Binani Zinc Ltd. Vs Asstt. Collector of Central Excise

Court: High Court Of Kerala

Date of Decision: Oct. 25, 1994

Acts Referred: Central Excise Rules, 1944 â€" Rule 57F(2)
Central Excises and Salt Act, 1944 â€" Section 35F
Constitution of India, 1950 â€" Article 265
Customs Act, 1962 â€" Section 129A, 129E

Citation: (1995) 77 ELT 514

Hon'ble Judges: B.N. Patnaik, J

Bench: Single Bench

Advocate: Antony Dominic, for the Appellant; George C.P. Tharakan, Sr. Central Government Standing Counsel, for the Respondent

Judgement

B.N. Patnaik, J.
The petitioner is a Public limited Company engaged in the manufacture of Zinc and Allied products. It is prayed that a

direction may be issued to the third respondent - Customes, Excise and Gold (Control) Appellate Tribunal, Madras - to dispense with payment of

duty as a condition precedent in filing the appeals (Exts. P6 and P7) by quashing Ext. P10 order passed by the third respondent. It is stated inter

alia that by the order dated 23-9-1991 (Ext. P1) the petitioner was exempted from payment of duty under Rule 57F(2) of the Central Excise

Rules, 1944 for removal of the inputs for further use in the manufacture of the final products. But, by order dated 1-2-1994 (Ext. P2) this

exemption was withdrawn and the Aluminium Cathode waste and/or scrap arising out of input Aluminium Cathode used in the manufacture of final

products were directed to be cleared on payment of duty. The petitioner challenged this order before the Appellate Authority. The Appellate

Authority confirmed the said order. Thereafter, the petitioner filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal.

The learned Tribunal directed the petitioner to pre-deposit Rs. 20 lakhs in respect of Silver Lead anodes and Rs. 75,000/- in respect of Aluminium

Cathodes and make the pre-deposit on or before 31st October, 1994 as contemplated in the proviso to Section 35F of the Central Excises & Salt

Act.

2. Learned counsel for the petitioner has contended that the deposit of duty demanded would cause undue hardship to the petitioner and as such

the Appellate Tribunal may be directed to reconsider the impugned order (Ext. P10). It is urged, by relying on the decisions in V.K. Thampi v.

Collector of Central Excise 1987 (1) KLT 562 and V.I.P. Sea Foods Vs. Collector of Customs, that there is a prima facie arguable case on

merits inasmuch as there are two conflicting decisions which are one of Bombay Bench of the Tribunal and that of the Madras Bench of the

Tribunal on the question of liability to pay duty in such matters. In Thampi''s case, the Court laid down as follows :-

In exercising the discretion under the proviso to Section 35F of the Act, the Appellate Tribunal should have considered, at least prima facie, the

question involved in the appeal, as to whether a prima facie view of the matter discloses an arguable case as against a frivolous one, besides

looking into the economic circumstances of the assessee. The amount involved in the case is certainly relevant. If it is a heavy amount, and if the

petitioner is able to show a prima facie case, to insist on payment of a substantial amount which the assessee is not in a position to deposit, would

constitute undue hardship. It is not the interest of the revenue that should weigh with the Appellate Authority in dealing with the request for waiving

the deposit of the amount as pre-condition for filing the appeal.

In V.I.P. Sea Foods case, the question involved was with regard to the application of proviso to Section 129E of the Customs Act which is in pari

materia with the proviso to Section 35F of the Central Excises & Salt Act. In that case, the following dictum has been laid :

In exercising the discretion under the proviso to Section 129E, the Tribunal should consider, at least prima facie, the question involved in the

appeal. Inter alia, the existence of a prima fade case on merits, constitutes an important relevant factor in the consideration of the question of undue

hardship. This is so because it causes undue hardship to any assessee to be called upon to make payment of amounts which are not legally due.

The very mandate of Article 265 of the Constitution is that there can be no levy or collection of tax without the authority of law. The accepted rule

of interpretation of provisions regarding appeals is to adopt that interpretation which will uphold the right of appeal rather than defeat it. While it is

true that the right to appeal conferred by Section 129A is a conditional one, hedged in by the conditions of deposit imposed by Section 129E, it is

equally important that the discretion to dispense with the deposit should be exercised judiciously based on relevant factors and circumstances.

Prima facie case is one such.

3. It appears that the Appellate Authority has followed the earlier Madras decision in the matter of levy of duty. The contrary decision laid down

by the Bombay Tribunal is not of course binding on the Madras Bench of the Tribunal and the Appellate Authority at Madras. Nevertheless when

two Banches of the Tribunal, exercising jurisdiction under the same Act in respect of the same subject matter, have rendered two different and

conflicting decisions on the same question, the correctness of the decision of one of the Benches cannot be free from doubt. In view of two

contradictory decisions of two Benches, the matter discloses an arguable case as against a frivolous one. In my view, therefore, there is a prima

facie case for the petitioner and in exercising the discretion under the proviso to Section 35F of the Act the Appellate Tribunal should have

considered this.

4. It is true that by the decision in O.P. No. 4165 of 1994, disposed of on 17-8-1994, this Court observed that the order passed by the Tribunal

under the proviso to Section 35F of the Central Excises & Salt Act cannot be interfered with inasmuch as the Tribunal in exercise of its

discretionary power is competent to pass such an order, unless it has acted perversely in ordering pre-deposit. There is no dispute about the

proposition of law laid down in the aforesaid Original Petition. But, what is urged here is that in view of the existence of a prima facie case, the

petitioner should not have been called upon to deposit a huge amount as a condition precedent for the hearing of the appeal. I find that the

contention of the petitioner is well founded and it is fortified by the aforesaid two decisions.

5. In view of the above finding, I direct the third respondent to reconsider the prayer of the petitioner to dispense with the pre-deposit, in the light

of the observations made above, in case the petitioner makes a petition to do so on or before 31st of October, 1994.

6. The writ petition is disposed of as above.