 2003 an intimation has been sent to the petitioner stating therein that in the absence of any stay order he has to make payment in the light of dismissal of the appeal by the Commissioner of Customs (Appeals). As on today, petitioner has not moved CEGAT and he has not obtained any stay order. Therefore, there is no impediment for the respondent to initiate recovery proceedings in the given set of facts. What is required to be noticed by this Court is as to whether recovery can be initiated during the appeal period available to a litigant.

9. Petitioner strongly relies on a notification dated 12.12.1990 to contend that no coercive proceedings for a period of three months is permissible. The said notification has been subsequently considered and a latest notification has been provided in terms of Annexure R-1. This circular is with regard to taking of no

coercive steps for realization of dues till the disposal of stay application by the Commissioner of Customs (Appeals). In fact, the said circular does not apply to CEGAT proceedings. It deals only with coercive measure during the pendency of appeal proceedings before the Commissioner. The Commissioner in this case has already disposed of the appeal. Circular also refers to no coercive measure during the pendency of stay proceedings before the Commissioner.

10. In the case on hand, petitioner is yet to move the authorities, and, yet to file a stay petition. Even before filing an appeal and the stay petition, petitioner wants automatic stay during the period provided for filing an appeal in terms of the statute. If the argument of the petitioner is accepted, there is every chance of some mischief being played somewhere by unscrupulous elements. Large sums of monies are involved in excise cases. Parties may also delay the filing of appeals by not receiving copies in time and avoid notice of the order. Therefore, the argument of blanket stay even in the absence of no appeal and no stay, is not in the interest of justice. Therefore, this argument does not appeal to me. However, I must notice realities in these cases. Authorities are also not to be allowed to take coercive proceedings thereby virtually frustrating an appeal remedy in some cases. In these circumstances a balance has to be struck by thus Court in the larger interest of either of the parties and in the interest of justice.

11. It is necessary at this stage to notice circulars issued by the Department itself. The Notification dated 2.3.1990 is issued by the Central Board of Excise and Customs, the subject of it being recovery of dues during the pendency of stay petition/application. The Board in the absence of statutory remedy thought it fit and fair to issue a circular providing for waiting period to initiate coercive measures for recovery of excise dues in the light of the judgments of the High Courts. The Bombay High Court in W.P. No. 3919 of 1988 ruled it was hardly fair and just to proceed with the recovery proceedings pending applications for stay of the impugned order before the appellate authorities. The Himachal Pradesh High Court in the case reported in Hans Raj Dhir Vs. State of Himachal Pradesh and Others, also notices that mere preferment of an appeal does not automatically operate as a stay of the decision under appeal and that till an application for stay is moved and granted by the appellate court, the decision continues to be operative. After noticing these two judgments, the Board in its wisdom has chosen to issue a Circular dated 21.12.1990. The relevant portion of the circular reads as under:

"2. The Board also took note of the fact that in two out of the three orders passed by the Bombay High Court as referred to above the Court had also imposed conditions of Bank Guarantee while granting stay in the concerned cases. It was also noticed that in the case of refunds very often the department is being called upon to refund duty even when the stay applications preferred by the department are pending before the appellate authorities. The Board felt that the same analogy should apply to demands.

3. It was felt that the correct legal position is that unless the assessee obtains a stay the department is within its rights to recover the duty confirmed in an order. However, as a practical step and for administrative convenience, a period of 3 months (one month for filing appeal and stay application and two more months for obtaining orders on the stay application) can be granted before taking coercive steps to recover the dues. If an assessee is genuinely interested, he need not take matter leisurely and wait for full three months for filing the appeal and stay application; he could easily file an appeal and obtain orders on a stay application from the appellant authorities within a period of three months from the date of communication of the order confirming demand against him. It was, therefore, decided that assessee should not be granted time beyond 3 months before restoring to coercive measures to recover dues arising out of orders passed by original adjudicating authorities as well as the appellate authorities. However, if a stay application of an assessee is rejected by an appellate authority even before the lapse of the time limit of three months, recovery proceedings should be initiated immediately."

On 12.11.1992 another circular has been issued. That circular deals as to whether coercive measure to recover duty demanded as a result of adjudication till such time as the appeal filed by the appellant has been disposed of by the Collector (Appeals) be taken or not. The said circular ruled as under:

"3. The issue has further been examined by the Board. The Board is of the view that it is not desirable to revise the above-mentioned instructions in the matter and provide for a blanket stay order for not taking coercive measures as pleaded by the Confederation of Indian Industries. If the assessee is diligent, as the things stand today, it would be possible to get orders on stay application well within a period of 3 months. In case of any individual hardships the case would be decided on a case to case basis.

4. In view of the facts stated above, the Board desires that you may dispose of stay application within a period of two months from the date of its receipt, in case for cogent reasons, you are not in a position to dispose of the main appeal within the same time frame."

Thereafter the Board has issued a latest circular dated 2.6.1998. The Board has stated as under:

"According to these instructions, Central Excise Officers were to allow a period of three months from the date of decision for payment of dues adjudicated before resorting to coercive measures to recover such dues. However, if the stay application is rejected by the Commissioner (Appeals) even before the lapse of time of three months, recovery proceedings should be initiated immediately. The Commissioner (Appeals) were also directed to dispose of stay application within the period of two months in case the Commissioner (Appeals) was not in a position to dispose of the main appeal within the same time frame."

This is in continuation of Circulars dated 21.12.1990 and 12.11.1992. These

circulars were the subject matter of several decisions. In *Shree Cement Ltd. Vs. Union of India (UOI) and Others*, , the Rajasthan High Court rules that no recovery proceedings shall be initiated during the stay proceedings. In the case of *M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise*, , the Supreme Court has ruled that circular instructions are binding on the parties. In the case of *Detergents India Limited v. Assistant Commissioner of Central Excise and two Ors.*, (W.P. No. 17037 of 1996, dtd. 9.7.1996), this Court has ruled that the adjudicating authority and its subordinates are restrained from pursuing the recovery proceedings in respect of demands which are the subject matter of appeal till the application filed by the petitioner under the proviso to Section 35F of the Act is finally disposed of.

12. All these judgments and the circulars referred to above deal with pending stay proceedings. They do not directly deal with the case of recovery proceedings during appeal period time. After noticing these circulars and noticing the judgments of this Court, I am of the view that it is fair and reasonable that no coercive steps are to be taken during the pendency of the stay application. This Court can take a judicial notice that -- to file an appeal and the stay petition, it may take reasonable time. The Tribunal may also take some reasonable time to dispose of the stay application. In such circumstances, this Court has to step in and clear the fog and pave way for an effective remedy to a litigant.

13. In the circumstances and taking realities into consideration, and taking note of beneficial circulars and the judgments referred to above, I deem it proper to hold and direct that--

(1) the authorities are not to resort to any recovery proceedings for a period of one month from the date of adverse orders;

(2) the authorities are to issue notice immediately after disposal of the appeal regarding their intention to initiate recovery proceedings within one month from the date of the order, so that the party is kept on guard for further steps by way of moving the appellate tribunal by way of stay petitions, and, if no orders are obtained by that time, recovery proceedings can be initiated instead of waiting for the entire three months period; and

(3) however, if for any reason the Department is of the view that the assessee is likely to deprive the State of its rightful revenue by certain unlawful means, the Department may take steps for immediate recovery with reasons.

This, in my view, would meet the ends of justice and this would meet the vacuum created by the statute, and this would be in the interest of the parties in the light of the statutory remedy of appeal available to the parties. It is observed that the Board would take note of realities in these cases, and, it is hoped that appropriate circular/s be issued. Till such time, during the interregnum period, the above directions govern the case. The Commissioner of Customs is directed to send a copy of this order to his subordinates for their reference and for needful action.

14. Petition stands disposed of with the above directions. No costs.