
(2018) 08 P&H CK 0458

In the Punjab And Haryana At Chandigarh

Case No : Custom Appeal No. 14 Of 2016 (O&M)

Commissioner Of Central Excise & Service Tax

APPELLANT

Vs

Gaurav Pharma Limited

RESPONDENT

Date of Decision : 21-08-2018

Acts Referred:

Customs Act, 1962 — Section 110, 110A, 129(1)(a), 129A, 129(C)(5), 129(1)(a), 129, 129(c)(6)

Citation : (2018) 08 P&H CK 0458

Hon'ble Judges : Rajesh Bindal, J; Amit Rawal, J

Bench : Division Bench

Advocate : Sharan Sethi

Final Decision : Dismissed

Judgement

1. The Revenue is in appeal against the order passed by the Five Member Bench of the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi (for short, 'the Tribunal'), arising out of Appeal Nos. C/53878/2014-CU(DB) and C/53901/2014-CU (DB), raising following substantial questions of law:-

"(i) Whether an appeal lies before CESTAT against the order passed by the Commissioner (Customs) under Section 110A of the Customs Act, 1962 for provisional release of the goods or not?

(ii) Whether the reference of CESTAT's Larger Bench of 5 Members is legally maintainable on the basis of grounds summarized?

(iii) Whether the Akanksha Larger Bench decision of the CESTAT dated 09.10.2012 being based upon the correct legal position requires any interference?

(iv) Whether the Larger Bench of 5 Members may like to answer the reference made to it to the effect that an appeal against a decision or order passed by Commissioner of Customs for provisional release of seized goods documents,

etc., made under Section 110A of the Customs Act, 1962 lie before the CESTAT under Section 129(1)(a) of the Customs Act, 1962?"

2. The appeals were preferred before the Tribunal against the order passed by the Commissioner of Customs and Central Excise, Rohtak, directing provisional release of goods in exercise of powers under Section 110A of Customs Act, 1962 (for short, 'the Customs Act'). Two Member Bench of the Tribunal while disagreeing with earlier order passed in *Akanksha Syntax Private Limited vs CC (General)*, Mumbai 2013 (289) E.L.T. 186 (Tri.- Mumbai), wherein it was opined that the appeal against the order passed under Section 110A of the Customs Act, is not maintainable, referred the matter to the President of the Tribunal for constitution of a Larger Bench to decide the issue. It is how the matter was listed before a bench consisting of five member including the President of the Tribunal.

3. Learned counsel for the appellant sought to argue that two Member Bench could not have possibly referred the matter to the Five Member Bench as it could at the best be referred to a Larger Bench of three members. In earlier case, which was doubted, the matter was considered by a third member on a difference of opinion by two members. He further submitted that any order passed under Section 110A of the Customs Act is an administrative order, hence, no appeal was maintainable against the same before the Tribunal under Section 129A of the Customs Act.

4. After hearing learned counsel for the appellant, we do not find any merit in the submissions made. Two Member Bench of the Tribunal having doubt on the opinion expressed by an earlier decision of Larger Bench in *Akanksha Syntax Private Limited's case* (supra), vide order dated 25. 5.2015 referred the matter to the President of the Tribunal for consideration and constitution of a Larger Bench for decision of the issue.

Relevant para thereof is extracted below:-

"The registry is directed to place the records before the Hon'ble President for consideration and to constitute the Larger Bench of this Tribunal to decide above mentioned issue."

5. A perusal of the aforesaid para of the two Member Bench of the Tribunal shows that first contention raised by learned counsel for the appellant is totally misconceived as the matter was not referred to be heard by a bench consisting of five members by the two members as it was merely referred to the President of the Tribunal for constitution of a larger Bench. Thereafter, it was an administrative action by the President of the Tribunal considering the circumstances of the case as to how much members should constitute the larger Bench.

6. Issue regarding jurisdiction of the President of the Tribunal to constitute larger Bench for hearing of a case was considered by Hon'ble the Supreme Court in *Union of India and another vs Paras Laminates (P) Limited* (1990) 4 Supreme

Court Cases 453, and it was opined that the President of the Tribunal has the power to constitute a Larger Bench, as the power is inherent in Section 129(C) (5) of the Customs Act. Relevant paras

10 and 11 of the aforesaid judgment are reproduced hereunder:-

"10. That the President has ample power to refer a case to a larger Bench is not in doubt in view of sub-section (5) of Section 129-C, which we have set out above. That provision clearly says that in the event of the members of a Bench differing in opinion on any point, and the members are equally divided, the case shall be referred to the President for hearing on any such point by one or more for members of the Tribunal, and such point shall be decided according to the opinion of the majority of the members.

11. It is true that sub-section (5) refers to difference of opinion arising amongst members of a Bench in a particular case, and not specifically where the members of a Bench doubt the correctness of an earlier decision. However, Section 129-C confers power of reference upon the President. That power should be construed to be wide enough to enable the President to make a reference where members of a Bench find themselves unable to decide a case according to What they perceive to be the correct law and fact because of an impediment arising from an earlier decision with which they cannot honestly agree. In such cases, it is necessary for the healthy functioning of the Tribunal that the President should have the requisite authority to refer the case to a larger Bench. That is a power which is implied in the express grant authorising the President to constitute benches of the Tribunal for effective and expeditious discharge of its functions."

7. The Tribunal is constituted by the Central Government under Section 129 of the Customs Act. Sub-sections 5 and 6 of Section 129-C of the Customs Act, read as under:-

"129-C. (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 the case shall be referred by the President 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 the members of the Appellate Tribunal who have heard the case including those who first heard it:

Provided that where the members of a Special Bench are equally divided, the point or points on which they differ shall be decided by the President.

(6) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or the discharge of its functions, including the places at which the Benches shall hold their sitting."

8. While concurring with the view expressed, we do not find any merit in the

aforesaid contention raised by learned counsel for the appellant regarding constitution of the Five Member Bench for hearing of the appeal.

The second issue sought to be raised is regarding maintainability of appeal against the order passed by the Commissioner for provisional release of goods in exercise of powers under Section 110A of the Customs Act. Relevant provisions of the Act are extracted below:-

Customs Act, 1962 "Section 2(1) "adjudicating authority" means any authority competent to pass any order or decision under this Act, but does not include the Boards, Commissioner (Appeals) or Appellate Tribunal;

Section 110A : Provisional release of goods, documents and things seized pending adjudication - Any goods, documents or things seized under Section 110, may, pending the order of the adjudicating authority, be released to the owner on taking a bond from him in the proper form with such security and conditions as the adjudicating authority may require.

Section 129A : Appeals to the Appellate Tribunal - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) under Section 128A;

(c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under Section 130, as it stood immediately before that day:"

9. The contention sought to be raised by the appellant in support of the argument that no appeal is maintainable against order passed by the Commissioner for provisional release of goods is that such an order is essentially an administrative decision. It is not adjudicatory, even though it may have been passed by an adjudicatory authority.

10. Scope of the provisions of Section 110 and 110A of the Customs Act and the jurisdiction exercised by the adjudicatory authority has been summed up by the Tribunal in paras 27 and 28 of the order, which are extracted below:-

"27. Section 110 of the Act empowers that if the proper officer has reasons to believe that any goods are liable to confiscation under this Act, he may seize such goods; upon seizure the said goods are in control/ custody of the customs department. Ownership of seized goods continues with the person from whom such goods were seized. Section 110A provides for provisional release of seized goods pending the order of the adjudicating authority. Such release can be

ordered only by adjudicating authority with such conditions as he may require. Later, sustainability of seizure and consequences for the owner will be decided after due completion of investigation, by the adjudicating authority.

28. Order for provisional release restores the seized goods to the owner. The conditions imposed for such restoration is decided by the adjudicating authority. Such decision will certainly have legal consequence to the owner of goods."

11. In the light of powers exercised by the adjudicatory authority, now the question arises as to whether in terms of provisions of 129A of the Customs Act an appeal is maintainable before the Tribunal, in our opinion, the answer would be in positive. Section 129(1)(a) of the Customs Act provides that any person aggrieved by any of the following orders may appeal to the Tribunal against such orders, if such an order has been made by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicatory authority. The fact that order of provisional release of goods is passed by an adjudicatory authority is not in dispute. The only distinction sought to be made is that it has administrative character and not quasi judicial to entitle a party effected by it to file appeal before the Tribunal. We do not find any error in the observations made by the Tribunal in the order impugned that the manner of exercise of powers having not been specifically defined in the Customs Act to the extent which of the order will be administrative or quasi judicial.

12. Under Section 110A of the Customs Act, the adjudicatory authority exercises wide range of discretionary powers. Whenever such an power is exercised, the necessary consequences of which is determination of rights of the parties, the principles of natural justice step in, unless specifically excluded by the statute. It is not the case of the Revenue that the statute bars opportunity of hearing to the party affected. It is settled principle of law that whenever civil consequences follow from an order passed by an authority, it assume the character of a quasi judicial order.

Reference has been made to judgment of Hon'ble the Supreme Court in Raj Kumar vs CIT 2007(2) SCC 181.

13. The issue as to whether any authority is considered as a quasi judicial authority and the decision rendered by it as a quasi judicial decision even in cases where the lis is not between the two contending parties, but the State on one side was considered by Hon'ble the Supreme Court in Indian National Congress (I) vs Institute of Social Welfare 2002(5) SCC 685. The opinion express was that wherever statutory authority is to act judicially, its decision is termed as quasi judicial as the rights between the parties are determined. Relevant paras thereof are extracted below:-

"20. But there are cases where there is no lis or two contending parties before a statutory authority yet such a statutory authority has been held to be quasi-judicial and decision rendered by it as quasi-judicial decision when such a statutory authority is required to act judicially. In Queen vs. Dublin Corporation

(1878) 2 ILR 371, it was held thus :

" In this connection the term judicial does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. And if there be a body empowered by law to enquire into facts, makes estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts."

21. Atkin L.J. as he then was, in *Rex vs. Electricity Commissioners* (1924) 1 KB 171 stated that when any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, such body of persons is a quasi-judicial body and decision given by them is a quasi-judicial decision. In the said decision, there was no contest or lis between the two contending parties before the Commissioner. The Commissioner, after making an enquiry and hearing the objections was required to pass order. In nutshell, what was held in the aforesaid decision was, where a statutory authority is empowered to take a decision which affects the rights of persons and such an authority under the relevant law required to make an enquiry and hear the parties, such authority is quasi-judicial and decision rendered by it is a quasi-judicial act.

22. In *Province of Bombay vs Kusaldas S. Advani & Ors.* (supra), it was held thus:

"(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act ; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In other words, while the presence of two parties besides the deciding authority will prima facie and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

23. The legal principles laying down when an act of a statutory authority would be a quasi-judicial act, which emerge from the aforestated decisions are these : Where (a) a statutory authority empowered under a statute to do any act (b)

which would prejudicially affect the subject (c) although there is no lis or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial.

24. Applying the aforesaid principle, we are of the view that the presence of a lis or contest between the contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority is sufficient to hold that such a statutory authority is quasi judicial authority. However, in the absence of a lis before a statutory authority, the authority would be quasi-judicial authority if it is required to act judicially.

25. Coming to the second argument of learned counsel for the respondent, it is true that mere presence of one or two attributes of quasi judicial authority would not make an administrative act as quasi-judicial act. In some case, an administrative authority may determine question of fact before arriving at a decision which may affect the right of an appellant but such a decision would not be quasi-judicial act. It is different thing that in some cases fair-play may demand affording of an opportunity to the claimant whose right is going to be affected by the act of the administrative authority, still such an administrative authority would not be quasi-judicial authority.

26. What distinguishes an administrative act from quasi-judicial act is, in the case of quasi-judicial functions under the relevant law the statutory authority is required to act judicially. In other words, where law requires that an authority before arriving at decision must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority.

27. Learned counsel for the respondent then contended that a quasi- judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial and in that view of the matter, the function discharged by the Election Commission under Section 29A of the Act is totally administrative in nature. Learned counsel in support of his argument relied upon the following passage from Wade & Forsyth's Administrative Law :

"A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A typical example is a minister deciding whether or not to confirm a compulsory purchase order or to allow a planning appeal after a public inquiry. The decision itself is administrative, dictated by policy and expediency. But the procedure is subject to the principles of natural justice, which require the minister to act fairly towards the objections and not (for example) to take fresh evidence without disclosing it to them. A quasi- judicial decision is therefore an administrative decision which is subject to some measure of judicial procedure."

28. We do not find any merit in the submission. At the outset, it must be borne in mind that another test which distinguishes administrative function from quasi-judicial function is, the authority who acts quasi-judicially is required to act

according to the rules, whereas the authority which acts administratively is dictated by the policy and expediency. In the present case, the Election Commission is not required to register a political party in accordance with any policy or expediency but strictly in accordance with the statutory provisions. The afore-quoted passage from Administrative Law by Wade & Forsyth is wholly inapplicable to the present case. Rather, it goes against the argument of learned counsel for the respondent. The afore-quoted passage shows that where an authority whose decision is dictated by policy and expediency exercises administratively although it may be exercising functions in some respects as if it were judicial, which is not the case here." (emphasis supplied).

14. It cannot be disputed that the powers vested with the adjudicating authority to be exercised for considering the prayer for provisional release of goods is circumscribed with well settled principles of law governing the same. Such an order is not based on any policy, rather on settled principles of law. These orders cannot be issued mechanically, rather many factors are required to be considered such as the nature of goods, seriousness of offence, whether the goods being imported are prohibited, etc. etc. Any such order passed has civil consequences, hence, it cannot be opined that the same is passed by the adjudicating authority in exercise of its administrative powers rather it has rightly been opined by the Tribunal that the exercise of powers by the Commissioner under Section 110A of the Act is quasi judicial in nature and so the order passed.

15. The language of Section 110A(1)(a) of the Customs Act is quite wide in its application to take within its umbrella such an order passed, against which appeal would lie to the Tribunal. Restrictive meaning as is suggested by the Revenue cannot be given to the provisions. Power of judicial review in exercise of extraordinary jurisdiction under Article 32 and 226 of the Constitution of India is altogether different and cannot be compared with a statutory right of appeal where the scope of interference is larger. The terms used in Section 129(1)(a) of the Customs Act are 'decision' or 'orders'. Meaning thereby it is not limited to any final decision.

16. Similar view has been expressed by Delhi High Court in the case of Gurdeep Kaur passed in WP(C) 4152/2015 on 17.9.2015 and in Cantex Chemical Fibres Private Limited 2014(310) E.L.T. 50, by Rajasthan High Court in the case of Shivmahal Textiles Private Limited in CWP No. 4946/2012, decided on 18.12.2012 and Gentleman Suitings Private Limited 2012(12) TMI 1001.

17. For the reasons mentioned above, we do not find any substantial question of law arises in the present appeal. The same is accordingly dismissed.