
(2005) 04 CAL CK 0051
In the Calcutta High Court
Case No : Writ Petition No. 926 of 2005

Rajiv Jain

APPELLANT

Vs

CC (Port) and Others

RESPONDENT

Date of Decision : 27-04-2005

Acts Referred:

Customs Act, 1962 — Section 130E

Customs, Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 — Rule 41

Citation : (2005) 102 ECC 58 : (2005) 128 ECR 137 : (2005) 187 ELT 435

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Hasmukh Kundalia and Vipul Kundalia, for the Appellant; Samajdar, for the Respondent

Judgement

Jayanta Kumar Biswas, J.

The Court:

1. The petitioner is aggrieved by the inaction on the part of the customs authorities regarding release of the imported goods in compliance with order of the appellate tribunal dated March 15th, 2005.
2. Since the question of law raised in the writ petition, can be decided finally on the agreed facts and dates, I am of the view that without calling upon the respondents to file opposition, the writ petition should be disposed of at this admission stage itself.
3. The petitioner imported certain photocopier machines. He declared them as capital goods. The bill of entry was filed immediately, after importing the goods sometime in October 2004. Since the assessment was not being made for determining the duty payable and the goods remained in the port area accruing demurrage liability on the petitioner, he moved Writ Petition No. 209 of 2005 before this Court. By order dated February 9th, 2005 such writ petition was finally disposed of directing the competent authority to conclude the proceeding

regarding assessment of duty within five working days. The authority then gave the decision holding that the petitioner had given a wrong declaration regarding the nature of the imported goods and hence because of the under-valuation he was liable to pay fine and penalty, each imposed at Rs. 10,00,000. Feeling aggrieved the petitioner moved the appellate Tribunal and succeeded in such appeal. By its order dated March 15th, 2005, the appellate tribunal held that though the goods would be treated as consumer goods, for existing confusion regarding the nature of the goods, the fine and penalty should be reduced to Rs. 1,00,000 on each account.

4. After the appellate tribunal gave the final decision, the petitioner approached the customs authority for release of the goods expressing his willingness to deposit the fine and penalty in terms of order of the appellate tribunal. Since the customs authorities did not oblige him, he took out the present writ petition.

5. By citing to me the decisions in *Union of India and others Vs. Kamlakshi Finance Corporation Ltd.*, ; *Naveet Kumar Didwania Ltd. Vs. Commr. of Customs*, ; *Pankaj Guljarilal Gupta Vs. Collector of Customs*, ; *Union Trading Company Vs. Union of India*, and the circular letter of the Central Board of Excise & Customs No. 390/93/88-AU dated September 9th, 1988, counsel for the petitioner argues that the customs authorities are under an unqualified obligation to release the goods in compliance with the order of the appellate tribunal. His further argument is that as was held by the Apex Court the argument of the customs authorities that they have a right to prefer an appeal before the Supreme Court, and hence no order should be made to release the goods or to enforce the order of the appellate Tribunal in any other manner, has no substance at all.

6. Counsel for the customs authorities refers me to the Customs, Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982, Rule 41, and argues that since remedy of execution as available before the Tribunal, where the petitioner submitted himself by preferring the appeal, there is no valid reason why the writ petition should be entertained, when admittedly the petitioner did not approach the appellate tribunal for execution of its order. His further argument is that in view of Section 130E of the Customs Act, 1962 his clients have a statutory right of appeal to the Supreme Court, and hence if a direction is given to release the goods or to enforce the order of the appellate tribunal, then the appeal, if preferred by his clients, will become infructuous.

7. There is no dispute that an appeal, if one is to be preferred by the customs authorities, is to be preferred within the period of limitation prescribed by the relevant provisions of law. Counsel for the petitioner refers me to the relevant provisions, and comments that the period of limitation is 60 days. I am of the view that the customs authorities definitely have a right of appeal, and by any order passed in the writ petition their such statutory right of appeal should not be made infructuous. But that is not the question before me. The question is whether by taking the plea that they have a right of appeal, they can defer the

implementation of the order made by the appellate Tribunal, without obtaining any other staying the operation of the order.

8. It is important to note here that the order was passed by the appellate tribunal on contest, and at the date it was pronounced no prayer was made by the customs authorities for staying its operation. The answer to the question whether by setting up a plea that they have a right of appeal the customs authorities can delay the enforcement of the order of the appellate tribunal, I agree with counsel for the petitioner, is available from the decision given by the Apex Court (reported at Union of India and others Vs. Kamlakshi Finance Corporation Ltd.,). In no uncertain terms the Apex Court said that only because the department enjoys a right of appeal to the Supreme Court, it would not enjoy the corresponding right to take a decision not to comply with the binding decision of the appellate tribunal. The several decisions cited to me were given by placing reliance on the said Apex Court decision, and in all of them almost in similar circumstances direction was given for release of the goods in terms of order of the appellate authority/tribunal.

9. As rightly pointed out by counsel for the petitioner remedy available under Rule 41 of the above-noted rules would not stand in the way of entertaining the present writ petition, since it is apparent that the customs authorities are not in a mood to release the goods in the absence of a mandamus for the purpose. I find force in his argument that on the facts of the case process of execution would not be an efficacious alternative remedy. I am unable to ignore the fact that the petitioner has been incurring the liability on account of demurrage payable to the port authorities. It is immaterial that in law he is entitled to recover the demurrage from the customs authorities.

10. For these reasons I am of the view that the writ petition should be allowed conditionally. Hence, I allow the writ petition and make the following order:

If within May 15th, 2005 the customs authorities are unable to obtain any stay of operation of the order of the appellate tribunal dated March 15th, 2005, then they shall release the goods imported by the petitioner on the petitioner's complying with the terms and conditions of the said order dated March 15th, 2005. If the occasion arises for release, then within 48 hours from the moment of making the deposits by the petitioner in terms of the order of the appellate tribunal (on account of fine and penalty), the customs authorities shall release the imported goods unconditionally.

11. In the facts and circumstances of the case, I am not inclined to make any order for costs in the writ petition. Hence, there will be no order for costs in it.

12. All parties shall act on a signed xerox copy of this dictated order and also on an urgent certified xerox copy thereof both to be supplied on the usual undertaking.