(1989) 01 CAL CK 0007

In the Calcutta High Court

Case No : Civil Rule No. 2787 (W) of 1984

General Foods (P) Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 13-01-1989

Acts Referred:
Customs Act, 1962 — Section 129A, 129A(2), 129D, 129D(4)
Income Tax Act, 1922 — Section 10(2)

Citation : (1989) 20 ECR 528 : (1989) 41 ELT 64

Hon'ble Judges : Suhas Chandra Sen, J

Bench : Single Bench

Advocate : Gautam Chakraborty, for the Appellant;Jatin Ghosh and Pradip Kumar Guha, for the Respondent

Final Decision : Dismissed

Judgement

Suhas Chandra Sen, J.—In this writ petition the petitioner M/s. General Foods (Private) Limited and Shyam Sundar Khandenwala have prayed for a writ in the nature of Mandamus for quashing the decision of the Central Board of Excise and Customs to prefer appeals against various authorities in India to the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter described as CEGAT).

2. The Memorandum of appeals were actually filed before the Appellate Tribunal and the petitioners have prayed for a writ in the nature of certiorari for quashing the various appellate proceedings pending before the CEGAT. There is also a prayer for a writ of prohibition directing the CEGAT to show cause why the proceedings commenced before it should not be quashed and it should not be refrained from entertaining the appeals.

3. The respondents to this writ petition are Union of India through the Secretary, Ministry of Commerce, North Block, New Delhi; the Chief Controller of Imports and Exports, the Collector of Customs, Cochin, the Collector of Customs, Madras, the Central Board of Excise and Customs, New Delhi and the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. The Collector of Customs and

the Assistant Collector of Customs, Strand Road, Calcutta, have also been made parties respondents.

4. I fail to see how this writ petition can be entertained at all. Under the scheme of the Customs Act, an appeal lies to the Appellate Tribunal from various orders enumerated in Section 129A of the Act. An appeal may be preferred by "any person aggrieved".

5. The, Collector of Customs has been specifically given the right to prefer an appeal u/s 129A(2) of the Act. Section 129D provides:

"Section 129D. powers. of Board or Collector of Customs to pass certain orders.

(1) The Board may, of its own motion, call for and examine the record of any proceedings in which a Collector of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

(2) The Collector of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Customs in his order."

6. This power to approach the Appellate Tribunal is a statutory power. It can be exercised when the Board is of the view that the legality or propriety of any decision or order should be decided by the Appellate Tribunal. If an application is made to the Appellate Tribunal or the Collector of Appeals, as the case may be, within the period of limitation, the Appellate Authority will decide such appeals in accordance with law. The authority concerned must come to a decision whether appeals should be preferred or not. It is not possible to uphold the contention of the writ petitioner that the decision whether an appeal should be preferred or not is liable to be reviewed in the writ jurisdiction.

7. Assuming that the points raised in the Memorandum of Appeals are frivolous or without any basis or are covered by decisions of this court or the Supreme Court, the appellant cannot be prevented from preferring or pursuing an appeal already preferred. In various statutory Tribunals, many appeals have been preferred and are being fought out every day on questions of law which have been concluded by various decisions of the High Courts or the Supreme Court. The appellants try to distinguish these decisions on facts or some points of law or some other ground. The respondents always take up the stand that the decisions are well covered. But that cannot be a ground for preventing a party from

preferring an appeal or preventing a Tribunal from hearing the appeal that has been preferred.

8. By way of illustration, reference may be made to the cases of sale of loom hours'' by the Jute Mills which were considered under the provisions of the Income Tax Act, by the Income Tax Tribunal. The Supreme Court in the case of Commissioner of Income Tax, U.P. Lucknow Vs. The Maheshwari Devi Jute Mills Ltd. Kanpur, held that transfer of ''loom hours'' by one Mill to another for cash payment is a transfer of capital asset and the receipts would have to be shown on capital account. The Supreme Court came to the conclusion that the ''loom hours'' were capital assets of Jute Mills.

9. This decision, however, did not bring to an end the spate of litigations tenet were pending in the various revenue courts, the Appellate Tribunal and on Reference to the High Courts.

10. In the case of Commissioner of Income Tax (Central) Vs. Empire Jute Company Ltd., , a Division Bench of this court following the judgment of the Supreme Court in the aforesaid case of Maheswari Devi Jute Mills Limited held that the price paid for purchase of ''loom hours'' by one Jute Mill to another was revenue expenditure. But the Division Bench, after examining the facts and also the working time agreement, came to the conclusion that the ''loom hours'' were nothing but the result of a restraint created by the members of Indian Jute Mills Association for the purpose of regulating the production according to the business needs of the market. This voluntary restraint had been imposed in the larger interest of the trade. Purchase of ''loom hours'' by a Jute Mill did not change its profit-making structure. It was in the nature of circulating capital.

11. The Supreme Court granted special leave to appeal against the judgment and order dated August 3,1973 of the Calcutta High Court. In its judgment (dated May 9 Empire Jute Co. Ltd. Vs. Commissioner of Income Tax, the Supreme Court held that the amount spent by Empire Jute Company Limited for purchase of ''loom hours'' represented revenues expenditure and was deductible u/s 10 (2) (xv) of the Indian Income Tax Act, 1922.

12. The aforesaid case of Empire Jute Mills Company Limited illustrate the inadvisability of stopping an appellate or reference proceeding ab initio without going into the merits of the case. If any appeal is without any merit, the appellate authority can dismiss the appeal. But just because an appeal is liable to be dismissed in limine cannot be a ground for preventing the department from preferring an appeal. If the Board is of the view that an appeal should be preferred in a case like this, the court cannot stop the Board from preferring an appeal. It is for the appellate authority to decide whether there is any merit in the appeal or not.

13. The petitioners sought to import Beef Tallow after 24-3-1983 on which date the Government of India prohibited importation of Beef Tallow into India. The case of the petitioners is that the petitioners had entered into sale contract on or

about May 22, 1981 for purchase of Beef Tallow on the strength of a licence which was initially valid up to October 31,1981. Thereafter, the licence was revalidated with effect from October 22,1982 and was subject to the provisions of paragraph 231 (1), (2) and (4) of the Import Policy of 1982-83.

14. The petitioners'' case is that the Deputy Collector of Customs, Calcutta, by an order dated April 13,1983 had accepted an order of the Assistant Collector of Customs that the petitioners'' licence was valid for importation of Beef Tallow. The Bill of Entry in respect of the goods which had arrived at the Port of Calcutta sometime in March 1983, was assessed and clearance was allowed of the goods upon payment of duty. The Central Board of Customs and Excise, New Delhi, however, was of the view that the import licence was not valid to cover import of Beef Tallow in view of the public notice dated June 5,1981 in terms of paragraph 231 (3) of the Import Policy 1982-83. The board was of the view that this provision contained in paragraph 231(3) would apply to all licences issued prior to Import Policy 1982-83. The Board directed the Collector of Customs to make applications before the CEGAT u/s 129D(4) of the Customs Act, for determination of correct legal position for the issue raised and for setting aside the orders of the Collector of Customs.

15. I fail to see how this court in writ jurisdiction can intervene at this stage and prevent the Appellate Tribunal from entertaining or hearing of the appeal or to prevent the Collector of Customs from preferring an appeal. A Momorandum of Appeal was forwarded by the Assistant Registrar of the Appellate Tribunal to the petitioners. If the petitioners are of the view that the appeal is frivolous and without any merit. The proper '' course of the petitioners would be to have the appeal expeditiously heard and dismissed. But it will be improper for the writ court to prevent an Appellate Authority from hearing an appeal that has been preferred on the allegation that the points involved in the appeal are already concluded by various decisions or the answers to the questions raised in the appeal are self evident.

16. I make it clear that I have not come to any conclusion about the merits of the appeal. All the questions must be gone into and decided by the Appellate Tribunal as and when the appeal is heard. In my judgment, at this stage the writ court cannot intervene and prevent appeals from Being heard or filed.

17. The writ petition, therefore, must fail and is dismissed. The rule is discharged. All interim orders are vacated.

18. There will be no order as to costs.

19. The application for variation filed on 7th May, 1986 filed by the Union of India is also disposed of on the above terms.

