IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 09.09.2021

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

C.M.A.No.1911 of 2021
and
C.M.P.No.10351 of 2021

The Principal Commissioner of Customs,
Chennai-III Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001. ...Appellant/Respondent

Vs.

Shri Mohammed Ali Jinnah ...Respondent/Appellant

PRAYER: Appeal filed under Section 130 of Customs Act, 1962 praying to set aside the Miscellaneous Order No.40028 of 2021 dated 03.03.2021 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.V.Sundareswaran
Senior Standing Counsel

For Respondent : Mr.B.Kumar, Senior Counsel
For Mr.B.Shruthan

JUDGMENT

This appeal has been filed by the Revenue under Section 130 of the Customs Act, 1962 (hereinafter 'the Act' for brevity) challenging the order dated 03.03.2021 in Miscellaneous Order No.40028 of 2021 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (hereinafter referred to as 'the Tribunal').

2.The Revenue has raised the following substantial questions of law for consideration.

"(a) The order of the tribunal is perverse and contrary to the factual finding and of admitted facts by the adjudicating authority

(b) Whether the tribunal erred in dismissing the stay application pending appeal on the erroneous assumption that granting prayer in Miscellaneous Application pending Appeal, would amount to allowing the appeal itself.

(c) Whether the Tribunal was correct in not considering the "twin test" laid down by the Apex Court and this Hon'ble Court in catena of cases while disposing of the Miscellaneous Application for stay pending appeal before it.

(d) Whether the Tribunal ignored the law that unless the order of the First Appellate Authority in Order-in-Appeal No.550/2019 dated 14/11/2019 is stayed, pending the appeal before it, the "smuggled absolutely confiscated gold" had to be released which would be prejudicial to the interest of revenue.

(e) The Tribunal being an quasi-judicial authority under the Customs Act, 1962 is also duty bound to protect the interest of the revenue while passing orders in the applications pending before it.

(f) Whether the Tribunal commenced an grievous error in not appreciating the difference between the appeal and miscellaneous application filed pending the appeal."

3. We have heard Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellant Revenue and Mr.B.Kumar, learned Senior Counsel appearing for Mr.B.Shruthan, learned counsel for the respondent.

4. The appellant Revenue filed the appeal before the Tribunal challenging the order passed by the Commissioner of Customs (Appeals-II), Chennai dated 14.11.2019. In an appeal filed by the respondent challenging the Order-in-Original dated 10.09.2018, by the said Order-in-Original, the Additional Commissioner of Customs, Chennai-III directed confiscation of the foreign origin gold bars weighing 3.097 kg valued at Rs.91,98,090/- under Sections 111(a), 111(d) and 111(i) of the Act, apart from confiscation of the packing materials, imposition of penalty, the first Appellate Authority allowed the appeal by order dated 14.11.2019 and set aside the order of confiscation and imposition of penalty. The Revenue being aggrieved by such order, preferred appeal before the Tribunal and since the appeal filed by the respondent was allowed by the first Appellate Authority, the first Appellate Authority order has been challenged by the appellant Revenue. In the stay

petition, the Revenue contended that the first Appellate Authority has ignored the evidences, available on record which would clearly go to sustain the order of confiscation and the first Appellate Authority committed a serious error with regard to the legal issue relating to the burden of proof in respect of the seized gold bar under Section 123 of the Act and in spite of detailed memorandum having been presented on all these issues, the first Appellate Authority has ignored the same. The Tribunal by impugned order has dismissed the stay petition stating that the arguments of the Revenue are touching upon the merits of the case and the Tribunal finds that no prima faice case has been made out by the Revenue.

5. When this appeal was entertained, the Division Bench by order dated 16.07.2021 had granted an order of interim stay. Admittedly, the Revenue is entitled to question the correctness of the First Appellate Authority by filing an appeal before the Tribunal. The Tribunal, while considering the prayer for interim stay, has to consider as to whether the balance of convenience is in favour of the Revenue, whether the Revenue has made out a prima faice case for grant of stay and whether irreparable hardship would be caused to the Revenue if the stay is not granted. To consider as to whether prima faice case has been made out by the Revenue, it may be necessary to have a consideration of the facts of the case and the merits of the appeal though not to the extent of deciding the appeal itself. With regard to the balance of convenience, the Tribunal has to examine the aspect that if stay is not granted what would be the consequence that will follow and with regard to hardship, that would be caused by the Revenue has also to be considered.

6. In our considered view, if the stay is not granted, then, the respondent would seek return of the seized gold and that has to be ordered, then the appeal filed before the Tribunal itself would become infructuous. Therefore, we are of the definite view that the undue hardship would also be viewed from the point of view of the Revenue and to protect the interest of the Revenue. Therefore, we are of the view that the order passed by the first Appellate Authority dated 14.11.2019 shall remain stayed till the disposal of the appeal filed by the Revenue before the Tribunal. We are informed that the appeal is listed for hearing on 22.09.2021 and the Tribunal may consider to dispose of the appeal at the earliest.

7. For the above reasons, the appeal is allowed and the order passed by the Tribunal dated 03.03.2021 is set aside and there will be an order of stay of the order passed by the first Appellate Authority dated 14.11.2019 till the disposal of the appeal by the Tribunal. The Tribunal is requested to consider whether the appeal could be disposed of at the earliest. As we

have allowed the appeal and set aside the order passed by the Tribunal dated 03.03.2021, it goes without saying the observations contained therein have also been set aside and the main appeal shall be decided by the Tribunal on merits and in accordance with law.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Sgl
To

The Registrar,
Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai.

Copy To:
The Section Officer,
VR Section,
High Court, Madras.

+1 CC to Mr.T.Suthanraj, Advocate, Sr.No. 45733.
+1 CC to Mr.V.Sundareswaran, Advocate, Sr.No. 45773.

C.M.A.No.1911 of 2021

LN(CO)
LS(23/09/2021)