

(2011) 07 MAD CK 0335

In the Madras High Court

Case No : Writ Petition No. 9830 of 2011 and M.P. No's. 1 and 2 of 2011

Manasa Impex Services

APPELLANT

Vs

Customs Excise and Service Tax Appellate Tribunal, (South Zonal Bench) and The Commissioner of Customs and Central Excise

RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(F)

Customs Act, 1962 — Section 114(3), 117, 129(A), 129(E)

Citation : (2011) 07 MAD CK 0335

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : S. Murugappan, for the Appellant; S. Udayakumar, (CGSC), for the Respondent

Final Decision : Allowed

Judgement

M. Jaichandren, J.—This writ petition has been filed challenging the impugned order of the first Respondent, in Order No. 249-343/11, dated 14.2.2011, and to direct the first Respondent to hear the appeal filed by the Petitioner, on merits, without insisting on the Petitioner making a pre-deposit, as per Section 129E of the Customs Act, 1962.

2. It has been stated that the Petitioner firm is a Custom House Agency, carrying on its activities, with a licence granted to it, under the Customs House Agent's Licencing Regulations, 2004, to transact the business relating to the import and export of goods, carried on under the provisions of the Customs Act, 1962.

3. In the course of its business the Petitioner firm had filed certain shipping bills, for the export of garments, on behalf of a number of exporters. While so, based on certain intelligence reports, the officers of the second Respondent had alleged that certain unscrupulous persons had floated fictitious firms and had exported various consignments, by grossly inflating the value, with a view to avail

wrongful duty drawback. The officers of the second Respondent had alleged that the Petitioner firm had done some business, based on the wrongful instructions given by one K. Gunasekaran, without verifying the credentials of the exporters concerned.

4. The Petitioner firm had filed shipping bills on behalf of 20 exporters. However, the goods in question had been confiscated and penalties had been imposed on the Petitioner firm, u/s 114(iii) and 117 of the Customs Act, 1962, based on the orders passed by the second Respondent. Aggrieved by the Orders in original passed by the second Respondent the Petitioner firm had filed 20 appeals before the first Respondent, along with the stay applications, seeking waiver of pre-deposit of penalty, pending disposal of the appeals.

5. Even though a number grounds had been raised on behalf of the Petitioner for waiver of pre-deposit of penalty, pending disposal of the appeal, the first Respondent Tribunal had not considered the grounds raised by the Petitioner before passing the impugned order, dated 14.2.2011.

6. The Petitioner had shown before the first Respondent that it had a prima facie case in its favour, as it was not involved in the activities of K. Gunasekaran, who is said to have committed various irregularities. Further, the Petitioner has shown that its role was limited to the filing of the shipping bills, as per the instructions and the documents forwarded to it by K. Gunasekaran. There was No. knowledge of the irregularities committed by K. Gunasekaran and therefore, penal provisions cannot be invoked against the Petitioner. Further, the Petitioner had also pleaded financial hardship, as it is controlled and managed by its sole proprietor, and its licence had been initially suspended and thereafter, it had also been cancelled. However, the first Respondent had passed the impugned order, dated 14.2.2011, without adducing proper reasons for the passing of the said order.

7. It had also been stated that the specific contentions raised on behalf of the Petitioner had not been recorded by the first Respondent in its impugned order, dated 14.2.2011. There is nothing in the impugned order to show that there was application of mind on the contentions raised on behalf of the Petitioner. After stating the facts the first Respondent had passed the impugned order, without considering the contentions raised on behalf of the Petitioner. There are No. findings against the Petitioner in the impugned order of the first Respondent, dated 14.2.2011. As such, the impugned order of the first Respondent, dated 14.2.2011, is liable to be set aside and the matter is to be remitted back to the first Respondent for passing an appropriate order, on merits, on the request of the Petitioner, for the waiver of the pre-deposit of duty draw back and penalty, by giving sufficient reasons.

8. The learned Counsel appearing on behalf of the Petitioner had relied on the following decisions in support of his contentions:

8.1. In *Amitava Saha v. CESTAT* [2007 215 E.L.T. 173 (Cal.)], it had been held as

follows:

26. Mr. Boss submission that financial position need not be considered unless there was a strong prima facie case on merits or at least an arguable case is difficult to accept. If a strong prima facie case is made out, the requirement of pre-deposit would have to be waived irrespective of financial capacity of the Appellant. If the Appellant were to make out an arguable case for appeal the pre-deposit might still be waived but on securing the interest of the Revenue. In the case of financial hardship pre-deposit the disputed duty and/or penalty and/or part thereof would have to be waived irrespective of the prima facie merits.

....

29. Even though the aforesaid submissions with regard to the financial capacity of the Appellants have been recorded by the Respondent Tribunal, the Respondent Tribunal has cursorily recorded a finding that the contention of the Appellants that they were not in a position to pay cannot be accepted. The Respondent Tribunal has further proceeded on the basis penalty of Rs. 5,000/- (sic) is not excessive. The aforesaid findings are not supported by any reasons. The impugned order is thus in flagrant violation of the principles of natural justice, and liable to be set aside and quashed.

8.2. In *Adinath Dyeing and Finishing Mills v. Commr. of C.EX., Ludhiana* [(2008) 10 S.T.R. 97 (P&H)], it had been held as follows:

In these petitions we are not concerned with the merits of the controversy raised in the appeals. The short question is whether the Tribunal has exercised the discretion vested in it under the afore-mentioned proviso on sound legal principles considering all the relevant facts. True that at the time of considering of application seeking waiving/stay, it is not desirable for the Tribunal to embark upon a detailed inquiry to find out whether the stand of the applicants is on terra firma yet it is imperative that before making any direction with regard to the pre-deposit, the Tribunal must take into consideration the relevant factors, namely, whether there is prima facie case in favour of the Assessee; the balance of convenience qua depositor or otherwise; irreparable loss, if any, likely to be caused in case the stay is not granted and safeguarding the public interest. The order of the Tribunal must reflect its application of mind on these factors. We feel that in the present cases, there has been non-application of mind in respect of each of the cases individually, thus, vitiating the pre-deposit orders.

8.3 In *Virender Kumar Yadav v. Union of India* (2010 250 E.L.T.484 (Del.)), it had been held as follows:

19. From various judicial pronouncements on this issue, the position, which emerges is that the Tribunal while considering any application for waiver of deposit is to take into account firstly the existence of a prima facie case. In case, it is found that a party has a very strong prima facie case, and/or where the errors in the impugned order are writ large on the records, in such a case, it

would be competent for the Court in the exercise of its jurisdiction to grant waiver of pre deposit since in such a case requiring a pre-deposit itself would amount to "undue hardship". There is No. denying of the fact that while dealing with the application for stay it is neither desirable nor proper for the Tribunal or any other authority to embark upon a detailed inquiry to find out whether the stand of the Appellant before it is correct or not because expression of any opinion on merits at that juncture, without full-fledged hearing and consideration of entire material, is likely to cause prejudice to either side. But at the same time, the authority concerned is required to consider whether with reference to the material placed before it, a prima facie case for grant of stay is made out or not and the balance of convenience lies in whose favor.

9. Per contra, the learned Counsel appearing on behalf of the second Respondent had submitted that the Petitioner had not raised, specifically, the ground of "financial hardship", as mentioned in Section 129E of the Customs Act, 1962. Further, No. materials had been placed before the first Respondent to substantiate the contentions raised on behalf of the Petitioner. The application filed on behalf of the Petitioner, for the waiver of pre-deposit of penalty, is bereft of facts and particulars.

10. In such circumstances, it is not open to the Petitioner to allege that the first Respondent had not considered the contentions raised on behalf of the Petitioner and that the impugned order had been passed by the first Respondent, without giving sufficient reasons. No. documents had been filed on behalf of the Petitioner to show the existence of "financial hardship". The waiver of pre-deposit of penalty is not automatic. Unless the Petitioner shows that the conditions enshrined in Section 129E of the Customs Act, 1962, are made out, by sufficient evidence, the waiver of pre-deposit of penalty cannot be granted, totally, as prayed for by the Petitioner. As such, the writ petition filed by the Petitioner is devoid of merits.

11. The learned Counsel appearing on behalf of the Respondents had relied on the following decisions in support of his contentions:

11.1. In *Vijay Prakash D. Mehta v. Collector of Customs* [(1989 (39) E.L.T. 178 (S.C)], it had been held as follows:

These observations cannot be applied to the facts of this case. Here we are concerned with the right given u/s 129A of the Act as controlled by Section 129E of the Act, and that right is with a condition and thus a conditional right. The Petitioner in this case has No. absolute right of stay. He could obtain stay of realisation of tax levied or penalty imposed in an appeal subject to the limitation of Section 129E. The proviso gives a discretion to the authority to dispense with the obligation to deposit in case of "undue hardships". That discretion must be exercised on relevant materials, honestly, bona fide and objectively. Once that position is established it cannot be contended that there was any improper exercise of the jurisdiction by the Appellate Authority. In this case it is manifest

that the order of the Tribunal was passed honestly, bona fide and having regard to the plea of "undue hardship" as canvassed by the Appellant. There was No. error of jurisdiction or misdirection.

11.2 In *Benara Valves Ltd. and Ors. v. Commissioner of Central Excise and Anr.* (2006 13 SCC 347), it had been held as follows:

In such matters though discretion is available, the same has to be exercised judicially. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has No. legs to stand on, it would be undesirable to require the Assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the Assessee to deposit full or part of the demand. There can be No. rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because the Supreme Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

Two significant expressions used in Section 35-F of the Central Excise Act, 1944, are "undue hardship to such person" and "safeguard the interests of revenue". Therefore, while dealing with the application twin requirements of considerations have to be kept in view

The aspect of undue hardship is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. Under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances. For a hardship to be "undue" it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

The other aspect relates to imposition of condition to safeguard the interest of revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of revenue.

In the instant case Tribunal has rightly observed that the rival stands have to be examined in detail with reference to material on record.

Considering the nature of the dispute and the difficulties highlighted by the Appellants seeking dispensation of deposit, it is directed that the appeals shall now be heard without requiring further deposit, if the appeals are free from other defects in accordance with law. However, for the balance of the amount demanded, with a view to safeguard interest of the Revenue, the Appellants shall furnish such security as may be stipulated by the Tribunal.

12. In view of the submissions made by the learned Counsels appearing on behalf of the Petitioner, as well as the second Respondent, and on a perusal of the records available, and on considering the decisions cited supra, this Court is of the considered view that the Petitioner has not shown sufficient cause or reason to grant the reliefs, as prayed for by the Petitioner in the present writ petition.

13. Even if it could be accepted that the Petitioner had made certain averments regarding its financial difficulties, it would not be entitled to the relief of waiver of pre-deposit of penalty, as such averments had not been substantiated with sufficient evidence. The order of the first Respondent cannot be held to be erroneous and invalid only on the ground that it does not give sufficient reasons for denying the request of the Petitioner, for the waiver of pre-deposit of penalty, as the Petitioner had not raised specific grounds, with sufficient evidence, to show that the ingredients enshrined in Section 129E of the Customs Act, 1962, had been satisfied.

14. Since, specific averments had not been made by the Petitioner regarding "financial hardship", in the applications filed for the waiver of pre-deposit of penalty, with supporting evidence, the first Respondent had no occasion to give detailed reasons for rejecting the request of the Petitioner. Further, it cannot be said that the Petitioner had made out a prima facie case to grant the relief in its favour. Therefore, the contentions raised on behalf of the Petitioner cannot be countenanced. As such, the writ petition is devoid of merits. No. costs. Consequently, connected miscellaneous petitions are closed.