Perfect Industries Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-07-1989

Reported in : (1990)LC332Tri(Delhi)

Appellant : Perfect Industries

Respondent : Collector of Central Excise

Advocate for Pet/Ap. : Shri. A.K. Jain

Judgement :

1. When the case was called on for hearing on 21-11-1988 Shri L.C.Chakraborty, learned JDR submitted that he is feeling handicapped in replying to the arguments advanced by the learned counsel for the appellants since the record is not available with the department.

Elaborating on his submissions he submitted that the relevant file of the case was sent by post parcel No. 819 dated 6-7-1987 to the Senior Departmental Representative, CEGAT and this parcel alongwith seven other parcels were delivered and received by the clerk of the office of the Sr. D.R., CEGAT, but incidentally the case file of the instant appeal is not traceable and there is also no likelihood of its being found in the near future. Under these circumstances he submitted that the statements of various persons recorded during the enquiry and relied upon in the show cause notice as detailed out in Annexure 'B' to the show cause notice be summoned from the appellants as the copies of all these statements were supplied to them as Annexure 'B' to the show cause notice and must be in their possession. He further submitted that these documents were relied upon by the Adjudicating Authority in his impugned order and these are material statements/documents for the purpose of deciding the controversy raised by the learned counsel for the appellants. In a nutshell his submission was that the appellants be directed to produce the said statements to secure the ends of justice either under Rule 41 or 23 of the CEGAT (Procedure) Rules, 1982. To lend support to his submissions he cited the following cases -Metal Extruders (I) Pvt. Ltd., Bombay v. Collector of Central Excise, (ii) Commissioner of Income Tax v. Steel Cast Corporation, (1977) 107 1TR 683.

2. Opposing the request Shri A.K. Jain, learned counsel for the appellants submitted that this Tribunal has no power to direct the appellants compelling them to produce the said documents (statements) unlike such powers being given to the Tribunal in Customs cases under Sub-section (7) of Section 129C of the Customs Act. In other words he submitted that Section 129C of the Customs Act provides for the Procedure of Appellate Tribunal. Sub-section (7) of the same section expressly provides that the Appellate Tribunal shall have the same powers as are vested in the Court under the Code of Civil Procedure, 1908 when hearing an appeal to compel the production of books of account and other documents. He emphasised that the instant case is a case under the Central Excises and Salt Act, 1944 and Section 35D of the Act provides for the "Procedure of Appellate Tribunal". Its Sub-section (1) expressly provides that the provisions of Sub-section (1), (2) (5) and (6) of Section 129C of the Customs Act, 1962 shall apply to the Appellate Tribunal in the discharge of its functions, under this Act (Central Excises and Salt Act, 1944) as they apply to it in the discharge of its functions under the Customs Act, 1962. In a nutshell his submission was that the power to summon or to compel the production of documents is not given to the Tribunal in the excise matters. To counter the submission made by the learned JDR that the said statements are material for the purpose of deciding the controversy in hand, Shri A.K. Jain, learned counsel for the appellants submitted that these statements were not used against the appellants by the Collector while recording his findings in the impugned order.

Therefore, it should be inferred that the Collector had accepted the statements made by the appellants and Ors. in their said statements for the production of which the learned JDR is making the request. To support his submission he cited the following cases :Shriram Refrigeration Industries Ltd. v. Collector of Central Excise, As regards the case of Metal Extruders (I) Pvt. Ltd. supra, cited by the learned JDR, he submitted that it is not applicable for, it deals with a case of "error apparent from record".

3. We have considered the submissions and find that the contention of the learned Counsel for the appellants Shri A.K. Jain that the Tribunal has no power to compel the production of documents for, Sub-section (7) of the Section 129-C of the Customs Act, 1962 is not made applicable to the Appellate Tribunal as would appear from Section 35D of the Central Excises and Salt Act, appears to be attractive at the first blush but a little probe in the matter would reveal that it has no force.

4. For the proper appreciation of the controversy it would be advantageous to trace the legislative provisions of both the Acts.

Customs Act, 1962 was amended by Finance Act, 44 of 1980, inter-alia, making provisions for the constitution of the "Appellate Tribunal".

Section 2(1-B) of the Customs Act defines "Appellate Tribunal" means the Customs, Excise and Gold (Control) Appellate Tribunal constituted under Section 129. This Section 129 of the Act provides that the Central Government shall constitute an Appellate Tribunal to be called the Customs, Excise and Gold (Control) Appellate Tribunal consisting of as many judicial and technical members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act. Section 129A of the Act makes provisions for appeals to the Appellate Tribunal. Section 129B of the Act, inter-alia, provides that the Appellate Tribunal may, after hearing the parties, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may remand the case for a fresh adjudication or decision, as the case may be after taking additional evidence, if necessary. Section 129C makes provision regarding the Procedure of Appellate Tribunal. Since this Section is the basis of the argument for the learned counsel for the appellants it would be useful to analyse the same after reproducing it. The said Section insofar as relevant runs thus - (6) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.

(7) The Appellate Tribunal shall, for the purposes of discharging its functions, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely : (b) enforcing the attendance of any person and examining him on oath; (c) compelling the production of books of account and other documents; and 5. On a close analysis of Sub-section (6) of Section 129C as extracted above it would appear that the Appellate Tribunal has been given power to frame its own Rules to regulate its own procedure and the procedure of the Benches thereof in all matters - 6. Likewise on a close analysis of Sub-section (7) of the same Section it would appear that it is not an independent sub-section but simply amplifies that for the purposes of discharging its functions as envisaged in Sub-section (6) the Appellate Tribunal shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely, - (b) enforcing the attendance of any person and examining him on oath; (c) compelling the production of books of account and other documents; and 7. Thus in our considered opinion Sub-section (7) is an integral part of Sub-section (6) and should be read as such while reading Sub-section (6) for, powers relating to discovery and inspection; enforcing the attendance of any person and examining him on oath, compelling the production of documents and issuing commissions are the irreducible minimum which the Tribunal acting as a quasi-judicial authority is to possess when trying a suit which for our purposes includes appeals as the words "trying a suit" meaning thereby 'trial' has been used in the wider sense, meaning thereby the entire proceedings from the time when the adjudication proceedings travel into the domain of this Tribunal as an appeal upto the pronouncement of the final order as held by the Hon'ble Supreme Court in the case of Harish Chandra v. Triloki Singh, AIR 1957 SC 444 wherein while dealing with the meaning of words 'trial of Election Petition' under Chapter-Ill of the

Representation of the People Act, 1951 their Lordships held that the word 'trial' has been used in the wider sense as meaning the entire proceedings before the Tribunal from the time when the petition is transferred to it until the pronouncement of the final order.

8. The contention of the learned counsel for the appellants that when the provisions for the appeals to the Appellate Tribunal were made by the same Finance Act of 1980 in the Central Excises & Salt Act, 1944 the omission to make the provisions of Sub-section (7) of Section 129C of the Customs Act applicable to the Appellate Tribunal in Section 35D of the Central Excises & Salt Act, 1944 would mean that those powers such as the power of compelling the production of books of account and other documents were not conferred upon the Tribunal while dealing with the appeals under Section 35D of the Central Excises & Salt Act, we are afraid cannot be accepted. Sub-section (aa) of Section 2 of the Central Excises & Salt Act, 1944 defines the "Appellate Tribunal" as follows : "(aa) 'Appellate Tribunal' means the Customs, Excise and Gold (Control) Appellate Tribunal constituted under Section 129 of the Customs Act, 1962." Section 35B makes provisions for the appeals to the Appellate Tribunal.

Section 35C provides for the hearing of the appeal and also with the powers of the Tribunal to pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or to remand the case,-after taking additional evidence, if necessary. It also provides for the amendment of its order if any mistake apparent from the record comes to its notice either suo motu or at the instance of either party to the appeal.

Section 35D of the Act provides for the procedure of Appellate Tribunal. Since Sub-section (1) of this Section 35D of the Act is the basis of the contention of the learned counsel for the appellants it would be useful to extract the same. The said Section runs thus :- (1) The provisions of sub-sections (1), (2) (5) and (6) of Section 129C of the Customs Act, 1962 (52 of 1962) shall apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Customs Act, 1962." 9. From a reading of Sub-section (1) of Section 35D of the Act as extracted above it appears at the first blush that Sub-section (7) of Section 129C of the Customs Act which amplifies that for the purposes of discharging its functions the Appellate Tribunal shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, inter-alia, to compel the production of documents etc., when trying a suit was not made applicable in Section 35D of the Central Excises and Salt Act, 1944 but this omission in our considered opinion, in the context of the provisions of Section 129C of the Customs Act and Section 35D of the Central Excises & Salt Act is of no consequence. In the first place there is not the slightest indication in the Finance Act of 1980 or in the Notes on Clauses that any such drastic curtailment of powers such as discovery and inspection; enforcing the attendance of any person and examining him on oath; compelling the production of books of account and other documents; and issuing commissions given to the Appellate Tribunal in the discharge of its functions under Sub-section (7) of Section 129C of the Customs Act was contemplated at that time. The Statement of Objects and Reasons for making the provisions of the Appellate Tribunal in the Customs Act, Central Excises & Salt Act and the Gold (Control) Act was with respect to certain recommendations including the abolition of the jurisdiction of the Central Government and hearing of the appeals by the Appellate Tribunal. No proposal/recommendation was made therein for abolition of the procedure of the discovery and inspection, compelling the production of books of account and other documents therein, though one would surely have expected to find this mention, if there had been such proposal; nor has the learned counsel for the appellants been able to point out any such proposal or recommendation.

10. It is further to be noted that Sub-section (7) of Section 129C of the Customs Act is not confined to the power of compelling the production of books of account and other documents. It enumerates a number of other powers, such as the power of discovery and inspection, enforcing the attendance of any person and examining him on oath and power to issue commissions. And it surely cannot be contended that with the omission of Sub-section (7) of Section 129C of the Customs Act in Section 35D those powers also have been taken away because such powers are the irreducible minimum which a Tribunal is supposed to possess in discharging of its functions when trying a suit.

11. A more reasonable view would seem to be that the Parliament did not consider it necessary to specify expressly the applicability of Sub-section (7) of Section 129C of the Customs Act in Sub-section (1) of Section 35D of the Central Excises and Salt Act. For, it appears to us that once the powers which are vested in a Court under the Code of Civil Procedure when trying in respect of the matters namely discovery and inspection etc. were conferred upon the Appellate Tribunal under the Customs Act, it was not at all necessary for the Parliament to repeat the same in Sub-section (1) of Section 35D of the Central Excises and Salt Act. From this omission it cannot be contended that the Parliament intended that the powers which were conferred by the Tribunal when trying a suit in respect of the matters namely discovery and inspection etc. should not apply to the appeals heard by the Tribunal. Counsel for the appellants were unable to cite any authority in support of his contention.

12. Now look from another angle. Sub-section (6) of Section 129C of the Customs Act made expressly applicable to the Tribunal under Sub-section (1) of Section 35D of the Central Excises and Salt Act empowers the Tribunal to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions. The said Sub-section (6) of Section 129C of the Customs Act, 1962 reads as follows : "(6) Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings." 13. The said Sub-section (6) of Section 129C of the Customs Act (which has been made applicable to the Central Excises and Salt Act, 1944 by virtue of Section 35D as stated above) is somewhat similar to Section 122 of the Code of Civil Procedure, 1908 which empowers certain High Courts to make rules regulating their own procedure and the procedure of the Civil Courts. The said Section 122, C.P.C. reads as follows :- High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule." 14. Interpreting the said Section 122, C.P.C. it was held by the Gujarat High Court in

the case of Goverdhanbhai v. Parshottam, AIR 1976 Gujarat 98, that under the Section the High Court may make rules regulating their own procedure and the procedure of the Civil Courts and may, by such Rule, vary or alter or add to any of the rules in the First Schedule and the rules so made have the force of law. Almost all the High Courts in exercise of their rule making powers under Section 122 have made their Rules in order to regulate their own procedure.

Likewise this Tribunal in exercise of its powers conferred by Sub-section (1) of Section 35D of the Central Excises and Salt Act, 1944 read with Sub-section (6) of Section 129C of the Customs Act have made its own rules known as Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 to regulate its own procedure in all matters arising out of the exercise of its powers or of the discharge of its functions. Rule 41 of these Rules empowers the Tribunal to make such orders or give such directions as may be necessary or expedient to prevent abuse of its process or to secure the ends of justice. The said Rule reads as follows :- The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice".

15. Thus, from a bare perusal of the said Rule 41 extracted above, it would appear that this Tribunal has power to make such orders or to give such directions as may be necessary or expedient to prevent abuse of its powers or to secure the ends of justice. Needless to say that directing a party to produce the documents under Rule 41 would be the matter of procedure. There cannot be and in our considered opinion there should not be, any controversy regarding any distinction between "power to compel the production of documents" and "the procedure directing the party to produce the documents". For, there is no anti-thesis between "procedure" and "powers" in such matters. In this view of the matter we are supported by the observations made by their Lordships of the Hon'ble Supreme Court in the case of Harish Chandra Bajpayee v.Trilok Singh (quoted with approval in the case of Rajendra Kumari v. Ram Adhar, (1976) 1 SCR 255 while dealing with the provisions of Section 90(2) and Section 92 of the Representation of the People Act, 1951, as amended by Act 47 of 1966. The said observations runs thus :- "18(3) It is then argued that Section 92 confers powers on the Tribunal in respect

of certain matters, while Section 90(2) applies the Civil Procedure Code in respect of matters relating to procedure, that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under Section 92 and not under Section 90(2). We do not see any antithesis between 'procedure' in Section 90(2) and 'power' under Section 92. When the respondent applied to the Tribunal for amendment, he took a procedural step, and that, he was clearly entitled to do under Section 90(2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of a petition is competent, but the passing of any order thereon is not? We are of opinion that there is no substance in this contention either." 16. Similarly, in the case of Sitaram Hirachand Birla v. Yograjsing Shankarsing, AIR 1953 Bom. 293, it was clearly pointed out that the distinction between 'power' and 'procedure' was completely artificial and this distinction is without any difference. The learned Chief Justice speaking for the Court observed as follows :- "In our opinion, Mr. Kotwal is right, because on principle it is difficult to make a distinction between procedure and the powers of a Court as suggested by Mr. Patwardhan. The whole of the Civil Procedure Code, as its very name implies, deals with procedure. In the course of procedure the Court always exercises power and when the Court is exercising its powers, it is exercising them in order to carry out the procedure laid down in the Code. Therefore, procedure and powers in this sense are really interchangeable terms and it is difficult to draw a line between procedure and power. The power conferred under Section 92 is not any substantive power, it is a procedural power, a power intended for the purposes of carrying out the procedure before the Tribunal. Therefore, in our opinion, the Tribunal was right when it took the view that it had the power to amend the petition under sub-s. (2) of Section 90 of the Act." 17. These observations were quoted with approval by the Hon'ble Supreme Court in the case of Rajendra Kumari v. Ram Adhar, 18. Thus, we hold that the Tribunal has power to order or issue directions to the parties to produce books of accounts and other documents under Section 35D(1) of the Act or Rule 41 of the CEGAT (Procedure) Rules, 1982 and overrule the objection raised by the learned Counsel for the appellants.

19. Now on merits the request made by the learned JDR appears to be genuine since as per the practice and the procedure of the Tribunal original records are not summoned from the adjudicating or appellate authorities unlike the Courts and the cases are decided on the basis of the Paper Book filed by the parties. Since admittedly all the documents relied upon in the show cause notice as detailed out in Annexure 'B' to it were supplied to the appellants and they have not disputed before us that the same were not in their possession, we order and direct the appellants to produce all the statements relied upon in the show cause notice as detailed out in Annexure 'B' to the show cause notice within four weeks from the date of receipt of the order so that hearing of the appeal may proceed. If the appellants fail to produce the said statements as ordered by us the law will take its own course.

20. Before we part with the controversy it may also be stated that the appellants have raised an unnecessary controversy and we have thought it proper to decide it to settle the law. For, the instant case is not a case of compelling the appellants to produce the documents. It is a case where learned JDR requesting that since the original record is not available with the department, the documents relied upon and mentioned in Annexure 'B' to Show Cause Notice may be produced by the appellants as the original records are not summoned by the Tribunal as per practice and the appellants are supposed to file the paper book including all the documents forming the part of the original proceedings. In these circumstances in our considered opinion the question of compelling the appellants to produce the documents strictly does not arise as envisaged under Order XI, Rule 14 read with Rule 12 of the Code of Civil Procedure, 1908 which provides for discovery and production of documents. In other words it is a case where the learned JDR is making a request for the production of the relied upon documents by the appellants for the purpose of appreciating the case of the parties to secure the ends of justice. Since the original records are not summoned by the Tribunal as per practice and the appellants have not filed the aforesaid documents which form the part of the impugned order we think it expedient that to prevent abuse of its (Tribunal) process and to secure ends of justice a direction can be issued in terms of Rule 41 of the CEGAT (Procedure) Rules, 1982 to the appellants to produce copies of all these statements relied upon in the Show Cause Notice and supplied

to the appellants - a fact which was never disputed by the appellants.

21. Needless to say that in the meanwhile the Department would be at liberty to re-construct the original record, if possible, and produce the same before the Tribunal.