
(2010) 11 MAD CK 0304

In the Madras High Court

Case No : Writ Petition No's. 26465 and 26466 of 2009 and M.P. No's. 2 of 2009 and 1 of 2010

C.P. Aquaculture (India) Pvt. Ltd.

APPELLANT

Vs

President, CESTAT

RESPONDENT

Date of Decision : 22-11-2010

Acts Referred:

Customs Act, 1962 — Section 129(6)

Citation : (2010) 260 ELT 501

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : T. Ramesh, for the Appellant; K. Mohana Murali and T.R. Senthil Kumar, for the Respondent

Judgement

K.B.K. Vasuki, J.—Both the writ petitions are arising out of appeal proceedings in Appeal No. C/07/2009 pending before the Appellate Tribunal. While 26465 of 2009 is filed to quash the order of the first Respondent/President of the Board dated 17-7-2009 thereby laying down certain directions in respect of the pending matters, WP. No. 26465 of 2009 is filed for directing the appellate Tribunal to pass detailed order in line with the gist of decision pronounced recorded and signed in open court on 4-6-2009 in the appeal proceedings of the Petitioner.

2. The brief facts which are relevant for consideration herein are as follows :

The Petitioner has filed an Appeal in C7/2009 before the 2nd Respondent/Appellate Tribunal against the order dated 10-11-2008 passed by the Commissioner of Customs. Chennai. The appeal was at the instance of the Petitioner posted for hearing on 4-6-2009 on which date argument was advanced on both sides for considerable length and the members of the Appellate Tribunal has after the hearing is concluded pronounced in open court the gist of decision in writing as "Appeal allowed" and both the members have signed the same on the same day and postponed the pronouncement of the detailed order by the Member (Technical) by name C. Karthikeyan with endorsement made by both the

Vice-President and Member to the effect that it is for the Member (Technical) to pass order. While the parties were awaiting detailed order following the gist of decision, a note was forwarded to the Vice President on 22-6-2009 by the Member Technical for re-hearing of the appeal on certain grounds and the same was endorsed by Vice President of the Tribunal and on the basis of the note dated 22-6-2009, the appeal was posted for rehearing on 30-6-2009 and the same compelled the Petitioner to come forward with the Misc. Application No. C/ MISC./252/09 praying to pass detailed order in line with the gist of the final decision pronounced in the open court on 4-6-2009 without re-hearing the appeal. It is stated in the petition that once the operative portion is finally pronounced in the open court after hearing both sides and the order sheet is signed by the members, the appeal reached its finality and the same cannot be reopened for rehearing and there is no provision under Customs, Excise and Service/Tax Appellate Tribunal procedure Rules (herein after referred to as "CESTAT Rules") to do so and the posting of the appeal for rehearing after pronouncement of the gist of final decision amounts to reviewing the order, for which, there is no provision in CESTAT and once the final order is passed, the Tribunal renders itself functus officio in relation to such matter and it cannot suo motto modify or alter the decision which is already pronounced in the open court. Pending this petition, the President of the Tribunal passed an order on 17-7-2009 thereby laying down certain guidelines in the matter of delivery or pronouncement of the order by the Tribunal and the order contains 10 directions, out of which Clause 4 and 5 are the subject matter of challenge in W.P. No. 26465/2009. The order dated 17-7-2009 was also followed by another order in 5/2009 dated 21-7-2009 as per which the Order No. 4/09 dated 17-7-2009 is directed to be made applicable to all pending matters as on 17-7-2009. It is not in dispute that after rehearing the Petitioner's appeal and the application are till date not disposed of. Pending the same, the Petitioner has come forward with the present two writ petitions for the reliefs as stated supra.

3. The main grievance raised on the side of the Petitioner in both the writ petitions is that the Tribunal having pronounced gist of the decision, after hearing both sides in the open court and having recorded the same and signed the same in the open court, is bound to pass final detailed order in the same line and the Tribunal has after pronouncement of the gist of decision become functus officio and is not vested with any power either to modify or alter the order or reopen the matter for rehearing and the rehearing would amount to reviewing its own order without any provision in CESTAT procedure. It is further contended by the learned Counsel for the Petitioner that Clause 4 and 5 of the Order No. 4 of 2009 dated 17-7-2009 to the effect that if no final order is passed even after expiry of three months without the order being delivered and pronounced from the date of conclusion of the hearing of the arguments, the same shall apply mutatis and mutandis to the cases where gist of the decision is pronounced and the same shall be deemed to have been "not heard" and will have to be listed for fresh hearing only after obtaining prior order in writing from the President of Tribunal,

are contrary to relevant provisions of law and are without any jurisdiction.

4. Per contra, the learned Counsel for the Respondents would seriously contended that the president is empowered to regulate the functioning of the benches in all the matters in discharge of its function and the circular is issued only in exercise of power vested upon the president and the directions was so issued only in pursuance of the in-direction issued in the decision made by Supreme Court (i) Anil Rai v. State of Bihar, reported in 2009 (233) E.L.T. 13 (SC) : 2009 (13) S.T.R. 465 (S.C.); (ii) R.C. Sharma Vs. Union of India (UOI) and Others, ; (iii) Division Bench judgment of Delhi High Court reported in Dinkar Khindria and Another Vs. Union of India (UOI) and Others, ; (iv) Division Bench judgment of Bombay High Court reported in Shivsagar Veg. Restaurant Vs. Asstt. Commissioner of Income Tax, 24(2) and Another, . Wherein according to the learned Counsel; for the Respondents the Supreme Court and the Bombay and Delhi High Court having expressed serious concern and anguish over the to delay in passing final orders issued general and specific directions and guidelines. It is further contend by the learned Counsel for the Respondents, that the tribunal has inherent power to recall its own order when there is error apparent on the face of the record to meet the ends of justice, in exercise of the statutory power vested upon the same for rectification of mistakes and posting the matter for rehearing is only in exercise of such inherent power and the same cannot be validly questioned by any of the parties to the proceedings.

5. The learned Counsel for the Petitioner and the Respondents have also in support of their respective contentions cited catena of judgments of Supreme Court, our High Court and other High Courts.

6. I have heard the rival submissions made on both sides and perused the records available herein.

7. The points arise for consideration herein are (1) whether the president is empowered to issue any order regulating the manner of functions of the benches in discharge of its functions if so whether such guidelines given effect to prospectively and retrospectively (2) whether the circular so issued by the president which is impugned herein is applied to the appeal proceedings in reopening the same for rehearing after the gist of the decision is pronounced, signed, written and dated in the open court.

8. The perusal of the Order No. 4/2009, dated 17-7-2009 with objectionable Clauses 4 and 5 impugned herein enclosed at pages 8 to 11 of the typed set of papers reveals that the same are issued only in the light of the decisions and directions issued by the Supreme Court and Bombay High Court in the judgments cited on the side of the Respondents with a view to avoid delay between the hearing of arguments and delivery of orders such delay is in the opinion of the Apex Court and other High Court likely to tarnish the image of judiciary and to shake the confidence of the litigant public in the same. The judgment of Apex Court and the Division Bench of other High Court have also

issued various directions in order to avoid delay in passing orders and the Bombay High Court has in the judgment reported in Shivsagar Veg. Restaurant Vs. Asstt. Commissioner of Income Tax, 24(2) and Another, specifically directed the President of ITAT to frame and laid down guidelines in the light of Supreme Court judgment Anil Rai case. The first Respondent/President CESTAT has even in the order issued by him referred to the earlier directions of the Supreme Court and Bombay High Court and referred to the circumstances under which order came to be issued. The attention of this Court is also drawn to the relevant provisions of Section 129B(6) of the Customs Act (herein after referred to as "Act") and Rules 4, 11, 16(5) & (6), 28(A)(7), 31(A), 40, 41, 44(1), 47 of CESTAT which deal with the power of the President to issue various orders in the matter of entertaining any appeal or applications, conduct of appeal or application, Constitution of Benches for hearing appeal, allotment of work, among benches, hearing of reference application and application for rectification of mistakes by the benches, various administrative general or special orders to Registrar and over all administration, filing and non-filing of the documents along with the appeal, implementation of the orders etc.,

9. That being the nature and extent of the power, vested upon the President under the Act and Rule and by legal dictum laid down by the Apex Court and High Court the Petitioner cannot be now permitted to say that the President has no power to issue any order the order containing the directions impugned in the writ petition. The Petitioner cannot be heard to raise any grievance individually also against the same for the following reason.

10. The reading of the order would reveal that it does not contain any clauses to the effect that the same is applicable retrospectively. However, the President has passed subsequent Order No. 5/2009, dated 21-7-2009 as per which it is applicable to pending matters as on 17-7-2009. The combined appreciation of both the orders would reveal that the same given effect only from the date of the order i.e., prospectively and not retrospectively.

11. Even otherwise, our High Court has had an occasion to deal with the issue as to whether any clarification/circular in the absence of any specific clause to the effect that it will have retrospective effect can be applied retrospectively. Our High Court in the batch of writ petition decided on 17-7-09 in Sundek India Ltd. v. Commissioner of Commercial Taxes and Ors. reported in 2009 (4) CTC 858 is pleased to observe that in tax matters the clarifications issued can be applied only prospectively failing which it will cause hardship to the assesses. That being the legal and factual position no further finding is necessary in this regard in so far as the circular impugned herein.

12. Regarding the validity and enforceability of the Clauses 4 and 5 in the Order No. 4/09, dated 17-7-2009, the same are for better appreciation extracted below :

4 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

5. The above stated procedure shall apply mutatis mutandis to the cases where gist of the decision is pronounced on conclusion of the hearing of the arguments by reserving the detailed order to be passed.

The reading of the same would reveal that it is applicable to cases when there is failure on the part of either single member or Division Bench of the tribunal to deliver or pronounce the detailed order even after three months from the date of conclusion of the hearing of the arguments or from the date of pronouncement of gist of decision. As rightly pointed out by the learned Counsel for the Respondents the reopening of the appeal filed by the Petitioner in appeal No. C/07/2009 for rehearing is on 30-6-2009 and in suo motto done much before the issuance of this order and the order is hence not applied to the Petitioner's appeal proceedings.

13. As a matter of fact, the Petitioner has already made representation to Registrar as well the President and the Deputy Registrar has in turn sought for clarification regarding the applicability or otherwise of Clauses 4 and 5 of the order to the Petitioner's appeal in which four months was already lapsed after the pronouncement of the operative portion of the order. The representation given by the Petitioner to the President and the clarification sought for by the Deputy Registrar from the Registrar are enclosed at Pages 16 to 18, 14 and 15 of the typed set filed by the Petitioner. While the clarification sought for by the Deputy Registrar from the Registrar on 23-10-2009 did nowhere mention the Order No. 4/09 dated 17-7-2009 it is mentioned only in the memorandum of the Petitioner. The clarification sought for by the Deputy Registrar is placed before the president by the registrar and the clarification issued by the president is as follows "The matter is on the judicial side before the tribunal. The parties/ advocate for any order in such matter have to approach the bench at respective place" The order was also communicated to the Deputy Registrar by the Registrar on dated 16-11-2009 enclosed at Page 19 of the typed set of papers.

14. Even otherwise the Petitioner has in the course of arguments produced Additional typed set of papers consisting of records relating to disposal of appeal proceedings in E. 5/4, 5/5 of 2002 filed by TVS motor company Ltd., There also the appeals are heard by the bench consisting of Vice-President and Member (Technical) and gist of the decision was pronounced written and signed by them on 22-7-2009 and the records are entrusted to Member (Technical) for passing final order and the Member (Technical) has on 20-8-2009 addressed to Vice-President seeking rehearing of the matter on some legal ground and on merits and the clarification was sought for from the President and the clarification issued by the President is as follows: "the tribunal renders itself functus officio in relation to such matters and cannot suo motto recall the final order and interfere

therein therefore the question of re-hearing of the matter in question does not arise".

15. In pursuance of the same the Member (Technical) recorded the final order and then sought for approval of the competent authority i.e., President to deliver the order and the approval was duly accorded for delivering the order and the Member (Technical) thereafter forwarded the file to Vice-President who is the other Member of the bench to do the needful for delivering the order and the detailed order was subsequently delivered on 10-2-2010. The perusal of the copy of the final order enclosed at pages 11 & 12 of the additional typed set of the papers reveals that the detailed order contains the date of hearing, date on which the gist of the decision is pronounced and the date of the final order is given at the top of the detailed order as 22-5-2009 and the detailed order is signed by the Member (Technical) on 28-10-2009 and the Vice-President on 10-2-2009.

16. As already referred to the main cause of action for filing both the writ petition is the reopening of the appeal, for rehearing where the gist of decision is already passed in favour of the Petitioner. As already referred to the appeal was heard in detail and the gist of the decision was pronounced in open Court appeal allowed and the same was recorded signed and dated by both the members on the same day and the records are also entrusted to Member (Technical) by the Vice-President/other Member of the Bench on the same day for recording detailed order. The Member (Technical) in his note dated 22-6-2009 forwarded to Vice-President explained the ground on which the matter is to be reheard. It is stated in the note enclosed at Page 2 of the typed set of paper as follows :

We allowed the appeal accepting the Counsel's plea that ratio of Virion case is that the cap of 50% of FOB value for benefit of Not. 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 Virion is that 50%) cap applied to DTA 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.

the same is also accepted by the Vice-President and the notice is issued for rehearing and the dated is fixed on 30-6-2009.

17. According to the learned Counsel for the Petitioner, once gist of decision is openly pronounced, written and signed with date the same cannot be recalled by the bench except by exercise of power u/s 129(B)(2) by way of application for rectification of mistake apparent on the face of the record and there is no suo-motto power of review. The relevant provision of Section 129(B) of the customs Act deals the manner in which and the time within which the orders to be passed

by the Appellate Tribunal Rule 26 of CESTAT procedure provides for the manner in which the final order to be passed and both Section 129(B) of the Act and Rule 26 of CESTAT is as follows :

Customs Act 129(b): The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

Rule 26 Order to be signed and dated: 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 case, 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.

18. The reading of the same reveals that the tribunal is empowered to pass its orders in two modes either by immediate dictation or by reservation in both the case the final date of the order the date of dictation on the bench and the date on which the final order is pronounced. The other mode is by pronouncing the gist of decision without detailed order and thereafter to pronounce the detailed order in such cases the detailed order shall contain the dates on which gist of decision is pronounced the date or dates on which the members sing in the detailed order and in such cases where the order is signed on different dates the date of the order is the last date on which either both or any of the members sign the order.

19. The combined reading of both Section 129(B) of the Act and Rule 26 would go to show that the appellate tribunal is after giving opportunity to the parties of being heard empowered to pass any order confirming modifying or annulling the order or to remand the same for fresh adjudication. It is not in dispute, that the statue does not contain any specific provision of law under which the tribunal is vested with power of review, the power vested upon the appellate tribunal u/s 129(B) is only to rectify any mistake apparent on the record that too when it is brought to the notice of the tribunal either by the commissioner of customs or by other party to the appeal.

20. Number of authorities are cited on both sides as to whether the tribunal has power only for rectification of mistake or wider inherent power of review and as to what is the error apparent on the face of the records and what is the nature

and extent of the power of review etc.,

21. The authorities produced on the side of the Petitioner are (i) Dinkar Khindria and Another Vs. Union of India (UOI) and Others, (ii) Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh, . (iii) Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, and (iv) Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, .

22. The authorities produced on the side of the Respondents are (1) Khushalchand B. Daga Vs. T.K. Surendran, 4th Income Tax Officer, A-1 Ward and Others, ; (2) Commissioner of Income Tax Vs. Dr. T.K. Jairaj, ; (3) Commissioner of Income Tax Vs. Shri Sudhir Choudhrie, ; (4) M/s. J.K. Synthetics Ltd. Vs. Collector of Central Excise, ; (5) Sunitadevi Singhania Hospital Trust and Another Vs. Union of India (UOI) and Another, ; (6) Ram Kirpal Vs. Union of India, ; (7) Aroon Phospho Products (P) Ltd. v. CCE, Bombay in 1996 (86) E.L.T. 476 (S.C.) ; (8) 1989 (25) ECR 207 ; (9) 1996 (83) ELT 192 ; (10) 1993 (68) ELT 918 (11) J.P. Jaiswal v. CC, Lucknow in 2008 (226) E.L.T. 13 (S.C.) (sic); (12) Anil Rai v. State of Bihar reported in 2009 (233) E.L.T. 13 (S.C.) : 2009 (13) S.T.R. 465 (S.C); (13) R.C. Sharma Vs. Union of India (UOI) and Others, ; (14) Devang Rasiklal Vora Vs. Union of India (UOI), ; (15) Dinkar Khindria and Another Vs. Union of India (UOI) and Others, ; (16) Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota Vs. Shukla and Brothers, ; (16) Shivsagar Veg. Restaurant Vs. Asstt. Commissioner of Income Tax, 24(2) and Another, ; (17) Suga Ram @ Chhuga Ram Vs. State of Rajasthan and Others, ; and (18) Joint Commissioner of Income Tax v. Saheli Leasing & Industries Ltd., in 2010 (253) E.L.T. 705 (S.C).

23. The law laid down in the cases cited on the side of the Petitioner is, that once the order is passed by the members of CESTAT, it cannot be altered by such members unless statute provides for review and only after hearing of parties and the power of review is wider than power of rectification and the power of rectification is only to rectify the mistake apparent on the face of the records and it may not be exercised on the ground, that the decision was erroneous on merits which would be the province of the court of appeal and any error which has to be established by a long drawn process of reasoning on points or where there may be considerably two opinions it can be hardly said to be any error apparent on the face of the record.

24. Whereas, the law laid down by the Supreme Court and other High Court in the authorities cited on the side of the Respondents is that the tribunal has power of rectification of mistake and inherent power of review in the interest of the principles of natural justice and necessary to discharge his function effectively for the purpose of doing justice between the parties, the tribunal has every jurisdiction apart from statutory jurisdiction to correct any error of committed by itself either to give effect to or in relation to its matter or to prevent abuse of process or to secure the ends of justice and the tribunal are under legal obligation to pass speaking and well reasoned order to ensure that

the decision is reached according to law and not the result of caprice whims of fancies or reached on the ground of policy or expediency and any formal expression of its decision to allow the appeal in the open court without dictating any reasoned order cannot be said to be its reasoned order and delay in pronouncement after conclusion of hearing is to be necessarily avoided etc.,

25. This Court is of the view that the legal observation of the Supreme Court and the Division Bench of other High Courts cited on both sides to the effect that the tribunal has apart from statutory jurisdiction inherent power of review to correct the error committed by itself, and there shall not be any inordinate and unexpected delay for delivering the order after concluding the hearings cannot at all be disputed but the views expressed by Special Bench 1989 (25) ECR 207; 1996 (83) ELT 192 ; and 1993 (68) ELT 918 cited on the side of the Respondents to the effect that the formal expression of the decision not followed by detailed order giving reasons is not an order are not applicable herein for the simple reason that those observations are made much before the insertion of Rule 26 which provides for pronouncing gist of decision and detailed order on different dates and for the reason that the issue involved are different. While in other cases, the tribunal was approached where the gist of decision was not followed by detailed order where in the issue involved herein is as to whether the matter can be reopened after gist of decision is pronounced.

26. Though, the Hon"ble Supreme Court and the Division Bench of other High Court in the judgments cited on the side of the Respondents are of the view that the tribunal has inherent powers of review such power of review is recognised by the Supreme Court and the Division Bench of other High Court only in respect of procedural error crept in under misapprehension and does not extent it to the extent of reopening and rehearing on merits that too suo motto. The three judges bench of our Supreme Court in the case reported in Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, held that error which has to be established by a long drawn process of reasoning on points can hardly be said to an error apparent on the face of the record. The Supreme Court has also in the judgment reported in Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh, clearly laid down that the power of review cannot be exercised on the ground that the decision was erroneous on merits. The Supreme Court is of the view that any decision on merits even if its erroneous is to be decided by the court of appeal not by the same bench which heard the matter.

27. Further though it cannot be disputed that the Tribunal has under the statue power of rectification and has also inherent power of review the same cannot be suo motto invoked. It can be done but only at the instance of either of the parties. As far as power of rectification is concerned the same has to be exercised within 6 months from the date of order that too at the instance of either of the parties, Thus, if the reopening of the matter for rehearing is by exercise of power u/s 129(B)(2) the same cannot be suo-motto exercised or if it

is under inherent power of review the same cannot be exercised in respect of any order which requires rehearing on merits.

28. Viewing from any angle reopening of the matter for rehearing suo-motto at the instance of one of the members cannot have legal approval. As rightly argued by the/learned Counsel for the Petitioner once the order is, in the manner as recognised under Rule 26 is pronounced, written and signed, the same is bound to be followed by detailed order in consonance with the same and the gist of decision delivered in open court is for all practical purposes to be treated as final decision and what is to be followed is the detailed order containing reasons in support of the final decision and the Tribunal become functus officio and has no power to reopen the matter on merits. As a matter of fact, the similar course adopted by the members in the different case filed by TVS Motor Company in E. 5/4, 5/5 of 2002 is not approved by the president and the gist of decision is followed by detailed order in consonance with the gist of decision pronounced by the bench.

29. Thus for the discussion held above this Court is of the view that the President is empowered to pass directions regulating the manner of discharge of functions by the benches and the Order No. 4/09, dated 17-7-2009 is issued only prospectively and the re-opening of the appeal filed by the Petitioner for rehearing is without reference to Order No. 4/09, dated 17-7-2009 and the bench having passed gist of decision in the manner recognised under Rule 26 becomes functus officio and has no suo-motto power to recall its own order and to reopen the matter for rehearing on merits and the bench is bound to record the detailed order in line with the gist of decision pronounced, written and signed in the open court on 4-6-2009 in appeal No. C/07/2009 of the Petitioner.

30. In the result, W.P. No. 26465 of 2009 stands dismissed and W.P. No. 26466 of 2009 is allowed as prayed for directing the 2nd Respondent to pass detailed order in the Petitioner's appeal No. C/07/2009 in consonance with gist of decision pronounced, recorded, signed and dated in open court on 4-6-2009, within 15 days from the date of receipt of the copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.