

Parasmal Solanki Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-30-1985

Reported in : (1985)(21)ELT704TriDel

Appellant : Parasmal Solanki

Respondent : Collector of Customs

Judgement :

1. This is an Application, which, along with three other identical Applications in as many Appeals [Appeal Nos. 367, 368 and 369 of 1985, apart from the instant Appeal], all heard together, purports to be one under Section 129E of the Customs Act, 1962 (hereinafter, the Act).

2. The prayer in the Application is "that the deposit of penalty of Rs. 20,000/- be stayed pending final disposal of the appeal", rather than one for dispensing with the mandatory requirement of a prior deposit in terms of Section 129E of the Act. Obviously, a stay of the mandatory requirement of a prior deposit is not what was contemplated in the aforesaid provision. There is no question of a stay of the deposit.

Rather, it could be dispensed with. The prayer, as worded, would appear to have been designed to facilitate reliance upon the decisions of Courts relating, generally, to the grant of stay in appropriate cases, regardless of their applicability in the context of the statutory provisions in Section 129E of the Act.

3. Even so, we proceeded to hear the Applications, as if they were made under Section 129E, as they purport to be.

4. Before us, it was contended by Shri Nankani, the learned counsel for the Applicants, inter alia, that- (a) the powers conferred on the Tribunal under Section 129A of the Act, with the widest amplitude, must, by necessary implication, carry with them all powers and duties incidental or ancillary to make the exercise of those powers fully effective [reliance upon AIR 1969 S.C. 430- ITO v. M.K. Mohammad Kunhi]; (b) it cannot be reasonably apprehended that the interests of the Revenue will, in any way, be prejudiced by indiscriminate exercise of the power to grant stay of recovery of taxes by the Tribunal, as a matter of course, since it is only when a strong prima facie case is made out that the Tribunal will consider grant of a prayer of stay of recovery and the conditions subject to which such stay could be granted [reliance on AIR 1969 S.C. 430 ibid]; (c) a discretion in the matter of a grant or refusal of stay is to be exercised judicially. A judicial exercise of discretion involves a consideration of the facts and circumstances of the case in all its aspects. The difficulties involved in the issues raised and the prospects of the Appeal being successful is one such aspect. The financial position and economic circumstances of the assessee is another. If the stay would result in jeopardy of the realisation of the tax or duty in question would also be a cogent factor. Likewise, the amount involved. If it is a heavy amount, it should be presumed that immediate payment, pending an Appeal in which there may be reasonable chance of success, would constitute hardship. Quick realisation of tax may be an administrative expediency but that, by itself, is no ground for refusing stay [reliance on 37 ITR 267-Aluminium Corporation of India v. C. Balakrishnan and Ors., 147 ITR 120-V.N. Purushottaman v. Agrl. Income Tax Officer and Anr.]; (d) accordingly, in a consideration of the question of "undue hardship" for dispensing with the deposit, in terms of the proviso to Section 129E of the Act, it is not merely a monetary hardship that has to be taken into account but the existence of a prima facie case as well, amongst other aspects; (e) if, therefore, as in this case, prima facie, the adjudication order penalising the Applicant was altogether erroneous, when, for a fact, no notice to show cause was, at all, received by the Applicant and he was afforded no opportunity, in violation of the principles of natural justice, to show cause against the levy of the penalty in

question, the requirement of a deposit of the penalty levied as a condition precedent for hearing the Appeal against the erroneous order, is, per se, an undue hardship and the deposit has, therefore, to be dispensed with.

5. It was, however, conceded by the learned Counsel that, financially speaking, the deposit of the penalty, in question, will not cause any hardship, whatsoever, much less undue hardship, as the Applicant has sufficient means.

7. On a perusal of the material papers, the submissions made and otherwise, it would appear that-

(a) as already observed, there is nothing like stay of the mandatory deposit. It could only be dispensed with provided that the Tribunal or the Collector (Appeals), as the case may be, "is of opinion that the deposit ... would cause undue hardship"; (b) nor does the provision, on its terms, speak of a stay of recovery of the duty or penalty that is required to be deposited. An order under the proviso to Section 129E dispensing with the deposit does not operate as a stay of recovery of duty or penalty, proprio vigore. A stay of such recovery can be granted, additionally, if prayed for, in the exercise of the incidental or ancillary powers that inhere in the Appellate forum [AIR 1969 S.C. 430-I.T.O. v. U.K. Mohammad Kunhi; and the Tribunal's decisions in 1983 (2) E.T.R. 357 (Atma Steels Pvt. Ltd. v. Collector of Central Excise) and 1984(16) E.L.T. 445 (CCE, Bombay v. Crescent Dyes & Chemicals Ltd.) while examining the scope of Section 35F of the Central Excises and Salt Act, 1944, in para materia, with Section 129E of the Act]; (c) Section 129E of the Act, prescribes a deposit as a condition precedent for the hearing of the Appeal. It is, hence, relatable to the maintainability of the Appeal itself rather than to any order, interlocutory in nature, in the Appeal, once it is held to be maintainable, like for e.g., a stay of recovery of the tax or duty in question by virtue of the inherent powers of the Tribunal. An Appeal can even be rejected for failure to make the deposit, where it is not dispensed with [AIR 1971 S.C. 2280-Navin Chandra Choteylal v. the Central Board of Excise and Customs-.construing the parallel provision in Section 129 of the Act as it previously read]; (d) in the premises, such aspects of the case as may be relevant for the grant of stay of recovery, by means of an interlocutory order in the Appeal, are not germane for a

consideration of the question of maintainability of the Appeal itself; (e) in terms of the proviso to Section 129E, a deposit of the duty or penalty in question in the Appeal can be dispensed with only and only if the deposit thereof would cause "undue hardship"; (f) the reasons for prescribing a deposit statutorily as a condition precedent for the hearing of the Appeal-a deposit that could be dispensed with if it would cause undue hardship-are, presumably, identical with those that prompted the Hon'ble Supreme Court in 1985 (19) E.L.T. 22 (S.C.) [Assistant Collector of Central Excise v. Dunlop India Ltd.] to deprecate the indiscriminate grant of stay, ostensibly in exercise of the jurisdiction under Article 226 of the Constitution of India. Said their Lordships, "We have come across cases where the collection of public revenue has been seriously jeopardised and budgets of Governments and Local Authorities affirmatively prejudiced to the points of precariousness consequent upon interim orders made by Courts. All this is not to say that interim orders may never be made against public authoritiesIn cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interests, a Court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that a prima facie case has been shown.

"[Para 5 of the Judgment in the aforesaid case]. And again, even assuming that the company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting the interim orders as was done by the High Court. There was no question of any balance of convenience being in favour of the respondent-company. The balance of convenience was certainly in favour of the Government of India.

Governments are not run on mere Bank Guarantee. We notice that very often some Courts act as if furnishing a Bank Guarantee would meet the ends of justice. No governmental business or for that matter no business of any kind can be run

on mere Bank Guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to public interest." [Para 8 of the report of the Judgment]. (underlining ours); (g) if this were so, in the case of a Writ Petition under Article 226 of the Constitution of India, the question of the existence of a prima facie case loses all relevance in the context of Section 129E of the Act. If an Appeal cannot be heard and it may even be rejected, unless the deposit is either made or dispensed with, an enquiry into the existence of a prima facie case in a consideration of "undue hardship" in making the deposit is not called for. It is as much as to come to a conclusion on the merits of the Appeal, howsoever, tentative or perfunctory a prima facie view can be; (h) in construing the expression "undue hardship", one is not to lose sight altogether of the context or the setting in which it occurs. The provision speaks of a pre-deposit as a condition precedent for the maintainability of the Appeal, except where the deposit would, if insisted upon, cause "undue hardship". The undue hardship is inextricably linked to the deposit. It cannot be any hardship, in the premises, not relatable to the deposit or the pecuniary difficulties of the Appellant in making the deposit. The injunction to impose such conditions as would safeguard the interests of the Revenue in a case of proven undue hardship also makes it clear that "undue hardship" is nothing but grave financial difficulties in complying with the mandatory requirement of a deposit as a condition precedent for hearing the Appeal. Any other construction to the expression would, necessarily fly in the face of not merely the statutory provision itself but the weighty observations of the Hon'ble Supreme Court in the aforesaid case. If the existence of a good prima facie case, or the balance of convenience are factors that are to be considered in the determination of "undue hardship" in making the deposit, there is nothing to have prevented the legislature from giving expression to it suitably. Nothing could be easier than that. One cannot, however, read those factors into the expression "undue hardship", in the context in which it occurs, in the absence of a clear legislative intent to include

them within the ambit of the said expression Accordingly, it was held by the Hon'ble Supreme Court in dismissing a Petition for Special Leave by the assessee (No. 7762 of 1984- Spencer & Co. Ltd., Madras v. Collector of C.E.) that "undue hardship" (occurring in Section 35F of the Central Excises and Salt Act, 1944-in pari materia with Section 129E of the Act) "would include a consideration, inter alia, of the aspect of liquidity possessed by the assessee."; (i) that "undue hardship" does not signify anything other than financial hardship and it is not the existence of a good case even prima facie, that is required to be considered, was the view we had consistently taken right from 31-3-1983 when we pronounced our order in an Application for Stay in Appeal No. 133/83-NRB (Tribhuvandas Bhimji Zaveri v. Collector of Customs and Central Excise, New Delhi). As observed by us in that matter, "if, in every Appeal, the requirement of pre-deposit amounts to undue hardship merely because the Appellant feels that he has a good case in Appeal, as he may, the provision requiring deposit is rendered altogether nugatory.

Again, 'undue hardship' is linked to the requirement of deposit and cannot, therefore, imply anything other than any immediate pecuniary hardship in the payment thereof."; (j) admittedly, nothing is pleaded in support of the Application except the existence of a good case, prima facie. There is no question of any hardship in making the deposit-much less undue hardships unless, payment of money held to be due by the two lower forums is the last priority that would, in itself, invariably cause undue hardship; (k) the decisions cited to us are all in a different context-for stay of recovery and not for dispensing with a deposit statutorily required to be made for the maintainability of the Appeal itself.

8. In the result, we see no merits in the Application, which is, accordingly, (dismissed).

9. This Appeal, alongwith the three other Appeals adverted to in para 1 supra, may be listed for disposal in accordance with law if the deposits required to be made in each of them are not made within eight weeks from the date of the communication of this order.