

Cc Vs. Shailesh Damodia

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-27-2002

Reported in : (2003)(106)LC319Tri(Mum.)bai

Judge : S T Gowri, G Srinivasan

Appellant : Cc

Respondent : Shailesh Damodia

Judgement :

1. The above application has been filed by the Commissioner of Customs (Export Promotion) Mumbai for stay of operation of order of the Tribunal No. C-II/3418/WZB/2001 dtd. 26.11.2001 certified on 19.12.2001 in Appeal No. C/1102/2001.

2. The present stay application has been filed in the following circumstances. A Show Cause Notice dtd. 3.4.2002 was issued to the respondent before us in respect of smuggling of AMIKACIN SULPHATE on the basis of search conducted in a Ghatkopar premises and resulted in the proceedings initiated by the Commissioner of Customs (EP), Mumbai on demand. The Show Cause Notice dated 3.4.2001 was issued for proposing to confiscate 250 Kg. Streptomycin Sulphate under the provision of Section 111 (d) of Customs Act and to impose penalty under 112(G) of the Custom Act.

3. The Commissioner of Custom (EP) by his order dtd. 17.8.2001 confirmed the said Show Cause Notice and imposed a penalty of Rs. 2 Lakhs on the respondent and another noticee called Hasmukh Parekh. The respondent paid Rs. 7 Lakhs, which was ordered to be adjusted against redemption fine of Rs. 8 Lakhs, imposed against him.

4. The Tribunal by the impugned order set aside the Order-in-original passed by the Commissioner of Customs (EP). The department has filed the instant application under Section 130A of the Custom Act, 1962 in the Hon'ble High Court of Bombay seeking the indulgence of the Hon'ble High Court to refer five questions of law for its opinion and also praying the Hon'ble High Court to direct the Tribunal to refer statement of the case for deciding the said questions. The said application has been filed in the Hon'ble High Court and it has been numbered as Custom Application 13/2002. The present application has been filed in the Tribunal for the stay operation of the order of the Tribunal. In the Application for stay in paragraph 4 & 5 of the same, it has been stated as follows.

4. In the aforesaid circumstance, the applicant has no option other than to approach the Hon'ble CEGAT with the request to stay the operation of its order dated 19.12.2001 till the final disposal of the Reference Application by the Hon'ble High Court of Mumbai.

5. The Application submits that the Hon'ble CEGAT is fully competent to stay the operation of its order where a Reference Application has been filed in the High Court as held by the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Delhi and Ors. v. Bansi Dhar and Sons and Ors.

6. It has been argued before us by the Departmental Representative that in view what is stated in the application, the impugned order should be stayed. On the other hand of the Learned Counsel for the respondent stated that it may be true that advisory jurisdiction of the High Court may not empower the Hon'ble High Court to grant stay of the operation of the order of the Tribunal but having regard to the averment in the application no case has been made out for stay of the operation of the order. It was also argued by the respondent that once order has been passed by the Tribunal unless necessary ground has been made in the

application for stay, the Tribunal in the circumstances of the case should not grant stay.

8. In the application filed before us reference has been made to Judgments of the Supreme Court in the case of Commissioner of Income Tax, Delhi v. Bansi Dhar and Sons . No doubt once we go through the Judgment, it would appear that the Hon'ble Supreme Court has stated that the Tribunal has power to grant the stay under the circumstances prevailing there. But the fact remains in the said case before the Supreme Court was that the reference application appears to have been admitted by the High Court. Here in the instant case during the course of the argument it transpired before us that Reference Application has only been numbered as Custom Application 13/2002 in the High Court and it was stated by both parties that it has not yet been heard. When that is the position then we have to see the case from the pleas filed before us. The application filed by the Department it does not state that there would have been irreparable loss would accrue to the department in the case of return of the fine to the respondent and in case the Department win its case in the High Court. The application did not say that the respondent is financially heavily indebted so that fruits of success in the litigative proceedings initiated by the department may become futile. In the absence of the said averment in the stay application we cannot exercise our discretionary power in-favour of the department.

9. It has been pointed out that whenever the tribunal or public authority exercises discretion, the same has to be exercised to use the words as Lord Halsbury mentioned in the case of Sharp v. Wakefield 1891/AC 173 which reads as under.

discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: Rooker's Case; according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.

And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

(Emphasis supplied) (Extracted from H.W.R. WADE, ADMINISTRATIVE LAW 5th Edition page 352) 10. Here in this case Application is silent about the financial status of the respondent, so that, applicant department may not enjoy fruit of litigation in case it success. In the absence of specific allegation to that effect in the application, we cannot exercise in the manner pleaded by the department which may be against justice, and not according to law. It may also be treated as arbitrary and fanciful, abuse of power, not legal and regular.

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