(2006) 04 BOM CK 0063

In the Bombay High Court

Case No : Custom Appeal No. 5 of 2006

The Commissioner of Customs (Imports) APPELLANT

Vs

Pride Foramer RESPONDENT

Date of Decision : 24-04-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 111, 112, 114A, 129A, 129B
Customs, Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 — Rule 41
Income Tax Act, 1961 — Section 254, 254(1), 254(2), 256

Citation : (2006) 4 BomCR 737 : (2006) 204 ELT 381 : (2006) 4 STR 401

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : P.S. Jetley, instructed by T.C. Kaushik, for the Appellant; D.B. Shroff N. Malhotra and Darshan Mehta, instructed by Dhruve Liladhar and Co., for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—M/s.Pride Foramer-the respondent imported the rig "pride Pennsylavania" into India in the month of March, 1999 to carry out a contract obtained from M/s.Oil & Natural Gas Corporation Limited (for short, ''ONGC''). M/s.J.M.Baxi-a clearing house agent filed the Bill of Entry on behalf of m/s.Pride Foramer for the clearance of the said rig for home consumption subject to re-export. The value of the rig ''Pride Pennsylvania'' was declared as US $ 17,682,690 in the Bill of Entry. The assessing officer accepted the invoice value on the basis of valuation certificate issued by M/s.Bureau Veritas. Rs.34,48,94,785/-was paid as customs duty. On the basis of intelligence gathered by the officer of Special Intelligence and Investigation Branch (Import), the investigation commenced and based on the preliminary investigation, the rig "pride Pennsylvania" was placed under Seizure on 26.09.2001. M/s.Pride Foramer on 27th September, 2001 requested the Commissioner to allow them to continue the operations as stopping of operations could result in serious consequences. In response thereto the Commissioner of Customs (Import) granted provisional release of the rig pending investigations and adjudication on submission of bond of Rs.50 crores backed by a cash deposit of Rs. 10 crores. Being aggrieved, M/s.Pride Foramer filed a writ petition before this Court under Article 226 of the Constitution of India. On 3rd October, 2001, the Division Bench of this Court disposed of the said writ petition holding that there was no ground for interference in the order directing M/s.Pride Foramer to furnish a bond of Rs.50 crores backed by a cash deposit of Rs. 10 crores.

2. M/s.Pride Foramer deposited a sum of Rs.10 crores and also executed a bond of Rs.50 crores on 31st October, 2001 and the rig was provisionally released. The notice was issued on 8th January, 2002 to M/s.Pride Foramer to explain and show cause as to why

(a) the Rig, ''Pride Pennsylvania'' value at Rs.1,96,69,50,295/-be not confiscated u/s 111(m) of the Customs, Act, 1962;

(b) the differential duty of customs amounting to Rs.52,13,50,125/-be not recovered under proviso to Section 28 of the Customs Act;

(c) penalty be not imposed on them u/s 114A of the Customs Act, 1962 and

(d) interest be not charged u/s 28AB of the Customs Act, 1962.

3. The notice was also issued to Mr.Jean Paul Rabier, the Logistic manager of M/s.Pride Foramer and M/s.Bureau Veritas, asking them to explain and show cause as to why the penalty be not imposed upon them u/s 112(a) of the Customs Act, 1962.

4. Pursuant to the show cause notice, the adjudication proceedings were completed and vide order dated 25th February, 2002, the Commissioner of Customs (Import) ordered confiscation of the Rig ''Pride Pennsylvania'' valued Rs.145,18,93,375.00 u/s 111(m) of the Customs Act, 1962, but redemption thereof was allowed on payment of a fine of Rs.5,00,00,000/-(Rupees five crores) in lieu of confiscation. The Commissioner of Customs (Import) confirmed the order of duty in the sum of Rs.29,45,19,057.00/-as the differential duty u/s 28(2) of the Customs Act, 1962 and also ordered appropriation of Rs.10 crores deposited with the department towards the duty liability. The Commissioner ordered interest at the rate of 24% per annum on Rs.29,45,19,057.00 and also imposed a penalty of Rs.29,45,19,057.00 upon M/s.Pride Foramer. The penalty of Rs.2,00,000/- also came to be imposed on Mr.Jean Paul Rabier and M/s.Bureau Veritas.

5. From the order dated 25th June, 2002 passed by the Commissioner of Customs (Import), four appeals came to be filed before the Customs, Excise and Service Tax Appellate Tribunal (for short, ''the Tribunal''). M/s.Pride Foramer, Mr.Jean Paul Rabier and M/s.Bureau Veritas filed three separate appeals and one appeal was by the Department. The Tribunal held that the sale price of US $ 17 million constituted FOB value. The cif value, after addition of towing charges

from Singapore of $ 500000 and in addition of 1.125% of $ 17500000 would come to $ 17696875 against the declared value of $ 17682690.50. The Tribunal, thus, allowed the appeals filed by M/s.Pride Foramer and set aside the valuation made by the Commissioner. The Tribunal also allowed the appeals of M/s.Bureau Veritas and Jean Paul Rabier. The appeal preferred by the Department came to be dismissed by the Tribunal.

6. Dissatisfied with the order of the Tribunal passed on 13th June, 2003, the revenue preferred four appeals before the Supreme Court. All the four appeals came to be dismissed by the Supreme Court vide order dated February, 14, 2005.

7. M/s.Pride Foramer thereafter called upon the concerned authorities to refund the amount of Rs.10 crores and for cancellation of the bond of Rs.50 crores. Despite repeated letters and representations when nothing was done by the revenue authorities, M/s.Pride Foramer made an application for refund on 9th July, 2003. The Assistant Commissioner of Customs, Appraising Group VB, Mumbai sanctioned refund claim of M/s.Pride Foramer, but ordered the same to be credited to the Consumer Welfare Fund in terms of Section 27(2) of the Customs Act, 1962 vide order dated 2nd September, 2005. Aggrieved by the order of Assistant Commissioner of Customs, Appraising Group VB, Mumbai ordering the refund to be credited to the Consumer Welfare Fund, M/s.Pride Foramer filed an appeal before the Commissioner of Customs (Appeals). The said appeal came to be dismissed on 22nd November, 2005.

8. Aggrieved by the concurrent orders of the Assistant Commissioner of Customs and the Commissioner of Customs (Appeals) ordering refund to be credited to the Consumer Welfare Fund, M/s.Pride Foramer preferred the appeal before the Tribunal. We are informed that on 10th April, 2006, the said appeal has been allowed. An affidavit to this effect has been placed on record, but the text of the judgment is said to be not yet ready.

9. Going little backwards and to complete narration of facts, M/s.Pride Foramer, in the month of April, 2005, also made miscellaneous application before the Tribunal for direction to refund the amount of Rs. 10 crores and discharge of bond of Rs.50 crores. The said miscellaneous application came to be disposed of by the Tribunal on 5th September, 2005 directing return of Rs.10 crores along with interest and cancellation and return of bond of Rs.50 crores executed by M/s.Pride Foramer. It is this decision which is in challenge at the instance of the revenue in this Custom Appeal filed u/s 130 of the Customs Act, 1962.

10. The first question is whether the appeal is maintainable. If the answer is in affirmative, then only we shall consider whether it gives rise to any substantial question of law. 11. The submission of the counsel for the revenue is that the decision dated 5th September, 2005 passed by the Tribunal is an order u/s 129B of the Customs Act, 1962 and, therefore, amenable to appeal u/s 130. He would submit that the miscellaneous application made by the respondent-M/s.Pride Foramer was in appeal and any order passed by the Tribunal on such application

in appeal is an order in appeal and further appeal therefrom is maintainable u/s 130 of the Customs Act, 1962. He relied upon the judgment of the Supreme Court in the case of Commissioner of Income Tax. Jabalpur Vs. M/s. Durga Engg. and Foundry Works, and the judgment of the Jharkhand High Court in the case of Commissioner of Central Excise, Jamshedpur v. International Auto Products (P) Ltd. 2004 (165) E.L.T. 268.

12. The appeal is only creature of the Statute and does not emanate from any inherent right. In other words, right of appeal is the right, if conferred by the statute. For maintainability, such appeal must be covered by the statutory provision that provides for an appeal.

13. Section 130 of the Customs Act, 1962 provides for an appeal to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003. Section 130 reads thus:

130. Appeal to High Court.-

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Customs or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver

such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in Sub-section (1).

(7) When an appeal has been filed before the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

14. The first requirement for maintaining the appeal to the High Court is that such an appeal is from the order passed by the Tribunal in appeal on or after the 1st day of July, 2003 not being an order relating to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment. The second pre-requisite is that such an appeal must involve a substantial question of law. If the order of the Appellate Tribunal that is impugned in the appeal u/s 130 is not an order passed in appeal by the Tribunal, obviously, such appeal shall not be maintainable. Can the order dated 5th September, 2005 passed by the Tribunal on the miscellaneous application be said to be an order passed in appeal by the Tribunal? In our view, it is not. An order in appeal by the Appellate Tribunal is an order u/s 129B. Such order is passed in the appeal preferred u/s 129A. The application made by M/s.Pride Foramer for enforcement of the Tribunal''s order is surely not an appeal u/s 129A. Rather, miscellaneous application made by M/s.Pride Foramer appears to be an application under Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 which empowers the Tribunal to make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice. The order passed thereon is not an order u/s 129B of the Customs Act, 1962. The said order, by no stretch of imagination, can be said to be an order in appeal. The appeals came to be disposed of by the Tribunal on 30th June, 2003 and further appeals from the said order came to be dismissed by the Supreme Court on 14th February, 2005. We fail to understand, how in this fact situation

the impugned order dated 5th September, 2005 can be said to be an order passed by the Tribunal in appeal. This is an order passed by the Tribunal in miscellaneous application made under Rule 41 and such order, in our opinion, is not amenable to appeal u/s 130 of the Customs Act, 1962.

15. The Supreme Court in Durga Engineering and Foundry Works dealt with the scope of Section 256 of the Income Tax Act, 1961. Section 256 of the Income Tax Act, 1961 empowers the assessee and the Revenue to require the Appellate Tribunal to refer to the High Court any question of law arising out of an order passed u/s 254. Section 254(1) empowers the Tribunal to pass orders not only on an appeal before it but also upon such applications as are made in the appeal and it specifies that before doing so, it shall hear both the parties to the appeal. Section 254(2) permits the Tribunal to rectify any mistake apparent from the record and amend any order passed by it under Sub-section (1) within four years from the date of that order. Dealing with the scheme of statutory provision contained in the Income Tax Act, 1961, the Supreme Court held that Section 256 contemplates the reference of a question of law arising out of an order passed u/s 254, that is to say, an order both under Sections 254(1) and 254(2) and, therefore, the reference may be made to the High Court and the question of law that arises out of any order of the Tribunal. Section 130 of the Customs Act, 1961 is little different that we have already explained above and since the impugned decision passed by the Tribunal is not an order in appeal, the said order is not appealable u/s 130. Durga Engineering & Foundary Works has no application in the present case.

16. The Jharkhand High Court, in International Auto Products (P) Ltd., allowed the application u/s 35H of the Act and directed the Tribunal to refer the question to it. We fail to understand the applicability of International Auto Products (P) Ltd. to the question posed before us about the maintainability of an appeal u/s 130 of the Customs Act made on the miscellaneous application under Rule 41 of the Procedural Rules of 1982.

17. We, thus, hold that the appeal by the Commissioner of Customs (Imports) from the order dated 5th September, 2005 passed by the Tribunal is not maintainable.

18. The result of the aforesaid discussion is that the appeal preferred by the Commissioner of Customs (Imports) is held to be not maintainable and is dismissed accordingly.

