

(2010) 06 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No. 7915 of 2006

Colourtex and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-06-2010

Acts Referred:

Constitution of India, 1950 — Article 142
Customs Act, 1962 — Section 129C, 129C(2), 129C(5)

Citation : (2010) 3 GLH 104

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Kamal Trivedi, with Mr. Uday Joshi, for M/s Trivedi and Gupta, for the Appellant; P.S. Champaneri for Respondents 6 - 7 Notice Served for Respondents 1 - 5, for the Respondent

Final Decision : Allowed

Judgement

Mr. D.A. Mehta, J.—The petition challenges the opinion (termed to be an order) dated 7th March 2006 recorded by respondent No. 4 herein and communication dated 28th March 2006 fixing the hearing of the matter before Third Member of the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (the Tribunal). On 19th December 2003, an Order in Original came to be made by respondent No. 6 which was challenged by way of appeal before the Tribunal. On 12th August 2005, the Bench which was assigned the appeals, heard the appeal and one of the Members allowed the appeal filed by the petitioners while the other Member rejected the appeal filed by the petitioners. The President of the Tribunal in exercise of powers u/s 129C(5) of the Customs Act, 1962 (the Act), placed the matter before the Third Member for hearing the reference on difference of opinion. On 10th October 2005, when the matter was listed before the Third Member for hearing, petitioners invited attention to a Rectification of Mistake Application filed by the petitioners before the Tribunal requesting that the hearing of the matter before Third Member may be adjourned till the original Bench decides the Rectification of Mistake Application. The Third Member

rejected the application for rectification of mistake. When the matter was carried by way of petition before this High Court being Special Civil Application No. 20771 of 2005, vide order made on 14th October 2005, the High Court recorded as under while rejecting the petition on other issues :-

"[5] It is not necessary to deal with the merits of the controversy between the parties. Section 129C(5) of the Act is couched in clear unambiguous terms. The Third Member who is assigned the matter by the President is required to hear only on the point or points on which there is difference of opinion amongst the Members of the Bench who heard the appeal originally. The Third Member can decide only such point or points because the President can make reference only on such point or points of difference of opinion. The Third Member cannot derive any further jurisdiction because the matter has thereafter to be placed before the Bench which originally heard the appeal and the appeal is required to be disposed of in accordance with majority of opinion of the Members.

[6] In these circumstances, the Third Member could not have passed the order dated 10/10/2005 (Annexure "D"). Accordingly, the said order dated 10/10/2005 (Annexure "D") is hereby quashed and set aside. "

2. When the Third Member took up for hearing the matter, it was pointed out that, in absence of any point or points of difference recorded by the original Bench which heard the appeal, the Third Member could not proceed to hear the matter. However, as the Third Member was not agreeable to the submission made, the matter was brought before the High Court by way of Special Civil Application No. 21526 of 2005 seeking appropriate direction. The petitioners were permitted to withdraw the petition so as to approach the President of the Tribunal.

3. Accordingly, the petitioners moved an application before the President, but the Registry of the Tribunal forwarded the application to the Bench who rejected the same. The order dated 6th December 2005 made by the Bench was, thus, challenged by way of one more petition being Special Civil Application No. 24130 of 2006. The said petition has been decided vide judgement rendered on 12th January 2006 as reported in *Colourtex and Another Vs. Union of India (UOI) and Others*, .

4. In the meantime; it appears that, on 9th/11th December 2005, one of the Members constituting the Bench originally, namely, Shri Moheb Ali M., Member (Technical) retired.

5. Vide communication dated 8th February 2006, the petitioners, through their Advocates, sought direction from the President for making a reference to the Third Member only after the Bench formulated and stated specific point or points of difference. On 15th February 2006, the Registry of the Tribunal informed the Advocates of the petitioners that as one of the Members had retired, the original Bench could not be convened and the petitioners were requested to move the High Court for necessary modification of the direction.

6. The learned Advocates for the petitioners mentioned the matter orally before the Bench and it is stated in the additional affidavit dated 15th April 2006 that the Hon"ble Court was of the view that in such a situation, law would take its own course. This fact was brought to the notice of the Registry once again by the learned Advocates. Thereafter, it appears that the President of the Tribunal passed an order which has been reproduced in the communication dated 27th February 2006 addressed to the Assistant Registrar by the Deputy Registrar. The said order made by the President reads as under:-

"Since Hon"ble Member (T) Mr. Moheb Ali M. retired on 11.12.2005, it will now not be possible for that member to state points of difference. The Hon"ble Vice President Mumbai who was the other differing Member of the Bench is requested to formulate points of difference arising from the two opinions and make reference u/s 129C(5) to the President for further action as per the provisions of Section 129C(5) of the Customs Act, 1962."

7. Respondent No. 4, one of the Members who originally constituted the Bench, has treated this order of the President as a direction, as can be seen from the opinion expressed on 7th March 2006 which is under challenge. Accordingly, respondent No. 4 has formulated five points of difference stated to arise from two opinions. Pursuant thereto, it appears that the President has assigned the matter to respondent No. 5 as Third Member and the appeal has, accordingly, been posted for hearing as per communication dated 28th March 2006.

8. On behalf of the petitioners, it is submitted that the President of the Tribunal has erred in making an order on the administrative side, directing the respondent No. 4, i.e. the Member who is still in service to formulate the point or points of difference of opinion on the basis of the two opinions expressed by respondent No. 4 and the Member who has already retired. It was submitted that a plain reading of Section 129C(5) of the Act indicates that there can be difference of opinion only between Members who constitute a Bench and in absence of a Bench, no such point or points could have been recorded by the remaining Member of the Bench originally constituted. It was submitted that a direction may now be issued to the Tribunal to hear the appeal afresh by a Division Bench and not only a Third Member.

9. Though served, there is no appearance on behalf of the respondent Nos. 1 to 5. Learned Advocate appearing for respondent Nos. 6 and 7 has been heard. The averments made in affidavit dated 30th June 2010 filed on behalf of respondent No. 7 have been reiterated. It is submitted that the points of difference had already been stated in order dated 6th December 2005 and therefore, there was no question of re-framing the issues. That even otherwise, the impugned order dated 7th March 2006 has merely reiterated the same points of difference and therefore also, there is no infirmity in the impugned order and the Third Member must be permitted to proceed with the hearing of the appeal. It was, therefore, submitted that the petition be rejected, leaving it open to the Third Member of the Tribunal to proceed with the hearing of the appeals.

10. In the judgement rendered on 12th January 2006 in the petitioner's own case in Special Civil Application No. 24130 of 2005, the High Court has elaborately dealt with the provisions of Section 129C(5) of the Act as can be seen from paragraph Nos. 15 to 20. Unfortunately, the direction issued in paragraph No. 23 of the said judgement has not been understood either by the President or the Member who originally constituted the Bench, namely, respondent No. 4.

11. It is necessary once again to refer to the provisions of Section 129C(5) of the Act, which reads as under:-

"129C (5) : If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority; but if the members are equally divided, they shall state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it."

12. Before going to the said provision, it is necessary to briefly recapitulate that Section 129C of the Act deals with the procedure which the Appellate Tribunal may adopt. Under sub-section (1) of Section 129C of the Act, it is provided that the powers and functions of the Tribunal may be exercised and discharged by Benches constituted by the President from amongst the Members thereof. Sub-Section (2) of Section 129C of the Act stipulates that a Bench shall consist of one Judicial Member and one Technical Member, subject to provisions contained in sub-section (4) which permits disposal of certain cases by Single Member upon fulfillment of the requisite conditions stipulated in the said sub-section.

13. Thereafter, sub-section (5) relates to the situation where Members of a Bench differ in opinion on any point or points. The legislative scheme therefore which unfolds is that normally, every appeal has to be heard by a Division Bench consisting of one Judicial and one Technical Member. It is only in a case where the issue involved is of lesser value, namely, lesser than the monetary limit set out in sub-section (4) of Section 129C of the Act that the matter is to be heard by a Single Member. In the facts of the present case, admittedly, the matter was originally placed before a Division Bench. In the circumstances, there would be no occasion for a Single Member to take up the appeal for hearing. Therefore, even without taking recourse to requirements of sub-section (5) of Section 129C of the Act, respondent No. 4 could not have made an order in the guise of recording an opinion. The Bench which had originally heard the appeal was no longer in existence upon retirement of the Member (Technical) and therefore, it was incumbent upon the President to have assigned the appeal to a Division Bench as required by sub-section (2) of Section 129C of the Act.

14. Even if one assumes that the said order, as reproduced by respondent No. 4 in the order dated 7th March 2006, was made by the President in compliance with direction issued by this Court in paragraph No. 23 of the earlier judgement rendered on 12th January 2006, the President could not have ignored the statutory provision of Section 129C(2) of the Act once having originally assigned the appeal to a Division Bench. No direction of any Court could be read to mean that an action contrary to statutory provision is warranted by any authority.

15. In the case of Oil and Natural Gas Corporation Ltd. v. O. L. of Ambica Mills Co. Ltd., 2005 (1) GCD (Gujarat), this High Court referred to the Apex Court decision in the case of Supreme Court Bar Association Vs. Union of India and Another, and reproduced the following extracts from the said judgement :-

"This power exists as a separate and independent basis of jurisdiction apart from the statutes."

"This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly."

Thereafter, this Court summarized the position in the following words :--

"Thus, even if it is accepted that the bunch of orders made by the Apex Court are under Article 142 of the Constitution, the said orders cannot be read as having ignored any substantive statutory provisions dealing with the subject i.e. winding up of a Company in liquidation and hence also the claim made by ONGC is required to be tested in light of the provisions of the Act read with provisions of The Provincial Insolvency Act, 1920."

16. As the aforesaid judgement principally relates to powers in exercise of jurisdiction under Article 142 of the Constitution of India, it is also necessary to consider the position when the Apex Court exercises powers of an Appellate Court. In the case of Commissioner of Income Tax v. Baroda Peoples Co-operative Bank Ltd., [2006] 280 ITR (Guj.), the High Court was called upon to decide the legal position. After referring to the Apex Court judgement in the case of Variety Emporium Vs. V.R.M. Mohd. Ibrahim Naina, , the Court extracted paragraph 7 of the said judgement and thereafter, summarized the legal position in the following words :-

"The legal position thus is that an order of the Apex Court cannot be understood as laying down a proposition contrary to law. The order of the Apex Court cannot and should not be construed in a manner so as to be inconsistent with the provisions of the statute as the Apex Court could not have contemplated passing an order contrary to the provisions of the Act."

17. If the Apex Court cannot make any direction contrary to a statutory provision, the same position in law would apply to the High Court with a greater

rigour, as the High Court does not have recourse to Article 142 of the Constitution of India.

18. Insofar as sub-section (5) of Section 129C of the Act is concerned, a plain reading indicates that the Section would come into play only in a case where the Members of a Bench differ in opinion on any point. In such an eventuality, the point shall be decided according to the opinion of the majority, if there is a majority. However, in a case where the Members are equally divided, meaning thereby where the Bench is constituted of even number of Members, they shall state the point or points on which they differ and make a reference to the President (emphasis supplied). If such a reference is made to the President, the President may himself hear or assign the matter on such point or points to any other Member of the Appellate Tribunal. After the President or the Third Member renders an opinion on reference, the appeals have to be decided in accordance with the opinion of the majority, and the majority has to be from amongst the Members who have heard the case and includes the Members who first heard it.

19. Thus, by no stretch of imagination or legal ingenuity, can one read and interpret the provisions to mean that even in absence of a Bench, only one of the Members who originally constituted the Bench, can state the point or points of difference and make a reference to the President. It is only in peculiar facts of the present case that this situation has come up because of the litigation that ensued between the parties. To be more precise, between the petitioners and the Tribunal, that this situation has arisen. One would have expected the President to read the provision and act accordingly considering the plain language of the provision.

20. In the circumstances, the entire exercise commencing from the order made by the President directing respondent No. 4 herein to formulate the points of difference, the order (opinion) dated 7th March 2006 and the communication dated 28th March 2006 are held to be bad in law being contrary to statutory provisions and are hereby quashed and set aside. The Tribunal is directed to hear the appeals afresh without being influenced by any of the preceding proceedings. The President shall ensure that the appeals are heard in consonance with the provisions of Section 129C(2) of the Act as per the original assignment of the appeals to a Division Bench by a division Bench having territorial jurisdiction as per the position prevalent today. The petition is allowed, accordingly, in the aforesaid terms. Rule made absolute with no order as to costs.