Collector of Customs Vs. Ruby Advertisers

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-04-1993

Reported in : (1994)(69)ELT304TriDel

Appellant : Collector of Customs

Respondent : Ruby Advertisers

Judgement :
1. As all the above misc. applications involve a common issue, they are heard together and disposed of by this common miscellaneous order.

2. C/Misc/708/91 and C/Misc./512/92-B2 in C/1497/82-B2. - The applicants (M/s. Ruby Advertisers) herein had imported a consignment of industrial laundry machines vide bill of entry dated 24-7-1980 and sought classification under Heading 84.40(1) of the First Schedule to the CTA, 1975 attracting 40% duty, as the machines were neither domestic washing machines nor laundry and dry-cleaning machines. The importers sought classification under TI 68 of the Schedule to the erstwhile Central Excise Tariff for the purpose of countervailing duty.

The Customs authorities assessed the goods under Heading 84.40(2) at 60% under TI 33C CET as domestic electrical appliances. The applicants deposited the amount of duty under protest, and subsequently applied for refund of excess duty charged which claim was rejected by the Assistant Collector of Customs, Refund Section. On appeal, the Collector of Customs (Appeals), Bombay reversed the order of the Assistant Collector and classified the goods under Heading 84.40(1) for the purpose of basic customs duty. Regarding countervailing duty, the appellate authority held that only a part of the goods would be classified under TI33C while the other part was classifiable under TI 68. On 29-9-1982 a show cause notice under Section 131(3) of the Customs Act, 1962 was issued by the Central Government proposing to set aside the order-in-appeal dated 18-4-1981 passed by the lower appellate authority. Subsequent to the filing of the reply to the above notice, the CEGAT was constituted and by virtue of Section 131B, the revision proceedings before the Central Government stood transferred to this Tribunal and numbered as the above appeal.

2.1 The appeal came up for hearing before the Tribunal and at one stage the Bench directed vide its order dated 15-6-1990 that copies of the appeal papers be served upon the respondents, otherwise the appeal may be dismissed for non-prosecution as and when it is taken up for hearing. The applicants also filed a miscellaneous application bearing C/Misc./708/91-B2 dated 12-7-1991 for directions to the Department to supply a complete set of appeal papers to the applicants/respondents - M/s. Ruby Advertisers. On 3-10-1991, the applicants had also served a notice under Order XII, Rule 8 of the Code of Civil Procedure calling upon the Department to produce the order-in-original dated 17-12-1980 of the Assistant Collector of Customs (Refund). C/Misc/512/92 has been filed for directions to the Department to file the order-in-original and the bill of entry and for directions that the appeal would be heard only in accordance with the CEGAT Procedure Rules, 1982.

2.2 C/Misc/817/92 in C/1521/82-B2 & C/1554/82-B2. - The respondents in this application imported Zip Fasteners which were assessed to duty under Heading 98.01/02 of the First Schedule to the CTA, 1975 with additional duty under TI 53(1) CET. A claim for refund of duty was filed by the importers on the ground that the goods imported are embellishments for foot-wear and are eligible to the benefit of Notification 29/79 which claim was rejected on the ground that the notification is applicable only to certain goods used in the leather industry while the subject goods find alternative use in other industries also. The Appellate Collector of Customs extended the benefit of the notification holding that since the subject goods had functional and decorative value similar to buckles (which were covered by the notification), the benefit available to buckles could not be denied to the imported goods which are identical to buckles from the point of view of their application. The Central Government issued review show cause notice under Section 131(3) of the Customs Act in 1982. The Department have filed this miscellaneous application setting out that the case records of the Customs House were sent to the Office of the Joint/Additional Secretary, (Revision Applications) in the Ministry of Finance which were subsequently transferred to the CEGAT, that the case records were not available and, therefore, the paper book containing copies of documents such as order-in-original, order-in-appeal, etc., could not be filed by the Department and praying for waiver of filing of the documents and decision of the appeal on available records.

3. Shri A.K. Agarwal, learned Counsel appearing on behalf of M/s. Ruby Advertisers submits that the non-availability of all records is fatal to the right of the Department to issue notice for review under Section 131(3). He further submits that the scope of revision proceedings is different from those of appeal proceedings, and since on transfer to the Tribunal the revisionary proceedings are deemed to be proceedings in appeal, the scope of the proceedings before the Tribunal is enlarged and the Tribunal will have to look into the order-in-original passed by the Assistant Collector as well as the order of the lower appellate authority for proper disposal of the appeal before it. He submits that the Rules relating to appeals should be followed after a revision application is transferred to the Tribunal and treated as an appeal and in this case as the requirement under Rule 9 of the CEGAT (Procedure) Rules has not been complied with by the Revenue the appeals merit rejection. He contends that the requirement of Rule 9 is mandatory and the Tribunal has no power to waive the requirement of compliance therewith. Shri L.P. Asthana, learned Counsel appearing on behalf of M/s. Suhag Traders and Novo Impex submits that the expression "may reject the memorandum of appeal" occurring in Rule 11(2) of the CEGAT (Procedure) Rules is to be read as shall and, therefore, if the documents referred to in Rule 9 are not produced, the appeal should automatically stand dismissed. His alternate argument is that in any event even assuming without admitting that the expression 'may' occurring in Rule 11(2) is directory and not mandatory, it would not be

possible in this case to proceed without the copy of the order-in-original as the reasons and conclusion arrived at by the Assistant Collector are not contained in the order of the Collector (Appeals), and further the review show cause notice seeks to set aside both the order of the Collector (Appeals) and that of the adjudicating authority.

4. The contention of Shri B.K. Singh, learned SDR is that once the revision proceedings have been transferred from the Central Government to the CEGAT, the Tribunal has to proceed from the stage at which the proceedings were pending and in these cases, the notice had been issued and the importers had replied, However, before the hearing, proceedings had been transferred to the Tribunal and, therefore, only the hearing was to take place before the Tribunal. According to him the character of revision is retained and as such the transferred proceedings are only deemed appeals and, therefore, the CEGAT (Procedure) Rules are not attracted in such cases. He submits that the procedural requirements are to be fulfilled for the purpose of securing the ends of justice and non-compliance therewith cannot block the cause of justice. It would still be possible to proceed to decide the eligibility of the importers (in the case of Suhag Traders and Novo Impex) to the benefit of Notification 29/79 and only that part of the review show cause notice relating to the issue whether the refund claim was time-barred may be affected by the absence of the production of the order-in-original. In the case of Ruby Advertisers the show cause notice only proposes to set aside the order-in-appeal and, therefore, the nonavailability of the order-in-original does not materially affect the pursuance of the appeal before the Tribunal. Lastly, he submits that there has been no intentional negligence on the part of the Department and no prejudice will be caused to the respondents if the order-in-original is not on record as the matters can be decided on the basis of available papers.

5. In rejoinder, Shri L.P. Asthana submits that the CEGAT (Procedure) Rules apply to transfer proceedings and procedural requirements are retrospective in operation. The filing of the order-in-original is absolutely-necessary as the show cause notice is not severable in nature.

6. We have carefully considered the submissions of both sides, perused the records and gone through the host of citations relied upon. The undisputed position that emerges is that the copy of the order-in-original is not available in spite of best efforts of the Department to place it before us. The affidavit filed by Shri R.Mukhopadhyay, CC (Judicial) to this effect is not disputed by the importers, who also do not have a copy thereof. The affidavit is reproduced below: I, R. Mukhopadhyay, Collector of Customs (Judicial), Custom House, 33, Rajaji Salai, Madras 600 001, do hereby solemnly affirm and sincerely state as follows: 1. I am the Collector of Customs (Judicial), Custom House, Madras and competent to file this affidavit.

2. I state that I am fully conversant with the available records and satisfied with this affidavit.

3. In the year 1982, a revision application was filed before the Joint/Additional Secretary (Revision Applications) in the Ministry of Finance. The case records of this Custom House were also sent to the Ministry. Later on, the same was transferred to Hon'ble CEGAT after its formation. It was hoped that all the papers would have been transferred to CEGAT by the Ministry in the normal course.

During the hearing on 10-4-1991, the Department was directed by the Hon'ble Tribunal to file paper books containing copies of the following documents 3.2 The paper book could not be prepared as directed by the Hon'ble Tribunal in view of the fact that the revision application was made in the year 1982 and the case records had been forwarded to the Ministry and as such the same is not available in the Custom House.

Even a thorough search made in the Custom House for the file was not fruitful. Ultimately, the paper book could not be filed.

4. The non-filing of the paper book is neither wilful nor deliberate. In the circumstances, it is prayed that the Hon'ble Tribunal may be pleased to waive the filing of the documents called for, which are not available in the Custom House and decide the appeal on the basis of the available records.

In the case of Ruby Advertisers, the Collector of Customs, Bombay has written to the CDR on 10-10-1990 which letter is as set out below : DO letter No. TCU/Gen/16/88, dated 10-10-1990 from S.P. Pundir, Collector of Customs to Mrs. Vijay Zutshi, Jt. CDR, CEGAT, New Delhi Sub : Appeal No. CD (SB) (T) 1497/82-B2 - Collector of Customs, Bombay v. Ruby Advertisers Please refer to your DO letter No. CD/SB/1481/87/3209 dated 14-9-1990 on the above subject.

As you may be aware that this is a transferred review show cause notice which came before the Tribunal as an appeal. The show cause notice F. No. 380/88/B2-Cus. II, dated 29th September, 1982 was issued by the Central Government in this case proposing review of order-in-appeal No. S/49-645/81R dated 18-4-1991 passed by the Appellate Collector of Customs, Bombay on the appeal of M/s. Ruby Advertisers against Order No. S/6-B-3258/80R, dated 17-12-1980 passed by the Assistant Collector of Customs (Review), Custom House, Bombay.

When the case papers might have been transferred from the Revision application unit of the Central Government to the Registry of the Tribunal, it appears that the case files which might have been sent by the Collector to the Central Government got delinked. As appears from the letter F. No. CD/SB/720/87/267 dated 9th February 1988 of Mr. J. Gopinath, the then SDR only reviewed the show cause notice and the other correspondence between the Collector of Customs and the Ministry were available in the Registry's file and with this letter he forwarded to the Custom House, copy of the review show cause notice and the correspondence.

The case files containing the order-in-original and other documents were either not received in the Custom House from the Ministry or these are not traceable now. There is a telex dated 7th March, 1988 from STO in the Ministry saying that the case files had been sent by them to the Collector of Customs (Appeals) on 24-4-1986. However, the appeal unit of the Custom House has not been able to trace these files. They have however located the correspondence section's file in which the order-in-appeal was recommended for review by the Custom House. In this file, a copy of the order-in-appeal is available.

The only documents on our record, therefore, are the review show cause notice and the order-in-appeal in question. I am enclosing copies of both for necessary action at your end. We are also supplying copies of the order-in-appeal and the review show cause notice to M/s. Ruby Advertisers also. Copy of the letter addressed to M/s. Ruby Advertisers is enclosed herewith.

Surely so far as reply to the show cause notice is concerned, the party can make their reply now and they will also have the triplicate B/E etc. with them. Even if they don't have copy of the order-in-original, which normally should be with them, the merits of the case could be examined by the Tribunal even in the absence of the original order.

In the circumstances, since the other documents are not available with the Custom House, the Bench could be suitably informed in the matter and the case could be argued on merits based on the order-in-appeal and the show cause notice issued by the Central Government.Associated Capsules v. Collector of Customs, Bombay -1983 (12) E.L.T. 809, a revision application filed before the Government of India under Section 131 of the Customs Act was transferred under the provisions of Section 131B to the Tribunal which had formulated the CEGAT Procedure Rules, 1982 in exercise of the powers conferred by the Section 129C(A) Customs Act and similar provisions in the CESA, 1944 and Gold (Control) Act, 1968. The objection of the Department that under Section 129A(4) 45 days' time should be granted to the respondent Collector to file cross objections against the order of the Appellate Collector of Customs was overruled, holding that the words "as if such proceedings or matter were an appeal filed before it" containing in Section 131B(2) would not mean that the revision application filed before the Central Government has become an appeal before the Tribunal for all purposes and the proceedings still retain the character of a revision application.Khira Steel Works v. CCE, Ahmedabad -1988 (38) E.L.T. 330, the Collector (Appeals) had passed the impugned order without even noticing that the appeal had been filed within the period of limitation and he had rejected the appeal as time-barred. The appeal had been filed in April, 1987 but not in proper form and without court fee and, therefore, in October 1987, the defects were rectified and the appeal was filed once again. The Tribunal held that the defects were procedural in nature and should not have stood in the way of treating the communication of the April 1987 as an appeal and procedural error or irregularity should not hamper substantial justice 7.1 The case law cited by the learned Counsel for the importers is not strictly applicable to the facts of the present appeals.Hari Shankar and Ors. v. Rao Girdhari Lai Chowdhury - AIR 1963 SC 698, the issue was whether the High Court in the exercise of its revisional power in a rent control matter is entitled to reassess the value of the evidence and to substitute its own conclusions of fact in place of those reached by the court, the Supreme Court held that the distinction between an appeal and a revision is a real one and a right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as is done in second appeals arising under the Code of Civil Procedure.M.L. Sethi v. R.P. Kapur - AIR 1972 SC 2379, the scope and extent of the revisional powers of a High Court under Section 115 CPC was considered and it was held that the jurisdiction of the High Court under Section 115 is limited. The present cases, however, are in the nature of deemed appeals, and, therefore, the above citations do not advance the case of the importers.

7.2 The citations relied upon by Shri L.P. Asthana are also distinguishable from the facts and circumstances of the present matters.Anant Gopal Sheorey v. State of Bombay - AIR 1958 SC 915, the appellant had applied to give evidence as a witness under Section 342A of the Code of Criminal Procedure which was amended in 1956 to enable any person accused of an offence before a Criminal Court to be a competent witness for the defence and to give evidence on oath to disprove the charge made against him or any other person charged together with him at the same trial. The Sub-Magistrate at Nagpur rejected his application and the High Court confirmed the decision of the Sub-Magistrate holding that the proceedings pending before the Sub-Magistrate would be governed by the procedure laid down prior to the amendment. The Hon'ble Supreme Court considered the question as to whether the provisions of the amended Cr PC apply to pending prosecutions and held that no person has a vested right in the course of procedure and has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an act of Parliament, the mode of procedure is altered, he has no.other right except to proceed according to the altered mode i.e. the change in the law of procedure operates retrospectively. The Court held that the appellant should have been allowed to appear as a witness.

In the case of Ramji Missar v. State of Bihar - AIR 1963 SC 1088, the interpretation of the word "may" occurring in Section 11 of the Probation of Offenders Act, 1958 arose for determination. Sub-section (3) of Section 11 provided that in a case where any person under 21 years of the age is found guilty of having committed an offence and the Court by which he is found guilty declined to deal with him under Section 3 or Section 4 of the Act and passes any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then the Appellate Court may either of its own motion or on an application made by the convicted person or the Probation Officer, call for and examine the record of the case and pass such order as deemed fit. The Hon'ble Supreme Court observed that though the word "may" occurring in Section 11(3) might connote merely an enabling or permissive power in the sense of the usual phrase "it shall be lawful", it is also capable of being construed as referring to a compellable duty particularly when it refers to a power conferred on a Court or judicial authority.

The interpretation of Rule 4(2) of the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 was the subject matter in the case of State of Uttar Pradesh v. Jogendra Singh - AIR 1963 SC 1618.

The Supreme Court held that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command and the whole purpose of Rule 4(2) which provides that the Governor of the State may, in respect of a Gazetted Government servant, on his own request, refer his case to the Tribunal in respect of corruption, etc. would be frustrated if the word "may" is not construed as "shall" because, in regard to Gazetted Government servants the discretion had already been given to the Governor to refer the cases to the Tribunal and, therefore, the Rule making authority wanted to make special provision in respect of them as distinguished from other Government servants falling under Rule 4(1).Vora Abbasbhai Alimahomed v. Haji Gulamnabi Haji Safibhai -AIR 1964 SC 1341, the Supreme Court held that the expression "may" occurring in Section 12(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which provides that where the rent is payable by the month and there is no dispute regarding the amount of standard rent and the permitted increase, if such rents are increased or in arrears for six months or more and the tenant neglects to pay till the expiry of the period of one month after notice period, the Court may pass a decree for eviction, was mandatory in nature. The word "may" occurring in Rule 37 of the Allahabad High Court General Rules (Criminal), 1957, providing for engaging a amicus curiae Counsel to defend an accused person who does not have the means to engage an advocate was interpreted as laying down a mandatory direction as the intention of the rule is clear that no accused person should remain totally unrepresented by a lawyer if he is being tried on a charge for which a capital sentence can be awarded, in the case of Bashira v.State of U.P. - AIR 1968 SC1313 and the Court held that the purpose of Rule 37 would be completely defeated if "may" is interpreted as merely directive.Shakuntala Devi Jain v. Kuntal Kumari - AIR 1969 SC 575 it has been held by the Supreme Court that the High Court has no power to dispense with the filing of the decree which is a formal expression of adjudication in a suit.

In the case of A.K. Impex v. Union of India -1991 (53) E.L.T. 203 the appeal filed before the Tribunal was held to be not maintainable for non-compliance with the statutory requirement under Rule 4 of the Customs (Appeals) Rules, 1982 regarding filing of copies of order of adjudicating authority and the order of the lower appellate authority.

It is pertinent to note at this stage that in the appeals before us, the question is not directly whether the Tribunal is empowered to dispense with the filing of the copy of the order of the adjudicating authority, but whether, in the absence of such a copy for reasons beyond the control of the Department, the Tribunal has no alternative but to reject the appeals as not maintainable. Hence Reliance was placed by the importers on the order of the Tribunal in the case oijyotsna Rani Ghosh v. Collector of Customs and Central Excise, Shillong - 1984 (18) E.L.T. 594. However, we note that this order is not a final order in appeal but an order directing the appellants to file the requisite sets of documents such as (a) order of the lower appellate authority (b) revisional order, etc. and in that case no plea was raised by the appellant whose revision petition was transferred to the Tribunal under Section 131B(2) that the documents were not available with them.

8. Further we find that it appears, at this stage, that it is possible to proceed to hear and dispose of the appeals with the available papers. Therefore, in the peculiar facts and circumstances of these cases, we hold that these appeals are maintainable. Accordingly we dismiss misc. applications No. C/708/91 & C/512/92-B2 (filed by M/s.

Ruby Advertisers) and allow C/Misc./817/92-B2 in C/1521/82-B2 & C/1554/82-B2. The miscellaneous applications are disposed of in the above terms.

9. We wish to emphasise that the above order is applicable only to the above cases and is not to be treated as an precedent. The appeals may now be listed for hearing.