

(2013) 05 CAL CK 0040

Calcutta High Court

Case No: M.A.T. No. 403 of 2013 With CAN No. 2988 of 2013

Datre Corporation Limited

APPELLANT

Vs

Commissioner of Customs (Port)

RESPONDENT

Date of Decision: May 2, 2013

Citation: (2013) 3 CHN 126

Hon'ble Judges: Arun Mishra, C.J; Joymalya Bagchi, J

Bench: Division Bench

Advocate: Bhaskar Sen, S. Sengupta and Santosh Kumar Roy, for the Appellant; S.B. Saraf and Sampa Sarkar, for the Respondent

Judgement

1. Heard the learned Counsel for the parties. Question arises in the appeal with respect to the payment of duty and interest imposed by Commissioner of Customs (Port), Kolkata vide order dated 9.11.2010. By the said order, the appellant was directed to pay the duty of Rs. 2,05,74,890/- along with interest at the rate of 24%/15% per annum from the date of clearance of the goods till the date of payment u/s 28 of the Customs Act, 1962 in terms of the conditions of the notification dated 05.06.1995.
2. The aforesaid order passed by the Commissioner of Customs (Port) has been questioned before the learned Customs, Excise and Service Tax Appellate Tribunal u/s 129E of the Customs Act. The same has been dealt with by the order dated 3.9.2012 passed by the CESTAT. The CESTAT has ordered 75% of waiver and has directed 25% of the amount of duty to be deposited by 4.2.2013. The order has been upheld by the learned Single Judge. Hence, the intra-Court appeal has been preferred.
3. Shri Bhaskar Sen, learned Senior Counsel appearing on behalf of the appellants has submitted that it is a case where the goods have been imported during the validity period of the import licence. Thus, when the shipment of the goods have been completed during the validity period of the import licence, import was over

and as such, the presentation of the bill of entry was not material and could have been made subsequently. Its presentation after the expiry of the validity period of import licence could not have been made a ground to charge higher duty and the direction of pre-deposit of 25% of the said amount was unjustified. It was also submitted that the recovery was barred by limitation and there will be undue hardship caused as the company has been declared sick by BIFR.

4. Shri Saraf, learned Counsel appearing on behalf of the respondent along with Mrs. Sampa Sarkar has submitted that presentation of bills of entry is material for determination of duty payable as provided in sections 68 and 69 of the Customs Act. The ex-bond bill of entry was presented after more than one year on 1.11.2000 whereas validity of the import licence expired on 31.12.1999. Consequently, no case was made out so as to interfere with the impugned order. Since the order is discretionary one, the same need not be interfered with and even if the Company is sick under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, no case for interference is made out as just order has been passed by the CESTAT. Due to the non-compliance of the order, the appeal has already been dismissed.

5. After hearing the learned Counsels appearing for the parties at length, we are of the considered opinion that no case has been made out so as to make interference in the impugned order passed by the CESTAT which has not been interfered with by the learned Single Judge. The order is a discretionary one and when facts and circumstances of the case have been considered by the learned Single Judge, in our opinion, such interim order does not call for interference by way of judicial review by this Court. We find no illegality in the impugned order passed by the learned Single Judge. No perversity or patent illegality is apparent in the order passed by the CESTAT. Order is a reasonable one.

6. In the facts and circumstances of the case, we are not inclined to make interference with the order impugned. The Hon"ble Supreme Court in the case of Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, has laid down that section 129E of the Customs Act provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. It makes obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellant Tribunal is fully competent to reject the appeal. Right to appeal is neither an absolute right nor an ingredient of natural justice, the principle of which must be followed in all judicial and quasi-judicial adjudication. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. The proviso to section 129E gives discretion to the authority to dispense with the obligation to deposit in case of under hardship. However, discretion must be exercised on relevant materials and exercised in a bona fide and objective manner. In case there is no undue hardship, High Court should not interfere in judicial review.

7. Considering the facts and circumstances of the instant case, we are of the considered opinion that no undue hardship is going to be caused. Tribunal has acted bona fide on the basis of the relevant materials and has granted substantial relief and has directed the appellant to make a pre-deposit of 25% of the duty amount. Thus, there is no case for interference applying the principles laid down by the Hon'ble Supreme Court in the case of Vijay Prakash D. Mehta (Supra).

8. Coming to the submissions that the appellant is a sick industry, the Hon'ble Supreme Court has laid down in Metal Box India Ltd. Vs. Commissioner of Central Excise, Mumbai, payment of principal deposit covered u/s 35F of the Central Excise Act, 1944 does not fall under any of the enumerated categories in section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. Similar is the case for duty liability under the Customs Act. Protection thereunder is therefore not available to the appellant. Apart from that, two other decisions of Gujrat and Delhi High Courts in 2009 (238) ELJ (Guj) and 2012 (275) ELJ 375 (Del) relied upon by the respondent has taken similar view in the context of Customs Act.

9. Coming to the submissions raised by the learned Senior Counsel appearing on behalf of the appellant that shipment of goods was completed during the validity of the import license, a perusal of the provisions of section 68 and section 69 of the Customs Act, would make it apparent that for clearance of the goods, presentation of bill of entry is one of the necessary preconditions and duty also has to be paid as on the date of the clearance. This question has to be finally gone into at the time of hearing of the appeal. We are *prima facie* of the opinion that the order cannot be said to be such which requires interference in judicial review. The view, which has been taken, *prima facie* appears to be a reasonable one. However, this question has to be answered at the time of final hearing. It was also submitted that the show cause was issued beyond the period of limitation. This question, being a mixed question of law and fact, is to be decided by the Tribunal at the time of final hearing. Upon this question, the finding of the Tribunal is apt. However, it appears that the appeal was dismissed prior to the institution of the appeal due to non-deposit, as directed. However, in the facts of the case, we enlarge the time and direct the appellant to make the pre-deposit, the amount as directed by the Tribunal within a period of two months from date. Upon deposit of the said amount, the appeal shall stand restored to its original number and shall be heard in accordance with law by the Tribunal.

10. With the aforesaid direction, this appeal is disposed of.

11. In view of the disposal of the appeal, the application being CAN 2988 of 2013 is also disposed of.

12. No order as to costs. Urgent photostat certified copy of this order, if applied for, be given to the appearing parties upon compliance of necessary formalities.