(2010) 10 CAL CK 0020

Calcutta High Court

Case No: A.P.O. No. 306 of 2009 and W.P. No. 1016 of 2008

Commissioner of Central Excise, Kol-II and Another		APPELLANT
	Vs	
Shree Gobinddeo Glass Works Ltd. and Others		RESPONDENT

Date of Decision: Oct. 5, 2010

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 189(3), 189(6)
- Central Excise Rules, 1944 - Rule 57CC
- Central Excises and Salt Act, 1944 - Section 35, 35B, 35B(1), 35C, 35C(2A)
- CENVAT (Credit) Rules, 2001 - Rule 6
- Customs Act, 1962 - Section 129, 129E
- Customs, Excise Service Tax Appellate Tribunal (Procedure) Rules, 1982 - Rule 18, 19, 20, 28A, 28C

Citation: (2011) 1 CHN 21 : (2011) 263 ELT 178 : (2011) 23 STR 177

Hon'ble Judges: Kalyan Jyoti Sengupta, J; Debasish Kar Gupta, J

Bench: Division Bench

Judgement

Kalyan Jyoti Sengupta, J.

The above appeal has assailed the judgment and order of the learned Trial Judge dated 23rd June, 2009 whereby and whereunder His Lordship disposed of a number of writ petitions as the core issue involved in all these writ petitions are identical and common, however, the problem were different. Naturally the reliefs in the writ petition were granted in different manner. The core issue involved in the matter is whether the learned Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the Tribunal) is justified in dismissing the appeal preferred before it for noncompliance of orders passed by it, directing pre-deposit u/s 35F of the Central Excise Act, 1944 (hereinafter referred to as the Act of 1944) and u/s 129E of the Customs Act, 1962 (hereinafter referred to as the 1962 Act)

2. The Writ Petition No. 261 of 2008 (M/s. Premising Exports Limited and Anr. v. Union of India and Ors.), Writ Petition No. 2428 of 2008 (M/s. Shree Krishna Limited and Anr. v. Union of India and Ors.) and Writ Petition No. 4006 of 2008 (Suresh Goyal & Sons v. Union of India and Ors.) were filed to challenge the orders passed in appeals by the Appellate Tribunal directing pre-deposit u/s 35 of the 1944 Act or u/s 129(e) of the 1962 Act. All the said writ petitions were kept pending for hearing and during pendency of all these writ petitions, appeals were dismissed by the Appellate Tribunal for non compliance of the orders directing pre-deposit. The Writ Petition No. 220 of 2008 (M/s. Shaman Ispat Limited and Anr. v. Union of India and Ors.) and Writ Petition No. 1016 (Ms. Shree Gobinddeo Glass Works Ltd. and Anr. v. Union of India and Ors.) were moved and further orders were passed by the Appellate Tribunal disposing the appeals for non-compliance of the orders directing pre-deposit.

3. The learned Trial Judge has recorded the submission of both the sides and after considering and interpreting the provision of both the Acts & Rules framed thereunder came to conclusion that on account of failure of pre-deposit the Tribunal could not dismiss the appeal. His Lordship also pleased to hold that it was not proper for the learned Tribunal to dismiss appeal when the writ petition was pending for adjudication.

4. In the context as above the matter was heard by this Court.

5. The learned Counsel appearing for the Appellant, submits that orders of dismissal on account of failure to comply with the order of pre-deposit passed by the Tribunal are absolutely justified and the learned Trial Judge therefore, ought not to have interfered with the same.

6. He submits by citing two decisions of Supreme Court reported in Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others, and Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, that it will appear that section 35 of the 1944 Act which is equivalent to section 129/129E of 1962 Act has been interpreted and categorically held that the right of appeal is not an absolute, rather conditional. If the condition is not satisfied the appeal shall be dismissed. In the Supreme Court cases factually the parties had failed to furnish the security to fulfil condition of preferring appeal, and it was held that the appeal was rightly dismissed. According to him the decisions of the Supreme Court still holds the field on the subject as the same is binding and incorporation of section 35C(2A) no way affects the binding nature of the aforesaid two judgments. This new Sub-section merely provides for a time frame for disposal of appeal preferred u/s 35C and it makes it clear if the appeal is not disposed of within six months order of stay if passed would stand vacated. It is thus clear the said provision of Sub-section (2A) cannot be said to have diluted the law laid down by the Hon''ble Supreme Court in the aforesaid two cases.

7. He submits that implied overruling of any decision cannot be inferred and furthermore the Supreme Court in the case reported in Municipal Council Palai Vs. T.J. Joseph and Others, has held that it is undoubtedly true that the Legislature can exercise the power of repeal by implication, but it is equally well-settled principle of law that there is presumption against implied repeal in the premise that the Legislature enacts law with a complete knowledge of existing laws pertaining to the same set and the failure to add a repealing clause indicate that intention was to repeal the existing legislation. Of course this assumption will be repeated if the provision of new Act is so inconsistent with the old Act that two cannot stand together. Hence the law declared in the above two decisions by the Supreme Court is binding upon all the Courts.

8. He further contends while drawing support of the Supreme Court decisions that in the matter of Krishena Kumar and Others Vs. Union of India and others, , it is the duty of the Court to adhere to precedent and not to unsettle things which are settled by the Apex Court and to apply all future cases wherein facts are substantially same.

9. His next contention is that the right of statutory appeal is subject to condition which Parliament can impose and unless this condition is fulfilled the appeal cannot be maintained. In support of this contention he has drawn our attention to a Supreme Court decision in the case reported in 1995 (2) SCC 175.

10. He further submits that section 35C(2A) came to be examined and incorporated by the larger Bench of the Tribunal in case of IPCL v. Commissioner of Central Excise, reported in 2004 (167) ELT, whereby the learned Tribunal held that in appropriate cases the Tribunal has power to extend the time of the stay if the appeal could not be disposed of within 6 months. This judgment has been upheld by the Supreme Court in case of Commissioner of Customs and Central Excise, Ahmedabad v. Commercial Cotton Mills Put. Ltd., reported in 2005 (108) ELT 434 (SC). Hence the said judgment and order of the learned Trial Judge should be set aside.

11. Mr. Pranab Kumar Datta, learned Counsel appearing for the Respondent/writ Petitioner while supporting the impugned judgment and order of the learned Tribunal submits that the learned Trial Judge has correctly concluded that the learned Tribunal has no jurisdiction to dismiss the appeal on the ground of failure to deposit or non-deposit as required u/s 35B of 1944 Act pending hearing of the appeal.

12. His submission is that in view of insertion of Sub-section (2A) to section 35C of 1944 Act the ratio decided by the Supreme Court in the case of Nab in Chandra Chattulal v. Central Board of Excise and Customs and Ors., reported in 1981 ELT 679 and Bhavani Prakas D. Mehta v. Collector of Customs, reported in 1989 (39) ELT 172 (SC), are no longer applicable. According to him the time limit provided in

Sub-section (2A) to section 35C is mandatory and the Tribunal has no option but to hear and decide the appeal within the time mentioned irrespective of deposit and this would be clear further from proviso of Sub-section (2A) of section 35C if any appeal is admitted with interim order and it is not disposed of within the period of 180 days from the date of such order then interim order will stand vacated. Thus on conjoint reading of the said two amended provisions it is clear that the ratio decided in the aforesaid two Supreme Court judgments is diluted and there cannot be any other interpretation except that appeal has to be heard ultimately without any interim order or for that matter without any deposit being made. According to him that the provision of Sub-section 35F cannot be read independently and divorced from the provisions of sections 35C(2A), 35B(1), 35D(1) of 1944 Act. The Rule has been framed u/s 38 of the Act; namely Customs Excise Services Tax Appellate Tribunal Rule 1982. By the Rules 28A, 18, 19, 20, 28C and 41 of the said Rules 1982along with public notice No. 7 of 1999 dated 2nd July 1999 the procedure of hearing of the appeal has been provided and if those provisions are read conjointly with sections 35B, 35E, 35F then there is no scope to hold that Tribunal has any jurisdiction to dismiss the appeal on the ground of non-deposit and/or failure to deposit in terms of section 35F.

13. He further submits that wherever two interpretation are possible one which prevail before insertion of section 35C(2A) and another after 11th May 2002 the principle of strict interpretation should be applied though, yet the Court could not interpret the same in such a manner which would create additional and fiscal burden on a person. In support of his submission he has relied on decision of the Supreme Court reported in Sneh Enterprises Vs. Commnr. of Customs, New Delhi, The above principle has been approved by the Supreme Court in the subsequent decision in the case of Ispat Industries Limited v. Commissioner of Customs, reported in 2006 (12) SCC 583.

14. He further submits that the Gujarat High Court has held in case of Sunrise Polymer Industries Limited v. Union of India, reported in 2005 (191) ELT 46, following the decision in case of Bhavani Kumar D Mehta (supra) has held that if appeals are dismissed as a result of non compliance of orders which are outcome of not exercising discretion on relevant materials honestly bona fide and objectively such appeal must be restored.

15. His further contention is with reference to section 189(6) of the Calcutta Municipal Corporation Act 1980, that in the said Act there is no provision for abatement of appeal on failure to pay the tax in section 35F. His contention is that in the Act itself there is no power to dismiss the appeal for non compliance of order of deposit made by the Tribunal. Other submission put forward and authorities cited by Mr. Datta in his written argument are not relevant for the controversy involved.

16. We have considered the argument advanced by the learned Counsels for the parties and we have carefully read the judgment and order of the learned Trial

Judge it appears the point which has fallen for consideration for decision of this Court, is whether the learned Trial Judge has correctly concluded in view of insertion of section 35C(2A) of the 1944 Act ratio decided by the Hon''ble Supreme Court in case of Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others, , and in the subsequent decision of the same Court in case of Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, with regard to the pre-deposit of hearing of appeal has been diluted, hence the appeal should not be dismissed on the ground of failure to make pre-deposit.

17. The reasons for conclusion of the learned Trial Judge appears to be that the language mentioned in section 35C(2A) fixing time limit for disposal of the appeal and having regard to various provisions of the Rules framed under the said Act now the Tribunal has no option but to take up the matter of appeal for hearing on merit.

18. We are unable to accept the reasoning and conclusion arrived at by the learned Trial Judge that the ratio decided by the Supreme Court in those two Cases have no binding force or for that matter with insertion of the said section 35C(2A). The provision of predeposit pending hearing of the appeal has been rendered infructuous To buttress our conclusion we need to examine the provision of section 35C with provision of insertion of new Sub-section. On careful reading of section (2A) of section 35C it appears to us that Legislature keeping in view the necessity of speedy disposal of the revenue matter has fixed a time limit, which was not provided earlier specifically. The time limit as far as possible was fixed for three years from the date on which such appeal is filed. We think that the aforesaid three years period is substituted with 180 days where any interim order of stay has been granted in an appeal. It has been further provided which could be understood on reading the second proviso of the said Sub-section that if for any reason the appeal is not disposed of where interim order of stay is granted then stay order shall on the expiry of that period will stand vacated.

19. Thus it is clear that the aforesaid provision is nothing to do with the provision for pre-deposit pending hearing of the appeal. We are of the view that the provision for pre-deposit is an independent provision and it is required in selective cases and situations and not in all appeals which required to be filed under the provision of section 35B of the said Act and this will be clear from the provision of section 35F of the Said Act.

Section 35F.

Deposit pending appeal of duty demanded or penalty levied.--Where in any appeal under this chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

(emphasis supplied)

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)], or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so decide such application within thirty days from the date of its filing.

(Explanation - For the purposes of this section "duty demanded" shall include.

(i) Amount determined u/s 11D

(ii) Amount of erroneous CENVAT credit taken.

(iii) Amount payable under Rule 57CC of Central Excise Rules, 1944.

(iv) Amount payable under rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules 2004.

(v) Interest payable under the provisions of this Act or the rules made there under.)

20. It is obvious from the said proviso pre-deposit in pending hearing appeal is required where appeal is filed against any order in connection of which any duty is demanded in respect of the goods which are not under the control of Central Excise authorities or any penalty levied under this Act. It therefore follows that where duty is demanded in respect of the goods which are not under control of Central Excise authority or penalty levied in order to secure the revenue the provision for pre-deposit has been made it mandatory, selectively a number of appeals contemplated in section 35F of the said Act. In the sequel where pre-deposit is not required at all, for example if any duty is levied in relation to any goods and it transpired later on levy of such duty and realization thereof is not warranted under the law then appeal could be preferred and in that case no pre-deposit is required. Another example in case where goods in question on which the duty is levied is in custody and control of the Central Excise authority then in such a situation no pre-deposit is required.

21. If we accept the logic of the learned Trial Judge that Sub-section (2A) of section 35C has really diluted the provision of pre-deposit then we are to hold that Sub-section (2A) is applicable in cases of the appeals where pre-deposit is required. The legislature never thinks to make any provision of the law applicable in a truncated manner unless of course it is specifically provided. We think while accepting the argument of Mr. Roychowdhury, that there is no legal change at all, of

the situation subsequent to the amendment of section 35C by way of insertion of Sub-section (2A) hence the decision of the Supreme Court in the aforesaid two cases have full force.

22. The Court has no power in general to apply the principle of casus omissus. It seems to us that the learned Trial Judge while interpreting the section has unmindfully applied the said principle. Casus omissus is an omission on part of the Legislature not making appropriate provisions. If the Court embarks upon to obliterate omission by supplying appropriate provision in all cases then it amounts to taking over power of Legislature by the Court which except in extreme cases constitutionally is impermissible applying theory of one of basic features if not structure.

23. Section 35F is an independent one and language of the provision appears to be mandatory and in all cases as mentioned therein and the power of dispensation of pre-deposit is also provided in fit cases. The rules framed under the Act cannot provide for any additional right or provision which are inconsistent with the provision of the Act itself. The learned Trial Judge has taken the help of few provisions of the rule as well as some notifications. We think those are of no help to dilute the provision of pre-deposit or the ratio of the Supreme Court decisions of the aforesaid two cases.

24. In view of the aforesaid findings and discussions recorded by us, the Constitution Bench decision as relied on by the learned Counsel for the Respondents reported in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, is not at all applicable. Similarly the decision of the Supreme Court in the case reported in Sneh Enterprises Vs. Commnr. of Customs, New Delhi, is also misplaced in this case as no interpretation is required to be made with regard to the provision of pre-deposit for hearing of the appeal and the ratio decided earlier by the Supreme Court. The analogy of section 189 Sub-section (3) of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the KMC Act) cannot be brought into operation in this case. In case of appeal filed u/s 189 Sub-section (3) of the KMC Act the provision of deposit of property tax is so rigorous that if the same is not done by the Appellant then the appeal automatically abates and there is no need to pass any further order of dismissal. The predeposit in cases u/s 189 Sub-section (3) of the KMC Act has to be made in every appeal. In the case of the pre-deposit under the provision of section 35F is not an absolute and rigid provision which could be dispensed with in appropriate cases unlike provision of section 189(3) of the KMC Act. When Supreme Court has laid down the law notwithstanding in absence of expressed power of dismissal of appeal in the Act that Tribunal is competent to dismiss the appeal in case of failure of deposit in spite of chances being given, no other contrary argument is tenable.

25. In our view the effect of insertion of Sub-section (2A) in section 35C with the proviso thereunder is no more than fixation of time limit within which appeal has to be disposed of, and if not possible then in case where stay order is subsisting in appeal the same would stand vacated. Consequence of vacating order of stay is that pre-deposit made earlier could effectively be appropriated by the department without any fetter whatsoever.

26. The learned Judge has held that the appeal has to be on merit heard even if no deposit is made in terms of order of Tribunal and the same cannot be dismissed even though interim order stands vacated, in a situation like this Revenue will initiate recovery proceeding where interim will stand vacated. This interpretation and findings of the Hon''ble Trial Judge, with respect, are not supported either by the provision of the Act or the Rules framed thereunder. The learned Trial Judge seems to have interpreted this provision basing on implication.

27. However, we agree with the observation of the learned Trial Judge the application for dispensation of pre-deposit has to be considered and disposed of with an objective manner bona fide and honestly. It appears that in one of the cases the Assessee Respondent company has gone to BIFR as such the learned Tribunal ought to have considered this factor for exercising discretion to dispense with pre-deposit. While reading the aforesaid decisions of the Supreme Court we find that the Tribunal cannot dismiss the appeal on account of failure of pre-deposit as a matter of course. Before any order of dismissal is passed reasonable and meaningful opportunities ought to be given, without the same being afforded if the appeal is dismissed it would amount to injustice for an Assessee should be given a chance as to make pre-deposit or to take decision with regard to proceeding of the appeal.

28. We are unable to endorse the conclusion of the learned Trial Judge during pendency of the writ petition the Tribunal ought not to have dismissed the appeal when the issue is pending before Writ Court, under the provisions of the said two Acts or the Rules framed thereunder there is no provision if the matter is taken upto the higher forum the Appellate Tribunal will automatically stay their hands. It is settled position of law pendency of any appeal or for that matter any proceedings which is akin to appeal do not operate as a stay, the stay has to be obtained specifically from the higher forum. If that is not done and in the event the learned Tribunal without any stay order being produced before it, sits tight over the matter the Revenue will remain in uncertainty. Therefore, we do not think that the learned Tribunal under the law has taken step de hors any provision of the law. The reliance of the learned Trial Judge of the Supreme Court decision in this regard in our view is wholly inappropriate as in that case the disciplinary authority practically threatened by their act and action the employee concerned against his moving higher forum. In view of factual background the Supreme Court has decided that it amounts to interference with the administration of justice when a litigant is scared illegitimately,

if not unconstitutionally for access to Court of law is part of fundamental right as being right to fair trial (see Commissioner of Police, Delhi and another Vs. Registrar, Delhi High Court, New Delhi,).

29. In view of the aforesaid discussion as stated above we think that the proper course and procedure of the Tribunal would be wherever pre-deposit is required either the same should be dispensed with fully or partially on application being made. If such dispensation is not allowed then the Tribunal would issue a show cause before taking up the appeal for dismissal on account of failure of pre-deposit. On the date fixed, if cause is shown the Tribunal will consider the same and if sufficient cause is to be found then Tribunal can exercise all discretion and may extend the period or may re-consider the question of dispensation of pre-deposit on subsequent event or fresh materials having been placed after earlier order having been passed.

30. From the record it is not clear to us whether such course of action was taken by the learned Tribunal. We, therefore, upheld the order of the learned Trial Judge and direct the Tribunal to decide all these matters in accordance with the aforesaid guidelines.

31. Before we part with the matter we think that the relevant Rule viz. Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 needs amendment for dealing with appeal where predeposit is not made or not dispensed with whenever necessary, as the Hon''ble Supreme Court ruled failure to deposit entails dismissal of the appeal.

Thus the appeal is disposed of.

Debasish Kar Gupta, J.

I agree.