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Court : Gujarat

Decided On : Oct-14-2005

Reported in : 2006(199)ELT200(Guj); (2006)2GLR1106; 2008[9]STR440

Judge : D.A. Mehta and; H.N. Devani, JJ.

Acts : [Customs Act, 1962](#) - Sections 129B(2) and 129C(5)

Appeal No. : Special Civil Application No. 20771 of 2005

Appellant : Colourtex and anr.

Respondent : Union of India (Uoi) and 4 ors.

Advocate for Def. : R.M. Chhaya, Adv.

Advocate for Pet/Ap. : Trivedi & Gupta

Judgement :

D.A. Mehta, J.

1. Heard Mr. Kamal Trivedi, the learned Senior Advocate for the petitioners and Mr. R.M. Chhaya, the learned additional standing counsel appearing on advance copy on behalf of the respondent No. 1, 2 and 3. The dispute between the parties lies in a very narrow compass and hence, the petition has been taken up for final hearing and disposal today.

2. This petition has been brought before this Court at a stage where, in fact, there is no order made by the Customs, Excise & Service Tax Tribunal (CESTAT).

3. It appears that when the appeals preferred by the petitioners were heard by a Division Bench of CESTAT on 12/8/2005, the learned Members constituting the Bench could not agree and recorded dissenting opinions. Therefore, in light of provision of Section 129C(5) of the [Customs Act, 1962](#) (the Act), the difference of opinion was referred to the President of CESTAT who assigned the matter to a Third Member to hear on the point on which there was difference of opinion between the Members constituting the original Bench. It is an admitted position that the Third Member is yet to hear the matter on the difference of opinion. In the meantime, it appears that the petitioners preferred an application seeking rectification of mistake on 29/9/2005 under Section 129B(2) of the Act.

4. During pendency of the said application for rectification, the matter came up for hearing before the Third Member on 10/10/2005. On behalf of the petitioners, adjournment was requested on the ground that rectification of mistake application is pending. The Third Member not only did not grant the request for adjournment, but called for the papers of rectification of mistake application and disposed of the same on the same day by stating that there was no scope for filing an application for rectification of mistake at the stage of hearing on the points of difference. It is this order dated 10/10/2005 which is under challenge in the present petition along with various other issues raised by the petitioners, including the grievance that, till the rectification of mistake application was decided, no further proceedings could be proceeded with.

5. It is not necessary to deal with the merits of the controversy between the parties. Section 129C(5) of the Act is couched in clear unambiguous terms. The Third Member who is assigned the matter by the President is required to hear only on the point or points on which there is difference of opinion amongst the Members of the Bench who heard the appeal originally. The Third Member can decide only such point or points because the President can make reference only on such point or points of difference of opinion. The Third Member cannot derive any further jurisdiction because the matter has thereafter to be placed before the

Bench which originally heard the appeal and the appeal is required to be disposed of in accordance with majority of opinion of the Members.

6. In these circumstances, the Third Member could not have passed the order dated 10/10/2005 (Annexure SD). Accordingly, the said order dated 10/10/2005 (Annexure SD) is hereby quashed and set aside.

7. In absence of any `order' made by the bench, which originally heard the appeal, provisions of Section 129B(2) of the Act were not available to the petitioner and hence, the petitioner could not have moved any application for rectification. Despite this, the Third Member could not have assumed jurisdiction. He was only empowered to hear and decide the point or points on which there was a difference of opinion, i.e. the point or points which were assigned to him by the President.

8. The petition stands rejected qua other issues raised in the petition.

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