

Vijay Prakash D. Mehta and Another

Vs

Collector of Customs

Civil Appeals Nos. 1219 and 1220 (NM) of 1987

(Sabyasachi Mukharji, S. Ranganathan JJ)

16.08.1988

JUDGMENT

SABYASACHI MUKHARJI J. –

1. These two appeals are under section 130E(b) of the Customs Act, 1962 (hereinafter called "the Act"), from the orders passed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter called "the CEGAT"). The questions involved in these two appeals are identical. The appellants' claim to be citizens of India is not disputed. At the material time in 1983, they were based in Hong Kong and Singapore respectively.

In February, 1983, when the appellants came to India, they were charged with alleged offences under sections 112 and 114 of the Act and also simultaneously with the alleged offences under the Foreign Exchange Regulation Act, 1973 (hereinafter called "the FERA"). The enforcement authorities recorded, under section 40 of the FERA, the appellants' statements at the time of their arrest. It is alleged that these statements were obtained under duress and by using third degree methods against them, and they soon thereafter retracted their statements. No statements were, however, recorded by the customs authorities under the corresponding section 108 of the Act. In the FERA proceedings, the Enforcement Directorate, it is stated, held that there was no evidence against the appellant, Vijay Prakash Mehta, and the Directorate had no objection to his discharge. Accordingly, by an order dated October 29, 1985, of the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Bombay, he was discharged and his bail-bond was cancelled.

So far as the appellant, J. D. Mehta, is concerned, he had replied to the show-cause notice issued by the Enforcement Directorate and the matter is pending adjudication. In the meantime, the proceedings under sections 111 to 114 and 118 of the Act resulted in the order dated January 19, 1984, of the Additional Collector of Customs (Preventive), Bombay, whereby he imposed a penalty of Rs. 3,00,000 on each of the appellants. It may be mentioned that each of the appellants was alleged to have been caught redhanded with foreign exchange to the tune of Rs. 11,90,648. The appellants had admitted their part in the systematic illegal export of foreign exchange from India during the past several years. Against the said order dated January 19, 1984, the appellants preferred their respective appeals to the Appellate Tribunal under section 129A of the Act. The Tribunal reduced the amount of penalty to be deposited, in an application made under section 129E of the Act, pending hearing of the appeal, to Rs. 1 lakh for each of the appellants.

It is alleged that since neither of the appellants were in any financial position to deposit even Rs. 1 lakh, they sought further reduction. The Appellate Tribunal, after considering the facts and circumstances of the case and taking into consideration all the relevant material facts and factors, by

its order dated February 17, 1987, declined to do so and dismissed the appeals for non-compliance with the provisions of section 129E of the Act. Aggrieved thereby, the appellants have appealed to this court. Section 129E of the Act provides as follows :

"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 the customs 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 proper officer the duty demanded or the penalty levied :

Provided that where, in any particular case, the Collector (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 Collector (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 interest of the Revenue."

The aforesaid section provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the section does not expressly provide for rejection of the appeal for non deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. See, in this connection, the observations of this court in respect of section 129 prior to the substitution of Chapter XV by the Finance Act, 1980, in *Navin Chandra Chhotelal v. Central Board of Excise and Customs*, AIR 1971 SC 2280. The proviso, however, gives power to the appellate authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardship. It is a matter of judicial discretion of the appellate authority.

The case of the appellants was that they had not gone out of India and that they had no assets in India. Their passports were impounded at the time of arrest. Their visa had lapsed and could not be renewed. They had no money, and hence, the right of appeal would be illusory unless they are permitted to deposit only Rs. 60,000 each which they contend they are able to procure with the assistance of their father.

In the impugned order, the Tribunal noted the several abortive and defective attempts made to get extension of time to deposit the security. Firstly, the prayer was to accept a deposit of Rs. 35,000 and secondly, to accept a deposit of Rs. 60,000 in two months. The Tribunal took into account the probability of the prima facie case of the appellants. The appeals had been filed two years ago. After taking into consideration these factors, the Tribunal rejected the prayer for reduction. It was contended that this was wrong. Shri M. S. Ganesh, learned advocate for the petitioner, pleaded that in a situation of this type, the condition of deposit of penalty was bad as it whittled down the appellants' right of appeal. This, in our opinion, is incorrect. Shri Ganesh tried to contend that the right of appeal is being whittled down by the procedure followed in this case. He drew our attention to certain observations of this court in *Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh*, AIR 1953 SC 221. There, this court held that when the right to appeal vests, change of law after initiation of proceedings in lower court would not divest the appellant of his vested rights. The right of appeal is a matter of substantive right and not merely a matter of procedure, and this right becomes vested in a party when the proceedings are first initiated in, and before a decision is given by, the inferior court and such a vested right cannot be taken away except by express enactment or necessary intendment.

The aforesaid observations, in our opinion, have no application to the instant case. Here, the right that was granted was a right held with a condition. There was no question of change of that right. In the instant case, the only substantive right is the right of appeal as contemplated under sections 129A and 129E of the Act and that right is a conditional one and the legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration of procedure arises in this case.

The right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

Counsel referred us to the decision of this court in *Collector of Customs and Excise v. A. S. Bava*, 1968 SC 13. There, this court found that section 35 of the Central Excises and Salt Act, 1944 ("Excise Act"), gave a right to appeal. Under section 12 of the Act, the Central Government was authorised to apply the provisions of the Sea Customs Act, 1878, dealing with the procedure relating to appeals to appeals under the Excise Act. In exercise of that power, the provisions of section 129 of the Act were made applicable to appeals under the Excise Act. The section required an appellant to deposit, pending the appeal, the duty or penalty imposed, and empowered the appellate authority, in his discretion, to dispense with such deposit pending the appeal in any particular case. The respondent therein filed an appeal against the duty imposed on him under the Excise Act and prayed for dispensation of the deposit. The Collector, who was the appellate authority, rejected the prayer and when no deposit was made within the time fixed, dismissed the appeal. The respondent filed a petition in the High Court which was allowed and the Collector was directed to hear the appeal on merits. This court held that section 35 of the Excise Act gave a right of appeal and section 129 of the Act whittled down that substantive right and, as such, section 129 could not be regarded as "procedure relating to appeals" within section 12 of the Excise Act.

These observations cannot be applied to the facts of this case. Here, we are concerned with the right under section 129A of the Act as controlled by section 129E of the Act and that right is with a condition and is thus a conditional right. The petitioner in this case has no absolute right of stay. He could obtain stay of realisation of tax levied or penalty imposed in an appeal subject to the limitations of section 129E. The proviso gives a discretion to the authority to dispense with the obligation to deposit in the case of "undue hardship". That discretion must be exercised on relevant materials, honestly, bona fide and objectively. Once that position is established, it cannot be contended that there was any improper exercise of jurisdiction by the appellate authority. In this case, it is manifest that the order of the Tribunal was passed honestly, bona fide and having regard to the plea of "undue hardship" as canvassed by the appellant. There was no error of jurisdiction or misdirection.

In a different context, the public policy involved in not granting interim stay has been explained by this court in *Asst. Collector of Central Excise, v. Dunlop India Ltd.* [1985] 154 ITR 172; [1985] 58Comp Cas 145 (SC).

It is not the law that adjudication by itself, following the rules of natural justice, would be violative of any right, constitutional or statutory without any right of appeal, as such. If the statute gives a right to appeal upon certain conditions, it is upon fulfilment of those conditions that the right becomes vested in, and exercisable by, the appellant. The proviso to section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to condone the obligation to deposit or to reduce it. It is a discretion vested in an obligation to act judicially and properly.

In the facts and circumstances of the case and all the relevant factors, namely, the probability of the prima facie case of the appellant, the conduct of the parties have been taken into consideration by the Tribunal. The purpose of the section is to act in terrorem to make the people comply with the provisions of law.

In that view of the matter, we are unable to accept the submission that there was improper rejection and non-consideration of material and relevant facts. If that is the position, then the appeal has no merit and is accordingly rejected.

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