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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2683 of 2016

Rajaram Johra .. Appellant

Vs.

1.Commissioner of Customs
(Airport & Cargo).
New Custom House, GST Road,
Meenambakkam, Chennai - 600 027.

2. The Customs, Excise and Service Tax Appellate
Tribunal South Zonal Bench, Chennai.
26, Haddows Road,
Shastri Bhawan Annexe, 1st Floor,
Chennai - 600 006. .. Respondents

Prayer : The Civil Miscellaneous Appeal filed against the final order No.40678/2016 in Appeal No.C/00249/2009 dated 29.04.2016 communicated to the Appellant by the communication dated 04.05.2016 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai - 600 006.

For Appellant :Mr.A.Thiyagarajan,Senior Counsel
for M/s.S.Ramesh Kumar

For Respondent :Mrs.R.Hemalatha
Senior Standing Counsel for R1

JUDGMENT

[Judgment of the Court was delivered by T.S.SivAGNANAM, J.]

This appeal by the assesee is directed against the final order passed by the Customs, Exercise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, (in short, "the Tribunal") dated 29.04.2016 in Final Order No.40678/2016.

2. Mr.A.Thiyagarajan, learned Senior Counsel appearing for the appellant, submitted that the Court may consider the



substantial questions of law No.(i) and (iii), though, the appeals have been admitted on 3 substantial questions of law vide order dated 02.12.2016. Thus, recording the concession given by the learned Senior Counsel for the appellant, this appeal is admitted on the following two substantial questions of law:

"(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in suo motu resorting the order of the Additional Commissioner of Customs, Adjudicating Authority, when there was no appeal filed by the Department under Section 129A or cross appeal under Section 129A(4) of Customs Act is correct in law ? and

(iii) Whether on the facts and in circumstances of the case, the Tribunal was right in holding that the Department has discharged the burden of proof is correct in law ?"

3. The appellant was issued a show cause notice dated 16.10.1992 proposing to absolutely confiscate 22 numbers of gold bars weighing about 2563 gms. valued at Rs.7,35,247.81ps. under Section 111(d)(l) and (m) of the Customs Act, 1962 (in short "the Act") read with Section 67 of the Foreign Exchange Regulation Act, 1975, as to why the materials used for concealment should not be confiscated and as to why penalty should not be imposed under Section 111(e) of the Act.

4. The appellant filed his reply dated 03.02.1993. The show cause notice was adjudicated by the then Additional Collector of Customs, Madras, and an Order-in-Original dated 11.01.1994 was passed. By the said order, the Additional Collector of Customs confirmed the proposal in the show cause notice and directed absolute confiscation of the 22 number of gold biscuits and imposed penalty of Rs.10,000/- on the appellant. Aggrieved by the same, the appellant preferred an appeal to the Commissioner of Customs (Appeals) [in short, "the Commissioner (Appeals)"]. The first appellate authority vide Order-in-Appeal dated 29.04.2009 modified the order passed by the original authority by allowing redemption of gold, subject to payment of fine of Rs.15,00,000/-, by exercising the power under Section 125 of the Act. Aggrieved by the amount of redemption of fine imposed, the appellant filed an appeal before the Tribunal. The Tribunal vide the impugned order, while dismissing the appeal filed by the appellant, restored the Order-in-Original dated 11.01.1994, wherein, absolute confiscation was ordered. The correctness of this order is put to challenge in this appeal.

5. Heard Mr.A.Thiyagarajan learned Senior Counsel for Mr.S.Ramesh Kumar, learned counsel appearing for the appellant and Mrs.R.Hemalatha, learned Senior Standing Counsel for the respondent.



6. The issue, which falls for consideration, is as to whether the appellant can be put in worse position in an appeal filed by him, when admittedly, the Department did not file an appeal against the order of the Commissioner (Appeals) exercising discretion under Section 125 of the Act and directing return of the gold, on payment of redemption fine of Rs.15,00,000/- ?

7. Section 129A of the Act deals with appeals to Appellate Tribunal. In terms of Clause (b) of Sub-section (1) of Section 129A, an appeal is maintainable to the Tribunal against the order passed by the Commissioner (Appeals) under Section 128A of the Act. The appeal before the Tribunal in the instant case was that of the appellant. Sub-section (2) of Section 129A gives power to the Department to prefer an appeal. The said provision states that if the Committee of Commissioners of Customs is of the opinion that the order passed by the Commissioner (Appeals) is not legal a proper, they can direct an appeal to be filed. Admittedly, in the instance case, the Chief Commissioner has not issued any direction nor formed an opinion that an appeal has to be filed against that portion of the order passed by the Commissioner (Appeals), allowing redemption of the seized gold.

8. One more opportunity available to the person, who has not filed an appeal and in cases where the aggrieved party is on appeal, is Sub-section (4) of Section 129A, which provides for a remedy. In terms of the said provision, on receipt of notice that an appeal has been preferred under Section 129A, the party, against whom the appeal has been preferred, may notwithstanding that he may not have preferred an appeal against such order or any part thereof, file within 45 days of the receipt of notice, an Memorandum of cross objection and such Memorandum shall be disposed off by the Appellate Tribunal as if it were an appeal preferred within the time specified in Sub Section (3) of Section 129A, which is to be filed within a period of three months from the date on which the order sought to be appealed is communicated. Thus, in the instance case, the Department neither exercised their power of filing an appeal under Sub-section (2), nor filed a cross objection on receipt of notice in the appeal filed by the appellant herein before the Tribunal. In such circumstances, could the Tribunal have exercised its powers and while dismissing the appellant's appeal, restore the order passed by the original authority, which stood modified by the order passed by the Commissioner of Customs (Appeals) ?

8. Mrs.R.Hemalatha, learned Senior Standing Counsel for the Revenue, would contend that Section 129B(1) of the Act states that the appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon, as it thinks fit, affirming, modifying and annulling



the decision or order appealed against or may refer the case back to the authority which passed the decision for fresh adjudication or decision. It is submitted that the terms "as it thinks fit" should be given a wide interpretation and meaning and therefore, the Appellate Tribunal was justified in restoring the order passed by the original authority ordering absolute confiscation, considering the facts and circumstances of the case.

9. A reading of Section 129B(1) would show that the Tribunal has to give the parties to an appeal an opportunity of being heard and after affording the same, pass orders as it thinks fit affirming, modifying and annulling the decision or order appealed against. What has to be borne in mind is that the appeal, which was heard by the Tribunal, was an appeal filed by the appellant herein and not an appeal of the Department nor a cross objection of the Department in terms of Sub-section (4) of Section 129A. Therefore, in an appeal filed by the assessee, the Tribunal could have passed an order as it thinks fit, affirming, modifying or annulling the decision or order appealed against and the order appealed against in the instance case is the order passed by the Commissioner (Appeals) dated 29.04.2009 and not the Order-in-Original dated 11.01.1994.

10. More or less a similar question came up for consideration in the case of Servo Packaging Ltd. V. CESTAT, 2016 (340) E.L.T. 6 (MAD) and one of the questions which was framed for consideration was whether the Appellate Tribunal and the Appellate Authority have jurisdiction to interfere with the part of the order of the Adjudicating Authority, which does not form the subject matter of appeal before the First Appellant Authority and whether the Tribunal is justified in enlarging the remand order of the First Appellate Authority, wherein, the First Appellate Authority has no power to remand the matter, since the provision of Section 35(A) of the Central Excise Act, 1944 used the word "affirming" or "modifying" or "annulling" the decision or order and there is no mention of remand.

11. The Court held that had the assessee not filed an appeal, they would not be placed in a situation of inviting an adverse order on the aspect of clandestine removal. A party, who files an appeal, expects that the appellate authority would only address the grounds of appeal made against the order impugned and the appellant does not expect the appellate authority to go beyond the scope of the appeal and pass an order adverse to his interest, in which event, it certainly creates a worse situation for the appellant/assessee in his own appeal than the order under challenge. Further, it was pointed out that the principal of "no reformatio in peius" would come into play, which means that



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a person should not be placed in a worse position, as a result of filing an appeal. It is a Latin maxim expressing the principle of procedure, according to which, using the remedy at law, should not aggravate the situation of the one who exercises it.

12. As pointed out earlier, the power of the appellate Tribunal is exercisable under Section 129B(1) only against the decision or order appealed against and in doing so, it may pass such orders as it thinks fit affirming, modifying and annulling the decision or order appealed against. Admittedly, the Department did not file an appeal against the order of the Commissioner (Appeals) permitting the redemption of the seized gold. In such circumstances, the Revenue should not be said to be aggrieved by such a direction granting redemption and the Tribunal clearly erred in dismissing the appellant's appeal and restoring the order passed by the original authority.

13. For the above reasons, the appeal is allowed and the order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for a fresh decision on the appellant's appeal to test as to whether the Commissioner (Appeals) was right in fixing the market value of the gold on the date when he passed the order, when according to the appellant, the market rate prevailing on the date of seizure should be taken into consideration. The remand is restricted to that aspect and the same shall be decided by the Tribunal in accordance with law. There will be no order as to costs.

Sd/-

Assistant Registrar(CO)

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Sub Assistant Registrar

kkn/gg

To

1.Commissioner of Customs

(Airport & Cargo) New Custom House, GST Road,
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+ 1 cc to Mrs. R. Hemalatha, Advocate Sr.65232

C.M.A.No.2683 of 2016

KS(CO)

EU(17/10/2018)