IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 21ST DAY OF JANUARY 2015/1ST MAGHA, 1936

WA.No. 1144 of 2014 () IN WP(C).30662/2004

AGAINST THE JUDGMENT IN WP(C) 30662/2004 of HIGH COURT OF KERALA DATED 18-02-2014

APPELLANT(S):
----

1. THE ADDITIONAL COMMISSIONER OF CUSTOMS, MUMBAI AIR PORT.

2. ADDL.COLLECTOR (ADJUDICATION) OF CUSTOMS
CUSTOMS HOUSE, BALLARD PIER, MUMBAI.

BY ADV. SRI.TOJAN J.VATHIKULAM,SC,C.B. EXCISE

RESPONDENT(S):
----

1. CHONAKADAVATH MOHAMMED
SHANUMAHAL POST, MUZHPILANGAD, MADAM
TELECHERRY TALUK, KANNUR DISTRICT, KERALA STATE.

2. THE CUSTOMS
EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WZB
JAI CENTRE, MASJID (EAST), P.D.MELLO ROAD,
MUMBAI-400 009, REPRESENTED BY ITS REGISTRAR.

R2 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
R1 BY ADV. SRI.MOHAMMED RAFIQ

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 21-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

sou.

ASHOK BHUSHAN, Ag.CJ & A.M.SHAFFIQUE, J.

W.A. No. 1144 of 2014

Dated this the 21st day of January, 2015

J U D G M E N T

Ashok Bhushan, Ag.CJ

Heard learned counsel for the appellant as well as the learned counsel appearing for the respondent/writ petitioner.

2. This writ petition has been filed against the judgment dated 18.2.2014, by which order the writ petition filed by the respondent was disposed of. The writ petitioner was the appellant in Appeal No. 567/1985 on the file of the Custom Excise & Gold (Control) Appellate Tribunal (West Zonal Bench), Mumbai. The writ petition was filed praying for the following reliefs :

> "a) to issue a writ of mandamus or other appropriate writ, direction or order directing the second respondents to grant leave to constitute fresh appeal and to consider the same within a short period and dispose of the appeal No.567/1985 pending before them.
>
> b) to issue a writ of certiorari or other appropriate writ, direction or order calling for the records relating to the appeal No.567/1985 pending before the second respondent, the order of penalty against which the appeal emerged.
>
> bb) To issue a writ of certiorari or other appropriate writ direction or order calling for the records leading to Exhibit R19b) order passed by the second respondents and quashing the same."

3. There was an order passed by the Additional Collector of Customs dated 25.4.1985 imposing penalty of Rs.3,98,749.75 ps under section 112 of the Customs Act. Challenging the said order, Appeal No.567/1985 was filed. An order dated 10.10.1985 was passed by the Appellate Tribunal calling upon the appellant to deposit an amount of Rupees Ten thousand. The Appellant did not comply with the said order nor made any deposit. A request for extension of time was made on behallf of the appellant, which was not accepted and the appeal was ultimately dismissed on 10.7.1989, which order was also challenged in the writ petition. The learned Single Judge while hearing the writ petition relied on the judgment of Apex Court in **Bhavya Apparels (P) Ltd. And Another v. Union of India and Another** [(2007)10 SCC 129], took the view that where the goods in question were in the custody of revenue, section 129 E should not be involved.

4. The writ petitioner was permitted to file a fresh writ appeal along with copy of the judgment. The Department aggrieved by the said judgment has come up in writ appeal.

5. Learned counsel for the appellant submits that present is a case where the judgment of the Apex Court in Bhavya Apparels was not attracted and section 129E was fully attracted and the

writ petitioner was obliged to make the deposit.

6. Learned counsel for the respondent/writ petitioner submits that the writ petitioner has already made statutory deposit of Rs.10,000/- as was already permitted by the appellate Tribunal and now the appeal has been reconstituted and has already been numbered.

7. We have considered the submissions of learned counsel for the parties and perused the record. The operative portion of the order which was passed by the Appellate Tribunal, dated 25.4.1985 was as follows :

> "In view of my above findings, I order :
>
> I under section 111(d)(i) and (m) of Customs Act, 1962 to be read with section 3(2) of Import and Export (Control) Act, 1947 and section 1391) of Foreign Exchange Regulation Act, 1973 order absolute confiscation of $5^1/_2$ gold bars of Foreign origin weighing 638 gms.
>
> For causing breach of law order section 111(d) (i) and (m) of Customs Act, 1962, I under section 112 of the Customs Act, 1962 impose on Chonakadath Mohamed a penalty of Rs.3,98,749.75 paise (Rs. Three Lakhs Ninetyeight Thousand Seven Hundred Fortynine and seventy five paise only).
>
> The brown coloured packets and the pouch used for concealment of the gold are also confiscated to the Govt. of India under section 119 of the Customs Act, 1962.
>
> This order is issued without prejudice to any other action that may be taken under section 135 of the

Customs Act, 1962 and/or any other Law for the time being in force.”

Section 129E of the Customs Act reads as follows :

"**129E. Deposit, pending appeal, of [duty and interest], demanded or penalty levied**.- Where in any appeal undner this Chapter, the decision or order appealed against relates to any duty and interest 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 duty and interest demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of duty and interest 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 and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such appliciation within thirty days from the date of its filing.”

8. Present is a case where the Appellate Tribunal exercising power under the proviso has dispensed with deposit subject to conditions as laid down in the order. One of the submissions raised by the learned counsel for the appellant is that learned Single Judge committed error in relying on the judgment of

Bhavya Apparel's case and taking a view that section 129Ewas not attracted. A perusal of the section 129E indicates that the two situations are contemplated in the order. They are (i) decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of the Customs Authorities, or (ii) any penalty levied under the Act.

9. Present is a case where penalty has been levied under the order as quoted above. First circumstance in which reference to duty and interest and the factum that goods are not under the control of Customs Authority was not attracted in the present case. , A plain reading of section 129E clearly attracts the facts of the present case. The judgment of the Apex Court in Bhavya Apparels was a case in which there was payment of duty as well, which facts have already been noted.

10. Learned Single Judge in the impugned judgment had relied on the above judgment of Apex Court where as in the present case, order was only with regard to payment of penalty. There was no payment of duty involved. When the payment of duty is not involved, the question as to goods were in custody of the department looses its significance. Hence on the above facts

the conclusion of the learned Single Judge cannot be sustained. We however, looking into the facts of the present case that the writ petitioner has deposited an amount of Rs.10,000/-, though belatedly, which was directed by the Appellate Tribunal, and appeal has been reconstituted. We do not find it a fit case where this court may interfere with the discretion exercised by the learned Single Judge by directing reconstitution of the appeal and re-hearing the appeal.

We, thus are of the view that the appeal which was already reconstituted be heard in accordance with law.

With the above observation, the writ appeal is disposed of.

Sd/-

ASHOK BHUSHAN,
ACTING CHIEF JUSTICE

Sd/-
A.M.SHAFFIQUE,
JUDGE.

sou.

// True copy //