

(2012) 03 MAD CK 0005

In the Madras High Court

Case No : Writ Appeal No. 18 of 2011 and M.P. No. 1 of 2011

Commr. of Cus. (SEA)

APPELLANT

Vs

C.P. AQUA Culture (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 130, 130E

Citation : (2013) 290 ELT 202

Hon'ble Judges : M. Venugopal, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : S. Xavier Felix, for the Appellant; T. Ramesh and K. Mohana Murali, for the Respondent

Final Decision : Dismissed

Judgement

Elipe Dharma Rao, J.—Aggrieved by the order dated 22-11-2010 passed by the learned single Judge in C.P. Aquaculture (India) Pvt. Ltd.

Vs. President, CESTAT, wherein and by which the Writ Petition filed by the first respondent seeking for a direction to the Customs, Excise and

Service Tax Appellate Tribunal to pass detailed order in line with the pronouncement made in the open Court and gist of the decision recorded and

singed on 4-6-2009 in Appeal No. C/7/2009, was allowed, the Department has come up with the present appeal. From the materials, it is seen

that the appeal filed by the first respondent, a private company, in Appeal No. C/7/2009 before the second respondent Customs, Excise and

Service Tax Appellate Tribunal [for short, "Appellate Tribunal"] as against the order of the Commissioner of Customs, Chennai dated 10-11-

2008, was posted for the hearing before the Appellate Tribunal on 4-6-2009 and after hearing the detailed arguments from both sides, the

Appellate Tribunal pronounced the order in the open Court allowing the appeal and the gist of the said pronouncement was recorded and signed

by the Members on 4-6-2009 but the matter was entrusted to the Member (Technical) for drafting a detailed order giving the reasons.

Subsequently, vide internal note dated 22-6-2009, the matter was posted for re-hearing on 30-6-2009. As against the same, the first respondent

Company filed the Writ Petition seeking for a direction to the Appellate Tribunal to pass the detailed order in line with the pronouncement made in

the open Court and gist of decision recorded and signed on 4-6-2009.

2. Learned single Judge, on consideration of the submissions made by the learned counsel for the parties and the materials placed in record,

allowed the Writ Petition directing the Appellate Tribunal to pass a detailed order in the appeal filed by the first respondent in consonance with the

gist of the decision pronounced, recorded, signed and dated in open Court on 4-6-2009 within 15 days from the date of receipt of the order.

Feeling aggrieved, the Department has preferred this Writ Appeal.

3. Heard the learned counsel representing the Department as well as the learned counsel appearing for respondent and perused the records.

4. The main contention of the learned counsel representing the Department is that the Tribunal immediately after hearing the appeal on 4-6-2009

observed that ""appeal allowed"" without gist of the order, and according to him, it is only formal expression of the Tribunal to allow the appeal in the

open Court without dictating any reasoned order and such an oral order announced in open Court but not followed by a detailed written order

giving reasons, is not a valid order in the eye of law. He further submitted that the note dated 22-6-2009 given by the Technical Member for re-

hearing of the appeal was accepted by the Vice-President (Judicial Member) and, therefore, prayed for interference of this Court and also sought

for direction to the Tribunal to rehear the appeal as gist of the order was not passed by it on 4-6-2009.

5. On the other hand, learned counsel appearing for the first respondent would submit that the operative portion/gist of the decision finally

pronounced in the open Court after hearing the arguments and the Order Sheet is duly signed by both the Members, the appeal before the

Appellate Tribunal had attained finality and the same cannot be posted for

rehearing. According to him, once the Tribunal becomes functus officio, it cannot modify or alter the decision already pronounced in open Court. He submitted that the learned single Judge has rightly appreciated the facts in its proper perspective and sought for dismissal of the appeal.

6. Before going into the merits of the case, it is necessary to extract Rule 26 of the Customs, Excise and Service Tax Appellate Tribunal

(Procedure) Rules, 1982 (for short, "CESTAT Rules"] which contemplates as to how a judgment has to be pronounced. Rule 26 reads as

follows:-

Rule 26: Every order of the Tribunal shall be in writing and shall be signed and dated by the Members constituting the Bench concerned. Last date

of hearing of the matter shall be typed on the first page of the order. If the order is dictated on the Bench, the date of dictation will be the date of

the final order. If the order is reserved, the date of final order will be the date on which the order is pronounced.

In cases, where gist of the decision is pronounced without the detailed order, the last para of the detailed order shall specify the date on which the

gist of the decision was pronounced. In such cases, the date of the final order shall be the date on which all the Members of the Bench sign the

order. If they sign on different dates, the last of the dates will be the date of the order.

7. In the case on hand, though the order was pronounced in the open Court on 4-6-2009 as ""Appeal allowed"" and last hearing date was recorded

as 4-6-2009, an endorsement has been made by the Vice-President to the Member (Technical) to the effect ""for orders please"" from which it is

clear that the matter was entrusted to the Member (Technical) for drafting a detailed order. It is evident from page 18 of the typed set that both the

Vice-President and the Member (Technical) have signed on 4-6-2009 while pronouncing the decision. Therefore, there cannot be any dispute that

4-6-2009 is the last date of hearing.

8. We are satisfied that the circumstances leading to the filing of the appeal is not as per the provision of the Act or Rules.

Apart from the merits of the case, the question for consideration in this appeal is as to whether the High Court has power to entertain an appeal as

against the order of the Appellate Tribunal.

9. As this juncture, it would be appropriate to refer to the Rule position with regard to the maintainability of the appeal before the High Court in the case arising out of CESTAT Rules.

10. It is true that unamended Section 130 of the Customs Act speaks about appeal to High Court. It enables that aggrieved person to file an appeal to the High Court as against the order passed by the Appellate Tribunal on or after the 1st day of July, 2003. But it is pertinent to note that by virtue of enactment of the National Tax Tribunal Act, 2005 (49 of 2005), several provisions of the Act were omitted including Section 130.

This Section was omitted by Section 30 and Schedule, part VI with effect from 28-12-2005. Therefore, from the date of omission of Section 130, the jurisdiction of the High Court is excluded.

11. Now in the light of Act 49 of 2005, let us consider whether the Writ Petition filed by the first respondent Company as against the order of the Appellate Tribunal is maintainable.

12. In this matter, the first respondent Company approached this Court invoking Article 226 of the Constitution of India and the learned single Judge, allowed the Writ Petition directing the Appellate Tribunal to pass a detailed order in consonance with gist of the decision pronounced, recorded, signed and dated in open Court on 4-6-2009.

13. When the Bench posed question on the learned counsel for the first respondent with regard to the maintainability of the Writ Petition itself, he submitted that the High Courts in India are superior courts of record and they have original and appellate jurisdiction. According to him, unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. It is his further submission that in view of the fact that the High Court has all inherent and plenary power, the Writ Petition filed by the first respondent is maintainable.

14. There is no dispute about the above proposition. The High Court in India are having inherent and plenary powers, and as a court of record the High Court have unlimited jurisdiction including the jurisdiction to determine their own powers. However, the said principle has to be decided with the specific provisions in the enactment and in the light of the scheme of the Act, particularly in this case, in view of the enactment of Act 49 of

2005 by virtue of which the jurisdiction of the High Court u/s 130 of the Act has been ousted, it would not be possible to hold that in spite of the

abovementioned statutory provisions, the High Court is free to entertain appeal against the order passed by the Appellate Tribunal.

15. Though the learned counsel for the first respondent tried to convince the Bench that notification is yet to be issued, the Act is very clear that the jurisdiction of the High Court was excluded from 28-12-2005.

16. Even on merits of case, the Tribunal simply held ""appeal allowed"" without even gist of the decision and, therefore, the same cannot be termed

as decision or order or judgment of the Tribunal. It is seen that the Member (Technical) instead of passing a reasoned order, vide internal note

dated 22-6-2009, posted the matter for re-hearing on 30-6-2009 and the order made to that effect may be usefully extracted below:-

We allowed the appeal accepting the Counsel's plea that ratio of Virlon case is that the cap of 50% of FOB value for benefit of Notification No.

2/95-C.E. did not apply and hence though there were no exports, benefit of 2/95-C.E. was available to DTA clearances which was denied by the

Commissioner in the order impugned. It appears that ratio of Virlon is that 50% cap applied to OTA sales under para 9(b) of Policy, such cap did

not apply to DTA sales against foreign exchange; other supplies of para 10(b) of Policy. Policy prescribed cap only in respect of 9(b) sales; such

restriction was not there in Policy in para 10(b). Court did not overrule the cap of 50% of FOB value in respect of DTA sales against Indian rupee

prescribed in 2/95-C.E. We may rehear.

17. In the above extracted order, the Vice-President, who is a Judicial Member, has also signed which shows that the Technical Member's note to

rehear the appeal was fully accepted by the Vice-President of the Tribunal and, therefore, the appeal was posted for hearing to 30-6-2009 to

rehear the appeal by both parties. It cannot be disputed that reopening of the matter for rehearing suo motu at the instance of the members of the

Bench cannot have legal approval.

18. In the meanwhile, the President of the Customs, Excise and Service Tax Appellate Tribunal issued Circular in Order No. 4 of 2009 dated 17-

7-2009 with regard to the time gap for hearing of the arguments and delivering the judgment in a matter. The relevant portion of the Circular is re-

produced hereunder:-

On expiry of period of three months without the order being delivered and pronounced from the day of conclusion of the hearing of the arguments

in a matter, such matter shall be deemed to have been "not heard" and will have to be listed for fresh hearing only after obtaining prior order in

writing in that regard from the Hon"ble President.

19. At this juncture, it is pertinent to refer another document dated 22-9-2009 signed by the Registrar, CESTAT, New Delhi, addressed to the

Deputy Registrar, CESTAT, Chennai, which is found available at page 31 of the typed set of paper. It is in the nature of clarification on the subject

of re-hearing of Appeal Nos. C/240, 241 and 243 of 2008 wherein it is stated as follows:-

Once the Tribunal has disposed of the matter finally, the Tribunal renders itself functus officio in relation to such matter and cannot suo moto recall

the final order and interfere therein. Therefore, question of refixing of the matter in question does not arise.

20. As seen from the facts and circumstances of the case, if, for any reason, the matter is kept pending after pronouncement of the result or gist of

the judgment, for giving a reasoned order by the Member (Technical), he should have taken up the matter at the first instance. Instead, the

Member (Technical) took a different view and vide internal note dated 22-6-2009, posted the matter for re-hearing on 30-6-2009.

21. In view of the above legal position, we hold that the High Court has no power to entertain an appeal filed against the order of the Tribunal and

if the parties are aggrieved, they should have approached the Hon"ble Supreme Court by way of appeal u/s 130E of the Customs Act instead of

resorting to invoke Article 226 of the Constitution of India when the jurisdiction of this Court has been ousted by Act 49 of 2005 from 28-12-

2005. In the light of the above discussion, we are of the opinion that the learned single Judge ought not to have entertained the Writ Petition and

the view taken by the learned Judge needs to be interfered with. Since the learned single Judge, without considering the legal position with regard

to the maintainability of the Writ Petition, has allowed the Writ Petition filed by the first respondent Company, the same is set aside dismissing the

Writ Petition as not maintainable and the Writ Appeal stands allowed. However,

there will be no order as to costs. Consequently, connected
Miscellaneous Petition is closed.