

Arvind Kumar Vs. Cegat

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Court : Allahabad

Decided On : Aug-16-2000

Reported in : 2001(130)ELT732(All)

Judge : S. Rafat Alam, J.

Acts : [Customs Act, 1962](#) - Sections 11B, 77, 111, 112 and 129E; [Constitution of India](#) - Article 226

Appeal No. : Civil Misc. Writ Petition No. 595 of 2000

Appellant : Arvind Kumar

Respondent : Cegat

Advocate for Def. : Vikram Gulati, Addl. Standing Counsel, Govt. of India

Advocate for Pet/Ap. : S.C. Budhwar, Sr. Counsel

Judgement :

S. Rafat Alam, J.

1. By this petition under Article 226 of the [Constitution of India](#) the petitioner has come up for quashing of the order of the Custom Excise & Gold (Control) Appellate Tribunal, Northern Bench, New Delhi (respondent No. 1) dated 15-5-2000 (Annexure 15 to the writ petition). Whereby the application under Section

129E of the Customs Act for waiver of pre-deposit penalty of the petitioner in both the appeals No. dated 10-11-2000 has been disposed of. Heard Shri S.C. Budhwar, learned Senior Counsel appearing for the petitioner and Shri Vikram Gulati, learned Additional Standing Counsel, Government of India for the opposite parties. Both of them agreed that this petition may be disposed of at the admission stage.

2. Since the counter and rejoinder affidavits have been exchanged and as agreed to by the learned Counsel for the parties, this petition is being disposed of at this stage as per rule of the Court.

3. It appears that a proceedings under Sections 111 and 112 of the [Customs Act, 1962](#). (hereinafter referred to as the Act), was initiated against the petitioner along with Mahendra Goel and Vijai Saxena for the alleged smuggling of mobile phones, its accessories and computer parts of foreign origin. It has been alleged that with the help and connivance of the petitioner who was posted at Babatpur Airport, Varanasi, mobile phones and computer parts were being smuggled from Kathmandu to Varanasi and then from Varanasi to Delhi without declaration and clearance under Section 77 of the Act, for the aforesaid allegation. The petitioner was put under suspension vide order dated 6-10-1997 in a contemplated Departmental proceeding. He was served with a show cause notice dated 24-2-1995 as to why a penalty should not be imposed upon him under Section 112 of the Act. Consequently, he filed his show cause stating inter alia, that he was on leave on 17-8-1997 and 24-8-1997 and on 1-9-1997 was on preventive duty and was not entrusted with the duty of clearance of passenger baggages which was to be performed by the Baggage Officer posted at Customs counter, and thus, he could not be held responsible for clearance of the alleged seized goods. The Commissioner of Customs (General), having heard the matter, vide order dated 30-11-1999 passed separately in original case No. 31/A&R;/V2/99 and original case no. 32A & 3V2/99, imposed a personal penalty of Rs. 2 lacs in each under Section 11B of the Act. The petitioner being aggrieved preferred two separate appeals before respondent no. 1 on 5-1-2000 along with application under Section 129E of the Act for the waiver of pre-deposit of penalty imposed on him. The learned Tribunal having heard the parties. By the impugned order dated 16-5-2000

directed the petitioner to deposit a sum of Rs. 25,000/- in each case on or before 16th August, 2000 and to report compliance by 24th August, 2000, failing which the appeal shall be dismissed without any further notice.

4. S.C. Budhwar, learned Senior Counsel appearing for the petitioner, contended that while disposing of the waiver application the learned Tribunal did not consider the hardship of the petitioner. He further sought to argue that the petitioner has been implicated only on the statements of Rakesh Kumar, Vipin Kumar Bansal and Mahendra Goel. But inspite of his request the Commissioner of Customs (General) respondent no. 2, did not give him opportunity to cross examine them. It is further submitted that the petitioner was never identified by the aforesaid three persons on whose statements the petitioner's complicity in the case has been found by respondent no. 2. It is last submitted that the petitioner's application to summon the records containing documents and report of the Superintendent Customs of the Babatpur Airport dated 22-4-1999 was also not allowed by respondent no. 2 and, therefore, the order imposing penalty suffers from the vice of principles of natural justice and the finding is contrary to the evidence on record.

5. Be that as it may, since the present petition has been filed against the order passed on the waiver application and the appeal is yet to be decided on merits by the Tribunal in my opinion, it would not be proper to express any opinion on the merits of the case at this stage and, therefore, this Court will only confine to the order passed on the waiver application.

6. On the other hand, Sri Vikram Gulati, learned Additional Standing Counsel appearing for the opposite parties vehemently opposed the writ petition and submitted that since the petitioner belongs to Lucknow and the order impugned has been passed by the Customs Excise & Gold (Control) Appellate Tribunal at Delhi, this petition is not cognizable by this Court. He further produced a photo copy of the order of a learned single Judge of this Court, dated 13-7-2000 passed in Civil Misc. Writ Petition No. 451 of 2000 (Ambika Industries and Anr. v. Customs Excise & Gold (Control) Appellate Tribunal, New Delhi and Ors.). I do not find any substance in the submission for the reason that the allegations against the petitioner are in respect of incident which took place at Varanasi Airport during his

posting there as Customs Inspector and, therefore, this Court has jurisdiction over the matter. The aforesaid order dated 13-7-2000 in Writ Petition No. 451 of 2000 is also not applicable in the facts of the present case from a perusal of the aforesaid order dated 13-7-2000. It is apparent that in the place at Amausi Airport, Lucknow and, therefore, the learned single Judge of this Court held that the cause of action, if any, has arisen within the territorial jurisdiction of the Lucknow Bench of this Court in that view of the matter. The petitioner was allowed to withdraw the writ petition in order to enable him to file fresh petition at Lucknow Bench.

7. Section 129E of the Act prescribes deposit of the amount of duty or penalty as the case may be, for the hearing of the appeal. The deposit of penalty is a condition precedent for the hearing of the appeal and in the event of failure the appeal can be summarily rejected. However, the proviso to Section 129E enable the Appellate Tribunal to dispense with such deposit subject to such conditions as he or it may deem fit to impose it in the opinion of the appellate authority such deposit of duty in interest demanded or penalty levied would cause undue hardship to the appellant.

8. The learned Appellate Tribunal while disposing of the application found that the cross-examination of the persons from whose possession the goods were recovered, was not permitted and, therefore, having considered the fact and circumstances of the case and having taken note of the fact that the petitioner was not on baggage duty, directed the petitioner to deposit a sum of Rs. 25,000/- in each case. However, the learned Tribunal did not consider the hardship which may cause to the petitioner if the deposit is not dispensed with, although argument was advanced that the appellant-petitioner is under suspension and not in a position to deposit any money. In my view, while deciding the waiver application under Section 129E of the Act. The Tribunal ought to have taken into account the hardship which may cause to the petitioner if he is asked to deposit the penalty besides existence of a prima facie case as prescribed in the proviso to Section 129E of the Act.

9. Admittedly, the petitioner is a permanent employee of the Customs Department and has rendered 12 years of continuous service and now under suspension from

October, 1997, almost for about three years. It is a matter of common knowledge that a suspended Government servant during the period of suspension does not get full salary but subsistence allowance only. But this aspect has not been considered by the Tribunal and, therefore, I am of the opinion that directing the petitioner to deposit Rs. 25000/- in each case will cause undue hardship to him. Apart from that the petitioner being still in Government service in the event of failure of the appeal the amount of penalty can be recovered from his salary, and other benefits and thus, it safeguards the interest of Revenue also, for these reasons, in my opinion, direction to deposit Rs. 25000/- in each appeal is excessive and bound to cause hardship to the petitioner and, therefore, in the interest of justice, the impugned order dated 16-5-2000 in so far as it directs to deposit Rs. 25000/- in each appeal, deserves to be quashed. At this stage Shri Gudhwar, learned Senior Counsel appearing for the petitioner submitted that the Tribunal may be directed to call for the report dated 22-4-1999 before deciding the appeal. I am afraid such a direction cannot be issued at this stage. Besides that this court has no doubt that the learned Tribunal will dispose of the appeal after giving full opportunity of hearing to the petitioner and taking into account all the documents and evidence on record.

10. In the result, the petition is partly allowed. The impugned order dated 16-5-2000 insofar as it directs the petitioner to deposit Rs. 25000/- in each case is hereby quashed. It is directed that if the petitioner deposits Rs. 5000/- in each case within the time fixed by the Tribunal, his appeals shall be decided on merits in accordance with law and after giving opportunity of hearing.

11. Let a certified copy of this order be furnished to the learned Counsel for the parties within a week on payment of usual charges.