

(2008) 04 GUJ CK 0036

Gujarat High Court

Case No: Special Civil Application No. 6058 of 2008

Mustan Taherbhai

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: April 10, 2008

Acts Referred:

- Constitution of India, 1950 - Article 226
- Customs Act, 1962 - Section 129E

Citation: (2008) 230 ELT 593

Hon'ble Judges: M.S. Shah, J; Akil Abdul Hamid Kureshi, J

Bench: Division Bench

Advocate: Paresh M. Dave, for the Appellant; Harin P. Raval, for Respondent 1, for the Respondent

Judgement

M.S. Shah, J.

RULE. Mr. Harin P Raval waives service of Rule for the respondents.

In this petition under Article 226 of the Constitution, the petitioner has challenged the order dated 04.03.2008 of the Customs Excise and Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad on Stay Application No. 03 of 2008 in Customs Appeal No. 01 of 2008.

2. The petitioner has challenged in the above appeal the order dated 26.10.2007 of the Commissioner of Customs (Appeals), Jamnagar in Appeal No. 99 of 2007 by which the Commissioner (Appeals) affirmed the order of the Assistant Commissioner confirming the demand of Rs. 75,89,375/- while finalizing the assessment in respect of the ship bought by the petitioner from sheriff of Mumbai in the auction proceedings. The assessment was initially done on provisional basis assessing the demand of basic customs duty of Rs. 13,24,825/- and additional duty of customs of Rs. 62,64,550/-. The provisional assessed bill of entry was appealed against by the petitioner, but the petitioner failed in the said challenge to the provisional

assessment. During pendency of the petition before this Court in that round of litigation, the petitioner was required to deposit a sum of Rs. 8 lacs by giving the Fixed Deposit receipt of Rs. 8 lacs to the department. The Fixed Deposit was given under the cumulative interest scheme and by now the Fixed Deposit amount has gone upto Rs. 13 lacs approximately. During the said litigation against the provisional assessment, the petitioner was also required to give bank guarantee of Rs. 7.60 lacs.

3. By the impugned order dated 04.03.2008, the Tribunal has directed the petitioner to deposit further amount of Rs. 25 lacs and to report compliance on 17.04.2008. Subject to deposit of the said amount of Rs. 25 lacs, pre-deposit of the balance amount of demand is dispensed with. This petition challenges the said order of the Tribunal.

4. Mr. Paresh M Dave, learned Counsel for the petitioner has submitted that the Tribunal was not justified in applying the principle of res judicata because the previous litigation was against the provisional assessment and the findings given in such provisional assessment cannot bind the assessee at the time of final assessment. It is also submitted that the petitioner has invoked the statutory exemption in respect of demand of additional customs duty of Rs. 62,64,550/- and the petitioner's defence based on such statutory exemption cannot be set out on the ground that notification granting such exemption was not produced at the time of provisional assessment or in the litigation challenging the provisional assessment.

5. On the other hand, Mr. Harin P Raval, learned Assistant Solicitor General has opposed the petition and submitted that pre-deposit order passed by the Tribunal is a discretionary order and does not call for any interference by this Court, more particularly when the petitioner has lost in the previous litigation and the final assessment is for the same amount of basic customs duty and additional customs duty.

6. Having heard the learned Counsel for the parties, we are of the view that since the challenge in the present petition is to the order of pre-deposit passed by the Tribunal u/s 129E of the Customs Act, 1962, it is not necessary to go into the merits of the rival contentions at this stage. However, considering the fact that question of the petitioner's liability to pay basic customs duty was considered in the previous round of litigation, we are of the view that the department should be permitted to appropriate, subject to the result the appeal pending before the Tribunal, the sum of Rs. 13,24,824/- from out of the amount lying in the fixed deposit which was taken out by the petitioner on 28.05.1993 with Central Bank of India, Station Road Branch, Jamnagar i.e. amount of Rs. 8 lacs plus the interest accrued thereon under Fixed Deposit No. 818814. If there is any short fall in the payment of basic customs duty, the department should also be allowed to encash the bank guarantee which the petitioner had given for a sum of Rs. 7.60 lacs.

7. We find that the question now to be debated before the Tribunal is in respect of the demand of Rs. 62,64,550/- by way of additional customs duty. 25% thereof would roughly come to about Rs. 15,66,137/- which may, for the sake of convenience, be rounded off to Rs. 15,60,000/-. The petitioner has already given bank guarantee of Rs. 7.60 lacs and therefore, we are of the view that the petitioner should now deposit a further sum of Rs. 8 lacs in cash within two months from today. We are also of the view that bank guarantee of Rs. 7.60 lacs lying with the department should be permitted to be encashed.

8. In the result, this petition is partly allowed. The impugned order dated 04.03.2008 of the Tribunal is substituted by the following order:

The department is permitted to appropriate basic customs duty of Rs. 13,24,824/- from out of the Fixed Deposit receipt No. 818814 dated 28.05.1993 of Central Bank of India, Station Road Branch, Jamnagar i.e. the original principal amount of Rs. 8 lacs plus interest accrued thereon. The department is also permitted to encash the bank guarantee of Rs. 7.60 lacs.

The petitioner shall deposit a further sum of Rs. 8 lacs in cash within two months from today. Upon deposit of such further amount of Rs. 8 lacs, the pre-deposit of the balance amount of demand is dispensed with. The Tribunal shall thereafter hear and decide Customs Appeal No. 1 of 2008 in accordance with law without being inhibited by its previous order dated 04.03.2008 or without being influenced by the present order.

9. It is also necessary to clarify that we may not be treated to have expressed any opinion on the question raised in this petition particularly with regard to view taken by the Tribunal about res judicata.

10. Rule is made absolute to the aforesaid extent.