
(2005) 02 CAL CK 0051
In the Calcutta High Court
Case No : Writ Petition No. 167 of 2005

Union of India (UOI)

APPELLANT

Vs

CESTAT

RESPONDENT

Date of Decision : 15-02-2005

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 125, 130, 130A, 130C, 130D
Income Tax Act, 1922 — Section 66
Income Tax Act, 1961 — Section 256

Citation : (2005) 183 ELT 250 : (2005) 1 ILR (Cal) 142

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : D.P. Mukherjee, Biswanath Samaddar and Biswa Brata Basu Mallick, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—Union of India has taken out this writ petition, feeling aggrieved by the order of the Customs, Excise & Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata, dated July 9th, 2004, which is :

"This is a Miscellaneous Application filed by the Revenue to stay the operation of the order of the CEGAT dated 16-11-1999. Shri T.K. Kar, SDR represented the Revenue. When he was specifically asked that under what provision the CEGAT can stay its own order he replies that there is no such provision. The Tribunal's order is nearly three years old. The Revenue should have implemented the department's order for fairness if they have not got any stay from any superior authority. I find the department's MA is frivolous and I reject the same."

2. On receipt of notice of the order of the appellate Tribunal dated November 16th, 1999, Union of India filed an application before this court under the Customs Act, 1962, Section 130A. After condoning delay, such application was

admitted by order dated April 7th, 2003; the appellate tribunal was directed to refer to this court the questions of law arising from its order. In compliance with the direction, the appellate tribunal has since referred the questions and the application is awaiting hearing. At such stage, Union of India moved the appellate Tribunal by taking out a miscellaneous application praying for stay of operation of the order of the appellate Tribunal dated November 16th, 1999. By the impugned order such application was rejected by the appellate Tribunal.

3. Counsel for Union of India argues that in view of provisions of the Customs Act, 1962, Section 130D, the appellate Tribunal should have stayed the operation of its order dated November 16th, 1999, till the reference application was decided by this court in terms of provisions of Section 130C.

4. By citing to me the Supreme Court decision in Commissioner of Income Tax Vs. Bansi Dhar and Sons, , and the single bench decisions of this Court in Prabir Kumar Majumdar Vs. Assistant Collector, Central Excise, and Anoop Kumar Vs. Commissioner of Cus. (Prev.), , he contends that the Appellate Tribunal had the requisite power to grant the relief. He comments that on the facts of the case the Appellate Tribunal should have granted the prayer for stay.

5. I am minded to agree with counsel for Union of India. In Commissioner of Income Tax Vs. Bansi Dhar and Sons, , after considering the question whether the High Court was empowered to grant stay or pass interim orders in pending references under the Indian Income Tax Act, 1922, Section 66, and the Income Tax Act, 1961, Section 256, their Lordships said (in, para 38 of the report)

"In an appropriate case, if the assessee feels that a stay of recovery pending disposal of the reference is necessary or is in the interest of justice, then the assessee is entitled to apply before the appellate authority to grant a stay until disposal of reference by the High Court or until such time as the appellate authority thought fit. But in case the appellate authority acted without jurisdiction or in excessive jurisdiction or in improper exercise of the jurisdiction, then decision of such appellate authority can be corrected by the High Courts by issuing appropriate writs under Articles 226 and 227 of the Constitution."

6. The provisions of the Income Tax Act, 1961, Section 256, considering which the above noted law was declared by their Lordships in Commissioner of Income Tax Vs. Bansi Dhar and Sons, , are almost identical with the ones of the Customs Act, 1962, Section 130A. Hence I am of the view that it (the law declared) will equally apply to a case under the Customs Act, 1962.

7. The decisions in Prabir Kumar Majumdar Vs. Assistant Collector, Central Excise, , and Anoop Kumar Vs. Commissioner of Cus. (Prev.), the one given in the context of the Central Excise & Salt Act, 1944, Section 35G, and the other in the context of the Customs Act, 1962, Sub-section 125 130 and 143, also support the view that during pendency of a reference application before the High Court the Appellate Tribunal concerned would possess the requisite power to make interim orders. Those decisions were also given on the basis of the law

explained in Commissioner of Income Tax Vs. Bansi Dhar and Sons, .

8. The Position of law being as noticed before, to my mind, the Appellate Tribunal ought not to have felt that it lacked in power to grant the relief, if facts of the case warranted it.

9. As to merits of the prayer, I find that the appellate tribunal attached great importance to the conduct of Union of India that it had left the nearly three year old order unenforced, without obtaining stay from superior authority. In my view, the conduct of Union of India does not warrant such criticism as was made by the appellate tribunal. There was no scope to obtain stay from any authority, until the pending reference application was admitted. There was also no significant delay in making the miscellaneous application dated June 6th, 2003; for the reference application (CUSTA No. 2 of 2000) was admitted only on April 7th, 2003. To my mind, the age of the order could not be a relevant consideration for examining the merits of the prayer for interim relief, once this court admitted the reference application.

10. In my view, the Appellate Tribunal should have granted the relief to Union of India. The adjudicating authority found that the seized crystal glassware of foreign origin had been smuggled into the country. Absolute confiscation ordered by him was set aside by the Appellate Tribunal on the ground that no positive and affirmative evidence showing illegal import of the goods had been brought on records. Hence it is only the decision in the pending reference that is to decide the future course of action; for in terms of such decision the Appellate Tribunal will be required to proceed u/s 130D. I think, these facts, coupled with public interests, are sufficient to stay the operation of the order of the appellate tribunal dated November 16th, 1999.

11. For these reasons I allow this writ petition, and set aside the impugned order dated July 9th, 2004. I order that the miscellaneous application filed before the Appellate Tribunal shall be deemed to be allowed; and that the operation of the order of the Appellate Tribunal dated November 16th, 1999 shall remain stayed till the final disposal of the reference application (CUSTA No. 2 of 2000) filed by Union of India.

12. In the facts and circumstances of the case, there will be no order for costs in the writ petition.

13. All parties shall act on a signed Xerox copy of this dictated order, and urgent certified Xerox copy thereof shall also be supplied to the parties; both on the usual undertakings.