

Anoop Kumar Vs. Commissioner of Cus. (Prev.)

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Court : Kolkata

Decided On : Apr-12-2002

Reported in : 2004(93)ECC149,2002LC316(Calcutta),2002(145)ELT48(Cal)

Judge : Dilip Kumar Seth, J.

Acts : [Customs Act, 1962](#) - Sections 2(33), 125, 130(1) and 143; ;Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 - Rule 41; ;
[Constitution of India](#) - Article 226

Appeal No. : Writ Petition No. 2150 of 2001

Appellant : Anoop Kumar

Respondent : Commissioner of Cus. (Prev.)

Advocate for Def. : Debal Banerjee, Adv.

Advocate for Pet/Ap. : Talukdar, Adv.

Judgement :

Dilip Kumar Seth, J.

FACTS

1. Certain goods were imported under a special import licence. These are described as walkie-talkie toys. The customs authority had refused to release the goods on the ground that those are not the goods, which were permitted to be imported under the Special Import Licence for importing electronic toys. A proceeding was initiated against the petitioner and the goods were confiscated under Section 111(d) of the Customs Act and then it was directed to be redeemed on payment of a fine of Rs. 3,00,000/- and also a penalty of Rs. 50,000/- by an order dated 9th August, 1996 issued on 10th October, 1996. An appeal was preferred under Section 129A of the Customs Act. The said appeal was decided in favour of the petitioner allowing the appeal and setting aside the order of confiscation together with consequential relief. A reference under Section 130(1) of the Customs Act was sought to be made by the department through the Tribunal. But the Tribunal refused to state this case under Sub-section (3) of Section 130 of the Act. Thereupon, the department has sought for a reference before this Court under Section 130(3) of the Customs Act. This Court admitted the reference, and the same is pending. The petitioner applied for release of the goods but the customs authority declined on the ground of the pendency of the reference. At this stage the petitioner has prayed for the release of the goods in view of the order passed by the Tribunal in appeal.

Submission on behalf of the Petitioner:

2. Learned Counsel for the petitioner submits that once the Tribunal has set aside the order of the customs authority, it is incumbent on the authority, as subordinate to the Tribunal, to carry out the said order. Any breach or default would amount to dereliction of duty and refusal to perform the duty cast upon it, as public officer. Therefore, the petitioner has prayed that the customs authority be directed to act in accordance with law and discharge its normal function. It is not in the form of an execution but a direction upon the authority to discharge its public duty. He further contends that there is no provision provided in the Customs Act or the Rules for execution of an order passed by the Tribunal. The Tribunal is also not clothed with the power of contempt of its own. In the circumstances, according to Mr. Talukdar, learned Counsel for the petitioner, there is no other alternative remedy but to approach this Court for securing release of the goods. He further contends that the

mere pendency of a reference does not operate as stay. There is nothing, which can empower the customs authority to refuse to release the goods, simply because the reference is pending. He, however, contends that the jurisdiction of this Court in a reference does not clothe it with the power, while entertaining reference, to grant any stay. Similarly, no stay could be operative in the execution of the order of the Tribunal. He has also referred to a decision of this Court in *Sardar Gurcharan Singh v. Collector of Customs*, 1992 (59) E.L.T. 355 Cal.), to support his contention, where in similar circumstances it was so held. He has also relied on a decision of the Supreme Court in *Commissioner of Income-tax, Delhi & Others v. Bansi Dhar & Sons & Others*, : [1986]157ITR665(SC) . He then contends that the provisions under the Customs Act for reference are identical with those provided in the Income-tax Act and, therefore, the principle enunciated therein, equally applies. Therefore, this Court should issue appropriate direction for release of the goods.

Submission on behalf of the Respondents:

3. Mr. Debal Banerjee, learned Counsel for the customs authority, on the other hand, points out that this writ petition cannot be maintained in view of Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 and points out that the petitioner should have approached the Tribunal (CEGAT) itself for the implementation of its order. This Court cannot act as an executing agency of CEGAT. Rule 41 provides identical alternative remedy under which the petitioner can apply. Even if it is contended that it has no power to issue contempt, still then the petitioner could have come to this Court after exhausting the remedy under Rule 41. He could not have come before it straightway without exhausting the alternative remedy.

3.1 According to Mr. Banerjee, in the reference if it is held in favour of the Department then it would be difficult to get back the goods. He points out that the goods are prohibited; even if the same are not altogether prohibited, but the same are permitted to be imported on a special import licence and the goods do not conform to the licence or there is non-compliance of any condition of the licence under which those are imported or if there is no special import licence, the same

equally becomes prohibited item. Therefore, it cannot be released in any way. He further contends that in the present case, the reference may take a longer time, but the goods cannot be released in view of the situation that the goods, which are liable to be confiscated, if released, the same cannot be recovered subsequently. Therefore, this writ petition should be dismissed.

Reply on behalf of the Petitioner:

4. The learned Counsel for the petitioner, Mr. Talukdar, in reply, points out to the remedy as provided under Section 143 of the Customs Act under which such goods can be released on execution of Bonds. Under Section 125 of the 1962 Act order of redemption can be passed in respect of goods, which are prohibited, at the discretion of the customs authorities, and which are non-prohibited, at the option of the importer. Therefore, the goods may be released, if necessary, in terms of Section 143 of the Customs Act.

Can the goods be redeemed? :

5. I have heard the learned Counsel appearing for the parties at length. The question involved in this case is very simple. The Customs Authorities had held that the goods could not be imported under the special import licence. As such, these were prohibited goods and liable to be confiscated. However, it had allowed the goods to be redeemed upon payment of a sum of Rs. 3 lakhs and a fine of Rs. 50,000/- after having confiscated the same under Section 111(d) of the [Customs Act, 1962](#). Section 125 of the Customs Act provides that in case of prohibited goods, it is the discretion of the authorities to allow redemption of the goods; but, where it is non-prohibited goods, the customs authorities has to redeem the goods at the option of the importer. The expressions, 'may' in respect of prohibited goods and, 'shall', in respect of non-prohibited goods, clearly indicate that there is a discretion in respect of prohibited goods, but there is no discretion in respect of non-prohibited goods when option is exercised by the importer.

5.1 'Prohibited goods' defined in Section 2(33) means goods/the import or export whereof is prohibited under this Act or any other law for the time being in force. But it does not include goods, which are subject to import or export on certain

conditions, if such condition is not complied with. By reason of the definition given in Section 2(33) of the Act, the contention of Mr. Banerjee that the goods imported without proper import licence is also prohibited goods. Prohibited goods are goods, which can neither be imported nor exported. In respect of such goods, no licence can at all be issued. Unless it is shown that import of the goods in question is prohibited under this Act or under any other law for the time being in force, a goods cannot be termed as prohibited goods. A goods may not be prohibited but it can only be imported under a licence. Assuming that such licence is obtained; but the description of the goods in the licence may not tally with the goods imported. Then such goods may not be prohibited but can be imported under a licence with specific description. In such event it would be a non-prohibited goods, but are liable to confiscation because the condition for import of such goods was not complied with. In such a case it comes within the exception provided in Section 2(33). In this case, there is no material to show that the goods imported are prohibited goods.

5.2 Therefore, even if it is taken as prohibited goods, still then, the customs authorities have the power to allow redemption at its discretion under Section 125 of the customs act. This is further fortified by reason of the order passed by the customs Authorities on August 9, 1996, where redemption was allowed on payment of Rs. 3 lakhs and a fine of Rs. 50,000/-. Therefore, there cannot be any objection in the matter of redemption of the goods, if a Bond is executed for the purpose in terms of Section 143 of the Customs Act. Therefore, Mr. Banerjee's contention that the goods cannot be redeemed, does not seem to be of any substance.

Section 143 : Rule 41 : How far efficacious : Can writ petition be maintained? :

6. Alternatively, Mr. Banerjee contended that in such event the goods can be released in terms of Section 143 of the Customs Act through a process under Rule 41 of the Rules. Therefore, the writ petition cannot be maintained. The answer is simple. Rule 41 provides that the Tribunal may make such orders or give such directions, as may be necessary or expedient to give effect in relation to its orders or to prevent abuse of its process or to secure the ends of justice. Thus, Rule 41

empowers the Tribunal to take appropriate measure. Therefore, Rule 41 is an adequate alternative remedy. But it is to be examined as to how far it is efficacious. In fact, both the learned Counsel agreed that there is no provision provided under the Rules and Regulations or in the Act in regard to the execution of the order passed by the Tribunal. But under Rule 41, it has power to direct compliance of its orders. But the Tribunal is not equipped with the power to issue Rule of Contempt. Thus, the Tribunal may pass order; but, if it is not obeyed, then it has no machinery to compel the authority to obey. At the same time, the authorities, who are bound by such order has a responsibility and duty to perform, in order to carry out the orders passed by the Tribunal. Therefore, it forms part of the duties of the authorities. If an authority fails to perform its duty or neglects to do it, in that event, when the Tribunal is not clothed with any power to compel compliance, this Court can entertain the writ petition to direct the said authority, which is otherwise duty bound to perform its normal duties, for compliance with such order, which it is otherwise duty bound to perform within its normal duties.

6.1 It seems that the matter is continuing for a long time, since 1997; almost 6 years have already lapsed. The order of the Tribunal was passed on May 30, 1997, yet the goods have not been released. Because of this, after almost 5 years gap, it would not be appropriate or desirable to send the matter back to the Tribunal for resorting to Rule 41 and compel the petitioner to suffer another trauma. Therefore, in my view, the contention that the writ petition is not maintainable in view of the alternative remedy cannot be sustained.

6.2 Having regard to the facts and circumstances of this case and the situation as emanated, such a writ petition is maintainable before this Court.

Does pendency of Reference prohibits redemption or release? :

7. Section 130(3) of the Customs Act provides for a reference to the High Court. The scope of reference is only advisory. The High Court is to answer the questions of law formulated in the reference. Section 130 postulates reference of a question of law in relation to a matter decided by the Tribunal. On an application being made, the Tribunal may state the case to the High Court referring any question of law arising out of such order. In case the Tribunal refuses to state, as in this case,

then the party has a right to apply before the High Court. If such an application is made, the High Court, if not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and refer to it. Thereupon, the Tribunal shall state the case and refer the same accordingly. The scope of reference is confined to answer the question of law referred to it. The decision by the Court is an opinion with regard to the question of law referred to it. As we find from Section 130C, after such opinion is delivered through a judgment, the question of law raised therein, the Tribunal shall pass appropriate order as are necessary to dispose of the case in conformity with such judgment being the opinion of the High Court.

7.1 Thus, the jurisdiction of the High Court on a reference is confined only to a decision on a question of law raised and which is supposed to be an opinion of the High Court. It neither sits on appeal nor on revision of the order of the Tribunal; it is only an advisory jurisdiction. Therefore, the High Court on a reference cannot do anything more than giving its opinion. It has no power or jurisdiction with regard to the case. It is not a regular Court. It also is not in session of the case. In effect and substance, it is the Tribunal, which seeks the opinion of the High Court through reference. Such reference could be made directly or could be had indirectly made by the Tribunal at the instance of the party routed through the High Court. It is the Tribunal, which is seeking the opinion through reference either by itself or having been so directed by the High Court under Sub-section (3) of Section 130. In both the cases, it remains a reference seeking opinion of the High Court. Therefore, the High Court cannot exercise any jurisdiction except giving the opinion by deciding the question of law. It cannot deal with the case. It is the Tribunal, which would then deal with the case on the question of law so decided. Therefore, the High Court is not authorized to exercise any jurisdiction, which it could otherwise exercise when a matter comes before it, either on appeal or on revision.

7.2 It is a special jurisdiction conferred of the High Court by Section 130 of the Customs Act. The jurisdiction has to be confined within the law, which confers the jurisdiction. It cannot travel beyond the same. Thus, the High Court cannot exercise any power either to grant stay or to deal with the matter in any manner whatsoever, except giving its opinion on the question of law raised. It is not a

regular process. It does not empower the High Court to grant any stay of the order against which reference is sought for. Similarly, mere preferring a reference also does not ipso facto operate as stay of the order against which reference is sought for. Even, in case of regular appeal, Order 41, Rule 5 of the Code of Civil Procedure prescribes that the filing of an Appeal does not operate as stay. The appeal Court has to pass an order of stay. In a reference, the Reference Court has no power to grant stay. Therefore, it is open to the petitioner either to approach the Tribunal for execution of its order or some other Forum where it can get the relief. As already observed, the petitioner could have approached the Tribunal, but since it had approached this Court and the writ petition has been entertained, it will be inappropriate and improper to send the matter back to the Tribunal. In view of the position in law, there cannot be any ground to refuse to redeem or to deliver the goods.

7.3 The provisions of reference provided under the Income-tax Act are almost identical with that of Section 130 of the Customs Act. Therefore, the principle laid down in the case of Commissioner of Income-tax, Delhi and Others v. Bansi Dhar and Sons and Others reported in : [1986]157ITR665(SC) applies in full force in the present case. Similarly, the ratio decided in the case of Sardar Gurucharan Singh v. Collector of Customs reported in 1992 (59) E.L.T. 355 (Cal.) applies in full force in the present case because in this decision, the facts were almost identical.

CONCLUSION

8. For all these reasons, it appears that there is no justification in withholding the release of the goods. However, as rightly contended by Mr. Banerjee, in case the reference succeeds, then how the duty could be recovered or how the confiscation could be effected! In the circumstances, the duty or other revenue has to be secured. Section 143 read with Section 125 of the Customs Act prescribes the procedure for release of the goods.

ORDER

9. In the circumstances, the petitioner shall furnish such Bond to the satisfaction of the Assistant Commissioner of Customs or the Deputy Commissioner of Customs,

as the case may be, for a sum of Rs. 3,50,000/- as was imposed by the customs authorities, subject to the result of the reference and the Bond shall be kept alive till the reference is disposed of. The customs authorities will accept the said Bond and examine as to whether the said Bond has been furnished in terms of Section 143 read with C.B.R. Letter No. F. 7/18/60-Cus. VII, dated 8th September, 1961, which runs as follows :-

'1(L) Bond/Guarantee for I.T.C. Regulations Authority of Bonds or instruments for the purpose of ITC Regulations can also be taken under the [Customs Act, 1962](#) as Section 143 of the said Act is sufficiently wide enough to cover such bonds or instruments.'

9.1 The customs authorities shall release the goods upon such bond being furnished to the satisfaction of the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be, in terms of Section 143 of the Customs Act within a fortnight from the date of furnishing such Bonds.

9.2 The writ petition is disposed of accordingly.

9.3 There will no order as to costs.

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