

(1999) 03 GUJ CK 0061

In the Gujarat High Court

Case No : Spl. Civil Application No. 605 of 1999 31 March 1999

SHETH ENTERPRISES (P) LTD. and Another

APPELLANT

Vs

COMMISSIONER OF CUSTOMS and ANRS.

RESPONDENT

Date of Decision : 31-03-1999

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35B(5)
Customs Act, 1962 — Section 128(1), 88, 89, 95

Citation : (1999) 154 CTR 195

Hon'ble Judges : B. C. Patel, J;A. L. Dave, J

Bench : Full Bench

Advocate : Mihir H. Joshi and Ms. Falguni M Joshi, for the Assessee and P.B. Majumudar and Mukesh R. Shah, for the Revenue, for the Appellant;

Judgement

By the court:

At the request of the learned Advocates, the matter is taken up for final disposal. The petitioner initially filed this petition inter alia praying for issuance of a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside, Annexure-"E" dt. 21-12-1998, the decision of the first respondent rejecting the declaration and application of the petitioner under the Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as the "Scheme"). The petitioner further prayed to direct the first respondent to dispose of the application under the provisions of the Scheme.

2. The appeal preferred against the order passed by the adjudicating authority was dismissed as time-barred on 9-12-1998, intimation of which was received by petitioner on 18-2-1999. Later on by amendment, the petitioner prayed to quash and set aside the order dated 9-12-1998 Annexure-G passed by the second respondent dismissing the appeal as time barred.

3. From the petition, it appears that a show-cause notice under the provisions of the Customs Act, 1962 (hereinafter referred to as the "Act") was served upon

the petitioner on 6-1-1998, which was adjudicated vide order in original dated 25-5-1998, by the Asstt. Commissioner of Customs, Customs House, Kandla, confirming the demand of Rs. 2,63,707. It is contended by the petitioners that the said order was received by the petitioner on 1-7-1998 and against the aforesaid order, the petitioner lodged his appeal before the Commissioner (Appeals)-Respondent No. 2 on 17-9-1998. His appeal was registered as Appeal No. 137/RDL/98, dt. 17-9- 1998.

4. It transpires that after registering the appeal, the second respondent addressed a letter dated 8-10- 1998, calling upon the petitioner to submit proof of date of receipt of the order in original within 10 days from the receipt of the said letter. According to the department, there was wide gap between the date of the order and the date of communication of the order to the petitioner. By letter vide Annexure-B, dated 3-11-1998, the petitioner contended that appeal has been filed within time. It is further contended by the petitioner that on the same day i.e., on 3-11-1998, a declaration as contemplated u/s 89 of the scheme was filed to claim the benefits under the scheme. An acknowledgment thereof dated 9-11-1998, has been produced vide Annexure C. Vide Annexure-E, dated 21-12-1998, the office of the Commissioner of Customs, Kandla rejected the application under the scheme as on verification, it was found that the Commissioner (Appeals), Ahmedabad has rejected the appeal as being time-barred. So far as the order of the dismissal of the appeal is concerned, which is produced on record indicates that there was gap of 34 days between the date of the order in original and the date of the communication. It appears that the petitioner was directed by an office order dated 8-10-1998, to produce a proof of the receipt of the order in original within 10 days. However, as no such proof was produced, the Commissioner (Appeals), arrived at a conclusion vide Annexure-"G" that the appeal is required to be dismissed being time-barred u/s 128(1) of the Customs Act, 1962, as there was delay of 21 days in filing the appeal. It is under these circumstances, contended before us that the order passed by the Commissioner of Customs, Annexure-E on 21-12-1998, is contrary to the provisions of the scheme inasmuch as the appeal was already pending on the date on which the declaration was made. So far as the applicability of the scheme is concerned, one has to refer section 95 of the scheme which reads as under ..

"Scheme not to apply in certain cases.-The provisions of this scheme shall not apply(ii) in respect of tax arrear under any indirect tax enactment,-

in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of the declaration made u/s 88;

5. In a case where no appeal or reference or writ/appeal is admitted and pending before any appellate authority or High Court or Supreme Court on the date of filing declaration then the scheme will not apply. In short, it is contended

that proceedings must be pending at the time of filing a declaration. It is submitted by Mr. Mihir Joshi, learned advocate appearing for the petitioner that the Commissioner of Customs while passing the order Annexure-E has not taken into consideration the fact that the appeal was pending when the declaration was filed. It is not in dispute that the appeal was presented on 17-9-1988. A letter was addressed on 8-10-1998, as there was delay in preferring the appeal. The explanation is placed before the Commissioner (Appeals) on 3-11-1998. Simultaneously, declaration has been filed on the same day under the scheme. However, appeal has been rejected subsequently as time-barred by an order dated 9-12-1998, by the Commissioner (Appeals) vide order Annexure-G. The order rejecting the appeal as time-barred has been despatched on 9-2-1999, which has been received by the petitioner on 18-2-1999. It is difficult to understand if appeal was rejected on 9-12-1998, as to why for such a long period, the order passed by the Commissioner (Appeals) remained unattended. In the instant case, what is required to be considered is that when the declaration was filed, the appeal was pending or not ? If the appeal was rejected on 9-12-1998, it cannot be said that the declaration dated 3-11-1998, was filed, when no appeal was pending. From this fact, the only conclusion could be drawn is that the declaration was filed under the scheme when the appeal was pending.

6. Mr. Shah, learned advocate for the respondents, however, submitted that in view of the trade notice by which clarification is given, appeal was required to be filed along with the application for delay and if the delay is condoned only thereafter, the application could have been entertained. The Commissioner of Central Excise and Customs, Ahmedabad, vide trade notice No. 108/98, dated 2-11-1998, based on C.B.E. & C letter F. No. 275/33/98-CX/8A(Pt.), dated 28-10-1998, published the same which- has been reproduced in Excise Law Times Vol. No. 104. The same was published under caption "Kar Vivad Samadhan Scheme, 1998, clarifications/instructions u/s 96(10) of the Act, 1998". Clause 8 refers to scope of sub-section 11(c) of section 95 of the scheme. As per clarifications, cases involving the delayed appeal filed before the Commissioner (Appeals) or CEGAT beyond the normal period of 3 months, may be entertained under the scheme only if proof of condonation of delay for late filing by Commissioner (Appeals), or delayed admittance by CEGAT as provided under relevant provisions of the statute itself [e.g. section 35 or 35B(5) of the Central Excise Act and similar provisions under the Customs Act] is produced. Relying on this, part of the trade notice, Mr. Shah submitted that mere filing is not sufficient but there should be a proof of condonation of delay for late filing. If the delay is not condoned, according to Mr. Shah, the application has been rightly rejected. He submitted that in the instant case, the delay application has not been preferred and, therefore, the appeal has been rightly rejected under the scheme. At the cost of the repetition at this juncture, we will point out that the appeal was filed on 17-9-1998, and by order dated 9-12-1998, it was rejected. The communication of which was forwarded by letter dated 9-2-1999, which was received by the petitioner on 18-2-1999. If the appeal is preferred and is

numbered, then, in our opinion, it cannot be said that the appeal was not pending since it was neither rejected on that day being timebarred nor before declaration was filed. In the instant case, the petitioner under bona fide belief did not make an application as according to the understanding there was no delay. The department called upon the petitioner to explain the delay of 34 days on 8-10-1998, which was explained on 3-11-1998. But before rejecting the appeal, declaration has been filed and thus, it can be said that when the appeal was pending, declaration has been filed. Mr. Joshi, learned advocate appearing for the petitioner submitted that the scheme contemplates pendency of an appeal. According to his submission, there was a valid and competent appeal under the law pending before the Commissioner (Appeals). The scheme refers to an appeal which should be pending and there is nothing in the language to justify the introduction of the qualification that it should be valid or competent. The validity or competency of the appeal is a question to be decided by the appellate court or appellate forum before whom the appeal is filed. This determination is possible only after the appeal or application is heard and decision is rendered and not before that. There is nothing to prevent a party from filing of an appeal which may ultimately be found to be incompetent i.e., when held to be barred by limitation or it does not lie before the court. The honourable apex court in the case of *Raja Kulkarni & Ors. v. State of Bombay* (1954) SCR 389 considered the question about the strike during the pendency of an appeal would be an illegal strike under sections 24 and 25 of the Industrial Disputes (Appellate Tribunal) Act, 1950, even though the appeal is not a valid or competent one. Section 24 of the aforesaid Act prohibits the workman who is employed in any industrial establishment, from going on strike during the pendency of an appeal before the Tribunal and section 25 renders a strike and lock out as illegal if it is declared, commenced or continued in contravention of the provisions of section 24. It was contended that section 24 contemplates the pendency of valid and competent appeal however as no valid (sic) contended that appellants committed no offence u/s 27. While rejecting the contention, the apex court pointed out that section 24 on the plain and natural construction requires for its application no more than that an appeal should be pending and there is nothing in the language to justify the introduction of the qualification that it should be valid or competent. The apex court further pointed out that from the fact such appeal is held to be not maintainable on any ground whatsoever, it does not follow that there was no appeal pending before the court. The apex court further pointed that "we considered the word "appeal" must be construed in its plain and natural sense without the insertion of any qualifying words such as are intended to be introduced by the contention raised before us. There is yet another reason for not construing the word "appeal" in the manner suggested by the appellants and that is that the legislature in introducing this provision contemplated that industrial peace should not be disturbed so long as the matter was pending in the court of appeal, irrespective of the fact whether such an appeal was competent in law." Thus, what is required to be seen that the appeal was preferred and was pending at the relevant time.

7. In the instant case, it transpires that appeal was admitted and number was given to that appeal. It may be that the department noticed that delay has been caused and, therefore, addressed a letter to the petitioner to explain the delay. If the appeal is admitted without the fact of delay in presentation have been noticed, it is always open to the department to raise objection at the time of hearing of the appeal. The honourable apex court in case of Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, observed that the court should be slow to adopt a construction which deprives parties of valuable rights. The Apex Court in case of Mr. S.B. Jain, I.T.O., Nagpur Vs. Mahandera, had pointed out that "the proceedings before the competent authority cannot be said to be not pending merely because no relief can be granted in those proceedings because of the bar of limitation. " Mr. Joshi submitted that assuming for the sake of argument that the appeal was barred by limitation, then application for stay at the most may not be considered if filed till the delay is explained but at the same time, it cannot be said by the department that there was no appeal pending.

8. If the appeal is not pending then in what proceedings, delay is to be condoned ? We are of the view that in the instant case, appeal was already pending before the Commissioner (Appeals) and was not rejected by him, before the declaration was filed, hence it cannot be said that the appeal was not pending and in view thereof, the order Annexure-E is hereby quashed and set aside with direction to consider the declaration filed by the petitioner in accordance with law. In amendment application, it is prayed before this court that the order passed by the Commissioner (Appeals) should be quashed and set aside and the delay should be condoned. As the order Annexure-E is already quashed and set aside, it goes without saying that the order is now required to be passed under the Scheme in accordance with sections 89 and 90 of the Scheme. Even if the delay is not condoned, it would not make any difference. Reading the orders, it appears that the authority has not considered the crucial question while rejecting the application. Therefore, the authority-Commissioner (Appeals) shall consider the question of delay as and when the occasion arises. It goes without saying that the declaration was rejected vide Annexure "E" on the ground which cannot be said to be just and proper and, therefore, time as mentioned in section 90(1) shall begin from the date of the order passed by this court. The petition stands allowed accordingly, with no order as to cost.

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