

(1988) 02 KL CK 0045
In the High Court Of Kerala
Case No : O.P. No. 447 of 1988

V.I.P. Sea Foods

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 24-02-1988

Acts Referred:

Constitution of India, 1950 — Article 265
Customs Act, 1962 — Section 114, 129A, 129E

Citation : (1989) 25 ECR 514 : (1989) 44 ELT 606

Hon'ble Judges : T.L. Vishwanath Iyer, J

Bench : Single Bench

Advocate : P.C. Chacko and Roy Chacko, for the Appellant; P.V. Madhavan Nambiar, for the Respondent

Final Decision : Allowed

Judgement

T.L. Vishwanath Iyer, J.—With the consent of parties, the original petition itself is taken up for disposal.

2. The petitioner is an exporter of marine products. They had imported raw materials without payment of duty of customs, for packing the marine products, under the Duty Exemption Entitlement Scheme. Later, however, the Customs Authorities initiated proceedings against the petitioner, alleging violation of the conditions of the licence by which import of the packing materials without payment of duty was permitted. The petitioner objected on merits, as well as on the ground that the Customs Authorities had no jurisdiction to take proceedings for violation of the conditions of the import licence. They were supported in the latter contention by the judgment of a Single Judge of the High Court of Madras in W.P. Nos. 9578 and 11152 of 1985.

3. The Collector of Customs did not accept these contentions. He held the petitioner guilty of violation of the conditions of the import licence. Accordingly demand was made for an amount of Rs. 8,69,813/- byway of duty and for an amount of Rs. 50,000/- as penalty u/s 114 of the Customs Act, 52 of 1962 (the

Act). A copy of the order imposing the duty and penalty is Ext. P-1.

4. The petitioner challenged the order in appeal u/s 129A of the Act before the second respondent, namely, the Customs, Excise and Gold (Control) Appellate Tribunal. Section 129E obliges the appellant to deposit the duty demanded or the penalty levied, pending the appeal; but a discretion is vested in the appellate authority (namely the Tribunal in this case), by the proviso to the section, to dispense with the deposit if, in its opinion the deposit would cause undue hardship to the appellant.

5. The petitioner applied to the Tribunal by their petition Ext. P-2 to dispense with the deposit of the duty and the penalty, in exercise of their power under the proviso to Section 129E. The petitioner contended, inter alia that the Customs department had no jurisdiction to initiate proceedings, regarding what essentially was violation of the conditions of the import licence, a contention which was supported by the decision of the Single Judge of the High Court of Madras mentioned earlier. The petitioner also pointed out that the same matter was pending consideration by a Division Bench of this court, the reference to the Bench having been made in view of the importance of the question. All this was quite apart from the submissions on the merits that they had not violated any of the conditions of the import licence. The petitioner also produced their Profit and Loss statement and the Balance Sheet which disclosed that they had to get Rs. 38.45 lakhs from sundry debtors and that they had a closing stock of Rs. 23.62 lakhs, to make out that insistence on deposit of the duty and penalty will cause undue hardship to them.

6. The Tribunal disposed of the application by the order Ext. P-3 dated 3-8-1987. The Tribunal did not attach importance to the fact that there was decision of the Madras High Court supporting the petitioner's case. The Tribunal did not find any discussion in the judgment, on the question of jurisdiction of the Customs Department. It was also noted that the said decision was pending in appeal before a Division Bench of that court. The Tribunal then went on to observe that "no opinion could be expressed in regard to the question of jurisdiction prima facie at this stage as the same would involve consideration of various issues in detail", which exercise could be resorted to only at the stage of final disposal of the appeal. The Tribunal found that the financial position of the petitioner was not such as to warrant dispensing with the deposit in its entirety. In the event, the Tribunal directed the petitioner to deposit a sum of Rs. 2,50,000/- before 26-10-1987. The appeal itself was posted to 27-10-1987.

7. The petitioner applied for extension of time to comply with the order with the plea that they were not in a position to make the deposit. The time was accordingly extended upto 30-11-1987. The petitioner was even then not in a position to make the . deposit with the result the Tribunal dismissed the appeal on 30-11-1987 by Ext. P-4 order.

8. The petitioner seeks to quash the orders Exts. P-3 and P-4 on the ground that

the Tribunal has not properly exercised the discretion vested in it under the proviso to Section 129E in directing the petitioner to make deposit of Rs. 2,50,000/- within the short time allowed. The petitioner would contend that the Tribunal has not taken into account various relevant factors which ought to go into the verdict in such matters.

9. At the time the original petition was admitted on 18-1-1988, I had directed the petitioner to make payment of an amount of Rs. 1,50,000/- within a period of three weeks. The petitioner complied with the direction, the delay of one day in making the payment having been condoned by me by the order on C.M.P. No. 4422 of 1988.

10. It has to be stated that the Tribunal has not correctly appreciated the various relevant factors which ought to be considered in exercising the discretion under the proviso to Section 129E. One of the contentions raised by the petitioner was regarding the jurisdiction of the Customs Department to initiate such proceedings in relation to violation of the conditions of the import licence. In this plea, the petitioner was prima facie supported by the decision of the High Court of Madras. The fact that the Tribunal did not find much of discussion in the judgment will not belittle its value as the judgment of a High Court, supporting the petitioner's case. The further fact that an appeal is pending against the judgment before the Division Bench is also not such as to detract from its validity, in fact, petitioner's case is that this court has itself found the matter to be of sufficient importance to be dealt with by a Division Bench. When the petitioner is supported by the judgment of a High Court, which is not expressly or impliedly overruled by the decision of superior court, or is not patently contrary to any other binding decision, and in the absence of any direct contrary decision from any other court, it has to be held that he has a prima facie case for consideration on merits.

11. In exercising the discretion under the proviso to Section 129E, the Tribunal should consider, at least prima facie, the question involved in the appeal. Inter alia, the existence of a prima facie case on merits, constitutes an important relevant factor in the consideration of the question of undue hardship. This is so because it causes undue hardship to any assessee to be called upon to make payment of amounts which are not legally due. The very mandate of Article 265 of the Constitution is that there can be no levy or collection of tax without the authority of law. The accepted rule of interpretation of provisions regarding appeals is to adopt that interpretation which will uphold the right of appeal rather than defeat it. While it is true that the right to appeal conferred by Section 129A is a conditional one, hedged in by the conditions of deposit imposed by Section 129E, it is equally important that the discretion to dispense with the deposit should be exercised judiciously based on relevant factors and circumstances. Prima facie case is one such. That prima facie case is relevant in this context is the ratio of the decisions in *Hari Fertilisers Vs. Union of India (UOI) and Others*, , *In Re : American Refrigeration Co. Ltd.*, and in *Thampi v. Collector of Central Excise* 1987 (1) KLT 562 of this court, all rendered under the analogous

provisions of the Central Excises and Salt Act, 1944.

12. The appellant's financial circumstances undoubtedly constitute a relevant factor. The facts of this case as disclosed by the documents produced disclose that they did not have sufficient liquid resources to enable payment of the amount directed to be paid.

13. In these circumstances, I am of the opinion that the order Ext. P-3 is not one in accordance with law, and that it has not been passed in proper exercise of the discretion vested in the second respondent by the proviso to Section 129E of the Act. Ext. P-3 is therefore liable to be quashed. Ext. P-4 is only an order passed in consequence of Ext. P-3, for failure to comply with Ext. P-3. If Ext. P-3 is quashed, Ext. P-4 has also to fail in consequence.

14. No contention has been raised regarding the maintainability of this original petition.

15. I, therefore quash Exts. P-3 and P-4. The petitioner has already paid Rs. 1,50,000/- towards the dues as directed by this court. In the circumstances, I do not think it necessary to direct the petitioner to make any further deposit as a condition of maintainability of the appeal. The second respondent Tribunal is therefore directed to restore the appeal to file and to dispose it of expeditiously on merits and in accordance with law without insisting on deposit of the duty or the penalty u/s 129E of the Act.

The original petition is allowed. There will be no order as to costs.