

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.8.2015

CORAM

THE HONBLE MR.JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE T.MATHIVANAN

Civil Miscellaneous Appeal Nos.906, 1118, 1119,
1120, 1146 to 1155, 1306 & 1307 of 2015

CMA No.906 of 2015

The Commissioner of Customs
Trichy
No.1, Williams Road
Trichy 620 001.

.. Appellant (in
CMA 906, 1118 to 1120,
1146 to 1155 of 2015)

The Commissioner of Customs
(Sea Port Import)
Customs House,
No.60, Rajaji Salai
Chennai-1

..Appellant in
CMA.NO.1306 & 1307/15

Vs.

1. Chettinad Cement Corporation Ltd.
Rani Seethai Hall Building
603, Anna Salai
Chennai 600 006.

..Respondents-1 (in
CMA.NO.906/15)

M.Chidambaram

..in CMA.NO.1118/15

TamilNadu News Print
and papers Ltd
Chennai-32

..in CMA.1119/2015

A.Kishore

..in CMA 1120/2015

Chemplast Sanmar Ltd
Chennai-86

...in CMA 1146/2015

S.Suresh

...in CMA 1147/2015

S.Muralidharan ...in CMA 1148/2015

Shree Ambika Sugars Ltd Chennai ...in CMA 1149/2015

Dalmia Cements(Bharat)Ltd
New Delhi -110 001 ...in CMA 1150/2015

Sanjay Sarda ...in CMA 1151/2015

Terra Energy Ltd
Chennai-34 ...in CMA 1152/2015

S.Muralidharan ...in CMA 1153/2015

Kasim Coal and Logistics Pvt Ltd
Chennai ...in CMA 1154/2015

Mohammed Ismail ...in CMA.1155/2015

2. Customs, Excise and Service Tax Appellate Tribunal

Shastri Bhavan Annexe, First Floor

No.26, Haddows Road

Chennai 600 006.

...2nd Respondents in CMA 906
118 to 1120, 1146 to 1155/2015
and R1 in CMA 1306 & 1307/2015

Appeals Under against the Miscellaneous Order No.42230-42339 of 2014 dated 18.11.2014 in C/S/40690/14 in C/40491/14, C/S/40691/14 in C/40492/2014, C/S/40747/14 in C/40538/2014, C/S/40777/14 in C/40560/2014, C/S/40918/14 in C/40692/2014, C/S/40919/14 in C/40693/2014, C/S/41505/14 in C/41235/2014, C/S/41511/14 in C/40617/2014, C/S/40842/14 in C/40624/2014, C/S/41510/14 in C/41239/2014, C/S/41504/14 in C/41234/2014, C/S/41504/14 in C/41234/2014, C/Misc/41621/14 C/S/41620/14 in C/41354/2014, C/Misc/41623/14 C/S/41622/14 in C/41355/2014 respectively in CMA906,1118 to 1120, 1146 to 1155 of 2015 and Common Miscellaneous Order NO.42230-42339 of 2014 in CMA 1306 & 1307 of 2015 against the order of the Commissioner of Customs, Trichirappalli dated 31.12.2013 and made order in Original No.5/2013, 5/2013; (in CMA NO.906 & 1118/2015)

dated 28.01.2014 in Order in Original No.2/2014 (in CMA NO.1119 & 1120/2015)

dated 9.1.2014 in Order in Original No.1/2014(in CMA NO.1146 & 1147/2015)

dated 05.03.2014 in order in Original No.5/2014(in CMA NO.1148 & 1149/2015)

dated 31.12.2013 in order in Original No.4/2013 (in CMA No.1150 & 1151/2015)

dated 05.03.2014 in order in original No.6/2014 (in CMA NO.1152 & 1153/2015)

dated 24.03.2014 in order in Original No.8/2014(in CMA 1154 & 1155/2015); and the order of the Commissioner of Customs (Port-Import)

dated 20.12.2013 in order in original No.23461/2014 (in CMA 1306/2015) and dated 14.02.2014 in order in Original NO.24161 & 24162/2014 (in CMA 1307/2015)

For Appellants : Mr.G.Rajagopalan,ASG
for M/S.V.Sundareswaran SPC
(in all CMAs 906,1118 to 1120
and 1146 to 1155/2015)
for M/S.Mohanamurali
in CMA 1306 & 1307/2015)

For Respondents-1:Mr.Raghavan Ramabadiaran
for M/s.Lakshmikumaran
(in CMA NO.906 & 1118/2015)
Mr.Muthu Venkataraman
(in CMA 1119,1150 & 1151/2015)

Mrs.Radhika Chandrasekar
(in CMA.NO.1146 & 1147/15)

No Appearance
(in CMA 1120,1148,1149,1152,
1153,1154, & 1155/2015)
Tribunal (in CMA 1306/2015 &
1307/2015)

Respondent-2 : No Appearance (in CMA 1306 &
1307/2015)

Tribunal (in CMA 906,118 to 1120 &
1146 to 1155/2015)

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J U D G M E N T
(Delivered by V.Ramasubramanian,J.)

All these appeals are filed under Section 130-A of the Customs Act, 1962, questioning the correctness of a common order passed by CESTAT, in a batch of Miscellaneous Applications seeking waiver and stay.

2. Heard Mr.G.Rajagopalan, learned Additional Solicitor General appearing for the appellant-Department of Customs, Mr.Raghavan Ramabadiaran, Mr.Muthu Venkataraman and Mrs.Radhika Chandrasekaran, learned counsel appearing for the respondents/assesseees.

3. The respondents in these appeals admittedly import coal. They claim that what they import is steam coal coming under sub heading 2701.1920. However, on the basis of specific intelligence that what was imported by the respondents was bituminous coal coming under the sub heading 2701.1200, show cause notices were issued to the respondents. After the respondents gave replies, the adjudicating authority passed Orders-in-Original, imposing duty on the basis that what was imported by the respondents was actually bituminous coal. The respondents filed statutory appeals before the Commissioner (Appeals). The appeals filed under Section 128 were dismissed by the Commissioner (Appeals) and the respondents filed further appeals under Section 129. Along with the appeals, the respondents took out Miscellaneous Applications both for waiver and pre-deposit condition and also for stay of recovery.

4. All the Miscellaneous Applications were taken up together by CESTAT Chennai Bench and an order was passed on 18.11.2014 in Miscellaneous Order Nos.42230 to 42339 of 2014. By the said order, the Tribunal referred three issues for the consideration of a Larger Bench and in the meantime, granted a complete waiver of the pre-deposit condition, till the disposal of the appeals. Aggrieved by the said common order, the Department appears to have filed some appeals before the Madurai Bench of this Court and the rest have been filed before this Court. As a matter of fact, some of these appeals were originally filed as writ petitions and later got converted into statutory appeals under Section 130. Therefore, we are now concerned actually with statutory appeals under Section 130 and none of these are now writ petitions under Article 226.

5. The grievance of the Commissioner of Customs, who is the appellant in all these appeals, is two fold, namely (i) that when there was actually no conflict of opinion between an earlier decision of the Chennai Bench of the Tribunal and a later decision of the Bangalore Bench of the Tribunal, there was no occasion for the Tribunal to refer the issues arising for consideration to a Larger Bench, and (ii) that in any event, the Tribunal was not right in granting a full waiver of the pre-deposit condition.

6. Assailing the order of the Tribunal, Mr.G.Rajagopalan, learned Additional Solicitor General contended that when a case arose before the Chennai Bench of the CESTAT, in the matter of Tamil Nadu Newsprint and Paper Limited v. Commissioner of

Customs, Tuticorin [(2010) 253 ELT 153 (Chennai)], the Tribunal decided the matter on its own merits, based upon the invoices and declarations made by the appellant therein. Therefore, the learned Additional Solicitor General contended that there was no question of law decided by the Chennai Bench in Tamil Nadu Newsprints and Papers Limited for the Tribunal to take a view that the Bangalore Bench has taken a contra view in its decision in Coastal Energy Private Limited v. Commissioner of Customs dated 20.6.2014. It is his further contention that when issues are decided by the two different Benches of the same Tribunal on the basis of facts placed before them, there is no conflict of opinions and consequently, no occasion for the Tribunal to make a reference to a Larger Bench.

7. We have carefully considered the above submissions.

8. In the light of what is stated from paragraphs 1 to 6, two questions of law arise for consideration. They are :

(i) Whether an appeal under Section 130A of the Customs Act, 1962 is maintainable as against a mere reference made by a Bench of the Customs, Excise and Service Tax Appellate Tribunal to a Larger Bench, of certain issues, on which, the Tribunal was of the opinion that there were conflicting views between two different Benches ? and

(ii) Whether in the facts and circumstances of case, the Tribunal was justified in granting a total waiver of the pre-deposit condition in favour of the assesseees ?

9. We do not think that we should actually go into the question whether there was a conflict of opinion between the Chennai Bench in Tamil Nadu Newsprint and Papers Limited and the Bangalore Bench in Coastal Energy Private Limited.

10. At the threshold, it is doubtful whether the present appeals are maintainable against an order of reference made by a Bench of a Tribunal, on the ground that there were conflicting views on the same issue by two different Benches. Though an order of reference is, in common parlance, termed as an order, the same cannot be elevated to the status of a decision, so as to enable one of the parties to file either a statutory appeal or a writ petition against such a reference.

11. The expression "order" is not defined anywhere in the Customs Act, 1962. But, the fact that the said expression should be understood to mean a decision, cannot be denied. The scheme of Customs Act, 1962 contemplates a four tier mechanism for adjudication. At the first tier, an order of adjudication is passed by the competent authority under Section 122. As against the adjudication so made, an appeal is provided under Section 128 to the Commissioner (Appeals). It will be relevant to note

that the expression "order" does not find a place in Section 122 or 122A. Section 122 uses only the expression "adjudication".

12. However, Section 28, which empowers the Proper Officer to determine the correct amount of duty as well as interest payable upon goods imported, uses the expression "order" under Sub-section (10).

13. Both the determination of duty and interest under Section 28 as well as the Order of adjudication under Section 122 are appealable under Section 128 to the Commissioner (Appeals).

14. Section 128 uses two expressions. One is "decision" and the other is "order". But, to make an appeal maintainable under Section 128(1), the prospective appellant should satisfy that he is a person aggrieved by such decision or order. This is in view of the fact that Section 128(1) uses the expression "any person aggrieved by any decision or order passed under this Act".

15. After an order is passed by the Commissioner (Appeals) on an appeal filed under Section 128(1), a further appeal would lie to the Appellate Tribunal under Section 129-A. Section 129-A (1) also uses the very same three expressions, namely (i) any person aggrieved, (ii) a decision, and (iii) order.

16. Therefore, the scheme of the Act makes it clear that the provisions for a first appeal to the Commissioner (Appeals) and a further appeal to the Appellate Tribunal are intended for the benefit of persons aggrieved. After the dismissal of the appeal by the Tribunal, there are two alternatives open to an aggrieved person. One is under Section 130 where an appeal is maintainable to the High Court and another is under Section 130-E where an appeal would lie to the Supreme Court. Under Section 130(1), an appeal lies to the High Court from every order passed in an appeal by the Appellate Tribunal on or after the first day of July 2003. Sub-section (1) of Section 130 requires re-production and hence, it is re-produced as follows:

"Section 30: Appeal to High Court.-

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."

17. Though Sub-section (1) uses only the expression "order" and it does not use the expression "decision", Sub-section (2) of Section 130 qualifies what is stated in Sub-section (1) by specifying that the appeal may be preferred by the Commissioner of Customs or the other party aggrieved by any order passed by the Appellate Tribunal. Therefore, it is clear that unless a person is aggrieved by an order of the Tribunal, an appeal cannot be maintained. A reference made by one Bench of a Tribunal to a Larger Bench, on the ground that two Benches of coordinate jurisdiction had come to different conclusions on the same issue, is not a decision, on which one or the other party can be stated to be aggrieved.

18. Drawing our attention to the orders of the Chennai Bench as well as the Bangalore Bench, Mr.G.Rajagopalan, learned Additional Solicitor General contended that there was actually no conflict of opinion and that consequently, no reference was warranted in this case. But, we do not agree. The question as to whether there was a conflict or not and the question as to whether the situation warranted a reference or not, are questions that could be answered very well by the Larger Bench. When the issue is still left open for the Larger Bench to come to a conclusion as to whether there is a conflict of opinion and whether it warranted a reference, it is not open to this Court, in an appeal under Section 130(1), to pre-empt a decision on those issues. As a matter of fact, the right of appeal under Section 130(1) is restricted only on a substantial question of law. The question as to whether one Bench of the Tribunal was right in making a reference of certain issues to a Larger Bench cannot even be considered as a substantial question of law. It is a matter of discipline. Therefore, on the first contention, we hold that these appeals are not maintainable. The first question of law is answered to the effect that no appeal is maintainable as against a mere reference of certain issues by a Bench of the Customs, Excise and Service Tax Appellate Tribunal, to a Larger Bench.

19. If the appeals have been filed only as against a reference to a Larger Bench, we would simply choose to dismiss the appeals as not maintainable. But, in the cases on hand, the Tribunal has also granted a complete waiver of the pre-deposit condition. As against the complete waiver, these appeals are maintainable. While an appeal is not maintainable against a reference made to a Larger Bench, an appeal as against an order granting a total or partial waiver or not waiving a pre-deposit condition is certainly maintainable. Therefore, we will have to go into the next question of law as to whether the Tribunal was right in granting a complete waiver or not.

20. In the common order passed by the Tribunal on 18.11.2014, the Tribunal has chosen to exercise the discretion to grant total waiver, on the ground that a prima facie case has been made out by the assesseees. Paragraph 15 of the common order of the Tribunal, which is under appeal, reads as follows:

"Both the Ld. Senior Advocates and other Ld. Advocate submitted that the instant issue has an impact on the entire industry all over the country. We have also expressed our prima facie view in favour of the decision of the Tribunal of Chennai Bench in the case of Tamil Nadu Newsprint & Papers Ltd. (supra). Since we are referring these matters to the Hon'ble President for constitution of Larger Bench, we waive the pre-deposit of duty along with interest and penalty till disposal of the appeals. Registry is directed to place these matters before Hon'ble President for decision on the constitution of Larger Bench."

21. Our attention is invited to a series of orders passed by several Benches of CESTAT, granting a total waiver of the pre-deposit condition, in cases where a reference is made to Larger benches. On the basis of those orders, it is contended by the learned counsel appearing for the respondents that when it is the consistent practice followed by the Tribunal to grant a total waiver in cases of this nature where a reference is made to a Larger Bench, there is no occasion for the Tribunal to make a deviation in these cases.

22. In response to the above contentions, it is argued by Mr.G.Rajagopalan, learned Additional Solicitor General that the very finding that the respondents have a prima facie case was contrary to law and that therefore, they could not have been granted a waiver.

23. The liability of an assessee to make a deposit of the duty and interest as demanded by the proper officer, when an appeal is filed before the Commissioner (Appeals) or the Appellate Tribunal, arises out of Section 129E. The first proviso to Section 129E confers discretion upon the Commissioner (Appeals) as well as the Appellate Tribunal to dispense with such deposit subject to such conditions as it may impose so as to safeguard the interest of the Revenue, if the Appellate Authority is of the opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person. What constitutes undue hardship has repeatedly come up for consideration before various Courts, including the Supreme Court. Since any payment demanded is contested by every assessee as causing hardship, the Courts have grappled with this question and laid down certain parameters. Therefore, generally

in all cases, the Tribunal is bound to look into the question of undue hardship. The question of undue hardship has in-built within itself, the question whether the assessee has at least a prima facie case to persuade the Tribunal to come to a different conclusion that the orders of the Authority under appeal.

24. But, in these appeals before us, the Tribunal has proceeded to follow its own precedents, where, whenever a reference is made to a Larger Bench, they have granted a total waiver. Therefore, we are of the considered view that the exercise of discretion by the Tribunal need not be interfered with. The second question of law is answered in favour of the assessee. As a matter of fact, the order of the Tribunal under appeal is dated 18.11.2014. Had not these appeals been filed, the reference itself would have been answered one way or the other and a decision in favour of either of the parties could have been arrived at. Therefore, at this stage, we do not wish to impose a pre-deposit condition and protract the reference being answered one way or the other. Hence, these appeals are dismissed. The Tribunal is directed to constitute a Larger Bench at the earliest and dispose of the appeals within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, connected M.Ps. are closed.

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

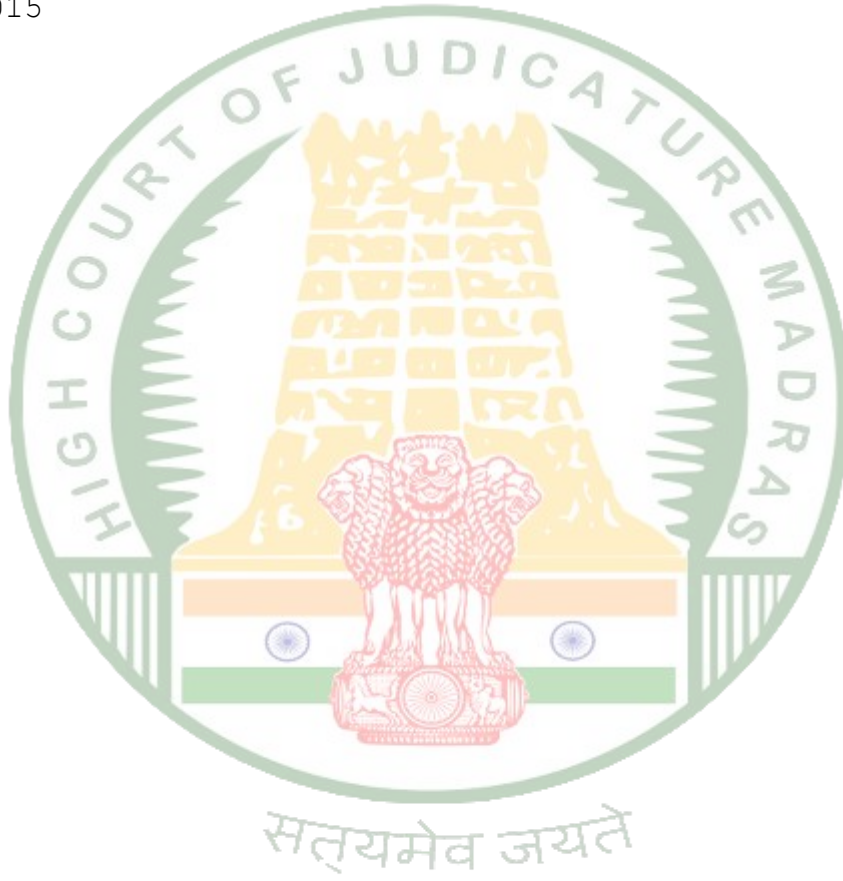
To,

1. The Customs, Excise and Service Tax Appellate Tribunal
Shastri Bhavan Annexe, First Floor
No.26, Haddows Road
Chennai 600 006.
2. The Commissioner of Customs
Trichy
No.1 Williams Road,
Trichy-62001

+2 ccs to Mr.K.Magesh, Advocate sr.40790
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+1 cc to Mr.Lakshmi Kumaran, Advocate sr.41471

C.M.A. Nos.906, 1118, 1119, 1120,
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