(2012) 04 P&H CK 0185

In the Punjab And Haryana At Chandigarh

Case No : Civil Writit Petition No. 15876 of 2011.

M/s. Bhagwati International and others — APPELLANT

Vs

Commissioner of Customs and another — RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:
Customs Act, 1962 — Section 111(d), 111(o), 129E

Citation : (2013) 289 ELT 158 : (2012) 168 PLR 719

Hon'ble Judges : M.M. Kumar, J;Alok Singh, J

Bench : Division Bench

Advocate : Jagmohan Bansal, for the Appellant; H.P.S. Ghuman, for Respondent No. 1., for the Respondent

Final Decision : Allowed

Judgement

Alok Singh, J.—Petitioners have filed present writ petition assailing order dated 16.11.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal-respondent No. 2, whereby learned Tribunal was pleased to dismiss the application of the petitioners seeking exemption to deposit duty imposed on the petitioners to maintain the appeal. Brief facts of the present case, inter alia, are that petitioner No. 1 (hereinafter called ''the petitioner'') had imported 08 consignments of ball bearing involving customs duty amounting to Rs. 3.84 crore; on 28.1.1999, Customs Department i.e. respondent No. 1 detained one consignment of the petitioner by declaring value of Rs. 34.06 lac; in follow-up action. Customs Department on 29.1.1999 searched the factory premises of the petitioner and goods worth Rs. 2.02 crore were seized saying that petitioner has imported finished goods whereas in the bill of entry, petitioner had declared incomplete goods; Customs Department has also seized goods valued Rs. 3.82 lac from the godown of the petitioner; show-cause notice was issued to the petitioner on 19.1.2000 and thereafter on 29.8.2005 respondent No. I has passed order confiscating the goods of the petitioner u/s 111(d) and 111(o) of the Customs Act and had imposed penalty. Feeling aggrieved from the order dated 29.8.2005, confiscating the goods and imposing penalty, petitioner had approached the Tribunal by way of appeal wherein an application u/s 129E of the Customs Act was preferred, which was initially dismissed by learned Tribunal on 10.2.2006 with a direction to deposit Rs. 3.00 crore; petitioners No. 2 and 3, namely, Kanchan Kumar Kaura and Mr. Mohan Lal Thapar, were directed to deposit an amount of Rs. 5,00,000/- each. Petitioner moved an application for modification of order dated 10.2.2006 stating that goods worth Rs. 5.07 crore are lying in the custody of the respondent, therefore, interest of the revenue is saved. However, it did not find favour with the learned Tribunal and modification application was dismissed by the Tribunal vide order dated 21.7.2006 and appeal was also dismissed on the ground of noncompliance of stay order. Petitioners preferred CWP No. 17304 of 2006 before this Court, however, same was dismissed by this Court vide order dated 2.11.2006; thereafter petitioners preferred SLP before Hon''ble the Supreme Court, however, Hon''ble Apex Court vide order dated 7.2.2008 was pleased to remand the matter to this Court by placing reliance on the judgment rendered in the case of Bhavya Apparels Private Limited and Another Vs. Union of India (UOI) and Another, . Thereafter, this Court vide order dated 3.10.2008 was pleased to remand the matter to learned Tribunal to pass fresh order on the stay application. Learned Tribunal again was pleased to dismiss the stay application vide impugned order.

2. We have heard Mr. Jagmohan Bansal, learned counsel for the petitioners and Mr. HPS Ghuman, learned counsel for respondent No. l.

3. Mr. Bansal has vehemently argued that if goods seized are in the custody of the department then the pre-deposit of the penalty and duty imposed to maintain the appeal is not required in view of Section 129E of the Customs Act.

4. On the other side, Mr. Ghuman, learned counsel appearing for the revenue, has argued that by this time goods seized must have lost their value, therefore, duty and penalty imposed could not be recovered even if goods seized are sold in the open market, therefore, Tribunal was well within its jurisdiction while dismissing the stay application.

5. To appreciate the arguments advanced by learned counsel for the parties, we would like to reproduce Section 129E of the Customs Act, which reads as under:- "129E. Deposit, pending appeal, of duty and interest, demanded or penalty levied.- Where in any appeal under this Chapter, the decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty and interest demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person, the Commissioner

(Appeals) or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

6. Having perused Section 129E of the Customs Act, we have no hesitation to hold that pre-deposit of the duty and penalty would be required to maintain the appeal when goods in question are not in the custody of the revenue. In the present case, admittedly goods were seized by the department and are in the custody of the department, therefore, pre-deposit of the duty and penalty imposed to maintain the appeal is not at all required.

7. Apex Court in the case of Bhavya Apparels (supra) in para No. 10 has held as under:-

10. We, however, having regard to the facts and circumstances of this case are of the opinion that the larger question, viz., interpretation of Section 129E of the Act need not be gone into.

Section 129E of the Act would be attracted where the goods in question are not in the custody of the Revenue. The said provision, therefore, would be attracted only when the ingredients thereof exist.

The learned Additional Solicitor General very fairly submits that a part of the goods is in custody of the respondents. If that be so, in our opinion, it was obligatory on the part of the Tribunal to take that factor into consideration in making the order of pre-deposit. Furthermore, while exercising its jurisdiction, the Tribunal was also required to apply its mind in regard to the question of undue hardship on the part of the appellants upon considering existence of a prima facie case. Merit of the case ordinarily should not otherwise be gone into unless the question on the face of it appears to be concluded.

8. In view of the above, we are of the considered view that Tribunal was not well within its jurisdiction while dismissing the stay application in view of the fact that entire goods seized are in the custody of the department. Since, petitioner is not in custody of the goods, therefore, asking him to deposit huge duty and penalty to maintain appeal would cause great hardship to the petitioner. Therefore, impugned order cannot be sustained in the eyes of law. Petition is allowed. Impugned order is set aside. The Customs, Excise & Service Tax Appellate Tribunal is directed to hear the appeal on merit without insisting of any pre-deposit as required in the ordinary cases where the goods are not in control of the department.